Regulating the University:  
Examining the Regulatory Framework of Australian University Corporations

A thesis submitted for the degree of

Doctor of Philosophy

of

The Australian National University

By: Benedict Cornelius Sheehy  
May 2010
Statement of own work

I declare that this thesis is my own work except as noted and that all sources upon which I have relied are acknowledged in the citations and references.

_______________________________________

Benedict Cornelius Sheehy

10 May 2010
ACKNOWLEDGEMENTS

I thank Prof. Stephen Bottomley for agreeing to supervise me during a particularly busy period in his career. His patience in allowing me to work through a wide range of issues, persistent efforts to help me focus and narrow my topic and willingness to allow me to work in an interdisciplinary manner are most appreciated. Further, I owe him a debt of gratitude for his careful reading of a myriad of ideas in my various false starts as well as for his guidance through the process. Finally, I appreciate his trust in taking me on—an unknown student studying part-time by distance.

I also particularly wish to acknowledge the contribution of A. Prof. Donald Feaver. Don first introduced me to regulatory theory and suggested to me how it might serve to answer the question I was trying to understand. Further, I wish to thank him for the many hours he generously gave working through the ideas, issues and arguments and for the recommendations about structure which have contributed greatly to clarity in matters of both substance and form.

Michael Coper and Peter Cane kindly agreed to act as committee members and deserve thanks for their willingness and discussion they have had with me. As well, I am pleased to acknowledge the contributions of colleagues Dr. Alperhan Babacan and Dr. Jackson Maogoto, both of whom read earlier drafts and provided helpful comments.

I thank Prof. Simon Marginson who graciously met with me and provided an introduction to the field of Higher Education. His intellectual contribution is evident as the references indicate.

Dinah Rigg deserves special thanks for her patient, cheerful and always helpful guidance and support. Her correspondence and contact made me feel a part of the College of Law and she smoothed the way through the many administrative
bumps one inevitably encounters particularly as a research student living at a distance.

I am grateful to my employer, RMIT University, for providing one semester of teaching relief to see the project through to its completion.

Finally, I am happy to acknowledge the support of family and friends who provide the social framework which allows such a work to be undertaken and completed. In alphabetical order they are: Monica Basic, Adriana Morales Castro, Susan Hartono, Paul Sheehy and Chatruedee Teeyapong.
ABSTRACT

The regulatory framework for the Australian university has brought about a radical transformation of the Australian university. The changes to the framework shifted the burden for resourcing from government to students and introduced a wide variety of competition based regulatory instruments. The Australian university has been successful in generating these resources, primarily from selling education to international students and has become a world-leader in the export of higher education. However, the other effects of the regulatory changes have been less positive. The thesis seeks to evaluate the regulatory change from the perspective of regulatory coherence. That is, rather than political or economic evaluations, the thesis examines the regulation from a legal, mechanical perspective.

The changes to the regulation reflect a broader societal shift from the welfare state to the regulatory state. For regulation to be successful it must be coherent within itself including taking adequate account of the extant institutions and social arrangements. This thesis provides a coherence analysis of the regulation. It is composed of eight chapters. After the introductory chapter, the thesis commences with a chapter reviewing regulatory theory and developing a theory of regulatory coherence. This theory is a new theory which facilitates a focus on the mechanical aspects of the regulation. The next chapter develops the analysis by examining the regulatory framework. This part of the thesis provides detailed analysis of the regulation, in particular, its instruments and accountability structures. It then turns in Chapter 4 to examine the policy-regulatory questions of public versus private providing a basis for evaluation of coherence. Next it turns in Chapters 5 and 6 to an examination of the institution of the university and its corporate organisational form. To capture the complexity of the university, the thesis takes an interdisciplinary view of the phenomenon. The penultimate chapter then provides an evaluation of the regulatory framework as against theory of regulatory coherence. The concluding chapter of the thesis reiterates the finding that fundamental incoherence impairs the well functioning of the institution and its organisations.
**TABLE OF CONTENTS**

**CHAPTER 1: INTRODUCTION** 12
1. Introduction 12
2. Introducing Regulation 16
3. Introducing The University 21
4. Transformation Of The University: Politics, Policy And Regulation 26
5. Statement Of The Problem 30
6. Methodology 33
7. Outline Of The Dissertation 34
8. Conclusion 39

**CHAPTER 2: REGULATORY THEORY** 41
1. Introduction 41
2. Disciplinary approaches to regulatory studies 43
3. Regulatory theory 52
   a. Regulatory Failure 52
   b. Responsive Regulation and Really Responsive Regulation 54
   c. Smart Regulation 58
   d. Regulatory Coherence 60
4. Mechanics of Regulation 66
5. Organising social problem, risk identification and regulatory intervention 66
6. Technical aspects of regulation: regulatory targets, regulators, tools and instruments 69
   a. Regulatory targets: persons, organisations, acts, things or risks 69
   b. Regulators 71
      i. Regulators’ Tasks: 71
      ii. Organisation of the regulator: Agencies, Boards, Commissions and Authorities 76
   c. Tools 78
   d. Techniques 80
      i. Command and control 81
      ii. Competition 81
CHAPTER 3: REGULATORY FRAMEWORK 107
1. Introduction 107
2. Regulatory Problem: pre- and post- World War Two 108
3. Regulatory Response: policy, regulatory arrangements and technical aspects 110
   b. Australian Universities Commission and the Murray Report 112
   c. The Martin Report 119
   d. The Commonwealth Tertiary Education Commission and mass university education 120
   f. West and Nelson Reports: hardening ideology under Howard: 129
   g. The Bradley Review, Rudd and Gillard: Changing Directions? 131
      i. Protocol A—All Higher Education Institutions 139
      ii. Protocol D 141
      iii. State University Acts and University Corporations Law 142
   b. Soft Law: Regulation by Consensus, Code and Competitive Schemes 143
      i. Commonwealth Grant Scheme 144
      ii. Other Grant Schemes 145
iii. Other Grants—Subsidiary Regulation 147
iv. Non Higher Education Support Act competitive funding schemes 151

5. Accountability for the Institution of the Australian University: Westminster 152
   a. Accountability for Australian University Corporations: Law and NPM 153
   b. Accountability standards 157
      i. Public Standards: Education, Research and Public Service 159
      ii. Private Standards: Prestige and Survival 162
   c. Accountability for Australian University Corporations: Social 163
   d. Accountability for Australian University Corporations: Markets 163

6. Conclusion 164

CHAPTER 4: THE PUBLIC-PRIVATE DIVIDE, THE PUBLIC GOOD
AND THE UNIVERSITY 168
1. Introduction 168
   a. Economic analysis of the goods and services of Higher Education 176
   b. Public economic support for Higher Education and the University: 179
   c. Critique of economics and regulatory recommendations 182
4. Politics and the Public-Private Melange 185
5. Sociology, Public Good and the University 190
6. Regulation, Law and the Public and Private Spheres 194
7. Conclusions: Public Good and University Regulation 199

CHAPTER 5: REGULATORY OBJECTIVES AND THE INSTITUTION
OF THE UNIVERSITY
1. Introduction 204
2. Institutional Missions of the University: Research, Teaching and Public Service 210
3. Historic Knowledge Based Missions 215
   a. Development of Individual, Citizens and Civilisation 217
   b. Training For Statesmanship 218
c. Liberal Arts 219

d. Development Of Scientific Research 221

e. Training For Professions 224

f. Contributing to the nation-state and social welfare policy 225

4. Economic: Profits, Non-profit and Development 227

5. Sociological: Sorting, Storing and Survival 235

a. Societal: Sorting, Weeding, Cooling and Credentialing 236

b. Societal Storing: Holding space for underemployed youth 237

c. Survival: Institutional and Organisational 239

6. Legal Objects 240

7. Policy 242

a. Policy: Government and the University 243

b. Policy: Australian Government and the University 245

8. Institutional Coherence: Complex and Conflicting Missions 249

9. Policy Coherence with the Institution: Adding Conflicting Missions 252

10. Conclusion 253

CHAPTER 6: REGULATED BODIES: THE UNIVERSITY ORGANISATION

1. Introduction 255

2. Sociological Analysis: Analysis Of Organisational Form 258

a. Academic Profession and the Community of scholars 259

b. Organized anarchy 265

c. Strategic organisation 267

d. Matrix 269

e. Entrepreneurial organisation 270

3. Economic Analysis: Participant In A Market Economy 274

f. The university as a business firm 275

g. The university as a non-profit firm 277

4. Political Analysis: Public Administrative Perspective 288

h. Understanding government bodies 289

i. Mode of creation 290

ii. Formal status 291

iii. Principal resource 292
i. Three categories of government bodies 292

5. Legal Analysis: The University Corporation and Public Law 297
   a. Legal character 301
   b. Enabling law 301
   c. Characterisation in the spectrum of governmental bodies 302
   d. Legal accountability via administrative law 303
   e. Extent of the application of private law 304
   f. Appointment of executive 305

6. Conclusion 306

CHAPTER 7: ANALYSIS AND EVALUATION 309

1. Introduction 309

2. Systemic Coherence 309
   a. Organising Problems and Organising Norms 309
      i. Characterising the Organising Problem 311
      ii. Systemic Norms 314
   b. Supplementary Organising Problems 318
   c. Normative policy response: regulatory theory and the public-private assignment 323
   d. Conclusion 327

3. Policy Coherence 328
   a. Policy coherence: norms 328
   b. Policy coherence: techniques 331

4. Instrumental Coherence 335
   a. Analysis of Instruments 336
   b. Analysis of Technique: Regulatory Bodies 338

5. Conclusions Systemic, Policy and Instrument Coherence 341

6. Institutional, Organisational and Administrative Coherence 342
   a. Regulatory coherence and the Institution 343
   b. Regulatory coherence and the Organisation 345

7. Accountability Coherence 347
   a. Political, and Public Institutional Accountability 347
   b. Institutional Accountability: Academic Profession, Rankings and Markets 353
c. Legal Accountability for University Corporations 355
d. Conclusions on Accountability Coherence 355

8. Regulatory Coherence and Incoherence in the Regulatory Framework 361
9. Conclusions 365

CHAPTER 8: CONCLUSION 369
1. Introduction 369
2. Review and Summary 369
3. Evaluation of Regulatory Framework 374
4. Recommendations for regulatory design 380
5. Preliminary considerations of Labor’s reforms under Rudd and Gillard 387
6. Conclusion 389

Bibliography 394
CHAPTER 1: INTRODUCTION

1. Introduction

This dissertation is about the regulation of the university. These two discrete topics—regulation and the university—are not often brought together and discussion of them quite easily leads into two different directions. Chronologically the ordering could put the university first and regulation second depending on how one defines the terms; however, the disciplinary commitment of this thesis puts the regulatory first and the university second. Further, this dissertation recognises both the phenomena of regulation and the university as social creations and hence socially embedded. Accordingly narrow disciplinary foci that do not attend to the political and social dimensions may be destined to failure. Thus the introduction to this dissertation in addition to introducing the topic also attempts to locate the subsequent study in its socio-political context. The dissertation sets out the thesis that effective regulation is regulation that is coherent at multiple levels—systemic, policy, instrument, institutional and administrative—and that regulatory incoherence is a cause of regulatory failure. The argument is made that the regulation addressing the university in Australia is incoherent and if not reformed, will lead the university to greater levels of failure.

The university in western countries is in difficulty and perhaps none more so than in Australia. A comprehensive review in 2008 of higher education commissioned by the then new Federal government found serious problems in every major aspect of the system from the quality of education and student preferences, to students’ difficulties in coping, staffing issues and physical infrastructure. The review was the first complete review of the national system since the radically changed policy settings under the Hawke government in 1988. Under that government, the tertiary education sector was rationalised and re-conceived along economic lines as an “industry.” This new policy was driven through the university sector by a comprehensive reform of the regulation

---

governing higher education regulation in Australia. The reform caused the dismantling of the non-governmental specialist advisory committee, the Commonwealth Tertiary Education Commission “CTEC,” created new legislation changing funding formulas and reduced overall public contributions, and imposed mergers of various higher educational organisations, among other things. These radical changes were not unique to the university. Rather, they were part of a larger ideological shift in public and expert thinking about the role of government in society, education and the public and private spheres.

This ideological shift—referred to globally as neoliberalism and as economic rationalism in Australia—changed the frameworks and mandates for governments. Government’s tools and abilities have been modified as its mandate shifted from public provision in the welfare state, to facilitating markets in the regulatory state. Privatisation and economic liberty have become the predominant policy concerns and directed the critical tasks of governments in breaking up public monopolies and public space in favour of private economic opportunity and individuals’ private preferences. A strong preference for regulation by markets has been the regulatory corollary of the neoliberal political agenda.

This shift has also occurred at a time of considerable changes in both the natural and social environments. Increased pressures from population growth, globalisation, shifting geo-political power balances and climate change on the international level, as well as increased demands from within the nation state challenge governments in ways not imagined fifty or even thirty years ago. The rapid growth of transport and telecommunications industries, the spread of powerful multi-national corporations and their norms and practices, and the development of western pop culture hegemony made the demand for western style of production, consumption, governance and management ubiquitous. In western countries, the domination of media by private capital re-shaped media content to meet commercial interests purportedly to give voice to consumer demands through choice—especially the wealthy or aspiring consumer—rather than voice and choice to socially oriented democratic citizens. All of these changes occurred at a time when new ideas were emerging about regulation.
These ideas of regulation, introduced more fully in the next section, included a move away from a simple Austinian command and control approach to more sophisticated approaches focused on incentives for behaviour as well as alternate models for reforming social behaviours and norms. As government changed from welfare state to regulatory state in this environment, it is fair to say the regulatory challenge for government has never been greater.

This dissertation investigates the regulatory framework of the Australian university. As noted, it investigates the regulation from the perspective of coherence, on the theory that coherent regulation facilitates desired policy outcomes, and incoherence leads to regulatory failure. The dissertation seeks to answer the question: does the regulatory framework enhance or detract from the Australian university’s ability to carry out its knowledge based social, economic and political missions as evaluated through a coherence perspective? It is argued that the regulatory framework is incoherent and is leading the Australian university toward failure in achieving its institutional mission which forms part of the policy objective. This study is innovative, as will be demonstrated below in the summary of arguments in each chapter, in that there has been no study undertaken on this topic. Accordingly, the answer to this question provides new knowledge and is one of the major contributions of this dissertation. It is significant because of the university’s key role in western society as the core institution for the creation, preservation and dissemination of knowledge, the importance of the university to the Australian economy as a major export, the impact of the university on the shape of society and the opportunities it provides its graduates and because of the public investment made in its on-going operations and growth. Further it is significant because the Australian regulatory framework has moved toward market norms including private funding more than any other OECD country. Accordingly, it is important to understand the framework and its strengths and weaknesses.

As part of the evaluative task, the dissertation must address both the theory of the university in terms of form and function as well as the university as it exists in

---

1 Ibid p. 147.
contemporary Australia. That is, there must be an understanding of the institution and the organisation\(^3\) to evaluate the contemporary domestic policy settings against the institutional and organisational forms and functions. In other words, the dissertation considers the consequences of regulatory reform on the institution and organisation of the reformed Australian university. The dissertation argues that the consequences while positive from the perspective of reducing government expenditure are negative from most other perspectives.

The answer to this question sheds light on the related higher education question concerning the nature and shape of the reformed Australian university. In this aspect too, the dissertation offers a contribution to knowledge. There is no such analysis of the Australian university. It is significant because it moves the discussion beyond the confines of traditional higher education scholarship which tends to battle old traditional elite conceptions of the university on the one hand and uncomfortably challenging the economic conception of the firm on the other. This dissertation while not providing new institutional or organisational models nevertheless offers a review of the foundations of the university, sets out the delimitations of the debate and identifies some of the necessary features of any university organisation or institution.

This effort to identify regulation appropriate for a public institution,\(^4\) to the extent it is generalisable offers a further contribution to knowledge. The regulation of public goods is a highly problematic issue not least because of the normative commitments of the dominant discourse of economics. Economic analysis fails to address satisfactorily the regulation of impure public goods—those public goods which fail to fall neatly into the economic model of public goods.\(^5\) This dissertation by avoiding an exclusively economic perspective, using regulatory theory, focusing on the regulation surrounding a traditional public good offers new insights into the issues and a different approach to public goods regulation.

---


\(^4\) Analysed in Chapter 5.

\(^5\) See Chapter 4 on the public-private divide.
There are a variety of ways to go about answering the question raised. An interdisciplinary comparative approach is self-evidently a necessity; however, as a law dissertation, this work takes its cue from law and accordingly, working with emerging regulatory theories and coherence analysis focuses on the regulation surrounding the university. That is, the dissertation examines the regulation from the perspectives of regulatory theory and coherence throughout, examining the process from the development of the problem, policy response, regulatory design through to coherence with the social institutions and objects they were designed to regulate. To do so, as noted, it must work through an interdisciplinary analysis crossing into the political and economic discussions of public-private divide and public good, higher education and higher education policy and notions of public good in the post-neoliberal era. The balance of this chapter introduces in order, regulation, the university, the socio-political background of the contemporary Australian university, the research question of the dissertation, and method. Next then is the introduction to regulation.

2. Introducing Regulation

The complexity of the problem of regulating the university is a microcosm of the larger challenge of regulation itself. This challenge is the basic institutional problem of regulating human social interaction and has a long history. Some types of regulation foster more positive social arrangements, other types more positive spiritual, economic or other arrangements—each regulatory effort of course creates some negative impacts in another part of the particular social system. Each type of regulation has a favoured agenda in the balance of positive and negative elements: economic growth over environmental preservation, or social stratification over egalitarian objectives, or change over tradition and preservation.


It is important to correctly characterise the regulatory debate at the outset. The regulatory debate is not a matter of more versus less, or regulation versus deregulation. That debate is more accurately described as a matter of whose regulatory priorities, whether private property or social equality, or which of some other set of objectives or prioritisation is to be favoured. Rather, the issue of regulation is “good regulation” versus “bad regulation”. Good regulation is a matter of avoiding too much of Regulation X or too little of Regulation Y to achieve specific ends—the well functioning of a society or other social organisation. Bad regulation is simply its opposite. From this perspective, good regulation is the ultimate public good in that it is the basis for the effective facilitation and preservation of human society. Thus the basic regulatory problem is providing a framework that allows humanity to flourish, preserving what needs to be preserved, while constraining its destructive tendencies and extinguishing that which is harmful.

While the discussion at this level is moral, the dissertation makes an effort to avoid some of the moral discussion of regulation in favour of the more technical discussion of regulatory efficacy. Inevitably an author’s political views will be engaged; however, the purpose of this dissertation is not to advance those political views but to focus on the technical, and where those views are engaged, to have them in a secondary position to the first technical task. Efficacious regulation is simply regulation which achieves the desired policy ends. The discussion of the moral or normative dimensions, however, cannot be avoided altogether. Regulation embodies politically decided norms, and an analysis of coherence requires attending to those norms. The normative dimension of the dissertation is drawn from the discussion of public good in Chapter 4, and further discussion of the institution and organisation of the university in Chapters 5 and 6 respectively. Essentially, the argument is that the university as a global millennium old institution has provided a public good and been a non-profit organisation throughout that history. Further, it is argued that these two, the institutional and organisational decisions have complemented one another allowing the university to develop to its current state. These decisions have normative implications for regulation, and it is argued, regulation which embodies different normative decisions which are at odds with these traditional
norms will lead ultimately to the decline and loss of the institution and the organisation. To the extent that the regulation leads in this direction it may be effective and coherent with the policy norms; however, it is incoherent with the norms of and destructive to the university. In this latter sense, the regulation may be “bad regulation.” The dissertation takes on both the effective and moral evaluation of the regulation. However, the focus is on the effective with the moral being merely a consequence of the analysis of the efficacy and coherence.

Various approaches to understanding the regulation of humanity’s activities and institutions have been developed. From a regulatory perspective, approaches can be divided into the two political spheres of public and private. While considerable scholarly attention has been granted to regulation in the private sphere and in particular as it pertains to private economic rights, less attention has been granted to the regulation of public goods. There are a variety of reasons, ranging from the complexity and related problems of human social organisation and the difficulty of defining the public good, to the complexities of designing appropriate regulation to achieve complex regulatory objectives. Peter Drahos, for example, observes that the regulation of public goods must attend to a wide range of matters, from their provision and distribution, to their uptake, to attending to their character as norm dependent or independent, capability dependent versus automatic flows, and status either as a primary public good setting a foundation for a host of other public and private goods, or a secondary public good.8

While regulation has been the focus of study for several decades, it has usually been an activity undertaken by disciplines such as economics and political science rather than law or public administration.9 The former analytical lenses study regulation as a means of supporting one or another normative commitment and tend to see it as a battleground for ideology. Indeed, until the 1960’s the dominant theory of regulation saw it through an economic lens as a response to

market failure. Moving regulatory study away from the narrow disciplinary lenses and ideological battle grounds of the above disciplines one accesses the disciplines of sociology, law, public administration and the various institutional approaches.

While a variety of disciplinary perspectives provide insight into regulation, none provides a method for a comprehensive analysis of the regulatory framework, tying policy objects, institutions, regulatory arrangements and administration in a coherent manner. A discussion of regulatory failure arose in the 1970’s again among economists possibly to challenge the power of the discourse supporting the social, collective leanings of the state and the potential challenge that discourse posed for private enterprise, laissez faire normative neoclassical economics.

Taking the discussion a step beyond the neoclassical lens, Breyer approached regulatory failure as more a matter of failure of technical and administrative arrangements than a big government worry. Breyer cautioned in 1983 that regulatory failure was the result of a mismatch of methods and objects of regulation. It is only more recently, however, that the emerging field of regulatory law or regulatory studies has appeared establishing a foundation for a more coherent and careful approach to the coordination of the elements of regulation. Regulatory studies examine the rules, organisations, institutions and norms that facilitate and constrain social interaction—both collective coordination and protection of the individual. Unlike other approaches to regulation, regulatory studies focuses on rules, tools and instruments of regulation without prior normative commitment. A rough analytical framework has emerged in which the instruments of regulation are identified and analysed.

Following on Breyer’s innovative description of regulatory failure and refining the rough analytical framework already established, Feaver and Durrant draw

13 Ibid.
upon the coherence discourse in jurisprudence arguing that for regulation to be
effective, it must be coherent.¹⁴ That is, a discrete coherent social issue must be
identified, a coherent normative framework must be identified and developed
from which a coherent policy can be extrapolated. That policy must then be
transformed into legislative rules creating institutions, organisations, rules and
instruments which cohere with the norms of the previously mentioned social
problem, norms and policy. In other words, for regulation to be effective it must
be free to depart from political and disciplinary ideologies to identify and address
an identified social problem in a coherent fashion. This dissertation, as will be
expounded below, draws on Feaver and Durrant’s work for its method.

In sum, there are three cornerstone considerations for a regulatory analysis.
These are: first, a political decision needs to be made assigning the objects of
regulation to either side of the public-private divide. This decision needs to be
taken to determine not only who will be involved in the regulation, how the
regulation will be carried out and what resources will be used to achieve the
social policy but also which laws will apply. Second, the coherence issues
identified by Feaver and Durrant—including the object to be achieved (also a
matter of political determination)—is critical. Regulatory analysis without
attending to coherence is analysis which lacks a rudder to avoid regulatory
failure. Third, as regulation seeks to change some aspect of human society and
hence has institutional impacts, it is necessary to consider the pre-existing
institutional arrangements. Seldom if ever does a legislator find a blank slate
upon which to legislate. To a considerable degree the success of a regulation
will depend on the degree to which that regulation coalesces or diverges from
pre-existing institutional arrangements. That is, whether regulation seeks to
eradicate some social practice, or promote a new one, its designers must take
account of those existing arrangements in order to create a system which
addresses the policy objects and shapes them to work within social reality. That
is regulation needs to be socially sensitive rather than generic.

International Law Journal 13: 33-56. and elsewhere
3. Introducing The University

In western societies, the university is an institution of considerable age. Depending on how one chooses to examine it, it may have an antiquity dating back to the classical Greek era of Socrates, Plato and Aristotle,\(^\text{15}\) or to the medieval period when universities such as Bologna, Oxford and Paris were founded.\(^\text{16}\) Despite the intervening centuries, the university today remains the direct descendant of at least the medieval university. The institutional continuity is evidenced in its objects, organisational structure, location on the public-private divide and corollary resourcing. Over the years its objects and roles have differed from theological training centres, to centres of scientific research, to technical training institutes, to centres of political critique and activism\(^\text{17}\) and national economic growth. The university institution has been instrumental in the development of western society and society has demanded much of its university institution over the ages, at times in consort with that institution’s self-conception and at other times in conflict. Indeed, society’s demands on the university are often in conflict. As a result the university finds itself being pulled in one direction externally, while trying to maintain its own mission internally.

The university as an institution has long been the target of conflicting criticism. As noted medieval scholar of the university, Charles Homer Haskins, observed, universities are at times criticised for their aloofness or their devotion to vocationalism, for being too easy or too severe, and drastic efforts have been made to reform them by abolishing entrance requirements or eliminating all that does not lead directly to bread and butter; but no substitute has been found for the university in its main business, the training of scholars and the maintenance of the tradition of learning and investigation.\(^\text{18}\)

Over the centuries of its existence it has been forced to re-invent itself, usually shifting between the poles identified by Haskins. Such a broad and deep foundation is a good grounding upon which to develop an understanding of the contemporary university. It emphasises the conflicting demands and radical shifts in the institution while sharply identifying its institutional core and critical role in society.

From the foregoing discussion, it is evidently a mistake to see the university as one thing or from one perspective. The university can be viewed historically, sociologically, economically, politically and legally. For example, one can consider historical perspectives that return to the medieval origins and consider it as a body corporate, first of students, and later of professors. Or one may choose to view it as a collection of people dedicated to higher education dating back to the classical era of Greek antiquity. It can be analysed sociologically in terms of its distinct organisational characteristics including such things as its status as an autonomous body of scholars with legal recognition, a course of study and examinations leading to degrees, and a hierarchy within a collegial governance structure. It can be considered politically as a public or private body. It can be analysed legally as a corporate body of some particular type. It can be evaluated economically as simply another firm generating revenue through the production of goods and services or a non-profit enterprise.

Among these perspectives, the institutional will be referred to throughout. Institutionalism emphasises the social embeddedness and normative character of collective activities such as those within and around the university. The institutionalist approaches avoid the overly abstract models put forward by some

---

19 Ibid pp. 9-11.
disciplinary perspectives and their associated errors. These institutional perspectives help explain the diverse roles the university has played over the centuries noted above—from a centre of training for civil duties, to theological advocacy, to an instrument of state indoctrination, to technical training institute as well as the continuity—and particularly the normative continuity that has been central to those roles. The university’s institutional bedrock that has remained stable throughout the centuries of change is the value placed on knowledge. The creation, dissemination and preservation of knowledge have been viewed as the overriding raison d’être of the institution, and knowledge itself as the premier value.

Entwined with the discussion of the intrinsic value of knowledge, however, is the question of the utility value of that knowledge. The value of knowledge depends on fundamentally philosophical commitments—is knowledge Truth and as such an avenue to the Divine as early church fathers would have it, or empirically verifiable phenomena or merely the misshapen opinion resulting from a recent marketing campaign? Answering the question of the utility value of knowledge and hence the utility value of the university has led to evaluating the university instrumentally in economic terms for example, of what it can produce as measured by numbers of graduates trained for vocations. Or as another example, from a sociological perspective, it may be asked: is the university an important social institution in its own right, creating, developing, storing and transmitting the knowledge that permits a society to sustain itself?

The debate about the nature of knowledge and the university—and hence the value of the university—has ranged from idealists like John Henry Newman and Wilhelm von Humboldt, to functionalists like Talcott Parsons, and Martin

Trow,\textsuperscript{26} to sociologist-philosophers like Jurgen Habermas\textsuperscript{27} and José Ortega y Gasset,\textsuperscript{28} to economic rationalists who see no value in the university except as it contributes to the economy.\textsuperscript{29} Accordingly, argument concerning proper policy for the university remains as fierce today as it has for centuries and reflects disciplinary, normative and political commitments as much as anything else\textsuperscript{30}, and accordingly, a regulatory analysis without such commitments is unlikely to satisfy any particular camp. While answering the regulatory questions will not satisfy these questions, they will point to important institutional orientations such as the university’s role in society creating, transmitting and preserving knowledge, and providing other broad public goods that are hallmarks of the university and which must be integrated into any appropriate regulatory framework.

The issues raised about the nature and utility of knowledge and the university are pertinent to the discussion of regulation of the university in a variety of ways. Where the university is some type of a pure knowledge institution peopled by high minded academics, it can be argued that they can be trusted to regulate themselves and the institution they inhabit. Where the university is a body of students, their concerns will reign and the regulation will meet their demands. Politicians have regulated to ensure an appropriate political agenda and sought power to appoint university officials to achieve their ends; church authorities have done so seeking to keep doctrinal purity in the heads and hearts of adherents; business has sought to control universities both to limit critical perspectives and to ensure a supply of trained labour and applied research at low cost. Where the university is the tool of a government or religion or economics, it will suit the doctrinal imperative placed on it, and its scholars forced to work within its ideological restrictions or face expulsion. Where the university is a


pathway to social acceptance or career advantage, its regulation will reflect those values. Perhaps this is what Maurice Kogan meant when observing a university can be anything the government wants.\textsuperscript{31}

Before moving further it is important to define a few dimensions of the study. One must note the basic distinction between regulating higher education, which is a matter of broader educational policy, and regulating the university which is a matter of the control of an institution and its organisations. The two are not synonymous. Higher education need not take place in a university. The university is a particular social institution, organisational form and legal instrumentality. The university has been the traditional home of higher education. Higher education should also be distinguished from tertiary education: the former has some expectation of critical thinking while the later encompasses broadly any post-secondary training. The university is the focus of this dissertation and, as the paradigmatic institution of higher education, the term “university” is at times used for the latter.

Further, for regulation to address the university, it must be noted that the term university does not have a single referent. It will be used in three distinct senses in this dissertation. These are the “university institution” which refers to the norms and practices of university organisations and their participants across geographic as well as time dimensions. It includes practices at national, regional and international levels associated with the term “university.” The term “university organisation” refers to specific organised groups of people carrying on the practices of the university institution within a defined group. The term is used as a sociological term. Finally, the term “university corporation” refers to a specific type of legal corporation that is the result of a unique sui generis trajectory in corporate law. To clarify, the term “corporate” is used exclusively for the legal corporation and the term “corporatisation” to refer to practices deemed private management practices sought to be introduced to the public sector. More on these terms will be offered later on in the dissertation as appropriate. The term “Australian university” too is used to refer to the local

institution and its organisations marking out its distinct characteristics as appropriate.

4. Transformation Of The University: Politics, Policy And Regulation

In last half century or so the university has been subject to two novel sets of changes that have had a profound impact on the institution and have had major consequences for its regulation. A first set of changes occurred after the end of World War Two. The university changed from an elite private institution to a mass public institution. This change put severe strains on the former, private, centuries old traditions of internal self-regulation, as well as introducing the state in new ways as it funded growth and took control exercising rights concerning organisational and institutional objects. To a large degree these changes were incorporated into the university organisation through expanded administration, while maintaining norms of the intrinsic value of knowledge and citizenship. This shift, however, forced the university away from a dominantly inwardly looking, self-referential institution to make it take more attuned to external environmental factors.

A second set of radical changes have taken place particularly in the last four decades as the nature of government has changed from welfare state to regulatory state and social activity conceived of as mimicking private economic behaviour. This second set of changes has changed the discourse about the university’s institutional norms from static and intrinsic value of knowledge, personal development and public good, to dynamic as it attempts to align them with the norms of economic values and measurement, and private good. This set of changes were introduced to the university by governments. Neoliberal governments imposed the norms and practices of private business through regulatory changes, attempting among other things to introduce business management practices and market mechanisms through a form of “quasi-market.” Quasi-markets are structured around tight central controls, but marked by deep channels of market-like conditions which combined serve to re-configure the form and function of the university. This second set of changes
has resulted in a radical challenge to the conception of university and a corollary change in the institution.

In terms of the conception of the university, the idea of an important social space not concerned with commercial activities but focused instead on social objectives of knowledge creation, transmission and preservation has been challenged. The traditional academically focused conception of the university has changed as priorities have placed commercial values at the forefront with academic norms remaining to the extent that they do not undermine the economic objects.  
Along with this shift is the tight central control—through a combination of re-oriented policy and re-configured regulation creating new audit type controls and agencies. This re-configuration allows driving the university by external performance measures set by government, rather than professional standards of the academic profession internal to the university. As to the changes in the institution, in essence the academic norms of collegiality and knowledge have been displaced by the norms of authority based business hierarchies and economic revenue generating and cost cutting norms as will be shown in throughout.

These changes to the university were introduced through sweeping regulatory change. It is important to note that the changes in Australian higher education do not stand in isolation. They form part of a broader policy debate concerning the role of the state, noted earlier and reflected in part in the debates surrounding various economic theories. The policy shift harkens back to the 1970’s at least, with the worldwide recession of that era, the onset of “stagflation” and the challenge this economic climate posed for Keynesian economics. In a nutshell, the combination of inflation and high unemployment challenged certain fundamental axioms of Keynes’ theory and led to a search for alternative approaches to securing the economic strength that was understood to provide the backbone for capitalism threatened by communism of the Cold War era—an era

32 See for example, Birrell
in which led to the concepts of political freedom and (elite) economic freedom being conflated, or at least seen as critically interdependent.\textsuperscript{33}

Whereas Keynes had advocated a strong role for the state in the economy, as a major participant in both the purchase and supply of goods and services, the alternative model proposed in the face of a “socialist threat” to the capitalist status quo offered that the state should have a minimal role, reducing inefficiencies and leaving supply and demand to the market. This position was advocated by economists such as Frederick Von Hayek and Milton Friedman. One aspect of this was the withdrawal of the state from the funding of various activities that previously fell under its auspices to provide—the shift from welfare state to regulatory state. Included in these cut backs were hospitals, schools and universities. In the political arena this policy is referred to as neolibereralism.

The current regulatory framework of Australian universities can be traced back to the reforms implemented following the 1980’s inquiry of Labor minister for education, John Dawkins.\textsuperscript{34} Dawkins reforms were, in the words of journalists Maslen and Slatter, “fired by an impatience with the universities’ poor attempts to adapt to the demands of economic restructuring brought on by the 1982-3 recession, and in part by a view at elite levels of the Labour Party that the universities were fat, lazy and complacent institutions.”\textsuperscript{35}

Dawkins reforms were based on a “do more with less” managerial approach and placed the university under considerable stress as it has been forced to secure private funding to make up for declining state funding. Their concern has been reflected in various schemes organized to increase revenues including industry partnering, commercialization arms, commercial subsidiaries, and recruitment of international student at highly differential rates.

The net result of the new regulatory framework introducing the market into the previously public sector has been the introduction of some of the market’s ethos, including a shift of emphasis from producing of public goods to production of private profit. A second shift is a reallocation or redistribution of externalities. This redistribution has permitted the social good of education to be distributed along the lines of market demand, namely to those with sufficient resources to invest the economic productivity potential of early adulthood into higher education while paying their living expenses in order to benefit from the market priced education. A further consequence has been the redistribution of the social costs of market driven education. These costs, it is alleged have put the university into crisis. As well, the changes include the driving out of public education, making the university for socio-economic elite, the cooption and corruption of the institution of the university changing it from a social institution to a profit driven corporation, and the degree from a certification to society of a student’s level of intellectual achievement to a diploma granted to a customer for having paid sufficient fees and passed a number of assessments. They pose a fundamental challenge to the coherence of university regulation.

Combined, these changes lead to consideration whether the regulation has so changed the university that the university is no longer able to fulfil its institutional role, and whether society so changed that the university’s former roles are no longer needed or desirable. Another way of framing the debate is whether the regulation has so changed the Australian university that an institutional break is occurring the result of which is to so alienate it from its roots and irrevocably change its path to make it simply another institution of private capital?

5. Statement Of The Problem

On the one hand, the university is a core social institution of western society—as argued in Chapters 4 and 5. It is the carrier of culture, the repository of all explicit knowledge concerning not only the organization and operation of government and society, but also the creative centre of knowledge in that society. As such, it is the critical institution for both sustaining and the development of western society. As an institution, it has developed its own path which has allowed it to carry on these functions successfully in the dynamic environment of human society for centuries. That is, the university has a long standing mission, is closely connected to societal needs, has its own norms and socialization processes, and its members have internalised these norms.  

Yet, on the other hand, starting in the late twentieth century and thereafter, the governments of western societies adopted a particular ideology in part in response to certain environmental conditions, that led to a fundamental reconceptualising of society. That re-conception was put tersely by then Prime Minister of the UK, Margaret Thatcher: “there is no such thing as society.” In other words, social, collective humanity no longer existed—there were only autonomous individuals (and apparently families). It followed that no social projects were necessary to sustain society. Accordingly, projects aimed at the preservation, maintenance and development of a society were to be systematically undermined. The university was no exception. More or less, government reduced its political and economic support from the university leaving it to sink or swim in the marketplace as would any other economic actor.

---


In the same era there was a shift in political discourse to an overriding concern with economics. In economic terms, policy advisors advocated and implemented policies that reflect a normative preference for private economic goods, faith in regulation by markets, a rejection of public goods which is not simply an aggregate of individuals’ private preferences, and a minimal role for government provision of goods and services. Where policies based on this view have touched upon the university, as with most other public and civil institutions, the effects have been profound. The notion of the university as a significant public institution, with a role to play in society’s well-being, a well-spring of knowledge, a store of culture and knowledge, a public resource, and centre of education and intellectual development has been in serious decline. The dominant discourse became that of business, markets, profit, and consumer. Accordingly, government and government enterprises seeking to provide a variety of public goods such as health care and education were challenged by that discourse, and derided and denied power as well as funding, denationalised by privatisation and subjected to scrutiny through the lens of business. The lens of business is not always focused on the larger social concerns of government and the members of society which do not hold potential for profit impacts.

The three contemporaneous changes—abandonment of social projects, reconceptualising of humanity as economic actors, and population boom mentioned previously—pose a significant challenge to the university. Traditionally conceptualised as a society itself, focused on societal well-being, without profit objectives, and generally restricted in numbers, the university was poorly positioned to respond to these changes. What has occurred in the university has been an effort to respond to the significant challenge. These efforts while successful to some degree, have left the university in a state of crisis and dysfunction not seen since its creation nearly a millennium ago. Its ability to carry its role as the central institution of western culture is in serious question, as it becomes increasingly subject to the discourse of individual, society, and profit, and is overwhelmed with people who have little idea about or interest in the institution dedicated to knowledge in which they wish to participate. More particularly, as the university struggles to address
individualised conceptions of human interests, generate its own economic resources, and participate in a economy organized around profit, while educating a less select margin of society, the stresses on the institution and its organizations, and the demands on its governance have increased significantly.

The discussion thus far, however, only focuses on part of the outcomes. The Australian university has adapted to these changes, and by some accounts, become a policy and regulatory success. It has become an economic powerhouse celebrated by government and media alike as forming a trilogy (with coal and iron ore) as a leading Australian export industry.41 Again the regulatory objective comes to the fore: What is the social problem that university regulation seeks to address? Is it the production of services for export and short-term economic gain? Or, is it for the education of Australian citizens for the long-term benefit of the nation?

The foregoing problems of institutional and socio-political change have caused the regulatory landscape for the university to be completely re-designed. This dissertation examines and evaluates the efficacy of the regulation of the university. The issue is not normative. Rather, it is a technical question concerning the choices of mechanisms and arrangements and of coordination to achieve politically determined ends—matters of coherence with institutions and coherence in regulatory design.

Addressing these issues requires not only a thorough review of government policy and regulatory arrangements, but makes a thorough analysis of the university itself mandatory. It requires in the first instance a review of the institution of the university to avoid regulatory failure emanating from a generic approach to regulation. This imperative finds a sounding within the discipline of higher education itself. As Professor Simon Marginson observes “Much is written on universities; and it is often didactic in tone, normative in project, and

circular in argument.”

This dissertation attends to the university as an institution and an organisation in its own right, emphasising description, being interdisciplinary and acknowledging a multiplicity of norms in the discourse surrounding the university.

6. Methodology

This section briefly explains the methodology of the dissertation. The basic question of the dissertation—does the regulatory regime facilitate, hamper or change the functioning of the institution of the university—does not lend itself to an easy answer. As the choice of methods to a considerable degree leads to particular conclusions the importance of correct methodology is difficult to overstate. A variety of methods provide information and analysis which will have bearing on the analysis. These include the standard methods of economics, political science, sociology and law. While a variety of disciplines including political science and higher education could be used to provide policy analysis—and this dissertation’s debt to those disciplines will be evident—law and specifically regulatory analysis provides a different, less ideologically driven approach. Using this legal method allows a more technical evaluation of the system to speak to the issues surrounding the regulation of this important institution at this juncture in history. It allows the contributions of sociology and economics to be considered to be integrated without allowing either to dominate the discussion. Rather, it takes those discourses and feeds their findings into the regulatory analysis to provide a basis for regulatory evaluation and potential reform. None of these disciplines, however, provides a comprehensive method for the analysis necessary to answer the question as it stands. Accordingly, from a methodological perspective, a non-standard approach may be best suited to the analysis. Such an approach as developed by Feaver and Durrant is referred to as regulatory coherence.

A basic principle of law is the notion of consistency, captured in the doctrine of *stare decisis*. That is, the same law applies to similar fact scenarios, and similar

---

actors. What Feaver and Durrant claim is that coherence is a property of well
designed regulatory systems. That is, where a regulatory system is coherent in
terms of system, policy and instrument its chances of being a regulatory success
are increased. The corollary is that where a regulatory system is incoherent, the
chances of regulatory failure are also increased. By using their approach and
analysing coherence at the systems, policy and instrument levels, an overall
analysis of the regulatory system for the university and higher education in
Australia answering the question posed by this dissertation can be achieved.

7. Outline Of The Dissertation

The dissertation is composed of 8 chapters including introduction and conclusion.
The chapters are as follows. The Chapter 1: Introduction explains the broad
political, institutional and legal issues and introduces the theory of regulation. It
provides the historical, political and social institutional context for the topic, as
well as the basic rationale for the theoretical approach. It then identifies and
explains the specific research question. Chapter 2: Regulatory Theory provides
the theoretical foundation and justification for the dissertation. It argues that
regulation has only recently come to be studied in its own right and that the
approaches taken in these studies are piecemeal and limited by disciplinary
perspectives. With the exception of recent work by Feaver and Durrant, the net
result of these approaches leaves regulatory studies in an unsatisfactory position
of lacking an overarching critical framework for the analysis and evaluation of
regulation. Feaver and Durrant’s work on regulatory coherence is critiqued and
adopted as the analytical framework for the dissertation.

The chapter also identifies and distinguishes various disciplinary approaches to
regulation. This task is undertaken to distinguish the peculiarly legal approach as
opposed to the more common economic and sociological approaches. The legal
aspects of regulation are often subsumed or assumed in the other disciplinary
approaches. By identifying the other approaches and distinguishing them from
the legal approach taken in this dissertation, the chapter is used to lay a further
foundation for arguing that this dissertation makes a unique contribution.
Finally, the chapter identifies the key aspects and features of regulation. These aspects and features from organising problem to policy development to regulatory design including accountability, have not been put together in this same way in the literature. That is, the dissertation’s use of Feaver and Durrant’s analytical framework is expounded in a more robust manner than elsewhere. This discussion of regulation and regulatory studies provides the basic literature review for the dissertation and grounds the rest of the dissertation from a theoretical perspective.

Chapter 3: Regulatory Framework critically examines the particular policy framework and regulatory arrangements in Australia. It reviews the history of the university in Australia in order to understand its purposes and the policy development. Further, it reviews the historical regulatory arrangements examining the role of government and its approach toward the university including over the century and a half since the founding of the university in the Antipodes. It focuses on regulatory bodies, government commissioned reports and policy responses. This historical background is used to argue that the Australian university has experienced an institutional shift from private elite, to public mass and back to private education provider as a result of changes to its regulation and its relation to government.

This argument is carried forward by a detailed examination of the contemporary regulatory framework. That examination, utilising the features and aspects approach developed in Chapter 2, draws attention to the highly directive nature of the regulation, the privatised aspects and the various strategies of regulation by code, consensus and competition. The final part of the analysis of the regulatory framework is the accountability framework. By examining the accountability framework, it becomes clear by what standard the university is being measured, and what values are expressed. Further, it becomes clear how the government sees the university. This part of the chapter argues that the university is primarily a source for government to underpin its economic reforms particularly strengthening private micro-economic reforms introduced in the 1980’s and shifting the university institution away from its broader public mission—a theme picked up and discussed further in Chapters 4 and 5. Finally, the chapter provides
the exposition of the regulatory framework on which the coherence analysis of Chapter 7 is conducted.

This chapter is one of the innovative and core contributions to knowledge made by the dissertation. Its detailed analysis of the policy, legislation, and regulatory structures through the lens of regulatory studies, provides a unique picture of the Australian higher education system. Its exposition of the policy framework and regulatory system forms the foundation for understanding the Australian university from both institutional and legal perspectives. The Australian regulatory system and Australian university as developed in this chapter are evaluated with reference to the university as a world-wide institution and organisation as discussed in chapters 5 and 6.

The next chapter *Chapter 4: Public-Private Divide, Public Goods and the University*, addresses a fundamental political and regulatory issue—the nature and location of the public and private spheres. It asks questions and examines answers about those spheres and the boundary between them. In terms of regulation, it examines the basis for assigning problems to the public or private side of the public-private divide and identifies the important consequences of the assignment, namely, what elements of public and private social and economic resources will be assigned to address the problem. The regulation, including its objectives, resources and accountabilities must be tailored to the sphere to which it is assigned.

This chapter serves the dissertation by identifying, clarifying and critically analysing the basic premises—public versus—private underlying and informing regulatory debate and decisions. In particular it examines critically the dominant neo-classical economic division between public and private spheres. It is argued that an economic understanding of public goods as a type of market failure is inadequate to the task of understanding the public good of the university. Further, it examines the significant positive externalities created by the university and their contribution to society at least to the extent they can be measured. This argument is significant as it provides the basis for the critique of the regulatory framework which is premised on economic understandings of public goods, and
in consequence reflects policy which privileges private economic goods and diminishes non-economic public goods.

The chapter then argues that the perspectives of political science and philosophy provide a more helpful understanding of public goods. These disciplines define public goods as those goods which contribute to the public functioning of a community. Understood through the lenses of these disciplines, the university delivers a significant public good. Accordingly, this chapter argues that the university is a foundational provider of public goods and so should be subject to regulation designed for public goods. As such, the chapter argues for considering the university as a public good, and provides the foundation for the coherence assessment in Chapter 7 in which the university regulation is evaluated as to its adequacy in supporting the university in the first instance as a public institution.

The next chapter, *Chapter 5: Regulatory Objectives and the Missions of the University*—examines the various roles of the university from a variety of institutional perspectives. An interdisciplinary perspective is important as the regulation will inevitably have an impact on the whole of the institution and all of its roles. Therefore, rather than simply relying on a single disciplinary perspective on the nature of the university, an interdisciplinary investigation will serve more effectively to understand the nature of this institution, its role in society and inform regulators of the nature of the matter being regulated. The chapter argues that the university serves multiple roles including knowledge creation, dissemination and preservation, contributing to the development of citizens, professionals and government, serving important sociological roles of sorting and credentialing the population, and helping government to achieve political objectives such as nation building and economic competitiveness. Examining these roles or missions of the university advances the argument that the university is best considered a public organisation strengthening the argument of Chapter 4 and further developing the foundation for the coherence analysis of Chapter 7. Chapter 5 argues that the complexity of missions requires an ordering of priorities which preferences the public missions and benefits over the private, and that overly narrow modelling and hence, regulation is likely to stifle the other significant missions of the institution.
Chapter 6: Regulated Bodies: Sociological, Economic, Political and Legal Perspectives on the University examines the university from various disciplinary perspectives detailing its organisational form. Again, the interdisciplinary perspective is important in order to understand the nature of the regulated body, a university corporation, which alternative models may be appropriate, and from which the coherence analysis can be developed. Organisationally, the university can be considered as a firm, a government department, or civil association. Its characterisation in this regard is significant in determining the laws which may or may not apply as discussed in Chapter 4 concerning the public and private spheres, and in consequence, the limitations on regulation which may ensue. Further, the chapter considers the economic alternatives of the university as a profit generating and non-profit organisation. This consideration is particularly important in terms of regulation and regulatory coherence because the regulatory framework for private for-profit and public non-profit organisations is likely to be markedly different. Further, from a policy perspective which favours private enterprise, it is important to identify the nature of organisations and understand how the university institution may fit into the alternatives. Further, the chapter examines the university organisation with respect to other public bodies from legal and public administrative perspectives. It argues that university organisations are most consistent with public bodies in terms of law and administration. This chapter builds on the arguments of Chapters 4 and 5 by arguing further that the university as an organisation is best understood and most coherent with public, non-profit organisations.

Chapter 7: Analysis: Coherence and Incoherence in University Regulation is the final substantive chapter. It brings the arguments, perspectives and analysis of Chapters 1 through 5 forward to subject the regulatory scheme to coherence analysis. Beginning with the Chapter 2 framework for regulation, i.e. the organising problem, the approaches, regulatory techniques structures, the coherence analysis examines each aspect of university regulation examined in Chapter 3 for coherence. The coherence is tested both externally with the social organising problem and institution internally with the organisation. Drawing from the foundations laid in Chapter 4 in which it was argued that the university
fits best on the public side of the public-private divide, the coherence analysis examines whether or the extent to which the regulation is coherent with this default position. The coherence analysis demonstrates that the regulation is incoherent with this public default position. From Chapter 5, the coherence analysis tests the regulation against the institutional features of the university. The coherence analysis leads to the conclusion that the regulation is incoherent with the institution of the university. The Chapter 6 organisational analysis is used in the coherence analysis to test whether the regulation is coherent with the organisational form that is most coherent with the university institution. The coherence analysis leads to the conclusion that the changes to the organisation fail to be as coherent as possible or as past. The chapter concludes that the elements of incoherence overwhelm the policy and regulation. It is the second and the major contribution to knowledge that this dissertation makes. The final chapter of the dissertation, The Chapter 8: Conclusion provides insight into the regulation of public goods not economically considered in the post-neoliberal era and provides some suggestions about how such regulation may be considered.

8. Conclusion

The dissertation contributes to the three fields of regulation, higher education and government policy. In particular its focus on the coherence of the regulation, i.e. the intersections of government policy, regulation and well established institutions and organisations provides new and unique insights into regulation, higher education and the development of appropriate policy. The dissertation demonstrates that the current regulatory framework is problematic. Lacking coherence at any level, it is a prescription for regulatory failure. Regulatory failure leads to failure of the projects subject to the regulation—in this case, the Australian university. The evidence for a degree of failure in the Australian university is dealt with in the literature and is referred to in the references throughout, one manifestation of which is the “crisis” literature referred to earlier.43

43 See n. 34 above.
One of the failings of neoliberal regulation is the neoliberalism’s ideological
dependence on neo-classical economics. In particular, economics
methodological assumption of radical individualism and that discipline’s
ahistorical understanding of itself lead to solutions appropriate for spot markets
and short-term financial gain rather than long term collective social survival.
The recent 2008-2009 collapse of financial markets should make clear that there
are fundamental flaws in the neoclassical model.44 In the post-neoliberal era,
new models of regulation are desperately needed, and it is hoped that this
dissertation contributes to the development of such models.

44 See for example, the “mea culpa” of one of its chief architects. Hellweg, E. (2008).
Greenspan’s ”Mea Culpa”. Harvard Business Review.
CHAPTER 2: REGULATORY THEORY

1. Introduction

In order to understand the regulation of the university, it is necessary to understand regulation: this chapter provides that introduction and draws out the relevant aspects of various theories of regulation to be used in the remainder of the dissertation. This chapter does so in three parts. First, as noted in the previous chapter, the academic study of regulation is relatively recent and so lacks a single, generally accepted approach to or definition of regulation. Such being the case, the chapter examines scholarship on regulation. Academics in the various disciplines of law, sociology, economics, various institutionalisms and political science all work on regulation and each develops its different theory of regulation according to the different disciplinary perspective. Each discipline makes a significant contribution to understanding regulation and regulatory theory and so has the potential to contribute to the analysis and evaluation of a regulatory framework. Further disciplines with their different methodologies and normative commitments contribute to the political debate about regulation. Therefore, in order identify, understand and capture the distinct disciplinary contributions to regulatory study, this chapter surveys and analyses the contributions most relevant for this study. Further, identifying the different disciplinary approaches and concerns will set the foundation for the approach taken to proposals and critiques of university regulation put forth by various disciplinary experts. Finally, this survey and analysis is used in the second part to argue for the selection of the methodology adopted by the dissertation, namely, Feaver and Durrant’s regulatory coherence.


An important aspect of this first part of the chapter is the argument that a large body of research has been developed by economists who because of disciplinary methodology focus on private economic goods. That focus and the recommendations so developed, it is argued, are inappropriate and inadequate for public goods like the university—a matter taken up and argued in detail in Chapter 4, and elsewhere in the dissertation. Further, the chapter argues that the contributions of political science and public administration while providing significant benchmarks and approaches to management, do not address the evaluation of a regulatory framework as a whole, which is the objective of this dissertation. Finally, the examination of institutional approaches to regulation contributes to an understanding of regulation that moves away from positivist approaches associated with one strand of legal scholars and allows a more socially relevant look at regulatory frameworks. The argument here is that each of the disciplines has a significant contribution to the understanding and evaluation of regulation, and accordingly, the dissertation will take account of these perspectives as appropriate.

The second part of the chapter aims to develop the dissertation’s theoretical foundation in regulatory studies. The chapter argues that the various theories of regulation while contributing to the current regulatory discourse fail to provide an overall framework for the critique of a regulatory framework. It would be a mistake, however, to dismiss them for this reason as they do indeed contribute significantly in their respective areas of focus. Accordingly, a survey and analysis of the main theories contributing to regulatory studies is conducted in a way which examines critically the focus and contributions of these theories. This survey and analysis is used in Chapter 7 which critiques the regulatory framework and proposes alternative regulatory arrangements. This critical review is used to argue that Feaver and Durrant’s theory and approach is the most suitable theoretical approach for the dissertation.

Finally, the third part of the chapter addresses the technical or mechanical aspects of regulation. Regulation as understood in this dissertation is a formal political response to socially interpreted phenomena. To understand that phenomena and to critique a specific manifestation of that phenomena in the form of university
regulation, a survey of the mechanics of regulatory systems is called for. That is, a review of the regulatory alternatives with respect to the organisation and design of a regulatory system is needed. This then includes a review of the organising problems, the regulators, strategies and accountability structures and processes. Simply put a more effective analysis and critique of a regulatory system can be developed once the technical and mechanical aspects and alternatives of regulatory systems are clear. Accordingly, the last part of the chapter surveys critically the various technical and mechanical aspects of regulation.

2. Disciplinary approaches to regulatory studies

This section reviews the contributions of various disciplines to development of contemporary regulatory studies. Distinguishing the various disciplinary views of regulation is important in order to develop a comprehensive evaluation because a regulatory scheme may be successful from one disciplinary perspective, but a failure from another. For example, a regulatory scheme that privatises the university may be highly successful from an economic perspective generating significant revenues, but unsuccessful from a sociological point of view in terms of concentrating benefits among a certain social class, or failing to achieve other functions such as creating and preserving knowledge. The disciplines with their distinct focal points and related accounts of regulation rely on different methodologies. As a result, it is difficult to analyse or provide an overall evaluation of a regulatory scheme without reference to a variety of disciplines. Indeed, it could be argued that to do so without an interdisciplinary approach is likely to unfruitful if not misleading.

a. Public Administration

To a certain extent, contemporary academic concern with regulation can be traced to Woodrow Wilson’s interest with the administration of government and its bodies. Wilson was concerned to avoid corruption as well as ensuring effective execution of the various mandates with which the departments and agencies were charged. Wilson’s work coincided in time with the development of large business corporations. The issues encountered in large business organisations with the coordination of large numbers of people and resources
were similar to those of government. These two coincident developments and concerns led to the development of public administration in government and business management business respectively. As noted, both were concerned with the effective and efficient use of those people and resources. In the public administration discipline, initially the work of Wilson, later followed by the work of Waldo and in business studies, the work of Frederick Taylor, then later followed by Chester Barnard pointed to the difficulty of rationalistic mechanical models of human behaviour in organisations and regulation. As well, both Taylor and Barnard noted the difficulties associated with and importance of coordinated regulation and effective government. Waldo argued as early as 1948 that regulatory study is an interdisciplinary enterprise. In that year Waldo stated: “administrative thought must establish a working relationship with every major province in the realm of human learning,” a view even more important today as disciplinary perspectives have greater impacts on regulatory prescriptions.

The dissertation now turns to examine the perspectives and contributions of policy analysis, political science, public administration, economics and institutionalism. Policy analysis, itself an interdisciplinary study, examines the development and implementation of policy—which usually means the design and evaluation of regulation. Policy analysis has taken a variety of approaches over time. Early rationalist approaches to policy making and regulation focused on before-the-fact evaluation. Government interventions were to be done by central planning agencies, and the execution and goal achievement were believed to be unproblematic, natural outcomes of the well laid plans. Little attention was paid to the overall design of the resulting regulatory framework.

This rationalist approach, as will be seen, has dominated the Australian higher education policy at least since the 1980’s. It is not an unproblematic approach. It is referred to as “naïve rationalism” because it ignores such things as side-effects, reverse effects, null effects, perverse effects, in other words a whole host

---

of unintended consequences—the problems associated with bounded rationality. As a result, critics of rationalist policy analysis began to focus on implementation planning.\textsuperscript{51}

Recognition of problems associated with rationalist and implementation planning approaches led to a search for yet another framework. One solution taken from management studies was the management by objectives approach. This approach looked less toward input-oriented and process-oriented management and more toward “good management practice.” Good management in this context meant: 1) setting clear goals, 2) participatory decision making, and 3) objective feedback of achieved results.\textsuperscript{52} This has been criticised as a modified form of Taylorism and carries with it many of the same rationalist problems. It provided no complete solution. In the field of higher education, the policy analysis approach provides neither an objective standard against which to evaluate nor normative direction. Further, it provides little guidance about the larger objectives of preserving the knowledge of and educating a society. It is focused on the minutiae of management.

Ex post approaches of policy analysis examine outcomes. Three main approaches to evaluation of policy outcomes have been developed. They are: Effectiveness Evaluation Models which examine goals, results, systems, and clients, Economic Efficiency Models, focused on efficiency and productivity, and Professional Models which examine quality and do so on the basis of peer review.\textsuperscript{53} Again, each of these has strengths and weaknesses, none dominating the discussion to the exclusion of the rest. More importantly, however, the problem of measurement becomes more acute as the less measurable objectives of higher education—i.e. knowledge creation, dissemination and preservation and education—being the most important, are exceedingly difficult to measure.

In sum, policy analysis contributes to regulatory studies at two points: the importance of attending to the policy which animates regulation, a matter addressed in Feaver and Durrant’s work, and the importance (and limitations) of

\textsuperscript{52} Ibid p. 30.
\textsuperscript{53} Ibid.
measurement for evaluative purposes—a significant issue in the design of regulatory accountability measures.

b. Political science

The related approach of political science examines the legitimacy of regulation in relation to a series of five tests or benchmarks. These benchmarks are whether the regulation is: supported by legislative authority, has appropriate accountability structures, procedures, expertise and efficiency.\(^{54}\) This approach acknowledges the potential for conflicting mandates and the complexity of evaluative frameworks and criteria. In particular, it is noted that any gain in one of the five areas is likely to require a trade-off in another.\(^{55}\) Further, it takes account of the inherent political nature of the basis of decisions concerning regulation. Rather than engaging in the politics, it aims to evaluate the regulation against the benchmarks. As Baldwin and Cave write:

> “the weight that individuals place on each legitimating argument will reflect their personal political philosophies and, in the absence of all persons agreeing on the nature of an ideal world, we will differ on matter of weighting, what we do seem to agree on, however, is the benchmarks themselves.”\(^{56}\)

To avoid the political debate Baldwin and Cave focus on simply the presence of the legitimacy or the grounds for legitimacy of a regulatory regime rather than attempting to weigh them or set out a calculus for such. In doing so they move the regulatory debate beyond the reductionist economic view and into a more technical realm, taking account of non-economic values and public good which their legitimacy theory recognises. Good regulation, from this perspective, is regulation which achieves an acceptable balance between the five criteria—it is regulation which merits public support. In this sense, “the legitimate” reflects the normative preferences of a society and so merits the term “good” in terms of that society. While this framework works for a political analysis, it fails to address the critical issue: what is the purpose of the regulation in the first place?


\(^{55}\) Ibid p. 169.

\(^{56}\) Ibid p. 169.
Any comprehensive evaluation of regulation must begin with that question and then move to the evaluation.

c. Institutionalism

Institutionalism—including new institutionalism—moves beyond the individualist analysis of liberalism to examine the social forces that shape organisations and institutions, focusing on the formal and informal rules and organisations that arise. As to regulation, institutionalism provides an account of the interactions between people, organisations and other institutions in the development, maintenance and demise of regulation. In this regard, an institutionalist approach offers insight about the workings of legal rules and arrangements, and through historical analysis provides a source of guidance for regulatory design. Institutional analysis emphasises the organisations and institutions created thereby, the degree of coordination between the rules, organisations and policy objectives. One important critique developed by institutionalists concerns assumptions of coherence within organisations and institutions. Contrary to rationalist efficiency accounts, new institutionalists emphasise legitimacy and other non-rationalist, non-economic goals as the true goals of organisations. These critiques offer crucial insights into the rationalist programmes of government policy and economic agendas, and lead to the suggestion that other agendas not only should be considered, but are critical to understanding organisations and institutions including government. As to the idea of coherence upon which this dissertation is founded, as will be argued below, it is not that conflicts cannot be sustained within an organisation or institution. Rather, the argument that will be made is that a prioritisation between incoherent or conflicting goals, objectives and norms needs to be made. Finally, institutionalism examines current institutions and formal attempts to modify them. As will be seen in the discussion of regulator theory below, institutionalist

approaches and insights are becoming increasingly important in regulatory discourse.

One increasingly important idea introduced into regulatory study from institutionalism is the notion of soft law. That is, where “hard law” is viewed as explicit rules formally promulgated by a recognised governmental authority, soft law refers to non-governmental regulation, self regulation, and the regulation stemming from non-legal institutions. So, for example, regulation of universities may occur by way of ranking systems as universities change their behaviour, focus and structures in order to achieve higher rankings. The term soft-law is not only used by institutional scholars, but also public administration scholars to describe regulatory techniques other than command and control. For example, regulation which provides incentives or forms of self-regulation in which standard setting is delegated to the regulated body may all be considered soft law. Public administration scholars refer to combined hard and soft law as “carrots, sticks and sermons.” Soft law regulatory approaches are particularly effective where strong institutions guide behaviour of organisations which seek to follow, mimic, comply and compete within a sector. Further, the soft law and hard law approaches are not mutually exclusive, and indeed the distinction at times is amorphous. For example, governments may create a regulatory regime that has both incentives for good behaviour as well as fines for non-compliance. As well, governmental policy may change the mix of hard and soft law over time in response to internal dynamics of the industry as well as changes in the external environment. In terms of accountability, whereas hard law usually relies on courts and Parliament, soft law may leave accountability to social reporting and censure, markets or other arrangements.

The significance of understanding the university as an institution and an organisation can hardly be overstated. In order to regulate effectively, one must understand the phenomenon to be regulated. Accordingly, the institution and

---

organisation of the university are examined in Chapters 5 and 6 respectively. Further, institutional soft law is a major contributor to the regulation of the university and this is integrated into the analysis and critique of the regulatory framework throughout, but particularly in Chapter 7.

d. Economics

Although the distinct projects of public administration, business management, policy analysis, political science and institutionalism provide grounds for different types of analysis, they do not provide complete or comprehensive models or analysis. Economists seeking to apply their methods broadly purport to do both.

Economics works within two significant constraints. First, economic analysis is constrained by a single overriding normative preoccupation—efficiency. In this aspect, economics is highly normative in its prescriptions for regulation. It promotes all that enhances efficiency and censures what does not, and often regards distributional issues as secondary—a consequence of adopting Kaldor-Hicks efficiency. Accordingly, economic analysis of regulation is mostly conducted by way of cost-benefit analysis (“CBA”) and is primarily about the efficiency of a particular piece of regulation or regulatory regime and its impact relative to an imaginary perfect market. Second, economic evaluation of regulation starts from a fantastical benchmark. Economics takes an imaginary free market in which all actors have complete, timely and accurate information, a complete suite of property rights—in other words, perfect markets—and obey laws all of which were sui generis as its starting point. These two elements of economics effect the analytical lens of economics such that its evaluations and recommendations concerning regulation may tend to skew its evaluation and policy advice.

In terms of economists’ approach to regulation, the analysis begins with its assumption of perfect markets and then examines areas where markets fail. These market failures include monopolies, externalities, information asymmetries, and may extend to areas such as scarcity, rationing and social policies including
distributive justice. From an economic perspective, regulation is no panacea. Indeed, in the hands of certain more politically motivated economists regulation seldom achieves its proposed outcomes, and the CBA often suggests costs regularly outweigh benefits. From this perspective it is asked: if regulation for the most part fails to deliver the desired norm of efficiency, the natural question is what less desirable motivations drive it? The answer to this question leads to public choice theorists, who apply economic analysis to politics and find hidden under most public initiatives a private exploitative motivation. Their analysis is what one would expect from ideologues: a single finding that regulation is bad.

While economists’ efforts fail to provide a complete description of regulation, they have contributed an important part of the theoretical foundation by categorising regulation as public or private, and contributing to the debate on regulatory justifications and purposes. From both justificatory and purposive perspectives, two broad theories of regulation can be identified: public interest or private interest theories of regulation. The former, which includes welfare economics, seeks to promote the overall good of the collective. Public interest regulation aspires to do what the market cannot do. In economic terms, public interest regulation seeks to address market failure. That is, it “produces market correcting, general interest policies.”

Public interest regulation also has political justifications. These include the values of broad participation in society, social justice, a diversity of views, and respect for individual human dignity. Regulatory objectives include raising sufficient funds to purchase public goods, and creating political consensus on the quantity of public goods to be supplied as well as their quality. These are important objectives because they speak to the economically non-rational in the sense that demand is not a function of willingness to pay.

Further, public interest regulation seeks to address the problems of bounded rationality, inequitable distributions and preference shaping by private interests.

---


That is, there is a role for government to address inequities in society, to shape preferences for such things as democracy, cooperation to overcome collective action problems, and civic values all of which are undersupplied by the market. These theories tend to view regulation for public collective purposes as desirable and such ends as achievable.

In contrast, private interest theorists are sceptical of the public intention of legislators, ideas of a collective as anything other than individuals, and as a result favour a limited space for regulation. Private interest regulation rejects substantive goals for society, and rejects any trans-individual goals. That is, there are no collective aspirations for the future of a community, generation or nation-state. All preferences are purely individual. These public choice views of regulation, although coming from public choice economics, fail empirical testing. As Morgan and Yeung distinguish the two, “Public interest theories stress market failure and the capacity of regulation to correct such failure. Private interest theories stress regulatory failure and the tendency of regulation to benefit narrow special interest rather than to promote collective welfare.”

This characterisation of regulation as public or private interest is critical for the regulatory program including the regulation of the university. Not only do public regulatory projects call for public support in terms of political legitimacy and public resources, but if the university is to be regulated consideration must be given to whether and how it should be considered in terms of public and private. The issue of the public-private distinction is addressed in Chapter 4 and the university is considered in these terms institutionally and organisationally in chapters 5 and 6 respectively.


67 Ibid p. 43.
3. Regulatory theory

This section turns to the second review of the literature—on regulatory theory. As will be seen, this literature does not form a coherent body of knowledge with a linear progression of ideas. Rather this body of literature is grows out of relatively recent work which was the result of new thinking about government. This new thinking was combined with the social sciences in part reviewed above. It comes from a disparate group of scholars working in different disciplines examining different parts of regulatory schemes, in turn developing their thinking about the particular area of regulation on which they have focused their research. Accordingly, the survey is not comprehensive, or as will be seen, demonstrating a coherent trajectory and development of ideas. It is important because the review connects the current work with the literature in the area and provides a justification for the choice of methodology.

a. Regulatory Failure

Economists and others have long bemoaned the failures of government regulation to achieve desired outcomes. These complaints came to be termed “regulatory failure.” Taking up this theme led to a landmark work and in new thinking about regulatory design by Stephen Breyer. Breyer’s work in regulatory failure and reform was a significant departure from the prior economic work. Whereas analysis of regulation prior to Breyer had been the province of economists and public choice theorists, Breyer separated out from the motivations of the political sphere and economic analysis the techniques and objectives of regulation and suggested that they be studied independently. Further, he suggested that such techniques and objectives needed to be coupled appropriately with the justifications for the regulation.

Breyer identifies his work as a theory of regulatory failure. According to Breyer, failure to achieve the objects is the predictable result of the mismatch of

---

regulatory objects and regulatory methods. That is, Breyer suggested that regulatory goals needed to be matched to regulatory systems. Breyer explained as “axiomatic” that objectives be determined first, that alternative regulatory regimes be considered second and finally, optimal methods be chosen. This ordering would militate against selecting regulatory regimes on ideological basis, or the alternative, simply working with the existing institutions. While Breyer acknowledged the importance of existing institutional arrangements, these are to be considered at the end of the analysis not the beginning. Breyer points to the importance of institutional arrangements and political conventions, as context; however, he suggests that regulatory analysis should not start from these contentious points, but from the coordination of the twin points of object and method. Finally, while starting from a normative preference for liberal freedoms and “unregulated markets” Breyer indicates that governmental activity is “needed to achieve an important public objective that an unregulated marketplace cannot provide.”

In expounding his argument, Breyer identified a list of justifications for regulation such as monopolies and social costs—Breyer focused on economic regulation and hence used market failure justifications—and then examined an array of regulatory techniques and identified their strengths and weaknesses. Once this examination was complete, he sought to ascertain which techniques were best suited to which problems or justifications for regulation. After his analysis and application, Breyer proposed a few general rules. These are: regulation should be aimed at worst cases with simplicity of rules, bargaining and incentive are preferable to command and control, and in economic regulation an order of preferences need to be set from unregulated markets to command and control.

Breyer’s concern for coherence between objects and methods is significant. It appears to be the first such identification. Even within economic regulation he identified coherence as critical. A failure to have such coherence he claimed was a cause of regulatory failure. While he does not distinguish between instrument and approach—that is, for example, between information instruments and cost-

---

71 Ibid p. 551.
plus approach—he does identify a variety of both. His analysis shed light from a non-economic perspective into the black box of regulation.

The significance of Breyer’s work for this dissertation is his novel idea that regulatory failure is the consequence of incoherence between problem and regulatory response, and the important separation of regulatory techniques from political ideologies. The first of these two contributions provides a foundation for Feaver and Durrant’s regulatory coherence and the second a foundation for the non-political evaluation of regulatory scheme of the university.

b. Responsive Regulation and Really Responsive Regulation

Since Breyer’s work, approaches to the study of regulation have blossomed. One such landmark work is that of Ayers and Braithwaite. Unlike Breyer, who adopted an economic normative default position of deregulation, Ayers and Braithwaite, a lawyer-economist and a criminologist respectively, attempt to address the ideological deadlock between de-regulationists and people who can see the benefits of regulation by avoiding a normative political commitment. They argue that rather than addressing regulation from a political perspective, thereby hobbling any attempt to coordinate activity, it is the operational aspect of obtaining compliance—which must be the focus of regulatory studies. Further, they argue that a more sophisticated and realistic model of actors—both regulator and regulatee is necessary if regulation is to be effective. They note that scholarly opinion on regulation has become divided on the basis of disciplinary perspectives rather than on the sui generis issues arising from regulation as an activity. They point out that economists working from an economically rational actor model ignore intrinsic motive and provide a limited range of approaches and predictions. By way of contrast they note that sociologists working from a model which allows for social norms and a variety of motives empirically proved rather than the economists’ assumed model have a larger array of tools and approaches for solving the regulatory puzzles. So, for example, Ayers and Braithwaite are able to take account of such intrinsic aspects

of human nature as the desire to be viewed as “basically good—reasonable, of
good faith, motivated to abide by the law” which they note is driven out by
punitive models of regulation. Working from a sociologically informed model
not focused on game theoretic free riders, Ayers and Braithwaite explicitly state
that regulation should be designed not only to control the bad but to encourage
the good.

They too identify the potential for regulatory failure; however, rather than a
mismatch of object and method like Breyer, they describe regulatory disaster as a
conflagration which occurs when “the tough, unprofessional, confused self of the
regulator encounters the irresponsible profit-driven self of the business
executive.” That is, where people are treated or act as if they were evil
simpletons, i.e. simple caricatures with single motives like self-interested utility
maximisation rather than real humans with multiple motives and values, they are
more likely to cause cataclysm than where dealing with each other and acting as
socially aware, multi-faceted beings.

Ayers and Braithwaite suggest a normative ordering, which they refer to as a
“lexical ordering”, can form a framework for accessing and understanding
motivations of actors. In addition to acknowledging a variety of potentially
conflicting norms and objects, this ordering allows more effective guidance from
regulators. Where regulators are able to appeal to the intrinsic or institutional
norms of the regulated they are more likely to have the regulation internalised
than if they were only to appeal to external monitoring and punishment.

Ayers and Braithwaite argue that there “is no such thing as an ahistorical optimal
regulatory strategy.... the appropriateness of a particular strategy is contingent on
the legal, constitutional and cultural context and the history of its invocation.”
That is, contrary to the economic “scientific” model, Ayers and Braithwaite point
out that regulation is not an application of some abstract science. Rather, it is

73 Ibid p. 25, 49.
75 Ibid p. 31.
76 Ibid p. 27.
77 Ibid. p. 101.
contextually applied social activity—in other words, they recognise the institutionalists’ focus of studying phenomena as socially embedded.

Ayers and Braithwaite’s focus is on effective operationalisation of regulation through effective design. Their study is focused on regulatory schemes that take account of various types of actors with different types of motivations in a dynamic interaction. They recommend regulation be designed to allow regulators to be “contingently cooperative, tough and forgiving.” Instead of the crude economic model of punishment and reward, Ayres and Braithwaite recommend a model that allows for cooperation in the first instance, where that fails escalation, where compliance follows, forgiveness and where it ultimately fails a “big gun.” Rather than a dyadic game, played strategically as economists model it, they see regulation as an iterative relationship between a variety of parties with a variety of interests.

Given Ayers and Braithwaite’s preference for analysing regulatory relationships as on-going iterative relationships, they recognise the potential for regulatory capture. To avoid negative regulatory capture, they advocate a third party participant in the regulatory regime—a Public Interest Group. This public group operates to ensure that the discretion in the variegated regulatory regime is not abused, but used for proper purposes of achieving compliance with the regulation.

Ayers and Braithwaite’s work is significant for this study because it emphasises not only the contextual nature of regulation contrary to the scientific model proposed by economists, but also the non-economic aspects of regulatory activity. Ayers and Braithwaite are not limited to consideration of economic impacts. In this way, their work not only compliments but moves beyond Breyer’s work which was limited to the problems of economic activity. In this vein, Ayers and Braithwaite’s idea of normative ordering is a further critical contribution. Their identification of worthwhile but conflicting regulatory objectives within a single regulatory scheme leads them to the idea that these

78 Ibid p. 51.
conflicts need to be ordered or prioritised. As will be seen, this idea has significance in the analysis and evaluation of the university. The conflicting objectives summarised as public good and private economic good co-exist in the institution and the regulation of the university must work so as to balance effectively both in order for it to work.

Finally, Ayers and Braithwaite’s work draws attention to the alternative regulatory arrangements that are possible by creating the idea of public interest groups involved in regulation. In sum, Ayers and Braithwaite’s contribution facilitates an expanded non-political, non-economic critique of certain aspects of regulation and regulatory arrangements.

Picking up on Braithwaite’s work, Baldwin and Black have examined what they call “really responsive regulation.” 79 This regulatory approach which they see as addressing short-comings in Braithwaite’s model for enforcement, takes greater account of the institutional context of the regulatory efforts. That is, rather than looking exclusively at the regulator-regulated relationship as does Braithwaite, and attitude of the parties, they investigate the cognitive frameworks within which the parties are operating, the institutional framework and “the different logics of regulatory tools and strategies”. 80 These factors combined are to be the focus of regulatory examination. 81 That is, evaluating non-compliant actors requires a subtle, carefully designed, responsive regime allowing regulators act with considerable discretion within a carefully prescribed area to achieve the identified preferred outcomes. These cognitive frameworks not only reflect the disciplinary approaches discussed above, but also the political programs of various governments be they left or right leaning. The implications for governments regulating the university are problematic particularly for highly ideological governments. The norms and critical, reflective and exploratory agendas of university research pose a direct threat to certain agendas such as neoliberalism. Again, like Braithwaite’s contribution, Baldwin and Black provide

80 Ibid.
further subtlety and sophistication to modelling regulatory schemes. This subtlety is an issue for this dissertation as it addresses regulation designed by economic rationalists for one of society’s most complex organisations and significant institutions, the university. Although Baldwin and Black’s model does not provide a direct contribution to the analysis, it does emphasise the complex cognitive maps which underlie regulators perspectives and regulatory preferences.

c. Smart Regulation

Further innovative thinking about regulation comes from Australians Gunningham and Grabosky. They developed what some see as a distinctive Australian approach to regulation combining empirical case study, broad theory and policy pragmatism. They have denominated their non-particularist approach as “smart regulation.” This approach is referred to as smart because it does not follow a single policy prescription, instead preferring to select carefully among alternatives, electing from the alternatives complementary policies and instruments along principled lines to design regulation suited to achieving desired outcomes as well as minimising the potential for unintended consequences. Their principles are simple:

- Prefer complementary instrument and institutional mixes over single instruments
- Prefer less intervention over more
- Prefer escalating response models with failure triggers over single response models
- Empower third parties to act as co-regulators
- Maximise opportunities for win-win

To a certain extent one can see elements of Breyer and Ayers and Braithwaite in the list. Breyer’s preference for unregulated markets aligns with “prefer less intervention.” And Ayers and Braithwaite’s iterative response model as well as public interest groups sound with “escalating response” and “empowered third parties.”

While smart regulation is still a first generation form of regulation, it provides a good basis for second generation regulation. Smart regulation it is argued is too idiosyncratic to be a broadly applicable model, and leaves many standards to be developed. This challenge has been take up by Howlett. Howlett describes second generation as sensitive to context rather than a broad policy prescription to be applied bluntly across large sections of society.\(^{84}\) That is, the traditional alternatives of “markets vs state” and “carrots, sticks and sermons” must be set aside as single, universal solutions. Being aware of context, however, greatly complicates the issues of instrument choices. As Howlett observes, in good times, governments find it easier to create more generous regulation. In times of scandal and collapse, heavy handed regulation, which normally would be rejected on philosophical grounds comes into favour. Additionally, second generation moves beyond “good and evil” dichotomy of and examines “why is a particular combination of procedural and substantive instruments utilized in a specific sectoral context?”\(^{85}\) The design of appropriate policy and underlying system is a matter of considerable complexity,\(^{86}\) a matter of systems theory,\(^{87}\) and well beyond the scope of this dissertation. However, ignoring extant organisations and institutions underlying the system is a recipe for failure. Accordingly, these two matters are taken up in chapters 5 and 6 respectively.

The survey so far has identified a number of theoretical approaches to regulation that are significantly removed from the simplified cost-benefit-analysis of economics, that are far more than simple command and control, and conceive of regulation as an iterative, localised, relationship, in which complex sophisticated analysis are appropriate. The survey makes clear that various scholarly discourses all coming under the heading “regulation” have markedly different focal points and methodologies. Accordingly, the difficulty for a dissertation on university regulation is to find one or a group of approaches that will address the


\(^{85}\) Ibid p. 6-7.


research question. This observation leads to consideration of Feaver and Durrant’s work.

What is lacking in all the foregoing approaches is an overarching framework for analysis of a regulatory scheme. None of the theories gives consideration to coherence among problem identification, regulatory response of policy choices and decisions, targets of regulation and regulatory design. That is, while some policy decisions may be well suited to economic regulation, others manifestly will not. However, given the ideological commitments of some governments, preferred regulatory designs will be implemented across the regulatory landscape with little consideration of the policy objectives, the norms inherent in the objects, or the consequences of various regulatory choices. These arrangements, as Breyer would predict, are primed for regulatory failure.

d. Regulatory Coherence

An innovative approach to regulation has been developed by Feaver and Durrant. They have identified the potential for aspects of legal coherence to be applied to regulation, and regulatory systems. Whereas Breyer identified the mismatch of approach and object as the cause of regulatory failure, Feaver and Durrant claim that such a mismatch is but one type of larger problem of incoherence. The corollary argument to incoherence leading to regulatory failure is that coherence widely construed leads to stability and regulatory success.  

Feaver and Durrant claim that regulatory coherence has three dimensions: systemic, policy and instrumental. Each of these dimensions must be coherent in order for an overall regulatory system to be coherent. They explain of the dimensions or levels. Systemic coherence is described as follows: “a regulatory arrangement is systemically coherent where the underlying social need for regulation coalesces… with the normative policy objectives formulated to address that need.”


89 Ibid 397.
that attends to the provision of public health. Where this coalescence of problem and policy response occurs, one has systemic coherence—i.e. a coherence between the social norm and the normative policy objective—public health. An example of incoherence in this dimension would be the social need for public health being addressed by policy that has a normative objective of creating private profit making opportunities.

Feaver and Durrant do not describe systemic coherence as extending beyond need and policy norms, yet the term systemic coherence is suggestive of a larger concern of coherence in the first instance among the systems comprising the social system and in particular, the political system. Systemic coherence so conceived would require a particular problem to be located on the public-private divide. That is, systemic coherence requires a political decision to allocate a particular problem to the public system or to the private system, so allocating primarily responsibility for the problem to the public or private realms. This allocation is necessary from both theoretical and practical grounds.

From a theoretical perspective, the decision to regulate is based on certain political and economic theories about the role and operations of government and private actors, as discussed in the survey of disciplinary approaches to regulation above. As noted, the public and private systems have different norms and scopes of concern. To fail to distinguish and scatter regulatory response over the division will lead to systemic incoherence. From a practical perspective, the ability to call upon the state’s authority and resources in aid of any proposed regulatory project requires the project to be cast as having a significant public impact. Accordingly the classification of a project as public or private is evidently a critical step. Systemic coherence therefore should require a careful consideration and development of policy that takes clear account of the public and private categories. Unsurprisingly, the location of the dividing line between public and private spheres is hotly contested for various regulatory projects. This important contest is a political and ideological manifestation of the larger contest of the public-private divide taken up in detail and argued as a fundamental theoretical issue in Chapter 4 and with respect to higher education and the university in the next chapter.
Systemic coherence is addressed in this dissertation in Chapter 3 by expositing the policy framework demonstrating a shift from public to private normative foundations, Chapter 4 in the discussion of the public-private divide and in Chapter 5 by examining the institutional options and related disciplinary perspectives. The systemic coherence analysis rests on normative foundations flowing from location on the public-private divide. The discussion in Chapter 4 identifies the normative and hence political nature of the public-private divide. Chapter 5 expands the systemic foundation by focusing on the social need addressed by the regulation—in the case of the university, the creation, preservation and dissemination of knowledge—and the regulatory potential of shifting the university to non-knowledge based tasks, including generating profit as a for profit business organisation. The potential for systemic incoherence resulting from such shifts is examined in detail and sheds light on what better—i.e. systemically coherent regulation of the university—might look like. Finally, the systems coherence arguments from these chapters are brought together and argued in the coherence analysis of Chapter 7.

Policy coherence, Feaver and Durrant state, has both internal and external coherence dimensions. In the first instance it is an internal alignment among the norms driving the policy and the choice of techniques embedded in positive legal instruments. One can return to the health care example. The provision of a public benefit like health care must not be driven by insurance companies seeking to maximise their private profits by such activities as denying benefits. Rather, public health care must be driven by the public who use, and health care professions who provide, health care services. It must utilise therefore instruments designed for distribution of public goods as opposed to instruments promoting competition for scarce private goods.

Externally, policy coherence requires consistency of regulation among similar types or categories of matters being regulated, as well as consistency across categories where related but distinct objectives are being pursued via

That is, policy coherence requires competitive regulatory arrangements in like instances and cooperation facilitating regulatory arrangements in other similar contexts. So, for example, public hospitals should not be driven to compete on economic grounds. Rather, if competition is considered desirable it should be on quality of health care on a wide range of measures including inputs and outputs.\footnote{Feaver, D. and N. Durrant (2008). "A Regulatory Analysis of International Climate Change Regulation." \textit{Law & Policy} 30(4): 394-422, 398.}

Policy coherence will be developed in the dissertation through the examination of regulatory techniques below, then used in the analysis of the regulatory framework in Chapter 3 and in particular the analytical review of historical policy framework. These policies will be analysed to identify missions and objectives for the university. These missions and objectives will be visited again in the coherence analysis of Chapter 7.

Finally, instrumental coherence requires coherence between positive instruments containing specific regulatory techniques and the social and normative drivers of policy. Thus for example, instruments must reflect a public good where public good is the normative policy being pursued. Returning to the health care example, instruments with regulatory techniques suited to spot markets in commodities are unlikely to be an appropriate model for health care. Feaver and Durrant’s instrument coherence finds its application in the exposition of the historical and contemporary regulatory frameworks set out in Chapter 3. That chapter works through the historical policy framework, related regulatory regimes and legal instruments regulating the university opening its regulatory foundations and elements for coherence analysis. Instrument coherence provides a lens for identifying particularly significant aspects of the regulatory framework. Instrument coherence is also applied in Chapter 6 where various approaches to university organisations are considered. The instrument coherence in that chapter examines whether the instruments have created an appropriate organisational form to achieve the systemic and policy objectives. The

instrument coherence identified and analysed in these chapters are brought together and argued in the coherence analysis of Chapter 7.

From a coherence analysis, regulatory failure is not just a mismatch of objects and instrument as Breyer would have it. Rather, it is the net result of overall regulatory incoherence. That is, incoherence at systemic, policy or instrument selection points (or some combination of them) will lead to a relative degree of regulatory failure. Where there is incoherence there will not be a well functioning, effective regulatory regime nor the desired regulatory outcome. Instead, as Feaver and Durrant have it incoherent regulation will be “ineffectual, produce unintended consequences, or impose… too many costs relative to the social benefits [it] achieve[s].”\(^{93}\) Critical therefore to any successful regulation is coherence, and hence any evaluation of regulatory arrangements may be construed as an analysis of the coherence of a regulatory system. Further, Feaver and Durrant’s approach is comprehensive. It is not limited to examining compliance or policy. It is an approach that addresses the whole of a regulatory system. For these reasons, Feaver and Durrant’s regulatory coherence is adopted as the theoretical approach for this dissertation.

The strength of Feaver and Durrant’s approach is that not only does it move away from the political to an examination of coherence of the regulatory technology, but it also provides a coherent framework for the analysis of a complete regulatory regime. Further, it does so attending to the overall politico-socio-legal architecture of regulation considered from the perspective of external policy coherence. As such, it demands interdisciplinary analysis. Without an interdisciplinary analysis, a coherence analysis will fail to take account of the fundamental systemic, policy and instrumental components of a regulatory system. Given the complexity of regulation, any single disciplinary approach will fail to adequately inform the coherence analysis. Finally, it emphasises the centrality of law understood as rules, the outcome of the political decision process, as a given and so provides a basis for a positive analysis rather than a

political or (contested) economic basis. While drawing on the various ideas about regulation and regulatory failure, this dissertation rests primarily on Feaver and Durrant’s idea of regulatory coherence, examining the coherence of system, policy and instrument choices.

The weakness of Feaver and Durrant’s approach is that it fails to take account of coherence between proposed regulatory arrangements and existing organisational and institutional arrangements—or “the context” as others such as Gunningham and Grabosky refer to it. The existing order in the final analysis may be the undoing of any proposed regime, stymieing its implementation. Feaver and Durrant’s framework is not likely to bring to light an underlying organisational or institutional coherence—matters addressed in Chapters 5 and 6. Further, where a positive law analysis may only reveal a coherent regulatory arrangement, such an analysis will not reveal a lack of implementation or a merely apparent compliance while persisting in undesired practices as allowed by loosely coupled systems. Finally, it does not take sufficient account of the organisation and structure of the regulatory body.

To avoid the weakness, of Feaver and Durant’s regulatory coherence the dissertation will attend to organisational and institutional regulatory arrangements as necessary, and given the strong traditions of the university, considerable attention to the institutional and organisational characteristics as mentioned will occupy chapters 5 and 6. That is, it will take note of the traditions and practices within the institutions and organisations, particularly as the organisations are themselves both creatures of law and creators of law. Thus in addition to Feaver and Durrant’s theory, it is proposed that institutions, organisations and resources need to be scrutinised to ensure coherence in these arrangements. These aspects of coherence will be addressed in the coherence analysis of Chapter 7.

---

4. Mechanics of Regulation

This part identifies the questions that must be posed and answered in order for a regulatory system to be created and implemented. Further, it surveys regulatory mechanisms available to develop a regulatory system. Again, the purpose of an analysis of the mechanisms is to provide an understanding of the choices made in the regulatory framework being analysed in this dissertation and to offer a critique based on alternatives. The regulatory questions which must be answered are predicated on a number of prior determinations and decisions. The first is the determination of an unsatisfactory state of affairs. Next a determination needs to be made as to whether or not to address it. To determine whether regulation is warranted in any given situation, and if so, the type of regulatory response required, political positions must be expressed about the objectives, parties and methods—including methods of accountability. That is, as seen above, policy must be developed about the issue being regulated, the delegation of power, the shape of the regulatory regime, the resources and the role of public and private sectors. These political decisions tend to attract significant amounts of attention and become a confused overlay when focused on a more technical legal analysis. These political issues cannot be ignored in a dissertation examining regulation, or indeed any examination which includes consideration of the public-private divide. The focus of the dissertation, however, is on the technical aspects of the regulation and accordingly, less attention is given to some of the normative political aspects of the regulatory scheme. The dissertation now turns to examine those technical aspects of regulation.

5. Organising social problem, risk identification and regulatory intervention

Although largely ignored in the regulatory literature, two critical points in any regulatory scheme need attention. These are the organising problem—the
problem addressed by regulation—and the classification of the organising problem as a public or private matter. The first provides the initial reason for regulation and the second provides the orientation for the subsequent regulatory scheme and its critique. Because the development and implications of a regulatory scheme may be markedly different depending on classifying an organising problem as public or private, and because the classification of public and private are themselves contested, the issue of the public-private divide is taken up and explored in detail in Chapter 4. All regulation is an adaptive response to a potential opportunity or perceived problem. That is, the first issue is “problematisation” or “framing”. Some person(s) must identify some phenomenon in the social or natural environment as existing and as presenting an opportunity or as problematic. Thus in the first instance, humans must create the phenomenon for it to exist, call attention to it and propose that is amenable to some type of organised response—a regulatory response. This problem is referred to in this dissertation as the “organising problem.” It is a problem or complex of problems that have drawn attention and around which the response has been organised.

For example, although microwaves have been part of the natural environment for as long as the planet has existed, they were not identified until the late 1800’s. Further there was neither problem nor opportunity in need of regulation concerning them until a few decades ago when commercially viable technology was created which could exploit them en masse for mobile telephone use. This technology created an opportunity as well as a problem or risk. The opportunity was the commercial exploitation of the bandwidth. The risk was that unlimited access driven by profit motive would create chaos to the point that the bandwidth could not be used—a classic commons problem. At that point the problem drew attention and government decided some type of organised response or regulation was needed to limit access to part of the bandwidth. A regulatory solution was developed through the creation of property in the waves and the licensing of access to those waves.

---

In the same way, the regulation of the university may be considered as regulatory response creating opportunity. In the first instance, some group of people saw the need for organising knowledge and disseminating it. Its regulation involved the creation of an organisation and ultimately an institution dedicated to the creation and dissemination of knowledge. The regulation created opportunities in ways not limited to the individual interests of parties with sufficient resources to do so on their own. These opportunities included the creation of new knowledge, the maintenance of as well as new openings into social hierarchies, and other types of social benefits—discussed in full in the review of various disciplinary views of institutional mission of the university in Chapter 5.

A second aspect of the opportunity-problem dyad of regulation concerns problems characterised as risk. Risk may be defined as “the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge.” Risks may be voluntarily undertaken or imposed, individual or collective, naturally occurring or the result of social arrangements.

Thus, from a risk perspective, the regulatory tasks are as follows: to identify those risks which can and should be regulated; to characterise them in politically mobilising way; to determine when and how to intervene. That is they must determine whether the intervention should be before the risk arises by limiting the production of the risk creating activity, or mitigating the effect, or aimed at creating resilience? The issue of risk poses an important touch point for the discussion of the university in this dissertation. The risk which university regulation must be designed to avoid is harm to or loss of society’s premier institution dedicated to the creation, preservation and dissemination of knowledge.

The issue facing would be regulators is to design a regulatory scheme appropriate to the opportunity, problem or risks. It is important to recall that the various disciplines identify and prescribe responses to opportunities, problems and risks.

99 Ibid pp. 139-147.
according to their distinct literatures, methods and frameworks. For this reason, again, single disciplinary approaches are unsuited to the complex institution of the university.

6. Technical aspects of regulation: regulatory targets, regulators, tools and instruments

After the political decision to regulate had been made, decisions need to be made about what is to be the target of regulation (person, organisation, acts or things—such as services or goods), tools, instruments, regulatory administration/organisations, as well as where in the system or dynamic chain to intervene (e.g. producer, retailer, consumer), and at what point—i.e. a priori or ex post—taking regulatory action is most likely to achieve the desired outcome. A brief review of these factors and identifying their strengths and weaknesses, particularly in terms of the public-private divide, will provide a foundation for evaluating the regulation of the university, as per Chapter 7.

a. Regulatory targets: persons, organisations, acts, things or risks

Decisions need to be made about what is to be regulated. This decision parallels the discussion of risk above which drew attention to the need to make decisions about where in a causal chain to intervene. If, for example, in the causal chain of narcotics it is the growing of the plant, or the refinement that is the object, different bodies, legal powers, resources and regulatory bodies need to be involved. Alternatively, if in the causal chain the focus is on local distribution and use, a different set of bodies, powers, resources and regulatory bodies will be appropriate. This section identifies some of the potential objects of regulation in the context of higher education.

Regulators may decide that it is a substance such as knowledge that needs to be controlled in its distribution, and hence regulation will be developed to control distribution without impacting on production or pricing. Regulators may decide that production is the issue, for example, where degree mills sell degrees or other educators purporting to offer higher education do not in fact do so. In other instances, such as potential monopolies, or where government deems broad distribution of a good or service a public benefit, the pricing of a good may be
controlled or otherwise subsidised. In the context of the university, those creating regulation may decide that the production of knowledge and its preservation and dissemination is under produced, over produced, of inadequate quality or poorly distributed, and so design regulation to address these issues. Regulators need not focus on regulating the substance like knowledge.

Regulators may also focus their attention on people or organisations. Certain behaviours may not be considered in the public interest and so not be tolerated. For example, higher education institutions dedicated to advancing certain types of religious radicalism may not be permitted to operate. Similarly, regulators may prohibit some types of persons from engaging in activities such as people without higher education credentials teaching in higher education organisations. Further, regulators need to decide whether individuals should be regulated only when acting as individuals or only in groups. In the context of the university, politicians may decide that its knowledge activities be best housed in a single body such as the university, or separated out into teaching organisations like TAFE and research organisations like CSIRO. These positions will be examined in detail, in Chapters 5 and 6 which consider the university as organisations and as institutions respectively. However, these are not the only regulatory options regulators have in the development of a regulatory scheme.

Regulators may equally focus attention on actions or activities. So, for example, a regulator may decide that knowledge acquisition is a benefit and should be promoted. Or in the negative, that tertiary education is a waste of economic resources and so be prohibited. Regulation to achieve these desired ends focuses on actions or activities rather than actors. In the context of the university, it may be that regulators decide the study, research and knowledge related activities are valuable and preferred ways to spend resources in a society and so design regulation to promote such. A regulatory focus on persons, organisations, actions or activities does not exhaust the alternatives. Some aspect of each could be included in the next category.

Rather than regulating goods, actors or activities, regulators may be decide to regulate to avoid, manage or develop responses to risks or opportunities. Risks
such as fire, consumer abuse, or workplace injury are all subject to regulation as risk. This perspective shifts focus from humans actions toward ex ante environmental (both natural and social) considerations and shift related regulatory interventions toward the preventative rather than curative. As to the university, regulators may decide that a society which loses essential knowledge is at risk of losing some important aspects of its functioning, including the ability to respond to unknown risks. Accordingly they may regulate to support an institution dedicated to the creation, organisation, dissemination and preservation of knowledge to minimise the risk.

These decisions about risk and opportunity regulatory focus can be taken across one or more of the potential targets of regulation. That is, regulators may decide to regulate actions and/or people and/or organisations, and risks, and intervene at any one or more points in the causal chains of activity. As will be seen in later chapters, all of these approaches and considerations are brought into the consideration and critique of the regulatory framework of the Australian university.

b. Regulators

In the decisions about regulatory schemes, there are decisions about regulators that need to be made. The basic decisions are which tasks the regulator will be charged with and the organisational structure most suited to achieving those ends.

i. Regulators’ Tasks:

Regulators may be charged with the execution of a wide variety of tasks and be granted a range of governance powers to carry out those tasks. Regulators may be given the task of regulating a market to preserve competition and integrity, ensuring quality of services through standard setting, monitoring compliance, recommending and undertaking enforcement among other tasks.

Standard setting is an increasingly preferred approach as it allows for the design of a responsive regulatory relationship, more nuance in evaluation of performance and compliance, and the use of a greater variety in incentives and
disincentives. Standards regulators typically can be categorised by their focus: design/process specifications, performance/output standards, and target standards. Design/process regulators focus on prevention of identified risks. The theory is that by limiting processes to proved processes, the risks of failure can be brought to an acceptable level. The drawbacks of this type of regulator are: it is highly intrusive, may inhibit innovation and professionalism, requires the regulator to lead innovation, and the difficulties of predicting harms and unintended consequences.\textsuperscript{100} In the university context, such standards are likely to lead to uniformity in the sector, and are recognised as a cause of organisational isomorphism.\textsuperscript{101}

Performance/output standards allow management to determine internal processes and measure instead the level of risk introduced into the system being monitored.\textsuperscript{102} Such standards may provide incentives to organisations to innovate in processes to achieve outputs by various means; however, it may be difficult to relate outputs to broader policy objectives. In the case of the university, numbers of graduates and numbers of research publications do not indicate the education or new knowledge created. Students can be graduated on a percentage basis and publications, even in prestigious journals, can be increased by a conservative strategy of following a journal’s formula.\textsuperscript{103}

A third type of standard, target standards, works by having government set a policy goal explicitly and allowing producers to achieve those targets among themselves.\textsuperscript{104} It works well where a group of producers can monitor and divide responsibility among themselves—a form of self-regulation—to achieve targets set by government. The organisations bear the costs of figuring out how to achieve the targets, and how to do so most efficiently. However, this approach


can only work where organisations are adequately resourced, able to cooperate, and have sufficient information among themselves to achieve those targets.

There are a number of significant issues to standard setting. These include the difficulty in gathering accurate, timely and complete information including finding appropriately unbiased experts to provide such information, identifying the costs of imposing the standard—including unintended costs such as those which may be incurred in preparing staff and records to provide acceptable evidence for audits, and calculating the net benefit from all the expense.

The standard setting approach is an increasingly common approach to regulation. Standard setting, often, requires some form of audit to demonstrate compliance with the standard set. The new institutionalists would argue that the audit provides legitimacy which they see as the objective of organisational activity. Although increasingly common, it is also becoming increasingly problematic. As Michael Power has argued in *The Audit Society*, the effects of pervasive audits on society are markedly negative. Among other things, the standard setting and audit approach to regulation forces parties to comply with an audit system to achieve audit targets as opposed to supporting efforts to achieve the desired outcome. Thus, rather than promoting the task—i.e. the first order objective, the second order activity, the audit regime, imposes itself over the first order, changing the nature of the auditee and its activities to comply with the audit. As Power describes: “Organisations must be changed to make them auditable.”

What makes something auditable is breaking it down into its component parts, creating measures, developing an opinion on whether the number assigned by accountable parties is an accurate ascription of the measures to the part or verifying that it has been done according the accepted system. This vague and abstract definition is what Power refers to as “the essential obscurity of auditing.”

---

108 Ibid p. 47
How this transformation of organisations and complex systems to become auditable occurs is not explained by Power. What may explain it, however, can be drawn from sociology. Ritzer, in his work, the *McDonaldization of Society*, argues that rather than Weber’s bureaucracy, the rationalism exemplified in the McDonald’s restaurants can be held as a model for contemporary organisations. Ritzer’s thesis is that rationalisation of organisations within society are changed or “McDonaldised” along four lines. These are: efficiency, calculability, predictability and control. Each of these is readily measurable and hence, auditable. The end result, he argues, is that the McDonaldised system, far from improving rationality and working better, promotes a new irrationality. He writes: "irrationality means that rational systems are unreasonable systems. By that I mean that they deny the basic humanity, the human reason, of the people who work within or are served by them." Not only is it irrational to those who operate within McDonaldised services, but also to those who must interact with or received services from such systems.

Such McDonaldised services have a particular benefit from a management perspective. By subjecting the service to the single norm of efficiency and breaking tasks down to promote calculability, predictability and control, the service can be managed relatively easily. Any generically trained manager can manage the McDonaldised service. Relatively simple systems that do not require professional judgement or discretion can be put in place to capture and calculate the service provision, and measure and adjust accordingly. The McDonaldisation or de-professionalisation of management is promoted by some economists and business scholars who describe it as “context indifferent” management. It is a

113 The debate is long-standing and far from being resolved. See for example, Alford, J. (1993). "Towards a new public management model: Beyond "managerialism" and its critics." *Australian Journal of Public Administration* 52(2): 135-148. This is noted with respect to university governance in Marginson and Considine’s comment. “We are forced to conclude from this persistent application of a medicine which appears redundant that it is not a disease which is under assault, but the patient!” Marginson, S. and M. Considine (2000). *The Enterprise University: Power, Governance and Reinvention in Australia*. Cambridge, Cambridge University Press, p. 62.
view that good management is not dependent upon or relative to the organisations being managed, but on the implementation of generic prescribed formulae and techniques. Certainly norms such as respect, efficacy and efficiency are generic, but their ordering in the different contexts such as in the delivery of public goods, or in the context of charitable enterprises or private for profit enterprise would be expected to be different. These orderings would need to be implemented through the exercise of professional judgement and are unlikely to be readily reducible to generic formulae and techniques.

This discussion leads to a second explanation of how the audit changes the organisation, implicit in Power’s work. Given that what is measured is what is valued, and what the audit does is make measurable and make visible some products of the organisation, it requires a shift in the normative ordering of the organisation. The re-ordering works to shift the audit from a measure of production processes or outputs to the focus of production—i.e. the production of auditable measures and reports becomes the organisation’s focal or main activity.

Returning to Power’s audit thesis it is noted that in order to satisfy audit requirements, organisations are required to invest significant resources distracting from first order tasks to provide information and evidence for auditors. Power notes two additional effects of audit that result from the dynamic interplay of an organisation and an audit regime. These are decoupling and colonisation. These two effects lead to dysfunction in two senses: decoupling is a form of an organisation avoiding the destabilising and delegitimizing effects of audit, and so, essentially fabricating whatever myth needs to be fabricated to keep the audit system satisfied and away from the core activities. The second dysfunction results as the audit is absorbed into the organisation and becomes a part of management strategy. It undermines the trust relationships and discretion required to operate any large organisation.

Perhaps of greatest concern is Power’s argument about the ultimate consequence and characterisation of the audit process. He describes audit as “the fatal remedy”. He explains thus:

“It has also been said that the rise of the performance related contracts has led to irrevocable damage to cultures of trust. New games are created to demonstrate quality and substantive performance declines… [O]ne might compare this imperative with that which informed the detailed output targets of the former Soviet Union…a situation characterized by pathologies of ‘creative compliance’, poor quality goods and the development of survival skills to show that, often impossible, targets were achieved. Games are played around an ‘indicator’ culture where auditable performance is an end in itself and real long term planning is impossible.”

In other words, the effort to control, achieve and measure by way of such mechanisms is ultimately damaging to the individual, organisation and institution to which it is being applied.

Finally, the standards may be in conflict with existing institutional norms, a matter of systemic incoherence, or within themselves a matter of instrument incoherence. These audit issues are significant in the regulation of the Australian university and are discussed and considered in greater depth in the organisational and institutional analysis in Chapters 5 and 6, and in the regulatory analysis of Chapter 7.

ii. Organisation of the regulator: Agencies, Boards, Commissions and Authorities

There is a wide variety of options for bodies charged with implementing and administering regulation—regulatory bodies. With respect to higher education, for example, the current government has declared its intention to create an agency, Tertiary Education Quality Standards Agency (TEQSA). The structure of the agency has yet to be announced, but it is not the only option as explained below and as demonstrate in the next chapter’s discussion of previous bodies

115 Ibid pp. 120-1. References omitted.
116 First announced under the Rudd government Gillard, J. (2009) "New agency to set quality benchmarks in higher education.”
tasked with regulating universities. The options for organisation of the regulator range from individual government departments to Directors General, to statutory agencies, to courts. Some regulators are part of government run by elected officials, others may be specially designed organisations with on-going operations managing substantial resources and generating significant resources, while others may simply be ad hoc boards, meeting irregularly to decide issues on a case by case basis. Each approach has distinct strengths and weaknesses from the perspectives of efficiency, democratic accountability and expert knowledge among other things.\textsuperscript{117} For example, in the case of the university, as will be argued in Chapters 5 and 6 expert knowledge is more important than say either democratic accountability or efficiency. The options, however, need to be set out to be discussed and examined to provide a basis for critique.

Ultimate regulatory authority is combined in parliament and the courts by the Commonwealth Constitution and the respective constitutions of the states. Both parliament and the courts, however, have their limitations as regulatory bodies. The executive lacks coherent objectives and suffers from a lack of consistency between committees. Further, changes in governments lead to changes in policy and hence regulation. Such changes while desirable in some instances, in others cause considerable upset making long term planning and certain benefits of stability impossible to achieve. As well, political interference in administration of the regulatory tasks can distort or even corrupt the regulatory objects. Finally, accountability through Parliament while notionally high, can easily be lost in the wide range of political activities and vast arrange of matters brought to Parliament.\textsuperscript{118}

Courts for their part have other limitations. It has been argued that courts lack democratic accountability in the sense that they are not susceptible to public, political censure for their decisions.\textsuperscript{119} Further courts are charged with upholding a different agenda than government. This agenda may be in conflict with the

\textsuperscript{118} Ibid p. 66-67.
agenda of the elected officials. Further, they create policy only sporadically and in a piecemeal fashion making it difficult to organise around its instructions. Finally, they lack expertise in certain areas which may require specialised decision making.

These limitations have led to the development of some other alternatives set out above. In the UK the Hammonds suggest that the start of this process of alternative regulatory bodies was a development stemming from the factories inspection system established in the mid-nineteenth century. In that system civil servants were selected on what was then novel criteria: non-class based technical criteria and charged with the duty to inspect factories and report their findings to Parliament. An inspectorate was created in order to carry out the inspections and was given independence from political interference. While certainly not the first regulatory body, it was among the first independent regulators charged with a regulatory task, resourced by government, operating independently on technical grounds and reporting back to Parliament.

In the context of the Australian university, as will be seen in the next chapter, a variety of regulatory bodies have been created, operated and dissolved. The current position is that they are regulated by a combination of Commonwealth government departments and a loosely formed council of state ministers. As noted, this arrangement is to be replaced or at least modified by the proposed agency TEQSA.

c. Tools

Further decisions about a regulatory scheme need to be made as it is evident that resources among other things must be marshalled in order for regulation to be created and implemented effectively. Bureaucrats charged with developing a regulatory scheme will need to consider what resources or tools they have at their disposal. Christopher Hood, who has done pioneering work in this area, identifies what he describes as the tools of government: “authority”, “treasure”,

---

120 Discussed in ibid.
Authority is the sovereign’s power to declare a rule and command people and organisations to follow it. This type of tool is associated with command and control forms of regulation. Authority ultimately relies on power the exercise of which may cost or benefit a government politically. This approach to regulation is the application of the political science description of effective regulation as being regulation with legitimacy. In the context of higher education, command and control must be exercised with care because of the institutions of independence associated with the university and in particular, of the academic profession. More importantly in a legal dissertation, legitimacy means that a government must only command in those areas in which it has constitutional authority to do so. This issue of jurisdiction is a significant issue in the division of power between Federal and state governments with respect to Australian higher education. While the states have constitutional right to legislate for education they lack the resources, and the commonwealth is restricted to the duty of funding students. This division of powers is identified in Chapter 3 and analysed in Chapter 7.

Treasure is the government’s wealth which may be used to achieve desired outcomes. That is, by using incentives or spending its resources as per its legislation, government can regulate society. This approach, which is discussed below as soft law regulation, can be implemented by way of payments or taxation. It is seen in the Australian system for among other reasons, the reason just identified—the division of legislative competence and economic power between the commonwealth and state governments.

In other instances, Hood observes, government may wish to be a central point for parties organising in a society. It may have information and facility to allow people to create networks through its operations. Regulation using this tool is usually some form of self-regulation or used to facilitate regulation by information. This tool or facility is referred to by Hood as “nodality.” In the higher education system of Australia, the government has attempted to create

---

regulatory bodies which among other things have functioned as nodes for information flows.

Finally, Hood identifies “organisation” as a tool by which he means government using its own resources to create or provide a specific good or service. This type of regulation was particularly common in the era of the welfare state when the government was involved in the provision of a variety of goods and services for citizens including in the Australian university context, not only the universities themselves, but payment in full of all the associated costs and expenses allowing students a university education free of tuition.

The university over the centuries has been both a centre and subject of governments’ tools. Which tools a government wishes to use in the development of a regulatory scheme must be made clear and the implications thought through. For example, a government which chooses to regulate the university by authority while more likely to receive the demanded outcomes, may find that in doing so it has stifled the creative functions of the university. Treasure alone is unlikely to achieve all a government’s objectives, although by funding expansion it might allow the university to absorb more unemployed youth. The use of nodality and organisation too are important in the regulation of the university. Crucially, which tools a government uses to regulate the university will depend to a considerable degree where it places the university on the public-private divide. There is little reason to expend limited public resources on a university dedicated to the provision of private goods—and vice versa. The coherence of tools with objectives, as will be demonstrated in the coherence analysis of Chapter 7, is critical to effective regulation.

d. Techniques

As noted, more recent thinking in regulation has led to an expanded conception of regulation beyond the traditional Austinian command-and-control model of sovereign and subject. This section reviews these developments with some consideration about their suitability for different parts of social and economic organisation, including the public-private divide and higher education specifically. Four techniques and one strategy of regulation are identified as
potential techniques for pursuing policy objectives. These are after command and control, regulation for competition (including tradable permits), regulation by information, soft law-experimentalist,\textsuperscript{124} consensus and code design.\textsuperscript{125}

\begin{enumerate}
\item Command and control

This basic conception of regulation posits a single source of omnicompetent authority and a subordinate wholly under the control of the authority. It is a simple model, operating on the single motivation of fear: fear of detection and fear of penalty. As discussed above in the consideration of tools of government, command and control has a variety of problems particularly in the area of higher education. Further, even if it were free of those problems, the problems of compliance, enforcement and political costs associated with command and control, not to mention the issue of stifling creativity in the case of the university as mentioned above, lead governments to opt for other means to achieve regulatory objectives.

\item Competition

In addition to command and control techniques, regulation for purposes of creating competition is simply creating a market. Markets work for goods and services that are readily commodifiable, where efficiency is the primary norm and distributions can safely be ignored.\textsuperscript{126} From government’s perspective they are particularly well suited to areas where the details of regulatory coordination would overwhelm a command and control approach.\textsuperscript{127} Markets may reduce the government’s regulatory burden by allowing government to set broad targets and allowing the individuals and organisation to respond as they see fit. This approach allows the government to avoid having to create detailed rules seeking

\begin{footnotes}
\end{footnotes}
to cover all the eventualities and avoid at least some of the unintended consequences of regulation.

Markets are believed to have the intrinsic virtues of efficiency and innovation—a contestable assumption. These virtues are believed to result from creative strategic management seeking ways to survive and grow in a competitive environment. This regulation by market is the opposite of a state created and maintained monopoly both producing and distributing goods. It assumes the state no longer directs the producers with detailed rules leaving them to innovate as they see fit. In order to harness these purported market virtues for government, regulators have created “quasi-markets”—market suited to governmental organisations. This form of regulation is developed by the creation of new property rights, or such competitive practices as competitive tendering, in the form of a monopsony—purchasing from a single buyer, government.

There are tools which allow refinement in the use of markets for regulation. These include creating licensing regimes to delimit boundaries (providing the opportunity to unbundle services), set entry requirements, protecting customers among other things. It may operate within a sector with an independent agency administering the regulation (USA preference), or as a department within a ministry (UK preference). There are a range of competitive alternatives, with varying levels of discretion, engagement, coordination and strategy allocated to state, intermediaries and organisations. The key economic concerns of capture, politicisation and judicialisation may guide among the preferences to be expressed in the ultimate design.

The regulation of the university in Australia has attempted to take advantage of some of these refinements setting the limits for use of the term “university” and a minimal standard for classification as a “higher education provider.” Further, it

---

has developed various agencies as sector wide regulatory agencies. In the Australian context, the Bradley Review has proposed a voucher system—discussed in Chapter 7 as part of the analysis of the regulatory framework.\textsuperscript{131} Markets have particular limitations in the higher education context. The value of education is not readily discoverable ex ante, nor is the quality and nor are the costs or the benefits. In fact, it is argued that it is impossible to capture either the full benefit of the production of higher education—a classical type of market failure—of achieve desirable distributions of higher education by markets—a reason for the non-profit organisational preferences of the university—discussed in Chapters 5 and 6. Accordingly, if it is to be used, this approach should be used with caution in the higher education system.

1. Tradeable Permits and Vouchers

Although some see tradeable permits as distinct from markets,\textsuperscript{132} it may be better to consider them in the same category as cap and trade systems, vouchers and coupons—all as sub-species of regulation by competition. Trade permits and cap-and-trade systems while usually conceived as means of regulation pollution can be conceived of more broadly as a means to regulate production of the good or nuisance by way of price signals. Permits and vouchers are property created to be traded or encashed in a type of market created for the particular voucher or permit in question. Where these instruments are tradeable for services, they are supposed to give direction to producers of the demand for particular products, as well as create the virtue enhancing competition.

Vouchers have long been applied to university systems.\textsuperscript{133} Voucher systems are designed to give power to consumers to cause producers to produce in accord with the preferences of the voucher holder. In both tradable permits and vouchers systems, the government has only minimal policy input—setting the desirable level of pollution or the number of students graduating. It is makes no


\textsuperscript{133} Discussed with respect to the Bradley Review in Chapter 7.
decisions in the university context about where higher education services should be provided whether regionally or in major centres, no decisions about what skills and education its citizens will require. Government takes a back seat to the decisions made by students. So, although vouchers are not tradeable, by being allocated to interested parties, they work to control producers by a type of market mechanism. As noted, these theories of markets, higher education and the university will be explored in Chapter 7 as well as in chapter 6 addressing the university organisation.

iii. Regulation by Information

A third regulatory option is referred to a regulation by information. This option seeks to correct information asymmetries between citizens/consumers and governments/producers. Information asymmetries are both pre-existing in the community and intentionally created by marketing efforts. The regulatory mechanism works by requiring the provision of information, often through some form of mandatory prescribed disclosure, allowing citizens to make informed decisions to achieve a variety of ends, including private, public, economic and social ends. For example, where information is provided about the effects of greenhouse emissions citizens are able to make informed choices about the whole range of interests from collective public social choices leading to lobbying politicians to increase spending on public transport to private economic decisions to purchase appliances which have lower greenhouse emissions. This regulatory option may be based on rankings, certifications and labelling, or such things as disclosure (voluntary or involuntary).\(^{134}\) It regulates activity exogenously, “ceding sanctioning to other actors.” Of course this regulatory option has its risks and drawbacks, which Yueng identifies in her aptly article title: “Government by publicity management: sunlight or spin?”\(^{135}\)

While at first, the idea of regulation by information seems to be a weak alternative to command and control, its efficacy in generating momentum to comply with public approval is marked. In addition to the aforementioned example of the power of information for regulation of greenhouse gas, the

---


efficacy of this approach in regulating university organisations has already been
demonstrated. In the university context public ranking systems disclosing certain
information about university organisations have become a fierce regulator of

In fact, under the New Public Management (NPM) program, government has
taken regulation by information to a new level allowing it to transform its
governance. Michael Power in his work, \emph{The Audit Society}, writes: “The
‘hollowing out of the state’ by the NPM generates a demand for audit and other
forms of evaluation and inspection to fill the hole.”\footnote{Power, M. (1997). \emph{The audit society: rituals of verification}. Oxford, Oxford University Press p. 44.} He describes audit as a
form of internalising external standards\footnote{Ibid p. 45-6.} and externalising internal processes.\footnote{Ibid p. 57.} NPM allows government to create the standards with which it wishes to inform
the electorate. Bodies, in exchange for receipt of any privilege from licensing and
permits to receipt of funding, in return must provide disclosure of the
information demanded by government regardless of the type, quality and
quantity, but particularly at intervals the government prefers.

There are a number of important issues in designing and utilising this form of
regulation. A serious drawback of this approach is that the creation of auditable
measures around which recipients must re-organise their organisational
structures, processes and outputs has the potential to fundamentally alter and
even distort the ability of the organisation to accomplish its intended ends.\footnote{Ibid p. 47.}
Power cautions that “the imposition of audit and related measures of auditable
performance leads to the opposite of what was intended, i.e. creates forms of
dysfunction for the audited service.”\footnote{Ibid p. 98.} Further, information must be relevant.
One may ask, for example, do the measures provide a measure of anything
actually relevant? Again, Power explains that the first issue for NPM is to create
auditable measures: “auditing must never be allowed to be impossible”\textsuperscript{142}—i.e. the matter must be readily reducible to numbers. Next presuming there is relevant information, the matter of getting the correct, complete and timely information arises. This second set of issues is no small matter for the university or any large organisation for that matter. Another and perhaps even more worrisome issue is ensuring people understand the information. Not only can it be quite complex and inaccessible to non-specialists, the basic problem of bounded rationality and costs associated with gathering, sorting, analysing and assimilating relevant information, particularly where costs of poor choices are high, militate against regulation by information.\textsuperscript{143} Further, where the information is to include some type of standard setting, developing the appropriate standard, monitoring and enforcing compliance can be both very costly and very difficult. Finally, it is a matter of concern that people often do not use the information in the desired way. Research on how potential students choose which university to attend is seldom based on the relevant information.\textsuperscript{144} Again, as part of market design and the Bradley Review, information in the context of higher education and the university are taken up in the Chapter 7, analysis.

iv. Soft-Law, Consensus Based and Experimentalist

The soft-law, consensus based and experimentalist regulatory options are regulatory mechanisms generated or at least influenced by the participants themselves. In contrast to command and control, markets and information based techniques—all of which may be imposed externally—in these techniques the regulated parties participate in the development of the technique’s rules. These techniques are referred to as soft law because they rely in part on the wiling participation of the regulated parties. Instead of being only the object of formal state coercion, soft law social dynamics guide and regulate. In some instances they may be accompanied by the state in Ayers and Braithwaite’s responsive

\textsuperscript{142} Ibid p. 82.
regulation model with a “benign big gun” at the top of a hierarchy.\textsuperscript{145} Rules created are sensitive to the local environment as they are developed by parties in that particular context although they may take account of other standards and rules to the degree appropriate. Soft law approaches are also favoured as they are more likely to take account of the expertise within the sector, have lower monitoring and enforcement costs and be more easily amended.\textsuperscript{146}

Of course, self-regulation has limitations and risks. These include soft enforcement, usurpation and combination of all three governmental powers: legislative, executive and judicial and putting them into control of a small body of regulators creating an opportunity for super-rents.\textsuperscript{147} While to some extent these risks can be overcome by injecting government regulation into the self-regulatory system at specific points or levels, certainly it cannot wholly eliminate them. Two soft-law techniques have significant history in the case of the university, both as an institution and as an organisation. These regulatory techniques are outlined with some indication of how they will be used in the coherence analysis of Chapter 7.

1. Consensus Based

The techniques which fall into this category include a variety of self-regulation, co-regulation and partnering alternatives.\textsuperscript{148} Generally, they occur where industry participants recognising an external threat such as impending regulation, or some such other threat, or an opportunity to create value by regulation and so work cooperatively to achieve mutually agreed upon ends by way of regulation. Often a peak body is organised, broad consensus based principles developed, and an option to join is provided to sector participants who see the benefit of joining. Benefits may include increased prestige, increased notoriety by membership, discounted goods and services, access to certain privileges such as access to


regulators or other similar incentives. The regulation may any form from enforceable standards, to mere ascription to an aspirational code. Although as described, the technique is self-generated, it may be developed in concert with government and include some form of government participation via a public interest group in their on-going enforcement and review, forming a type of co-regulation, as in the “responsive regulation” model\(^\text{149}\) or be wholly sector based, informed, enforced and reviewed.

In the context of the university, such bodies as Universities Australia, formerly the Australian Vice-Chancellors’ Committee, and the Group of 8, may be viewed as consensus based regulatory bodies. They provide principals by which the members agree to conduct themselves and offer benefits such as prestige and privileges of access to government.

2. Experimentalist

The experimentalist approach is a combination of regulation by information and self-regulation. This approach allows a sector to attempt to achieve goals cooperatively, by identifying approaches, strategies and tactics that work and that fail. It requires open sharing of information, to avoid the costs of each organisation trying and failing, and it permits rolling standards as things improve. It requires generation of data, sharing of information and metrics.\(^\text{150}\)

This model has met with success both in Australia and abroad.\(^\text{151}\) Interestingly, it is the model of academic conferences. At successful conferences, academics create networks of people engaged in similar projects and share information about outcomes on an on-going basis and so the regulation of academic work, ideas and efforts occurs as members of the profession limit their work and shape it to the confines of the discipline as understood by the profession.

7. Accountability: Law, Markets, Social Norms and Bureaucratic


Accountability is a core feature of regulation and a significant concern of governance. In broad terms accountability has two dimensions: accountability has a relational dimension. As matter of logic, a party that has responsibility for a system may be accountable to another party for the working of that system.\(^{152}\) Second, it has a time dimension: it is backwards looking for purposes of evaluation and potentially reward and punishment, but also has as a primary purpose of future guidance by allowing for reform or redirection. In this way, accountability can be thought of as an institutionalisation of the lessons of trial and error.

The notion of accountability stands in contrast to the notion of autonomy. Autonomous organisations are free of accountability requirements—at least free of formal, non-voluntary requirements. They are not subject to accountability imposed by or to external parties. Autonomy is a tradition of the institution of the university, as will be seen in the institutional discussion of Chapter 5, although that need not mean that it was free from external control.

More particularly, the meaning of the term “accountability” is contested. It has “explanatory, remedial, supervisory, and sacrificial,” connotations,\(^ {153}\) that is responsibility for reporting, empowering for making changes, providing oversight, or suffering in consequence for undesired consequence. As well accountability may be understood as a process, a state of affairs, or a product.\(^ {154}\) Finally, it may engage personal, communal, and political dimensions of morality and call upon professional ethics.\(^ {155}\) In evaluating accountability structures and processes as part of a regulatory regime, as will be done in this dissertation, one must be clear on the nature and purposes of the accountability.

Accountability in the public sector, is conceptualised differently. As Dowdle observes it is viewed by economic development agencies as rationalized and transparent “systems of bureaucratic control”, by legal development agencies in

\(^{153}\) Ibid p. 453.
\(^{155}\) Ibid p. 76.
terms of “judicial enforcement of legal norms,” by human rights activists as broad based “participation in and supervision of political decision making” processes, by regulatory reformers as the creation of “market like competition and disciplines.” A variety of accountability mechanisms are available. Stone identifies five. These are: 1) accountability as parliamentary control, 2) managerialism, 3) judicial/quasi-judicial review—i.e. law, 4) constituency relations, and 5) markets. In other words, accountability has a very broad range of meanings and dimensions across a variety of public, private, personal and community institutions.

A different perspective on accountability comes from the work of the Dutch scholar Mark Bovens. Bovens’ identifies passive and active dimensions of accountability. The former is accountability in the sense of providing an answer, particularly post facto. Passive accountability may be individual, organisational, hierarchical, or collective. The other accountability, active accountability, he discusses only in individual terms which he describes as “responsibility as a virtue” and a notion of “organisational citizenship.” He observes that in a bureaucratic organisation, different types of active responsibility posit loyalty or responsibility to different norms. These loyalties and norms he identifies as follows: hierarchical responsibility is to superiors on the norm of following orders; personal responsibility is to one’s conscience on the norm of one’s personal ethics; social responsibility to one’s peers on the basis of social norms; professional responsibility is to a profession on the basis of professional ethics; and civic responsibility as to citizens on the basis of civic norms.

159 Ibid p. 7.
161 Ibid p. 149
Each of these approaches has particular strengths and shortcomings. In terms of the professional he notes that “appeal to professional norms may also promote the effectiveness of the organisation’s conduct. Their proximity to the actual outputs of policy making and their technical expertise enable professionals, more so than general managers... to spot instances of corporate... deviance.”\(^{162}\) The weakness of professional norms, however, is that as Bovens cautions, professions also seek to protect their members, tend to have loyalties external to the organisation and are not readily open to public scrutiny or democratic debate.\(^{163}\)

The basic issues in evaluating an accountability regime are: 1) who is accountable, 2) to whom, 3) for what activities, 4) using which standard, 5) by what processes, and 6) to what effect or outcomes.\(^{164}\) These critical questions help orient the accountability regime Stone’s five can be reduced to four potential accountability structures which may be used in developing a regulatory scheme. These are the three systems of law, social norms and bureaucratic accountability and the one mechanism of markets. The legal system encompasses the creation of a regulatory scheme which is likely to include some type of accountability to Parliament by way of reporting, and possibly, some form of administrative review provided through access to the administrative appeals systems. Social norms provide accountability by way of membership in a particular social context or club. Accountability through social norms operates as members are required as a condition of participation in that particular society or segment of society to comply with its norms or face risk of exclusion. Whether members report on themselves, are monitored by others or submit other information deemed relevant, accountability comes about as others are able to scrutinise and evaluate the behaviour of the member. Bureaucratic accountability occurs in organisations, both public and private. In such systems, accountability is mandated along hierarchical lines with subordinates accounting for the use of the organisation’s resources and the use of their time. Markets do not provide

---

\(^{162}\) Ibid p. 162  
accountability per se; rather, participation in a market limits the amount of goods
or services provided in excess of demand. The nature, strengths and weaknesses
of each accountability system is turned to next in order to develop a framework
to critique the accountability system used for the university.

a. Accountability via Law

The basic accountability structure in a public regulatory scheme is through law.
Legal accountability in the regulatory context has three dimensions. These are
accountabilities of the regulated parties, the regulatory organisation, and the
legislators creating the regulatory scheme. Legal accountability may operate via
courts or parliament or through some other integrity agency. The rules forming a
regulatory regime usually include among other things rules establishing
mechanisms for monitoring, evaluating and enforcing compliance of the
regulated, reporting obligations of the regulators and some provisions for
administrative or judicial review. Legal accountability is manifested in the
ultimate accountability structures of government created by the Constitution—
Parliament and the administrative bureaucracy. These are taken up in the next
discussion of accountability in the Westminster system and bureaucratic
hierarchies. The mechanisms employed in legal accountability may include
inspectors, complaints system. Legal accountability operates on the basis of legal
authority and is primarily backward looking and punitive.

Accountability via law has both strengths and weaknesses. Its strengths are its
objectivity, broad acceptance and long history. These all add to its institutional
authority, predictability and universality. The weaknesses of legal accountability
where conceived of as common law include the delay, cost and complexity of the
legal process, the limited issues that can be addressed, including the limited
rights of citizens to bring an action against government—although these issues
are addressed at least to some degree by administrative tribunals. Further, legal
accountability gives little direction for the future—at least beyond the precedent
of a specific case. Forward looking legal accountability leading to reform is the
province of the legislature. Finally, where legal accountability is by way of
mandated reporting and audit, it operates as a form of regulation by information, as noted above.

i. Westminster Accountability

The Australian government’s accountability follows to a large extent the traditional Westminster model. In that model, government ministers are responsible to Parliament for the activities undertaken by their departments and the agencies of which they have oversight.\(^{165}\) This accountability is a type of bureaucratic accountability.

Max Weber identified bureaucratic accountability as the opposite of the pre-modern accountability which was based on social accountability obligations such as kin, religion and locale. Weber saw bureaucracy as the appropriate response to organisational problems resulting from the revolutionary overthrow of the established socio-political order and the industrial revolution—Hobsbawm’s dual revolution.\(^ {166}\) For Weber, an alienated, rational, meritocratic bureaucratic organization was the solution.\(^ {167}\) Weberian hierarchical bureaucracy operated on the basis of authority with those at the top providing orders to those lower down. Accountability in the hierarchy then was responsibility to answer to those higher up in the hierarchy. In the government context, as seen, accountability is between lower agencies to higher ministers. In the university context, Weberian accountability occurs within the organisation through the management structure—an issue of internal governance somewhat tangential to the external regulatory focus of this dissertation—and the bureaucracy of government administering the regulatory regime enacted in the legislation discussed as NPM.

---


This simple account of public accountability is outdated—described by Sir Anthony Mason as “a gross overstatement”168 and indeed, it is unclear whether in fact it ever truly operated even in the UK.169 As Lord Greene MR noted: “the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them.”170

The overwhelming of the Westminster model in Australia led to an ‘open government’ agenda under then Treasurer, Coombs. As a result of the reports of Sir John Kerr (1971) and Sir Henry Bland (1973) which led to the enactments of Administrative Decisions (Judicial Review) Act 1977 (Cth), Ombudsman Act 1976 (Cth), and Administrative Appeals Tribunal Act 1975 (Cth)171 public accountability in Australia improved significantly. This suite of legislation was later complemented by a second series of legislation governing the public service including the Public Services Act 1999 and the Financial Management and Accountability Act 1999. This complement of accountability agencies, officers and institutions form the core of current accountability structure in Australia.172

The functioning of this accountability model will be seen in the main cases dealing with the university, discussed in Chapters 3, 5 and 7 some of which were brought before tribunals before being appealed through the courts.

Although this public accountability may open up public bodies to scrutiny of the courts, it does not address the other dimension of public accountability—the broader issue of political accountability for social institutions. That accountability is presumed to occur through the political election process. However, this presumption is questionable for voters may cast their votes for a

variety of reasons and often not on a single issue such as a government’s policy on the university. As seen, the Westminster system is not viable as complete accountability system. This situation does not, however, mean government is unaccountable nor as the next section demonstrates that government bodies are unaccountable.

ii. NPM Accountability and Audit

The failings of the Westminster system resulting from the increased size of the administrative state and correlated problems of accountability, combined with the failure of Keynesian economics to address the economic problems of the 1970’s, provided critics of the welfare state with a strong case for reform. Government no longer had the resources to support a broad array of public goods and the consensus on the government’s role was shattered.

A new theoretical framework was developed on the basis of a research program conducted by economists in the USA. Essentially, the tools of the neoclassical economists were applied to the public sector creating the public choice school of government which came to dominance in the USA with echoes elsewhere. According to the view espoused by public choice theorists, politicians have no activity but maximizing their private individual benefits and the only regard they have toward public is opportunistic, allowing them to gain well out of proportion with the benefit they provide. This critical lens coalesced with right wing ideologies and resurrected the “less government is good government” slogans of by-gone eras.

Studies of government organizations exposed waste, corruption and redundancy, and perverse incentives, all of which led to the creation of fiefdoms and inflated budgets instead of increased quality and quantity of public services. One obvious next step was to look for alternative means of controlling government

---


agencies and their managers, making them more efficient and responsive, i.e. “accountable”, a task answered by managerialism, audit and implemented via NPM\textsuperscript{175}—matters discussed above in reference to Power’s \textit{Audit Society}. The new institutionalist approach provides an alternative to this rationalist explanation. Institutionalists observe that public organisations are chaotic which may lead to legitimacy problems.\textsuperscript{176} The new institutionalist focus on legitimacy leads may support an argument that auditable reporting model as copied from the private sector (distinct from the long-standing role of Auditor-General and similar public auditors) is a strategy of NPM to enhance the legitimacy of public organisations.

The sharp focus of NPM can be seen in its seven main principles: 1) management of organizations by people trained in management “professional managers” as opposed to people trained in civil service, 2) clear measurable objectives often developed as Key Performance Indicators, 3) an emphasis on output measures, 4) disaggregation of civil service into discrete semi-autonomous units, 5) creation of competition in the public sector via tendering and contracts, 6) private sector management practices, and 7) raising the value of efficiency over other values such as effectiveness, equity or other non-economic values.\textsuperscript{177} Examining these seven principles, one notes a marked shift in the conceptualisation of public service and as a result, of accountability. Rather than the civil service being a corps designed to service the needs of the public, it becomes a disaggregated service focused by a business manager on auditable economic measures which narrowly define a segment of ministerial concern and focus.\textsuperscript{178} Its sharp focus on economy, closely aligned financial incentives and measurable objectives, attention to other matters such as fairness, equity, and effectiveness, which are

more difficult to measure, are subordinated or lost altogether. Accountability is narrowed to objects and outputs readily measured and audited.

These narrowed concerns result from the private sector’s audit approach to accountability. In the private sector accountability is viewed as a matter of compliance by way of reporting on some created performance measure or control system rather than a more broadly construed responsibility for providing the good or service itself. This form of accountability displaces the personal sense of accountability that is an important component of certain activities, as argued by Bovens, particularly those services associated with the professions. The result of a compliance and reporting approach is that the focus shifts to technically conceived measures avoiding a more penetrating analysis and reform of processes and structures in institutions and organizations. Thus, while this agenda provides intimate accountability for certain nominated activities within organisations, it fails to provide important information about large systemic and institutional issues, such as the well-being of the university as an institution—the focus of this research.

As noted, one important idea under the NPM initiative was to provide accountability for public funds, later dubbed “Value for Money.” That is, NPM was to ensure that money provided for a particular objective would be spent with “economy, efficiency, and effectively.” This approach of monetising and attempting to make measurable matters which may not be measureable at all called for the migration of the private audit practice into the public sphere.

---

181 Ibid.
182 Ibid p. 10-11and see Ch 3.
185 Ibid p. 44.
186 Ibid p. 10-11and see Ch 3.
While the idea of Value for Money is an eminently rational objective on its face, it confronts a fundamental and intractable problem. As Nobel laureate in economics Herbert Simon has shown, measurement of public objectives is an impossibly difficult task because of bounded rationality. Essentially, Simon argued that quantitative performance measures tended to be inappropriate as public services had hard to define objectives. This situation exists because the services usually have multiple purposes and furthermore, even if it were possible to provide precise identification of the purposes, measurement requires difficult value judgments i.e. political judgments in order to weigh the respective value of these purposes. Finally, Simon observed that varying results could not be causally linked to such factors as competence, effort, or the varying local conditions in which the agencies found themselves.\footnote{Simon, H. (1937). "Can municipal activities be measured?" The Municipality 32: 281-282., cited in Rothstein, R. (2008). Holding Accountability to Account: How Scholarship and Experience in Other Fields Inform Exploration of Performance Incentives in Education. Performance Incentives: Their Growing Impact on American K-12 Education. Nashville, Tenn., p. 3.}

Further research on the measurement problem has demonstrated that efforts to provide simple or simplified agendas and incentivise such objectives must navigate a hazardous route. As Rothstein writes: “Simon and Campbell defined two shoals on which public accountability policy has foundered: that public goals are too complex to reduce to simple quantifiable measures; and attempts to do so corrupt public service.”\footnote{Rothstein, R. (2008). Holding Accountability to Account: How Scholarship and Experience in Other Fields Inform Exploration of Performance Incentives in Education. Performance Incentives: Their Growing Impact on American K-12 Education. Nashville, Tenn., p. 4} In other words, this form of quantitative accountability is destined to fail because it cannot be designed to measure and evaluate what needs to be measured and evaluated. Accordingly, purporting to achieve accountability by some such design is either misguided or misleading. The discussion leads to the issue of standards for accountability to which the dissertation turns next.

iii. NPM and Accountability Standards

The discussion of measures and measurements is intimately related to the matter of standards. The standard chosen gives an orientation for a regulatory regime
and provides a benchmark for the reward or censure function of in a regulatory regime. Such standards focus the attention of the regulator or regulatee on the measure it will have to meet and allows it to monitor and adjust its activities. Standards may be orientated toward inputs, outputs, quality, quantity, substance, and process.

In the context of the university, the standards to be used must reflect among other things the objectives of the university—be they private economic, private social, public economic or public social, or some admixture of them all. Among the standards that could be applied to the university are: economic, as in output measures of the generation of revenues, production of degrees (i.e. number of students graduating), or commercialisable research or patents, or process measures such as efficiency in use of resources or input measures against outputs as in “return on investment”. The standards, however, could also be social such as inclusion of marginalised peoples, or breadth of distribution of degrees in terms of population or disciplines. Finally, they could also include social inputs such as the quality of members of the academic profession, the quantity and quality of the students admitted, resources per student, teaching and research funding and levels of support both professional and physical for the teaching and research projects undertaken. These standards tend to be ex ante measures often seeking to ensure some form of “quality.”

Output standards would focus on the delivery of teaching, research and community service.\(^{189}\) Such teaching standards are expressed numerically as in raw numbers of graduates and encompass everything from the more pedestrian standards of “fit for purpose” and an objective measure of mastery of a body of knowledge, to the aspirational standard of transformation through acquisition of intellectual skills and personal development. Output may also be measured in terms of the quality and achievements of graduates—whether in employment or otherwise. Standards can also be knowledge based such as the breadth of program offerings and curriculum, or creation of public, private, utilitarian or basic knowledge. Output standards are more quantitatively focused and provide

a basis for censure and reward. Thus, standards may be developed for university as for other organisations, measuring inputs, processes and outputs. As is evident from the range of standards available, the choice of standards is not only a complex issue\textsuperscript{190} but also an important normative and political decision. Given the power of audited standards to shape organisations, they need to be chosen with care.\textsuperscript{191} Regulators need to make careful decisions about them being clear about what can and cannot be measured.

b. Accountability via Social Norms

Accountability may also work on the basis of social norms. For example, organizations such as the professions contribute to accountability as individual members are judged by group norms, via some form of collective or peer appraisal, leading to either approval or removal from the social network. Social norms are also at work with respect to accountability in institutional settings.

The university institution among other things operates on local, regional and global contexts setting acceptable norms for the behaviour university organisations and its academic members. These norms, for example, will extend only to those organisations which require substantial critical study of an area of knowledge and so excludes “degree mills” and organisations whose mission is indoctrination. Further, the university institution as a professional organization of the academic profession capitalises on the academic profession’s mutual recognition of peers, as is evident in the successful completion of examinations which allows individual applicants either to “admission to the degree” or where unsuccessful, to rejection. The standard was set by the academic profession, who likewise had been subjected to an examination by a collective of graduates, who in turn either approved admission to the academic guild or rejected the supplicant student. The leader of a university organisation, traditionally at least, was accountable to the other members of the community. Leaders were accountable

\textsuperscript{190} There is a significant literature on the topic of quality standards in higher education. See Koslowski, F. A. (2006). “Quality and assessment in context: a brief review.” \textit{Quality Assurance in Education} 14(3): 277-288. and various journals such as Quality Assurance in Education dedicated to the issues.

for upholding academic values—that is, some demonstration of scholarship or mastery of knowledge was required. Thus the university was an institution based on accountability by social norms.

Social accountability allows for both punishment and reward. Punishment results in the loss of social status and may even lead to expulsion from the social group. Reward is the increased social status that results from compliance with group norms. The ongoing engagement with the group and the important social resources that are derived from group membership make this form of accountability a powerful source of pressure.

This review of accountability mechanisms provides insight into their respective characteristics, strengths and weaknesses. The legal and political models provide the highest levels of public scrutiny and attention. They suffer from the limitations of narrow focus, high levels of abstraction in Parliamentary reports and distortion by NPM audit demands. Market mechanisms do little more than provide incentives for producing to demand. They do not address quality issues in services or matters of distributions. Social mechanisms may work well in professional contexts; however, they are difficult to measure, manipulate and censure.

c. Accountability via Markets

A fourth accountability mechanism results from the operation of markets. It should be noted that it may be inappropriate to refer to markets as providing accountability. As noted, they do little more than limit the production of goods and services which are not readily produced at a desirable level of profitability. Such being the case, the discussion of markets providing accountability must be a limited discussion. Production, distribution and pricing via a market will cause producers to produce items which satisfy consumer wants and provide producer profits. Markets do not arise in a total vacuum. Regulation (formal or informal) creating the market links parties to the market limiting and stimulating production and consumption, and so no further accountability for production and consumption is necessary.
Accountability via markets, as indicated, is a limited proposition. Accountability in the product market is from producers, to consumers, for quantities and qualities that are immediately discoverable on inspection, at the standard of individual preference. Problematically for the university, the notion of accountability in the market is limited in important respects. For example, quality of services is difficult to measure ex ante—a situation which favours producers over consumers in markets. Thus low quality education may be marketed effectively but students will not be aware of quality problems until they have made an irreversible investment of time and money in a particular university. Another issue for regulation of the university institution is accountability for how a market distributes education. Markets provide no accountability for distribution except on the basis of economics. They fail to address public goods issues associated with distributions, needs, or other equity issues.

Market accountability has both punitive and reward consequences. That is, where organisations ignore their markets they suffer the punishment of being ignored by consumers. Organisations that create or follow markets find themselves rewarded to the extent that they respond to the preferences expressed in those markets. In this sense, market accountability allows for future adjustment.

The problems of market mechanisms, including the inadequacy of accountability forms a justification for regulation and have been the basis for creation of considerable areas of law including, contract, product liability, employment, financial regulation and certain aspects of private property law. Looking to the market to regulate institutions providing public goods is a decision to adopt a market failure, the effects of which may be difficult to predict and the costs of which difficult to calculate ex ante.

8. Method

The foregoing surveys of disciplinary approaches to and theories of regulation, and of the technical issues and decisions need to be taken together to provide the basis for a regulatory analysis and evaluation. Further, as noted, the overarching
theory for this dissertation is Feaver and Durrant’s regulatory coherence. In order for that theory to be applied, not only does the legislation need to be examined, but the larger issues to which the legislation responds, as well as the registered bodies need to be considered. It requires regulatory theories, decisions and techniques to be identified and analysed.

Coherence analysis in the first instance requires a normative analysis of problem and policy at the foundation of the regulatory framework. Next an analysis of coherence between policy norms and instruments must be conducted. Finally, instruments need scrutiny. In addition, it has been argued that institutional, organisational and administrative aspects of regulation need to be analysed for coherence.

These tasks can be accomplished by identifying the various components of regulation discussed and applying a coherence analysis. That is, beginning with an analysis of the social problem and risk, identifying the public-private divide, identifying and analysing targets of regulation through an approach to the institution, organisations and administrative arrangements that make up the regulatory framework for the university will allow a thorough-going analysis of coherence. As the analysis is of an existing regulatory arrangement, that of Australia, the first step is to identify and work through those arrangements.

The next chapter, Chapter 3, is an examination and preliminary analysis of the policy and legislative framework for the university and higher education in Australia. It provides an exposition of the social organising problem to which higher education and university policy are the regulatory response. Further, as a technical chapter dealing with the legislation and regulatory arrangements, the technical aspects of design and technical aspects of regulation—the target and regulator, and choices of technique—are identified. The chapter identifies the tools the government has employed over time and forms the foundation and reference point for the analysis in the chapters which follow. Finally, it examines the accountability regime.
As noted, regulation rests on fundamental conceptions of the public and the private, and the public-private divide. Coherence and regulatory response as well as institutional and organisational arrangements are organised around understandings of the public and the private. The chapter following, Chapter 4, sets out the parameters and issues in the debate about the public-private divide. It does not seek to harmonise positions or avoid the political. Rather, it points to the socio-political nature of the divide and evaluates where the university and higher education might fit coherently into the divide variously construed. With this background, an analysis is positioned to identify and evaluate this aspect of the normative coherence of regulatory arrangements.

The chapter which follows, Chapter 5, examines the institution of higher education and the university. As noted, a lack of attention to institutional arrangements and in particular, to coherence between institutions and the environment may result in failure of identification of opportunities, problems and risks, as well as a failure in terms of implementation. It is assumed institutions serve purposes in the first instance and so changes to institutions should be done only after due regard for those existing arrangements and purposes. The chapter considers the institution of the university from a variety of disciplinary perspectives and the various missions or objects that may be assigned to it. It explores the various normative orderings associated with these perspectives and missions and lays the foundation for the coherence analysis at an institutional level. As coherence between systems and institutions is critical for success, and the university is an institution, a coherence analysis requires a clear understanding of the institution and its relation to the systems environment.

The chapter which follows, Chapter 6, addresses the organisation of the university. Examination of the university from an organisational perspective allows a coherence analysis to be conducted to evaluate whether the organisational characteristics are coherent with the institutional environment including mission. Organisational configuration may arise from the institutions of the university, or be imposed by external regulatory authorities. To achieve institutional missions, organisations must be suited to the purpose. As different organisational forms have different purposes adequate account must be taken of
such in the regulatory framework and the coherence analysis must lead to a
determination of whether they serve either or both institutional and regulatory
objects.

Chapter 7 provides an analysis of the coherence of regulatory arrangements
drawing from all parts of the dissertation. That is, it provides an analysis of the
coherence at systemic, policy and instrumental levels as well as coherence in its
institutional, organisational, and administrative and accountability dimensions. It
provides the basis for the conclusion that serious regulatory incoherence is at the
basis of Australian university and higher education regulation and leads to a
conclusion of a higher likelihood of failure in the future.

9. Conclusion

As has been argued, regulation is a highly complex task—a matter reflected in
the diverse and divergent disciplinary approaches to it. These approaches were
made clear in the survey of the relevant disciplinary literature. This survey
provided a foundation for approaching the more specific theories dealing with
various aspects of regulation. A second survey of these specific but disparate
theories made it clear that there is only one theory of regulation which provides a
comprehensive approach to regulatory analysis—Feaver and Durrant’s regulatory
coherence. This survey also provided a variety of insights and approaches to
specific aspects of regulation which are utilised and referred to in various parts of
the dissertation as alternatives, points from which to critique existing regulatory
arrangements, and provide recommendations for reform. Having reviewed these
theories of regulation then provides the first part of an analytical tool kit for the
analysis required by this dissertation. A third and final survey of regulatory
methods, including organisation of the regulator, regulatory techniques and
accountability structures, provided the foundation for the last part of the analysis.
A critical understanding of these hard features of regulatory systems is necessary
again to critique and offer alternatives for the regulatory system under analysis.
This chapter not only provides a foundation for the analysis which follows but
argues that the approach of a single discipline is likely to mislead rather than
inform. Thus, it argues strongly that the dissertation must be interdisciplinary if it
is to succeed. Finally, it argues that the nature of Feaver and Durrant’s regulatory coherence demands interdisciplinary analysis to fill its framework. Achieving an adequate analysis of that regulation requires careful attention to a variety of disciplinary perspectives, careful consideration of the regulatory arrangements, paying attention to the socio-political, technical and existing institutions and organisations. It must be based on a detailed evaluation of the social problem, risk, regulatory response in terms of legislation, tools, and instruments.

Scrutinising these arrangements through a coherence lens provides critical insight into the strengths and weaknesses of regulatory arrangements and will draw attention to the potential for regulatory failure and success as well as drawing attention to important opportunities, problems and risks.
CHAPTER 3: REGULATORY FRAMEWORK

1. Introduction

This chapter takes up the basic task of identifying the regulatory issues identified in the previous chapter by examining the Australian regulatory framework for universities. That is, it identifies the social organising problem as Australian governments have shaped it, it examines the assignment on the public-private divide, further, it identifies the relevant legislation, analyses the legislation from a technical perspective, and identifies the accountability framework. It provides a preliminary evaluation of coherence, which is consolidated and developed in the analysis of Chapter 7.

Although the traditional focus of work on the regulation of the university has been on the internal structures of the university, the regulation and governance of university corporations and the institution is neither solely nor primarily a matter of internal structures and processes.\(^{192}\) Indeed, as Clark Kerr observed in the 1970’s “the ‘ivory tower’ of yore is becoming a regulated public utility.”\(^{193}\) In the 1990’s this trend continued to the point that, as Shattock pointed out in the UK, “higher education has moved from being privately to being publicly governed, essentially changing from self-governance to governance explicitly by the state.”\(^{194}\) The same trajectory has been followed in Australia\(^{195}\) with the regulation of the university becoming a combined effort among a significant number of parties. In broad terms, Clark has identified the regulatory environment as being composed of government, market and the academic


Consideration of the regulation of the university corporation is an analysis of the university corporation’s relations with its external environment including legal authorities. The analysis below will focus on the regulatory control of the university corporation as a legal person operating in the legal environment created by the state.

This chapter develops the foundation for the argument that the policy framework has changed having significant implications for the university institution. It is argued that policy and subsequent regulatory arrangements integrating the university into the state apparatus has forced the university to mould itself to the demands of government and subjected it to New Public Management style accountability. The chapter sets up in inchoate form the argument that these regulatory changes, while serving government agendas, are incoherent with the university institution and lay the groundwork for increasingly dysfunctional university sector in Australia.

2. Regulatory Problem: pre- and post- World War Two

Prior to the Second World War, the university in Australia as elsewhere was a private body (i.e. a body not required to pursue government defined interests) that selected the best and brightest from the middle and upper classes, and provided socialisation and credentialing of the upper classes. Although opening up the institution in the nineteenth century may be evidence of a public policy to make access more equitable and available, it remained largely a private institution with the objects just mentioned. The strong government interest in the university came only as a result of the war and its potential technological contribution to the war effort. After the war, a variety of forces came to bear on the university, as well as the rest of society, which set a course radically altering

---

the shape of both. These were access to the populace at large, expansion of knowledge, and reconceptualising on the public-private divide.

The creation of the regulatory organising problem as shaped by the Australian government post World War Two is somewhat at odds with the mission of the university institution, namely, the creation, preservation and transmission of knowledge (discussed in Chapter 5). That is, the government has identified nation building and economic competitiveness as problems to be addressed by the university.¹⁹⁹

By way of contrast the three universal objects of the university institution are undergraduate teaching, research, and public service. That is, the university’s institutional tasks of providing high quality higher education, producing annually a cohort of graduates who have developed a mastery of a body of disciplinary based knowledge, mastered critical thinking skills, and developed a set of flexible intellectual skills as a foundation for a lifetime have become subject to government instrumental policy objects. It is not that the two agendas are wholly incompatible or inimical.

The convergence of government and university interests occurs in research and teaching: the university is to provide the new knowledge and graduates needed by the nation both to solve its own internal problems and to compete and cooperate on the international field. This activity—producing both knowledge and researchers—is vital to the nation’s ability to survive and thrive. In this aspect the Australian government policy has benefited from the university institution’s own objects for purposes of national interest and business power. This interest is distinct, however, from the policy alternative of the development of citizens for their own sake. The university also has a role as the preserver of unique Australian knowledge and culture. This role is of limited value to government, particularly where governments prefer a less than transparent account of the past and policy options. Finally, even less felicitous to government has been the university’s unique position as a critic and general

contributor to political and social debate. Evidently, the Australian university is charged with difficult tasks at least partly in conflict with the government policy, and all of which are expensive to establish, maintain, measure and monitor. The dissertation now turns to examine the problem shaping, policy development, and regulatory arrangements that form the regulatory response.

3. Regulatory Response: policy, regulatory arrangements and technical aspects


As noted, prior to the Second World War, Australian universities had been pre-eminently private organisations despite their public status. That is, they were free to pursue their own objects with little regard for government policy, but in receipt of public funds. They were funded by a mix of state government, benefactions, and student fees. During the Second World War it became evident to the Allied countries that university research was going to be critical to success. Accordingly, governments took a renewed interest in the institution.

The Commonwealth began to provide significant funds after hearing from its newly established Commonwealth Universities Commission (often referred to as “UC”) in 1943, which was created pursuant to regulation under the National Security Act, for the purpose of supervising the Commonwealth Financial Assistance Scheme for students. Labor Prime Minister Chifley decided to establish a committee under the chair of Professor R.C. Mills. The Mills

---

200 The distinction between public and private, and the role of the university in each is analysed in detail in Chapters 4, 5 and 6.
Committee issued an interim report which explained the financial situation of the universities as being a matter of urgency.\textsuperscript{205} The interim report was the final report issued by the committee and it urged unequivocally “that in view of the national importance of the development of universities, the Commonwealth Government is justified in extending its interest in the work of the Universities and, in association with the States, in accepting further responsibilities.”\textsuperscript{206} The committee still recognized a distinction between State and Federal obligations for the universities, placing the primary obligation for the universities on the State,\textsuperscript{207} consistent with the Constitution which assigns the obligation for student support to the Commonwealth.\textsuperscript{208}

The Mills Report had two important features. First, it demonstrated that the Commonwealth had a long standing interest in the universities, particularly in the development of original research and training of researchers, leading to the conclusion that the universities were institutions of national importance. Second, the Mills Report held that the Commonwealth had financial responsibilities for the universities, which were to be shared with the States and which it implemented through a revised grant scheme. The grant scheme, however, was far from a carte blanche for unlimited spending. It required the university to obtain three times the value of the grant from the State government and tuition fees in order to obtain the top level of grant. Further Federal grants were restricted to operating costs of the university rather than capital improvement measures.\textsuperscript{209}


\textsuperscript{208} Discussed in detail in Section 4 of this chapter.

The Mills Report led to the passing of the *States Grants (Universities) Act 1951* (Cth).\(^{210}\) This statute formalized and legitimized the Federal government’s on-going involvement in the universities, justified pursuant to s. 96 of the Australian Constitution.\(^{211}\) Menzies, however, recognized the need for the universities to retain their autonomy and their individuality at least with respect to issues of internal management.\(^{212}\)

The Mills report brought with it a changed view of the objects of the university. This changed view is seen in the government’s change of policy from private goods to public goods. Further, as a result of the Mills report, the government selected a nodality tool, and following a consensus model of regulation, inserted the first of a series of commissions to mediate between government and the university institution.

b. Australian Universities Commission and the Murray Report

Although universities are state bodies, that is, they are established and controlled as state statutory corporations, the universities in Australia remained elite training institutions until after the Second World War when the Federal government became active in setting policy. The return of service personnel, led many countries including Australia to make adjustments, one of which was the re-training of recently returned service personnel. Any discussion of the university after the Second World War must take cognizance of critical changes in the environment. Foremost is a public interest policy expressing collective preferences for nation building and social mobility. These equitable objectives were to be achieved through providing mass higher education.

This change demanded a fundamental reworking of the notion of the university from an elite institution to an institution suited to serving an expanded mission—i.e. mass education. It resulted in rapid growth in student numbers. It created

\(^{210}\) *States Grant (Universities) 1950* (Cth).

\(^{211}\) *Commonwealth of Australia Constitution Act 1901* (Cth).

confusion in the Australian system as the inquiries discussed below illustrate and in the various university corporations. American universities in this era, according to the former President of the University of California, Clark Kerr, faced challenges he identified as expansion of student numbers, coordinating the curriculum with society’s needs, dealing with new knowledge, and the related administrative structural changes necessitated by the three previous changes, led to what he termed the “multiversity”.  

The situation of the universities in Australia after Second World War is well described by the historians of the University of Sydney.:  

“[beginning around 1955 the University of Sydney] began to experience what could justly have been described as a sea change, extensive and comprehensive but not such a complete transformation as to obscure the previous structural outline of the university body. During the next two decades the university greatly increased its population of students and staff. It had to come to terms with the new phenomenon of student and non-professorial staff power. It accumulated new buildings and engulfed acres of old settled areas of inner Sydney. It substantially remodelled curricula in all departments, saw a dramatic rise in the popularity of the social sciences, computing, applied mathematics, and the performing and fine arts. There was an expansion beyond the previous preoccupation with European-based scholarship to an interest in Asian cultures and an appreciation of Asian, American and Canadian scholarly work. And there was a much greater importance placed on the duty of academic staff to engage in diligent and productive research.”

These changes were disorienting for those involved at the time. Two Professorial Board committees reported on matters in 1958 and 1959 at Sydney and commented on such matters as the maximum size of the university, lack of effective communication between staff and students, lack of communication between departments, lack of administrative cohesion—all without any suggestions on how the situation might be improved.  

---

216 Ibid p. 70.
at Melbourne faced similar issues and complained of being excluded by administration undermining the sense of collaborative enterprise and community.\textsuperscript{217} These dramatic changes led to a crisis in the universities which in turn drew the attention of government to the potential for the development of higher education by policy rather than simply allowing organic development to continue.

As a consequence of the dramatic changes, the Menzies government determined that a new inquiry into the state of the universities was due.\textsuperscript{218} In 1957 Menzies approached Sir Keith Murray to head an enquiry: Committee of Enquiry into the Future of the Australian Universities.\textsuperscript{219} The committee’s terms of reference were not sharply proscribed, but were set out as:

“to inquire into such matters as—
1 the role of the University in the Australian community;
2. the extension and co-ordination of University facilities;
3 technological education at University level; and
4. the financial needs of Universities and appropriate means of providing for those needs.”\textsuperscript{220}

The terms of reference continue: “The list is not meant to be exhaustive and it does not set out to the limit the inquiry to be undertaken by the Committee.”\textsuperscript{221}

The committee in its report, known as the Murray Report, identified five particular issues for the universities of Australia. They were: increasing student

\textsuperscript{220} Ibid Appendix A.
\textsuperscript{221} Ibid.
numbers, high failure rates, weak honours and post-graduate work, serious shortages of facilities, and support, including inadequate staff remuneration (salaries, superannuation, study leave, research support and travel). It was clear to the committee that the universities were inadequately resourced for the task with which they were charged.

Indeed, the report was instigated by financial crisis of university corporations the result of a combination of increased demand and inadequate state funding, among other things.

There were several important outcomes from the Murray Report, not the least of which was the establishment in 1959 of the Australian Universities Commission, set up to replace the UC via the Australian Universities Commission Act 1959-1973 (Cth). This new commission strengthened regulation through Hood’s nodality. Menzies envisioned a new statutory authority, as a regulatory body instead of the advisory body of the UC. The Australian Universities Commission would in Menzies’ words: “coordinate the work of the universities to avoid overlapping, to push somebody here and hold somebody back there, and to get the overall pattern of university training in Australia brought into the most useful shape.”

It is interesting to note in contrast to today’s managerialists, the Commission’s committees and civil servants discussed their own embarrassment at their lack of knowledge and their acknowledgement and reliance on the expertise of the Australian Universities Commission.

---

222 Ibid.
The legislation, which is quoted at length as it remained relatively untouched for the next thirty years, gave the Australian Universities Commission and its successors a clear mandate, clear discretion and clear, strong public accountabilities.

13 (1) The functions of the Commission are to furnish information and advice to the Minister on matters in connexion with the grant by the Commonwealth of financial assistance to universities established by the Commonwealth and of financial assistance to the States in relation to universities, including information and advice relevant to (a) the necessity for financial assistance and the conditions upon which any financial assistance should be granted; and (b) the amount and allocation of financial assistance.

In addition, the Act sets out clearly policy objectives within which the Commission is to exercise discretion. Section 14 reads as follows:

(1) The Commission shall perform its functions with a view to promoting the balanced development of universities so that their resources can be used to the greatest possible advantage of Australia.

(2) For the purpose of the performance of its functions, the Commission shall consult with universities, with the Australian Commission on Advanced Education and with the States upon the matters on which it is empowered to furnish information and advice.

That is, it was public interest based regulation, justifying the intervention on the basis of “the greatest possible advantage for Australia.” Further, the commission was to regulate using a consensus model. It was to “consult” with the universities, the Australian Commission on Advanced Education, and with the states. While it was not forced to achieve consensus, the Commission was to take account of the issues, interests and needs of the various stakeholders.

Finally, the Act sets out clear processes for accountability. Section 15 read:

(1) The Commission shall, at such times and in respect of such periods as the Minister directs, furnish to the Minister reports containing recommendations with respect to the financial assistance that should be granted to or in relation to universities in respect of those periods and the conditions upon which the financial assistance should be granted.

And further, “(2) The Minister shall, as soon as practicable, cause each report under the last preceding sub-section to be laid before each House of the Parliament.” Section 16 created the duty on the Commission to furnish to the Minister on request such further reports as well as the right to issue such further
reports as the Commission “thinks fit.” The Commission worked therefore as a conduit for information between the targets of regulation, the universities and the government.

The Australian Universities Commission’s impact on the universities was dramatic. The Murray Report justified increased Commonwealth involvement on the basis of decreased availability of state funding, and increased national demands on the university corporations.\(^{229}\) In his detailed and exhaustive study of the Australian Universities Commission, Gallagher convincingly argues that “the AUC increasingly served the Commonwealth Government rather than universities or State Governments, thereby facilitating a growing national role in an area traditionally the responsibility of the States.”\(^{230}\) Although the states may have wished to circumvent the Federal government in the latter’s power to make conditional grants, two High Court decisions\(^{231}\) effectively put an end to that option, allowing the Federal government to attach such conditions to funding as it saw fit.\(^{232}\)

The Murray Report also established a rationale for creating a nation-wide university system, in the sense of government seeing them as a single category or institution, as opposed to the dealing with each university corporation individually.\(^{233}\) Thus the university came to be a tool of national government policy, a point of Federal government contact with a community, demonstrating Federal government largess and interest in a particular location. The university was no longer a local expression of an international institution serving local needs.

---


\(^{231}\) South Australia v Commonwealth (Uniform Tax Case), (1942) 65 CLR 373 and Victoria v. Commonwealth (Second Uniform Tax Case) (1957) 99 CLR 575.


\(^{233}\) Murray, K. S. (1957). The Report of the Committee on Australian Universities. Canberra, Government of the Commonwealth of Australia., p. 59. It is interesting to note that at the time, only New South Wales had three universities, each of the other states only having one.
Further, it was the Murray Report that first publicly, although informally, determined that the university was no longer to be an elite institution (rather an admission of the post-war reality than a new direction), but an institution for the benefit of the masses, and to contribute to the knowledge of all humanity as well as providing training for practical purposes. This shift in the internal mission increasing emphasis on practical training challenges traditional intellectual pursuits of the university.

In terms of university governance, the most significant effect of the Murray Report was the laying of a foundation for Federal involvement in the universities, in a sense without limitation. It undermined the independence of the universities, and by reducing the role of state funding, it removed a power which helped balance the competing interests of the universities, the Commonwealth and the State governments.

The Murray Report had such significant consequences for Australian universities because of the personal interest taken in the universities by the then Prime Minister, Menzies and given the dire financial circumstances in which the universities found themselves when left to the generosity of the state governments’, the enthusiasm of the Vice-Chancellors as expressed by the AVCC letter to Menzies personally, is understandable. The Vice-Chancellors could not but be pleased with a promise of increased funding; however, they remained cautious about the necessity for the universities to retain their autonomy.

---


236 As quoted in Gallagher “your personal interest in our welfare has put new heart into us all” ibid., p. 6.

237 Connell, W. F G. E. Sherington, et al. (1995). *Australia’s First: A History of the University of Sydney, Volume 2, 1940-1990*. Sydney, The University of Sydney in association with Hale & Ironmonger Pty Limited p. 67 notes the VC of the University of Sydney replying to the Prime Minister “that the long-established principles of the customary autonomy of the universities will not be interfered with.”
c. The Martin Report

The Government adopted the Murray report and began what was intended to be a triennial grants scheme as recommended by the report. The near sufficient funding promised by the Government’s adoption of the Murray Report was not to last. By 1960, as the Government was preparing the second round of triennial funding, it was made clear through the Martin Report that the recommendations were to be in line with “financial limits which are relatively very much more modest” than under the first grant.  

The Martin Report of 1964 built on the changes in the Murray Report, the net effect of which is described by Marginson and Considine as “a complete transformation of higher education from a semi-private domain of upper-class culture and state-based training for the elite professions into a system of mass credentialing designed to capture the spirit of optimism of the long boom.” In other words, as Australia’s economy boomed, its social vision changed as well.

The boom, combined with the vision and Keynesian economic theory, provided a justification for regulatory intervention from which a dramatic expansion of the Federal government’s role in education was possible. It resulted in the marked growth of the tertiary sector which remains albeit in a rather modified form today. It had as its focus the development of individuals on the basic belief that investment in individuals was a contribution to the nation itself. This policy, a public interest policy was concerned with both general economic welfare and social justice concerns of equity and social mobility.

Martin’s basic view was carried forward in the years of the Whitlam Labor Government (1972-75) in which the positive liberal notion of rights was

---

238 Letter from Prime Minister to Chairman, quoted in Susan L. Davies, The Martin Committee and the Binary Policy of Higher Education in Australia, p. 33, quoted in ibid p. 69, n. 32.
extended to include the right to tertiary education as a means of developing the individual to one’s fullest potential. Throughout the era, policy makers paid little heed to development, and the tertiary sector became rather confused with Colleges of Advanced Education, teachers' colleges, institutes of technology and universities all claiming similar traditions of research and teaching.  

\[242\]

d. The Commonwealth Tertiary Education Commission and mass university education

The trajectory of history is never linear. The next issue Australian policy makers had to consider was economic turbulence, growth in state budgets along Keynesian lines, and re-trenchment following the 1970’s recession. The economic contraction in the OECD countries beginning in the late 1970’s led to a review of budgets and a challenge of the Keynesian view of the role of government. That view was based on the premise that government investment in the economy was always a net positive regardless of the specific social results.  

\[243\]

Thus, while from a Keynesian perspective such investment was a positive, in the changing policy environment moving away from Keynes, government investment was not necessarily a positive and needed to be justified.

Further, discussion of regulatory change must take into account the rise of the neo-liberalism as a political movement that has shifted government attention and resources from the provision of broadly available public goods to a narrow focus on providing regulation aimed at increasing private economic goods with little regard to distribution. These effects have not been limited to Australia of course, but have been world-wide phenomena. Consequently, some of the discussion which follows will include references to international standards, issues, and universities.  

\[244\]

\[243\] Ibid p. 25.
The Australian Universities Commission survived until 1974, after which it was re-named Commonwealth Tertiary Education Commission by amending the University Commission Act 1974 (Cth). This Act was repealed in 1977 and following a re-organisation to encompass the whole of tertiary education in Australia a completely new piece of legislation the Commonwealth Tertiary Education Commission Act 1977 (Cth) was enacted. The statute charged the Commission with a much larger mandate, functioning essentially as a comprehensive source of information on the institutions of higher education being the university, the colleges of advanced education, and TAFE as well as various specialised organizations (s.7). Its mandate allowed it to report to the minister on any matter related to tertiary education that it considered important. In other words, it was not limited to answering questions, but was able to provide a professional opinion on its own initiative on matters it deemed important to the sector. However, its was circumscribed by the legislation with respect to the internal, academic matters of the various autonomous institutions. Section 7(4) reads: “The functions conferred on the Commission do not extend to matters that relate to a course, or courses, at an institution … of tertiary education.” This restriction is significant in that it permitted organisations to follow their own paths, conform to institutional norms, and had the effect of promoting diversity.

In addition to the mandate of “balanced” development for all of Australia drawn from the prior Act, the Commission was charged with seeking to increase higher education opportunities and increase cooperation across the sector’s institutions s 8(2)(b)-(c). The commissioners were an equal mix of specialised civil servants and experts s 10.

The Act specifically excluded for profit provision of tertiary education s 5 and there was a clear commitment to tertiary education as a public good. It may be implied from these provisions that there is a view that profit making motivations are in conflict with the production and distribution of public goods. The nation state had an obligation to educate its populace.

The establishment of this Commission marked formal recognition (as opposed to Murray informal acknowledgement) of the transition from elite to mass higher
education. By composing the group of commissioners with a balance of bureaucrats, non-academics, and academics, the commission expresses the view that the university is not solely for the elite. Rather, it is a public concern, the funding of which is a matter for those not holding positions within the institution. Further, the Act marked the shift of university governance from academic centric to management centric by displacing academics from the centre of university affairs at the higher level of the commission.

The CTEC was also the final buffer to exist between the university and government. The CTEC was dissolved by Minister John Dawkins in 1988 when its experts refused to conform to his economic view of the university. Essentially, it had provided direct accountability to Parliament and refused rationalist economic orthodoxy doctrines, setting itself up for excommunication. Marginson describes the era as one of “ministerialisation” which he describes as “the imposition of economic agendas and the displacement of the role of the directors-general of education by generic managers without the same interest in policy or professional matters.”

In other words, this shift marks a change from education as a matter of specialisation and professional concern with significant public goods dimensions, to education as another contribution to the economy, simply a private economic commodity the production and distribution of which is to be controlled by business managers. This view reflects economic and business scholars’ belief in “context indifferent” management discussed in the previous chapter.


The mid-1980’s under the Hawke Labor government adopted a neo-Keynesian approach of coordinating labour and business interests, taking on the management mantra of “do more with less”. This movement emphasized the

---


measurement of the effectiveness of policy by constant monitoring and checking whether desired results were achieved. One very significant impact was “managerialism,” which greatly increased power and profile of senior bureaucrats and managers who came to view constant change as an important strategy and basis for personal advancement, while decreasing the focus on the tasks at hand. The language of accountability, strategic planning, and the tying of departments to performance plans closely linked to policy was introduced. This change reflected a hardening economic climate, a loss of faith in government, and the rising strength of neoliberalism and its commitment to the private economic benefits over equity and public good. This change, it would appear, complemented a change in industrial policy as government ministers considered Australia’s balance of trade in light what they believed to be an impending decline in the value of primary industries particularly as globalisation began shifting toward a knowledge economy. Looking for new sources of wealth, ministers looked to the university as a potential industry providing new revenues.

A vast series of reforms referred to earlier were initiated by Hawke’s minister for Education and Training, John Dawkins. Dawkins conducted a review of the higher education system and started a series of structural reforms that have had a dramatic, long-lasting effect. Indeed, Marginson and Considine in their study of Australian universities consider the Dawkins reforms to be the most significant reforms to higher education policy to the time of their writing.

Dawkins labelled university administration archaic, preferred a five year probationary period, proposed professorships to be temporary and subject to

---

250 Ibid p. 27.
252 This was first suggested to me by Margaret Thornton. A similar vein of thinking can be found in Davidson, K. (2009). An industry policy is vital for growth. The Age. Melbourne.
seven year terms after which incumbents could re-apply, opposed the elections of deans, supported dividing the academic profession by rewarding achievers (those who publish rapidly), and punishing those who fail to perform—although the same criteria is noticeably absent in his discussion of management. In Dawkins’ words: “inadequate performance should not be protected.”

Problematically, Dawkins’ Report has no references and so provides no evidence for his assertions. Marginson describes Dawkins policies as

statements of policy as truth that were designed to secure authority over education and its professionals, to demonstrate that authority to an outside public in business and the media, and to open education to external intervention. They were not descriptions or analysis, and were not subject to testing or verification.

Dawkins, an economist by training, re-envisioned higher education as an industry and unsurprisingly his policy document reads like an economist’s analysis of the system. While he acknowledged social, personal development and cultural contributions of the university, the public socio-economic goods and private social goods, the bulk of the document stands on economic issues, and in particular private economic goods. For example, Dawkins’ objective was “outputs”, and in particular, degree graduates ready for the workforce, a rather narrow training view of the university. As another example, the review is oriented by his statement that Japanese and American policies see higher education as “important sources of their economic strength and vitality,” that technical change requires more skilled workers in design, production and management, and in his comparisons of Australia economy with the economies of other OECD countries.

Reading Dawkins one gets the impression he viewed the higher education “industry” as a terra nullius, a wholly malleable collection of inputs from which

255 Ibid p. 58.
256 Ibid p. 50.
257 Ibid p. 56.
he was seeking certain measurable outputs. His policy instruments are command and control with an element of markets. Dawkins, however, was not naive about the traditions in the organizations that were located in his *terra nullius*. He makes his scepticism of the university clear and uses it to justify his policy instrument choice: “unless an institution has that commitment [to a profile agreed with the Federal government] it will inevitably regard its profile as a limiting factor to be ignored or bypassed.”\(^{261}\) In other words, Dawkins was clear about the university’s institutions of public socio-economic goods and private social goods as well as the power of the academic profession to resist. He was worried they would thwart his private economic agenda unless he could silence and control it. Lacking legal jurisdiction to command the university and so unable to withdraw the Federal government’s organisational resources, he had only the tool of treasure by which he could exercise control.

The Dawkins review was explicitly focused on achieving organisational growth, in an environment of declining resources. The shortfall was to be made up from efficiencies and finding new sources of funding. Dawkins was explicit about his policy. He wrote on the first page of the Green paper “growth in a climate of continuing financial restraint will require close attention to the efficient use of resources.”\(^{262}\) How was this efficiency to be obtained? Dawkins provided a blueprint. At a systemic level, Dawkins did not see diversity. Rather, Dawkins saw a fragmented and poorly coordinated situation with universities, Colleges of Advanced Education (CAE’s) and Technical And Further Education (TAFE’s) organizations all offering of tertiary education to Australians. Through his economist’s eyes, he saw opportunities to make the system work more efficiently by changing from a binary university-CAE system to a unitary system, by combining small institutions, improving the ease of movement of students through the system’s various types of tertiary institutions, including course recognition and transfer. Thus he proposed a more coherent system, coordinated at a national level by the Federal government. The latter point was important: Dawkins made it clear that a re-structured system would make it easier for the Federal government to achieve its policy ends of having a well-trained

\(^{261}\) Ibid p. 29.

\(^{262}\) Ibid p. 1
competitive workforce—a source of serious concern for Dawkins.\textsuperscript{263} As is evident from subsequent Federal government actions, the university has been used to achieve many other Federal government policy aims, discussed in detail later in this chapter. It should be noted that under-funding provides additional leverage to government as cash starved organisations will be more compliant with government demands.\textsuperscript{264}

At an organizational level, ironically Dawkins determined that his efficiencies could be achieved by a combination of: institutional specialization, diversity, a dominant focus on teaching, competition for funding, flexible staffing, and causing them to be “more focused.”\textsuperscript{265} Internally Dawkins saw serious “constraints.” Chief among his concern was the academic profession’s board, which when over 100 persons can cause “important decisions [to be]... delayed, causing inefficiencies and inaction.”\textsuperscript{266} In particular, the Academic board and other bodies said Dawkins were: “not [to] function to dilute the management power of the chief executive or to restrict appropriate delegation to those who should have responsibility at other levels.”\textsuperscript{267} While Dawkins repeatedly stated it was not the Federal government’s role to meddle in the internal affairs of the university, his determination of the size of boards, appointments to those boards, the roles of committees and the subordinate place of academics seemed to suggest the contrary. Indeed, Dawkins appears to have stepped further into the university than any of his predecessors. Troublingly, as previously noted, there was no evidentiary basis for his determination that the arrangements were inefficient and ineffective in the first instance. Understandably, Dawkins was worried that his reforms would not be adopted with alacrity by the university organisations.

For Dawkins the definition of “university” was primarily an economic one and must be drawn from two related sections of the report. A university must have

\textsuperscript{263} Ibid Preface iii-iv.
\textsuperscript{266} Ibid p. 50.
\textsuperscript{267} Ibid p. 51.
more than 5,000 students, and offer “an appropriate range of undergraduate and post-graduate programs” in three areas.\textsuperscript{268} The definition has no clear conception of the institution and its distinct mission nor its organisation. He did not mention academic staff, which presumably Dawkins would acknowledge are an important part of an organization calling itself a university, nor give any idea what “three areas” means: one cannot know if Dawkins meant broadly arts, science and medicine, or something as narrow as medieval English, modern English and English as a second language. This bare definition of the university underscores Dawkins view of the sector as a production centre in a market economy rather than a critical social institution tasked with the creation, dissemination and preservation of significant non-economic, social, public goods. Dawkins set the university on a trajectory of increasing regulatory incoherence from which it has not turned.

Finally, as Dawkins made clear funds would not be increasing. He steered the university toward private funding in the form of consultancies, commercialisation of research, and private fee-paying international students (of which there were about 1,000 in his time). Whereas up until Dawkins’s reforms Australia had been a contributor to the international community, providing scholarships and support under the Colombo plan to the best and brightest in developing nations in the region, so developing a reputation for quality, Dawkins saw this contribution as a waste. This decision was part of a broader neoliberal commitment to colonising public social production with private enterprise. In line with this change of views, Dawkins saw a great market opportunity in Asia. The reputation for quality could attract private investment and used to subsidise the education of Australians and the best and brightest from needy countries would find their own ways.

As previously mentioned, Dawkins dissolved the CTEC, a well-informed agency which had provided an informed view on the sector. In line with its tradition of integrity without regard to political concerns, it criticised Dawkins policy. Dawkins retaliated by strategically creating a “purple circle” of supporters from

\textsuperscript{268} Ibid pp. 34-5.
the sector, effectively silencing opposition by excluding them from this informal policy body.\textsuperscript{269} Dawkins’ NPM in this matter mirrored closely that of his UK counterparts. Dissolving the University Grants Commission and in its stead creating the University Funding Council (later renamed Higher Education Funding Council), the UK neoliberal government was able to change its position from receiving advice to imposing an agenda. As Power observes: “These institutional changes signalled a fundamental shift in evaluative philosophy… from … local forms of self-evaluation to standardised measures of output.”\textsuperscript{270}

Despite the rhetoric of efficiency and consumer choice from rationalisations, Marginson and Considine observe:

“Rarely was efficiency or consumer choice uppermost. For example, it was taken as a virtual necessity that the major universities would simply absorb any CAE close to their main campus and that such institutions would quickly lose their identity and distinct purpose…. Few would afterwards argue that the allocations followed any pattern or served any wider purpose than the crude fact that many were easily reduced to few.”\textsuperscript{271}

This post-facto evaluation of the merger activity initiated by the government further evidences ideology as the driver rather than economic rationality, public benefit, or regulatory coherence.\textsuperscript{272}

Dissolving the CTEC allowed Dawkins the Federal minister to control university organisations directly individually and not as a group. He did this by introducing the \textit{Higher Education Funding Act 1988} (Cth). That legislation replacing the \textit{Universities (Financial Assistance) Act 1963} (Cth) marked the start of steering from a distance by tight control on finances, by careful targeting and by under funding, creating new pressures on university organizations to comply with Federal government ideology on higher education. In anticipation of the

\textsuperscript{269} Ibid p. 31.  
legislation the Federal government established the Higher Education Council which took on the advisory role of the CTEC but not the coordinating role.\textsuperscript{273}

f. West and Nelson Reports: hardening ideology under Howard:

The Liberal/National Coalition government under Prime Minister John Howard drove Australia further to the political right/conservatism. With respect to tertiary education policy, Howard’s Liberal coalition government continued the policies set by the previous Labor governments, but with markedly increased intensity. The impact on higher education policy in this environment is predictable.

Howard commissioned two reports: the West Report and the Nelson Report. The West Report came from a man who was a banker with no public experience and contributed little to the university. His advice was simply more neoliberal markets and private sector management practices—aligning with the NPM agenda of the government.\textsuperscript{274} The Nelson Report\textsuperscript{275} provided little more than promises of further funding.\textsuperscript{276} The net outcome of the Howard government has been that the changes since 1990 have been more profound than those in the revolutionary prior 40 years.\textsuperscript{277} What in substance are these changes? David Pick provides an overview of Australian higher education policy over the last two decades.\textsuperscript{278}

Pick writes:

This policy shift is significant in that at its core is an acceleration of the privatization of Australian universities through industrial relations reform, changes to student fees, increased competition and continued reductions in government funding support… reshaping the higher education system [even] beyond that envisaged in the Dawkins reforms of

the 1980s representing a further shifting of universities from their traditional roles and functions.279

These changes reflect frame shifts. In terms of Australian educational policy, Pick sees a frame shift in two steps. These are:

“a reinterpreting of the deeply held cultural values of nation building. This reinterpretation was, first, from one of national, social and economic development to one that the future of the nation depends on being globally competitive (to be a lean and mean competitor in the global marketplace) and, second, to one that is focused on private gain and market competition.”280

This re-visioning of the Australian university has dramatically altered the core institutions of the university (discussed in Chapter 5). Traditionally the institution of the university held the academic profession in high esteem and had a strong mission of public service. The post-Dawkins era has seen in the marked decline of the status of the academics vis-à-vis administration (now called management to indicate the control it now exercises); a struggle for the university to re-define itself and present a coherent mission of public service and revenue generation in the midst of on-going financial crisis. The new university has been described as the “Enterprise University” by Marginson and Considine who see it as an organization with the combined aims of economic sustainability in a hardening financial climate while struggling to maintain institutional prestige.281 This Enterprise University looks to re-shape or “re-invent” itself as a service provider, tends to be short-term, and a in a constant state of re-organization as management use re-organisation as a strategy to create instability.282 The outcome of the Howard era was a rigid, system in which university corporations had no effective discretion,283 one third were in a precarious financial condition,284 the system in a state of serious decline, and

279 Ibid p. 229.
280 Ibid p. 231.
282 Ibid p. 61.
284 Ibid p. 48.
burdened with the reporting requirements a summarized version of which occupies fourteen pages when set out in chart forms.285

g. The Bradley Review, Rudd and Gillard: Changing Directions?

Part of Labor’s 2007 election platform was renewed interest in education, including higher education. To that end, on 13 March 2008, the then Deputy Prime Minister, Julia Gillard initiated a Review of Australian Higher Education. After an initial consultation document, an invitation for submissions, and a series of nation-wide consultations, the Chair of the review, Professor D. Bradley, a former Vice Chancellor of the University of South Australia submitted a 271 page report on 12 December of that same year.286

The report is markedly different from all since Dawkins for a number of reasons. First, and perhaps most importantly, it was given a comprehensive mandate in its terms of reference. The effect of the broad terms of reference was that a systemic review was possible. In contrast to the Dawkins Report, not only was it based on significant, referenced research, and broad consultation, its evaluation moved beyond the narrow confines of economic analysis to a more realistic evaluation of the situation. Perhaps most importantly the Review acknowledged that the Howard government failed Australian society by failing to safe-guard the higher education system. Howard’s policy failed this important objective by its protracted and significant under-funding which sent the system into a serious decline.

For example, Bradley pointed out that the policy goal of developing diversity in the university corporations through management was unrealistic. She observed that this goal was unrealistic because “under the current framework, the general mission and strategic direction and the level of student load cannot be implemented or applied in any practical sense without the approval of the

Commonwealth government.287 Bradley also noted serious problems with the quality of student experience.288 This problem was one of the results of under-funding which led to high student-staff ratios and efforts to compensate using information technology. She also noted the undermining student ability to solve collective needs by the removal of compulsory student union fees.

Turning to the Australian university’s increased international activity, and the growing dependence on revenues from selling education, Bradley also found cause for significant concern. She noted that the reliance on international students for funding the university’s basic operations, and the vulnerability of the sector to changes in demand whether resulting from competition or variation in the economic environment and the system as a whole vulnerable to economically induced collapse.

The Bradley Report while identifying areas of significant problems and making recommendations for change, in other areas continues some of the direction identified earlier with Dawkins. In particular, despite a greater acknowledgement of the non-economic role of the university—i.e. the social and public role of the university—Bradley’s focus and recommendations continue with the conception of higher education being primarily a private economic good. That is, Bradley focuses on the role of higher education in preparing students for the workforce and does so by framing the social problem as a matter of international competition. While students educated to participate in the workforce contribute to the overall public good, the focus on their individual economic benefit permits them to be classified as a private good—and so provides a policy justification for increasing individual student fees. Bradley also continues the error of equating the aggregate of individual preferences as an expression of collective preferences.289 That is, she advocates relying on individual student demand as the only criteria for the creation, preservation and

dissemination of knowledge and education without regard to the needs of society as a collective whole.

By excluding all but the individual student as the beneficiary of the private economic good of education, Bradley ignores the important social and political roles of the university identified by her earlier—i.e. the university as a space for informed debate about the shape of society, model of democratic governance, and a place for civic and non-economic values of public collective existence. Its unique place as a public outpost apart from the market, organised on a basis other than economic and political power, and the last and best opportunity for shaping preferences prior to participation in the workplace. Her private focus precludes her from seeing the problem of increased enrolments in a narrow range of business and related disciplines.

Bradley provides a number of recommendations. The Bradley Review recommends regulating the university and tertiary education providers by markets and in particular by way of competition between higher education organisations for student consumers empowered with vouchers and by way of competition for funding for teaching and research. This set of controls is to be supplemented by a new regulatory agency. In sum, the report’s regulatory recommendations are use of regulation for competition, regulation by information, and regulation by consensus and resort to the policy tools of treasure, nodality and organisation.

The Rudd Labor government accepted for the most part the Bradley Review and its recommendations. The education revolution was to form one third of the government’s broad policy initiatives along with climate change and broadband.290 In the policy paper released in 2009, Transforming Australia’s Higher Education System,291 the Rudd government set out ten broad policy initiatives which can be summarised as follows: growth in size, diversity and

---

291 Ibid.
participation, increased capital and operations funding, reformed regulatory administrative arrangements, and a demand driven system for education.

While the bills for the reform have not been tabled in Parliament and so no further description of the details of the Rudd reforms is possible, it is possible to identify some of the parameters of the changes—which appear to be still in place under the Gillard government. The 2009 budget set out significant funding for the university. It included $500 million for infrastructure, indexation for research funding, and a host of other initiatives.292

The Rudd government has also indicated its intention to set up a new quality agency to be known as the Tertiary Education Quality and Standards Agency (TEQSA). This agency is to be tasked with a wide set of responsibilities. The policy paper states:

It will accredit providers, evaluate the performance of institutions and programs, encourage best practice, simplify current regulatory arrangements and provide greater national consistency…. [it] will take the lead in coordinating this work.293

Next, it is responsible to establish “objective and comparative benchmarks of quality and performance.”294 Further, the policy paper advises that “[t]he agency will collect richer data and monitor performance in areas such as student selection, retention and exit standards, and graduate employment.”295 This increased data collection will certainly increase reporting loads on university organisations. In addition, TEQSA “will evaluate the performance of universities and other higher education providers.”296 It will have the power to deny the right of an organisation to use the title “university.” From a regulatory perspective, the charging of a single agency with rule making, rule enforcement and adjudication is a problematic decision. However, it appears the Rudd and, subsequently, the Gillard governments is prepared to do so.

292 Ibid.
293 Ibid.
294 Ibid.
295 Ibid.
296 Ibid.
Finally, the Labor government plans to fund the university system on the basis of student demands. That is, rather than either centrally planned matching of university programs and places, or university organisations deciding what programs to offer, university organisations will have to provide programs and courses to the demands of students. This system appears to be an implementation of the voucher system proposed by Bradley.\textsuperscript{297} As discussed in the previous chapter, a voucher system is a type of market instrument.


The regulatory framework for the university is a complex matrix of instruments. It involves both state and commonwealth governments for historic and constitutional reasons. As noted the university corporations are creatures of state legislation. All of them, with the exception of The Australian National University which was created pursuant to Federal legislation, were created by a State or Territory enactment.

Constitutionally, the Commonwealth has no power over education. Pursuant to s. 51 xxiii of the \textit{Commonwealth} the Federal government’s sole responsibility with respect to education is for ensuring students are properly funded. Accordingly, for the Commonwealth to exert power over the university corporations it cannot use tools of authority. Such being the case, one would not expect in the examination of the legislation to encounter a command and control approach to regulating the university corporations. One expects and does indeed find, soft law methods of regulation, particularly using government’s treasury tool and incentives. The States have been sidelined in terms of their control of the university, for without funds, they are largely without say. They are able to advance their interests solely through the newly created Ministerial Council for Tertiary Education and Employment.\textsuperscript{298}

\textsuperscript{297} For discussion see Sheehy, B. (2010). "Regulation by Markets and the Bradley Review of Australian Higher Education " \textit{Australian Universities' Review} 52(1): 60-68.
The use of treasure incentives fit neatly with the neoliberal rhetoric of “choice” and autonomy. Such choice is supposed to represent autonomy. It has more accurately been described as “a paradox: it is the autonomy to be free to conform.”\(^{299}\) Hence, the Commonwealth has invited university organizations to choose to comply or be cut off from funding and fail. The general criteria and conditions for funding, a practice first established after the Murray Report, are contained in the relevant statutes; the details of specific compliance are contained in individual contracts negotiated between the individual university organizations and the Commonwealth. The legislation is discussed next. Efforts to obtain a negotiated contract, or compact between a university and the Commonwealth have been fruitless—a matter addressed by the proposed new compact regime under the Gillard government which will publish the compacts on Commonwealth websites.\(^{300}\)


The foundation for higher education regulation in Australia is the *Higher Education Support Act 2003* (Cth).\(^{301}\) It instrument is composed of seven chapters and runs to some 387 pages in length and includes a “dictionary” as Schedule 1.

The objects of the Act are broad, diverse and at least to some degree in clear conflict. They are set out in section 2 which reads as follows:

The objects of this Act are:
  (a) to support a higher education system that:
      (i) is characterised by quality, diversity and equity of access;
      (ii) contributes to the development of cultural and intellectual life in Australia; and
      (iii) is appropriate to meet Australia’s social and economic needs for a highly educated and skilled population;


\(^{301}\) The 15 December 2009 compilation has been used.
Paragraph (a) addresses the system of higher education in Australia. It views this level of education as a whole, and within this system is the university. The university at this systemic level is analysed in Chapter 5 of this dissertation as an institution. Clear conflicts in the objects of legislation are evident in subparagraph (a)(i) as “quality” understood as a high standard of knowledge is likely to be in conflict with equity of access. This and other conflicts at the institutional level are discussed in Chapter 5. Subparagraphs (ii) and (iii) are objects best cast as social and public good, which include public economy.

The objects of the Act are continued in section 2, defined as:

(b)  to support the distinctive purposes of universities, which are:

(i) the education of persons, enabling them to take a leadership role in the intellectual, cultural, economic and social development of their communities; and

(ii) the creation and advancement of knowledge; and

(iii) the application of knowledge and discoveries to the betterment of communities in Australia and internationally; recognising that universities are established under laws of the Commonwealth, the States and the Territories that empower them to achieve their objectives as autonomous institutions through governing bodies that are responsible for both the university’s overall performance and its ongoing independence.

In paragraph (b), the legislation seems to have made a jump from the higher education system or institution of paragraph (a) to individual universities, and the objects of this subsection are directed to those individual university organisations. It is not clear that the legislators intended the shift. Again, these objects are not necessarily coherent. For example, education is not necessarily coherent with enabling a person for leadership (i), nor is education necessarily coherent with the applications of knowledge (iii). A further incoherence occurs where the balance of the Act is about control, reporting and accountability, yet the final part of the subsection identifies them as “autonomous institutions” and further injects its own organisational preference of “governing bodies that are responsible for both the university’s overall performance and its ongoing independence.” These matters are taken up in Chapter 6 addressing the organisational form of the university.
The final two paragraphs of the section address broad political, economic, social and globalisation objectives, and the actual purpose—funding.

(c) to strengthen Australia’s knowledge base, and enhance the contribution of Australia’s research capabilities to national economic development, international competitiveness and the attainment of social goals;

These objects are clearly the priorities of government. All three objectives—the development of a knowledge base that supports the Australian economy, the power of Australia in the international political and economic arenas—are important political priorities. The added “attainment of social goals” appears to be an effort to align or improve coherence between the former goals with the institutional and organisational objects of higher education and the university respectively. The final paragraph, which reads: “(d) to support students undertaking higher education and certain vocational education and training” seems to be the basic objective and consistent with the Commonwealth’s constitutional jurisdiction as discussed below.

Despite its size, it provides little detail of the regulatory techniques of incentive programs; rather it provides a general framework as well as the administrative framework for reporting and student financing. The Act has two main funding provisions: the Commonwealth Grant Scheme, and the Other Grants. Each of these will be examined in detail below.

The main exercise over the administration of the universities is set out in the appendix of National Protocols for Higher Education, and the funding formulae. Incorporated by reference in s. 19.20 of the legislation, the National Protocols form an important part of the main legislation. The Protocols are composed of an introduction and five independent individual protocols titled Protocol A-Protocol D.

Their primary objective is to set standards regulating entry into and maintenance of status as organisations providing higher education in the Australian higher education sector. They address the criteria for classification as a higher education provider in Australia, accreditation of “non self-accrediting”
institutions and their courses, self-accrediting non-university providers, establishment of new Australian universities, and overseas higher education providers wishing to operate in Australia respectively. The Labor government has declared that they remain in force and in any event have become institutionalised.

The significance of the status is the access to public funds for capital and operating costs as well as tuition subsidies in the form of loans to students. Accordingly, the Federal government is able to control these bodies in the absence of jurisdictional authority, by denying them access to funds. Further, it has regulated the use of the term “university” to limit organisations’ use of the term to those organisations which comply with Federal government research agendas.

The dissertation next turns to examine the relevant protocols in some detail.

i. Protocol A—All Higher Education Institutions

All such institutions (organizations in this dissertation) must be

“a legal entity... recognized by... Australian legislative instrument... contribute to the [national] goals of higher education... [have] a higher education purpose that... support[s]... free intellectual inquiry... delivers teaching... with advanced knowledge... has governance arrangements, quality assurance processes and [an appropriate] staffing profile. [must have] sound financial and business management... comply with AQF [where granting qualifications]... academic staff ... active in scholarship that informs their teaching... provide sufficient support and infrastructure for effective student learning and provide... for protection of students in the event of closure of the entity or any of its courses.”

Essentially, this protocol establishes the ground rules. The legal entity must be a corporation or a trust. Reference is made to “national goals of higher education”. Puzzlingly, neither the legislation nor government policy has any list of “national goals of higher education”—nor even a reference to such in the Department

charged with the education portfolio. The Act does refer to “national priorities” and offers the following definition.

Section 30.20 National priorities

A national priority is a particular outcome:
(a) that relates to the provision of higher education; and
(b) that is an outcome specified in the Commonwealth Grant Scheme Guidelines as a national priority.

Given the vague definition, the same section of the Act goes on to provide some specific examples.

“The following are examples of national priorities:
(a) increasing the number of persons undertaking particular courses of study;
(b) increasing the number of particular kinds of persons undertaking courses of study;
(c) increasing the number of persons in particular regions undertaking courses of study.

Despite this assistance, however, the relationship between “national priorities” and “national goals” is unclear.

Higher education (and hence its purpose) is likewise not defined. Higher education may cover anything from hairdressing to astrophysics. Traditionally, higher education would require the critical faculties to be engaged and demand at least something more than basic job skills. This notion of higher education is expressed in the National Protocol’s phrases “free intellectual inquiry” and possibly in “advanced knowledge.” The focus on intellectual development here is clear.

The protocol then identifies the practical concern of delivering teaching, and shifts to managerial concerns: governance arrangements, quality assurance, staffing profile—and some pressure for scholarship, business plan, and infrastructure for students.

These basic criteria for higher education institutions are supplemented by an additional protocol for the university.

ii. Protocol D

This protocol is a supplement to Protocol A for university corporations. It reads in part:

“in addition to meeting the nationally agreed general criteria... an Australian university will meet the following criteria:... a culture of sustained scholarship... in all fields in which courses are offered; undertakes research that leads to the creation of new knowledge... in those fields in which Research Masters and PhDs... are offered; demonstrates commitment of teachers, researchers, course designers and assessors to free inquiry and the systematic advancement of knowledge... demonstrate governance [and process] admission policies... underpinned by the values and goals of universities... and which ensure the integrity of the institution’s academic programs” and “deliver AQF higher education qualifications across a range of broad fields of study... and sets standards for those qualifications which are equivalent to Australian and international standards.”

This protocol differs in that it calls for “sustained” scholarship as a culture of the corporation in all areas taught. Further, where higher research degrees are being offered, research in the fields offered is required. Courses are to be designed to facilitate “free inquiry”—that is not simple mastery of skills.

The protocol identifies the normative “values and goals of universities”; however, it does not specify or define them. Rather, it appears to be a reference to the informal, institutional norms of the universities—discussed in detail in Chapter 5 of this dissertation. Importantly, despite mandating quality assurance management processes, it places these institutional norms as the foundations for appropriate admission policies and integrity of the academic programs. Again, integrity is not defined and can be widely interpreted from meaning avoidance of plagiarism to philosophical integrity of adherence to values of knowledge generally throughout all programs.

The protocol also addresses the managerial concerns of governance and compliance with Australian Qualifications Framework.

In essence, this Protocol establishes a baseline for university organizations and does so at least in part by institutionalising the values of the academic profession.
Curiously, it does so not by empowering the academic profession, but by empowering management while undermining the basic mechanisms of quality control—adequate control of inputs; adequate resourcing; restricting access to suitably qualified students, and employment of suitably qualified academics.

iii. State University Acts and University Corporations Law

The States’ Ministries of Education have enacted various pieces of legislation to regulate university corporations operating within their jurisdiction. The legislation since Dawkins has for the most part been simply brought the state statutes into conformity with the imperatives imposed by the Federal government. 304

The university organisations are all incorporated bodies. That is, each one is a corporation created by statute. Unlike Corporations Act companies, they have restricted membership and objects clauses that restrict their activities. For example, membership in Melbourne University is limited to the following:

(a) a council and its members;
(b) the graduates;
(c) the professors;
(d) members of the academic staff;
(e) members of the faculties and boards of studies;
(f) the graduate students;
(g) the undergraduate students;
(h) the diplomates;
(i) such members of the staff of the University, other than the academic staff, as are designated from time to time by the council;
(j) such members of the staffs of the affiliated colleges as are designated from time to time by the council as members of the University; and
(k) such students (if any) as are neither graduate students nor undergraduate students. 305

Further, it is limited to the following objects:

The objects of the University include—

304 See for example Higher Education Acts (Amendment) Act 2005 (Vic).
305 Melbourne University Act 1938 (Vic) s 4(1).
(a) to provide and maintain a teaching and learning environment of excellent quality offering higher education at an international standard;
(b) to undertake scholarship, research and research training of international standing and to apply that scholarship and research to the advancement of knowledge and to the benefit of the well-being of the Victorian, Australian and international communities;
(c) to equip graduates of the University to excel in their chosen careers and to contribute to the life of the community;
(d) to serve the Victorian, Australian and international communities and the public interest by—
(1) enriching cultural and community life;
(2) elevating public awareness of educational, scientific and artistic developments;
(3) promoting critical enquiry, informed intellectual discourse and public debate within the University and in the wider society;
(e) to confer degrees and grant diplomas, certificates and other awards.  

b. Soft Law: Regulation by Consensus, Code and Competitive Schemes

The funding itself is complex. It is broken up into at least seventeen different sources, some in the form of compliance grants and some in the form of competitive, contestable funding. Each of the various funds sets a distinct objective the government wishes to achieve and sets a pathway university organizations, having complied with the Protocols must further follow to obtain the associated funds—in Morgan and Yeung’s terms, regulation by code.  

A primary government objective for the university are its economic goal: supplying the labour market with trained graduates, minimising expenditure of public funds by characterising higher education as a primarily private good and charging fees accordingly, and maintaining higher education as a significant source of export generated revenues, which it does through positioning the Australian university as a high quality institution.

306 Ibid s. 4A.
A brief review of the major public funding sources follows. It should be noted that private sources of funding are primarily student fees in the form of domestic subsidies and from international students who pay full fees. Unlike other developed countries, the role of philanthropic and industry investment in university based research is minimal in Australia.

i. Commonwealth Grant Scheme

This grant scheme is developed pursuant to Part2-2 of the *Higher Education Support Act 2003* (Cth). As the basic grant, it is fairly comprehensive addressing all of the following:

- National priorities
- Regional loading
- Medical student loading
- Enabling loading
- National Governance Protocols & Higher Education Workplace Relations Requirements
- Adjustments to basic grant amounts
- Determining the funding clusters
- Special purpose advances

This grant supports the basic teaching activities of the university organisation. As the government explains, it “supports the provision of undergraduate and some non-research postgraduate higher education places.”

While government does not specify which disciplines should be offered by a university, or how a particular university should manage its funds, the government controls the course offerings by the Commonwealth Grant Scheme. Government does so by providing individual higher education providers an amount for an agreed number of Equivalent Full Time Student Load in a given year. The amount is determined by reference to overall numbers per discipline cluster as established by the government. That is, funding is set to government calculations of costs associated with teaching each clusters regardless of student interest or other social or public motivations.

309 *Higher Education Support Act 2003* (Cth) s 30-15
310 Ibid s 30-1,(1)(b).
Government will provide higher subsidies to some subject clusters, but will set the numbers of subsidies available. For example, it funds commerce and law at a cluster 1 level of $1,674 and humanities at $4,647. However, it may fund 15,000 law places but only 1,000 humanities places. Non-economic objectives such as personal development, arts and social projects will receive only limited funds. Indeed, the Minister has the discretion to determine that any particular course should not be supported by the Federal government under the Commonwealth Grant Scheme—and no guidelines for the exercise of that discretion are offered. The Grant Scheme is highly prescriptive in the powers granted to the Minister including the discretion to provide no commonwealth supported places at all to any particular higher education provider.

In other words, a limited amount of funding will be assigned to clusters that are not supported by government—regardless of student interest or other social or public motivations—and government will fund those interests it seeks to advance. In line with political debate in Australia being focused on economic growth, and government’s strong commitment to neoliberalism and economic rationalism raise the possibility that priority will be given to those clusters which advance those objectives.

ii. Other Grant Schemes

The Higher Education Support Act 2003 (Cth) works as incentive based instrument in other ways to achieve “national priorities”—defined as above and explained in the previous paragraph. Section 41-10 is a table of programs and incentive based programs.

<table>
<thead>
<tr>
<th>Eligibility for grants under this Part</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Item</td>
<td>Purpose of grant</td>
<td>Who is eligible</td>
</tr>
<tr>
<td>1</td>
<td>Grants to promote equality of opportunity in higher education</td>
<td>Table A providers</td>
</tr>
</tbody>
</table>

311 Ibid s 33-10.
312 Ibid s 30-25, (2A) see note therein.
313 Ibid s 30-25 generally.
314 Ibid s 30-10(1) “the Minister may allocate a specified number of Commonwealth supported places to a higher education provider for that year.” Italics added.
<table>
<thead>
<tr>
<th>Item</th>
<th>Purpose of grant</th>
<th>Who is eligible</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Grants to promote the productivity of higher education providers</td>
<td>“Table A providers”</td>
</tr>
<tr>
<td>3</td>
<td>Grants to enhance learning and teaching in higher education</td>
<td>“Table A providers”</td>
</tr>
<tr>
<td>4</td>
<td>Grants to support national institutes specified in the Other Grants Guidelines for the purposes of this item</td>
<td>“Table A providers”</td>
</tr>
<tr>
<td>5</td>
<td>Grants to support the capital development projects of higher education providers</td>
<td>“Table A providers and “Table B providers”</td>
</tr>
<tr>
<td>6</td>
<td>Grants to assist with the cost of higher education providers’ superannuation liabilities</td>
<td>“Table A providers”</td>
</tr>
<tr>
<td>7</td>
<td>Grants to support research by, and the research capability of, higher education providers</td>
<td>“Table A providers and “Table B providers”</td>
</tr>
<tr>
<td>8</td>
<td>Grants to support the training of research students</td>
<td>“Table A providers and “Table B providers”</td>
</tr>
<tr>
<td>8A</td>
<td>Grants to assist with the cost of providing the practical component of teacher education</td>
<td>“Table A providers, “Table B providers, and bodies corporate that are specified in the Other Grants Guidelines for the purposes of this item</td>
</tr>
<tr>
<td>9</td>
<td>Grants to foster collaboration and reform in higher education</td>
<td>“Table A providers and bodies corporate that are specified in the Other Grants Guidelines for the purposes of this item</td>
</tr>
<tr>
<td>9A</td>
<td>Grants to support diversity and structural reform</td>
<td>“Table A providers, “Table B providers that are universities, and bodies corporate that are specified in the Other Grants Guidelines for the purposes of this item</td>
</tr>
<tr>
<td>9B</td>
<td>Grants to support structural adjustment</td>
<td>“Table A providers and “Table B providers that are universities”</td>
</tr>
<tr>
<td>10</td>
<td>Grants to support the development of systemic infrastructure used by higher education providers</td>
<td>“Table A providers and bodies corporate that are specified in the Other Grants Guidelines for the purposes of this item</td>
</tr>
<tr>
<td>11</td>
<td>Grants for activities that: (a) assure and enhance the quality of Australia’s higher education sector; or (b) foster an understanding of the importance of, or promote research and scholarship in, science, social science or the humanities in Australia; or (c) support open access to higher education across Australia.</td>
<td>“Table A providers and bodies corporate that are specified in the Other Grants Guidelines for the purposes of this item</td>
</tr>
<tr>
<td>12</td>
<td>Grants to assist higher education providers with the transitional costs of changes to maximum student contribution amounts</td>
<td>Higher education providers to which Commonwealth-supported places have been allocated for any year</td>
</tr>
</tbody>
</table>
These incentives further stretch university organisations to achieve government objectives in regional areas—maintaining regional economies and a locally trained workforce. That is, government provides revenues to revenue starved organisations to stay and service regional areas. In some instances, regional universities are the major employers in the region and critical to the on-going economic viability of those regional centres. Further, government is seeking to improve efficiencies in regional university organisations and is providing incentive funding to achieve that end.

A separate “medical student loading” is an incentive to train physicians—a long and gruelling training program that leaves significant parts of Australia underserviced. Thus, university organisations are conscripted to achieving this governmental task.

iii. Other Grants—Subsidiary Regulation

The Other Grants are regulated by two pieces of subsidiary legislation, Other Grants Guidelines (Research) 2009 (“Research Guidelines”) and Other Grants Guidelines (Education) 2008 (“Education Guidelines”). The Research Guidelines similarly have a variety of policy aims and objectives and set out many competitive research grants. These are set out in the four different chapters that make up the Guidelines. Chapter 1 has four grant schemes as follows. The Research Infrastructure Block Grants (RIBG) Scheme, is a scheme designed “to maintain and strengthen Australia’s knowledge base and research capabilities by developing an effective research and research training system.”

The Joint Research Engagement (JRE) program is designed to: “give greater emphasis to end-user research by encouraging and supporting collaborative

---


318 Other Grants Guidelines (Research) 2009. Commonwealth of Australia s 1.10
research activities between universities, industry and end-users, beyond those specifically supported by competitive grants.”

The Sustainable Research Excellence (SRE) in Universities program is designed to address the negative impacts resulting from more than a decade of under funding, specifically, “to ensure that these institutions are better placed to meet the indirect cost of research activities that are not entirely met by the various competitive grant programs.”

The final scheme in the chapter is the Institutional Grants Scheme (IGS). The IGS is an annual block grant to support research and research training activities. It allows discretion in spending on “any activity related to research.” The government adds: “Specifically, the IGS aims to… allow HEPs to manage their own research activities and set their own priorities, assist HEPs to response flexibly to their research environment in accordance with their own strategies [and] enhance support for areas of research strength.”

Under the Gillard government, following Rudd, the IGS is to be replaced by “compacts.” These compacts are comprehensive “agreements” between universities and the Federal government directly. In the language of the government, the compacts speak to “the responsibilities of the Commonwealth to ensure that the institutions it funds are sustainable and deliver the outputs for which they are funded, that their outcomes are of a high quality and that they comply with their legal obligations.”

This assessment framework addresses four government identified principle elements: organisational sustainability, achievements in higher education provision, quality outcomes, and compliance. Government monitors and evaluates each institution by an extensive data collection, annual reports from

---

319 Ibid 1.30.1.
320 Ibid 1.50.1.
each organisation, AUQA audits and biennial visits by senior bureaucrats from DEEWR and DIISR.

Chapter 2 of the Research Guidelines offer further competitive funding. The first of these is the Research Training Scheme (RTS). The objectives of this scheme are to increase the number and quality of trainee researchers. It is a scheme of block grants, granted on an annual basis to support research training for students undertaking Doctorate and Masters degrees by research.

The objectives of the RTS are to:

1. Enhance the quality of research training provision in Australia;
2. Improve the responsiveness of HEPs to the needs of their research students;
3. Encourage HEPs to develop their own research training profiles;
4. Ensure the relevance of research degree programs to labour market requirements; and
5. Improve the efficiency and effectiveness of research training.

In order to achieve this later result, students will have to be pushed through more quickly.

Government has also created a Commercialisation Training Scheme. The Guidelines state:

The objective of the CTS is to provide high quality research commercialisation training for the next generation of Australian researchers (Doctorate and masters by research students) as a means of equipping them with the skills, knowledge and experience necessary to bring research-based ideas, inventions and innovations to market.

In addition, the Guidelines make provision of non-public universities and bodies to access certain funds to assist with the development of infrastructure to assist in data collection and compliance for governmental purposes, as well as providing funds to other learned bodies, such as the learned academies of Australia.

---

324 Ibid., 20.40.1.
The Education Guidelines are made up of nine chapters setting out a variety of competitive grants to achieve various government policy aims. These include, Indigenous Support Program the purpose of which is: “to assist eligible higher education providers to meet the special needs of Indigenous Australian students and to advance the goals of the National Aboriginal and Torres Strait Islander Education Policy.”

The Equity and Disability grants are designed to “to undertake activities that assist in removing barriers to access for disadvantaged domestic students and promote equality of opportunity in higher education.”

A Disability Policy seeks to distribute funds through three programs:

(a) Additional Support for Students with Disabilities;
(b) Australian Disability Clearinghouse on Education and Training; and
(c) Performance-based Disability Support funding.

Another series of grants are aimed at Learning and Teaching. The Learning and Teaching Fund, is to “reward those higher education providers for excellence and improvement in learning and teaching.”

Special grants programs have been created to fund quality assurance and enhancement, and are available to some of the bodies that contribute to the soft law institutional regulation of the university. These are set out in the guidelines:

(a) The Australian Institute for Learning and Teaching in Higher Education (ALTC);
(b) The Australian Universities Quality Agency (AUQA);
(c) Graduate Careers Australia (GCA);
(d) The Australian Council for Educational Research Limited (ACER);
(e) Universities Australia (UA); and
(f) The Organisation for Economic, Co-operation and Development (OECD)

A special grant has been established for open access (Open University Australia).

---

326 Ibid 1.40.1.
327 Ibid 1.65.1.
328 Ibid 2.5.
329 Ibid 8.5.
330 Ibid 8.15.
A Diversity and Structural Adjustment Fund has been established for reform. Specifically, it seeks
to promote structural reform by eligible higher education providers that supports greater specialisation among providers, more diversity in the higher education sector and better responsiveness to labour markets operating in the local or national interest.  

In addition, funds are available under the Educational Guidelines for a variety of other policy initiatives.

iv. Non Higher Education Support Act competitive funding schemes

Outside of this legislation other funding schemes are or have been available. These include the Rudd Government’s Better Universities Renewal Funding (BURF) announced in the 2008-09 Budget as a one off $500 million to address the effects of the severe underfunding of previous governments on infrastructure; a Capital Development Pool (CDP) Program to encourage development of campuses in suburban growth corridors and regional centres and particularly projects which support greater collaboration between higher education providers and other organisations of all types, that assist higher education providers to establish or expand courses identified by the government as discipline areas of national importance, information and communications technology infrastructure projects which improve the cost-effectiveness and quality of educational delivery, and projects which enhance capital infrastructure for student amenities.

The Nation-building Funds Act 2008 (Cth) establishes the Education Investment Fund which subsumes Higher Education Endowment Fund. Under

331 Ibid.
334 Nation-building Funds Act 2008 (Cth).
this Act competitive funding for capital improvements is also available to higher education providers. A National Competitive Grants Program is administered by the ARC and NHMRC.\textsuperscript{336} In sum, there is a plethora of soft law incentive schemes which universities must diligently pursue in order to maintain financial viability. The regulatory choice of instruments appears to rely solely on competition.

5. Accountability for the Institution of the Australian University: Westminster

This section provides an overview of institutional accountability. That is it examines the accountability structure and processes for the university institution in Australia. In Australia, accountability for the university institution is in the first instance in the political arena via the Westminster system. This public accountability is a function of the location of the university on the public side of the public-private divide. The decision to create university corporations by way of Parliament makes them public bodies at law. Additionally, the use of public funds to operate the national system makes them public. Accordingly, both their individual status as statutory corporations and as a publicly funded system makes them public. That makes the State and Federal governments accountable for the university institution and corporations.

At the Federal level, the Department of Education, Employment and Workplace Relations reports to Parliament pursuant to section 63(1) of the Public Service Act 1999 (Cth). The most recent annual report, 2007-2008, expresses the Department’s view of that for which it is accountable to Parliament.\textsuperscript{337} In the first 264 page volume of the report, Higher Education is reported as “Outcome 3” and covers 24 pages. It offers an overview of the main activities, including the revocation of the National Governance Protocols (firmly entrenched in any event) and the Higher Education Workplace Relations Requirements— budget

\textsuperscript{336} Ibid.
information, measures of effectiveness with highlights and aggregates of funding programs and projects, and the plan for the sector under the Government. Parliament has remained silent about the reports.

Understanding whether, what and how the individual university corporations are achieving their mandates is done via an Institutional Assessment Framework. The report explains it thus:

The department monitors accountability, quality, fairness and financial viability of higher education institutions and the sector through the Institution Assessment Framework (IAF). The IAF aims to ensure that the institutions it funds are sustainable and deliver the outputs for which they are funded, that their outcomes are of high quality and that they comply with their legal obligations. The department’s assessments are based on quantitative and qualitative data from universities and external sources. Assessments focus on the four key areas of organisational sustainability, achievements in higher education provision, quality, and compliance with requirements of the Higher Education Support Act 2003. In 2007–08, the department visited 21 Australian universities for bilateral discussions as part of the IAF process.

In sum, the report indicates no problems, makes no recommendations for reform and is tabled, open to question in Parliament.

a. Accountability for Australian University Corporations: Law and NPM

Accountability for individual university corporations as opposed to the institution is like any a statutory body, also through the courts. That is, the university is subject to administrative law requirements. The application of administrative law has been limited. It is not that the university has escaped public accountability via public law; rather, that the public law has had a limited role in the regulation of the university corporation. There are a number of court cases on this topic. These include Australian National University v. Burns, a case in which a professor had become senile and the university wished to fire him, Australian National University v. Lewins dealing with promotions, and Griffith

---

338 A search of Hansard for the years 1990-2009 returned not a single question concerning the university in the reports.
v. Tang,\textsuperscript{342} a case in which a PhD student appealed the termination of her candidacy by the university on the grounds of her having falsified scientific data. Two other cases \textit{Quickenden v O'connor}\textsuperscript{343} in which a lecturer objected to a new union agreement which included performance measures and \textit{University of Western Australia v Gray}\textsuperscript{344} involving ownership rights in intellectual property in innovative medical research round out the collection. While the latter two cases refer to the university as a “trading corporation”, they provide little insight into the legal nature of the university or provide a distinct regulatory structure for the university corporation. None of these cases addresses accountability in any broad sense of either university corporations or the university as an institution. Rather, as appropriate to the courts, they examine narrowly defined, specific acts of university corporations in the normal course of operations. In addition to courts, various inquiries have been instituted, as for example, in the case of Professor Hall and UNSW examining questioned use of scientific data\textsuperscript{345} and by way of the independent investigatory bodies as in the case of the Independent Commission Against Corruption investigation at the University of Newcastle.\textsuperscript{346} While the latter inquiry encompassed a broader review of the university organisation, it did little to address the matters under consideration in this dissertation.

Accountability via the courts and such inquiries, however, is not the only or even the main form of accountability. As will discussed in greater detail below, accountability of Australian university corporations is primarily by way of reporting—an obligation that has increased significantly under NPM. In a review of the reporting requirements of Australian university corporations commissioned by the then AVCC, consultants PhillipsKPA wrote:

universities [are]... undertaking a very diverse range of activities, [and] are probably subject to more reporting requirements than any other type

\begin{itemize}
\item \textsuperscript{342} Griffith University v Tang [2005] HCA 7.
\item \textsuperscript{343} Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission (2001) 184 ALR 260.
\item \textsuperscript{344} University of Western Australia v Gray (2009) 259 ALR 224., University of Western Australia v Gray (No 20) (2009) 246 ALR 603.
\item \textsuperscript{346} Cripps, J. (2005). Findings of corrupt conduct & disciplinary action recommended in Newcastle University report. Sydney, Independent Commission Against Corruption.
\end{itemize}
of organisational entity. This total sum of reporting requirements is unseen by any single government agency.  

The consultants go on to note that excluding state based reporting, and reporting on activities not directly related to teaching, learning and research, university organisations are subject to “more than 30 major categories of reporting obligations and over 100 more specific elements.”

Accountability for Australian university corporations is primarily by way of reporting. A brief example of the accountability reporting can be drawn from The University of Melbourne, which provides an overview of its reporting cycle. The overview identifies the main form of reporting as by way of reports filed with the government. The University of Melbourne’s 2007 Annual Report is in excess of 156 pages and is divided to address the issues the university believes addresses its accountabilities and it believes are important in terms of disclosure. The first seven pages is information on Council membership, its senior executive and leadership. The pages from 14-64 provide a five year statistical profile, information about governance as well as information about its activities. The university reports on its activities in research and research training, learning and training, knowledge transfer, international engagement being whole of organisation measures largely based on performance in international rankings by way of comparing outcomes with “Performance Against Targets.” In addition, it publishes information about some noteworthy achievements and plans, and highlights work by particularly successful members of the academic profession.

It discloses and reports on ten of its statutory reporting obligations. These statutory reporting obligations occupy pages 71-83. They are:

1. Environmental Sustainability, Statement on Occupational Health and Safety Matters,
2. Statement on the University’s Risk Management Strategy
3. Conformity with the Building Act 1993

---

348 Ibid p. 12.  
350 Ibid.
4. National Competition Policy and Competitive Neutrality Requirements
5. Compliance with the Educational Services for Overseas Students Act
6. Statutes and Regulations
7. Whistleblowers Protection Act 2001
8. Grievance Procedures
9. Freedom of Information, and
10. Statement Concerning Compulsory Non-academic Fees, Subscriptions and Charges

The final and significant portion of the report, pages 84-154, address the finances of the corporation. For the year 2007-8 these indicate a gross income of $1.5 billion and a net of $5.2 million, a loss on university investments of approximately $300 million reducing endowment funds from $1.4 billion to $1.1 billion as a result of investments in financial products effected by the global economic crisis as the main figures. Further, reporting on subsidiaries and breakdowns of income sources, expenses and comparative figures from previous years provide an overview of the corporation's financial situation.

In addition to that report, the university publishes as part of its annual report an investment report and provides its budget, and strategic plans. Finally, the university published a glossy 28 page booklet “Ensuring Accountability: A Strategic Framework for Planning, Managing & Assuring Growing Esteem 2009” indicating its efforts to compete in the national and international institutional competition. While this publication is a voluntary initiative, it is likely to add some type of regulatory influence as institutionalist research indicates.

The reporting cycle can be summarised as follows. First, the reporting is focused on accounting for the use of funds to achieve government determined outcomes. There are considerable sums and assets involved and so financial reporting is appropriate and important. However, I argue that normatively it should not be the first or dominant issue of the reporting requirements. This structure of the

---

report reflects the normative ordering of the regulatory framework. Second, it is focused on the more immediately measurable outcomes. That is, to the focus is on outputs, compliance, and those qualities readily measured. Third, it operates within the quality framework determined by the government—which has declared its purpose in the quality agenda as providing “quality assurance” to international markets to maintain the standing of Australian higher education—as opposed to quality education. While certainly there is a public interest in this disclosure, the use of that information in some decision making contexts is questionable.353

b. Accountability standards

In considering a regulatory system and the level of coherence in its structure, the importance of the choice of accountability standards cannot be overemphasised. As noted in Chapter 2 choosing one standard over another is a normative political choice that shapes the organisational objects. At a most basic level, the standards society expects from the university institution are those critical products, “teaching excellence, acquiring critical thinking and analytic skills, excellence in research, enriching civic values and promoting a learning society,”354 Yet these basic and most important products present the most complex and difficult if not intractable problems in measurement. Indeed, one of Power’s main criticisms of the audit explosion is its dysfunctional impact on audited organisations. Power argues forcefully that the re-organisation and design of activities, structures and processes in order to make them auditable not only distracts them from their core or first order activities, but have the potential to fundamentally distort them.355 He uses as an example the higher education system in the UK with its Research Assessment Exercise and Higher Education Quality Council— a system which Australia has sought to emulate. Further, although accountability for these critical institutional products is primarily

356 Ibid., pp. 98-104.
political through the Westminster system, the actual impacts on university operations and what forms the basis of ministerial reporting is the audited reports presented by bureaucrats to politicians.

The legal standards for the university corporation are set out in the objects of the corporation as found in the enabling statute. Further, legal standards flow from a number of pieces of legislation calling for different types of accountabilities and the individually negotiated funding agreements. The problem with classifying the standards in the *Higher Education Support Act 2003* (Cth) as legal standards is that they are not legal standards in the sense of command and control. That is, the standards are not backed by authority to enforce through the legal system. Because the Federal government lacks jurisdiction to enforce compliance using the legal system, it can only use its tool of treasure. The standard it chooses will only be enforced by censure or reward.

While some of the general information about the standard contained in the individually negotiated funding agreements may be surmised from “Performance Against Targets” type sections in Annual Reports, the specifics of the standards as set out in the individually negotiated funding agreements are held in confidence. Attempts to gain access without resort to Freedom of Information legislation to these funding agreements for this dissertation were denied by both university corporations as well as the Federal government.

The only other source of information about university performance, Auditor General Offices of the various states and the Commonwealth to date have been for finance only.\(^{357}\) No Australian university has been subjected to a performance audit by this office. Thus availability of appropriate measures from government sources is limited.

There are significant informal institutional standards which apply to the university that are of long standing—leading to another stream of conservatism

stemming from the institutions of the academic profession rather than political orientation. These standards are based on reputation and prestige. The measures of prestige and reputation each carry their own distinct standards. An example of these standards which have recently become more formalised are the rankings by Shanghai Jiao Tong University, Times Higher Education Supplement, and Leiden University. Recently, the Australian government has raised the possibility of developing its own national ranking system to reflect its own interests in the university and presumably to both help inform students and pressure university organisations to compete. University organizations compete in order to develop their prestige, reputation and to survive.

Prestige, reputation and survival of a university organisation are dependent in part on members of the academic profession that form the core of the university. Standards for the academic profession are prestige related based on published outputs, place of employment and grant money generated among other things. Standards are based on perceived quality and quantity of work. Although these standards operate independently of the university organisation, they are intimately related as their inclusion in various ranking indicates and exercise, as Dill points out, the ultimate control over production.

i. Public Standards: Education, Research and Public Service

The standards for education are in the first instance coordinated at the national level and are of an NPM style. This coordination, all rather recent and untested, is done through the Australian Qualifications Framework (AQF), currently presided over by John Dawkins, and quality is assured through the Australian Universities Quality Agency (AUQA). The AQF is formed by the

Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), replaced in 2010 by the Ministerial Council for Tertiary Education and Employment (MCTEE).\textsuperscript{364} The Australian Qualifications Framework establishes the range of qualifications from high school through to the doctorate. It identifies the competencies the qualifications are purported to certify. It is a minimal output standard. For example, the standard for a bachelor’s degree is as follows:

- the acquisition of a systematic and coherent body of knowledge, the underlying principles and concepts, and the associated communication and problem-solving skills;
- development of the academic skills and attributes necessary to undertake research, comprehend and evaluate new information, concepts and evidence from a range of sources;
- development of the ability to review, consolidate, extend and apply the knowledge and techniques learnt, including in a professional context;
- a foundation for self-directed and lifelong learning; and
- interpersonal and teamwork skills appropriate to employment and/or further study.\textsuperscript{365}

Knowledge is viewed traditionally as systematic, coherent and discipline based. The standard for the knowledge objects while primarily set internally by the university corporations as self-accrediting bodies, are increasingly set externally.

AUQA, the quality regulator, was established in 2000. Its mandate is set out in its Constitution. Section 1.5 states that its objectives are to:

(a) Arrange and manage a system of periodic audits of:
(i) the quality of the academic activities, including attainment of standards of performance and outcomes of Australian universities and other higher education institutions;
(ii) the quality assurance arrangements intended to maintain and elevate that quality;
(iii) compliance with criteria set out in the National Protocols for Higher Education Approval Processes;
(iv) and monitor, review, analyse and provide public reports on the quality of outcomes in Australian universities and higher education institutions.\textsuperscript{366}

Interestingly, nowhere in the Constitution is there a definition of quality—or for that matter, in its Audit Manual. Rather, AUQA works on the assumption that the higher education provider has an objective of providing quality programs and focuses its attention on the quality systems within the particular provider organisation. It attempts to work with the particular university to help it achieve its mission and qualities the particular university seeks to achieve rather than imposing an external standard.

Basically, AUQA is a quality standard auditor with an internal focus, examining quality processes and aimed toward organisational improvement. That is, it identifies processes that are deemed to ensure quality within the university, aiming at consistency across courses and programs in terms of delivery and overall standardisation.

The National Protocols, which as noted have statutory force, are very broad organizational standards that set out the nature of organizations wishing to use the word “university” in their names. They set out certain specific standards such as the size of the governing board. This change was part of a neoliberal political agenda designed to change the nature of the university corporation to make it more like a trading corporation. It is an external standard designed to suit state interests.

As noted earlier, the measures and standards for research are difficult to establish. Nevertheless, governments have attempted to standardise the measures by way of various frameworks—the Research Quality Framework under Howard, and the Excellence in Research Australia under Rudd. Although neither of these standards translates directly into legal standards for reasons just noted, they are designed to have a direct impact on funding. Standards for public engagement are non-existent, although some efforts have been made to develop

---

policy for such engagement\textsuperscript{369} and measure public engagement as composing part of the positive externalities of higher education discussed above and in the chapter on public goods. Whether such standards are beneficial or helpful is questionable at best as their impact changes research and publishing and invites a strategic response.\textsuperscript{370} Indeed, the impact of such standards and measures have been used by management, it has been argued, such that teaching and research have been “colonised by hard managerialism”\textsuperscript{371} leading to what has been referred to as the “McDonaldization of Higher Education.”\textsuperscript{372}

ii. Private Standards: Prestige and Survival

The private or quasi-market standard for measuring university organisations is prestige and prestige itself is measured by way of rankings. Prestige is based on a set of indicators taken to be representative of quality. These include everything from notable graduates, attractive architecture and grounds, to well recognized members of the academic profession, “stars” carrying tokens of professional esteem such as Nobel prizes or highly cited articles, honours bestowed by public bodies such as honorary degrees, public consultancies to government, and prestigious positions on academic and other professional bodies. It is further supplemented by the size of research grants, laboratory and other resources put at the disposal of these members of the profession and their trainees. Prestige is a combined result of financial savvy of its management and the investment the academic profession is able to make in the execution of its educational and research mandate.\textsuperscript{373}

Survival is a more complex matter for the university organizations and dependent in part on their prestige. Not only must they obtain resources from their


environment but they must effectively mobilise the resources they do have. They must be able to attract and retain quality academics. Further they must engage the members of the academic profession to expend discretionary energy in order to obtain the best efforts in education and research. University organisations must also attract students of sufficient quality, determination and economic power in order to survive. Finally, the university organisation must encourage and enable its academics to produce reputable research and contribute to solving local problems.

c. Accountability for Australian University Corporations: Social

In addition to the political and legal accountability, this dissertation argues that the university has a public social accountability. That is, members of the academic profession bear public accountability. Their accountability occurs through their participation in the university’s dissemination mission: the academic’s research and teaching functions. The professional accountability is for compliance with the norms of the profession.

This public accountability is most evident when members of the academic profession fail with respect to their professional obligations vis-à-vis the profession, as seen in certain recent instances in the case of fraudulent data by Professor Hall at UNSW, with the case corruption of student results at the University of Newcastle and consequent discipline recommendations against Professor English and a public resignation of Vice-Chancellor David Hall at Monash University for plagiarism committed at various points in his career.

d. Accountability for Australian University Corporations: Markets

The Rudd government proposed to adopt Bradley’s recommendations in creating a market for students via a voucher system—a proposal continued under the Gillard Government. While the details are not yet available, the general idea is to cause the university corporations to produce those services in demand by

students.\textsuperscript{377} This accountability will cause the universities to shift resources toward producing the courses, which reflect the preferences in the current market of students.

Further, the university corporations have a type of market accountability by way of their cooperation with parties in the private sector. That is, universities will only find funding to produce research desired by the private sector. Both of these accountabilities reduce the organisations’ ability to pursue their own independent objectives.

6. Conclusion

This chapter has demonstrated that the regulatory framework for the university is complex. It has identified the wide variety of social objectives and problems assigned to the university and which have been used to inform policy. The policies driving the regulation have ranged from nation building, to global competitiveness to social equity. Over time the social objectives and problems and their related policies have shifted from broad public foci to private economic concerns. The argument about the role of the university is picked up and argued in detail in Chapters 5 and 6 and implications for regulatory coherence considered. The lack of continuity of policy over time has had significant, destabilising effects on the university—an argument to be advanced through Chapters 6 and 7. In addition to policy informed by government agendas, the regulation of the university has been driven by ideology. NPM based regulation by information with its heavy reliance on audit mechanisms has moved the university toward shifting its normative ordering to prioritise the production of second order auditable outcomes rather than first order less measureable goals of teaching, research and public service.

A variety of regulatory arrangements have been utilised to implement the various policies. These have included commissions such as the Commonwealth Universities Commission, the Australian Universities Commission and CTEC

staffed by academics and later by bureaucrats. More recently, the administration has been done by departments internal to government such as DEEWR, and the use of quality agencies. AQUA and the proposed TEQSA. The framing of the social problem and regulatory response including administrative arrangements have followed the concerns and ideology of the government of the day rather than any coherence with norms or organising problem. The lack of attention to coherence, leads to an increasingly incoherent system of regulation. The jettisoning of the buffer agencies and their related expertise leads to the suggestion that government’s commitment to its ideology causes it to ignore specialist input. The rejection of the CTEC, the last buffer agency, is in line with Power’s argument that under the NPM audit regime, technical expertise has been displaced by managers whose grasp of the underlying issues is marginal, but epistemologically questionable faith in auditable numbers unshakable.378 The impact of this incoherence is manifested in the impact of the auditable measures where the institution of the university and university organisations are re-organised to produce auditable outcomes. Auditable outcomes, it was argued, are the outcomes of second order activities and over time tend to become a substitute for producing the first order outcomes for which the university (or any other such organisation) is designed.379

The Chapter has also examined in detail the regulatory features of the legislation. The last major legislative reform led to the enactment of the Higher Education Support Act 2003 (Cth). It remains the foundational piece of legislation. The Higher Education Support Act 2003 (Cth) although a hard law instrument, because of the limited jurisdiction of the Federal government, relies extensively on soft law models of regulation. That is, rather than using authority, it uses incentives to gain compliance, and as noted, information. Its various funding schemes create a plethora of competitive arrangements which conceive of university organisations as competitive rational individuals pursuing largely the same goals and objectives in the same competition. The creation of an increasingly competitive ground on identical measures, it is argued, creates

intensified pressure to compete as opposed to carrying on its traditional functions. That is, the intense competition consumes additional resources which are shifted from first order operational issues to addressing competitive demands.

Further, the regulation re-shapes the university organisations and the institution. It does so by imposing significant auditable reporting obligations on the university organisations. In doing so, the legislation shifts the attention of the university from its mission as argued in Chapter 5, to the production of auditable outputs. Both of these changes introduce new incoherence into the regulatory framework as they require the university to shift their focus from the research and teaching at hand to competition on measures which are not necessarily relevant to their operation, and to auditable outputs which would otherwise not consume limited resources.

Under the Rudd Government, there were to be some significant changes which have been continued under the Gillard Government. Although the details have only been partially released, it is clear that there is increased funding, a new all encompassing quality agency, and a demand driven system of education provision by way of student vouchers. The voucher system is the use of a market type instrument which is designed to increase competition between university organisations. These changes have the potential to change considerably the institution of the university in Australia. Whether or not they do, and if so, in what ways, is a matter of speculation at this point. Accordingly, no conclusions about the coherence or incoherence of these changes has been argued, although the voucher system will be discussed at different points including the final coherence analysis in Chapter 7.

The accountability system for the university and the higher education system generally is diverse utilising a variety of accountability mechanisms. It uses Westminster ministerial responsibility, legal, social and market mechanisms. The Westminster system, as noted, is overburdened. Accordingly, it cannot and does not inform the public about the nature and position of the university system. The legal accountabilities are limited with respect to the Federal government. However, this constraint on legal accountability is side-stepped by the heavy
reporting obligations supported by NPM’s preferred method of regulation—
regulation by information. The report and audit obligations are re-shaping the
university in ways that it is argued are incoherent with its actual tasks. The types
of accountabilities are for things ranging from social inclusion and equity
objects, through to economic objects, but does include accountability for
knowledge objects coherent with the university as argued in Chapters 5 and 6—
those of knowledge creation, preservation and dissemination.

The chapter has argued that the extensive regulatory regime which penetrates the
university institution and organisation deeply with the government’s various
agendas, using invasive regulatory techniques does little to advance the
university’s mission. As such, it is incoherent at this basic level. Further, it has
argued that the imposition of both broad and deep audit regimes has added a
further dimension to the incoherence as such regimes tend to distract
organisations from their first order tasks. Finally, audit regimes cause
organisations to re-organise themselves from organisations best suited to
achieving their missions to organisations that are easily auditable. In other
words, the audit regime of regulation by information adds to the incoherence
already imposed by government policy agendas.

1. Introduction

This chapter addresses the first level of systemic coherence. It identifies and unpacks the preliminary decisions that need to be made in systemic terms. That is, it examines the nature of the public and the private in broad terms, examining the political and economic discourses around these two spheres, connects them to their underlying philosophical commitments and lays a foundation upon which the rest of the regulatory superstructure is to be built. The chapter argues that the public and private are not hard categories, but malleable political concepts and not reducible to technical economic units of analysis. Building on this theoretical foundation, the chapter then turns to consider the place of the university in these arenas. It argues that the important social and political role of the university, and its diverse inputs, processes and outputs make locating it in a simple dichotomy problematic. The chapter argues that the university is more likely to thrive where it is viewed as a public institution. And accordingly, the regulatory demand for some location in these social categories leads to the argument that the better place for the university is in the public sphere.

As noted in Chapter 2, theories justifying regulation fall into two broad categories—public and private. That is, there are theories which hold that public good is attainable through the political process and which view incomplete markets and market failures as problems which can be resolved through some type of regulatory intervention. These theories support regulatory intervention. There are other theories, however, which are based on suspicion of government, political processes and are ruled by a faith in markets. These theories reject public good and all regulation except that which supports private property and markets. Both of these theories hold implicit views of government, the nature of society and conceptions of individual members of society. These larger issues are matters of philosophy, politics and other social sciences. The particular issue for this dissertation, following the convention, is referred to as the “public-private divide.”
Further, as noted, the public-private divide concerns the proper role of
government, society and conceptions of individual members of society. The
public-private divide is significant for identifying government interests, its role
and responsibilities, including public goods as well as the economic implications
of those identifications. The ideas of public good and the public-private divide
underlie much of the debate about regulation, the university institution, higher
education and indeed political debate generally. As will become evident through
the argument, it is an important distinction for regulatory purposes. This chapter
examines in detail the ideas of public good and the public-private divide, and
their significance for higher education and the university.

Although the idea of public good is in the first instance an idea in political
philosophy about social coordination, determinations about the divide and public
goods can be derived from analysis of social objects, economic outputs and
political debate as well as derivation from the classifications of history,
sociology, and law. As Breyer notes there exists a sharp divide in disciplinary
approaches to regulation based on the public-private divide. Whereas approaches
to regulation of organisations deemed public are subject to political science
analysis, public law and government scholarship, organisations deemed private
are subject to management, economics and corporate law. Breyer’s
distinction is significant as it points to two discrete sets of regulatory norms
applicable to organisations and projects depending on the public-private
classification and appropriate for the analysis of the various projects of the
different sectors. The discussion which follows illustrates the discrete norms and
their significance for regulation generally and higher education and the university
specifically.

To illustrate briefly, in the context of university regulation, where the university
is viewed as a private organisation providing private goods without public
consequences, the need and justification for public involvement including
regulation, finance and oversight is minimal. Where the university is seen as a
significant public institution, providing public goods with public finance, the

case is markedly different. High levels of public regulation including scrutiny of decision making and accountability are deemed not only appropriate but necessary. The examination which follows proceeds from five disciplinary perspectives—historical, economic, political, sociological and legal. Broadly, historians indicate that the divide and the issues it represents were identified some 2,500 years ago in the city state of Athens. From the perspective of economics, higher education is both public and private. It is a public good, a private good bearing characteristics as social goods and an economic good.\textsuperscript{381} From the perspective of politics the question is developed as a decision about the role of the state and the requirements of both state and society taking account of the practical and political implications of a normative commitment to democracy. From the sociological perspective one sees a variety of public goods well beyond the economic. Finally, from the legal perspective, the distinction is the result of both common law and legislation as characterised by assignments of rights, duties and liabilities in a balancing of the individual and the collective.


The traditional public-private dichotomy stems from classical Greece.\textsuperscript{382} Community leaders had rights in the home with respect to their domestic affairs which were not subject to public scrutiny. The home (\textit{oikos}) and domestic arrangements were considered to be private matters at the sole discretion of the householder. In addition to domestic arrangements, however, the householder had public civic duties. These included payment of taxes, participation in political life and military activity as determined by the state. As Humphrey’s observes: “the Athenians in the fifth century discovered two of the major problems of western political theory: the relation between public and private interests, and the relation between politics and the economy.”\textsuperscript{383} These two


\textsuperscript{383} See discussion in ibid.
problems lie at the core of the controversy over the role of government and its regulatory tasks.

Moving the discussion forward from the Athenian city-state to the re-organisation of society after the revolutions of the 16th and 17th centuries, the recreation of the public and the private as well as the role of public government had to be re-invented. 384 Whereas prior to the revolutionary overthrow of the absolute monarchs whose authority was based on the doctrine of the divine right of kings, and whose authority over public government was based on a combination of religion and bloodlines, after the revolutions a new basis was needed on which to establish public governmental authority to control society. The basic political issue was one of constituting a society deemed voluntary, instead of one based on religion, kin or coercion. In western societies this problem was answered by way of the Social Contract. 385 Social Contract theory, through intellectuals such as Hobbes, Locke and Rousseau, answered questions organized around issues such as what permits a society to function? What form of public government over private households is justifiable and with what rights, obligations and limitations? In other words, it provided a philosophical justification and political basis for the public-private divide.

These Social Contract theorists imagined the initial state of Nature—a state in which no government existed—and from that initial position formulated what they believed to be the justification for authority to regulate an ideal form of social organization or relation between governors and governed—i.e. government. In all its forms, the essential Social Contract addresses the organization of society, and it does so uniformly on the basis that the public is formed for the potential benefit of improved private households. Next social contract theorists argued that government serves the dual purposes of both coordinating public collective wants as well as advancing private household rights. 386 In other words the Social Contract is an effort to define what benefits or

goods must be provided or produced by the public government for the benefit of the public collective as well as the private households in order to legitimate its existence and justify its actions. Thus, the next question is: What type of public and private spheres must be created and what related services must a government provide to have a claim for legitimacy? And, what actions are justified actions?

The answers to these questions developed into two distinct streams each leading to expanded views of the role of government. The basic collective good provided by public government was security: protection from assault and destruction of the collective’s means of survival. This basic good provided a basis for taxation and military duties. These physical protections and appropriated resources are supported and supplemented by regulation: the legal system and laws—laws creating interests, determining which interests will be assigned to whom, on what basis (economic, the common weal, or some other value) and which interests are protected by the state. These goods are for the people at large—a public good. The role of public government therefore is not only creating public and private space, but also creating conditions in which society including among other things, its means of reproduction (culture) and sustenance (economy), can operate effectively. This understanding of public good and the role of government led to the two streams referred to earlier.

The first stream had to do with a developing notion of humanity. Religious and philosophical thinkers began to advance ideas concerning human dignity and rationality, which came to be reflected in political thinking. No longer was it sufficient for government to merely provide protection against violence and unjustified taking of property, but it was necessary to advance certain rights for individuals to flourish. Human flourishing requires those things which enhance freedom and dignity from the basics of food and shelter, to education of both the hand and the mind. This view coalesces with the notion that democracy requires the citizen to have a basic understanding to participate in political life. The reformers of nineteenth century education saw education as a basic public obligation which created a public government obligation to provide basic

---

education. For a government organised on a non-elitist basis, i.e. a democracy, the distribution of goods supporting human flourishing and participation in governing should be provided as widely as possible—hence the ideas of a broader public sphere and of public goods as a fundamental task of government extending well beyond the basic security and property guarantees of the original Social Contract theorists.

The second stream answering to the role of government and an enlarging public sphere was developed from the socio-economic changes stemming from the Industrial Revolution. Both technological innovation and capitalist economic systems require an increasingly educated workforce. The industrial revolution of the late eighteenth century expanded exponentially the need for an educated workforce to create, maintain and develop again the tools of industrial production, while capitalism needs to grow the economy and its corollary support services sector. Combined, these two streams met in a demand for enlarging the public government sphere and for public goods generally and education in particular. Thus education at all levels and government support for it remains a live issue. Among important contemporary approaches to the issue is economics to which the discussion next turns.

3. Economic theory: Public Goods and the Public-Private Dichotomy

Economists view the public-private divide as objectively presented, or as Marginson argues, a naturally occurring phenomenon, with a sharp division between the two. The public sphere is the sphere in which public goods exist: all the rest of human activity is in the private sphere which is dominated by private property and exchange markets. Taking this assumption of a natural or objective division as a starting point, classification as public or private becomes a technical issue for the science of economics.

To develop an understanding of the public-private divide from the economic perspective, the neo-classical economist Paul Samuelson defined public goods as those goods which are non-rivalrous and non-excludable in terms of consumption.\footnote{Samuelson, P. (1954). "The Pure Theory of Public Goods." \textit{Review of Economics and Statistics} 36: 387-389. Samuelson, P. (1955). "Diagrammatic Exposition of a Theory of Public Expenditure." \textit{Review of Economics and Statistics} 37: 350-356.} Marginson points out an important assumption in Samuelson’s version: that goods by their nature are intrinsically public or private. As a result, Marginson observes, in Samuelson’s perspective goods are naturally private or public. Samuelson classifies a good as non-rivalrous when that good can be “consumed” by one party without depriving another party of the use of the same good. A classic example of this is knowledge: each party can obtain the same knowledge without in any way depleting the overall supply.

The second characteristic, non-excludability has two facets. The first facet arises when it is impossible or prohibitively costly to provide a good to a group and exclude individual parties who would use but not pay for the goods. One common example is defence services. All benefit from national defence and it is impossible to protect only those who are paying for this good—non-payers cannot be excluded. The second facet of non-excludability is where a good’s benefit cannot be restricted to an individual purchaser and excluding groups who do not pay. Where such goods are purchased by an individual, it is not only that individual who benefits from the purchase. Rather, other individuals “the public” may also benefit. A classic example of this type of public good is found in public health. Where an individual is inoculated against some illness such as malaria, not only does he or she avoid the illness but at the same time reduces the risk of those nearby from receiving an infection as well (an “externality”)—regardless of the other parties not paying for it. From an economic perspective, public goods are “public” because producers cannot adequately sequester the benefits of their production to private parties—themselves or paying consumers. According to economic theory no private party will invest in the production of goods which can be freely had.\footnote{Notwithstanding the growing phenomenon of free open source software and such counterfactual patterns as the re-packaging and sale of free software available on the internet.}
Economists also identify public goods as something inadequately supplied by the market—i.e. a type of market failure. In the case of public goods, economists argue that non-excludable, non-rivalrous goods will not be created to meet an acknowledged need, and so the market will fail to produce the needed goods. Where market failure occurs, the government is required to step in and provide some regulatory solution, either in the form of public provision, public finance or in the form of regulatory reform, changing the market rules. This category of public good is evidently open to political debate about the quantity and quality of the goods and even the existence of market failure itself. Nevertheless, for the most part, economic analysis of public goods fails to take account of the political nature of the public-private classification decision. Economists’ personal political commitments inevitably inform their positions.

The political dimension of economic public goods was addressed by the neo-classicist Kenneth Arrow. Following economic individualist methodology, Arrow sought to identify the appropriate areas in which government should produce and distribute goods and services through mathematical modelling based on individual preferences. The theory had been that those goods could be identified and valued on the basis of aggregation of individual preferences—a view Arrow originally held. Arrow’s breakthrough, however, was his demonstration of the impossibility of arriving at a social welfare function on the basis of the aggregation of individual preferences. That is, public goods cannot be identified or receive appropriate levels of finance on a mere aggregation of individual preferences. Not only are individuals’ preferences in fundamental conflict, there are problems in preferred levels of support, and the free rider problem. Arrow, despite a life long interest in shared values, like his fellow orthodox neo-classical economists has been unable to identify a measurable common, public good, and hence, unable to identify and decide

394 As a result economic analysis has focused on how to exclude more people from goods they have not paid for (the free rider problem) and to capture a sufficient economic return for the benefit delivered. For an interesting alternative view, see Marmolo, E. (1999). "A constitutional theory of public goods." Journal of Economic Behavior & Organization 38: 27-42.
which goods should be publicly supplied on a technical, non-political basis. Quite simply, economics lacks both theory and technique for public goods. This leads economists to their default position—conceptualising as much as possible on the private side of the public-private divide.

In sum, the basic problem of public goods as traditionally conceptualized by economists is a failure to sequester the purchased benefits to paying consumers and the economic benefits of production to the producing suppliers. Economists conceptualise public goods as problematic also because the consumption of those goods fails to destroy the resource and so fails to create new demand, create an adequate market and more economic activity/transactions. Finally, no aggregation of individual preferences is possible either for purposes of identifying public goods or desirable levels of such goods. As such private goods are the preference and focus of most economists’ analysis.

a. Economic analysis of the goods and services of higher education

From an economic perspective it is possible to exclude people from educational opportunities and in terms of non-rivalrous consumption, education meets the test at least partially. It is self-evident that the consumption of educational services precludes others from accessing the same services to some degree. Where one person occupies a seat in a classroom, that seat is no longer available to others, and even in the age of the internet, where one thousand people are using a server to provide and exchange information, others cannot do so. However, consumption of information for the development of knowledge from a broad view is non-rivalrous. One person’s consumption of information does not exhaust the information’s resource potential. Accordingly, from an economic perspective there is little room and perhaps no legitimate argument for the public supply of education. Indeed, a call for public provision of education may appear to be more a case of special pleading. In this view neither the university as an

---

institution nor any distinct university organisation or other higher education provider has any claim to public government support. Its educational goods are excludable and at least somewhat rivalrous. Accordingly, from a neo-classical economic perspective the market should be allowed to determine supply and demand.

There are several important private goods generated by higher education. Marginson identifies and describes four private goods from higher education. These are first, self-goods—those goods which advance personal development without regard to exchange value. Second are positional goods: goods that provide social status. Third are knowledge goods, being those goods which in certain instances may be protected by the law of intellectual property. Finally, are the training goods which prepare a person to enter the workforce.397 While there are considerable private goods to be derived from a higher education, those goods are neither the whole nor even the major contribution of the university. Their public dimension will be taken up with a discussion of a range of important social goods provided by the university discussed later.

The common problem whereby the cost of goods is more easily measured than the benefits of the goods is particularly problematic in the context of public goods. One important aspect of public goods identified, can only poorly measured and that is the matter of externalities—such as in the health example above. The externalities of higher education are extensive and, difficult to identify and measure.398 As such they are hard to quantify and analyse despite efforts to do so.399 These externalities are: static human capital, which raises the

399 Wolfe and Haveman list the following 17 some of which are mix of private and social: Individual market productivity; Nonwage labor market remuneration; Intrafamily productivity; Child quality: level of education and cognitive development; Child quality: health; Child quality: fertility; Own health; Consumer choice efficiency; Labor market search efficiency; Marital choice efficiency; Attainment of desired family size; Charitable Giving; Savings; Technological change; Social Cohesion; Self-reliance or economic independence; Crime Reduction, Wolfe, B. L. and R. H. Haveman (2002). Social and Nonmarket Benefits from Education in an Advanced Economy. Education in the 21st Century: Meeting the Challenges of a Changing World. Boston, Federal Reserve Bank of Boston. pp. 104-106. See also Venniker, R. (2001). Social Returns to
productivity of other production factors; dynamic externalities, such as the improved ability to learn new things including job tasks and new technologies (particularly associated with higher education\textsuperscript{400}) and other, non-pecuniary externalities.\textsuperscript{401} These values are particularly important in understanding higher education.

Higher education’s positive externalities are particularly significant in the current world where the value of human capital is increasing exponentially in what is referred to as the information age. As Usher and Cervenan, authors of an international study of higher education, observe: “In many ways, accessible mass higher education is the foundation of the modern knowledge economy.”\textsuperscript{402}

Participation in the knowledge economy and the growth of that economy requires high levels of participation in higher education. The issue then becomes what is a desirable level of participation in higher education. Given the high level of positive externalities, there appears to be a strong argument for investment of public funds into public higher education. Indeed, no economy in the world whether developed or developing is ignoring higher education.\textsuperscript{403} The value of a highly educated population to the overall functioning of society including the economy has become an increasing concern and focus of policy discussed in the section which follows.\textsuperscript{404}


\textsuperscript{404} See, for example, the legacy of George Psacharopoulos, former education economics advisor at the World Bank, whose career is highlighted and outlined in Jimenez, E. and H. Partinos (2003). "Curious George: the enduring Psacharopoulos legacy on the economics of education in
In summary, the public-private dichotomy proposed by neo-classical economic theory is too strict and reverses the correct order, at least according to sociologists, anthropologists and others. The development of private household interests cannot occur in some individualist vacuum. Maintaining society by public government is a first priority. The private is contemporaneously intermeshed with the advance of the collective public sphere. Public institutions such as the government, regulation and the university are critical points of focus for the development and maintenance of the public sphere and hence the private. Put differently, such public institutions provide the bedrock upon which the private sphere rests. As such, their importance can neither be neglected nor relegated to status as an irrelevant off-shoot of non-economic productive goods and activities. Despite this fact, political debate driven by economic interests tends in that direction.

b. Public economic support for higher education and the university:

The idea of the university education as a public space deserving of public economic support goes back to dealings with the first ultramontane university, the University of Paris. Shortly after his return to Italy from France in 1165 A.D., Pope Alexander III issued a decree to provide for the abolition of payment for a licence to teach (licentia docendi). This position was confirmed at the third Lateran Council of 1179, where it was decreed that both the licence and the teaching should be free of charge. This decree recognised both the public good and the hazard of commodifying and selling higher education. The Council addressed the issues of student admissions to ensure that students were...
admitted on merit instead of financial capability, and that teachers were adequately paid. These regulatory measures which were taken to address the issues of corruption and simony in the issuance of licenses to students who had simply bought them,410 established the institutional norm of university education as a public good, a matter taken up again in Chapter 5.

On the island of Britain, public support for higher education arrived only slightly later. The citizens of Oxford paid a tax for the support of students as early as the thirteenth century.411 Economic justification followed some 500 years later. Adam Smith wrote:

For a very small expence the publick can facilitate, can encourage, and can even impose upon almost the whole body of the people, the necessity of acquiring those most essential parts of education.412

A variety of studies have been undertaken identifying the public benefits of education. Studies of the overall contribution of higher education to the economic development and well functioning of a society indicate significant returns on investment.413 Analysis of OECD countries suggests that investment in higher education brings both significant public and private benefits. World Bank educational economics expert George Psacharopoulos’ analysis is helpful in this regard.414 His analysis suggests that social return on investment in higher

410 Ibid p. 80.
414 There is a vast literature dealing with the economics of education, including a number of journals dedicated to the topic. It is well beyond the scope of this dissertation to engage it and neither is it necessary for the purposes of the discussion. Psacharopoulos, G. (1994), "Returns to Investment in Education: A Global Update." World Development 22(9): 1325-1343., provides a more detailed analysis and discussion, although quite dated. Psacharopoulos, G. and H. A.
education in OECD countries is equivalent to the return on investment in primary education. Psacharopoulos provides an exact value on the public social return on investment in higher education. He calculates the public investment to generate an 8.5 per cent return. This public investment and return are not the only calculation he provides. As noted, there is also a significant private return. Psacharopoulos provides the comparative private return on investment in higher education at 11.6 per cent, with a return that outstrips the value of investment in secondary education. Studies of the Australian situation suggest an even higher rate of return, 14.5 per cent. In other words, education, including higher education, is an excellent public investment.

As noted, the value of higher education has been recognized by nations globally as demonstrated by the OECD, a special higher education program and its journal dedicated to higher education management. In 2002, 53 countries reported providing 63% of the costs of their tertiary institutions. As it is, 25 of 28 of the countries forming the OECD fund more than 50% of the costs of tertiary education from the public purse. Obviously, the majority of the world’s governments have a broad notion of public good at least in respect of higher education and the necessary regulatory and budgetary decisions have followed.


Ibid p. 2.
c. Critique of economics and regulatory recommendations

As noted, neo-classical economists’ normative preference is for the private sphere. It is premised upon their views of a profit driven market as a naturally occurring phenomenon, superior and hence preferable method of controlling supply and demand. As well, neo-classicists lack a theory and model of public goods that takes account of political, social and social concerns. As such their economics fails as a science designed among other things to study the phenomenon of public goods.421

There are a number of other critical problems with economic models which should preclude excessive confidence in those models or an over reliance on economic regulatory recommendations. Perhaps most problematically, neo-classical analysis fails to address the foundation of the society in which the economy is embedded and thrives422—the public sphere. The neo-classical failure to adequately address public goods and the more broadly, the preservation, transmission and dissemination of knowledge for the continuation of society is a matter of concern—particularly in a non-traditional society which lacks other institutions for the intergenerational transfer of sophisticated knowledge. The problem is that economic analysis “directs primary attention to monetized outputs regardless of their impacts on people,…. ignores the environments of the system of market activity [including social environment].”423

Some neo-classical economists are well aware of this, and insist that the maintenance of non-economic values are of paramount importance for the maintenance of society. Downs, for example, in his 1962 article correcting errors in his theory stated:

“Any description of a democratic system which does not include some mechanism for self-perpetuation is an incomplete description. It does not explain why people keep obeying the rules that make it possible. This

---

omission is, in my opinion, the biggest single failing of my own economic theory of democracy.”

The message of sustainability or the continual reproduction of the conditions necessary for a government (democracy) and an economy (market)—i.e. the issues identified by the Athenians, are a matter of great concern.

Another example of the problematic limitations of neo-classical modelling of public goods, is the noted issue that individual preferences for public goods are often in conflict. Accordingly, attempting to develop policy and regulation for public goods on this basis, while politically astute, is a poor regulatory choice, setting the foundation for regulatory failure. That is, while it may be popular to promise the commonsense view that regulation will be developed on the basis of the aggregation individual preferences and not to advance some government inspired project from a regulatory perspective, which must take account of matters such as Arrow’s and Simon’s discoveries, collective policy decisions developed from the aggregation is impossible. Further, communal and collective preferences are significantly different from individual preferences. While individual preferences are regularly modified it may be that public preferences are not. Finally, the need for a sense of community beyond market and well apart from individual preferences is widely recognised. Accordingly, to rely too much on neo-classical economic models is not a wise policy choice.

Economists’ policy and hence regulatory advice, based on their normative preference for “naturally occurring” private property as argued by Locke and as markets extrapolated from Smith, emphasises commodification of goods and services, increasing property rights, expanding market mechanisms, and where possible creating new markets in their entirety transforming economically non-productive public goods (regardless of social or other production) to economically productive private goods. Governments follow this economic advice by withdrawing from the production and provision of public goods and services, by privatising their goods and services including higher education—an approach to governance advanced by neoliberalism’s NPM.429

Yet as noted, the effort to divide phenomena both social and physical into an objective, natural public and private divide in order to develop social and economic policy, and to do so as if the divide created exclusive hard categories as economics does fails to take account of the weaknesses of the models and the political nature of the issue. Attempting to make the divide appear to be a natural division suited to technical criteria masks the reality of the political nature of the decision and the need for debate which underlies regulatory decisions. Accordingly, a sharp public-private divide not only is not natural as economics would have it, but as poor theory is likely to create unhelpful, limited perspectives and ultimately to recommendations setting a foundation for regulatory failure.

Despite neo-classical economists’ private regulatory recommendations, governments historically and globally have recognised other less easily measured but important public benefits from higher education and the university and have provided public support in the form of regulation, finance and resources.

Political thinking has moved beyond the simple dichotomy of economic modelling in most instances. As the rise and fall of the welfare state and the fading of neoliberalism which held to the older dichotomy demonstrate, fresher and more nuanced thinking about the governments and governance will continue.

For instance, Colin Crouch writing in 2004 building on the work of du Gay finds an array of governance and government policies which combine elements of “substantive state,” “associations”, “community”, “networks”, “market”, “procedural state” and “corporate hierarchy” for purposes of social, political and economic coordination. In other words, progressive political thinking rejects the simplistic dichotomy that serves economic modelling that leads to regulatory failure. As public administration scholar Ronald Moe quips in his critique of the application of neo-classical economics to government activities: “the real world is not limited to economic premises.”

4. Politics and the Public-Private Melange

To move the analysis forward, a more nuanced consideration of the nature of educational goods and the university as a social institution is necessary. That is, not only must the analysis consider higher education as an economic good to be regulated according to its position in a private-public dichotomy, but it and the university must also be considered as social phenomena located in the public-private melange. The analysis begins by contrasting the economic and political approaches to the idea of the public good and then delves into a detailed discussion of different versions of the public good.

In contrast to economics which begins with an assumption about goods and then moves on to discuss the role of public and government, political analysis begins with the body politic as a public body and its needs and considers resources, goods and services against that background. Political analysis of the public-private divide approaches the two spheres on the basis of debate rather than the purported scientific distinction of economic modelling. The political analysis proceeds from an analysis of the role and nature of government. It then places certain activities within the public sphere defined ideally as a non-economic

---

space where the goals of human society and human life can be determined independent of the distortions introduced by economic concerns of finance and economic value. While the nature of the public and society are contested, sociologist and philosopher Jurgen Habermas’ definition will work. He defines the public as the sphere “beyond the state or private interests.” In Habermas’ version, matters not determined public are placed into the private sphere while those in the public will have resources allocated to coincide with the politically determined outcomes.

Political scientists, political economists and other scholars view public goods as those goods required for people to live as a collective—including, environmental, physical, psychological and institutional which facilitate social well-being. In this debate “public good” and “public goods” are not equivalent terms. To distinguish the economic and political uses of the words public good, the term “Public Good” needs to be investigated. Doing so will provide a better theoretical framework for understanding public good, analysing the public-private divide and the role of higher education and the university in society.

Professor Jane Mansbridge suggests that “public good” is an essentially contested concept. That is, following Gallie’s notion that certain ideas such as those forming the grounds of political debate include in their very essence a conflict of ideas and values, Mansbridge claims that the contestability of public good results from the unsettled nature of politics itself. This unsettled nature of politics and its role in human society denies the possibility of resolution on the basis of objective scientific knowledge about society or the individual or the self and by definition precludes a single normative basis for the public good. This position stands in marked contrast to the economic version of public good.

---

433 Quoted ibid p. 38.
discussed above. Mansbridge’s position rejects the normative basis for much policy making which is based on neo-classical economists’ individualism and appeal to self-interest. Her position acknowledges Arrow’s theorem of the impossibility that the whole of the public will be best served by each pursuing his/her own self-interest, and rejects the political and ethical commitments of that purported science.

Recognising economics dominance in contemporary political debate and policy making, Mansbridge raises a caution in relying on its norms. She argues that a society (and by implication policy) that focuses exclusively on individual self-interest is a:

“a society [that] will not be able to produce efficiently a large number of goods that require subtle and complex forms of human cooperation. These subtle forms of cooperation -- which range from not littering, voting, and obeying the law all the way to volunteering for combat -- depend not only on self-interest but also on many individuals acting for the public good on the basis of primarily internal rewards. A normative structure resulting from the large-scale practice of narrowly self-interested behavior would degrade the lives of everyone.... Our generation thus faces … the growing necessity, in an increasingly interdependent world, for sophisticated forms of cooperation”

Mansbridge is arguing what Arrow demonstrated: society is more than a mere aggregation of individual preferences. In essence, while contemporary political debate is premised on a sharp distinction and even a conflict between the public and the private, Mansbridge, after a careful historical survey suggests that there is a considerable confluence of public and private good, and that the longer standing view in western thinking supports only a weak division between the public and the private.

Mansbridge notes that public good has three notions or areas of contested meanings, two of which are relevant to the discussion. First, public good is thought to be the aggregate of private individual wants. As noted, there are a

number of problems with this view: Arrow has demonstrated that it is impossible to arrive at a public utility function based on the approach.

The second notion of public good Mansbridge identifies emphasises the political nature of public good and the resultant public-private divide. Following Walter Lippman, Mansbridge identifies this stream of thinking about public good as something that results from a political process. Lippman argued that the positions and decisions taken by a group of people pursuing debate about public good determined what the public good is.\textsuperscript{438} In other words, the public good may be that good which a group of well informed, rational people, acting with disinterested benevolence would choose. The public good and hence the location of divide is thus a decision based on wholly political and philosophical deliberation.

To understand the public good, Mansbridge argues: "[t]he phrase serves as a site for contest over what is ‘public’ and ‘good,’ and it serves to direct approbation to those who act for the public good, especially in contrast to promoting their private interests."\textsuperscript{439} Further, she argues: “[a]lthough the present state of imprecision is not necessarily better than a more precise definition would be, at least one of the present functions, serving as a site for contest, would be destroyed by narrowing and fixing forever the meaning of the ‘public good.’”\textsuperscript{440} Thus vagueness is a desirable characteristic as it facilitates an important democratic function—that of providing a critique of and proposals for the direction of society—a critical function and contribution of the university. The public-private divide and public good is something that must be subject to ongoing political debate, being modified to suit the particular context of a society.

A third view, not inconsistent with Mansbridge’s thinking draws political and unorthodox economic thinking together. Amartya Sen\textsuperscript{441} and Martha

\textsuperscript{438} Lippman, W. (1956). \textit{The Public Philosophy}. New York, Mentor P. 40. Lippman believed an elite should be given the task of deliberation.
\textsuperscript{440} Ibid.
Nussbaum\textsuperscript{442} envision economic public goods as those goods which are needed at a basic level to allow individual to make meaningful choices they see such goods as creating a positive obligation on government to create an environment in which people are able to make such choices about their own lives and development. Sen and other unorthodox economists view the neo-classical approach and the market as limiting freedom, limiting options to the choices offered by the market and further limiting those choices to those particular individuals with resources. Instead of limiting the discussion of public goods to a discussion of GNP per capita\textsuperscript{443}—that is a discussion of public welfare in terms of market performance—Sen examines what it is that people do with their goods and how that contributes to the “Good Life”. Governments and citizens alike have adopted this view with respect to education as critical to the good life and an important public good—i.e. a good or service to be supplied by the government free or below cost\textsuperscript{444}—for more than a century.

Public goods and the public-private divide from a political perspective are artefacts resulting from engagement in the political process, artefacts determined by public debate. That is, debate pursued without economic or state imperatives, and focused particularly on the common weal. Those goods including the political process which enhance the functioning of human society (not something reducible to economic development) are public goods, and merit public support. They are assigned to the public side of the divide and merit regulation appropriate to those ends.

The classification of higher education and the university institution as political public goods is evident from a closer inspection of democratic political


Participating in a democratic system of governance in an informed way in modern society is a challenge. It requires a level of understanding of the issues, challenges and opportunities facing the nation state—and an ability to evaluate critically, claims and counterclaims made by competing politicians and other interested parties. Higher levels of higher education allow individuals to compare more effectively and efficiently the policies of competing candidates, and make more informed decisions about the shape of the community in which they wish to live. Higher education provides a critical frame of reference from which to evaluate competing claims and to hold accountable those in power—the key component of democratic theory.

The political view of public goods and the public-private divide as a melange rather than a dichotomy provides a different justification for the role of government and for argument for public provision of economic support for the university and higher education than does economics. It is a wider, more realistic role; however, it is less susceptible to measurement.

5. Sociology, Public Good and the University

Again, unlike economics, sociology does not view the public-private divide as objective or naturally occurring phenomenon. Rather, it views the divide as a social construct, movable as necessary or desirable to understand the framing of issues, used to provide analysis of events and policies, and to identify structures and processes that support societal functioning. Further, sociology has no specific category termed public goods. Rather, it analyses the operations of society and those things which sustain society as a whole. Thus, the discussion which follows does not offer justifications for assignment to either side of the divide or classification of higher education as public good. Rather, it examines the role of higher education and the university institution in society with respect

---

to these matters. (The two chapters which follow—Chapters 5 and 6—address the sociology of the university more broadly and in greater depth.)

To understand the public and private in higher education from a sociological perspective one must ask two questions: What is education and in particular higher education? And, what is the role of higher education in society? The questions can be approached in a variety of ways. One must ask the nature and purpose of education generally, and then inquire about the nature and purpose of higher education specifically. Education itself serves as part of socialization process; that is equipping people with the thinking skills and knowledge required to participate in society. It is necessary for the development of humans, as rational, deliberative beings in a society composed of like beings.

Further as noted above, in a society which does not place as strong a reliance on the traditional personal forms such as myths and religion for preserving and transmitting critical knowledge for societal collective survival, the importance of a strong impersonal/bureaucratic social institution such as the university to perform such preservation and transmission functions becomes critical. As Burton Clark writes the university, as the home of the academic profession provides “critical centers of meaning and as primary devices for linkage into the larger world”. 447 In other words, the university provides a significant public function by providing means for significant swaths of human knowledge to be connected, it provides meaning and the orientation that allows human society to continue to function particularly where it is no longer based on religion or ethnic uniformity. (These and other functions of the university are discussed in detail in Chapter 5). Thus, for a complex economy, the complex knowledge and skills preserved and transmitted by the university are a critical public good necessary for the maintenance of a society dependent upon those skills and economic ordering.

The distinction between “lower” and “higher” education also requires definition for sociological analysis. These terms are not used with normative or pejorative

connotations. Lower is vocationally orientated and focused on the development of technical skills, teaches people the “how” of an activity. The idea of higher education, by way of contrast, is about teaching thinking about the “why” of things—whether in a philosophical sense or a critical thinking, problem solving approach to scientific or technological problems. Higher education requires a critical examination of the phenomena under consideration and an understanding of its role and context physical, social and/or psychological. Higher education is a critical part of contemporary society and a significant mission of the university.

Higher education scholar Brian Pusser conceptualises the whole of higher education as a public space. Following on Habermas’ idea of the public sphere, quoted above as “beyond the state or private interests” Pusser observes that the university has provided that space as an essential public good. That is, such public space allows deliberation, critique and innovation free of both state and private commercial/political interests.448 Given the increasing colonisation of public space and personal identity by both state and private corporate interests, the need for such space and its value and importance is increasing.

Sociologist Craig Calhoun describes the university as the “paradigmatic institution of the public sphere.”449 Calhoun identifies four senses of public in the university.450 First, he sees the university as public on the basis of its economic inputs. He notes that the university draws its financial resources from a variety of sources including governments. In addition to direct payments, it also receives less evident benefits such as the benefits of various tax incentives, credential accreditation, and regulatory support.451

Secondly, Calhoun identifies it as public in the sense that there is accountability to outside, public interests. That is, unlike a private body such as a business

corporation, which only answers to a very limited audience, the interests of a wide variety of people and interests affected by the university are accounted for through the organisational structure, political process as well as “markets.” These interests have historically been the church and the state. Both of these external bodies have formed the public or at least belonging to the public sphere. Yet, universities have always argued for a degree of autonomy and to be able to regulate themselves internally, much like private corporations and to some degree by reference to other universities.

Thirdly, Calhoun sees the outputs of the university as public. The knowledge produced and the education provided particularly as it pertains to civic participation, as being a public good. He notes, however, that these goods have been de-emphasised of late in the university discourse in favour of instrumental knowledge claims focusing on university credentials providing better incomes for graduates and the benefits of technology being provided to private parties.

Finally, Calhoun observes the public benefit provided by the university as it provides a critique of knowledge. The university provides the critique by conducting its research in the public sphere. By opening its knowledge to public debate and subjecting it to the scrutiny of logic and evidence, the university challenges knowledge discourses based on “social bases, pedigrees, or institutional and political backing.” While certainly Calhoun’s explication of the public good from a sociological perspective is not comprehensive, it does point to a number of important goods provided to the public by the university.

There are a variety of other public goods/social benefits from the university. For example, higher education provides social mobility and hence facilitates equality. Where policies promoting equitable access to higher education are implemented, higher education acts as a ladder and leveller, allowing merit based virtues of hard intellectual work to even out social differences based on power stemming from non-merited things such as inherited wealth, race, or other aspects of heritage. The overall good is that a more equitable society is a more stable

452 Ibid p. 12.
society and less inclined to violence and harm. Finally, higher education operates as a collective public good by shaping a common culture. Again, these ideas are explored in greater depth in the next two chapters.

6. Regulation, Law and the Public and Private Spheres

Law has developed an approach to the assignment of projects to the public or private spheres by way of a theory of government and creation of areas deemed private—that is, not subject to state intervention. Like its binary categories of legal-illegal, law forms a sharp dichotomy and as will be seen, struggles in the current environment where shades of grey increasingly mark that boundary. In creating the legal/illegal dichotomy, law starts with the powers and authority granted to government under constitutional law and then derives from those powers the role of government, the extent of the public sphere and so delineates the public-private divide. That is, law has created two areas: public law and private law—at least in theory.\textsuperscript{453} Justification for regulatory purposes at law comes from the legal classification of an actor, organisation or activity as being public. This classification is based on tests.

With respect to public law—the matter of concern in this dissertation—law has two tests for the assignment based on an implicit understanding of the role and nature of government. As noted, the constitution governs the powers of government. However, where the constitution is silent or unclear about government powers, or where government action is challenged, the case law sets out the tests. In determining the public-private divide in Commonwealth countries, the law has developed two tests.

First is the public powers test. This test examines whether the power being exercised is a public power granted pursuant to legislation. That is, where a body or person was using powers in an “exercise of prerogative” or as “derived from legislation” it was deemed to be exercising government powers and hence

\textsuperscript{453} A considerable amount of law, as will be evident below, falls into the grey area between the two.
subject to public law. The legal issue under this test is one of determining whether the body is acting on a power conferred by statute “under an enactment.” Where the body is doing so, the body is determined public. The leading Australian case revolves around the termination of Professor Burns from the ANU. In that case it was held that the termination by the statutory university corporation, the ANU, was not a decision under an enactment. That is, the power to terminate Burns was not derived from the statute creating the ANU. Rather, the power to terminate was a common law contractual power and hence not an exercise of governmental power.

The second test is a public functions test, being an examination of whether the activities in question are customarily exercised by a government. In the classical liberal tradition of the nineteenth century, Lord Watson was able to write that in the UK the “administration of justice, the maintenance of order and the repression of crime, are among the primary and inalienable functions of a constitutional government.” Of course as society became more complex socially, economically and politically, government grew and the determination of government functions became more problematic. Nevertheless, the test still stands.

This test was taken up and applied in Australia through the Commonwealth Conciliation and Arbitration Commission in the adjudication of labour disputes. In 1959 Windeyer J in R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Professional Engineers' Association opined:

The functions which government in fact undertakes vary with the time in history and the country concerned and the nature of its polity…. [and] will reflect political philosophy current at a particular time … I cannot

---

457 R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Professional Engineers' Association (1959) 107 CLR 208.
see any ground for saying that, in law, any one activity which government undertakes is really any more a true function of government than any other. No fixed criteria for the application of the assumed distinction have been formulated. And it has no firm historical foundation.\footnote{Ibid quoted in Bini, M. (2008). "The Public Administration Act 2004." Company and Securities Law Journal 26(3): 172-190 p. 5.}

This test has been described as a “but for” test in that but for the fact of private provision, the government would step in and provide.\footnote{Campbell, C. (2007). The public/private distinction in Australian administrative law. Australian Administrative Law: Fundamentals, Principles and Doctrines. M. Groves and H. P. Lee. Cambridge, Melbourne etc Cambridge University Press pp. 37-39.} Addressing the same issue more recently, the House of Lords appears to have collapsed the two tests into one in its recently offered opinion:

What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.\footnote{Parochial Church Council Of The Parish Of Aston Cantlow V Wallbank [2003] UKHL 37.}

The House of Lords by taking account of governmental function and the exercise of statutory powers brings together the two approaches to the test and adds considerations of public financing, fulfilling roles traditionally taken by government and provision of public service—apparently begging the question.

Some recent innovations have been suggested in Australia. Colin Campbell suggests that a better approach to a legal determination of public power would be based on the exercise of a monopoly power\footnote{Campbell, C. (2007). The public/private distinction in Australian administrative law. Australian Administrative Law: Fundamentals, Principles and Doctrines. M. Groves and H. P. Lee. Cambridge, Melbourne etc Cambridge University Press p. 48.}—a position also used in economics to justify regulation. That is, where a body is exercising a monopoly power, it is exercising a public power and should be subject to judicial review. Where the universities are exercising a monopoly of degree granting power, and a monopoly power on the use of the word “university” as they have through the
Higher Education Support Act 2003 (Cth), they may be exercising a public power.462

The examination of the public-private divide in law cannot stop at the Federal level. Law in the States also address the issue. In the Victorian context the legislature has embarked upon law reform process to clarify the distinction and the test. In Victoria the Public Authorities Act 2004 (Vic) (PAA) has a two pronged approach. As Bini observes, in the first instance, the PAA assigns organisations to the public side by identifying a range of entities from departments, to administrative offices, special bodies such a police, exempt bodies such as universities and local government committees, and listed bodies such as health centres.463 The second innovation that the PAA introduces is by placing on the public side all entities in which the minister or the Governor in Council may appoint 50% or more of the directors.464 These innovations are too new to have judicial interpretation, and accordingly, other jurisdictions merit consideration.

In an American legal analysis of the public-private divide, an analysis which differs only slightly from the Commonwealth model, Moe argues that the public side of the equation is fundamentally related to sovereignty. That is, where there is an exercise of sovereign powers, the organisation must be public.465 For example, where there is coercion, such as violence or taxation, a sovereign exercise of power is taking place, and any body exercising such powers must be public. Further, where matters of public safety and security are concerned, public control is seen as a premium value.466 Moe notes that the challenges of contemporary society have obviated the potential for a standard set of criteria for assigning an organisation to the public or private spheres. Rather, there are various dimensions of an organisation’s structures, processes and functions, each

464 s. 5(1)(b).
one of which can be placed on a continuum allowing it to be located on the
dand public divide in each of the dimensions. Moe identifies these
anchoring continua as: the organisation’s subjection to various types of
legislation including legislation concerning revenue and profit related taxes,
freedom of information, administrative decision reviews, government audit,
bankruptcy, and various public service conflicts. Merely being subject to
public regulation alone is insufficient for classification to the public side. That
classification must occur with some of the other criteria.

With respect to the university, the case of *Australian National University v
Burns* found that the university in that specific instance was not acting under
an enactment. It was simply exercising powers as any other employer. In *Griffith
v Tang*, the majority took the position that the university was acting on its
internal procedures and hence not to be faulted. Kirby in his dissent observed the
grave consequences of being excluded from a PhD program and suggested that
some type of remedy should be available. The other significant case in this
regard is *University of Western Australia v Gray*—a case involving ownership
rights in intellectual property in innovative medical research both struggled with
the location of the university on public-private divide. In that case, the Federal
Court of Appeal stated:

> UWA is a special purpose statutory corporation. It was created to serve the
public purposes served by a “university”... that there is nothing in the
evidence to suggest that those commercial activities have displaced, either
totally or if in part to what extent, UWA’s traditional public function as an

---

469 *Griffith University v Tang* [2005] HCA 7.
471 *University of Western Australia v Gray* (2009) 259 ALR 224., *University of Western Australia v Gray* (No 20) (2009) 246 ALR 603.
institution of higher education in favour of the pursuit of commercial purposes (if it lawfully could do so under its Act)472

Clearly, the court in this case decided that the university was on the public side of the divide. This ambiguity in the case law, at times placing of the public Australian university on the private side of the divide in two instances but on the public on the other is troublesome from a legal perspective.

As noted in Chapter 6,473 university corporations in Australia are public corporations in all matters save some private contribution of finance. Law has yet to come to grips with the changes to the institution transforming it from largely private to largely public since the end of World War II, let alone the new financial pressures and reform resulting from the neoliberal regulatory agenda,474 and the university’s increased role in the provision of important public goods necessary for the maintenance of technologically and economically advanced societies. Law does not yet have a good way to deal with the common public-private dichotomy in the current melange in which governments operate today. The solution has been to make that decision on a case by case basis, at times producing the contradictory outcomes noted above. What occurs is a decision to make the assignment to one or the other side of the public-private divide depending upon which feature of the organisation or operations under scrutiny in the particular case.

7. Conclusions: Public Good and University Regulation

Much of the discussion of public goods and the public-private divide rests on the assumption of a real and natural distinction between the public and private spheres. The underlying assumption, critical from a regulatory perspective, is that public law and money should be used for public ends and private law and money for private ends. Yet, as noted, there is reason to query strict definitions of public good as well as the sharp dichotomy. Moving the analysis from a substantive scientific issue to a philosophical and disciplinary issue, Marginson

472 University of Western Australia v Gray (2009) 259 ALR 224, paras 183-4.
473 Section 6, “Legal Analysis”
474 The court noted these changes in University of Western Australia v Gray (2009) 259 ALR 224. para 96 (v).

Marginson writes:

\begin{quote}
\textit{in terms of the requirements of explanation and of policy making, more important than the formal legal title of ownership, is the social and cultural character of the outcome or ‘goods’ produced by higher education: the effects of these institutions in teaching/learning, research, certification of graduates, community and national service.}\footnote{Ibid p. 309-10.}
\end{quote}

In other words, the justifications determine the classification of goods and services as public or private—a regulatory matter of priority.

Normatively, Marginson describes the dichotomy as an artefact of the liberal focus on the individual instead of the collective.\footnote{Ibid p. 311-12.} There are significant implications from this normative preference for regulatory purposes. Given that the public-private divide is more a continuum than a divide, it should not be surprising to find the vast majority of institutions, organisations and activities having elements of both. Accordingly, the implication for regulators is not somehow “purifying” the regulated object to fit neatly into one or the other side of the divide, but to use the division for purposes of lexical ordering. That is, by assigning to one side or the other the regulated object, those responsible for the control of the regulated object when confronted by a choice between competing objectives with conflicting norms are able to select or prefer the objective which aligns with the appropriate side of the divide.

As Marginson notes, the classification of goods as public goods can just as fairly be based on an examination of their production and/or consumption by a public collective as on a private individual basis.\footnote{Ibid p. 311-12.} In the context of higher education the public good of higher education is not self-evident solely by examination of its private economic, or social, political and public economic impact.\footnote{Also discussed in Levin, H. (1987). "Education as a public and private good." \textit{Journal of Policy Analysis and Management} 6: 628-641.} The
matter of assignment is a political decision rather than something inherent in higher education itself.

The assignment to the public or private side is an important decision with significant consequences. A failure to take adequate account of the purposes for and implications of the decision can lead to conceptual opacity which sets the groundwork for regulatory failure. As Moe notes, efforts to “somehow bridge the legal and organizational terms the public and private sectors… encounter problems which weaken the capacity of the organization to achieve its assigned mission.”

That is, without a clear regulatory assignment leading to clarity in understanding an organisation’s assignment, an organisation’s awkward straddle of the boundary compromises the effective execution of its mission. Recognising the same issue in the context of Australian government companies, Bottomley stresses the importance of treating such enterprises “as if” they were one or the other at least where there is genuine debate on the issue.

Analysis of the university institution and of higher education in terms of public good and the public-private divide leads to the conclusion that they have significant contribution to and form an integral part of the public good. This conclusion has a number of implications for regulation. Regulation of the university and higher education needs to take account of that very significant public good component as well as the economic benefits both public and private. A regulatory design that fails to do so will result in a governance agenda for the university institution and higher education which is dysfunctional. Indeed, as Prewitt observes, “much of public policy and law is about policing what occurs at the borders separating the three sectors [state, market, and society] and about determining what function will be performed in which sphere.”

Failure to take hard non-ideological political decisions not only fails to responsibly discharge the public duties on government, but by failing to establish appropriate, coherent

---

regulation sets a foundation for regulatory failure and institutional failure—a failure too easily hidden through inappropriate accountability regimes.

The foregoing analysis of the public good and the public-private divide suggests a number of issues for consideration in terms of regulation. Perhaps most importantly, not only is there no purely technical economic reason for making an assignment to one side or another, but there are significant non-economic reasons for assigning it to the public side. Among these, it has been argued that the university itself is a premier public space for the debate about matters public and private including the nature and location of the divide. It has also been argued that higher education more broadly is an increasingly important public good in the information age. Further, sociological analysis similarly envisions significant public goods coming from the university. As well, law does not provide a singular model for public goods or the public-private divide. Finally, it is clear that a political decision needs to be made to assign clearly such organisations to one side or the other of the divide. Accordingly, assignment is a political decision, a matter for debate. While a detailed discussion of the functions of the university—and hence its important role in society—are set out in the next chapter, a preliminary conclusion can be drawn here. The university should be assigned to the public side of the public-private divide on the basis of its significant public good. I have argued that the public-private divide is an idea that helps sort out collective and government functions and responsibilities from those suited to individual resolution. Further, I have argued that as an outcome of political debate, decisions concerning the appropriate location of organisations on the divide are matters not amenable to technical solution, political decisions must be made and for functional purposes, must be made clearly. Finally, as governments enact decisions creating the public-private divide, organisations are forced to work with those assignments.

Political decisions about assigning it to the public or private need to be clear, non-partisan and brave. Failure to do so will most likely lead to regulatory failure, corruption of the public mission, and lead the institution into dysfunction as it attempts to staddle the divide. The preponderance of good economic, political, social and legal reasons are sound reasons or justifications for assigning
the university and higher education to the public side of the divide. The political
decision and regulatory consequences as well as internal regulatory practices
need to be developed with this in mind. These issues are explored in greater
detail in the chapters which follow examining the institutional (Chapter 5) and
organisational (Chapter 6) characteristics in turn.

Higher education is a public good in historic, economic, political, sociological
and legal senses. Higher education provides considerable public benefits to
society at large, effecting positively a wide range of things from individuals’
personal development, to improving quality and quantity of civic participation, to
providing a well educated, highly skilled work force, and sophisticated
consumers. It provides social mobility, equality of opportunity not based on
inheritance or economics. Its serves as a focal point for the preservation,
transmission and dissemination of knowledge critical to the functioning of
technologically and economically advanced societies which cannot rely on the
bonds of tradition to accomplish these tasks. These significant public roles and
public goods provide adequate regulatory justification for assignment of the
institution and functions of the university and higher education to the public side
of the divide.
CHAPTER 5: REGULATORY OBJECTIVES AND THE INSTITUTION OF THE UNIVERSITY

1. Introduction

A key issue in regulatory coherence, as argued in Chapter 2, and supplementing Feaver and Durrant’s systemic coherence, is coherence between social and policy norms. Social norms are those norms embedded in institutions. By “institution” is meant the norms, practices and rules that create a particular community, including an understanding of who makes up that community, what its objectives are and the methods employed to achieve those objectives. By organisation is meant a particular group of people collaborating to achieve a particular objective. Institutions are created around norms which have some objective and are perpetuated over time. Institutions such as parliament, the legal system, the market and the university all have different norms, and regulating each requires sensitivity to those norms. Policy norms are those norms selected by politicians which reflect their political philosophies and which are then reflected in legislative and regulatory agendas. Incoherent norm systems cannot co-exist. One must give way to allow the other to rise. Trying to maintain incoherent norms systemically will negatively impact either or both of the extant institutions or the political agenda. Accordingly, this dimension of regulatory coherence needs careful attention.

It has been argued in Chapter 2 that regulatory coherence demands either coherence between the policy norms and existing institutions, or that regulation be crafted carefully to take account of such institutions where there is to be a to change institutions or creation of a new one. That is, where politicians have decided to use regulation to create or modify an institution, they do so with attention to existing institutions. Failure to attend to the institutions is likely to

484 Ibid.
485 The reader is reminded that use of the term institution in this dissertation is to the national and global institution of the university and not used with respect to any specific instance of a university organisation.
lead politicians and regulators into the creation of incoherent regulation and so lead to regulatory failure.

This chapter addresses these issues by asking and answering three questions. First, it asks the institutional question: what is the institution of the university? And, importantly, is the university a unique institution, or is it merely another generic institution in contemporary society? The chapter argues by way of literature surveys and application of those surveys to the university that the university is a distinct, social institution based on non-profit knowledge norms.

The first survey is an historical examination of the institutional tasks or “missions” over the centuries. A more complete institutional answer, however, requires the chapter to examine the university institution from a number of additional perspectives. These perspectives are developed through critical surveys of economic, sociological, legal and political literature and application of that literature to the university. Not only do these disciplines provide competing policy and regulatory recommendations, but more importantly they provide different understandings of the institution itself. Secondly, the chapter asks the policy question: what do politicians and regulators require of the university institution? It answers this question by the same historical review of the “missions” of the university and subsequently with a specific political regulatory focus in sections 7 and 8 of this chapter. This historical and contemporary examination helps to capture the historical institution which informs the contemporary university, provides a characterisation of the contemporary institution and provides an understanding and basis for critique of the contemporary missions assigned to the institution by current governments.

Answering these questions provides a strong basis for arguing that the university is a foundational social institution of western society and a provider of important public goods, which also provides private economic and social goods.

The third question is derived from the answers to the first two questions about the nature of the institution and the policy question of what politicians ask of the university. The third question asks the coherence question: are the policy demands coherent with the institution? The answer to this latter question is mixed—to the degree that the knowledge norms and public good agendas form
part of policy, the answer is in the affirmative; however, where policy shifts the university’s foundation to private and economic norms the policy is incoherent. These answers therefore not only inform political decision makers as to where to place the university in terms of the public-private divide, but also provide for an understanding of how to regulate it and for what purposes or objects the institution of the university can and should be used.

Concerning the second issue, policy objectives, it should be noted that they can be markedly diverse, ranging from such objects as increasing and concentrating political power over civil service agencies by appointments and restructuring management hierarchies—as under NPM reorganisations of government bodies—to the promotion of cooperative and democratic norms. Such procedural and ideological objectives may have little or no substantive involvement in the institution itself, yet their underlying norms may be a source of serious conflict and dysfunction for the institutions upon which they are imposed where those institutions are founded on other norms. Although it may seem self evident that procedural norms are likely to have an impact on substantive issues, it is a position that is controversial. For example, as noted in Chapter 2, some economists and business scholars advocate “context indifferent” management and regulation—i.e. that good management and regulation is not dependent on the institution’s organisations, but on the implementation of generic prescribed formulae and techniques. Although one of the significant theses of this dissertation argued in this and the following chapter is that the university is a distinctive social institution, the universalist approach just identified presents a challenge to that view. Further, as it is in vogue with management scholars and is consistent with NPM advocates, it forms a background for much policy making for, and regulation and governance of, the university. The challenge for one holding a distinctive view of the university is

486 The debate is long-standing and far from being resolved. See for example, Alford, J. (1993). "Towards a new public management model: Beyond “managerialism” and its critics.” Australian Journal of Public Administration 52(2): 135-148. This is noted with respect to university governance in Marginson and Considine’s comment. “We are forced to conclude from this persistent application of a medicine which appears redundant that it is not a disease which is under assault, but the patient!” Marginson, S. and M. Considine (2000). The Enterprise University: Power, Governance and Reinvention in Australia. Cambridge, Cambridge University Press p. 62.
as one Vice Chancellor put it: “If the universities have no independent mission of
their own other than … training of individuals for jobs, then they should not be
surprised that they are treated like any other supplier of service.”

There are critical political ideologies and normative assumptions that underlie the
belief in generic regulatory policies and practices. Essentially, these views and
philosophies are premised on rationalist reductionist models of humankind and
its institutions and organisations. These views were discussed in the previous
chapter’s critique of economics and political ideologies. While they are relevant
to the discussion in this chapter, they are tangential to the main argument which
is that universities are a unique social institution contributing to societal well-
being—i.e. public good. Accordingly, the reader is referred back to the
previous chapter’s critique where appropriate and the focus of this chapter is
 premised on those foundational arguments.

This chapter’s examination of institutional objects provides a clear understanding
of the policy choices, institutional objectives as well as the potential for their
coherence. Coherence cannot be assumed to inhere among institutional objects,
and as will be seen, is a matter critical to the coherence analysis of Chapter 7.
Indeed, there is little potential for coherence where policy objects are at odds
with institutional objects. While that coherence analysis is carried out in detail in
Chapter 7, this chapter provides the foundation for that part of the analysis.

Understanding the objects of the university institution requires a somewhat
expansive examination of the institution both historically as noted, as well as an
examination through various disciplinary lenses. The university is not a recent
local invention and it is a mistake to consider its regulation as if it were. Rather
it is one of the few institutions to survive from the medieval era. Over the
centuries, the university has been many things: the training ground of the clergy
and of the deputies of the court and lawyers, the place for the perpetuation of the

Ltd.: 182-191 p. 188.
488 Critical management studies, among other things, challenges the normative basis of
management, political science critiques neoliberalism and its political ideology of privatization,
and public administration scholars address the issue in their critique of New Public Management.
elite, an engine room for nationalism, the weapon of the secular governor against competing church power, the research centre providing nation states with technical advantage in war, feeding their populaces, a creator of economic and social good, the representative of ecclesiastical power against secular authority, a political strategy, a centre for coordinating society, as well as society’s critic among a host of other things. The foregoing representative list identifies only some of the educational, vocational and political objects of the university.

Additionally, there are other significant institutional and organisational objects that need to be taken into account. These include concerns of maintaining legitimacy, enhancing prestige and economic survival. Further, account must be taken of the use of the institution and its organisations by individuals and small groups, internally such as students, administrators, or academics, as well as externally by business and politicians seeking to advance their own agendas. In addition, the university has a social mission of sorting and credentialing members of society. Finally, shifts in politics over the last few decades—a short time in the centuries long history of the university—have attempted to impose economic objects including revenue generation and in some instances profits on the institution.

This variety of roles, functions and objects of the university is monumental, difficult to distinguish and hard to evaluate. They seldom appear together in briefs of politicians, policy advisors, and regulators. Nevertheless, a clear understanding of these objects is necessary for effective regulation. These various tasks of the university are usually compiled into the vague term “mission.” It is important to note the change in the meaning of the term “mission”. Whereas earlier it referred to the transcendent objects of an activity, it now means objects of measurement for accountability purposes. The earlier meaning is more appropriate in the context of the university and it is used in that sense in this chapter dissertation (it is used differently in discussing organisational mission in the next chapter).

---

Where one begins with an examination of the institution, one finds that how one defines the university institutionally provides a foundation for the determination of all regulatory matters from policy objects, to assignment on the public-private divide, to appropriate instruments, administrative arrangements and accountability. Given the various approaches to understanding the university, as noted, the chapter examines the institution from a variety of disciplinary perspectives. With respect to the university any broad notion of its mission depends on particular views of humanity, epistemology and the institution of the university in society. These views would include such things as the belief in the limits of human nature and human potential, the possibilities of knowledge, ordering of information, and knowledge as a public good among other things.

After the review of the historical institutional missions and the disciplinary perspectives on the institution, the chapter then turns to examine specifically the mission of the university in the Australian and particularly the contemporary challenges posed by policy. Abraham Flexner’s observation in his 1930 study of the university in Germany, the UK, and the USA is worth bearing in mind: “Every age, every country, has its unique concrete needs and purposes. For that reason there can be no university type, persisting through the ages, transferrable from one country to another. Every age does its own creating and re-shaping; so does every country.” The university in Australia is no exception. Flexner’s comment does not mean that the university can be anything from an iron foundry to apple orchard. His idea, rather, is that the emphasis of the university institution can and must be shaped by the environmental context. The continuity of the university in each of these contexts is its normative commitments around knowledge: knowledge creation, knowledge preservation, and knowledge dissemination. It has maintained the primacy of knowledge as an intrinsic value

---

regardless of any particular knowledge’s instrumental utility. The university is the premier knowledge institution of western society. How that has been interpreted over time and geography varies as shall be demonstrated; however, those variations do not alter the institutional norms around knowledge or their normative ordering. This argument leads to the final argument and section of the chapter addressing the coherence between the institution and policy. This section argues that the increasing incoherence between the institution and policy are leading toward an increasingly dysfunctional institution and ultimately a form of regulatory failure.

2. Historical Institutional Missions of the University: Research, Teaching and Public Service

As a point of departure for answering the questions of the nature of the university the comment of Barnett, a UK scholar of the university, is interesting: “[the] university no longer knows what it is to be a university.” His point is that the changed environment including the regulatory environment of the university institution over the last few decades has radically changed the institution. As a result, there are many assumptions that no longer apply to the contemporary university. Trying to move beyond this ambiguity, Jarvis, a renowned higher education scholar observes:

“the university is a part of the social institution that seeks to respond to humanity’s will to understand the truth in every walk of life and in the universe within which all human life is lived…. The will to truth demands an educational institution that offers, as a service to everybody


who wishes to participate, lifelong and life wide quality research, scholarship and teaching.”

To consider the university as an institution, there must be some similarity or a convergence among a number of organisations which consider themselves “universities” that is sufficient to allow them to be placed together as a single social institution. These similarities will be with respect to capacities, objectives, and resourcing needs; a similarity in resources in terms of staff, students, infrastructure, and finance; an accord with respect to the vision and mission both among the various professionals within organisations, between organisations, and as between that institution and the government.

Many efforts have been made to define the university more carefully and exhaustively. Some, such as the famous view espoused by Cardinal Newman, have viewed the university as “an idea.” This group of thinkers views the university as an ideal state of affairs, an institution based on normative primacy placed on knowledge, given to the contemplation of disinterested knowledge. In this view, the university institution is supported by a system of organisations providing higher education usually with the support of public authorities who accept a normative or lexical ordering prioritising knowledge. It follows that the funding and control of the university is by these authorities.

Others have viewed the university instrumentally. That is, the university has been considered an instrument to achieve objectives of other parties rather than asserting its unique social contribution with respect to knowledge. It has been used instrumentally by the state, the church, and more recently, by business through providing preparation for participation in capitalist production. As put by one scholar “they are… essentially education and training establishments that will lead to a form of capitalist cultural reproduction rather than centres of democratic criticality, that we might expect from the more traditional

This comment reflects a normative conflict on the value and nature of knowledge, the normative objects of social coordination, and the related normative ordering of the missions of the university. Further, it leads to the question: Is knowledge approaching or approximating “truth” or is its value merely instrumental to increase economic efficiency or some other such end? In the latter context the university has become less about the wisdom of the sages and the struggle for meaning and more about the economic value arising from know-how of technology.

Underlying the foregoing discussion are some critical but unarticulated assumptions. These are the normative assumptions about the value, nature, and control of knowledge on the one hand, and the role of the university in relation to that knowledge and society at large on the other. The assumptions about knowledge, as mentioned earlier, include the value of knowledge as of intrinsic value or only instrumentally through its economic exchange value. If one is to take the latter view, all knowledge leading to psychological comfort or well being, environmental well-being, or peaceful co-existence is only valuable to the degree that it can be commodified and sold.

Where higher education’s knowledge is an esoteric knowledge—a private knowledge for the privileged, elite of society—then cloistering it in a university serves those purposes. Where higher education’s knowledge is viewed as critical to a society’s ability to develop an informed democracy, to enable individuals to develop and prosper in the broadest sense, to foster the well-being of society including future generations it is viewed as an invaluable public good, it is a good that should be shared as widely as possible—a important norm to underpin university regulation. In a time when knowledge was more easily controlled and society was stable from generation to generation, it was easier to justify payment by sponsors such as religion, governments, and wealthy individuals. However, where knowledge is considered a private good, a commodity, the role of the


university is re-drawn. The contest between public and private conceptions of knowledge and the university reflect a larger shift in the social conception of knowledge. As sociologists Marta Calas and Linda Smircich observe:

“The moment ‘knowledge’ was positioned as a commodity in the wider context of capitalist modes of production and (‘free’) market forces, universities were to receive declining support for continuing as sanctioned sites for the production of innovations in the arts, the sciences and the professions, and still much less support for continuing as places for ‘disinterested knowledge’ in the quest for a better society.”

Thus, at a basic level the contest is a contest one about the nature of knowledge—as an expression of universal truth and the university its handmaiden as Newman would have it, or as Mode 2—i.e. an applied, context specific, production oriented, project limited knowledge, with neither on-going organisational nor institutional nor social value beyond its transactional economic value. This debate is part of the larger debate on the nature of knowledge from a pragmatic perspective purportedly apart from the stricter philosophical enquiries of epistemology. It further reflects an academic divide between modernist and post-modernist views dubbed “the culture wars,” which in turn add another layer of complexity. Unsurprisingly this complexity is reflected inconsistently in regulation of the university. While seemingly esoteric questions and issues, they go to the fundamental regulatory questions of what is being regulated, by whom and for whom? Is it correct to assert that the university is

the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge?

Regulating the university to favour the creation and protection of intellectual property is part of a particular normative agenda as is regulating the university

for the purposes of broad concepts of knowledge and political literacy for
democratic participation.

Regulatory issues surrounding the university of course are not new. Circa 1250,
Humbert de Romans, Master General of the Dominican order and graduate of the
University of Paris, listed a number of causes for complaint about scholars
which, while reflecting medieval views on the university’s mission, have a
remarkably contemporary ring to them. Humbert complains about the waste of
resources, failing to take advantage of opportunities to expand the mind, lack of
focus, poor learning habits and not putting one’s learning to good use. One
can see from this list both an idea of the objects of the university and the
perennial frustrations of in those involved in its regulation and governance. The
university’s primary job is providing students with the opportunity to develop
knowledge about the world. To achieve this objective, however, it must engage
in two additional tasks: the preservation of old knowledge and creation of new.
If it fails to do these, what will it teach?

Although the mission of the university is often summarised, for example, as
teaching, research and public service, this trinity is in fact shorthand for a variety
of missions. It is important to note from the outset that the missions are not
always in alignment nor necessarily coherent: some missions are coherent and
others are in conflict. This theme of conflicting missions will be highlighted in
this chapter. They are significant because while some conflicting missions may
be incorporated within a single institution, others will be fatal to it. While the
three main missions may largely be coherent or reconcilable, further examination
and explication of the university’s missions is in order to understand the
functions and role of the university in society. These latter functional missions
of the university, i.e. missions developed from an understanding the role of the
university in society are separate and distinct from the sociological institutional
and organisational missions, discussed separately.

Exposition of the Rule of Blessed Augustine, in Thorndike, L. (1944). University Records and
3. Historic Knowledge Based Missions

Historically, the university developed for the purposes of educating, testing and credentialing people seeking the right to teach. That is, students attended the universitas in order to study and upon successfully passing examinations, receive the licenciate permitting them to teach. As part of the teaching and examining role, scholarship developed. That is, books on all topics of inquiry were studied, examined, copied and recopied—by hand of course—and lectures based on those studies were prepared for dictation to students. These scholarly activities form the foundation for the research mission discussed later. Over time the universities developed extensive libraries for use by teachers and students alike. To rulers and wealthy individuals the value of university educated graduates was self-evident and demand for educated people drove students to the university. This teaching activity started the sorting and credentialing mission of the university. Further, as local citizens recognized the social, political and economic benefits of the university corporations in their respective cities, local political leaders worked to keep them in place. Society’s experience with the institutional led to an expansion of the university’s mission.

One of the most basic conflicts in the university institution lies deep in its history. That conflict is the conflict between the disinterested pursuit of knowledge for its own sake and the utilitarian mission of career training. This conflict goes back to the origins of the university. As Classen observes:

“the schools of the twelfth and the universities of the thirteenth century never set themselves the goal of providing the courts and municipalities with specialized experts….. From the very beginning, education was subject to the tension between the fundamental and primary impulse to seek the truth and the desire of many persons to acquire practical training.”

The medievalist Cobban characterises the medieval university as a largely vocational school: it taught law, medicine and theology all for purposes of

---

employment. Yet, as he elucidates elsewhere, the curriculum of medieval era
was designed for intellectual and spiritual development, not skilling for
employment. Essentially, the medieval university was a vocational capstone
on a classical—or “liberal” as it would more readily be known—education.

One finds echoes of this historical comment in both the contemporary
sociological research and economic criticism of the university. Sociologists note
that the role of the university is as much about sorting and providing
credentials—at times quite disconnected from actual abilities and skills—as it is
about providing education. Economists complain about the cost of universities
and their lack of focus on job skills, seemingly oblivious to the critical social
functions with which the institution is charged and the potent non-economic
benefits the institution provides. Indeed, at a most basic level some would view
the utilitarian and ideal objects of university as fundamentally in conflict. This
is not the conflict, as shall be demonstrated. It is significant to note that the
conflict is not about the value of knowledge per se, or the university’s role in its
creation, preservation and dissemination; rather, the issue is which knowledge is
to be created, preserved and transmitted. That is a normative and political
debate—whether the knowledge of value is only that which generates
immediately recognisable economically valued knowledge or whether there
might be some other knowledge, such as how to organise and regulate an
economy or a society, which might be of value. These normative and political
dimensions of knowledge and the university’s mission of knowledge creation,
preservation and dissemination will be seen throughout the missions which
follow.

---

508 Ibid p. 130.
Education: Contributions and Their Contexts. P. Gumport. Baltimore, MD Johns Hopkins
University Press p. 208.
208.
a. Development of Individual, Citizens and Civilisation

Higher education has long had the dual aims of individual human development and the development of citizens capable of participation in collective social and political life.\textsuperscript{512} The former aim is identified with the humanistic movement with its emphasis on the redemption of fallen creatures through ethical development.\textsuperscript{513} The university itself was seen as having a mission of evangelizing in medieval times,\textsuperscript{514} and so contributing to civil society or “Christendom” as it was then called. This “socio-political mission” of creating citizens has been carried forward throughout the millennia in various forms.\textsuperscript{515} As Rudy sees it, the institutional mission of the universities is to be “nurseries of humanism and science, scholarship and social responsibility….dedicated to their basic task: to further the quest for truth and to release the full potential of human creativity.”\textsuperscript{516} In the Marxist version of this mission, the university is the institution for training the elite necessary to maintain the ruling class.\textsuperscript{517} Still, regardless of how one sees it, there has been a strong tradition of the university as contributing to the maintenance of society and, where admission has been on the basis of something other than privilege, the levelling of society.\textsuperscript{518} The development of individuals, citizens and society remains a contemporary mission for the Australian university as seen in Chapter 3 and discussed below.

This view of the importance of development of citizens is a critical mission of the university today in Australia and not merely some misplaced nostalgia or idealistic critique. Justice Owen, the Commissioner charged with the inquiry into the $4 billion collapse of HIH Insurance stated:

\textsuperscript{518} This view is argued in Australia. See for example Davis, R. (1990). Open to Talent. Sandy Bay, The University of Tasmania., p. 36, argues this as one of the major defences of the University of Tasmania.
“I think all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply those tenets in the decision-making process. The education system—particularly at tertiary level—should take seriously the responsibility it has to inculcate in students a sense of ethical method. In an ideal world the protagonists would begin the process by asking: is this right?”

Owen J’s views of the role of tertiary education in Australia’s largest corporate collapse is instructive in that it is his view not that tertiary education needs to improve its ability to generate revenue, or develop technical or professional skills. Rather, Owen J’s concern is with the failure of the tertiary education system in developing students’ faculties needed to engage in critical, ethical thinking about personal as well as collective objects. In Owen J’s view, the failure of HIH is in part a failure of tertiary education in Australia. The university has a mission of developing students with collective social commitments and abilities in contrast to merely training self-interested business managers operating in an amoral environment. The education provided by the university must not only be more than how to make a profit. It must provide education which is properly described as “higher education”—critical, reflective and broadly aware.

b. Training For Statesmanship

The philosophers of antiquity saw the main objective of higher education as the preparation of individuals for successful participation in politics, a type of “seminary that provided councillors and law-givers for republics and reigning sovereigns.” Such notables as Cicero, Seneca, and others all received higher education as training for politics. Society has long looked to the university to provide experts on all manner of issues, providing advice and advisors to

---


520 Ironically, the loss resulting from the single collapse was roughly equivalent in size to the whole of the Australian tertiary education export market at the time of the inquiry.

governors of all types of organisations. The University of Paris, for example, was so involved in the governance of the city, that it became impossible to distinguish between university and royal opinion at times. The papacy drew heavily from the graduates of the law school at the university corporations of Bologna and Paris from their earliest days. As the clergy played a significant role in the governance of society, functioning as judges, ambassadors and in other important civic roles the education of the clergy as statesmen has been an important function of the university.

Leaders of all developed commonwealth countries are university educated, as are most diplomats and one would assume all senior civil servants. The idea of a civil service based on technical ability rather than social standing has been a hallmark of civil service and bureaucracy since the 19th century. Every Australian Prime Minister since Chifley lost office in 1949 with the exception of Keating has been university educated, and its first Prime Minister, Edmund Barton, like the UK’s first Prime Minister Robert Walpole two hundred years earlier, was a university graduate. While this history does not prove the university’s institutional mission, it is evidence of an important institutional role in the shaping and training of leaders.

c. Liberal Arts

The mission of the university has long been centred on the teaching of the liberal arts. The curriculum adopted by the medieval university came from the culture of late antiquity—that of the first century B.C. It was based on the three literary

arts: grammar, rhetoric, and dialectic, and the four branches of mathematics: geometry, arithmetic, astronomy and theory of music.\textsuperscript{527} As the thirteenth century scholar Humbert de Romans observed, the liberal arts were a form of personal development and not limited to the immediately practical.\textsuperscript{528} This curriculum formed the basis of all education at the universities, and provided a foundation for the learning of higher knowledge, namely theology, law and medicine.\textsuperscript{529} The revival of the liberal arts in the middle ages, of course, resulted from the rediscovery of the classical works of antiquity, and the effort to integrate them into the belief in the revealed truth of the Christian church.\textsuperscript{530} The importance of the liberal arts in the formation and development of western culture, science and technology need not be re-iterated here. Suffice it to say that the liberal arts provided a significant part of the foundation.

In the contemporary context, liberal arts provide a basis for discussion about meaning—from the mundane meaning of fluctuations in the economy, to the meaning and conduct of collective existence and social organisation, to the esoteric discussion about the meaning of life. The university’s objective of maintaining and developing the liberal arts makes it society’s primary place for debate about the development, challenge and transformation of meanings socially and collectively as well as individually. That is to say, the university holds a special if contradictory role as both the guardian of culture, and the critic of society, being both conservative and creative. The liberal arts provide the foundation for that discussion including its language, its arguments, its values and logic. The university’s mission in this regard is again in conflict, to be both conservative and radical. It may be that this mission is the most difficult of all mission to evaluate in terms of its success except to say that this integral role as


embraced by the academic profession has been sufficient to sustain it for nearly a millennium at the heart of the university.

d. Development Of Scientific Research

Humanity has gained knowledge about itself and its environment through various versions of research throughout recorded time. One important and long standing object of the university institution has been scholastic research. The origins of an institution of higher learning dedicated to research can be traced back to the Museum of Alexandria from around 285 B.C.E.\(^{531}\) According to Marrou, the Museum supported the research of “geometers, astronomers, physicians, historians, critics and grammarians.”\(^{532}\) The scholars were maintained by the king and their needs attended to by others so they could dedicate themselves to their research.\(^{533}\) Its librarian, Callimachus, catalogued the collection amounting to one hundred and twenty thousand volumes.\(^{534}\) Although not initially established for educational purposes, it did over time develop into an educational institution that lasted well into the fourth century A.D.\(^{535}\)

The Italian universities of the Renaissance of 1475-1600 had research as an important mission. It has been argued that they were the basis for the Humboldtian research university which inspired other German universities, American, UK and ultimately, Australian models.\(^{536}\) Although the advancement

---

532 Ibid p. 189.
533 Ibid p. 189.
534 Ibid p. 189.
536 Grendler, P. F. (2002). *The universities of the Italian Renaissance*. Baltimore, Johns Hopkins University Press., pp. 242-246, 510-511. The Humboldtian tradition goes back to the early nineteenth century when Wilhelm von Humboldt, a philosopher, linguist and Minister of Education, was assigned to provide a report on higher education which ultimately led to the founding of University of Berlin in 1810. That university, home to such notables as Max Planck and Albert Einstein, implemented von Humboldt’s view that education was not a solitary endeavour, but one which depended on the community and which in turn required a contribution to society as a whole. In the Humboldt model, the research and teaching functions were fully blended in the single role of the professor. Clark, B. (1983). *The Higher Education System. Academic Organization. Cross-National Perspectives*. B. Clark. Los Angeles, Berkeley, London, University of California Press p. 98. The university fulfilled its function in the advancement of scientific knowledge and the training of scientists through what Clark describes as “a common search for truth, in the form of new knowledge.” Clark, B. (1996). *Teaching, Research, and Quality in the Twenty-First Century. Universities in the Twenty-First Century*. S. Muller.
of knowledge and the institutionalization of its advancement are long standing, research generated knowledge as an end in itself\(^{537}\) has only gained prominence and become a significant focus of human endeavour since the Enlightenment. This relationship between society’s interest in knowledge and the Enlightenment is significant because the driving force in the establishment and growth of the university has been the Enlightenment belief in the progress of the human spirit.\(^{538}\)

As Cobban explains, the result of the Enlightenment was that the work of scholars at the medieval university changed from “a random study of scientific data to a more fully integrated mathematical investigation in physical phenomena, underpinned by a method of scientific inquiry comprising observations, hypothesis and experimental verification.”\(^{539}\) That shift also paralleled a shift in western epistemology from one in which all knowledge was by divine revelation, to one in which human agency was efficacious in discovery of truth.

The German decision to integrate research and teaching as in the Humboldtian university has been a model emulated throughout the world as integrating research and teaching into a single organisation, with research leading the way. This is not to say the advancement of empirical research is the sole or main driver of the university. Many of the great university organisations of contemporary society made teaching their main mission, for both the professions and the liberal arts. Indeed, teaching was the foremost institutional mission as discussed above.

\(^{537}\) Institutions such as temples and other cultic centres dedicated to the advancement of knowledge of divination, astrology, spirituality have been a feature of human society for millennia.


Teaching in the traditions of a discipline is backwards looking or historic. In other words, teaching as imparting knowledge is working with the accumulated, refined and re-worked knowledge of the past. In contrast, research is an innovative mission. It is forward focused in the creation of new knowledge and future focused, and its creative character sets it in opposition to traditions taught, at least in some views. Further, these two activities take different mindsets, different abilities, and either one can easily consume the energies of an individual. Abandoning either mission, however, is to abandon the institution of the university. Any organisation wishing to comply with the institutional norms of the university has made scholarship a significant part of its activity and mission—a point recently illustrated by the for-profit University of Phoenix which responded to criticism of its status as a university through creation of a National Research Centre.  

There are significant normative issues underlying the research mission in terms of disinterested basic research, commercialisable applied research, and the revenue generating mission of the contemporary university. Ruegg argues that despite the importance of utilitarian professional training of university studies in the medieval era,

“the university as a body serving only [these] material interests and freedoms, would have shared the fate of other medieval institutions;…. It was the collective responsibility for the organization and discipline of the striving for knowledge…. which gave some meaning to the liberties and privileges of scholars and masters, transcended their immediate material interests, and assured the persistence of the autonomy of the university in its most distinctive activity, which is that of scholarly and scientific teaching and research.”  

In fact, Ruegg believes this normative commitment to knowledge is the basis of the notion of the transmission of knowledge as a public good. Further he

---

542 Ibid p. 29.
believes that the normative commitment is what allowed scientific discovery to take hold.\textsuperscript{543}

Regardless of how knowledge is conceived, it is insufficient for an organisation that wishes to participate in the institution of the university to teach but not engage in research broadly defined. A university which fails to research is by some accounts at least not a university.\textsuperscript{544} This has been a criticism of the for-profits, such as McDonald’s Hamburger University and Motorola University\textsuperscript{545} and just noted University of Phoenix which responded by its “National Research Centre”.\textsuperscript{546} Smith argues that the notion of “The University” is outdated, and all that exists is a constellation of organisations with various objects relating to the creation and dissemination of knowledge, known as universities\textsuperscript{547}—although it may be significant to observe that the comment appears to conflate the global institution with various local organisations. Such perspectives, however, fail to take adequate account of the social nature of knowledge and the community or collective environment within which much successful teaching and research take place.

\textbf{e. Training For Professions}

In the medieval university, the professions attracted considerable numbers of students. Indeed, the earliest universities were outgrowths of the law schools at Bologna, and there is evidence that students hurried their liberal arts studies in order to move on to the lucrative professional studies as soon as possible.\textsuperscript{548} The


\textsuperscript{544} For example, the National Protocols, Protocol A, 3 A.8 provides the following criteria for being classified as a higher education institution "academic staff… are active in research when engaged in research student supervision".


\textsuperscript{546} University of Phoenix (2008). University of Phoenix Forms National Research Center and Names Advisory Board Charter Members.

\textsuperscript{547} This the main thesis of Smith, T Ed. (1996). Ideas of the University. Sydney, Research Institute for the Humanities and Social Sciences, The University of Sydney in association with Power Publications.

professions were considered vocations and universities were seen as organisations dedicated to training teachers, theologians, lawyers and doctors.549

Students at the earliest universities in Australia, namely Sydney and Melbourne, were for the most part engaged in studying for Arts degrees preliminary for qualification for studying professions in the UK.550 Training for the professions has remained an important function of the university. The Australian government has recognized this function and published its findings, recommending among other things, on the growth of opportunities for professional training by increasing related university enrolments.551

This training for the professions has both public and private components as well as entrepreneurial and caring dimensions. The public good of the professions is their contribution to the social order and individual well-being of members of society. The private benefits of professions are to the professional in terms of social prestige and in many professions, economic reward, as well as to the individual beneficiary of professional services as well as society as a whole.

f. Contributing to the nation-state and social welfare policy

The mission of the university has been closely linked with the creation and development of the nation-state. That is, by developing the notion of the nation-state, an ethnically based group, training the bureaucracy to serve the government, the university has played a significant role in the development of the nation-state as a power, assisting it in the definition of roles, developing control over the populace and a political agenda—for both left and right wing governments. The social and political missions of the university can be seen in the early history of the university in Australia.552 The University of Melbourne

was established for the combined purposes of competing with the University of Sydney and making higher education more readily available to the local elite.\textsuperscript{553} This impetus for the university as social competition may go some distance in explaining the Australian university’s imbalance toward utilitarian professional training over intellectual leadership, research and scholarship.\textsuperscript{554} Yet, the knowledge of importance was the ability to understand the dynamic socio-political and geographic environments of the colony in its position on the opposite side of the world from the homeland. The knowledge from other countries was considered crucial for the development of and integration into the larger global political and economic systems. That knowledge was to assist the growing colony to establish and build itself eventually into a nation-state, a public good.

Part of the nation building mission policies involves the social welfare and social mobility policy agendas of governments from post World-War II to the 1970’s. In that era, the university was seen as an important part of governments’ policies to decrease disparity between socio-economic classes providing all citizens with equal opportunity to achieve higher social standing and increased economic resources. This shift transformed the university from a private elite institution to a public egalitarian institution.\textsuperscript{555} It also added a further conflicting mission demanding academic excellence for the finest minds while insisting on equal access for all. The government’s use of the university to achieve social equity through social mobility—referred to as a mission of accessibility.\textsuperscript{556} Problematically, this accessibility mission has come into conflict with its mission of excellence.\textsuperscript{557} The university as a public institution is expected to be inclusive, fostering diversity, yet it must have policies which promote inclusivity.

\textsuperscript{553} Ibid.
\textsuperscript{554} Davis, R. The Unbalancing of Australian Universities. Wollongong: 83.
These policies may at times limit free expression of controversial views. This shift has been moved a step forward as the knowledge privileged by government has been only that which produces immediately foreseeable economic advantages.

This section has argued that while the university is certainly not the only institution that is charged with the creation, preservation and dissemination of knowledge—other research institutions, think tanks, government laboratories, museums and organisations such as libraries serve these functions—the university is a special institution in that institutionally it functioned best as autonomous from sponsoring interests in the creation, preservation and dissemination tasks. Further, it is founded upon an intrinsic view of the value of knowledge rather than an instrumental view. Although training for professions, statesmanship, and research have been outcomes, the consistently operative foundational norm has been knowledge conceived of. In these ways the university is a unique knowledge based institution with its historic mission being the preservation, transmission and creation of knowledge.

Other perspectives on the institution, however, are important for understanding it and its potential. The chapter next turns to these, first economic, then sociological, legal and political.

4. Economic: Profits, Non-profit and Development

This section examines the university institution from the perspective of economics. While some balk at the notion, there has been recent discussion of an economic mission of the university. This discussion of economics is critical in the assignment on the public-private divide. As noted in the previous chapter,

---


much of the policy advice and political decisions are made on the basis of economic perspectives and advice. For this reason, a consideration of the economic mission of the university is important.

There are in this discussion two distinct economic missions of the university. One is external and the other internal. The external economic mission refers to the university’s significant economic contributions to its external environment in terms of the advancement of knowledge, hard technology as well as shaping of policy, culture and hence ultimately, society. Bringing in new ideas and developing local knowledge are innovative missions of the university and the university has been effective in this regard.

Externally, there has been discussion of the university as having an economic objective in terms of facilitating economic development resulting from enabling people’s creativity and innovation. While certainly not its main function according to the majority of higher education scholars, in a certain way it is another form of its public mission—disseminating knowledge by the transfer of technological innovation created there. Stephen Sample, former president of the University of Southern California, suggests that it is a core function of the university. Sample stated: “we need to incorporate technology transfer as part of the basic mission of the university.”560 One important concern arising from this view is that transforming the university to support economic growth is a subtle way of redefining "public good" to mean supporting those activities that facilitate corporate activity in the global knowledge economy. Some argue that this focus diverts the university from addressing “the most urgent social, economic and educational needs of the population,”561 a diversion to serving corporate rationality, or simply the other personal, public and human missions discussed above. Further, this view of the university’s external economic mission must take into account the larger issues of core public values and critical public

mission of the university which, if the university is to be assigned to the public side of the public-private divide are decidedly non-commercial. It may be that the normative implications of placing economic revenue generation whether for base operations or for profit are so inimical to the university institution as to shatter its core.  

This discussion leads to consideration of the internal economic mission.

The discussion of the internal economic mission of the university is the most controversial. The controversy stems from a combination of fact and ideology. The fact is that university organisations are significant economic actors in their own right in terms of the production and provision of goods and services, consumption of resources, distribution of goods and services, and employment. They are economic actors at local, state and international levels.

Through the normative lens of neoclassical economics, the exchange of money for the provision of service should be treated as a commercial transaction. Normatively, as noted, this transaction should be a private for profit transaction. An organisation that is the providing party in such transactions should be a private profit generating organisation. There is no reason for it not to be—from this perspective at least. From a political perspective, neoliberals favour privatisation and as such, seek opportunities to privatise public organisations including the university institution to the maximum extent possible to increase the sphere of private economic activity. As such both neoliberal political scientists and neoclassical economists might be disposed to see universities as privatisation opportunities to be welcomed, creating new profits in the private sector, and expanding economic freedom. Thus from this perspective, the internal mission of the university should be changed from higher education to generating a profit.

---


563 This rationale is evident in Dawkins review. See also, Giroux, H. A. (2003). "Selling Out Higher Education." Policy Futures in Education 1(1).
There has been a start on the scholarship on the university as a private, for-profit enterprise, and some centres have been established to examine it. Although a doctoral dissertation at Harvard has been offered, and a recent collection of essays overseas, to date there has been very little done in Australia. A question similar to the earlier VC’s sharpens the focus from generic organisational management to a for profit enterprise: “if the ‘corporate university’ is hardly distinguishable from a business corporation, one has to ask: upon what basis should universities exist?”

The University of Phoenix is the sine qua non of this for-profit model of the university. Private university scholar, Breneman, referred to it as the “poster child” of the group. The University of Phoenix, a subsidiary of the Apollo Group, has current student enrolments of 224,880. It has been in operation since 1976. The university has been described as a “stock market darling” because of its outstanding financial performance, business model and management.

---


To understand the “university” in this model one can do no better than to quote the founder and CEO of the owning corporation. In her article on the University of Phoenix, Ana Marie Cox quotes John Sperling, Chair and CEO, Apollo Group, owner of the University of Phoenix, on his view of the university. Sperling declares: “This is a corporation, not a social entity. Coming here is not a rite of passage. We are not trying to develop their value systems or go in for that ‘expand their minds’ bullshit.”

This view is the consequence of the implementation of neoclassical economics and is a concern to some who view the university differently. The lack of interest in students’ intellectual development and narrow normative view of job readiness, challenge the idea of this particular organisation as a part of the university institution—and hence its right to refer to itself by that title. Further, it is suggestive of other institutional norms such as intellectual development and a poly-normative environment or approach to studies.

The for profit model has worked in very limited circumstances. Essentially, it functions in niche areas such as adult part-time education. These for profit universities have survived, however, only by free-riding on non-profit universities for such resources as libraries and qualified academic staff.

Analysis of the shift to for profit models and market regulation have been addressed by a number of authors—from economists to social theorists and higher education specialists. They have published various critical, insightful analysis.

---

and comprehensive analysis of the models. All of these studies point to a variety of serious limitations and consequences of leaving universities to for profit organisations and their regulation to markets. Indeed, Breneman later questioned the model as a variety of Federal government lawsuits were filed. The lawsuits, for the most part successful, alleged exploitation of students by providing misleading information and high pressure sales, inappropriate accessing of public funds, improper incentivising of admissions counsellors, misleading the market, failure to hold sufficient study group hours, various efforts to game regulators and labour issues. While it is not suggested that profit driven university corporations will necessarily operate this way, there are two important consequences arising from this behaviour. First, the value of a degree is largely reputation based. That is, the value of a degree depends to a large degree on the reputation of the organisation issuing the degree. Secondly, the actions of the corporation operating the University of Phoenix are hardly anomalies in the business sector. In the Australian context, an on-going spate of scandals concerning private providers of TAFE and language skills attests to the problems associated with the introduction to the profit motive into the provision of educational services—a matter dealt with in greater detail in the next chapter and considered from a coherence perspective in the analysis in Chapter 7.

In the Australian context, as noted, since Dawkins the university has increasingly been pressed to finding means to generate revenue and reduce its expenses. Indeed, some argue that this pressure has been so great that its public good ethos

has been lost and hence the university is ‘in crisis.’ It is argued that the mission of the university may be in a stage of transformation from a public institution which provides public goods to a wide array of citizens on the basis of academic merit into a private, for profit business providing whatever courses can be sold to people with the economic resources to pay. The issue of public good has been dealt with in depth in the previous chapter.

Were the university and its mission to become like any other business, that is, simply generating a profit, it could not but radically change the university. To think about it clearly, one can conduct a simple thought experiment of the university-as-a-business. In that model, the university would examine its resources and if it determined that it were more profitable to sell debased, plagiarised or incorrect knowledge, work to narrow minds by advocating a single perspective or truth, then it would readily engage in such activities—as there are no widely accepted business norms to restrain it from doing so. Further, if it was more profitable to sell all the facilities and fire all the academic staff, simply printing “degrees” on fancy paper, then that university-as-a-business would do so. Business has a clear over-riding norm: make a profit. The reaction against such “degree mills” suggests that a university is more than a business, and as the discussion thus far would indicate, other than a business.

The shift to revenue generation from the external environment and maximising economies within create a serious threat to the university. As Professor Gavin

---


Brown, the former Vice Chancellor of the University of Sydney stated, “concentrating on garnering the resources and squeezing out the efficiencies that would allow one to achieve lofty goals.” In other words the careful implementation of for profit management practices undermines the ability of the university to fulfil its public mission. Further, it contradicts the public good objects which motivate many of the academic.

If one acknowledges the core of the university institution as being the academic profession consistent with Clark’s concern for a stimulated heartland it is interesting to note the following. Concerning the academic profession, Weber discussed the profession’s idea of a “calling” as something more than a mere way to earn a living. The idea has not died. Rejection of the producer-consumer relationship model for relations between academics and students remain. For example, there have been calls for academics to take a “Hippocratic Oath”, requiring public good or interest be put ahead of one’s own interests, and there are those who argue that fiduciary relations exist between teacher and student. Further, there is also the traditional idea of disinterested methodology of science as a service to society. Robert Merton championed the idea as “communism, universalism, disinterestedness, originality and scepticism.” None of these core university ideals is compatible with the profit motive, and in fact, are inimical to it. Essentially, the consensus is that the profit objective and revenue generation undermines the university, destroying the academic ethos.

In concluding this section on the economic perspective of the institution, it has been argued that while the institution does have economic impacts, the conception of the institution of the university in the first instance through an economic lens is to miss its nature fundamentally. The university is not first about economics. It is about knowledge and a normative ordering which places knowledge in the first position. The introduction of strong economic goals is in conflict with the knowledge goals and more likely to corrupt or divert the institution from its foundational institutional norms. To argue as economics might that the university needs to be conceived as simply another economic institution is to fail to understand the institution. Accordingly, to develop policy on economic premises is to have selected an incoherent policy foundation for this institution. Having seen the university institution through an economic lens and contrasted it with economic norms, the dissertation now turns to examine it sociologically.

5. Sociological: Sorting, Storing and Survival

Other important institutional missions of the university are sociological. These missions as will become evident, are also important from a political point of view because they go to the core philosophies and theories of society, government and humanity. The social missions are important from a regulatory point of view because they provide justifications for assigning the university on the public-private divide. A sociological analysis of the institution of the university provides evidence of important social functions or missions of the university in the social ordering, reflecting political theory and social policies such as those effecting hierarchies and equality. The university creates and facilitates hierarchies and stratifies society by providing honours to some while denying those same honours to others. The political questions are whether this is desirable, and if so, on what basis? The answers to these questions not only reflect political philosophies but also provide powerful arguments for assigning the university and higher education to one side or the other of the public-private divide.

From a sociological point of view there are two dimensions of the university’s mission: the university’s institutional mission in society and its institutional/organisational mission to survive and thrive as an institution and organisation in its environment. The first deals with societal institutional expectations put on the university, that is, how the university contributes to social order. The second deals with how institutions and organisations respond to their environment. This section deals with the societal and the institutional and organisational missions in that order.

a. Societal: Sorting, Weeding, Cooling and Credentialing

The university provides a critical social function in contemporary society. Contemporary western society lacks traditional bonds of kinship and culture for sorting and credentialing people for various positions in society. For people to find a place in society there are a variety of mechanisms available. These mechanisms include violent power as discussed by Hobbes centuries ago and found in collapsed states today, economic power, which when used in the context of government is considered a form of corruption, and nepotism. Aside from these mechanisms are other favoured means that rely upon more universally accepted values such as intellectual, athletic or artistic abilities. Higher education and the university rely on intellectual norms.

Whereas traditionally the university was tasked with credentialing people, Cote and Allahar note that more recently the sociological mission of the university has expanded. Formerly undertaken by the high schools, the sorting of individuals is now left to the university. Complex societies require sorting into fields and hierarchies to allow them to operate. Whereas earlier, high schools failed students who did not have academic ability or interest, in the 1970’s a policy of “social passing” allowed students who had failed the academic standard to “pass”

593 Ibid.
in order to avoid social embarrassment.\textsuperscript{594} This policy, once implemented in the high schools, created a mass of undifferentiated, unsorted high school “graduates” who received inflated marks and graduated with records that do not reflect achievement of academic standards.

Cote and Allahar argue that a significant number of students in this mass of high school graduates lack academic ability and are ill-prepared for university studies. Hence it is left to the university to conduct sorting, weeding and cooling functions. In the first instance it must sort out those who lack ability and then to prepare those who have the ability and interest. The university must then weed out those who are unsuited to advanced and professional studies from those who are. Finally, it must “cool” the hopes and expectations of those students whose dreams are beyond their abilities.\textsuperscript{595} This evaluation appears to be applicable to the Australian situation.

The ultimate outcome of this process is determining who among the sorted group become eligible for the credentialing function or object of the university. That is, the university provides credentials to those who survive the weeding process, and the particular status of the credential further establishes rank in social, educational hierarchy as the outcome of the sorting and cooling functions. This whole process and object is referred to as “credentialing”—a term invented in the 1970’s by the sociologist Collins,\textsuperscript{596} and is the object of the weeding process. This mission becomes problematic when revenue generating norms dominate academic norms and result in the hobbling of the credentialing standard.

b. Societal Storing: Holding space for underemployed youth

The second function Cote and Allahar identify is creating a holding space for youth in a chronically depressed labour market. Cote and Allahar note that the youth labour market in North America collapsed in the 1970’s and never

\textsuperscript{594} Ibid pp. 69-71
\textsuperscript{595} Ibid pp. 39, 42-43
recovered—and it appears that the parallel events took place in Australia. As manufacturing industries moved to low cost, less economically developed countries, the market for young, unskilled people in western developed economics decreased dramatically. The net result is that it has been hard for young people trying to find their way into the labour market. The connection between youth unemployment and the university two is logical—there are youth who need their time consumed and higher education at a university which consumes time.

Government policy in Australia took advantage of the situation proverbially killing two birds with one stone. On the one hand, it created an opportunity to introduce a large swath of the population to higher education and on the other solved the problem of high unemployment. Pushing unemployed youth to become students at the university has become part of the Australian higher education policy dialogue. A recent article in *The Australian* newspaper discussing higher education noted that youth unemployment was at 16.4% and considered the relationships between the two as axiomatic—which indeed to some extent they are. These sociological missions of the university both collide and coincide with the conflicting missions of excellence and equality.

The sorting, weeding and cooling mission also relates to what is often referred to as the “pastoral” mission of the university. The pastoral mission is seen as the university institutions manifestation of the caring and helping tradition of professional service. In the case of the university, the pastoral mission can be seen in the caring or psychological/emotional investment of academics in the intellectual development of students, and the instilling of a passion for a discipline or area of specialisation. Law recognises this role through the imposition of a fiduciary duty and characterisation of teacher-student relationship as fiduciary.

---

598 Barcan, A. (1980). *A History of Australian Education*. Melbourne, Oxford University Press. p. 377, although Barcan simply refers to the issue as being the result of the affluence of Australian society and comments that it could afford to keep youth from vocational activities longer.
c. Survival: Institutional and Organisational

The sociological mission of the university as an institution and as individual organisations is survival and growth. Institutional survival refers to the reproduction of the university institution—i.e. the norms, practices and rules of university organisations around the globe generally and in Australia in particular. This reproduction is a matter of the values embedded in the university enterprise and in particular the reproduction of the values of the academic profession. It may be that in this area, the greatest concern resides as the traditions of professional work, autonomy and personally tailored service are jeopardised by the massification of higher education. 600

Organisational survival refers to the individual university organisation’s ability to survive in a competitive environment. Survival in this context is a function of the ability to obtain sufficient resources to continue its operations. The survival depends crucially on success in the competition for prestige and reputation—the former referring to achievement of status enhancing acquisitions such as attractive campus buildings and star researchers, the latter referring to high quality education. 601 University organisations must both cooperate and compete in order to survive.

Where these two missions are not in conflict, or where the organisation is not under threat such as by lack of resources, the educational mission can be attended to more easily. However, where the university organisation’s survival is in question, the mission of the organisation’s short-term survival must dominate to the detriment of educational and all other missions. A determination of the threat to survival of the university, of course, requires a conception of the nature of the university as well as an evaluation of the nature and potential of the threat—a normative and political problem as argued throughout this dissertation. Where the university no longer offers a social location for knowledge as a value in its

own right, but merely as a location for the dissemination of knowledge with immediately recognisable economic value, the university loses its claim to societal legitimacy and hence its claim for public support. It is merely another participant in a market economy. The institutional legitimacy of the university in society rests at least in part in its role as a harbour for disinterested knowledge—and its tasks in the creation, preservation and dissemination of that knowledge.

The sociological analysis of the institution of the university provides insight into the complexity of the university’s role in society. Far from simply providing trained graduates for gainful economic employment, the university is seen as a complex institution fulfilling multiple important if conflicting missions. The reduction to the simple rationalistic model presented by economics is at odds with this complex situation, and in fact, is inimical to the fulfilment of these other equally or arguably more important roles. The argument in this section further supports the position that the university is a distinct and unique social institution. These roles and institutional norms are encapsulated in the law that creates individual university organisations. The dissertation now turns to examine the law’s handling of the university organisation as a particular instance of the institution.

6. Legal Objects

Law, as the institutionalisation of political and ethical decisions, provides an instance of reification of institutional norms. In the context of the university it does so both through the larger regulatory regime focused on the institution and found in the Higher Education Support Act 2003 (Cth) which is the primary focus of this thesis and through the provision of legal form to university corporations as actors in a socio-legal system. The legal person of the university corporation is discussed in the next chapter dealing with the university organisation.

As noted in Chapter 3, the Act identifies a number of broad objects which reflect the institution of the university. These objects are set out in s.2 as:

(b) to support the distinctive purposes of universities, which are:
(i) the education of persons, enabling them to take a leadership role in the intellectual, cultural, economic and social development of their communities; and
(ii) the creation and advancement of knowledge; and
(iii) the application of knowledge and discoveries to the betterment of communities in Australia and internationally;

In sum, the Act sets out the objects as education for purposes of participation in the intellectual, cultural, economic and social discourse, the creation and advancement of knowledge and the application of knowledge to contribute to the betterment of the community however defined. These institutional norms are protected by the institutions surrounding particular university organisations. Again, these are enacted in the legislation. The legislation acknowledges that individual university corporations have enabling legislation which “empower[s] them to achieve their objectives as autonomous institutions through governing bodies that are responsible for … its ongoing independence”. In other words, the Act recognises and institutionalises the university institution as providing a public good to the community on a normative ordering that prioritises knowledge norms. Further, the Act supports the institutions of autonomy and self-governance allowing the organisation to govern itself in alignment with the national and global institution of the university—a matter arguably better understood by the academic profession than by managers or bureaucrats.

These institutions are reflected in the enabling statutes of the individual university organisations which are organised at law as corporations. Although taken up in detail in the next chapter dealing with the university organisation, for purposes of clarity and continuity of argument the issue is addressed briefly here. The Melbourne University Act 1958 for example, in s. 4A provides the following broad objectives:

(a) to provide and maintain a teaching and learning environment …
(b) to undertake scholarship, research … to the advancement of knowledge and to the benefit of the well-being of the Victorian, Australian and international communities;
(c) to equip graduates of the University to excel in their chosen careers and to contribute to the life of the community;

---

602 Higher Education Support Act 2003 (Cth) s 2(b).
603 Ibid s. 2(b).
(d) to serve the Victorian, Australian and international communities and the public interest by—
   (i) enriching cultural and community life;
   (ii) elevating public awareness of educational, scientific and artistic developments;
   (iii) promoting critical enquiry, informed intellectual discourse and public debate within the University and in the wider society;
   (e) to confer degrees and grant diplomas, certificates and other awards.

The courts have examined the university’s institutional mission in the case of University of Western Australia v Gray. In that case, as noted in Chapter 4, the court opined that the university: “is a special purpose statutory corporation. It was created to serve the public purposes served by a “university”… UWA’s traditional public function as an institution of higher education.” Again, although dealing with the corporate organisational form of a single university organisation, the court appears to be alluding to a common understanding of the institution of the university in its interpretation of the statute.

In sum, the social institution of the legal system recognises the diverse missions of the institution of the university. These are sufficiently distinct to call the attention of the Parliament in the enactment of legislation creating the specific university corporations. These statutory corporations are given distinct and in law unique mandates around knowledge and public good broadly conceived. This analysis of the institution of the university at law supports the contention that the institution is a unique institution. Further, the policy behind the university at the state level appears largely coherent with the historical institution of the university discussed above and the sociological missions of education and credentialing.

7. Policy

The institution of the university has co-existed with political authorities for its entire existence. In the early centuries the political institution was a form of the

---

604 University of Western Australia v Gray (2009) 259 ALR 224.
605 Ibid paras 183-4.
Over time the nation state came to be the dominant political authority and the university has had to interact with that larger public governmental authority as a result. The influence, of course, has been bi-directional, as seen in the advice provided by the university to the statesmen of old and as this dissertation demonstrates with the regulation of the university by the nation state. This government impact on the institution has occurred as a result of the regulatory environment including resources. This section examines the missions granted to or imposed upon the institution of the university by government, first generally and in the subsequent section, the Australian government.

a. Policy: Government and the University

As noted in the introduction to this chapter, the objects of the university are not limited to those sui generis to the institution. Rather, external parties shape and impose other missions on the institution. Among the leading external influences on the shape of the institution are the government.

The political system has had a close and direct involvement with the institution of the university since its origins in eleventh century Bologna. The political recognition of the value of the university’s mission as a creator, preserver and disseminator of knowledge and culture has long been reflected in policy. For example, from the middle ages Pope Alexander IV declared the university to be “the Tree of Life in God’s paradise”—a description unlikely to cross the lips of many an academic or politician today—to its position at the heart of the current knowledge economy, the university stands out as society’s premier knowledge institution. Today governments sponsor major research institutes within university organisations with billions of dollars in recognition of the intellectual power of those organisations and hence, the institution of the university.

Governments have recognised the significance of the university’s knowledge mission, by supporting university organisations and by developing policy.

---

designed to shape the university. Over the centuries government support has covered everything from housing costs for students in medieval Oxford and Bologna, to curriculum to be taught in Paris and Rome, to efforts to dictate subjects taught in teacher training under former minister Brendan Nelson in Australia. Again, these policies and missions are at times in consort with and at times in conflict with the public and academic missions of the university. Both ecclesiastical and secular powers have sought to protect and foster the university. Both recognized the value of the university’s knowledge for the operation of society. As another example of the powerful position of universities in the operations of government can be seen in the history of the Hundred Years War. Scholars at the University of Paris were called upon to solve that war, and although their recommendations were not implemented, the fact of the appeal demonstrates both the political power and importance of creative intellectual activity in political matters that the universities have had since earliest times.

Governments and authorities in every country recognising the power of the university’s knowledge and as such its considerable influence on and role in society have both worked to support the institution and to destroy it. Positively, governments have used the university in the welfare states to advance economically and to increase equitable distributions of opportunity among diverse populations. Negatively, governments have sought to suppress the university and its academic mission for ideological reasons such as may be seen in the University of Berlin during the Communist era, the Khmer Rouge regime in Cambodia. More recently under neoliberalism governments have sought to drive out the political debate carried on universities to avoid debate and critique.

---

610 Paris is considered by some to have been the most powerful university of the middle ages. See, Gross, C. (1901). "The Political Influence of the University of Paris in the Middle Ages." The American Historical Review 6(3): 440-445 pp. 440 ff.
of the weaknesses of markets and the ideology of market fundamentalism\textsuperscript{612} with its normative emphasis on short-term economic gain—a model preferred by big business.

While this brief political analysis does not support any particular view of the university as a unique social institution, it does provide evidence of a governmental view of the university as an important public institution—whether through education, research or social commentary. Further, it demonstrates the government fear of university criticism as independent, critical and knowledge based criticism rather than simply another source of biased or partisan critique. In other words, it demonstrates negatively the value of an independent university to social and democratic principles and processes. In sum, the above four perspectives, economics, sociology, law and politics combined create a strong foundation for arguing that the university is a unique social institution not readily reduced to any particular agenda and likely to be distorted by attempts to shift it from its knowledge norms.

b. Policy: Australian Government and the University

In the Australian context, Pick identifies three important visions for the university, which he places into a chronological policy framework.\textsuperscript{613} He defines these first as Martin’s view of universities in Nation Building through the formation of national culture and citizenship, second as Dawkin’s idea supporting the nation’s move toward economic globalization, and third as Nelson’s view of universities as organisations participating in a market needing to respond to market forces.\textsuperscript{614}

In the first broad national university policy, as discussed in Chapter 3, the 1965 Martin report characterised the university as a major tool in a common enterprise of nation building. It was supported by public funds and was truly a collective, community effort. The second policy phase sought to utilise the university as a


\textsuperscript{614} Ibid. neatly summarized in chart form, p. 239.
means of both global competitiveness and global integration. This phase was ushered in and carried forward from the 1980’s until the late 1990’s. Its focus was shifted as a result of a shift in government from welfare state to regulatory state, as from provider of public goods to facilitator of markets for private goods with a related shift from public to private funding. Under the neoliberalism of the Howard Liberal government, the privatization mission was moved to the front. The mission of the university in this environment is not the dissemination of public goods as widely as possible, or the creation of new knowledge for public benefit; rather, it is to provide private educational benefits to those with economic resources and to produce commercialisable research primarily for private enterprise.615

The Australian university had a significant international mission in the Asia-Pacific region. From 1949 until the 1980’s the Colombo Plan provided scholarships to talented and often poor students seeking higher education. As a result of these talented people who had applied themselves diligently to their studies returning to their homelands, Australia earned a regional reputation as a provider of good quality higher education. This reputation paved the way for the next step in Australian higher education policy. Australia withdrew its support for the scholarship program, created a different scholarship program more focused on Australian national interest which it offered through AusAID,616 and created a policy of selling its higher education to the privileged of the region, and deprived its university organisations of funding adequate to carry out the tasks imposed.617 The university has been forced by a government policy of cutting funding while increasing demands to exploit its reputation and its geographic


617 See discussion of Dawkins reforms in Chapter 3 above.
position, ultimately travelling a downward spiral in terms of quality and morale, in its efforts to stay afloat financially. In essence, government policy had been to use money paid by international students from Thailand, India, Malaysia and other developing countries, to subsidize domestic students and balance budgets. Doing so has permitted the government to cut university expenditure while appearing to continue to provide quality higher education to an increasing cohort of domestic students. The government has by this creative policy achieved a continuation of broad participation in higher education while not paying the true costs of educating Australia’s own citizens. These uses of the institution by the government and shifting norms concerning the nature and value of knowledge challenge intimately the institution of the university in Australia.

As Australian government policy shifted away from the welfare state projects of nation building and the development of the individual, to the privatization agenda of the regulatory state, Federal higher education policy was recast in economic terms and focused to achieve private ends. Achieving this objective with public goods which by definition lack qualities that attract market activity posed a serious problem for government. Accordingly, all government could do, short of simply publicly abandoning the university which undoubtedly would have borne an unacceptable political cost, was to cast them into a position of serious and chronic under-funding.618 In this context, Marginson and Considine write: “higher education moved from its broad role in public culture and its function in raising the level of participation of citizens to a new orthodoxy which favours business values and income generation.”619 And indeed, the Australian university has become increasingly focused on training of overseas full fee paying students in business management620—a matter of pride to the Howard government which boasted about Australia’s higher education as an export outstripped only by coal and iron ore621 and a source of demoralization and

619 Ibid p. 37.
despair to the academic profession and those members of society who look for something more in life than economic gain.

Whereas prior to the Dawkins reforms the university was considered an important public social institution in Australian society, in line with the then Labor government’s neo-liberal ideology, Dawkins claimed it was an industry. As an “industry”, the university ought to have very different aims than it would as a social institution. Whereas the latter is viewed as providing some socially useful activity or function, an industry does no more than provide economic benefits as a result of production—purposes, objectives and social role are not factors. From an industry perspective coal mining, tobacco sales and university education are all one in the same. This re-framing of the mission of the university as an industry has had profound effects in terms of the shape, funding, and objects of the institution. In particular, it creates opposition to public funding as this framing causes appeals for funding to appear no more than special pleading of a failing and poorly managed “industry.” Indeed, this has been the rhetoric from Dawkins carried forward through the various governments up to the end of the Howard regime.

The missions imposed by the Australian government do not tend to add coherence to the institution of the university as conceived in the initial institutional section of this chapter. The imposition of nation building, global economic competitiveness and finally private profit generation are not necessarily coherent with the knowledge norms of the institution. At a high level of abstraction the ideas of nation building and to a lesser degree increased global competitiveness can be viewed as somewhat coherent. These missions may be coherent as by-products or externalities of the essential knowledge missions of the university—creation, dissemination and preservation. By engaging in these missions, the university is likely to contribute to the nation and economic missions. The extent to which these missions become the government’s


override policy interest in the university and re-shape the university’s regulation is the extent to which they limit or minimize the potential for incoherence between government missions and the institution of the university. The shifting of the foundational norm from knowledge to profit and from public to private, however, as has occurred under the neoliberal governments, has established new norms fundamentally incoherent with the foundational norms of the institution of the university. The incoherence introduced by these changes which effect at such a fundamental level may be the incoherence which proves to be the fatal form of regulatory failure.

8. Institutional Coherence: Complex and Conflicting Missions

As is evident from the foregoing discussion, there are a variety of conflicting missions within the institution of the university and the various university organisations. One of the most basic conflicts is between the disinterested pursuit of knowledge—i.e. pursuit of knowledge for its own sake and the utilitarian missions of career training. This conflict, as noted, goes back to the origins. It leads to a curious phenomenon: that training at the university is seldom suited to utilitarian, market objectives. Ruegg describes it in historical terms:

“the social role of the medieval university consisted primarily of training for more rational forms of the exercise of authority in church, government, and society. This seems to contradict the fact that the course of study, the examinations, and the degree were not oriented to the provision of any training for occupations other than those of university teachers.”

As noted this conundrum is found in contemporary sociological, economic and political criticism of the university, where sorting, providing credentials and education, is quite disconnected from actual abilities and skills, the high cost of universities without focus on productivity improvements in the job market. The utilitarian and ideal aims of university appear to be in fundamental conflict.

---

Overlaid on this complexity is the neoliberal normative demand that the university shift its normative priority from knowledge to privatisation and generation of its revenue without regard to social, knowledge and egalitarian political norms.

Further, a number of scholars have noted the conflicts within the university. Former Chancellor of Vanderbilt University, Alexander Heard, noted some of conflicting demands on the university. These he described as:

“the inherent conflict between the function of transmitting existing information or values or skills, on the one hand, and the processes of evaluation, criticism, and creativity that question whatever is existing, on the other…. The need for a university to be at once utilitarian and independent…. And educational freedom [from political control] necessary for this strange institution… [which] must be sustained by consensus in the society outside.”

Similarly, Watson notes a number of missions demanded of the university that are contradictory. He puts them into bullet points that reflect sharply contemporary rhetoric. The university is simultaneously called to be:

- conservative and radical;
- critical and supportive;
- competitive and collegial;
- autonomous and accountable;
- private and public;
- excellent and equal;
- entrepreneurial and caring;
- certain and provisional;
- traditional and innovative;
- ceremonial and iconoclastic;
- local and international.

None of these missions is unimportant or can be ignored. Indeed, public support exists for all of these varied missions and to abandon any one of them is to abandon an important part of the university’s mission. This variety of important collective missions reflect the problem identified by Arrow and discussed in the previous chapter—the impossibility of generating collective preferences and social welfare functions on the basis of the aggregation of private preferences. In

---


other words these important missions can only be carried out by a public institution and provide a powerful justification for assigning the university to the public side of the public-private divide. These public missions have been assigned to and taken on by the university with a margin of success. Searching the environment for alternative institutions more appropriate to carrying out these missions leads back to the institution currently charged with there execution—the university.

As Professor Herman Leonard of the Kennedy School of Government at Harvard observed:

Society puts the hardest jobs in the public sector…. When there are ambiguities about value, or conflicts about priorities and values, we ask the government to step in. So we shouldn't be surprised to discover that the problems the public sector is handling are the most difficult, most confusing, and most conflict-ridden -and, therefore, the hardest to guarantee high performance.  

In other words, the complexity of the mission can only be based on a complex foundation—that is, in an institution that is complex in itself. Any simplification of the mission of the university’s objects to a simple calculus can only occur by the denial of one half of the conflicting dichotomies that create the university mission in the first place.

The university has a variety of objects. These objects are wide ranging and include political, social and economic tasks. They do not always operate in concert and yet none appears to be readily severable. Indeed, they are all related to and/or outcomes of the basic normative core of the university—the primacy of knowledge, and its core knowledge missions of preservation, creation and transmission. The complexity of these missions and their important public nature would support argument against assigning the institution or its organisations to the private side of the public-private divide. Further, in the same line of

argument, the importance of the institution’s public mission overshadows private economic outcomes and so to privatise those crucial social tasks from preserving society’s knowledge to sorting and credentialing its people for a life time and subsume them to the commercial priorities of private enterprise is not only hazardous as the University of Phoenix experience may suggest, and a poor choice, but a fundamental misunderstanding of the institution and the role of public good organisations not only economically, but socially and politically as well.

9. Policy Coherence with the Institution: Adding Conflicting Missions

The complexity of institutional missions is compounded by the institutional missions imposed by the governments. These missions may operate as beneficial by-products or externalities of university activity; however, where they become drivers of university policy and entrenched in the regulation they may lead to incoherence. Government policy which attempts to shift norms, particularly foundational norms is likely to cause a fatal incoherence. That is, where government attempts to modify or replace the norms of knowledge and public good, the attempt may well destroy the institution itself—a matter recognised in the medieval era.

The diversity of missions leads to the question of whether coherence is desirable or even possible. The answer to this question is not clear. What is evident from history is that the university, like other public institutions and organisations, is able to survive and manage a number of more or less coherent missions. Accordingly, a tightly controlled and enforced coherent policy may result in the displacement or destruction of some crucial missions as the conflicting missions may be serviced and hence the institution able to survive if those conflicting missions not brought into too close a proximity. This proximity issue is dealt with in the institutional literature of loosely coupled systems—a matter beyond the scope of the current investigation. The point is that the conflicting missions

---

would lead to the suggestion that incoherent missions heavily imposed are a potential source of increasing institutional dysfunction.631

A further issue with the conflicting and complex missions of the institution is the rationalist policy’s NPM project of quantifying and carefully measuring the activities of government bodies through the introduction of private business norms and private management practices. Tightly controlled systems or institutions, as opposed to loosely coupled systems, are less able to handle and adapt to complex and changing environments. Such tightly controlled institutions do not have the discretion to balance various competing norms and tasks in a dynamic environment as they are forcefully focused on the quantified, carefully measured activities. As a result they must fail to attend to important but unquantified or unquantifiable missions and activities which underpin institutions. This chapter argues against such quantification and careful measures. Such measures introduce problems which result from what Power has described as the dysfunctional effects of audit.632

10. Conclusion

The foregoing argument leads to the conclusion that the university is indeed a unique institution. It is not simply another institution in the economic system to be regulated by the same economic incentives and penalties and to be held to account on the same narrow measures. Rather, it has been argued that the university is as much an institution of the present and future as it is of the past. That is, it is designed to preserve the best from the past as well as prepare citizens for the future. It is both an incubator and a museum. It cannot be limited to providing for the immediate, short term training needs of would be employers and employees. Its knowledge cannot be limited to short term economically valued or private knowledge. As such, it is important that regulation of the university and the demands made on it have a strong, long term, future orientation which is coherent with the institution. The university is society’s

institution for the disinterested creation, preservation and dissemination of knowledge. It is also an institution steeped in history. It carries both good and ill from history and provides a storehouse, a genetic depository of human creativity and intellectual achievement. Regulation which is coherent with this markedly successful institution will support the normative public knowledge foundations. Efforts to shift these foundations are likely to lead to regulatory failure.

There is no golden age to which the university institution could return, and even if it were possible it is far from clear that it would be desirable. Indeed, the institution is and must be attuned to social (including economic) and geographical environment. The environment is shaped in part by government policy. Government policy may enhance the university’s functioning as well as effective interaction with its environment, or alternatively, government policy may prove to be dysfunction creating as it seeks to alter foundational institutional norms and re-focus the institution’s points of interaction with the social environment from public social good to private economic.

For the university institution to survive certain critical norms need to remain in place. These include a prioritising of knowledge, a commitment to knowledge as a public good which is created, transmitted and preserved in a non-profit normative environment. Regulation which fails to foster these critical norms is incoherent with the organising problem and is a recipe for regulatory failure. Where government wishes to alter the institution, it must be attuned to the shape, dynamics and purposes of the extant institution. In the case of the Australian university and government, it is clear that the government has gone ahead with the change prior to attending to the extant institution. The changes it wishes to make to foundational norms shifting the university from providing public social goods to private economic goods is incoherent with the institution to the point of destroying the institution itself.
CHAPTER 6: REGULATED BODIES: THE UNIVERSITY ORGANISATION

1. Introduction

In Chapter 5 it was argued that the better view of the university is as a social institution dealing with the creation, preservation and dissemination of knowledge conceived of as a public good not necessarily tied to utilitarian aims. Yet, a university is not only an institution. As indicated in the Introduction and argued elsewhere, the university is also a specific communal organisation existing in its own right, with its own internal laws, resources and with its own exclusive community of people. It has a hierarchy, mission, and activity, and often a connection to a particular city specifically located in time with its own political and social organisations, and economy. Universities such as those at Oxford and Paris and later, Sydney and Melbourne, in their various centuries and locales, represent a distinct social phenomenon in their larger respective social spheres and societies. They are organised communities to be examined and considered, each in its own right. These universities present various educational programs, services to the communities (including preservation of local social traditions, knowledge, and research), and general participation in the political and social endeavors of their respective times and places. They have their own concerns, projects, objectives and outcomes.

As this dissertation is focused on the regulation of an institution made up of a group of organisations, the chapter’s consideration of the university organisation is critical. This chapter examines both the nature of university organisations as instances of the institution and as an organisation that is the object of regulatory attention. As will be seen, there is a considerable range of organisational options available to the university but the university has consistently selected and advanced organisations with particular characteristics. The range of options and selections made will be examined in detail.

As argued in Chapter 2, a critical supplement to Feaver and Durrant’s regulatory coherence is organisational choice. As distinct from institutions, organisations are specific groups which may in turn be instances of a broader institution.
Organisational choice is important in terms of regulatory coherence because the organisational form carries within it certain norms. Groups of people will develop organisational forms that suit or facilitate their purposes. Such organisational choices tend to be coherent with the procedural, structural and normative aims. From the perspective of regulatory coherence, an understanding of the nature of the regulated body is imperative. Failure to attend to the organisational form may lead the creation of incoherent regulation and so lead to regulatory failure. This chapter addresses the nature of the regulated body, the university organisation and university corporation.

This chapter asks and answers two questions: first, what type of organisation is the university? Second, it asks: what characteristics are best suited to the university organisation? The first question is the essentialist question of whether the university organisation is some unique and particularly well suited species of organisation, or merely a specific instance of a generic model of organised group. The chapter answers this question by surveying the sociological literature on the university as an organisation. This literature does not stand alone but is connected to the larger body of organisational literature. The purpose of the survey is to establish that the university has developed as a specific organisational form that is academic centric relying on a “stimulated heartland” as Clark would have it, as opposed to a management centric organisation. Further, that the university organisation is loosely coupled to allow for a diversity of objects including potentially conflicting objects as the new institutionalists point out and not a tightly coupled McDonaldised, readily audited organisation pursing easily measured objects. The loosely coupled organisation readily facilitates the institutional norms discussed in the previous chapter and so leads to the conclusion that the organisational form chosen by the university is coherent with the maintenance and advancement of the university institution.

Extending the analysis and the argument the chapter turns to consider the organisational options from an economic organisational perspective. The

---

framework of economics reduces analysis to its binary alternatives of profit-nonprofit organisational forms. It asks whether the university can function equally well in for profit and non-profit organisational forms. It then examines by way of literature survey what the particular advantages of this model are, why the university has chosen this model and how this model serves more advantageously the university’s objects. It argues that the university organisation has chosen almost exclusively the non-profit organisational model. In making that argument it examines the nature and purposes of non-profit organisations and impacts of profit making on university organisations. In terms of coherence therefore, the university’s organisational form has been coherent with the institutional norms as set out in the previous chapter.

The chapter then turns to consider the university organisation through the lens of political science. In political science terms the university organisation is a public body. This analysis is significant because the majority of university organisations in Australia are public bodies. It furthers the arguments of Chapters 4 on public goods and the previous chapter addressing the public institution of the university arguing that in Australia it is properly classified as a public body. Within the spectrum of public bodies it is argued that the university organisation is a type of statutory body—those bodies being farthest from political influence. As an organisation pursuing knowledge norms, an organisational form that is less subject to political interference is clearly preferable to one with more. Accordingly, this section leads to the conclusion that the statutory body model is well suited to university organisations.

Finally, the chapter examines the university organisation in terms of law. This part of the analysis both focuses and expands the analysis of political science to take account of law’s categories. As a legal body, the university organisation is a unique type of corporation. Its composition and objects are found nowhere else in corporate law, and examination particularly of the statutory objects of the university corporation lead to the suggestion that it falls clearly on the public side of the public-private divide.
The chapter argues that the university organisation developed organically to be coherent with the institution, with a normative ordering that places knowledge in the first position, a non-profit structure that fits clearly on the public side of the public-private divide. In sum, all of the different disciplines place the university organisation, like the institution, as a distinct and unique organisation delivering public goods most suited to the public side of the public-private divide.

As evident from the above discussion, an interdisciplinary approach is called for by the nature of the university organisation itself. Professor James Perkins writing in the 1970’s observed:

Organisationally the university is, in fact, one of the most complex structures in modern society; it is also increasingly archaic. It is complex because its formal structure does not describe either actual power or responsibilities; it is archaic because the functions it must perform are not and cannot be discharged through the formal structure provided in its charter.634

In the years intervening between Perkins’ statement and the present such radical changes as the introduction of market mechanisms, the revolution in information technology, and the changing, ideas of knowledge and conflicting demands being placed on the university make the situation Perkins describes even more complex.

2. Sociological Analysis: Analysis Of Organisational Form

Sociological analysis of the university has contributed significantly to understanding both the institution as discussed in the previous chapter, and the organisation of the university.

The reader is reminded that the term institution is used to mean a group of norms, practices and rules whereas the term organisation is used to indicate a particular group of people collaborating to achieve a particular objective.

Sociology has contributed various models of the university organisation which while corresponding to some degree to different eras of the university continue to provide important insights. Historically, sociologists find professional, bureaucratic and community models of the university. More recent sociological analysis has led to a number of models the most important of which are the university as professional community, organized anarchy, strategic organisation, matrix and entrepreneurial organisation. These models and the implications for regulation will be reviewed in turn.

a. Academic Profession and the Community of scholars

Historically the university has been the home of the academic profession. The first university at Bologna was little more than a group of young men studying law with senior teachers. The latter group, a group of older men whose privileged status as professionals was derived from the two traditional indicia of the professions: knowledge acquired over a long period and, a mode of organisation that gave some kind of autonomy over their work, formed a type of self-regulating guild. Although organisational study of the university as a community only came to the fore in the 1960’s with studies by Goodman and

---

636 Ibid.
638 The discussion that follows is based on ibid.
Millett, over the centuries the university has always been a professional community organised in a communal quest for the preservation, the re-interpretation/creation of knowledge and dissemination of that knowledge. As an independent community within the larger community, at times harmoniously and at times antagonistically as the various “town and gown” interactions over the centuries demonstrate, the university has been a recognised socially as a particular type of organisation.

The distinctive independence of this community was maintained because it was never wholly integrated with the rest of the community, because variously of its non-commercial objectives, its cosmopolitan composition including clergy with external loyalties, and its status as an independent professional guild. This distinctive character and independent status was recognized by grants of power freeing it from the dominion of various authorities, and from medieval to contemporary times facilitated by the grant of the legal corporate form. Further, the distinctive character forms part of the basis for the claims of academic autonomy.

The notion of an “academic profession” is somewhat problematic at present. Not only have the professions generally suffered at the hands of sociological and economic critics who emphasise their self-serving exclusivity and exploitative monopolistic practices respectively, but the nature of academic work has changed markedly over the last fifty years. Indeed, it is asserted that one cannot speak of an academic profession. Instead, there are academic professions—marked by a diversity in career tracks such as between sessional and tenured professionals, disciplines such as fine art versus hard sciences, and different emphases such as


research versus teaching. Nevertheless, when one examines norms and practices there remain significant commonalities. These include a high value placed on knowledge, a discourse around advanced ideas, peer review, autonomy in work, and the exercise of professional discretion in the execution of tasks. This similarity not only supports the view of the university as an institution as discussed in the previous chapter, but also supports the understanding of the university as a distinct organisation designed to house such groups.

The traditional conception of the university institution and its organisations as the home of the academic profession was put to severe test in the social upheavals of the 1960’s and 1970’s. In that era radical attack on the institutions of western society was undertaken on a wide scale and included an attack on the university institution and its organisations. The attack


emphasised a division in the academic profession as some members took an anti-establishment line while others supported western institutions including the university. This split supports the view argued in Chapters 4 and 5 of the public value of the university as an open public place for both progressive and conservative political debate. The social changes of the era led among other things to a general public distrust of the professions’ claims to esoteric knowledge and commitment to public good, and combined with decline of the welfare state toward a general turn against government, and in turn a suspicious view of the professional community of scholars some of whom supported government with professional claims.  

Although some may suggest that the community of scholars model may be finished legal analysis discussed in a separate section below suggests a different view. A few aspects of the legal character of the university are significant for understanding the community of scholars model. The university took on an incorporated form early on. As a corporation it was the legal organisation of the community of the academic profession. The academic profession’s incorporation has foundations in law which have on-going legal and hence regulatory implications. Historically, the university corporation was created as a protection for foreign students. This object was achieved by creation of a protective legal organisation—a university corporation. Over time, the corporation resulted in a re-distribution of power among on the one hand local secular and local ecclesiastical authorities, and on the other central authorities of empire and church. The university corporation served as a location of power independent of local authority because of its loyalties located extraterritorially. Further it served too as a location of power for those central powers in smaller territories. Playing both powers off each other effectively led


the incorporated university organisations over the course of the first century to their place of independence and autonomy. A strategy and position it has been more or less effective in keeping over the intervening centuries.

The regulatory significance of this autonomy, first intimated in the *Authentica Habita* of the twelfth century, from the perspective of sociological evolutionary theories of institutions is as follows. The millenium long survival of the university institution and many university corporations suggests that the university itself (as opposed to regulators) is in the best position to determine how it should be organized to achieve its objectives, that it needed independence in order to do so, and that such independence is critical to achieving its aims of protecting and transmitting the corporate knowledge of its members. The development and its significance is commented on by the historian of the university Perkin.

No institution so flexible or so productive of new knowledge and adaptable experts has yet been discovered. Yet this flexibility and productivity still depend… on the academic freedom to teach and to pursue knowledge wherever it can be found. If the overbearing state, the all-mighty corporation or the heresy hunting churches crush that freedom, it may well kill the goose that lays the golden eggs. Without the ability to protect themselves from the threat of these powerful forces, the university may well suffer the fate of those institutions in the non-European world that never enjoyed the autonomy and freedom that the medieval division between church and state unintentionally bequeathed to academe.

The law creates social space for the community of the academic profession via corporate law which draws a perimeter around this community by defining its objects, its rights to determine membership, what honours are bestowed on or withheld from whom and on what grounds including what amounts to an offence against the norms institutionalised in the corporate charter and the appropriate penalty.

---

Examples of these legal issues and the view of the university as a guild or community are evident in some contemporary case law. For example, in the 1967 judgment of Donaldson J in a lawsuit dealing with the University of Aston in the UK, his honour refers to the “student guild”. In Australia students are explicit made as members of the corporate university community, in founding statutes. These founding statutes are quite distinct from both other government bodies corporate as well as business corporations. For example, while other government bodies corporate may have a single member, such as a minister holding a single share, the university has as its members the traditional members of the community: academics, university officers and bodies, students and alumni.

Further, unlike a business corporation, membership rights at the university are not automatic on continuing attendance or paying fees. As the NSW Supreme Court determined in Ex parte Forster, Re: University of Sydney, it is a duty of the university to exclude those who are not maintaining sufficient academic standards, and far from obliged to admit by right all applicants, Young CJ in Harding v University of New South Wales, declared “no resident of New South Wales has any statutory right to be admitted to a university,” a statement of the law which applies nation-wide. The university is an exclusive scholastic group.

In Harding v University of New South Wales, the court affirmed the en banc obiter of Ex parte Forster, Re: University of Sydney, that

The institution which is in question is not only a 'public' university; it is also, changing the emphasis, a public 'university'. It is essential to the proper performance by a university of its functions that it maintain and insist upon high standards of scholarship.

The court continued, “that the judiciary (and by implication the government) not interfere to impair the University from carrying out its public function in

---

652 R v Aston University Senate ex parte Roffey (1969) 2 WLR 1418.
655 Ex parte Forster; Re University of Sydney (1964) 63 SR NSW 723.
657 Ibid.
securing the best scholars to be trained with public funds.”658 In other words, from a regulatory perspective, the best judges of academic performance are members of the academic profession—not the judiciary, not the government, or one might venture, the generic managers of NPM.

In sum, the legal form of the corporation institutionalises the institutions of the academic professional community. By providing an organisational vehicle for community and setting out certain norms, the university corporation creates a context within which a community of people is able to coordinate their collective aims in a single organisational form. As the Spanish law puts it a corporation is a joint mutual commitment ‘compromiso conjunto.’659

b. Organized anarchy

As a result of the social upheaval, complexities of growth and demands for equity, mentioned above, which effected the university in the 1960’s and 70’s it became evident that new models for the university were needed. This need in turn led to further analysis and theorizing of the university. Clark Kerr, the President of the University of California from 1958-1967 saw the university as “a whole series of communities and activities held together by a common name, a common governing body and related purposes” something he termed the “multiversity.”660 Changes experienced by Kerr and others led scholars to theorize the university in terms of political,661 loosely coupled systems,662 and conglomerate663 models. One of the most original and insightful models was that of M. Cohen and J. March who took a radical approach to understanding how

658 Ibid para 78
university organisations operated by focusing on how their presidents worked. Rather than the standard linear problem solving model composed of problem identification, analysis and solution, Cohen and March suggested presidents took the opposite approach. That is, Cohen and March suggested that leaders worked with a pet solution or agenda, and then worked that through a university organisation—“a solution in search of a problem.”

In this same era of social upheaval, industrial unions made their appearance on university campuses. Whereas earlier disputes about workplace issues were dealt with internally as a matter between professional peers to be resolved on the basis of shared professional norms—both leaders and academic colleagues seen as belonging to the same professional institution—by the late 1960’s university academics found reason to organize as they perceived their bargaining power declining, a sharper division between them and leaders (workers and management) and the need to put pressure on government to increase funding. In the Australian context, the Federated Council of Academics formed in 1968 and over time with additional amalgamations eventually led to the formation of the National Tertiary Education Union. Law then worked to help distinguish and empower the diverging interests within the university.

The regulatory significance of this model is as its two word title “organised anarchy” suggests—the university organisation evolved to function without highly centralised control configurations. That is, as an organisation, the university must be organised and configured to allow for loose coupling. It will operate best in this organisational form because it facilitates the variety of conflicting missions and values of this highly complex organisation, with its various agendas held by management and academics, and the problems associated with the coordination of the whole. Thus one measure for evaluating the coherence of regulation for university organisations is the degree to which the


regulation facilitates a loosely coupled organisation, or allows the “organised anarchy” to occur. This measure would align with the concern of institutionalists that public educational organisations struggle more with legitimacy and particularly so when tightly controlled and measured.

c. Strategic organisation

A rationalist model of university organisations is based on the sociological theory of resource dependence. In that model, organisations recognize and respond to their institutional environment and in particular to its resources on a rational basis. It was introduced through the work of Phillip Kolter and has maintained a strong hold on the imagination of higher education researchers. The strengths of this analysis are that it acknowledges the role of the environment for the survival and development of the university. Prior to this line of thinking, universities were studied as if they were self-contained organisations/communities. Accordingly, a theory which links the organisation to its environment brings a significant advance. The weakness of this approach, however, is that it provides too rational a view of the situation, an issue taken up and addressed by institutionalists. Neither people nor their organisations operate nearly as rationally as the models would suggest. Further, rationalist models generally fail because they fail to capture the complexity of the environment, problems of internal organisational coordination, and issues arising from the individual personalities involved in leadership.

An alternative dichotomy of organisational models arises from the work of Burns and Stalker. These scholars suggest that organisations may be developed as

---

670 For example, a recent PhD dissertation uses this approach for its theoretical framework. Leisyte, L. (2007). University Governance and Academic Research: Case Studies of Research Units in Dutch and English Universities. Twente, The Netherlands, University of Twente. PhD.
mechanistic or organic systems. The mechanistic operates as a highly integrated machine, relying on careful coordination by a hierarchy of a highly specialised workforce in a stable environment. The alternative model, the organic, allows authority, knowledge and response to occur at any level within the organisation. This type of organisation is focused more on accomplishing its task than the mechanistic which Burns and Stalker see as being focused on internal processes.  

Law also corresponds to a rational model. It does so by the creation of property rights and the corollary of contractual obligations to be created and enforced—essentially, facilitating a strategic approach to future opportunities and risks. By contracting, law allows the university corporation to prepare to meet its organisational needs while limiting its potential liabilities. University organisations under government pressure to direct resources to readily commercializable research, and in search of revenue made strategic choices in the funding of such research and into contracting with academic staff to control the outputs of intellectual work. The US government, for example, under the Bayh–Dole Act allowed universities to retain profits earned under patents granted to the individual organisations. This legislation has been followed in recent years in other jurisdictions.

The regulatory implications are obvious. The need for university organisations to have legal autonomy and legal powers to contract, hold and transact property rights, must be part of their regulation which indeed occurs through their corporate status. Regardless of the actual strategic use of these as proposed by regulators, whether government or within the university corporations, to function in the legal environment, they need these basic legal characteristics or powers to operate where a government wants them to be anything more than an arm of the government.

---

The equally important corollary flowing from Burns and Stalker’s work is that in a dynamic environment, coherent regulation will be regulation which facilitates the university to operate organically as opposed to mechanically.

d. Matrix

Institutional, open system models have become the norm since the limitations of rationalist models of organisations have become more evident. Among the more useful system models of the university has been the matrix model. Alpert, in his 1985 article investigated performance in terms of research that occurred in apparently moribund organisational forms. Alpert suggested that a matrix explains the conflicting structures both internal and external supporting the different teaching and research functions in the university while still allowing them to be coordinated with the external environment. Alpert, acknowledging the challenges facing the university under economic constraints, among other things suggests a reconsideration of the “invisible colleges” of peers (the academic profession), supporting one another in informal communities, viewing the university as a matrix of multidisciplinary units, with multiple missions and relying on a variety of external supports. The matrix model identifies a number of parties key to the university organisation’s operations internally and to the organisation’s survival by successful relations with the external environment.

The matrix model of the university organisation finds soundings in law in many areas. Internally, the matrix model is evident, for example, in the founding statutes of university corporations. These statutes allocate certain places on the university council to various constituencies such as leaders, students and academics internally, political appointees, community appointees and others. These members—some from within the university, some from the community and some from government—allow the university corporation to coordinate various participants within and without the university community more

676 Ibid.
677 See figure 3, ibid p. 255.
effectively. Externally, the matrix model allows for a significant number of laws
to shape the legal environment. For example, one recent estimate has identified
nearly 100 pieces of legislation applicable to The University of Queensland.\(^{678}\)
From laws such as the state based incorporating statute, to the Federal funding
provisions under the *Higher Education Support Act 2003* (Cth) discussed in
Chapter 3, to occupational health and safety laws all contribute to the complexity
of the matrix that Alpert’s model identifies and attempts to clarify.

Using this model to contribute to the evaluation of the regulation, it is evident
that the complexity of the regulatory arrangements in place must be identified
and considered. the complexity of the legislation just identified provides a
justification for claiming that the university organisations are simultaneously
over-regulated, under-regulated and mis-regulated. In other words, attending to
the matrix model should allow a more sophisticated coherence analysis and
identify an expanded area for potential incoherence and regulatory failure.
Essentially, attending to the matrix allows a better understanding of coherence
and potential to identify regulation mis-matched to the regulated organisation.

e. **Entrepreneurial organisation**

The dominant model of the university today is the entrepreneurial university.
This model of the university was created in the late 1990’s by the renowned
sociologist of higher education, Burton Clark. Clark based his model on a study
of five radically transformed universities.\(^{679}\) He identified the five following
features of the entrepreneurial university as having: “a diversified funding base; a
strengthened steering core; an expanded developmental periphery; a stimulated
academic heartland; and an integrated entrepreneurial culture.”\(^{680}\) These
university organisations had a strong core, enhanced peripheral units,
discretionary funding bases allowing pursuit of independent pathways,

\(^{679}\) Clark, B. (1998). *Creating Entrepreneurial Universities: Organizational Pathways of
cultivating of areas of particular local importance or strength and a partial shift in values referred to what Clark called “entrepreneurial” values.

An important feature for regulatory consideration was Clark’s finding with respect to the role and position of the academic profession. Clark found that one of the critical factors for success of the Entrepreneurial University was the ability to operationalise entrepreneurialism by integrating effectively divergent academic and managerial values. The university organisation, while taking better account of the resources in its environment and increasingly conscious of its expenditures, was not to abandon its academic norms in favour of revenue generating objects. That is, the lexical ordering of the norms of the university required it place the academic norms above the others, including norms of revenue generation. However, it was not to do so without regard to the economic resources.

Clark emphasized the importance of the academic profession as core in the success of the university. As noted, one of the five hallmarks is the “stimulated academic heartland.” According to this model, the activities of the university were to be judged in the light of academic values, not business values. In Clark’s words: “If not judged by academic values as well as managerial and budgetary interests for their apppropriateness in a university, they can move an institution towards the character of a shopping mall.” Academic values are not to be displaced by commerce: rather, they are to be supplemented and informed by commerce and management. In other words, the conception of knowledge, education and degrees as mere commodities, private economic goods that are sold at a university, transforms the university into simply another retail outlet. To do so was to radically alter the nature of the institution in a manner inconsistent with its objects, its core societal and organisational functionality.

As noted, Clark’s study leds him to view the academic profession as critical to the success of the university. The stimulated academic heartland is at the core of the successful entrepreneurial university. The members of the academic

---

profession are engaged with academic activities of teaching and research, not overly burdened or monitored, and consulted with respect to their preferences in terms of workload. In other words, they are treated as trusted colleagues “professionals” rather than economically modeled shirking employees or auditable subjects. Their work is not McDonaldised and so difficult to audit. The trusted professional model allows academic values to remain paramount and so maintain the university as an institution and as an organistaion distinct from managerial centered commercial organisations.

Clark’s analysis provides insight for problems noted by other researchers. Slaughter and Rhoades for example, examining the behavioural trends of and demands on the academic profession, write 682

Today, higher education institutions are seeking to generate revenue from their core educational, research and service functions, ranging from the production of knowledge (such as research leading to patents) created by the faculty to the faculty’s curriculum and instruction (teaching materials that can be copyrighted and marketed)…. changes that prioritize potential revenue generation, rather than the unfettered expansion of knowledge, in policy negotiation and in strategic and academic decision making. 683

This model has been considered in the Australian context as noted by Marginson and Considine with what they describe as the “enterprise university.” They note that Australian university policy and management has failed in two critical aspects: first, it has failed in “stimulating the heartland.” The result has been to create a “schizophrenic split between the managerial and the academic.” Second, it has failed to “create an integrated entrepreneurial culture.” 684 The net result of the Australian regulatory system is a poorly functioning system that leaves Australian university organisations with an overly empowered, disconnected management, high levels of conflict within the university between academic and


management professionals, a stifling of academic dynamism, an overly high level of surveillance, and suffering a loss of public value.\textsuperscript{685} The marked decline in the morale of members of the academic profession may be attributable to this hyper-powered management model among other things.\textsuperscript{686}

This management centric model, however, connects well with the generic model of organisations and management discussed in Chapter 2—a shift presaged by the shift from academic to management centric model of the university under the CTEC. Further it facilitates the McDonaldisation of the university so it can be run more easily and makes it more readily measured and hence auditable—objectives argued by Power.\textsuperscript{687}

The regulatory implications of this model as indicated by Clark’s and Marginson’s studies are that the thriving university organisation in contemporary society must be an organisation which maintains a normative ordering that prioritises knowledge, that maintains a “stimulated heartland” and that provides a balance combination of academic and managerial values. Further, it implies that the regulation must facilitate adequate economic support as well as effective interaction with the environment from which the university draws resources. Thus, regulation which shifts the economic norm to the top priority, which sees the academic profession as human resources bought and sold on a spot market model, or which sets either academic or managerial value to the fore and neglects the other is regulation designed for regulatory failure.

The failings of the Australian entrepreneurial university model are not only facilitated by law but made imperative by a shift in policy norms and consequent regulatory design as discussed in detail in the examination of the Regulatory Framework in Chapter 3 and evaluated in the coherence analysis of Chapter 7.

\textsuperscript{685} Ibid pp. 242-243.
3. Economic Analysis: Participant In A Market Economy

Unlike the foregoing sociological models which integrate multivalent systems, the economic lens’ dualistic view identifies activity as profit or non-profit. This section addresses university organisations from an economic perspective as operating in a market economy. Economic analysis is concerned with the production and distribution of scarce resources. The default context for the economist’s analysis, as noted in the previous chapter, is a market where goods are traded between individuals. By definition an individualist model is inadequate for organisations. One response from economists has been the development of neoinstitutional economics. This development allows neoclassical economists to apply their analytical framework designed for individuals to organisations or “firms” which are treated as if they were simple, rationalist individuals. Among firms, economists have developed a theoretical distinction between profit driven and non-profit firms.

Accordingly, in this section the university organisation will be analysed along the lines of these two broad categories.

Unlike the foregoing sociological analysis which aimed at developing heuristic models for the university based on internal organisational and institutional norms, the economic models of the market and the firm are vacant structures available for application theoretically at least in any context. That is to say they are stand alone models which may be applied broadly in the economy for the purposes of understanding how people and firms behave in conditions of scarcity. These models are not suited to capturing the broad public and social roles of institutions such as the university; rather, they are focused on the economic concerns around exchange, and supply and demand, firm productivity, maximising return on assets, and efficiency. Finally, although the economic analysis of the firm has had a significant contribution to the law of the business

corporation, it has had significantly less to say about the non-profit firm. Economics is a normative discipline evaluating arrangements on the basis of conformity to economic values of efficiency, wealth generation and production of goods and services which fit the economic paradigm. This normative commitment needs to be kept in mind as it provides a backdrop for the evaluation of economic models of the university organisation.

a. The university as a business firm

Although the model of the university as a firm goes back at least to the turn of the twentieth century, the characterisation of the university as a firm has become more important as part of a larger discourse in which the state has been transformed from the welfare state interested in the welfare of its citizens to the regulatory state focused on creating markets—a shift based on the assumption that markets are the best way to both manage supply and demand, and to distribute costs and benefits. The discourse of the university as a firm views the university as simply one among many other firms—i.e. organisations which individuals create for economic purposes.

There are good economic arguments for modeling the university as a species of the firm. Universities both consume inputs and generate outputs. They use inputs provided by others and employ workers, use plant and equipment, and compete for customers. Some of the university’s activities are readily measured in economic terms. They provide educational and research services. Further, following the analyses of Coase, Williamson and others, universities like other firms function by reducing transaction costs. That is, a group of suppliers and consumers can more efficiently coordinate their activities by organizing themselves into a firm than they can by searching for them on open market.

---


690 See discussion on economics and public goods in the next chapter.


The model of the firm provides some valuable regulatory insights. For example, it highlights difficulties in accountabilities when there are neither profit objects nor shareholders.\footnote{Most famously, Hansmann, H. (1986). The Role of Nonprofit Enterprise. The Economics of Nonprofit Institutions. S. Rose-Ackerman. New York, Oxford University Press. but also other studies, for example, Gasser, R. (1986). The Economics of Nonprofit Enterprise: A Study in Applied Economic Theory. Lanham, New York, London, University Press of America and for a sociological view see DiMaggio, P. J. and H. K. Anheier (1990). “The Sociology of Nonprofit Organizations and Sectors.” Annual Review of Sociology 16: 137-159.} Without profit objects, other objects need to be crafted, first for purposes of guiding the organisation ensuring the objects are consistent with the institution and the organisation’s stated objectives. A further question may be asked: should the objects be constructed so that they are readily measurable—a matter of concern to Power who suggests that making objects auditable has the potential to significantly alter not only the processes, but the services and even the organisation itself.\footnote{Power, M. (1997). The audit society: rituals of verification. Oxford, Oxford University Press.} As has been argued in Chapter 2, the altering of the organisation may be desired or an unintended consequence which leads to Power’s reference of audit being the “fatal remedy.” Second, without economic ownership, the university is responsible first to itself as a group of professionals, a reputation based community. Ownership of the reputation then needs to be an incentive for the profession. From a regulatory accountability perspective it may be that implications of both profit and ownership are that the highest level of integrity of members is required and that the organisation needs be both granted

autonomy and insulated from the market as well as political interests, and be placed with an orientation to society at large. By way of contrast, the business firm is subject to no expectations of integrity beyond the minimum imposed by law, it is expected to respond to the market, and has only that orientation toward society imposed on it by the market of consumers and the law.

b. The university as a non-profit firm

For most of its existence the university has been a non-profit enterprise and as such, a markedly different type of enterprise than the for profit firm. Given the importance of this model, the public good and public policy mission discussed in the previous chapter, a discussion of some length follows.

Understanding the nonprofit firm requires an approach rather different from the approach suited to the for profit firm. Professor Henry Hansmann in his seminal economic analysis of the non-profit enterprise identified two defining characteristics of firms that operate in the nonprofit sector. These are a non-distribution constraint which constrains managers from distributing profits to owners, and the existence of significant information asymmetries. Hansmann denominated these two characteristics as forms of contract failure which he believes, in addition to other things, drive nonprofit entrepreneurialism.

Hansmann observes that the market works with sufficiently complete and accurate information to allow the consumer to make reasonably accurate comparisons between products and prices prior to purchase, to make a clear agreement, as well as determine post facto whether contractual obligations have been complied with by the producing firm. Where all these conditions are not sufficiently met, Hansmann argues that nonprofit firms are a superior more efficient form of production and distribution.

---

697 The matter of for profit “universities” is discussed later in the chapter.
699 Ibid p. 843
Hansmann explains why: “The nonprofit producer, like its for-profit counterpart, has the capacity to raise prices and cut quality in such cases without much fear of customer reprisal.” In other words, the nonprofit producer has the same opportunity as the for profit producer to take advantage of the consumer using information asymmetries. What constrains the nonprofit producer from doing so however is unique to the nonprofit form. Again, Hansmann:

[the nonprofit] lacks the incentive to do so because those in charge are barred from taking home any resulting profits. In other words, the advantage of a nonprofit producer is that the discipline of the market is supplemented by the additional protection given the consumer by another, broader "contract," the organization's legal commitment to devote its entire earnings to the production of services.

The result of this constraint is that consumers are less likely to be exploited for gain on the basis of information asymmetries. Thus, a critical place of the nonprofit enterprise in society is where information asymmetries are severe. The measurement evaluation of services is a particularly fraught undertaking. Accordingly, the opportunity for consumers to make well informed decisions in the purchase of services, as well as to evaluate whether they have received that for which they bargained is particularly difficult. In this situation, the nonprofit is the preferable approach from an economic point of view.

Universities are a case in point. As both the nature of the good, and the value of the good are pieces of information that cannot be known until after consumption, and even then possibly not for many years afterwards, production and transfer in a for profit market poses significant risks for the consumer. Further, as the consumption is often a once in a lifetime decision that cannot be repeated the cost of a poor choice is increased exponentially. This issue is well illustrated by Professor Winston’s hypothetical consumer: “I went to Harvard the first time, but frankly it wasn’t worth it, so I’ll get my next undergraduate education at the

---

700 Ibid p. 844
701 Ibid p. 844
University of Montana”. In these situations, the non-profit works as a participant in what the economist Hansmann models as a trust market.

The non-profit model, however, leads to another problem. In the business firm, the organisational object or “objective function” is quite clear—at least according to economists: it is maximizing shareholder returns. In the non-profit firm the question of objects is not as clear. What is the common organisational object or “objective function” of the nonprofit? And what is to be maximized? Is it the size of the budget, or service maximization? While economists argue that without a single, easily identifiable objective function like profit, the directors of the nonprofit are at a loss because of lack focus, the research does not seem to bear this out. Nonprofit directors are successful and efficient in achieving their diverse aims. Indeed, it is not at all clear that the concerns of agency-principal conflicts are significant concerns in the nonprofit sector’s firms.

A critique of the economic firm analysis of the university has been developed by the economist of higher education, Gordon Winston in his article entitled: “Why Can’t A College Be More Like a Firm?” Winston examines the basis for the traditional and dominant model of the university as a non-profit. In doing so he identifies six fundamental economic differences the first three of which follow from an application of Hansmann’s analysis of non-profits and the latter three

---

specific to the university. First is the non-distribution constraint. A university, as a non-profit enterprise, is prohibited from distributing its surplus to owners—were there to be owners in the first place. As a non-profit enterprise, the distribution is to the beneficiaries of the nonprofit, in this case first the students, and second society at large.

Second, as a non-distributing entity, the university has less incentive to operate efficiently. Whereas the profit motive of for profit firms supposedly causes them to operate efficiently, the university has no such objective. In the non-profit sector, however, the objective is idealistic, with the net result being that the “inefficiency” is not likely wasted. Rather, it has been expended differently: that is, it is likely to be expended in the pursuit of idealistic goals including “educational excellence… student opportunity and access… [and] diversity.”

In other words, the resources are directed to other social and public missions, and difficult to measure aspects of services such as quality.

Third, the non-profit’s sources of revenue are markedly different from firms, as is the price they put on their services. Their revenues are donative and/or commercial. The university receives both sources of revenue: donative from the public purse and commercial in the form of tuition. This allows the non-profit to charge a price that is below production cost. In other words, it allows the university to provide a subsidized good, education at a higher level of quality than the price would suggest. Indeed, this negative differential between cost and price is the basis of quality in higher education.

This finding is supported by an empirical study by Cowen and Papenfuss who found that non-profit universities, when compared to for profit universities, maximize “the efficiency of reputational certification and attracting donations.” As such the “Non-profits certify the reputation of the high quality students and faculty, rather than the

709 Cowen, T. and S. Papenfuss (1997). Why are Most Universities Not for Profit? George Mason University WPS 97.04 p. 34.
711 Cowen, T. and S. Papenfuss (1997). Why are Most Universities Not for Profit? George Mason University WPS 97.04. Unfortunately, only the abstract of the study is available.
individuals willing to pay the most. Donations then are used to maintain the pecuniary value of the institution.\textsuperscript{712}

Fourth and following from the second, potential consumers do not know what they are getting, and cannot find out until long after they have graduated. As a once-in-a-lifetime decision it cannot be corrected. Accordingly, decisions are made on a protective, conservative basis to avoid regrets, and buy the best one can afford. Without information, the unrepeatable nature of the decision and the corollary conservative investment strategy, the only basis for the decision becomes a combination of “animal hunches” and the reputation of the particular universities in question.\textsuperscript{713} The service provided by the university is quite unlike most other goods and services purchased on the open market. Thus the consumer prefers to rely on a producer not susceptible to deviate from educational objectives in favour of profit objects. The issue of reputation also has a significant effect on the next characteristic.

The fifth characteristic is the university’s reliance on consumer input in the production of its goods. The university is not the only case where consumers inputs are essential;\textsuperscript{714} however, the university is the classic case where students contribute to their own learning and the learning of fellow students. This characteristic partially explains why competition for quality students is so important as between universities on the one hand, and why competition between students to get into universities is so intense on the other. Higher quality students produce higher quality graduates which in turn serve to increase the reputation of the university which increases the value of the education. In other words, it is a type of virtuous circle in good institutions and a negative vortex in the case of lower quality institutions. This distinction between higher and lower quality universities leads Winston to his sixth and final distinction.

Winston notes that heterogeneity in price, quality and the price-quality nexus is a distinctive feature of universities. High price does not equate to high quality and

\textsuperscript{712} Ibid.


low price does not mean low quality. Indeed, the price-quality nexus is unconnected. High quality education may be free where for example full scholarships may be made available to students at Yale, while tuition of $39,975\textsuperscript{715} a not insubstantial amount, for a three year on-line degree at the University of Phoenix gives no guarantee of quality. Subsidies to students can run as high as $276,303 per student per annum at Yale.\textsuperscript{716}

At a basic economic level the argument goes against the profit model. Results from an economic analysis of private for profit model versus the public higher education model suggests that the quality in publicly funded education is likely to be higher.\textsuperscript{717} If there is a public subsidy, the cost of education to the student is below market clearance rates. This subsidy means that there is a surplus value that can be extracted from the student. That surplus can be extracted by such things as higher standards of work and accepting higher quality of students.\textsuperscript{718} Where a student pays $30,000 for a degree the value of which is $30,000, there cannot be an expectation that the student will be willing to put more than the bare minimum extra effort. In other words, the degree is a commodity sold for $30,000 and the value is paid in full in cash. Therefore, the additional effort needed to read, think, understand, and write are additional “sweat equity” not properly factored into the costs of the degree. Indeed, this important issue of student contribution by their work “customer-input feature” has been recognized as a factor in the competitive environment for tertiary students and the problem of extracting fees (and quality) that results.\textsuperscript{719}

\textsuperscript{717} Cowen, T. and S. Papenfuss (1997). Why are Most Universities Not for Profit? George Mason University WPS 97.04.
Perhaps Winston’s introduction serves as a good conclusion to this section.

Winston writes:

in *My Fair Lady*, Rex Harrison asks plaintively, “Why can’t a woman be more like a man?” If she were, he thought, she’d be a whole lot easier to understand and to live with. In academic board rooms and … legislative chambers, the question has become, “Why can’t a college be more like a firm?” If it were so, goes the hope, it would be a whole lot easier to understand and to live with.\(^\text{720}\)

As is evidenced by the foregoing discussion, the hope and value of economic analysis is more an effort to grapple with the difficult political issues and regulatory challenges than an appropriate application of neoclassical economic normative preferences.

From a regulatory perspective, the significance of the economic analysis is that the university is quite distinct from a business firm. Although some insights from that analysis are relevant to the matters of regulation, such as the importance of understanding the impacts of missions and ownership, the analysis is not helpful in the regulatory decisions concerning assignment in on the public-private divide, nor the position of “production workers” in the overall. From an economic point of view, it is clear that the regulatory preference should be the nonprofit model.

These conclusions can be further investigated through an economic lens by examining the charitable enterprise. The basic economic explanation for the existence of charitable enterprises, as noted above, is contract failure based on information asymmetry. This explanation is incomplete.\(^\text{721}\) In addition to information asymmetries there are the important roles played by such non-economic incentives as altruism, pride in one’s work, and other normative commitments such as may be found in the social environment more broadly.\(^\text{722}\) Such motives, norms and incentives are underrepresented in the market—as may be extrapolated from Cowan and Papenfuss. Nevertheless, they are integral to

---


the university which offers social honours such as degrees, and prestigious titles such as “Professor,” “Dean” and “Chancellor.” Further, the university as a nonprofit allows socio-economic space for a value structure that places a higher value on knowledge and public goods over private economic goods. The institutional context of the nonprofit firm rewards those non-economic contributions in those other no-economic normative hierarchies.

A further insight comes from examining purposes of investing in non-profit firms. Auteri and Wagner suggest that people invest in nonprofits because they are dissatisfied with the outcomes of market based production and distributions which are dominated by for profit firms. They describe nonprofit entrepreneurialism as “seeking to change the architectural pattern of outcomes that are generated within the market economy.” That is, these “nonprofit entrepreneurs”, whether private individuals, organisations or governments, think that producing and distributing on the basis of ability to pay does not achieve the most desirable social outcomes. Further, these entrepreneurs believe that the nonprofit form is superior to the for profit model in the development and distribution. Nonprofit entrepreneurs are not focused on personal wealth maximization as would shareholders in a for profit firm. Rather they are seeking to maximize such things as quality, equity, innovation—whether technical or social—or some other such value in which nonprofit firms prove to be a superior to for profit firms. Evidence from research in areas such as health care, education and environment suggest nonprofits are particularly effective in achieving such ends or missions in these areas.

The university, as the premier provider of higher education has long provided an opportunity for a redistribution of society’s resources, at first for the few particularly outstanding scholars who were granted opportunities to attend the elite institutions, and later, pursuant to a broad policy of equality of opportunity

---

through national policies encouraging broad participation in higher education, leading to the massification of higher education. Regulatory decisions placing the university organisation on the public side of the public-private divide have allowed the university to achieve these important public good objects much more effectively than had they been placed on the private side of the divide. By creating opportunities for all citizens to participate in the university, governments as nonprofit entrepreneurs created opportunities for all citizens to to achieve socio-economic positions based on merit instead of birth. In other words, it challenged market distributions which tended to keep wealth, jobs and opportunities within a restricted circle of privilege.

Auteri and Wagner further observe that nonprofit firms, as non-market vehicles for the production and distribution of goods and services, serve as an important form of non-market ideas and products. Further nonprofits are a place for the creation and dissemination of ideas and products. Auteri and Wagner write:

> While nonprofit enterprises are not normally thought of as areas of contest, unlike courtrooms or legislative assemblies, they nonetheless operate as arenas of contestation over the substantive characteristics of societies, though this perhaps only becomes apparent when considered in light of the profit-seeking alternative to the creation of nonprofit enterprises.  

As noted in a previous chapter, Mansbridge discusses the importance of a public space for debate about the nature of “public good”. The university is admirably suited to providing that space. It provides important space in society for the generation of ideas and the contest of ideas on the shape of society. Such space is a vital part of any democratic society or society particularly for a society facing serious threats to sustainability as is society today in the face of global climate change. As Auteri and Wagner’s analysis suggests, the non-profit suits this purpose admirably.

---

Finally, Auteri and Wagner note the irony and special place of the nonprofit in a market economy. In their words:

“There is a certain ironic quality to the creation of nonprofit enterprises. They emerge within the market economy, and yet operate as agents of substantive change to create a different societal landscape from what would be generated within an economy that was organized wholly through profit seeking firms. There would be no reason for an entrepreneur to create a nonprofit enterprise if he were wholly content with the societal outcomes generated through the market economy.”726

In other words, not all human activity should be surrendered to short term profitability, and space made by nonprofits for the contestation of values and society in general are of immeasurable value—perhaps part of the very problem of the understanding and valuation of universities in a market economy.

In conclusion, for regulatory purposes there are some important insights to be gleaned from an economic analysis of the university as a firm. By drawing attention to the constraints on the nonprofit firms and the lack of ownership, the analysis draws attention to both the strengths and challenges of the nonprofit university—the critical issues of accountability and the challenge of identifying an objective function.

The analysis of the university as a nonprofit firm also draws attention to three other crucial factors at work in the university of which account needs to be taken for regulatory purposes. These are the overwhelming information asymmetries inherent in making decisions about university education, the important social policy objective of egalitarianism of the university that is facilitated by nonprofit firms, and the issue arising from the absence of a single clear objective function like profit maximization. With respect to this last issue, research indicates that in the absence of a single objective function,—i.e. a clear nonprofit/social or public good function—“mission”becomes a substitute and hence is critical to the nonprofit enterprise.727 This fact makes it imperative that the university have a clear mission, which has significant implications for regulators. Finally, economic analysis evidences that accountability in the university must be

---

726 Ibid p. 60.
727 Ibid.
carefully identified and articulated. The assumption of accountability by simply comparing the university to a for profit firm or too narrowly or numerically conceived is exposed as vacuous, as indeed are many of the for profit assumptions believed to be applicable to the university. A careful analysis of accountabilities needs to be undertaken, as identified in chapters 3 and 4 to identify who should have accountabilities for what objects, to whom, by what standards, using what processes and with what outcomes.\textsuperscript{728}

A final word of caution on economic analysis of the nonprofit firm comes from sociology. Di Maggio and Anheier in their sociological review of nonprofit organisations and nonprofit sectors observe that while economic models “possess an elegance” that institutional explanations (and other analysis) lack, economic modeling is far too narrow to offer much explanation into the institutional structure.\textsuperscript{729} They note a wide variety of roles and functions of nonprofits that distinguish them from private firms. These include the origins, behaviours, value commitments,\textsuperscript{730} and legal form among other things.\textsuperscript{731} The value placed on efficiency in business, a means based focus, is inadequate in the context of nonprofit organisations which are following a different value rationality.\textsuperscript{732} Finally, they note the congeniality between the professional ethos and the nonprofit sector, both of which value autonomy, participatory governance, and revenue structures which empower.\textsuperscript{733} In other words, while the economic model has important insights to offer, it is a far from complete explanation. Former scientist and Executive Vice-Chancellor of UCSF and entrepreneur Zach Hall concludes: “The relationship [between industry and university] is most successful, … when the two parties acknowledge and respect their distinct missions.”\textsuperscript{734}


\textsuperscript{730} Ibid p. 145 and 153.

\textsuperscript{731} Ibid p. 150.

\textsuperscript{732} Ibid p. 145.

\textsuperscript{733} Ibid p. 142.

4. Political Analysis: Public Administrative Perspective

A different and important understanding of the regulatory issues can be developed by examining the university organisation as a part of the administration of government. Public administration as a scholarly endeavour is an independent discipline that lies at the intersection of political science and management. It is an effort to understand the organisation and workings government and government of various types. In the analysis which follows, the characteristics which mark public government bodies are identified and tested in application to the university organisation. The evidence is clear that from the perspective of public administration, the university is on the public side of the public-private divide. Again, the regulatory implications are significant in terms of the legal regime and political accountabilities.

In contrast to the previous approaches to the university, public administration considers the university as one of a subset of a larger group of state bodies including departments, agencies, statutory authorities of various types and government business enterprises. Placing the university among other public enterprises and comparing its structure and processes to other government providers of public goods, all of which receive some type of government sponsorship, provides insight because it suggests what type of government organisation it is and adds to the foundational thinking of how the organisation should be regulated.

The analysis in this section identifies not only the applicable bodies of law, but also the principles of law applicable. The university was first placed under a state agency during the reign of Charles VII of France in 1446.735 There it received both financial support and political oversight from the French government. In the English tradition, the university came under state control when the elected Chancellor (with the masters’/ academic profession’s approval)

---

moved from the university to the court in the mid fifteenth century. Since that
time, there have been a variety of arrangements as the various powers have
wrestled for control of the institution and its organisations which in turn and in
its own right has responded to those powers.

Today, the university in Australia with the exception of two small private
organisations—Bond University and the University of Notre Dame Australia—is
a creature of the state legislatures. As such, it is subject to administrative review
legislation applying to government bodies of all types. Where the office of
University Visitor exists—an office dedicated to dispute resolution, tracing its
roots back to the private eleemosynary corporation of the late middle ages—the
visitor is the state’s governor or the appointee of the governor. This public
appointment demonstrates the university’s character not as a private charity but,
as put by the majority of the High Court of Australia in Griffith University v
Tang, one among the “publicly funded institutions, constituted by statute and
discharging an acknowledged responsibility of the state.”

a. Understanding government bodies

The disorganisation and variety among these organisations led the UK public
administration scholar Professor Christopher Hood to describe them as a
“zoo.” Hood teased out three dimensions of difference forming some type of a
foundation for classification within this sector. These three dimensions are:
mode of creation, formal status and principal resource. Each of these can be
applied to the university.

---

737 See for example Australian National University v Burns (1982) 43 ALR 25, in which the
Administrative Decisions (Judicial Review) Act 1977 (Cth) was considered but applied—the case
738 Griffith University v Tang [2005] HCA 7, para 40.
Control and Evaluation in the Public Sector. F. Kaufman, G. Majone and V. Ostrom. New York,
Control and Evaluation in the Public Sector. F. Kaufman, G. Majone and V. Ostrom. New York,
i. Mode of creation

In terms of the first dimension, the mode of creation, the university in Australia was created in what Hood refers to as both “bottom up” and “top down” fashions. That is, the Australian university was created in the first instance as a response to elite demands of the mid-nineteenth century beginning with the University of Sydney the various legislatures have created the various university corporations of Australia. The universities created after Dawkins are “top down” bodies. Hood suggests top down bodies as efforts to by-pass “jurisdictions of other agencies, governments, lower level governments.”

One can see the applicability of Hood’s hypothesis in Dawkins’ realisation that the university institutions, organisations and academic profession would for the most part reject his approach, leading him to dismantle the CTEC and carry out his program without meaningful consultation with the institution—or the public for that matter.

From a legal perspective, Hood compares the two modes of creation as “trusts in the common law tradition as autonomous collective entities created by citizens,” being his bottom up category, and the Roman-law understanding of corporations as “concessions of the state” being the top down category. As just noted, the Australian university corporation has changed from a political response to local agitation to a national policy initiative, in as seen, for example, in the creation of several new university organisations by way of merger in the 1990’s.

Interestingly, Hood observes it is not uncommon for private bottom up institutions to become part of government. In such situations, the non-profits

742 Ibid p. 189.
may be taken up by government as the broader policy benefits become clear or the political attractiveness of their activities become evident.

The role of university organisations, in terms of the power of its social status and its power to confer status as well as its potential for the advancement of socially desirable goals like equality present a strong case for government to take up and integrate them into government. It is evident in Australia that the government by taking up the university organisations has been able to task them with the various equity missions to achieve government’s social policy objectives, as well as directing their focus toward economic norms through the funding arrangements discussed in Chapter 3.

ii. Formal status

Hood’s second dimension, the formal status, refers to the position of the organisation on the continuum from core constitutional government to independent public authorities delivering public goods, through to public-private partnerships. Hood identifies four dimensions to this formal status: ownership, finance, operation and oversight. 745 In all four of these dimensions, in nearly all instances 746 the Australian university has been public: it has been publicly owned, publicly financed, publicly operated and publicly overseen. Public ownership of the Australian university corporation is evident in that 38 of 40 university corporations are statutory corporations. In terms of finance, although over time the arrangements have changed in the Australian university with students picking up more of the financial burden over the last few decades, it still remains arguably public. The situation of the majority of Australia’s universities is that about 55 per cent of funding still comes from the Federal government. 747

The decline, however, is significant. Indeed, the decline has reached the point that Professor Glyn Davis, Vice Chancellor of the University of Melbourne

745 Ibid p. 194.
746 Again the exceptions being Bond University and Australian Catholic University.
declared: “we can’t really call ourselves a public University any more, when only 23 percent of our income is directly guaranteed by the Federal government.”

iii. Principal resource

Hood’s third defining characteristic of organisations is their principal resource. Hood identifies four common types of resources linking organisations to government. These are: “nodality, treasure, authority and organisation.” As will be evident in the explanation which follows, the Australian university relies all four of these government resources in differing measures. The university has an important role as a “node” in “information interconnectedness” providing research to the government and operates as government’s premier information creating, gathering, organizing, and disseminating institution. Further the university relies on government “treasure.” That is it has a fungible asset, a good or service to sell to the public. It sells education, status, knowledge and skills, it grants degrees and sells its research. The Australian government, by way of legislation controlling the use of the term “university” and control over “higher education providers” has given an exclusive or monopoly right to the university to grant certain titles. In this way, the Australian university by definition has “authority” to command or certify via the granting of degrees, diplomas and certificates. As to Hood’s final resource, the Australian university has “organisation”—the possession of goods and humans arranged in a useful manner. The various states have granted organisational powers to the Australian university to allow it to carry out its various functions.

b. Three categories of government bodies

While Hood’s analysis provides a framework locating the university in the public-private continuum as a form of paragovernmental body, it does not characterise or locate it with the government itself. That perspective can be drawn

---

750 Higher Education Support Act 2003 (Cth).
from Prof. Roger Wettenhall’s investigation of government bodies.\textsuperscript{751} Outlining
the development of modern government structures, Wettenhall follows the initial
work of D.N. Chester.\textsuperscript{752} In 1951 Chester identified three types of government
bodies: the ministry or department of the central government, the local
governmental bodies, and “the rest.”\textsuperscript{753} The category denominated “the rest”
were often some form of what had earlier been described as “statutory bodies for
special purposes.”\textsuperscript{754} These were bodies independent of ministerial control and so
separated from the core of the governmental architecture. The category “the
rest” tend to be function based organisations which in some instances share many
commonalities with Hood’s paragovernmental organisations.

Chester observed that third category bodies suffer from a number of problems
including understanding the nature of the category, popular attack—a problem
Hood also notes as both conservatives and progressives attack paragovernmental
bodies\textsuperscript{755}—problems of accountability, and so on. An important aspect of these
“the rest” bodies is their need for independence and autonomy. Wettenhall
observes that these bodies tend to be those that protect the national interest. That
is, these bodies provide a buffer for the larger society from the government of the
day. These bodies include “electoral commissions, ombudsmen, taxation offices,
public universities, national broadcasting commissions and a variety of
regulatory bodies.”\textsuperscript{756} They work as “trustees of the national interest”—an
interest which extends beyond the interests of the government in power.

Their special function is to protect national interest when national interests and
the interests of the government of the day collide. As a result, “the rest” bodies

\textsuperscript{751} Wettenhall, R. (2003). "Exploring types of Public Sector Organizations: Past Exercises and
\textsuperscript{752} Ibid.
\textsuperscript{753} Chester, D. (1951). "Public Corporations and the Classification of Administrative Bodies."
\textit{Political Studies} \textit{1(1):} 34-52 cited in Wettenhall, R. (2003). "Exploring types of Public Sector
Journal} \textit{3:} 219-245 p. 225ff.
Control and Evaluation in the Public Sector}. F. Kaufman, G. Majone and V. Ostrom. New York,
de Gruyter p. 200-201.
\textsuperscript{756} Wettenhall, R. (2003). "Exploring types of Public Sector Organizations: Past Exercises and
require strong legal structures, popular support, and independence in terms of funding, staffing and operating mandate in order to achieve public objectives. Indeed, as Wettenhall puts the dilemma,

“how to guarantee or protect autonomy, especially when governments control the financing and may want to ensure compliance with other whole-of-government policies in areas such as industrial relations or purchasing, is a major issue running through world experiences with third category organisations.”

Wettenhall specifically mentions the university as a third sector body. Its public mandate requires it to maintain independence from and a critical view of the government. As a public body for the national interest, the university needs to maintain independence of and critical stance toward all such consolidations of power, be they government, business or some combination of the two.

Returning to Chester’s taxonomy of the central government ministry, a municipal local body and “the rest”, one notes that the third category body has no political leadership per se. That is, unlike central or local governments, the leadership of these bodies is not a part of the electoral process. This lack of political leadership is an obvious source of complaint about accountability. Bodies of this category are headed by “single executive, or a collegial board or council.” The challenge is to balance autonomy with accountability of such statutory bodies or, as Wettenhall puts it and just quoted above “how to guarantee or protect autonomy, especially when governments control the financing and may want to ensure compliance with other whole-of-government policies such as industrial relations.”

The Australian university is obviously not at the core of government. That is, it is not a ministry of the central government, nor a local agency. Rather it fits nicely into Chester’s broad third category, the “rest.” The decision to shape it as a statutory corporation has significance. Although the distinctive features of the university corporation remain unclear, Rashdall identifies them as arising from the model of the medieval corporation. That is, they had the following

---

757 Ibid p. 233
758 Ibid p. 228.
759 Ibid p. 231.
760 Ibid p. 233.
characteristics: a written body of rules, rights of legal action, appointment of officers and a common seal.\textsuperscript{761} Although it has been argued that rules, legal rights and common seal are the hallmarks of the private trading corporation, they are equally hallmarks of the statutory corporation, and in this regard demonstrates the importance of university autonomy.\textsuperscript{762} These bodies although drawing some of their funding from the state and providing services of a public nature, have a right to exercise discretion in the execution of their objectives.\textsuperscript{763} Wettenhall notes that in Australia, all Chester’s “the rest” government bodies have been statutory corporations, regardless of their function.\textsuperscript{764}

As noted, the formal status of the university corporation is as a statutory corporation. The statutes create a separate legal entity, create an identifiable membership, provide its objects, create responsible officers, set out powers including the right to hold property and sue and be sued.\textsuperscript{765} The early statutes provided economic support. For example, the NSW Legislative Council’s \textit{University of Sydney Act 1850} provided for an annual grant of £5,000 to defray expenses.\textsuperscript{766} It is clear from reading the \textit{University of Sydney Act} that the government intended to create a body independent of the Legislative Council in all manner including finance where its spending was in excess of £5,000 in any given year. The Act makes no reference to reporting or audit by the government but does provide for some control by its power to appoint the first members of a self-sustaining senate,\textsuperscript{767} supervision of statutes, bye-laws and regulations,\textsuperscript{768} and appointment of the Governor as the university Visitor.\textsuperscript{769}

\textsuperscript{763} Ibid p. 229.
\textsuperscript{764} Ibid p. 230.
\textsuperscript{765} See note 89 above [ the note reads: \textit{University of Sydney Act 1989} (NSW) s 4; \textit{Melbourne University Act 1958} (Vic). s. 4; \textit{University of Ballarat Act 1993} (Vic) s 2(a)-(d); \textit{University of Western Australia Act 1911} (WA) s 4; \textit{University of the Sunshine Coast Act 1998}(Qld) s 4; \textit{University of Tasmania Act 1992} (Tas) s 5. \textit{University of Adelaide Act 1971} (SA) s 4(2). Curiously, the University of Queensland’s legislation, \textit{University of Queensland 1998} (Qld) has no membership provisions. It merely identifies bodies (senate, colleges and academic board) with certain rights and duties mentioned for each, and sets the senate as the governing body-- unambiguously.
\textsuperscript{766} An \textit{Act to incorporate and endow the University of Sydney 1850} (NSW).
\textsuperscript{767} Ibid I.
\textsuperscript{768} Ibid XV.
\textsuperscript{769} Ibid XVI.
This particular statutory corporation was to deliver a range of services to the public which have changed over time. As noted, in the period prior to World War II, the university’s main objective was the confirmation of the elite and production of professionals for the social, cultural and economic institutions of Australian society. After that time, it took on its more familiar role in nation building, enfranchising an increasingly larger swath of the public, and enabling larger social shifts, accommodating among other things the changes in the nature of work and problems with oversupply in the labour market—as discussed in the previous chapter.

The view of the university as a statutory corporation that operates independently of political interference is found in the case law. For example, the court in *Harding v. University of New South Wales* explicitly notes the necessity of the government leaving to the university the exercise of its discretion even if the court were to find that the university had made an undertaking to admit a student. In that case, Young CJ said in obiter: “I would also have great difficulty in considering that this Court had the power to direct the University to do that [i.e. order it to accept a student].” In other words, the exercise of discretion by the university within its areas of competence are matters best left to the university—a matter reconsidered by the High Court with a similar result in *Griffith v. Tang*. The issue of autonomy, however, carries with it special problems and with the university itself, as a corporation engaging in private contracts with students.

In the case of *Harding v University of New South Wales* in which the court was called upon to determine the existence of a purported private contractual right of an expelled student applying for re-admission to the medical faculty, Young CJ wrote:

“it is usually unsafe to apply a combination of public law and private law principles to any piece of litigation. As Lord Hoffmann said in giving the decision of the House of Lords in *R v East Sussex County Council; Ex*  

770 *Harding v University of New South Wales* (2002) NSWCA 325, para 82.
771 Ibid para 82.
772 *Griffith University v Tang* [2005] HCA 7.
While Young CJ’s comment is helpful, it is evident that further legal analysis is necessary—and is taken up in the next section.

From a public administrative perspective, it is clear that the Australian university is indeed a government body. The significance is not only that the university has accountabilities to the government, but also that the public functions of the university have been acknowledged by both the state and Federal governments in Australia. Public administrative analysis assigns the university to the public side of the public-private divide; however, it does so only conditionally. That is, in instances where private law is applied, the “publicness” of the university need not preclude the application of private law. The preference between the use of public or private law can only be clarified from a regulatory point of view by a clear assignment of the university corporation on the public-private divide and appropriate normative ordering in the regulatory framework. Some clarity on the issues raised by Young CJ may be obtained by an analysis of the university corporation and its place in public law, to which the dissertation turns next.

5. Legal Analysis: The University Corporation and Public Law

This section investigates the legal characteristics of the university organisation—the unique university corporation—and places it within the public law sphere. Unlike Corporations Act corporations which are created by right and have little restriction, university corporations as statutory corporations are created with specific, legal objects. They are not free to engage in any activity they may choose. Rather, they are given specific tasks and restricted in activity. These tasks, as shall be demonstrated, are markedly consistent with the institutional norms noted in the previous chapter’s examination of the university institution and missions.

The state based legislation creating the university corporation addresses all the missions of the university discussed above in some form or other. For example, the Melbourne University Act 1958 (Vic) provides the following broad objectives:

(a) to provide and maintain a teaching and learning environment of excellent quality offering higher education at an international standard;
(b) to undertake scholarship, research and research training of international standing and to apply that scholarship and research to the advancement of knowledge and to the benefit of the well-being of the Victorian, Australian and international communities;
(c) to equip graduates of the University to excel in their chosen careers and to contribute to the life of the community;
(d) to serve the Victorian, Australian and international communities and the public interest by—
   (i) enriching cultural and community life;
   (ii) elevating public awareness of educational, scientific and artistic developments;
   (iii) promoting critical enquiry, informed intellectual discourse and public debate within the University and in the wider society;
(e) to confer degrees and grant diplomas, certificates and other awards.\textsuperscript{775}

The organisational objects of the corporation are broad public good objects, normatively ordered to prioritise knowledge for communal purposes. The standard set by the objects, s. 4A(a) “excellent ... at an international standard” recognises that the local Australian university corporation is part of an international institution. Subsection 4A(b) addressing scholarship, research and research training, identifies “knowledge” as an ultimate value and not merely as instrumental value to be determined by the market. Further, it identifies the benefit not in individual terms, but in terms of the broad public benefit of the local, national and international communities. This normative ordering, or lexical ordering as Ayers and Braithwaite would have it,\textsuperscript{776} confirms the Australian university organisations’ places in the international institution which place primacy on knowledge.

\textsuperscript{775} Melbourne University Act 1958 (Vic) s 4A.
The issues of economic norms and other normative orderings while not addressed by the statutes have been addressed by the courts. In the case of *University of Western Australia v Gray*, the court specifically stated that despite the changed environment which results in onerous economic obligations on the university, it is not up to the university to cast aside its public good or other obligations and pursue economic objects. The court stated:

> We accept that UWA has not been immune from the forces, financial and otherwise, that are forcing changes in the character of the university sector in Australia. As French J noted, UWA has engaged in commercial activities, as have done “most, if not all, universities”. … What is notable for present purposes is that there is nothing in the evidence to suggest that those commercial activities have displaced, either totally or if in part to what extent, UWA’s traditional public function as an institution of higher education in favour of the pursuit of commercial purposes (if it lawfully could do so under its Act).”

In other words, the university organisation must pursue the public good with which it has been charged prioritising its knowledge norms. Further, it is not permitted to re-order its norms under the Act.

The utility value of knowledge and its individual application is not ignored. It is addressed in the subsection which follows: however, the normative ordering stays in tact by the proviso that the valuable contribution to the individual’s career a university education provides is still used by the graduate to contribute to the community s. (4A)(c).

The subsection which follows s.(4A)(d) provides a more detailed explanation of the public mission. The university is to “(i) enrich... cultural and community life; (ii) elevating public awareness of educational, scientific and artistic developments; (iii) promoting critical informed intellectual discourse and public debate within the University and in the wider society.” These objects are clear public good as argued in Chapter 4. They are focused on the community, not on individual advancement. There is a clear identification that the dissemination of

777 *University of Western Australia v Gray* (No 20) (2009) 246 ALR 603 para 184.
knowledge about the development of humanity’s higher faculties—of thought, understanding and emotion—are key objectives of the university.

Finally, s.(4A)(e) merits consideration. This section, which makes it an object to “confer degrees and grant diplomas, certificates and other awards” indicates the nature of the university corporation’s activity. It is to be engaged in sorting and distinguishing members of the university by the conferral of degrees and awards. These awards are honorific in nature as indicated by titles such as “doctor” and “professor”. The basis for these awards is assumed is scholarship given that this is the university corporation’s legal object. This set of objects and priorities is coherent with the institutional priorities and purposes as set out in the previous chapter. In sum, the state parliaments in their enactments of legislation creating the specific university corporations appear to have done so in a manner which is largely coherent with the historical institution of the university discussed above and the sociological missions of education and credentialing.

Turning to the classification of the university corporation within the legal system requires further consideration of the public-private divide discussed in Chapter 4. This section argues that the university organisation is assigned at law to the public law sphere. Professor Ronald Moe identifies a series of questions that allow such a classification to be made from a legal perspective. Moe points out that while economists and policy advisors may fail to adequately identify the differences between public and private organisations, there are significant public and political goals, as well as important institutional considerations derived from the legal status and organisational structures. On the public side, these goals, status and structures are safeguarded by public law. While Moe’s criteria allow for the significant blurring of the line between public and private, they do provide significant benchmarks. His criteria are more like continua with the potential for describing the criteria as “more” or “less” rather than simply “yes” or “no.” As such they are well suited to an organisation like the university which has elements of both public and private goods.

Moe’s classification criteria are as follows: an organisation’s legal status, its enabling legislation, its relations with government as a central, local or third type of organisation (as discussed above in the public administration section), the extent to which it is subject to administrative law, the extent to which it is subject to private law, and the appointment of its executive. Moe’s framework as applied to the Australian university supports the public assignment argued in Chapters 4 and 5.

a. Legal character

At law the Australian university is a body corporate, a statutory corporation. It is a corporation without share capital or guarantee. It has no board of directors, but has a council charged with the supervision of the corporation. Membership in the corporation is not purchased, but is based on association with the productive, distributive and consuming functions of the corporation. In particular, students, graduates, members of the academic and administrative staffs are the members. It identifies the chief officer as the Vice Chancellor.

b. Enabling law

The enabling legislation for each university corporation is State enacted legislation. The individual states create by statute each university as a legal body corporate—with the exception of the Australian National University which is a product of the Federal government. The enabling statutes set an express public purpose for the corporation. The example of the Melbourne University Act as noted above identifies the objects as creating knowledge by undertaking scholarship, research and research training for the benefit of the community, equipping graduates to contribute to the life of the community; and to serve the public interest.

779 Australian National University Act 1991 (Cth).
780 Melbourne University Act 1958 (Vic) s 4.
c. Characterisation in the spectrum of governmental bodies

Locating the university on this criteria is somewhat unclear. Although not a legal characterisation, in terms of Chester’s analysis, as discussed above, it falls clearly into the third category, or “the rest.”\(^{781}\) As further noted above, in terms of Hood’s taxonomy, it lands squarely in the public sector.\(^ {782}\) The issue of its status vis-à-vis the Federal and state governments, however, is unsettled. The main source of funding is the commonwealth but the state governments retain legislative competence.

These relationships have been tested. In the case of \(R v University of Sydney\)^\(^ {783}\) the Commonwealth government had tried to mandate the number of students the University of Sydney was to accept and into which faculties they were to be accepted. The High Court held that the Commonwealth government had overstepped its bounds. In the words of Starke J. holding with the majority: “the Commonwealth is seeking to control education in the universities of Australia, which is wholly beyond its power.”\(^ {784}\) Thus, it is clearly a Constitutional issue. Although the Constitution provides the States with power to create corporations including the university corporation, it grants the Commonwealth with power in 51(\(\text{xxiiA}\)) to meet economic needs of students.

The decision not to grant legislative competence over education to the Commonwealth under section 51 of the Constitution leaves education to State jurisdiction as a residual power. This situation reflects the preconfederation legacy of states’ responsibility for public education. This awkward position gives the Federal government responsibility for finance but denies it jurisdiction in terms of direct legislative control. To address this, the Federal government has taken increasing control by imposing demands through funding schemes which make funding conditional upon compliance with Commonwealth

---


\(^{783}\) \(R v University of Sydney\) [1943] 67 CLR 95.

\(^{784}\) Ibid 16.
legislation, as discussed in Chapter 3, through the *Higher Education Finance Act 2003* (Cth).

The university corporations’ relationship with the State governments which nominally exercise control is also not clear. Although not a state agency, as a statutory corporation the university corporation reports to the State and is subject to State appointments to council. Yet, it also has significant accountabilities to the Federal government.

d. Legal accountability via administrative law

This issue, taken up in detail in Chapter 3 examining the regulatory framework governance, is addressed again briefly here from an administrative law perspective. The university stands in a somewhat ambiguous position in terms of the applicability of administrative law. While the precise reach of administrative law is not clear, there are many instances which demonstrate that it is certainly not beyond the reach of judicial review on administrative law grounds. The judiciary, however, has been circumspect in interfering with academic decisions. For example, the academic decision made by Griffith University in the case of *Griffith v. Tang*, was deemed beyond the scope of judicial competence, although in his dissent in Kirby J. suggested that such review was appropriate, particularly given the stakes for the student.\(^{785}\) In that particular case, the student was to be excluded on the basis of allegations of falsification of data. The university had made the decision to exclude and its decision was then challenged in the courts on the basis of whether it was subject to review, a matter which turned on the prior question of whether the decision was taken “under an enactment.” That is, whether the decision to exclude was a decision specifically enabled by the legislation and hence subject to judicial review.

The court held that although the *Judicial Review Act 1991* (Qld) did apply to the university generally,\(^{786}\) it did not apply as the decision was a normal exercise of academic professional discretion under authority properly delegated and

---

\(^{785}\) *Griffith University v Tang* [2005] HCA 7.

\(^{786}\) *Judicial Review Act 1991* (Qld).
exercised, and not a specific exercise of authority granted by the statute and which would not otherwise be available.  

To some degree at least, it may be that the university’s traditional independence has made the courts reticent to interfere excessively with the university on the government’s behalf. This creates a situation where the new entrepreneurial university has an empowered public executive with neither private law remedies nor the traditional internal constraints imposed by the academic profession to constrain it—a matter for consideration in regulatory design.

e. Extent of the application of private law

As noted by Young, CJ above both public and private law may apply to an organisation. That leads to the penultimate of Moe’s categories. To identify an organisation as private, Moe draws attention to the following characteristics: the organisation being subject to taxation, reporting requirements, administrative law, creditor recourse, privacy and the extent of political involvement in the appointment of executives. The dissertation turns briefly to consider each of these characteristics in the context of the university.

With respect to taxation, the university is not subject to taxation on revenues. Further in terms of its disclosure obligations its obligations are quite distinct from either proprietary or public trading companies. Rather than requirements with respect to finances of trading companies, the university is required to report to both Federal and State governments on matters of finance as well as operations. Further, as the case law discussed above demonstrates, unlike a private company, it is subject to various forms of judicial review. The accounting procedures at the universities are complex and must be organized to provide data for the further reporting to both levels of government.

While theoretically a university corporation could go bankrupt, the probability is that no government would allow that to occur. They have run deficits for many

---

788 Harding v University of New South Wales (2002) NSWCA 325, para 82.
years and financiers have yet to make a demand or commence an action for administration. To allow a public university to collapse would send negative signals of significant consequence on a host of levels.

f. Appointment of executive

Finally, Moe identifies the appointment of the executive as the last criteria. In a private company, the parties holding power are free to nominate and possibly to appoint whomever they choose and most certainly would be able to do so free from political interference. In a public corporation like the university, the executive are political appointees. In the university, the executive would be office holders such as Chancellors, Vice Chancellors, some Pro- and Deputy Vice Chancellors, and some directors and senior managers. The appointment process of Vice Chancellors is less than transparent and in many cases delegated to recruitment agents or done on an informal network basis with the Council simply approving a recommendation.

Working through Moe’s analysis, it is evident that the categorization as public or private is a simple matter—and requires clear political decision. As Moe observed in his analysis of the Federal Asset Disposition Association, a corporation can seek to be “private in its direction and interests but public in its rights and privileges.” Interestingly, this is exactly the opposite to the situation one finds in the Australian university. In the case of the Australian university, the government seeks to control, direct and define the university’s interest, while forcing the university to find significant private sources of funding.

---

791 With respect to Vice Chancellors, see O'Meara, B. R. (2002). The recruitment and selection of Vice-Chancellors for Australian universities. Melbourne, Deakin University. PhD.
Further, governmental direction of the university is evident throughout the *Higher Education Funding Act 2003*, as for example, the Federal government’s decisions with respect to the imposition of structural changes in decision making via the National Protocols, its decisions concerning funding allocations, imposing student numbers, and forcing the university to focus on private economic concerns. Additionally, the private rights and privileges of university corporations are narrower than those in the public sector, or those traditionally associated with statutory corporations. In the case of the university this is specifically the monopoly on the granting of degrees and the exclusive use of the title “university.” These privileges under Gillard, may be rescinded if the Bradley review recommendations on these issues are implemented.

In sum, a legal analysis of the university corporation is coherent with the institutional and organisational norms which are public good and normatively order knowledge in first place.

6. Conclusion

The disciplines of sociology, economics, politics and law have been called upon to shed light on the nature of the university organisation—i.e. the regulated object or target. The university is a unique organisation, focused on public good and knowledge norms. It is not simply a specific instance of a generic organisation. It has been organised legally through the corporate form, and indeed, it is the original corporate form for the western world. As a corporation the university is a collective organized around the objectives noted above and institutionalised by the law. These objects have been predominantly some form of the public good. While the incidents of incorporation have changed over time, the hallmark of allowing the collective identity to remain while specific membership changes, and bringing together resources to pursue agreed upon objects continues to stand. Over time the mechanisms of control have changed and identifying, understanding and aligning them is one of the major

---

challenges of contemporary corporate law generally and an issue in the legal regulation and control of the university specifically.

While certain aspects of the legal form of the university have undergone a metamorphosis over the centuries from legal recognition of a collective endeavour of foreigners to seek protection from abuse by citizens by creating a *universitas* to today’s statutory Australian corporation the underlying objects and normative ordering have remained stable. The discussion has established the university in Australia as a state-enabled but independent corporation, a charitable corporation, with a complex web accountabilities, internal constituencies and external stakeholders. It can be characterized as a public enterprise subject to the constraints of regulators and in the current political climate, the quasi-market established for it.

The current effort to transform the university by shifting its organisational norms toward those consistent with private for profit organisational norms, in part by changing its structures to mimic those of a for profit corporation poses significant problems. These include the difficult and conflicting roles placed on academics as members of a professional organisation versus their roles as employees of a for profit firm engaged in knowledge production and dissemination. This problem is exacerbated even more for senior academics who have taken on management roles. Under NPM models, they are to be business leaders driving economic norms, but as university leaders they are required to pursue knowledge norms.

From a coherence perspective the organisation which has developed organically is well suited to its public role, non-profit aims, creation and dissemination of knowledge and housing the academic profession. Law has supported this

organisational form and institutionalised it through the creation of the university corporation. It is unclear how the university organisation under the current economic imperatives with an organisational structure which privileges management as a management centric organisation which denies the academic profession can survive. As Burton Clark identified in his work, successful universities in the current climate need a “stimulated heartland.” While the university corporation’s traditional structures made that heartland sacrosanct, it is not evident that the policy and regulatory changes from Dawkins forward have been attuned to this imperative. Essentially, they lead to the McDonaldisation, audit regime and generic management approaches of NPM which this chapter has argued are clearly incoherent with the traditional organisation and its norms.

As with the argument of Chapter 5 addressing the institution of the university, it is argued in this chapter that there is no golden age to which the university organisation could return. Indeed, the organisation needs to be attuned to its rapidly changing environment—policy, law, social and economic—and it may be suggested that good regulation facilitates the adaptation. For the university organisation to survive as a university, however, certain critical organisational features need to remain in place. These include a prioritising of knowledge norms, being organised and operating as a non-profit organisation and sustaining the academic profession as a profession exercising discretion. Regulation which fails to foster these critical features in an organisational structure is incoherent with the regulatory objectives and fails to address the organising problem.
CHAPTER 7: ANALYSIS AND EVALUATION

1. Introduction

This chapter provides an analysis of the coherence of the regulation at systemic, policy and instrumental levels as well as at institutional-organisational and accountability levels. The analysis includes an examination of the coherence of organising problem norms and policy, coherence between the technical aspects of the regulation, regulators and targets, tools and instruments and finally a coherence analysis of accountability. Each section—systemic, policy, instrument, institutional-organisational and accountability—provides a discrete analysis of the coherence.

2. Systemic Coherence

Systemic coherence, as explained in Chapter 2, occurs where “the underlying social need for regulation coalesces… with the normative policy objectives.”

This section examines systemic coherence by analysing the organising problem its norms and analyses the coherence with policy norms. It commences by examining the coherence of the group of problems collected together as an organising problem and assigned as such to the university. It then examines the norms derived from the analysis of the organising problem and those of the policy response to identify and evaluate coherence.

a. Organising Problems and Organising Norms

As explained in Chapter 2, the first issue in regulation is the identification of an organising problem—an issue which has been identified as call for a response. A regulatory response is a response to an organising problem in the first place. As advanced by Feaver and Durrant, discussed in Chapter 2, there must be coherence between the solution and the problem.

In the case of the university, it has been argued through Chapter 5’s critical
survey, and the examination and analysis of the historical institutional missions
of the university, that the basic organising problem concerns the creation,
transmission and preservation of knowledge. This argument was carried forward
in Chapter 6 by the survey, examination and analysis of university organisations
which again were organised around knowledge norms. This organising problem,
however, does not arise in a social vacuum.

The basic organising problem, as argued in Chapter 4, stems from the knowledge
problems of living in a non-traditional society. That is, whereas in a traditional
society the knowledge necessary to keep society functioning can be passed on
without public bureaucratic structures, in contemporary non-traditional societies
both the amount and the types of knowledge needed for social functioning have
increased exponentially. At the same time, contemporary non-traditional
societies have seen declines in the traditional institutional mechanisms for
knowledge transfer. Finally, in contemporary non-traditional societies increasing
numbers of peoples and cultures are coming into contact creating, sharing,
dependent upon and required to maintain a complex society and a nation-state in
a competitive international, globalised environment. This latter increased contact
and complexity creates a greater need for even more knowledge to allow the
effective coordination necessary for society to function.

At the core of this complex of problems is a three-fold knowledge problem: first,
without traditional systems of intergenerational knowledge transfer, the potential
for the loss of knowledge over time is multiplied. The costs of such loss of
knowledge, whether it be something like the loss of languages and the
knowledge they encode in contemporary society\(^\text{798}\) or the loss of technologies in
past eras—such as the rejection of farming technologies by Australian
aboriginals\(^\text{799}\)—are most difficult to identify. Further, the increasing types of
knowledge needed to sustain such a complex society inhibits the potential of
adequate levels of random, local preservation and transmission to meet the needs

Press.

The Last 13,000 Years? The Haskins Lectureship on Science Policy, RAND Corporation.
of society. Finally, the lack of common cultural understandings about how things are done, what knowledge is needed, available, desirable to be preserved, developed and transmitted, places an imperative on government to ensure that the knowledge which sustains a particular society be protected, enhanced and disseminated. This problem is the one to which the university institution and university organisations have responded. Additionally, however, politicians have placed a variety of other tasks on the university. These additional organising problems as framed by Australian politicians have been identified and examined in the Chapter 3 policy survey, and in Chapter 5 examining the historical, social and political institutional missions. They include the political and economic goals of “nation building”, “enabling citizens” and “globalisation.” This broad range of problems needs to be brought together or characterised before it can be examined and analysed for coherence. The next section characterises the organising problem.

i. Characterising the Organising Problem

Returning to thinking about the organising problem, consideration of the categories identified in Chapter 2 is necessary. In that Chapter, organising problems were characterised as one of three types: a general societal problem, an opportunity or a risk. The organising problem identified by politicians in the case of the university is all three types; however as argued here, it is in the first instance a type of risk. The creation, maintenance and dissemination of necessary knowledge is at risk of loss because of the inadequacies of non-traditional knowledge transfer institutions.

Characterising something as a risk requires further refinement and a brief re-iteration of the risk discussion of Chapter 2. In the case at hand, the risk of knowledge loss is a socially created risk—i.e. a risk that, unlike a risk coming from the natural environment, is a consequence of living in a society. A further refining characteristic of the risk is that it is imposed as opposed to voluntarily adopted. For example, risks such as car accidents may be adopted or avoided depending on choices of movement and means of transportation, whereas other risks are imposed, such as the adverse consequences of exposure to nuclear
power or other pollutants. A final aspect of characterising risk is its collective or individual nature. A risk may be either a collective risk or an individual or some combination of the two. With respect to the risk of knowledge loss the problem which the university must address, the risk can be characterised as a social, imposed, collective risk. Such a risk is certainly a public or collective risk. It cannot be addressed solely by individuals and requires resources beyond the reach of the individual in terms of time, ability and expense. A society’s knowledge is a collective matter by definition, and so the organising problem is, as argued first and foremost a public risk, socially, collectively imposed. Further, given the dependency of advanced societies on knowledge, and which the lack of non-traditional means of intergenerational knowledge transfer, and given the extreme cost if the risks were to eventuate, an advanced society cannot afford the risk.

This analysis of the character of the problem as a type of risk leads to the regulatory question: can and should the risk be regulated? The affirmative answer seems uncontroversial for all but a few public choice theorists. So, it is argued, there is strong support for a response to these risks by way of regulatory intervention. That leaves two further related questions: When and how should the intervention be designed?

The risk of loss of knowledge is difficult to identify and quantify, and difficult to address. There are a variety of reasons for these difficulties and they are briefly discussed next. The risk is difficult to deal with because it is not something likely to happen in the form of a single catastrophic event. Where a society faces the loss of an important public asset in a single catastrophic event it is easy to identify, consolidate political will and rally the public to demand an appropriately focused regulatory response. The problem is that societies lose their knowledge incrementally with little awareness of the loss or its potential consequences. As a result the problem of the loss of knowledge is difficult to identify, difficult to call sufficient political attention to and so difficult to prevent. Further, such losses are difficult to quantify as knowledge and its value

---

are at the same time both contextual and absolute and the value dimensions of both contextual and absolute knowledge are both multiple and dynamic.

In terms of addressing risk, as argued in Chapter 2 there are three main regulatory options. These are: avoiding the causes, mitigating the effect, and creating resilience. Of the three, in the case at hand it is argued here that the loss of knowledge is best avoided. Neither mitigating the effect nor creating resilience to knowledge loss make much sense when the option of avoiding it in the first instance is a viable option. To avoid the risk of knowledge loss may lead to some suggestion that a warning system be designed as in many other cases of risk. A warning system, however, would be difficult to develop and keep in place for the reasons just set out. Not only is knowledge changing and contestable—as argued in Chapter 5 and in some detail below—but it is also dynamic and held by individuals and so subject to escape and dissipation. Accordingly, rather than a warning system, an institution dedicated to maintenance of knowledge seems to be best. This framing of the organising problem creates potential for a coherent problem which can be addressed by a regulatory response.

More broadly considered, however, the organising problem to which the university is a response is not only a risk. That is the organising problem centred on knowledge not only addresses risk, but also creates opportunities and challenges. As discussed, knowledge about advanced societies’ systems including its knowledge system, presents problems not only in terms of its creation, management (preservation) and dissemination but simultaneously creates opportunities through its recombination.

All human endeavour has problems requiring on-going research. Complex contemporary society not only benefits but will enhance its ability to survive in part based on its ability to research solutions to the problems it encounters. Given that the knowledge outcomes and their benefit cannot be determined beforehand, the allocation of knowledge rights and duties to the public sector may be a good first decision for the public problem and opportunities associated with knowledge. (Subsequent assignment to the private sector is possible should
it become appropriate.) The assignment of knowledge to the public side of the
public-private divide it is argued can be logically deduced to be coherent with the
public norm arising from the previously discussed public nature of the risk.

Both the risk faced and the potential opportunity that arises from the creation,
preservation and transmission of knowledge provide the foundation for a strong
argument for regulatory intervention. There are significant risks where a limited
view of knowledge constrains the regulatory response and the risks of following
partisan interests, invoking environmental law’s precautionary principle or
best response. In the case at hand, the avoidance of the risk of knowledge loss
would lead to the suggestion that guarding against the loss of knowledge should
be the primary consideration and should be left to disinterested parties.
Disinterested parties would be those whose normative ordering centres around
knowledge rather than political, economic or other power related norms.

ii. Systemic Norms

The organising problem as set out above provides a normative foundation for the
analysis in a number of ways. First, it sets a significant group of norms around
knowledge. That is, the creation, preservation and dissemination of knowledge
are the critical normative issues. This knowledge forms the foundation for the
maintenance of a contemporary, complex, cosmopolitan, multicultural society.
Given the nature of this society, a strong argument has been made for a broad
view of knowledge. A knowledge confined to certain types of commercially
exploitable knowledge and which are currently relevant in the job market will
miss not only a wide swathe of human knowledge, but is also likely to miss many
of the important knowledges—such as knowledge about government systems, or
the knowledge contained in dying languages, or the non-economic consequences
of media concentration—that that allow this society to function.

Further given that the organising problem is a type of risk that is best
characterised as social, imposed and collective, the organising problem falls

primarily and in the first instance, on the public side of the public-private spectrum. As noted, however, knowledge creates not only risks, but also opportunities—which themselves may further the important objective of social survival. This view of public knowledge based norms reifies the public normative foundation for the organising problem. In sum, the organising problem so described creates a normatively coherent problem. Further, it allows the creation of a coherent set of norms. These are encapsulated as follows: the paramount task for government is a regulatory response which secures the public knowledge necessary to allow a complex knowledge based society to operate and sustain itself.

Taking the analysis of the organising problem and organising norms further as well as specifically analysing them in the Australian context, there are additional concerns to be identified and addressed particularly within the context of the regulatory framework. As mentioned above the first organising problem to which the university is a regulatory response—the creation, preservation and dissemination of knowledge—has two significant dimensions. These dimensions are epistemological and sociological and both have normative implications.

The epistemological dimensions as argued in Chapter 5, are about the nature of knowledge and its value on the one hand, and the sociological discussion concerns the role of knowledge in society and its dissemination on the other. Addressing the epistemological issues, first, it must be asked: what is knowledge? It was argued that if knowledge is no more than another commodity, it can and should be protected by private property law and addressed as other commodities—bought and sold in a market. If, however, knowledge is something more than a commodity exclusively for the satisfaction of individual private preferences, i.e. something with special significance to human society collectively then there is an interest in it which justifies public intervention. While post-modernity may well challenge many aspects of traditional views of
knowledge, it does not undermine the value claims of knowledge broadly conceived to which the dissertation next turns.  

The question of the value of knowledge is whether knowledge is a value to be pursued in its own right or only to be valued as instrumental. While philosophers will not agree on the former, politicians and economists at least are likely to find common ground in the latter view. In terms of Australian higher education policy knowledge has instrumental value and is valued to the extent that it has exchange value, is able to achieve political support or create other commodities. Thus it is not clear that any social or political consensus exists for the pursuit of knowledge as a value in its own right (in contrast, for example, to norms concerning preservation of the natural environment or economic growth). Further, in terms of normative or lexical ordering, it would appear that knowledge as an intrinsic value falls below other instrumental values such as economic growth—at least anecdotally (the actual normative ordering is an area for further empirical research). As such, it is difficult to place knowledge into a single normative sphere easily suited to a single, lexical normative ordering.

For the university this lack of epistemological answers and related lack of philosophical agreement, as noted in Chapter 5, make it difficult to advance claims in support of the independent pursuit of knowledge. Rather, the university is bound by and limited to its philosophical and political environment. Without such epistemological foundations, the university is subject to the agendas and prescriptions put forward by the pragmatic politicians. From a regulatory standpoint, knowledge, although properly a public good based on public needs, can be conceived as a narrower private good and so presents some justification for assignment to the private side of the divide. This discussion of the nature and susceptibility to political interference and economic shaping of epistemic issues and values leaves the decisions about what knowledge is to be created, preserved and disseminated open to considerable, self-interested political manipulation. Knowledge to be created, preserved and transmitted may be only that knowledge which is agreeable to powerful political and economic interests.

---

The counterargument, whereby the university’s knowledge stands as an absolute value, sees the university as having a special contribution. Accordingly, the argument consideration of which knowledge is to be created, preserved and transmitted depends on prior decisions about the nature of knowledge. It may involve a quest for: truth, basic laws of universal structures and processes, or it may be transient, temporal knowledge with little permanent value—a knowledge dependent on such things as specific projects, job markets, or marketing.

Alternatively, the knowledge may be what is needed by citizens in a complex democratically governed society to participate effectively and act as humans in a collective social arrangement, or it may be the knowledge needed to amass a private fortune.

While abstract, these questions about knowledge are critical for purposes both of assignment of knowledge on the public-private divide as well as related issue of normative or lexical ordering. The two questions of what knowledge is to be the province of governmental concern and what values are to be placed on it—i.e. the form of the organising problem addressed by university regulation needs to be clear. While these discussions are certainly matters of fierce debate in many forums within and external to the university, they underpin a strong argument for a university dedicated to knowledge broadly conceived. The highly contested nature of these epistemic issues militates against an early policy decision to limit the scope and nature of knowledge to what is immediately useful or fashionable among the day’s employers. This part of the discussion lends support to the earlier conclusion that it is public knowledge, broadly defined which is to be the core.

The sociological aspect of the organising problem—concerning the nature and role of knowledge in society—also needs to be considered. If one uses survival of society as the organising problem, not only are decisions needed concerning which knowledge is necessary to survive, as well as how it should be created, preserved or transmitted, but also decisions are needed on the related issues of how it should be transmitted by whom and on what conditions (e.g. economic, geographic or social). These issues also bear important regulatory implications.
Depending on how they are cast and decided, these decisions feed into the other normative policy objects for the university such as equity and accessibility.

As is evident from the foregoing discussion, these knowledge issues are directly connected to the organising problem as well as supplementary organising problems arising from politically and economically associated socio-political problems to which the discussion turns next.

b. Supplementary Organising Problems

Although a single organising problem has been identified—securing public knowledge for a complex society—there are in fact four sets of organising problems to which politicians have responded using the university. Further, of the four, only two are explicitly addressed by the regulatory framework. It has been argued in the Chapter 3 review of Australian university policy and the Chapter 5 survey of Australian university missions, that the Australian university currently addresses the following four organising problems: first the already discussed traditional problems of creating, preserving and disseminating knowledge. These traditional problems are addressed through research, scholarship and education, and are addressed by the regulatory framework. Second, the sorting and credentialing problem which is addressed through the course of study arranged by the university and the granting of a degree to successful candidates is also included in the regulatory framework. The third is the holding of underemployed youth. This problem, although addressed by making available physical facilities, infrastructure and time consuming programs offered by the university, is not mentioned in the Australian regulatory framework. The fourth problem forms a large part of the discussion: it is the politico-economic problems of nation building and global competitiveness.

As argued in Chapter 5, the need to have people sorted and credentialed is a basic organising problem for all human society. Humans live collectively and in some
cultures tend toward hierarchical forms of organising. The issue for these cultures then is the basis of those hierarchies. In the complex western societies that include Australia one such hierarchy is based on educational achievement. This organising problem of sorting and locating people on a knowledge based hierarchy is coherent. That is, the sorting and credentialing functions are complementary, and further, these functions operate on a coherent norm related to knowledge. Thus far the sorting and credentialing problem is coherent with the larger organising problem assigned to the university.

It must be noted, however, that these tasks are not wholly coherent with the university where the university is driven by economic norms. Where the university is driven by economic norms, the sorting and credentialing functions are carried out not on the basis of knowledge norms but on economic norms. The acquisition of degrees on economic norms is a corruption of the knowledge norms, a problem recognised in the medieval era and addressed by the non-profit institutional and organisation structures and norms as argued in Chapters 5 and 6 respectively. While knowledge and credentialing are related, the creation and preservation of knowledge neither requires nor is necessarily related to the formal sorting or credentialing of people. While knowledge created by credentialed people may be more likely to achieve authoritative status, there are certainly many types of knowledge that are created and preserved by people without credentials. For example, indigenous Australians pass on knowledge and sort people without the bureaucratic apparatus of the state. It may be more efficient to keep knowledge and knowledgeable, credentialed people in one place, and this efficiency argument may provide a justification for the creation of an institution designed for those purposes. The institution that results may be the best way to tie together the creation, preservation and dissemination problems, as well as the credentialing problem. It does not follow from this economic argument, however, that knowledge functions must co-exist with sorting and credentialing functions. For these to co-exist additional institutional normative

---

support would be called for—as exists in the university institution where the two are deeply, normatively and pragmatically linked.

The sorting function, while as noted traditionally belonging to secondary education, has become a matter of higher education. The imposition of this function onto higher education would appear to impair the higher education function. That is, the failure to restrict admission to sorted, suitably qualified students lessens the ability of the higher education organisation to limit its focus on dissemination to suitably able students as students must have learning skills developed before they are able to take up the higher knowledge. The dedication of resources to the basic sorting task may take those resources from the higher education dissemination tasks. The transfer of admission decisions from academic profession to economic agents in Australia by organisations such as IDR, has had a negative effect.\textsuperscript{804}

Turning to the third organising problem, the holding of unemployed youth (keeping jobless youth occupied out of the labour market) it appears to be incoherent with the challenges associated with knowledge problems. While it might appear that putting young minds in line to receive knowledge available for dissemination is logical, the lack of interest and/or ability on the part of those youth may in many instances be not only an insurmountable obstacle to them but also a hindrance to the operation of university organisations and those students who are trying to acquire that knowledge. If numbers of unemployed youth by neither ability nor orientation are inclined to higher education, placing them in university and placing this holding task on the university introduces a further incoherence into the knowledge problem and the university response.

The fourth complex of problems which Australian politicians have deemed to be part of the organising problem are the socio-political and economic problems of nation building and economic competitiveness. Why politicians identified nation building as a problem suitable to resolution by the university is not clear. Perhaps it was the idea that social capital would be increased and so the sense of

community through participation in a communal endeavour such as university education would help solve this problem. It may be as Mansbridge identified, the nation would be built from the public good as a product of a discursive process, the creation, challenge and refinement of an idea—a process not inimical to the university.

The economic problem is less easily aligned with the university’s knowledge norms. Economic growth occurs just as easily from the exploitation of raw materials as from the development or exploitation of humans. As argued in Chapter 3, Dawkins viewed the university as an industry the purpose of which was to train employees, generate foreign revenues from export, and commercialisable research. This view reflects a lexical or normative ordering in conflict with the university’s institutional normative ordering. Further, Dawkins’ decision to under-resource the university in order to force it to generate its own revenues is remarkable in the incoherence it introduced with respect to the knowledge norm of the institution which sees knowledge as having intrinsic value regardless of its instrumental value, particularly in contrast to knowledge’s utility and exchange values. Dawkins’ decision to introduce revenue generating norms to the university was an effort to displace institutional norms which gave the institution its existence beyond the reach of the market and not focused on economic productivity. Perhaps more importantly, Dawkins saw that the university was beyond the reach of government and hence “unaccountable”—a matter which was a major focus of NPM.

The socio-economic problem of an inadequately skilled workforce, identified under the Howard government, is an organising problem removed from the institutional norms of the university. Construing training of individuals for participation in the job market pursuing private economic and social ends as a

807 See discussion in Chapter 3 above.
significant component of the organising problem is incoherent with the
disinterested pursuit and dissemination of knowledge as a public good. While
job readiness may be an outcome of university education, particularly in the
professional schools, the effort to revise the university’s normative ordering to
make training of the workforce the first priority is a source of significant
incoherence.

Finally, the problems of lack of equity and social mobility have also identified as
part of the organising problem to be assigned to the university. While these
problems may be partly coherent with the university as public good, their
existence or occurrence is more a desirable externality than a core component of
the organising problem. Simply put, the role of knowledge in society gives its
holders the power and access to positions of power and provides one means of
lifting one’s socio-economic status. Accordingly, opportunity to achieve these
ends may well lie in access to the knowledge and credentialing resulting from
university education. The resolution of these two organising problems of
training and equity does not lie beyond the boundaries of the university;
however, they are tangential and to make them a main or focal point for the
organising problem to which the university institution is a response is another
matter.

In summary, connecting all these socio-econo-politico problems and the
knowledge norms of the university is problematic. In the first instance, the
organising problems do not form a coherent whole within themselves— neither
normatively, nor socially, economically, or politically. This group of organising
problems covers too broad a range—problems which are inherent in collective
co-existence in a complex, multi-cultural, democratically governed society. Such
a broad mandate even if coherent would seem likely to overwhelm any single
institution.

809 See discussion of Collins’ credentialing mission in Chapter 5.
Toronto University of Toronto Press.
Further, there is little coherence on the one hand between them and whatever common normative foundation they may have and on the other, the university institution’s normative foundation. The only thing that does become clear through this discussion of the organizing problem is a common thread centred on knowledge. Accordingly, it is argued that the better view prefers knowledge norms as holding first preference in the lexical ordering. In terms of evaluating the risk, it has been argued earlier that the risk of loss of the knowledge which allows society to function, including knowledge about governance, environment, social, political and economic systems is a serious risk. The social subsystem dedicated to knowledge creation, preservation, dissemination is too important to risk systemic failure and the consequent dissipation of knowledge to occur. While the role of economics cannot be ignored, it cannot be allowed to re-direct the institution or its knowledge.

Further, it is clear that the organizing problem cannot be addressed by a narrow definition of knowledge. From this understanding of the organizing problem it can be concluded that knowledge must be both widely construed and widely disseminated. These two conclusions both follow from and create a coherent norm for a foundation of the organizing problem around knowledge and knowledge as a public good.

c. Normative policy response: regulatory theory and the public-private assignment

This section connects the foregoing normative discussion with regulatory theory. It answers the question of how the regulatory response is to be connected to the organizing problem.

As argued in the Chapter 4 discussion of market failure, markets alone cannot be relied on to respond to society’s knowledge needs. Market failure occurs in the production and distribution of the public goods such as the knowledge of the university. Further there is debate about whether knowledge held by the university, and the academic profession in particular should be classified as public or private and accordingly assigned to one side or the other of the public-
private divide. This issue of classification has been addressed in Chapter 4 where it was argued that the university belongs more on the public side, in part because its knowledge is a critical, foundational public good. Further as argued in Chapter 5, the knowledge of the university is better understood as knowledge not limited to specific applications or projects, but knowledge more broadly construed. Accordingly, the better argument is placing this public good in a sphere other than the market.

As market failure is one generally accepted justification for regulatory intervention, and the knowledge goods forming the organising problem are public goods, a market failure in this area suggests some regulatory response is justified. It does not, however, identify the type of regulatory response that will address the market failure. As argued in Chapter 4 and elsewhere, it is clear that there are many significant non-economic goods unsuited to markets derived from the university which also support the conclusion that a regulatory response by government is appropriate; however, these arguments fail to indicate what response is appropriate.

It is clear that there are large, significant—albeit hard to measure—public goods to be derived from the university. That is, from an economic point of view there are externalities that cannot be captured by either producers or consumers. From a socio-political perspective the larger benefits of an educated population are too important to put at risk and subordinate to the financial interests of markets. Further, given the increasing importance of knowledge to the economy, multiculturalism and general complexity of society, a better educated population is likely a key factor to the successful maintenance of society. These perspectives would suggest that a public interest justification of regulating the university is coherent with the norms identified as flowing from the organising problem. This coherence, however, is not the total coherence as consideration of the private perspective makes evident.

A private interest theory perspective identifies the evidently significant private economic benefits from the university. Ab initio, the focus on these private goods would suggest that a private regulatory response would be most coherent.
Individuals obtaining university education generally have greater individual economic returns and social status than those not attending. Accordingly, examination of these significant, lifelong benefits would lead to suggestions that assignment to the private side is more coherent.

There are, however, a number of problems with such an assignment. The first issue is that a university does more than disseminate knowledge. It also creates and preserves knowledge. Furthermore, as discussed in Chapter 5, the nature of the knowledge of the university is not only applied technical knowledge suitable for private economic uses. Other non-economic public uses are important and it has been argued, paramount—an argument that supports the public normative ordering. In addition, a private interest perspective fails to capture the systemic, collective, imposed nature of the risk. While private benefits may justify passing on some of the costs of these goods to the individual beneficiaries, it does not amount to a justification for displacing the public interest theory, particularly given the acknowledged market failure in the supply of public goods generally and higher education specifically, and given the significance of the vast public good. Finally the worry of private interest theories free-riding and unrecovered private economic benefits do not outweigh the risks related to failure of on-going creation, preservation and transmission of knowledge. In other words, the public interest theories of regulation outweigh the concerns of private interest theorists and as such are more coherent with the public nature of the organising problem.

The foregoing analysis of coherence applied in the higher education and university contexts leads to the coherence analysis of the assignment of higher education and the university on the public-private divide. While the argument has been made that higher education and the university should be on the public side of the public-private divide, the regulatory implications of the assignment are not clear. That is, it has not been argued whether it means the state should provide or merely fund the provision of higher education for its citizens. That argument can be constructed from the analyses of Chapters 5 and 6 which included a discussion of the nature of the university institution and organisation respectively.

811 Noted in Chapter 5.
from a variety of perspectives including the economic. It was clear from those discussions that the university’s foundational norms are non-economic and that the university organisation functions best when in a non-profit organisational model. That is, the trust in its credential, in the advice it provides to students (the matter of information asymmetries) trust in its knowledge and the quality of the education make a strong case for public provision, not just funding. Further, traditionally the university has been a public, non-profit institution. That is, it has coalesced with the public, non-profit policy objects placed on it by authorities both secular and religious. The regulatory justifications have coincided with the assignment of the university to the public, non-profit side of the public-private divide. Thus from a coherence perspective, the norms of regulation and the public assignment traditionally coincide, and to the extent that one believes in evolutionary theories of path dependent institutional development, its evolution along these lines suggest that it has been a successful adaptation.

The regulatory framework which requires the university to re-order its norms in order to focus on generating their own revenue effectively produces a normative ordering that prioritises private economic policy objects. These changes by Australian governments have created an incoherence with the norms of the institutional organising problem as well as the traditions embedded in the regulatory response. This incoherence has significant justificatory implications. If private economic preferences obtain normative priority the justification for a publicly funded institution fails on two counts. First, from a neoliberal perspective the private sector can provide private goods more efficiently and to provide them publicly deprives private enterprise from economic opportunity. And secondly, from a private interest theory perspective, public provision or funding amounts to little more than a subsidy to the socio-economically privileged who make up the majority of the university population in the first

---

812 Where the Church is seen as “public” the university was public since its inception; where public means supported by government authorities and available on merit bases, it was public since the nineteenth century as seen in the University of London, Queen’s universities, and Land Grant Universities.


814 See analysis of Instruments in Chapter 3.
place—welfare for the middle class. To make the regulation coherent with private theories of regulation a different regulatory response is called for. If the regulatory justification is premised on the advancement of private economic and social interests, then the regulatory intervention should be simply the creation of regulation suited to enhancing private law rights—private property, including intellectual property, and contracts, and coordination by way of markets.

d. Conclusion

In conclusion, a systemic coherence analysis reveals that the organising problem in the first instance is coherent. That is, the problem of the creation, preservation and dissemination of knowledge is a coherent organising problem. The additional organising problems of sorting and credentialing, potentially introduce some incoherence, although not necessarily so. It is not that the university needs to do only one thing, and indeed it does not do so as the various missions discussed in Chapter 5’s institutional analysis demonstrates. Various approaches to university education have been taken over time and met with varying levels of success. For example, some countries have focused on undergraduate education, others on research and yet others on public service. However, a basic determination needs to be made as to the objects of the university and the normative ordering of those objects. For systemic coherence to exist that ordering must be coherent with the university’s assignment on the public-private divide, and as will be argued, institutionally.

The issue of systemic coherence becomes problematic, however, when the tasks of holding unemployed youth, skilling the workforce, social equity, generating revenues from export, nation building and global competitiveness are added. At this point the incoherence of the organising problem threatens to overwhelm the system.

Simply put, knowledge norms do not coincide with and are incoherent with other aspects of the organising problems such as holding youth, or training of labourers (as distinguished from education). Further, the broad dissemination and equity

---

agendas are in conflict with the normative re-ordering under the current regulatory framework. The regulatory framework requires university organisations to prioritise economic norms of revenue generation and production of private economic goods and leads to distributions on the basis of economic means. Finally, the equity and accessibility norms are not wholly coherent within themselves nor with the knowledge norms of the university. Given the systemic, collective and imposed nature of the risk, the available subsystems and justificatory options, it is clear that private subsystems and justificatory options are incoherent with and unsuited to the organising problem’s systemic, collective, imposed demand. That demand requires a public systemic response.

3. Policy Coherence

Policy coherence as defined in Chapter 2 has both internal and external facets. Internally it refers to an alignment of norms driving policy with the choice of regulatory techniques as found in the legal instruments. Externally, it refers to a consistent approach to regulation of similar categories of issues, as well as consistency across categories where related but distinct objectives are being pursued. The analysis in this section will make it evident that the incoherence of the organising problem compounded by the list of organising problems added by politicians as set out in the previous section, undermines the potential for policy coherence. In other words, as a result of the contribution of the political process adding further incoherent missions, it is unclear which normative ordering is to prevail and ultimately the potential for a coherent foundation for policy is lost. The discussion which follows first turns to examine the coherence and normative debate in the policy framework.

a. Policy coherence: norms

That there exists serious incoherence in policy norms, given the incoherence at the systemic level, is unsurprising. The most serious policy incoherence is the inclusion of the fundamentally conflicting norms of the public and the private without clear assignment on the public-private divide and without clear, coherent lexical ordering between knowledge and economic norms. This lack of
assignment and lack of lexical ordering provides an incoherent basis for organising the knowledge tasks which the legislation must achieve.

For example, whereas the public norms seek the widest dissemination, usually on the uneconomic basis of free or subsidised dissemination of disinterested or non-partisan knowledge, and maximisation of production within given resource limitations, private norms operate on an opposite normative foundation. That is, the private disseminates on the basis of economic resources, and relies on maximisation of revenue and cost cutting without regard to long term or public welfare concerns.  

Another example of the difference between public and private norms relating to knowledge is evident in the objectives and mechanisms employed. The private seeks to restrict creation, preservation and dissemination of knowledge. It does so particularly through limiting access on the basis of economic and political power, and by way of intellectual property law among other means. The public knowledge norms see knowledge as a public good, made available through public libraries, public lectures, and most recently, the public internet.

A third example of the difference between public and private knowledge norms comes from the epistemological discussion above. Arguably private norms more easily foster partisan information—that is information which suits private purposes regardless of whether those purposes are contrary to public interests, as for example, with tobacco and automotive marketing. While public norms are clearly susceptible to manipulation by governments, a broad knowledge norm, allowing and fostering unrestricted knowledge investigation, and encouraging robust debate and critique such as found in the autonomous university institution are less susceptible.

The drive to re-order the normative ordering to favour economic revenue generation may have impaired the university’s knowledge missions. This impairment may occur because in the creation, preservation and dissemination missions, only limited amounts of research and teaching can generate significant

---

surplus revenues, and only a minimal amount can be generated by providing access to library services. Knowledge preservation and basic research, although critical missions for the institution, are not revenue generating activities. Further, maintaining a cohort of academic professionals able to teach in the publicly important but less economically significant and less lucrative disciplines may be more likely to be a net loss than a net gain. Yet, it is clear that knowledge other than that which can generate a short term revenue surplus, i.e. profit, is critical to social survival. The creation and normative re-ordering to favour the revenue imperative at a policy level has introduced a source of regulatory incoherence at a foundational level in the university.

Further, it must be noted that the lack of balance between intrinsic and instrumental values of knowledge has been problematic in Australia. Indeed, some lament that discussion of the Australian university takes place in: “the absence of any explicit belief by universities, government or academics that the role of the university is to foster the personal, moral and civic growth of undergraduates. Australian universities have, for the most part, been vocationally focused and students essentially pragmatic in their expectations, although there is a widely agreed notion that graduates should exhibit qualities associated with independent and lifelong learning.”

The lack of a clear assignment on the public-private divide and correlated conflict between knowledge and economics in terms of normative ordering leads to a predictable lack of balance between public good, basic research, and the creation of citizens on the one hand, and the production of commercialisable research and trained, employment ready labourers on the other. This lack of balance means that the ability to establish strong policy norms and coherence around knowledge or public goods, or alternatively around private educational goods is difficult to achieve.

The situation leaves two candidates as the core policy norms: 1) private economic goods and significant revenue generation, with a narrow focus on generating revenue by the teaching of business and other applied subjects to international students, fee paying employment ready professional labourers, and on readily commercialisable applied research, or 2) public goods which are

817 Davis, R. The Unbalancing of Australian Universities. Wollongong: 83.
provided on broad dissemination principles, for public purposes, and knowledge as an integral part of humanity. While both have knowledge emphases, the difference between the two norms amounts to a chasm—particularly when juxtaposed and where there is neither coherent normative ordering nor assignment on the public-private divide. The effort to combine the two norms in a single policy or for that matter within a single institution is evidently problematic. The further policy norms of equity, credentialing and holding in a mass education system complicate the already complex issues just raised.

Undoubtedly, there is a desire on the part of all governments to create and support an institution based on knowledge norms. Further, while a variety of other meritorious policy objects such as economic competitiveness exist, their inclusion into university policy must be re-prioritised to establish sufficiently coherent policy norms for moving the analysis forward and for the creation of a foundation for the analysis of instruments which follows. It has been argued that the better and more coherent view is that the public interest and related public goods are to have normative preference over private interests and goods in the university and knowledge norms to take precedence over economic norms. Following from this argument, the analysis which follows proceeds from that position.

b. Policy coherence: techniques

Without coherent policy norms it is unlikely that internal policy coherence—i.e. coherence terms of techniques will exist—in either the internal and external dimensions. The lack of policy coherence in terms of technique is evident in even a cursory examination of the legal instruments. Although as argued in the Chapter 6 examination of the State-based legislation which provides a broad public good objective and wide managerial discretion, the Federal legislation examined in Chapter 3 narrowly focuses on the various policy objectives including the conflicting missions and greatly restricts the scope of managerial discretion. These policy objectives as argued in Chapter 5 and above are in conflict among themselves as well as with the state based legislation, and they are in conflict with the norms of the university institution.
These problems of internal policy incoherence reflect the larger lack of policy coherence in jurisdictional assignment. That is, while there is reason to assign university regulation to one or another level of government, the bifurcated jurisdictional assignment makes coherent policy and legislative frameworks difficult. The Constitution assigns partial responsibility for education to the Federal government making it responsible for the support of students while the states have jurisdiction over the creation of the university corporation, including its establishment and objects. In such a situation the potential for incoherence is not only self-evident but additionally multiplies.

It is not that one or the other government need have complete jurisdiction or that both do not have legitimate interests in the university institution or university organisations. Rather, the issue is that the weak and competing conceptions of the organising problem and of the university institution preclude the development of a clear policy foundation and so impairs the development of coherent regulation. In essence, the way jurisdiction is divided providing the Federal government with jurisdiction over distribution of funds but being and unable to use any tools but financial incentive, while providing to the states jurisdiction over all other matters including programs, curriculum and organisations is a recipe for incoherence. This allocation facilitates additional incoherence particularly where governments have competing agendas.

Further, the Federal instrument, the *Higher Education Act 2003* (Cth), which imposes heavy student loads\textsuperscript{819} with decreased resources, while not explicitly prohibiting the non-revenue generating activities of basic research, knowledge preservation, and teaching of less popular courses, effectively precludes such autonomous university organisational normative ordering choices by placing university organisations in a condition of constant financial crisis. For example, a university not struggling financially could continue to support a significant philosophy department despite that department’s limited ability to generate

\textsuperscript{819} See discuss in Bradley Review p. 71-72 Fig 19.
This condition of on-going crisis impairs the university’s ability to engage in these normatively preferable and epistemologically significant activities. The net result of this incoherence has been: a significant narrowing in the conception of knowledge, narrower range of values and a decline in quality of education. These changes have been necessary to accommodate as many revenue generating international students as possible in order to subsidise the university organisation’s operations and cross-subsidise the research activities.

Two further instruments the Commonwealth Grant Scheme and Other Grants inhibit management discretion and hence university innovation. This result ensues because the instruments’ incentives which are paid as bonus for compliance are not funds in excess of basic operating needs. Rather, the incentives paid pursuant to these instruments provide only a partial make up for the shortfalls in basic funding. In other words, instead of being incentives in the sense of payments for voluntary performance of those missions which a university organisation can internalise with minimal disruption, the incentives function as lifelines for organisations desperate for funds and eager to comply simply to achieve short term survival regardless of the costs of such compliance in terms of internal disruptions or long term incoherence. If the competitive funds were provided as bonuses, they would allow university corporations to develop diversity, follow independent strategies, and adapt to local needs. Adequate funding would permit them to pursue knowledge norms as interpreted in response to both global and local institutional environments rather than the demands of the prevailing labour market. However, government appears not to have taken this into consideration.

While appearing to be competitive market type instruments, these instruments create a competition with few if any winners. Fierce competition destroys the

---

earlier collaborative social norms of the institution. Fierce competition encourages maximising individual’s potential for immediate success in surviving without regard to either collective institutional norms or long term survival. Such competitive strategies for gaining access to the precious resource are likely to include a debasing of standards, disinformation, collusion, or any other strategy likely to give advantage. It is questionable whether knowledge norms can surface let alone survive in such an environment.\textsuperscript{824}

The external instrumental coherence, that is the coherence with other similar regulatory regimes across other sections of government, is a broader matter for government’s overall policy on society generally, and not an issue addressed by this dissertation. It is sufficient to note that the following bodies contribute to regulatory incoherence. In addition to Department of Education, Employment and Workplace Relations (DEEWR), the Federal government acts through AQUA, and the Australian Learning and Teaching Council. Further the Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEECDYA) (formerly Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA)) as a joint Federal and state council, with its Australian Qualifications Framework, allows the various Federal and state governments with their respective ministers for education, and subsidiary agencies such as Australian Education International to contribute to university regulation. They do so by developing nation wide standards among other things. Additionally the Federal government requires the university corporations to report directly to a number of Federal bodies including the Australian Tax Office, Centrelink, Department of Immigration and Citizenship, Australian Research Council (ARC), National Health and Medical Research Council (NHMRC), Equal Opportunity for Women in the Workplace Agency. All of this reporting facilitates objectives far from the policy objects of the university. The state governments require the university corporations as statutory corporations of the various states to report on performance among other things.

\textsuperscript{824} The state based instruments, while allowing discretion in the conduct of affairs do not have the financial support to make them effective alternatives to the Federal instruments. As noted in Chapter 3, the only recent state Acts have been bringing the university corporations into compliance with Federal demands.
As well, there are statutory duties to report to organizations like Universities Australia and Graduate Careers Council of Australia.

All these other bodies place demands on the university that force it to contribute to their various mandates supporting discrete policy objectives ranging from immigration compliance to identifying and prosecuting tax fraud. The costs associated with compliance with the legislation and support of these other policy objectives leads one to suggest that those objectives cast further incoherence into the already complicated policy coherence of the university.

Finally one cannot turn from a discussion of policy coherence without identifying the inherent contradiction in the policy objective of successive governments which have sought to create diversity but insist on a single set of measures as set in the regulation. For example, the diversity mandate requires all university organisations to compete in a single ranking, the Excellence in Research for Australia (ERA), using the same system of measures, incentives, and requires the same accountability in terms of outcomes. This approach does little more than institutionalise isomorphic tendencies driving university organisations away from diversity.  

4. Instrumental Coherence

This section investigates instrument coherence—discussed in Chapter 2 as coherence between positive instruments containing specific regulatory techniques and the social and normative drivers of policy. As argued in Chapters 4, 5 and 6, the university rests is in the first instance on the norms of knowledge as a public good. Further, as argued it is the premier knowledge institution of an increasingly complex non-traditional society which lacks the traditional institutions for the creation, preservation and transmission of a society’s knowledge. Chapters 3 and 5 also identified normative drivers of policy only tangentially related to the university which were equity and economics. The

---

instrumental coherence question then asks: are the positive instruments coherent with these norms?

a. Analysis of Instruments

The legislation is the Federal government’s *Higher Education Act*\(^{826}\) and the *Other Grants* legislative instruments\(^{827}\) and the various State Acts creating the various university corporations. The social and normative foundation for the university as defined in in this legislation, as analysed in Chapters 3, 5 and 6, is the creation and preservation of knowledge broadly defined and wide dissemination of that knowledge viewed as a public good with such dissemination to occur on a non-economic basis. Do these instruments reflect coherently these social and normative foundations? At a basic level, one would expect cooperation and collaboration to be the favoured foundational techniques to achieve these goals. More creation, preservation and dissemination would seem to be a more likely outcome of cooperation than competition.

The instruments, however, are competition-based instruments relying on economic incentives to drive university organisations achieve the aims. The basic idea behind these instruments, as explained in Chapter 2, is that by creating competition government can allow organisations to adapt themselves to the competitive environment and government can avoid being burdened with the task of creating detailed rules. Further, as market based instruments, in theory they alleviate the burden of accountability as markets are believed to perform that duty.\(^{828}\) Examining the instruments, including the National Protocols, it is evident that government is not taking advantage of the benefits of competitive instruments. In fact, the level of detail in the control of the university organisations could appropriately be described as micro-management.\(^{829}\)

Further, given the onerous reporting requirements, it appears the government has little faith in the operation of markets to provide the accountability upon which

\(^{826}\) *Higher Education Support Act 2003* (Cth).

\(^{827}\) Other Grants Guidelines (Research) 2009 and Other Grants Guidelines (Education) 2008.


the instrument selection is based. On the basis of these arrangements, it may be concluded that the instruments are incoherent within themselves. That is, the government has created competition based instruments that fail to rely on the benefits of competition, and impose the burdens on government competition instruments are designed to avoid.

Competition, while certainly a naturally occurring motivator among university organisations, has been a technique favoured by neoliberal governments. Governments have attempted to create, stimulate, monitor and direct competition in a variety of ways. These efforts have been less than an unqualified success. In addition to requiring a significant investment in resources in order to comply with such competitive exercises, these schemes have also undermined the collaborative, public norms of knowledge that have been part of the university institution for most of its existence. As a result of the competitive arrangements university corporations are increasingly entering into confidential, private commercial arrangements, and doing so competitively with one another. Not only do these overly competitive arrangements undermine the collaborative institutions, but they also harm the public good by depriving the public of one of the important social functions of the university—the non-partisan evaluation of knowledge claims put into the public sphere. For example, drug companies may partner with and fund university research centres but bind and even attack university researchers who may find problems with the drug companies’ products.\textsuperscript{830}

In sum, the instruments are incoherent with the social and normative foundations. The competitive demands and structures put in place are at odds with the collaborative, public conceptions of knowledge called for in the foundations. This issue will be examined from a slightly different perspective in the section which follows.

b. Analysis of Technique: Regulatory Bodies

The techniques of regulation include consideration of the use of regulatory bodies. The main non-departmental regulatory body reporting to government is the Australian Universities Quality Agency or AUQA. AUQA, a company limited by guarantee, operates as a standards regulator. As noted in Chapter 2, standards regulators typically can be categorised by their focus on one of three possible points: design/process standards, performance/output standards, and target standards. AUQA is a standards regulator of the first type—examining quality processes and aimed toward organisational improvement. By way of contrast, AUQA identifies processes that are deemed to ensure quality within the university, aiming at consistency across courses and programs in terms of delivery and overall standardisation. It is not an inter-university comparator or guarantor of educational quality. It is a management quality auditor.

The drawbacks of this type of standards regulator are identified in the regulatory literature. Such regulators are highly intrusive, may inhibit innovation, require the regulator to lead innovation, and of course suffer from the difficulties associated with predicting harms and other unintended consequences.\(^{831}\) Although government seeks to create a competitive market this type of regulator is not a market regulator per se. A market regulator would watch behaviours which undermine the functioning of a market. That is, a market regulator would monitor such things as false or misleading information, anti-competitive behaviour, collusion, and price gouging. AUQA does not have this mandate or capacity—a matter which should be taken up in the consideration of the design of the new regulator TEQSA.

The decision to task the university regulator with internal quality control is incoherent with market regulation in the first instance. To have the regulator focused on internal processes is incoherent with the basic premise of market regulation: market regulation operates on the presumption that organisations left to themselves will respond most efficiently to the market conditions in which

---

they find themselves. A market regulator ought to be focused on the market, not the participants. AUQA is not designed to achieve the outcomes needed to be an effective market regulator. Further, from the perspective of regulatory theory, such internal, process oriented regulators stifle the innovation necessary to create diversity in the higher education sector. Thus from the regulatory perspective the decision to create such a regulator is incoherent with the organising problem and government policy. The lack of coherence the objects of the regulation—i.e. the organising problem—is manifested again at this level.

AUQA’s role is puzzling as there was no evidence that the university organisations were lacking in quality management and quality assurance processes. What was clear was that there were quality of education issues resulting from underfunding. Perhaps the best explanation for AUQA’s mandate is that the Howard government carried on Dawkins’ view that the universities were bloated, inefficient organisations that could be improved with proper management and presumably responding to some form of external audit. Still, this explanation does not address the fundamental problems of knowledge creation, preservation and dissemination. The regulatory body addresses neither academic nor societal nor market concerns.

The impact of AUQA on the university’s knowledge objects is less effective than it could have been and unlikely to be different in terms of improving depth of education, intensity of learning or research. What AUQA has achieved, however, is in line with Power’s predictions about the unintended consequences of audit. As argued in Chapters 2 and 5 Power has argued that audit regimes shift attention from essential tasks which may be unmeasurable to the unessential, secondary

---

834 Discussed above in Chapter 3.
835 How else does one explain large number of students graduating with Australian degrees ostensibly taught and studied in English but unable to function in English? See Birrell, B L. Hawthorne, et al. (2006). Evaluation of the General Skilled Migration Categories. Canberra, Department of Immigration and Multicultural Affairs.
but auditable tasks. As Power further argues,\textsuperscript{837} however, such measures make it possible for government to increase responsiveness of agencies (in this case the university organisations) to government agendas. The Australian government’s agenda, is as noted, the commercialisation of the university and the goods and services it provides.

While the Rudd and subsequent Gillard governments plan to do away with the agency, plans for replacement are insufficiently clear to address in this part of the analysis in much depth. What is clear is that the new regulatory agency will take up some of AUQA’s functions and so be subject to the same critique. As a matter of concern; however, there are plans for TEQSA to set national academic standards within disciplines—something traditionally understood to be a matter of expertise of the academic profession. This step provides the basis for suggesting that in broad terms there is a consistent approach by government to the university. In Chapter 3 it was noted that bureaucrats of the Martin era expressed their lack of knowledge about the university and higher education systems. At that time, bureaucrats saw the university institution as a distinctive and valuable social institution with its own institutional norms. This view of a distinct social institution seems to have been overtaken by the generic management model discussed in Chapter 6 which informed Dawkins’ ideologically driven economic. The government’s TEQSA appears to take this trend a step further from generic management to generic definition and control of knowledge.

A second critique of this type of regulatory body is that as argued in Chapter 2 the potential for Responsive Regulation and Smart Regulation requires an intermediary body and an interactive relationship, successive governments have removed all intermediary bodies with the result that this type of regulation functions more in a command–like mode: “comply or perish” stick. A Responsive Regulatory approach would allow university organisations to adapt to achieve regulatory objects within their local contexts, and as they interpret those within the university institution of which they are a part. Such an approach

\textsuperscript{837} Ibid p. 47-51.
is considerably different from the current approach where government determines regulatory objects, irrespective of the university institution and imposes on university organisations an inflexible mandate to achieve those objects.

The second alternative, a Smart Regulatory approach which in addition to the Responsive Regulatory approach just described may provide for a body composed of multiple stakeholders or Public Interest Group (PIG) which would include members of the university at all levels and more specifically, academics, managers (in this regard, not dissimilar from the Australian Universities Commission) and students and other community groups such as public groups and business. The regulatory objective, as drawn from the organising problem and input from the PIG, would be tabled and a model of regulation developed which would enhance the university’s institutional objects of knowledge creation, preservation and transmission, as well as integrate with appropriate normative ordering those objects not incoherent with these institutional objects. The Commonwealth, however, has taken an approach which is not only incoherent with the instruments, but heavy handed also incoherent with regulatory best practice, with the autonomous traditions of the university institution, and with the nature and purpose of the statutory corporation.

5. Conclusions Systemic, Policy and Instrument Coherence

The normative coherence between the systemic and the instrumental levels is problematic. At the systemic level, the organising problem was characterised as a broad, collective, systemic and imposed risk that called for a coordinated, broad systemic response. The organising problem created public norms around knowledge broadly construed. While certainly some types of scientific knowledge may be created in competitive private environments, most knowledge is public and created, preserved and transmitted through collaborative, voluntary and cooperative arrangements—be they family, neighbourhood, profession, nation or country. These general norms provide a normative basis for instrument selection. That is, instruments which foster collaboration, volunteering and cooperation. Evidently the government has rejected those norms and is looking to
re-norm the institution on the basis of market principles—introducing a considerable degree of incoherence.

The normative coherence between the policy and instrumental levels likewise is poor. At the policy level, the lack of assignment to one side or the other of the public-private divide, combined with ambiguous normative or lexical ordering, leaves the two norms of private economic gain and broad public benefit in conflict without normative structures or processes for resolution of that conflict. The ensuing lack of clarity and heightened incoherence find their reflection in the instrumental incoherence just described. The balance of the regulatory negotiations do not occur in public and as a result, no further analysis of the regulatory coherence is possible.

Finally, at the level of instrumental coherence the regulatory body fails to address the most important tasks of knowledge creation, preservation and dissemination. Further, it fails to regulate the quasi-market created by government. Instead, it is focused on internal management processes and so not only undermines the benefits of market regulation from the outset but diverts attention from the regulatory objectives of education and research and creating an environment which supports such. Essentially, from the perspective of instrumental coherence, it may be concluded that the regulatory framework has collapsed under the systemic and policy incoherence.

6. Institutional, Organisational and Administrative Coherence

This section addresses the coherence between the regulation and existing institutional and organisational arrangements, and between those arrangements and the administration of the regulation—i.e. the adjudicative, executive and rule making duties of the regulator under the regulatory framework. These two analyses are conducted in order.
a. Regulatory coherence and the Institution

In the first instance, coherence analysis necessitates consideration of the traditions and institutions of the university. These institutions were critically examined through the surveys of Chapter 5. As Dawkins was well aware, the university was not tabula rasa awaiting the impression of his ideology.\footnote{Dawkins, J. S. (December 1987). Higher Education: a Policy Discussion Paper [Green Paper]. Canberra,, Australian Government Printing Service p. 29.}

Considering the university as an institution posits the university organisation as an autonomous organisation, and an independent corporation—indeed of external interference in terms of its objects, process and operations: independent in education, organisation and bestowing of honours. From its earliest history each university organisation established its own curriculum, stood independent of local civil jurisdiction and resisted outside interference or review.\footnote{Cobban, A. B. (1975). The Medieval Universities: their development and organization. London, Methuen & Co Ltd.} This tradition, however, is paralleled by a tradition of reliance on external sponsors—state and church—who demanded and received power to determine educational, organisational and financial objects and the bestowing of honours, albeit only with considerable acrimony.\footnote{Baldwin, J. W. and R. A. Goldthwaite, Eds. (1972). Universities in politics; case studies from the late Middle Ages and early modern period; Johns Hopkins Symposia in Comparative History. Baltimore, Johns Hopkins Press.}

Coherence analysis must therefore be alive to the balance of the competing claims of autonomy and accountability.\footnote{Sossin, L. (2004). Public Universities and the Public Interest: Toward a Vision of Governmental Oversight. Taking Public Universities Seriously. University of Toronto.}

graduate employment (particularly with multinational corporations), and of course, for prestige. Increasingly important in the international competition are the rankings, a form of regulation by information, which have had significant impacts on university organisations’ responses. The development and publication of formalised rankings has had a significant impact on universities. Governments seeking to control and extract new accountabilities from university organisations pressed the rankings into service. These rankings have encouraged both cooperation and competition as university organisations seek to improve their standings in the rankings. As noted, however, regulators of the university tend to overlook the norm of collaboration. This norm is evident in the long history of international cooperation and collaboration between university corporations, by sharing of resources, faculty and student exchanges, and sharing of knowledge published as a public good.

It is evident that the institution of the university is centred on knowledge norms, social norms (as opposed to economic norms), and housed in the non-profit sector of the economy. Coherence with the institution at the national and international level requires compliance with those norms. As is evident from the analysis, the regulatory framework in Australia is only partially in compliance with those norms. Further, with its strong emphasis on competition, and neglect of cooperative and collaborative norms the regulation for the Australian


institution appears to be leading away from the larger institutional norms. Incoherence at this level is likely to lead to dysfunction and friction with the larger institution—possibly leading to the undermining of academic collaboration internationally as the parties pursue disparate, incompatible norms.

b. Regulatory coherence and the Organisation

In terms of the university organisation an coherence, as argued in Chapter 6, university organisations in Australia as in most of the developed west, are statutory corporations. They have legal autonomy and have had relatively little external accountability. The significance of this legal status is that it increases their potential to operate independently of the ideology and interests of the government of the day. While they may depend on their government for their resources, their ability to respond to and act with integrity toward their knowledge mission has depended on their freedom from political interference. As such, these university corporations have been able by way of their corporate organisational form to contribute significantly to their countries. ²⁴⁸

The policy of competition discussed above has been effective resulting in less collaboration and increased division. ²⁴⁹ The lack of coordination between university organisations and the regulating department of government has allowed a different type of incoherence to arise in addition to the inefficiency and redundancy that Dawkins’ reforms sought to remove. Dawkins rationalisation led to university organisations being created by re-structuring TAFE’s and other organisations such as CAE’s and re-naming them “universities.” Such re-naming did little to change an organisation from a tertiary education provider to a university. Meek has referred to this strategy as a recipe for mediocrity ²⁵⁰—a matter described in this dissertation as regulatory failure resulting from regulatory incoherence. These “university” organisations are what government dictates regardless of compliance with institutional norms. The problem as put by

²⁴⁹ The various universities have created competitive groups from the Group of Eight, to the Australian Technology Network and the Innovative Universities.
Professor Glyn Davis and noted elsewhere is: “A university [in Australia] is whatever the Federal funding agency and its minister decide a university is.”

This regulatory approach can hardly be evaluated as coherent with the organisation.

Organisational coherence also requires analysis of the nature or character of organisations. In Australia all of the university corporations are non-profit bodies, most are public and only a few are private. These organisations are not structured for profit generation, nor are they designed for private type service arrangements—i.e. producer and consumer relationships and market regulation. Rather, as argued in Chapter 6 addressing the public law classification, these organisations are bodies with wide memberships, wide public duties and responsibilities. They answer to a public mandate and report publicly on that mandate in Parliament. Accordingly, coherence demands that such organisations follow a normative ordering for which they are structured, which places their public knowledge goods, public interests and public service first. Re-ordering those norms along the lines of private economic goods and markets as would a corporation limited by shares is a source of regulatory incoherence. The regulatory drive to re-orient the organisations and hence academic professionals to generate revenue through such things as grants and consultancies are incoherent with the organising problem.

As further analysed in Chapter 6, the better organisational model was “organised anarchy.” This model allows a variety of potentially incoherent norms to be pursued, acknowledges the complexity of the organisation and its missions and is coherent with the exercise of professional discretion. Finally, it appears more coherent with the Clark’s “Entrepreneurial University.” Its drawback is that it is difficult to manage from an NPM perspective and difficult to audit. The regulatory framework, however, is incoherent with the better organisational model as for example, the National Protocols which penetrate deeply into the

---

852 Bond University, Australian Catholic University and University of Notre Dame Australia.
management and governance of the university to attempt to create a tightly coupled organisation.

In conclusion, there is a significant level of incoherence between the regulatory framework and the institutions and organisations that make up the university.

7. Accountability Coherence

The coherence analysis of accountability queries whether the accountability regime ensures that the risks, opportunities and problems identified in the organising problem have been addressed by the regulatory response: this includes accountability by the regulator and regulatee. In this case, accountability should be for the university’s fulfilment of its institutional mission or objectives: the creation, preservation and dissemination of knowledge.

The importance of coherence in terms of normative or lexical ordering accountability is self-evident as effective and appropriate accountability is predicated upon an appropriate and clear assignment on the public-private divide and a clear normative ordering.

The analysis asks two questions: first, do the accountabilities ensure the organising problem / risks and opportunity identified are being addressed, monitored, errors corrected and forward planning appropriate? In other words, is the accountability regime aligned with the policy objectives? And second: are the accountability regimes normatively coherent with the rest of the normative framework underlying the regulation? That is, it questions whether the accountabilities align with the norms of both policy and the university institution. These two questions are addressed through the analysis of the three accountability types: political, institutional and legal.

a. Political, and Public Institutional Accountability

Accountability has two facets. First, there is a broad accountability of the university to the public via the government and via the academic profession. The
chain of accountability via the government to the public for the institution of the university is exercised at least nominally through a vote. Second, there is the accountability of the university organisations bureaucratically by way of reporting, aggregated into the single institution of the Australian university, to government. These accountability chains are dealt with successively. As argued in Chapters 2 and 4, political accountability follows from the assignment on the public-private divide. A public body has public political accountabilities via the Westminster system and a private body has private accountability via markets. Further as a public institution, the academic profession has public accountability. The first question is whether the accountability suitably scrutinises, provides feedback, holds to account and permits reform on the basic organising problem and associated risk of knowledge loss, and the additional government policies related to economics, equity and underemployed youth. Are the creation, preservation and transmission of knowledge in a non-traditional, complex society on an intergenerational basis being adequately safeguarded?

The Australian regulatory framework sets accountability for the institution in the first instance with the government and not the academic profession. By doing so, it should be noted that the regulatory framework focuses institutional attention away from the norms of the academic profession—the core institution of the university—to the bureaucratically determined audit able targets and objects of government policy. The audit, as noted earlier, is an important from a sociological point of view as providing legitimacy to organisations. This legitimacy is particularly important for the university, for as Selznick notes, among organisations that struggle for legitimacy, those with the greatest struggle are public educational organisations. The struggle for legitimacy via audit is in conflict with the basic connection between competence and trust—the hallmarks of professions.

As argued in Chapters 3 and 5, Australian government policy and the Australian university mission respectively, have decided the Australian university is to

---

provide job training and foreign revenues from the export of services.\textsuperscript{855} These tasks are at odds with the institutional norms including accountability norms. The extent to which the university is able to fulfil its knowledge missions has been reduced narrowly to government visions, permissions and resources to do so.

Accountability for certain limited knowledge targets has been developed through bureaucratic auditable accountability frameworks of the Research Quality Framework under Howard and the Excellence in Research for Australia under successor Labor governments. These two frameworks attempt to achieve accountability as audited metrics from the university organisations for research outputs. The government policy of objective as noted in Chapter 3 is generating international economic revenues. It needs, therefore, auditable metrics to support Australian university producers on the international market. The effect of this accountability structure, however, is markedly negative, de-railing research programs, undermining the institutions of quality and collegiality of the academic profession, and creating a host of other unintended consequences.\textsuperscript{856}

Do the accountability frameworks address the knowledge creation, preservation and transmission missions? In the first instance at least they may appear to do so. However, a more careful analysis suggests they do not. Specifically, they ensure only certain types of knowledge and practice are maintained, and it is far from clear that these are the important let alone vital ones. For example, the privileging of industry knowledge needs by way of subsidies through the Australian Research Council Industry Linkage grants, or the CISRO (Commonwealth Scientific and Industry Research Organisation) while pursuing significant industrial objectives take scarce resources away from other socially productive research. These activities though worthwhile they may be focus on the opportunity aspect of knowledge, and specifically its economic and technological instrumental opportunities—without giving adequate weight to the

\textsuperscript{855} See discussion in Chapter 3.
risks they may entail including the loss of other knowledge (an issue identified in the organising problem) deprived of resources by way of consequence. Further, something as apparently simple as quantifying research outputs has created a whole bureaucracy within university organisation consuming resources including the already scarce time of the academic profession which would otherwise be used preparing for dissemination of knowledge through teaching and publication, or creating new knowledge by research—another example of Power’s concern of second order issues taking precedence over first order priorities.857

Bureaucratic accountability is also pursued via large aggregated reports from the various university corporations which are tabled in both Federal and State Parliaments.858 In the Federal parliament, these “Performance Against Targets” reports contain a wealth of information and are based on voluminous amounts of data.859 However, the data and reporting are constrained to the parameters dictated by the norms of the government in power. That is, only the government’s normative policy version the creation, preservation and dissemination of knowledge and of knowledge itself are clear from those reports.

There is no mechanism in place to monitor and assess these institutional issues. The only objective independent information comes for the OECD which found that during the decade of the Howard government the Australian university went backwards from the middle to the bottom of the OECD rankings in terms of public financial support.860 It is not argued that the rankings measure all the important values of the university. Rather, the point is that the rankings are able to capture some significant features of the university regulatory system, and that such a significant fall may well be indicative of a risk of regulatory failure. The value of an international ranking independent of government and university is that it allows some limited comparison within a global institution and as such the

859 Ibid.
potential for identifying risk of failing institutions, organisations based upon the regulatory policies in place to support them. The issue is that government tends to report information suited to its normative agenda and so possible to create the perception that the university is well supported and not at risk of failure—witness the Howard government’s media campaign championing the financial success of the university as evidenced in the sound bite “Australia’s number three export after iron ore and coal.” The quote makes clear that government publicity concerning universities lacks normative coherence with the institution and so skews accountability structures to matters of secondary relevance. While accounting for the contribution to the economy by exports of coal and iron ore is appropriately measured in financial terms, this measure is not an appropriate measure of the social institution or the contribution of the university.

What accountability does the government hold for the institution of the university and its knowledge? The answer to that question is dependent on government of the day: its interest in the university, its willingness resource the university and to accept information about the university from independent sources. Bureaucratic accountability is shaped by government priorities, and in the present era, largely by policy analysts in an NPM framework. As a result, bureaucratic accountability is conceived in the current regulatory framework as responsibility for delivering on the auditable metrics determined by the analysts. The accountability is not for an independent knowledge based institution providing for the creation, preservation and dissemination of all the knowledge Australian society needs to sustain itself. This set of bureaucratically determined auditable metrics and arrangements creates an incoherence in that it deters the university from being accountable to the public for the knowledge missions entrusted to it—again an issue argued in above and in Chapter 2 with respect to Power’s audit concerns. As the auditable metrics do not measure the institution’s success at discharging its institutional responsibility, the university fails to answer to society because it is forced instead to attend to government accountabilities which reflect the normative ordering of that government.

---

As the individual university corporations are State bodies, they have accountabilities to the State. The State governments assert that they are the correct bodies to receive accountability, yet they appear to take little interest in their university organizations. A search of Hansard for Victorian Parliament between 1998 and 2009, for example, revealed not a single question or other request for information about the state’s eight university corporations—a disturbing state of affairs in a State which has one of the nation’s premier university organizations and that in a nation whose reliance on export of higher education has been increasing. Hansard of NSW provided a similar result excepting one question concerning the conflict between the Chancellor and the Vice-Chancellor at the University of New England—which was answered by deferring to the autonomy of the university. This state of affairs exists notwithstanding the sharp denunciation of the University of Newcastle’s handling of plagiarism by the Independent Commission Against Corruption, serious allegations in the transition of Vice Chancellors at Macquarie University, and a major challenge to the academic integrity of Professor Bruce Hall conducting immunological research at UNSW to mention but some of the more recent major non-financial failures of university corporations.

It may be argued based on the above that there is limited political accountability for the university. As argued above in Chapter 3, under the current regulatory framework, the survival and well-being of the university is dependent upon the ideology of the government of the day and not on the knowledge norms of the institution. When government policy cast the university as a contributor to the nation and society of Australia, it was a priority for government and resourced accordingly. Where government policy casts the university as a mere provider of largely private economic goods and where collective preferences are no more than the aggregate of individual private economic preferences, the university is forced to shift its norms to pursue tangential or conflicting policy objectives such

---

863 NSW, Parliamantary Debates, Legislative Council and Legislative Assembly.
as revenue raising. This structure of accountability leaves the government only weakly accountable for the institution of the university.

The weakness of bureaucratic accountability for the institution of the university is illustrated by the Bradley Review established by the Rudd government.\textsuperscript{867} The decision of the Rudd government to commission a thorough review of the higher education sector was not part of an inter-governmental accountability cycle. This is not to say there is no public accountability for university expenditure or knowledge.

In sum, accountability for the institution of the university is both weak and incoherent. There is no organisation independent from government responsible to report to government or to society on the condition of the institution. Further, the government’s reporting system works not to provide broad accountability for the institution but for measuring university alignment with government policy. Perhaps most problematically, government efforts to develop accountability on academic matters have been developed by the use of economic norms, and narrowly defined short term metrics, all of which are fundamentally at odds with the academic norms they purportedly measure. In other words, the accountability regime is normatively incoherent with the problem, risk regulatory response and institution. The risk identified as the organising problem is not being effectively monitored or evaluated leaving no possibility for correction where government goes wrong. Further, by focusing on the specific economic measures to the detriment of other less tangible measures, the accountability structure re-enforces the regulatory incoherence rather than providing a corrective accountability.

b. Institutional Accountability: Academic Profession, Rankings and Markets
Non-bureaucratic accountability systems are part of the traditional university institution. These systems rely on standards based on reputation—of individual members of the academic profession, disciplinary based groups/departments, and

university organisations and even national systems. These standards are based on quality of research as judged by expert peers and teaching quality judged by students which have been created through networks centred on the academic profession. These standards in turn provided a foundation for hierarchies within the academy. This accountability follows Boven’s model of professional accountability.  

A demand for information about quality in the university led media businesses to develop rankings, and governments seeking prestige and answering calls for accountability in higher education, saw potential value in these rankings which in turn became increasingly formalised. An example of these ranking, their recent formalisation and the public contest about them can be seen in the competing rankings and methods represented among Shanghai Jiao Tong University, Times Higher Education Supplement, and Leiden University. This competition is illustrative of the increasing place of ranking in providing forms of public accountability for the university institution in various countries and for particular university corporations within those countries. Rankings, however, are not the clear indicators they first appear to be. The creators of the highly cited Shanghai Jiao Tong University ranking, for example, recently commented:

“Methodological problems involve the balance of research with teaching and service in ranking indicators and weights—inclusion of non-English publications, the selection of awards, and the experience of award winners. Technical problems exist in the definition and name given to institutions, data searching and cleanup of databases, and attribution of publications to institutions and broad subject fields.”

Finally market-like accountability is hoped to occur as a result of Bradley’s student voucher demand driven system. It coincides with the Federal

---


government’s attempt to re-assign the university to the private side of the public-private divide. Accountability in this quasi-market system has been reconceived as being to individual students rather than society as a whole. Accountability so conceived requires the producer to respond to/ or be accountable to current student preferences. The result is that the university institution will become captive to the knowledge norms set by current largely undergraduate students. Where there is little demand, regardless of the reason, the knowledge will be lost—whether ancient languages, mathematics or engineering—and where there is great demand, such as the design of entertaining video games or new ways of marketing fashion, the university will shift its resources to provide.

Thus, the increased emphasis on student preferences and re-orienting management in order to focus on reshaping university organisations to capture student interest, force an incoherence which restricts the institution’s ability to fulfil its broader social mission.

c. Legal Accountability for University Corporations

The regulatory framework provides legal accountability for the university corporations. As noted, the Australian university at law is a statutory corporation with legal accountability via the courts. The leading cases as argued in Chapters 4 and 6 lead to the suggestion that the university corporation while created by statute with significant public accountabilities is still sufficiently free to take necessary actions. Yet, it is clear that they must do so in a manner consistent with their status as public bodies forming part of the public service. In answer to the core question concerning accountability for addressing the organising problem of knowledge creation, preservation and dissemination, although both the Federal and state legislation broadly mandates such, it fails to provide appropriate or adequate standing or remedies.

d. Conclusions on Accountability Coherence

This argument leading through consideration of accountability in political, institutional and legal perspectives returns the dissertation to consideration of the
issues surrounding the standards by which the university and hence accountability is being measured. These in turn raise the fundamental questions about the nature of the university and the policy objectives to be integrated into the accountability regime. The accountability issues are a reflection of the complex and at times conflicting objectives discussed in the earlier this chapter and Chapter 5. These objectives include conflicting objects described as knowledge based versus politically, socially and economically based objects. Further, additional conflicts were noted such as, effectiveness versus efficiency, which two measures are themselves contested and traded off again against equity. Equity too is to some degree in conflict with matters of quality. In addition there are questions about long-term versus short-term standards and time frames—the university cannot work on a spot market model—as well as the balancing of private and public objectives to be considered. These conflicts reflect the normative dimensions of the political, institutional and legal standards.

The reporting structure, process and substance follows the policy concerns of government, not the social risks of the organising problem or the institutional mandate of the university institution or the university organisations. The reporting structure, process and substance instead reflects successive Australian Federal governments’ preoccupation with economics and their apparent efforts to shift the university toward the private side of the public-private divide. The reporting structure facilitates this shift by characterising the university as a supplier of private economic goods and contributor to the economy. While given the considerable financial sums and other assets involved, clearly reporting requirements pertaining to finances are important; however, the normative priority placed on those financial and readily measured and audited outcomes in reporting fail to amount to proper reporting. This criticism has four dimensions.

First, the reporting can be described as focused on accounting for the use of funds to achieve government determined outputs rather than ensuring the risk identified in the organising problem is being minimised. Second, it is focused on the more immediately measurable outcomes in line with NPM and auditable metrics. That is, the focus is on outputs, compliance, and those qualities that are
readily measured, rather than the most important. Third, it operates within the quality framework determined by the government—which has declared its purpose in the quality agenda as providing assurance to international markets for purposes of maintaining Australia’s export revenues rather than ensuring the missions are being carried out. And fourth, it ignores the widely acknowledged and critical inherent problems of what is and can be measured.

At a most basic level, the organising problem identified and regulatory response place responsibility on the institution of the university for the provision of the critical products of: “teaching excellence, acquiring critical thinking and analytic skills, excellence in research, enriching civic values and promoting a learning society.” Yet measurement of these basic and most important products present the most complex and difficult if not intractable problems in measurement theory. Recall from Chapter 2, “[the] two shoals on which public accountability policy has foundered: that public goals are too complex to reduce to simple quantifiable measures; and attempts to do so corrupt public service.” More recently, as government has shifted to an audit model, the forceful imposition of audit on the university has caused it to re-focus on the second order issue of creating and generating auditable measures to the detriment of the first order issues of research, teaching and public information. As argued in Chapter 2, this approach is implementing what Power describes as “the fatal remedy” which may lead to irreparable damage to the culture of trust and goodwill that the academic profession and hence university ultimately rely upon.

Thus, although it may be fairly easy to generate auditable measures, there are deep and likely intractable problems for a variety of reasons. First, as mentioned the destructive effects of the suspicious and reductionist audit approach is

---

incoherent with the trust based professional model of the complex university organisation as argued in Chapter 6. Second, determining what precisely is being measured, and in fact, whether what is being measured is the desired public good is likely not possible. For example, to create accountabilities for quality of education, quality of research and process one must be certain that these are measurable in order to be assured that they can be accounted for. While arguably these activities and these outputs are the most important, they are also the most difficult to measure, not only because of the variety of issues such as the contested nature of quality itself, the conception of the consumer (individual or society) served by the university but also the time scale, being the time lag between delivery of the education and the proof of its worth over the course of a lifetime.

Neither complexity nor difficulty are sufficient reasons to abandon attempts at setting standards or accountability; however, in considering the development of and accountability based on such standards these critical problems must be kept in mind. As such, accountability for these major knowledge objectives should be soft, and acknowledge the roles of discretion and trust—in sum, matters traditionally assigned to the professions as the preferred way to address these difficult types of problems. Arguably, accountability for the core knowledge objects of the university corporation may be unascertainable, and hence, it is appropriate to be reminded of Mashaw’s caution: “Every exercise in devising appropriate accountability system is thus an exercise in comparative incompetence.” As Power has argued in his analysis of the audit approach to UK university system, too tight a reign on the university serves neither society nor the institution well.


Political efforts to measure and weigh the university with precision such as occur through Australia’s extensive reporting requirements seems to suggest that politicians have failed to grapple with the basic problems of measurement and the university. Further, the weak political accountability for the university institution, where there is no independent reporting body, suggests that the university institution remains at risk of failure, and further that this risk is exacerbated as a result of politically determined objects which are at best only marginally coherent with the university institution.

Accountability for the institution of the university would be best served by an independent body standing between government and the university corporations—like the CTEC which was dismantled by Dawkins for refusing to bend to his political agenda. The CTEC provided independent advice, informing both government and the public about the situation in the universities. It allowed a form of accountability that is not possible without some such independent intermediary. Such a body could enhance coherence or at least contribute to the coherence critique by pointing out where and how the government’s policy is coherent and incoherent and make suggestions about revisions to policy. Unlike Universities Australia, the Vice Chancellors’ body, which depends on lobbying and persuasion, an independent regulatory body in the CTEC vein would have direct access to the minister, and be able to put issues directly.

The drawback of such an agency is as Dawkins experienced: it may not be amenable to minister’s policy preferences and may provide public criticism of such policies. Further, it may be susceptible to capture by the university sector where it is staffed predominantly by academics—an unlikely event given the "tribes" that make up an increasingly divided profession. It is unclear that such drawbacks outweigh the potential benefits an independent intermediary could play. The current reporting system stymies critical debate about the nature and value of knowledge, the efficacy of the university and its role in the public

---


sphere, and leads to valuing only that which the government wants valued and measured.

Market accountability by way of student voucher is a significant deviation from, and incoherent with, the legal accountability. Legal accountability is for compliance with the broad public good set out in the objects of the statute, whereas market accountability is for the individual preferences of students seeking a variety of self-interested objectives. Thus, whereas Labor’s proposed voucher system may direct economic accountability toward individual students’ preferences without regard for public preferences, the state based enabling statutes create legal accountability though the restricted statutory objects to the public at large. It is not to say that the university corporations should disregard students. On the contrary, the enabling statutes explicitly state that an environment conducive to learning is part of the legal obligation placed on the university corporation. However, the potential for increased incoherence results from these conflicting accountability regimes.

Essentially, the system of accountabilities creates incoherence and causes confusion. The assumption that the objects are indeed measurable and lines of accountability can be drawn—a particular problem for any institution with socially oriented, long term, public good objectives—misleads the government and the public that a host of measures achieves appropriate accountability of the government for ensuring the knowledge missions of the university are not put at unnecessary or unacceptable levels of risk. The fact that the university’s mission is so important but difficult to measure makes it difficult for the public to hold government and its ministers accountable for the university institution. The implication of this is that the government can only be held accountable for ensuring adequate resourcing—a matter of both political decision and professional expertise. The public must rely on government because information about conditions and operations of the university institution, the university system and university corporations, as well as the complex nature of the objects of the university, (i.e. information provided by accountability regimes) cannot but be incomplete. Governments therefore have a heightened responsibility for
ensuring the well being of the institution including providing a coherent regulatory framework.

The analysis of reporting at both institutional and corporate levels leads to the conclusion that the accountability regime is incoherent. The tight measures, driven by economic incentives and market like drivers are at odds with the social knowledge problem and the institution of the university itself. That is, the normative ordering around knowledge norms are at odds with the readily measurable, with the economic incentives and with the young adult students’ private preferences. The normative accountability is also incoherent. Much of the accountability follows economic incentives and supposed quantification of what is known to be immeasurable, ignoring the important potential of professional accountability for the most important missions of the university—its knowledge missions for the maintenance of society.

8. Regulatory Coherence and Incoherence in the Regulatory Framework

In summary, the analysis of regulatory coherence in this chapter has been both broad and deep. Beginning with the level of systemic coherence, it will be recalled that there are two sets of problems assigned to the university. These are the knowledge based and other politically assigned problems. As to the first, it is evident that the organising problem of knowledge creation, preservation and transmission is the foundational problem which calls for a regulatory response. The organising problem is a broad problem affecting potentially all of society. The problem is one of risk but with significant elements of opportunity. The risk is the loss of the knowledge necessary for the maintenance of a non-traditional complex society; however, opportunity exists as a result of the potential to create new knowledge beneficial to human society and survival through the processes associated with mitigating the risk.

Further, the regulatory response has been to conceptualise the problem as a public problem and so to assign the problem and its resolution to the public side of the public-private divide. At the systemic level, therefore, the normative foundation is to be found in the broad based public problems around knowledge.
The core social institution charged with addressing these problems has been the university which institution has long held public knowledge norms as its foundation. The institution has utilised organically developed non-profit organisations. At this basic level, there is no systemic incoherence.

The second set of organising problems identified by politicians are the social issues of credentialing, sorting and holding unemployed youth. The regulatory response to these problems has also been to assign them to the public side of the public-private divide and to search for appropriate institutions and mechanisms to address these problems. One institution available to politicians is the university. These tasks while not wholly incoherent with the institution are not wholly coherent either. The university is in a position to credential those who have demonstrated a degree of competence in the acquisition of knowledge. However, while credentialing is an outcome of sorting, the low level of sorting required of the Australian university—as with university in other jurisdictions—falls below higher education standards and as such depletes the university’s resources available for missions such as higher education which are coherent with its higher education institutional position. The fortuitous consequence of youth enrolment in the university is that unemployed youth find their time occupied. This consequence, however, does not contribute to the formation of a coherent foundation for the university. To place the university as the core social institution to address this complex of problems is to introduce incoherence by shifting its institutional mission away from the knowledge norms to the socially worthwhile but institutionally incompatible and distinct tasks of sorting and holding unemployed youth.

At the systemic level, the regulatory response of assigning the university institution to the public side of the public-private divide carries with it certain implications for normative ordering. At a most basic level, this dissertation argues that the knowledge tasks must take precedence over other tasks. In particular it has been argued that the revenue generating norm must be secondary and subservient to public institutional norms. The regulatory response does not preclude revenue generation; however, it places an imperative that revenue generation is lower in priority to maximising the creation and distribution of the
public good, knowledge. Accordingly, the policy of directing the university to engage in significant revenue generation and to direct it by economic incentives into areas contrary to its institutional mission are serious sources of regulatory incoherence at a systemic level.

One important task of politicians is to make decisions about the quality of services they expect. Levels of funding must be connected to the quality desired to avoid the decoupling and gaming identified in Chapter 2 derived from Power’s work. This issue is particularly important for the university as argued in Chapters 5 and 6 with its non-profit norms, and as a non-market institution dedicated to the distribution of public goods. The same criticism of regulatory incoherence which results from the introduction of revenue generation norms applies in respect of the public equity objects. Social equity objectives may be achieved as a positive externality; however, to make it a normative priority is to undermine coherence. Further such equity objects may well be in conflict with the revenue generating norms as people from lower socio-economic levels are less likely to participate in higher education in the first instance for a variety of reasons not the least of which is the lack of resources and the relative cost of higher education compared to their means. The prioritising of the revenue generating norm is thus in conflict with this particular equitable mission.

At the level of policy coherence, the problems identified at the systemic level find expression in the policy norms and in specific legal instruments. As noted, from a policy perspective whereas the public goods enterprise operates with the norms of maximising of production and distribution, in the neoliberal policy universe these norms are displaced by the private enterprise norms of revenue generation and cost cutting—a problem identified in the context of dysfunction in the American higher education policy. These norms are instituted through the Higher Education Funding Act 2003 and related legislation which effectively demand more from the university than the government is willing to resource placing the university in a state of continual financial crisis. Contrary to government policy of using revenue constraints to drive efficiency and innovate

---

new sources of revenue, there is the inevitable need to conserve resources by a reduction in the quality of the service being provided—an uncomfortable issue not addressed by either increased quality audit or surveying student “customers.”

The instruments, reflecting neoliberal philosophy of competition, introduce further incoherence. In conflict with the significant cooperative norms in the academic profession and among universities, the instruments create a highly competitive environment. These competitive norms work contrary to the cooperative norms of the university. At this same level as noted, until the neoliberal era ushered in by Dawkins, government relied upon advice from an independent advisory body about an institution that belonged to the public sphere. Under neoliberalism the university has been re-cast as another industry like iron ore and coal—a generic industry with revenue generation potential. The intermediary advisory council was dissolved and the regulation re-designed to deliver the presumed efficiencies of markets. The funding and regulatory arrangements were no longer conducted through consultations with the individual university organisations which make up the institution, but were made by ministers in consultation with policy advisors. Such an approach to the delivery of public goods and the guardianship of society’s premier knowledge institution is incoherent with the public missions of the university and indeed, it may be argued, with government. It leads to the conclusion that this type of arrangement is a less than optimal arrangement for a government charged with the preservation of the knowledge which undergirds a democratic society.

In terms of institutional, organisational and administrative coherence, as noted, the university institution has a tradition of collaboration as well as competition. The preference of competition over collaboration is incoherent with institutional norms. Further, at this level, coherence between organisational independence and autonomous pursuit of the mission are incoherent with the high levels of intervention from and reporting to government. Finally, at the level of accountability, the incoherence is considerable. Whereas the objects of the university function primarily around non-commoditised difficult to measure public goods, the accountabilities have been structured to be measured in great detail as if it were measuring the production of mere private economic goods.
The incentive structures related to that accountability rather than being coherent with institutional norms of knowledge, prestige and reputation have been built around the economic and neoliberal models of human society: revenue generation and output production numbers.

9. Conclusions

The analysis leads to the conclusion that there is significant incoherence in the regulation of the Australian university. Although recognising the organising problem as a risk that is social, imposed and collective, government has designed the regulation increasingly as if the organising problem were a matter of private, individual, economic choice. As noted in Chapter 3, with political debate in Australia being focused on economic growth combined with government’s strong commitment to neoliberalism and economic rationalism, priority will be given to those bodies which have normative orderings coherent with that ordering, leaving bodies which have other normative orderings to be either set aside or pushed toward the favoured ordering.

This incoherent approach to the organising problem leads to incoherent approaches to the assignment on the public-private divide. Whereas an organising problem cast as a public problem would favour a normative ordering placing the university on the public side of the public-private divide, neoliberal governments’ have attempted to shift the assignment by re-ordering norms to align more closely with orderings suitable to private economics. It is evident that governments’ normative ordering and objectives are incoherent with university institutional normative ordering and objects. Institutional ordering such as the pursuit of knowledge for its intrinsic value and objects such as collective socio-political well-being, personal development, arts and social projects are incoherent with government ordering preferring commoditised knowledge and government objectives of revenue generation and work place training.

The justification for the change under neoliberalism is one of Breyer’s justifications for regulation—“rationalisation.” Rationalisation is a justification for regulation; however, as Breyer cautions, it is suited to economic regulation,
not social or other types of regulation. Dawkins and successive Australian governments seem to have ignored evidence in favour of ideology. Further, the rationalisation process and norms, at least as practised in Australia, focus on the private cost cutting agenda rather than the public maximisation of resources and distribution norms.

The legislative instruments used follow the incoherent theorising of the organising problem, risks, institution and organisation. They attempt to introduce market mechanisms of competition into the public domain. These mechanisms encapsulated in the instruments, however, are incoherent internally. That is, although designed to create markets the benefits of which are less prescriptive, lower monitoring and lower cost—the instruments do not rely on market outcomes in terms of allowing university organisations to manage and create their own rules, or accountability by way of markets instead of government audit. Further, the measures and standards have been drafted to capitalise on the readily measured, and revenue generating potential rather than the risk avoidance, public good and collective, collaborative norms of the institution. The net benefit has been a short-term saving to government of public expenditure on the university, permitting the education of Australian citizens to be subsidised by international students, and a decline in the quality of university education in Australia.

It is not that tasks assigned to the university such as government’s economic development and equity agendas cannot be carried out by the university. The issue is that they require significant resourcing if they are to be carried out in a way that is not incoherent with or cause a negative impact upon the university. Successive governments from the Hawke government forward, however, have created a compound problem by simultaneously imposing such missions, requiring increased student numbers and requiring the university to become increasingly financially independent. With its severe resource restrictions the university has been force to become a type state owned enterprise. The university faces the challenge of raising substantial revenues from the private sector creating the previously noted incoherence between its institutional public mission

---

While certain political decisions and related regulatory responses such as equity concerns are unlikely to be implemented without additional regulation, there is no reason such policies could not be implemented via special purpose regulatory initiatives suited to the particular concern and/or university organisation. In fact, from a regulatory perspective, enhanced coherence including organisational coherence is likely to be an outcome. Examples of effective regulatory intervention include overcoming university reticence concerning massification of education as well as some of the equity initiatives. However, incoherent regulatory intervention changes not only the organisation but also the critical knowledge institution of western society thereby enhancing the risk rather than avoiding it by regulation.

The Labor government’s decision to introduce a voucher system elevates an ongoing incoherence in the university system. There are two elements to the incoherence introduced: in the first instance, university organisations all need to compete in the same student market. Where the majority of students prefer short courses in business management and video games, the university will be forced to develop those programs at the expense of others. Not only will this result in greater uniformity among university organisations, but it will lead to declines of alternative options as knowledge and fads change.

Second, it fails to take sufficient account of the complex nature of the organising problem and its regulatory solution. The Labor government’s mix of competitive instruments is not only incoherent with the object of regulation—higher education, a public good—but also with the institutional traditions of the university. The voucher system misidentifies the consumer of university services. It posits the individual student as opposed to society as the sole or at least primary beneficiary of the social institution of the university. By identifying the

---

consumer of university education as the student seeking private economic goods, governments move the university institution away from its broader more important social missions of the creation, preservation and transmission of knowledge.

In sum, the regulation is incoherent from systemic, policy, instrumental, institutional-organisational and accountability perspectives—and ripe for failure. With this knowledge, there is great opportunity for reform, starting with a re- visioning of the university for a nation. The Australian university has accomplished much and made a significant contribution to society, just as its counterparts elsewhere have done over the centuries. There is currently a strong interest in the university as the Bradley Review and government response have demonstrated. A renewed sense of the university as something more is in the air and the time is ripe for public debate to allow it to fulfil a role greater than a contributor to private wealth and job training, and to reform its regulation to take on such a role.
CHAPTER 8: CONCLUSION

1. Introduction

The research question for this dissertation is the following: is the regulation of the university good regulation? This has required an examination of the university and how it fits into the regulatory framework, and an analysis of whether that framework is coherent. The answers to these questions have led through a consideration of a variety of issues. The issues and themes identified, however, allow a clear answer to be established. The short answer is that the regulation is not good regulation. It is poorly designed regulation, fundamentally incoherent and is likely to lead to the university becoming increasingly dysfunctional over time as it shifts institutional public knowledge norms toward private economic norms. This conclusion follows from the analysis summarised below.

2. Review and Summary

After the Introductory chapter which identified the research question and set the socio-historic context, the second chapter examined the theories and methods of regulation, and provided an overview of the issues and decisions to be made in the development of a regulatory scheme. That chapter identified the issues of the organising problem, the nature of the problem—opportunity, problem or risk, the regulatory response in terms of public and private interest theories as well as the theories of regulatory design—from regulatory failure, through smart regulation to regulatory coherence. It next identified the various tools and instrument choices to be addressed by governments, in broad terms, their normative functions, and accountability options. This chapter led to a number of conclusions. These were that clarity in the organising problem is critical as is

assignment on the public-private divide (discussed in Chapter 4). Further, the chapter argued that there are a variety of potential justifications for regulation which need to be considered carefully before determining whether any regulation is necessary, and considerations about the nature of the regulatory response. That is, first, whether the response should be focused on avoiding a risk, or mitigating or developing resilience, and then whether the response should be in the public or private spheres. Finally, it argued that where the assignment was to the public side of the divide, the use and provision of adequate public resources was critical.

The third chapter examined the nature of the public-private divide and the location of the university on that divide. This chapter set out the parameters of that important distinction and the foundations of the debate. It examined the divide from a variety of perspectives—namely, politics, economics and law. It made clear that contrary to assumptions underlying Samuelson’s economic theory of public goods, the divide is not a naturally occurring phenomenon; rather, it is the invention of humans. That fact does not diminish its importance from a regulatory perspective. Instead, it makes clear that it is a matter for political debate: there is no non-political technical decision to be derived from economics to which politicians can defer. It was argued that the university is best assigned to the public side of the divide. That is, regulation for the university should, as its default position, be thought of as public regulation.

Given that there is no technical solution to determining which side of the public-private divide is preferable, and that while the divide is not a clear and simple dichotomy, it was made clear that some assignment to one side or the other is desirable from all perspectives. The implications of the divide for the university and various economic, political and legal justifications for the assignment of the university were considered. These considerations led to the conclusion that the university should be assigned to the public side of the public-private divide.

Chapter 4 identified and examined the regulatory framework. It began with a consideration of the policy which sets the basis for identifying the organising problem. It was noted that the policy had changed significantly over time, most
recently under neoliberalism toward the classification of the university as a provider of private economic goods. The analysis then moved to the framework in terms of the regulatory administrative arrangements, tools, instruments, and accountability structure. This analysis noted without comment some anomalies in the regulatory framework particularly with respect to the tight control on the university while at the same time making the environment extremely competitive. This competition is the result not only of the regulatory design of instruments, but also of the policy of declining funding while simultaneously increasing demands. Further it noted the impact of the current absence of an intermediary advisory body on the university as an institution in Australia.

Chapter 4 makes a contribution to knowledge because it draws together the overarching policy as well as the regulatory framework for higher education in Australia from a legal perspective. No other such exposition exists from a legal perspective. This contribution is important because it provides insight for policy makers, regulators, academics and interested others on the exact nature of the regulation, the points of intersection and a platform for critique and further regulatory reform.

The chapter concluded that the regulatory framework, while still in transition under the current government, has a wide variety of policies forming the organising problem. Further, it was concluded that although the university was assigned to the public sphere there were a number of inconsistencies in that assignment. For example, the lack of clarity in the missions and difficulties in the legal assignment made clear that the regulatory framework is not internally coherent. Additionally, it was evident that there was an exclusive reliance on competitive instruments which while nominally harnessing markets were in fact highly controlling.

Chapter 5 examined the university as an institution answering the question of its contribution to the social subsystem of higher knowledge. That is, the chapter examined what type of regulatory objects or response the university institution is suited to provide. It examined the mission of the university from a variety of perspectives: historic, social, economic, and political science. This chapter
identified the range of objects which had historically and could potentially be assigned to the institution. That is, it reviewed a range of missions which the university had pursued with varying degrees of success and where possible, it provided some analysis on the impact of those missions on the institution. The tasks considered were education and other knowledge-related functions; the sociological tasks of sorting, ‘weeding’ and credentialing; economic roles; the political roles of critique and space for debate; and then some of the uniquely Australian missions of nation building and global competitiveness/revenue generation. It drew attention to the variety of missions the university has pursued, their potential conflict as well as complementarity, and the dynamic changes over time.

This chapter too makes a significant contribution to knowledge. It is significant because it draws the main theories from the disciplines mentioned and applies them comparatively to the single institution of the university. This comparison provides new insight into the institution by tackling its multifaceted nature simultaneously and the parameters that should be considered by regulators seeking to create good regulation.

The chapter concluded that the university has traditionally been a non-profit institution for a variety of reasons, including: market failures of information asymmetries and failure to produce adequate public goods, and the institution’s important contribution to discourse in the public sphere among other things. Finally, the chapter made clear that while the university can carry out a variety of missions, not all of which need be purely knowledge based, from the perspective of the institutional mission it belongs clearly on the public side of the public-private divide.

Chapter 6 examined the organisational characteristics of the university. It addressed the regulatory problem of the nature of the body to be regulated. The examination from five disciplinary perspectives: philosophy, sociology, economics, politics and law, identified the organisation’s position on the public-private divide, and the important norms in and around the organisational structuring that placed it firmly on the public side.
Like Chapter 5, this chapter makes a contribution to knowledge. By examining the university organisation through a variety of disciplinary lenses and comparing these perspectives, it sets out the foundations of the political debate about the organisation. This contribution is significant because it draws the main arguments together and examines them in a less political fashion than a political science or a normative economic perspective. Instead it evaluates them from an organisational perspective for match between organisational form, organisational norms and institutional objects. This comparison provides new insight into the normative parameters that should inform regulators.

Chapter 7, the coherence analysis provided a complete coherence analysis of the regulatory framework. It examined all aspects of the regulation from a regulatory perspective analysing all levels for coherence. At the systemic level, it found that the organising problem was overly large and incoherent. Further that the policy response was normatively at odds with the norms (identified as those norms which would emanate consistently from the organising problem coherently constructed). At the level of policy, the analysis revealed that policy norms and instruments were also incoherent with the organising problem as well as with the policy response. Further this incoherence was carried into the choice of instruments.

Analysis of the institutional, organisational and administrative coherence also revealed problems. That is, the institutional and organisational norms were at odds with the norms of the regulation and the regulatory framework. The analysis of accountability structures revealed incoherence demonstrated in that neither the university institution nor the university corporations were subject to appropriate accountability structures. The incoherence resulted from the reporting structure which focused on government’s concerns as opposed to accountability for addressing the organising problem as well as the problems of the Westminster system, namely, the lack of effective accountability to the public via Parliament. The analysis concluded that the regulatory framework was incoherent at all levels.
This chapter is innovative because it is the first coherence analysis of a national regulatory framework. By the same token it is the first coherence analysis of the higher education regulation in Australia. Its finding of incoherence is significant for two reasons: first, it is assumed by politicians and regulators that regulation is coherent in the first instance. No government intentionally designs regulation that is incoherent—although it may be incoherent in its ultimate politically compromised form. The finding of incoherence alerts policy makers, regulators, and other interested parties to the existence of incoherence in the regulatory framework and problems associated with it. This conclusion leads to the second and main significance which is that regulatory incoherence is a cause of regulatory failure, and in the case of the university, a failure which Australian society cannot bear. This review of the dissertation sets the basis for the evaluative questions and recommendations which follow.

3. Evaluation of Regulatory Framework

A regulatory framework can be evaluated from a number of perspectives. It may be that a regulatory framework is incoherent yet draws the response; ‘so what?, it achieves the desired ends’. This line of argument, however, draws attention to the fundamental evaluative standard: reference to its success in addressing the organising problem it is designed to resolve. In the case at hand, the organising problem as noted is a complex of problems identified by politicians. In the first instance these are the creation, preservation and dissemination of knowledge.

The further organising problems have been sociological problems of sorting and credentialing, socio-political problems of social mobility and equity, and nation building, and the economic problems in the generation of revenues and preparing labour for the workforce. As noted throughout the dissertation, success in the achievement of the objects or missions of the university is difficult to measure, and particularly so in the short term. What is evident from the Bradley Review among other studies is that since the radical shift in the regulatory regime introduced by Dawkins more than twenty years ago the Australian university has declined in most significant measures. The only measures where it has increased are in the dramatically increased student numbers and the revenues it now
generates on its own. These changes have not been insignificant—from the few thousand international students and a small percentage of revenues in the Dawkins era to approximately 250,000 international students and the majority of revenues measured in billions of dollars in the present.\footnote{888}{Bradley, D P. Noonan, et al. (2008). Review of Australian Higher Education: Final Report. Canberra, Department of Education, Employment and Workplace Relations., p. 89}

By the same token, however, the declines have also been significant. In terms of public financial support, the Australian university, formerly a mid-ranking system in the OECD, as a result of funding cuts has fallen to the bottom.\footnote{889}{Ibid p. 147} This movement is dramatic and not easily reversed. Further, the quality of education has declined over the period. Staff to student ratios have increased to the highest level in the OECD and students complain about the quality of their experience and the difficulty of meeting with academic staff.\footnote{890}{Ibid Figure 19, p. 72} Further, students’ financial stress has added significant strain to their lives and is a cause of decreased ability to study.\footnote{891}{Ibid pp. 47-51.} While the issues of measurement addressed throughout the dissertation caution against a strict or overly certain interpretation of measures, measures of these types—staff to student ratios and time available to students—are measures likely to be indicative of institutional capacity to achieve the various coherent institutional missions of the university. This state of affairs leads to the conclusion that the ability of the university to address the organising problem has been significantly compromised by the regulatory framework. In its most important task, therefore, the avoidance of risk of loss of knowledge, the regulatory framework is a failure.

A further approach to evaluation of a regulatory framework can be made by examination of the condition of the social subsystem it is designed to regulate. Not only did the Bradley Review find significant problems in the delivery of the response to the organising problem, it found, as did a number of other studies,\footnote{892}{See the crisis literature referred to in Chapter 3, 5 and 7 Neilson, W. A. W. and C. Gaffield, Eds. (1986). Universities in crisis: a mediaeval institution in the twenty-first century. Montreal, \textcopyright{} Institute for Research on Public Policy: Institut de recherches politiques, Chipman, L. (1999). “Part I: Crisis and Opportunity in Transnational Education.” \textit{Higher Education in Europe} 24(2): 177 - 186, Senate Employment Workplace Relations Small Business and Education References}
that the state of the Australian university institution and its organisations are not in a good condition. The run down condition of the infrastructure is matched by the demoralised, over-worked staff. Further, other studies have noted a serious conflict within the university between academic and managerial staff, described by one study as bullying—an ultimately unsustainable dysfunctional state of affairs.

In terms of accountability the question is: does the regulatory framework provide sufficient accurate, relevant, detailed and complete information to create the potential for accountability in the form of a review of what has happened, the ability to hold those responsible accountable for censure, remedy of policy error, and to provide a solid basis for forward planning? This thesis concludes that to a large measure, the information provided is accurate and detailed. The problems, however, are related to the relevance and completeness of that information. That is, while information may be correct, all of the information necessary for evaluation may not be available. These problems are consequences of the problems associated with measurement. Measuring the objectives of the university is nearly impossible in the short term for reasons that the value of what is learned or knowledge otherwise created and preserved may not be known in the short term, as noted in Chapter 6, and hence, developing an evaluative short term measure of the university is impossible. This results in attending to what
can be measured with the unintended consequence of normative re-ordering. As the saying has it: “what is valued is what is measured rather than measuring that which is valued.” The accountability structure in this sense impairs the ability of the university to fulfil its obligations.

The system of accountabilities which contains a significant amount of irrelevant, incomplete and detailed information causes confusion and an inability to trace accountability for the different objects of the university institution (assuming that the objects are indeed measurable and lines of accountability can be drawn—a particular problem for any institution with socially oriented, long term, public good objectives). These important but difficult to measure objectives make it next to impossible for the public to hold the government and its ministers accountable for the university institution. Even in terms of informing the public about conditions or operations of the university institution, the lack of an independent advisory body denies the public insight into the university. In this sense, the accountability regime within the regulatory framework is poor. Further, neither state nor Federal ministers table reports dedicated to the system in their respective parliaments, nor on individual university corporations. The university is included as a subsection of the broader reports on education tabled by the ministers responsible for education. This organisation of the accountability structure leads to the suggestion that the knowledge subsystem for which government is charged and delegated to the university remains at risk of loss.

Another important evaluation of the regulatory framework, also coming from the accountability framework, asks the coherence question: how does the accountability system interact with the norms of the academic profession? Any evaluation of the accountability system should work to enhance the functioning of the profession rather than as a substitute for professional accountability structures. The poor state of the Australian academic profession, as various studies have indicated, suggests that the accountability system is failing to achieve a fundamental function—allowing rectification of erroneous policies and

---

898 See nn. 892-95.
censure of those responsible. As noted in Zemsky’s work the neoliberal hope of markets providing suitable information and warning about the state of the academic profession is misguided.

The normative incoherence identified in the previous paragraph is an expression of the conflict between the norms of knowledge and public good on the one hand and economics and private enterprise on the other. The furtherance of the private economic norms via the regulatory framework exacerbates a conflict already within the university that resulted from the post-World War II shift from elite to mass education mission in which academics were replaced in university management by managers. The different norms, provide on-going organisational conflict. For example, in his dissertation “Quality Assurance at Australian Universities” Nathan Jiang finds that management prefers a quality system which sees the quality system as an opportunity to improve in competitive rankings with the associated benefits of prestige, funding both public and private, and student preferences. This competitive view favoured by management, however, is distinct from the view favoured by academics. The latter view the main purpose of standards to be providing “quality teaching, research training, and research results, and contribute to knowledge and discipline development.”

This conflict is described by Jiang as a conflict between competitive and academic purposes. While not suggesting that academics are without a competitive motivation, Jiang suggests that academics value the aforementioned list of values ahead of competition whereas the managers hold the opposite. The lack of consensus on these basic issues reflects normative conflict at the operational level of the university organisations exacerbated by the regulatory framework.

The regulatory framework does not foster an environment which encourages teaching and research, contact with the students, or which take issues of low morale and staff disengagement seriously. The conditions of academic


employment in Australian universities are unappealing,\textsuperscript{901} with staff morale declining over the last decade.\textsuperscript{902} Research in the literature suggests that university organizations across Australia are failing with two-thirds experiencing low morale among academic staff.\textsuperscript{903} As an organization dependent on academic staff’s expenditure of discretionary energy, and upon whom the university’s success is staked, the low morale is unsustainable.\textsuperscript{904} This decline in academics’ well-being predictably has negative effects on education: Marginson argues that executive drive and entrepreneurial zeal have had negative consequences on academic success.\textsuperscript{905} Thus, from the perspective of the well-being of the subsystem too, the regulatory regime is a poor one.

Evaluating the regulatory framework from the perspective of the organising problem of creating an educated, diverse citizenry able to understand and make social, political choices is also important. A normative shift from public to private economics is evidenced in the growth in the numbers in business degrees,\textsuperscript{906} which increased in international enrolments by more than 700\% in the same decade that saw domestic non-business students increase by less than 2\%
and domestic business students by about 150%. These figures suggest that there has been a shift to a focus on business studies and leads one to question whether this focus can be said to be “enriching cultural … life” as found in state legislation, or for that matter, whether business studies (premised on economics’ self interest theory) complies with statutory object of “enriching…. Community life.” Does this business focus advance the legal mandate of (ii) “educational, scientific, and artistic development”? The issue is not that business studies do not belong in the university, rather, the argument is that the balance is off. Fundamental to this dissertation is the idea that the university should create, preserve and transmit knowledge that allows the whole of the human being to participate in society, and for that society of human beings to live collectively successfully. The university is tasked with the provision and creation of that knowledge. The regulatory framework since Dawkins, as noted, has created a dramatic shift away from the public knowledge norms toward private economic concerns. In this sense, it is a failure.

4. Recommendations for regulatory design

As seen from the analysis in this dissertation, summarised in this Conclusion, the first and critical task for the designer of a regulatory framework is defining a coherent organising problem. That problem needs to be developed usually through wide consultation and broad well-informed thinking. The identification of an appropriate and coherent organising problem is, however, not sufficient by itself to provide the foundation for good regulation. The second critical task for regulatory designers after the identification of a coherent organising problem is a clear assignment to one side or the other of the public-private divide. In the case of the university, coherence analysis suggests that on the basis of an examination of the organising problem evident in the regulatory justifications and the public good(s) emanating from the university, a clear, coherent normative basis is discernable which assigns the university to the public side of the divide.

908 Melbourne University Act 1958 (Vic).
909 A good early argument is A.N. Whitehead’s address at Harvard Business School The Aims of Education and Other Essays (London: Christophers, 1922)
910 See Chapter 5 above.
This assignment will require political decisions about the two sets of norms currently within the regulatory framework—1) the value of knowledge and the value or role of economics, and 2) the public and the private. These two sets of norms push in different directions and a clear appropriate normative ordering must be put in place. It is not that they cannot co-exist: organisations are never single purpose. Rather, decisions need to be made as to which norm and which objective will have priority particularly in the case of conflict.

These two tasks—the creation of the organising problem and assignment on the public-private divide—form the basis of policy development. Policy development should consider first the critical knowledge risk and the wide array of benefits of higher education, and draw from that consideration that regulation should focus on the widest tenable distribution of the public benefits of higher education. As a public social good, it is significant from an equitable perspective that as many members of the public as possible receive those benefits, and indeed, one of the policy imperatives following from the post-World War II massification of higher education was just that. The public social good also has significant private social good implications. As a means for social mobility, higher education provides an opportunity for individuals to improve their chances based on effort and ability rather than inheritance.

Second, with respect to the economic goods, as argued in depth in Chapter 4 both public and private economies derive significant benefits from higher education. High rates of return on public investment in higher education make higher education an attractive option, particularly in the on-going development of the knowledge economy. The private benefit is extensive as well, lasting for the balance of the graduate’s working career and thereafter into retirement. The private benefit may justify some private contributions by private beneficiaries.

Third, it may be that the greatest personal benefit is the development of the individual’s mind or ultimate human potential—the knowledge and critical

---

thinking abilities opened up by the higher education experience. The value of the opportunity to achieve one’s potential, to gain insight into the world and one’s place therein is difficult to evaluate. To put a price on this good is problematic as it provides different benefits over the course of one’s life. To do without higher education on the basis of decisions made early in life because of perceived private economic costs or because of public policy decisions about assigning higher education matters strictly to one or the other side of the public-private divide on the basis of economic theory rather than political debate is inappropriate in a democratic society.

In terms of designing appropriate public goods regulation Peter Drahos’ observations mentioned in the introductory chapter need to be considered. Appropriate design of public goods regulation requires more than regulating the university as if it were a public utility: rather, designers of the regulatory framework must attend to a wide range of matters, from the provision and distribution of public goods, to their potential for uptake, their character as norm dependent or independent, capability dependent versus automatic flows, and status as either primary, providing a foundation for a host of other public and private goods, or secondary. Considerations of this kind are evidently critical for the design of effective regulation for the university.

Further, there is much to be culled from a careful consideration of regulatory theory. For example, Smart Regulation, which prefers complementary instruments, less intervention over more, escalating responses and triggers, and empowered third parties to act as co-regulators with a view to maximising win-win opportunities would provide a markedly different regulatory framework as the current regulatory framework adopts none of these ideas. As analysed in Chapter 7, the current regulatory framework lacks complementary instruments, is highly interventionist, lacks a system of triggers and responses, and has avoided third party participation. There is considerable scope for implementing Smart Regulation in the design. One such important change in regulatory design in terms of regulatory administrative arrangements would be the re-instatement of

an independent advisory body.\textsuperscript{913} The re-instatement would be consistent with Smart Regulation in that its presence would facilitate a dialogue between university and government, bringing the expertise and insight of the regulated body (organisations and institution) to the regulation. A well designed body, such as the former CTEC discussed in Chapter 3 would allow university organisations to act on their missions as they see fit rather than being at the disposal of the government. With an independent body advising government of the risks and issues, the government would have actual information about the university as opposed to the channelled reports it now receives and society would have a clearer view on the state of the institution.

At a basic level, a soft law approach to regulation of the university law has much to offer. In the first instance, it is consistent with the institutions of the university itself. Its development from the medieval era to the present has depended largely on these forms of self-regulation via information sharing, both formal and informal, through libraries, academic conferences and academic and student exchange programs. They measure themselves, their organisation’s learning and achievements against their peers. The academic conference which is a formalised information sharing event is a prime example of how it works. It is an existing institutional practice in which academics share information about their research, offer information, ideas and criticism to others for the purposes of improving the overall output of the research endeavours of the university. Conferences while not without their problems,\textsuperscript{914} may prevent the worst errors from being published and certainly provide the opportunity to improve ideas by being subjected to open discussion and debate. Further information sharing by word of mouth and citation has driven the reputations of individual academics and their university corporations for centuries. Indeed, the first university at Bologna was developed around the famed teacher, Ireneaus.\textsuperscript{915} Given the

\textsuperscript{913} Universities Australia is a body that lobbies government advancing the Vice Chancellors’ views. It is not clear that these views are representative of either the university community as determined in the statutes, or the view of the community at large.

\textsuperscript{914} Problems may include such things as poorly vetted papers, speakers ignoring time limits and being organised with inadequate attention to the academic as opposed to social function of the conference.

complex nature and mixture of goods produced, as well as the complexity of university organisations themselves, some form of quasi-autonomous or self-regulation that includes a significant level of input from the academic profession would appear to be the most suitable choice. Such a body should be in the form of a statutory corporation in order to preserve independence from government. It would be composed of academics from various Australian organisations, and given the global nature of the institution as well as Australia’s higher education ambitions, academics from leading global university organisations and institutions, as well as government, and some community representation including students. This body would be charged with the review and development of regulation, and refrain from advising on matters of academic work, curriculum, and student affairs allowing those issues to remain within the domain of the respective university organisations. It would have to be funded by Federal and state government to avoid being overly dependent on the government of the day.

Good regulation would need to take better account of, and more effectively integrate the university’s sociological functions. It would need to take particular account of their normative implications. The university provides credentials to those who succeed and the particular status of the credential further establishes rank in social, educational hierarchy as the outcome. The problem of attempting to fulfil this object when revenue generating norms dominate academic norms is the hobbling of the credentialing standard. That is, the knowledge creation, preservation and dissemination missions of the university as expressed and tested through teaching, must be the basis of the credentialing and related sociological mission. Further, that mission is best accomplished by the exercise of professional discretion of the academic heartland through teaching, assessment and counselling, rather than the application of standardised management controls suited to economically tasked and driven organisations. The normative dimension of the sociological mission relates to what is often referred to as the

“pastoral” mission of the university.\textsuperscript{916} That is, the caring and helping tradition of professional service. In the case of the university, it is the caring or psychological/ emotional investment of academics in the intellectual development of students, and the instilling of a passion for a discipline or area of specialisation.

The entrepreneurial economic and pastoral caring missions imposed by the regulatory framework on the university are in fundamental conflict. It is far from clear that any of these critical sociological missions should be secondary to the profit motives of private enterprise. At a most basic level, it must be queried how a university can discharge and advocate a public good of sharing professional expertise and knowledge, encouraging the expenditure of discretionary energy while extracting the maximum amount of economic resources from the student at the same time? Australian regulators’ efforts to displace knowledge norms in favour of economic norms have created a deep-seated normative conflict for the university as an institution.

The effort to divide phenomena both social and physical into a natural order aligned with a natural public-private ordering on which it is appropriate to develop social and economic policy, and to do so as if they were exclusive hard categories not touching each other fails to take account of the weaknesses of the models and the political nature of the issue. Attempting to make it appear a natural division suited to technical criteria masks the reality of the political nature to the decision and the need for debate which underlies regulatory decisions. Accordingly, a sharp public-private divide not only is not natural as economics would have it, but as poor theory is likely to create unhelpful, limited perspectives and ultimately likely to lead to recommendations setting a foundation for regulatory failure.

The discussion of the public nature of the good of higher education and the university by no means precludes private benefits. Indeed, the private benefits are manifold. Among these it is evident that the private good of education

\textsuperscript{916} Côté, J. E. and A. L. Allahar (2007). Ivory Tower Blues: A University System in Crisis. Toronto University of Toronto Press p. 41-44. For discussion and analysis, see Chapter 5 above
includes the advancement of personal knowledge, increased employment opportunities, higher status as one possesses a positional good, honour and all the associated benefits. Regulation should be designed to take account of these private goods as well.

As higher education scholar Pusser cautions, however, the university provides both significant social and economic goods with public and private aspects. These goods, he observes, are effectively impossible to disaggregate and measure. As a result, he argues it is imperative that all the outputs be put into any equation to avoid privatising the easily measurable, profitable goods while allowing the important public and social goods to whither. Regulation which allows this disaggregation and fails to adequately account for the value and importance of public goods will fail as a regulatory response to the risk presented in the organising problem—the creation, preservation and transmission of knowledge.

Effective regulation will require political consultation with the academic community. As Professor Newman writes:

> policy makers and academic leaders [must] engage in ... substantive discussion with each other about the nature of higher education [as a private economic good training for the workforce, or a public good contributing to the well being of society as a whole]. In the absence of such debate and of conscious planning…. The result is likely to be the loss to society of some of the attributes of higher education that are essential to a free and effective society.

Good regulation will take account of these issues in framing an appropriate, coherent organising problem and making an appropriate and coherent assignment in the public-private divide. The regulatory arrangements and instruments will provide flexibility to allow the university to shape itself to promote the knowledge objects that help achieve broad social, political and personal objects of both social and economic value. Recognising that there is a wide range of significant public, personal, social, political and economic goods that are

---


produced by the university derived from the academic profession, regulation must ensure that the core academic activities are protected, stimulated and allowed to operate without excessive focus and constraints arising from less relevant measures.

5. Preliminary considerations of Labor’s reforms under Prime Ministers Rudd and Gillard

The legislation to be enacted under the Labor government of former-Prime Minister Rudd and presumably taken forward by Prime Minister Gillard has not been released and all that is available at the time of writing this dissertation is the policy document. Accordingly, only the outline of the regulation is available. From the policy document, it appears that the complex organising problem identified by Labor continues the paths established by previous governments. Labor is not following the path without some reforms. For example, in contrast to the Liberal Government’s policy shaping in terms of economic exports comparable to coal and steel, the Labor government construes the policy in terms of nation building which is used to justify significant funding increases. By doing so the Labor government is reducing some of the pressure on the university with respect to generating income. Reducing pressure allows the university to engage in lexical or normative re-ordering, returning knowledge closer to the primary position it requires. If the university engages in this lexical re-ordering, a reduction in systemic incoherence, should translate into better institutions (i.e. more coherent) and hence, more likely to be effective in the pursuit of its knowledge norms.

The Labor government also plans to introduce some type of voucher system. This system too is a change from preceding governments. It may be argued that doing so improves coherence between university course offerings and society’s interests—at least with respect to students. However, such a system not only fails to represent society and long term interests, it also creates incoherence with

920 Ibid “The Vision” identifies all of the following as policy objects: jobs, opportunity, economic growth, equitable access, , p. 7 and one of the government’s three “nation building” projects (Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund), p. 28 established by Nation-building Funds Act 2008 (Cth).
respect to the broader knowledge missions. Those missions are not limited to the knowledge fashionable at the moment nor to the commercial interests of big business. Further, as economists have demonstrated, (see Chapter 4) seeking to derive collective utility functions by aggregating individual preferences is impossible. Rather, what is required is political effort to identify and enact collective preferences which will ensure the long term survival of society. Instead, the voucher system with its increased emphasis on individual students’ private preferences will put additional pressure on the normative ordering preferring short term individual interests over long term collective interests.\textsuperscript{921}

The unknown core of the Labor regulatory regime is the new agency—the Tertiary Education Quality and Standards Agency “TEQSA.” As noted in Chapter 3, it will have a broad mandate, setting standards, evaluating compliance, and punishing the non-compliant. TEQSA appears to be an effort to solve the difficult issue of ensuring quality in the provision of services as well as providing a means of regulating by information. Problematically, the evidence is that students make poor use of such information. Further, there does not appear to be a consensus on what the quality issue are, let alone their causes. The Bradley Review does make clear that one cause of the problems is the poor level of funding.\textsuperscript{922}

Further, the academic standard TEQSA is set to create and enforce may introduce institutional incoherence if that standard is at odds with professional norms of the academic profession—a potentially serious incoherence as seen, for example, in Jiang’s study cited above.\textsuperscript{923} Further, this agency’s mandate appears incoherent with the policy of “respect, trust and shared goals”\textsuperscript{924} which is at the basis of the new mission based compacts—that is it appears to create external policy incoherence.

Although Labor government policy seeks to shift government-university relations to mutual trust and respect, presumably allowing university organisations more autonomy to determine and pursue their own missions, it is unclear how either the compacts or TEQSA will do so. If government continues the control exercised under the Institutional Grant Scheme it seems unlikely there will be any significant change; however, if it does, the government creates the potential for the university to increase coherence at least at the level of institution-organisation-administration.

6. Conclusion

The dissertation asks and answers a large question: “Is the regulation of the university good regulation?” As noted, the regulatory framework in Australia has produced contradictory outcomes. For a neoliberal, the measure of a policy is the extent to which the public sphere is dismantled and private economic opportunity created. Applying that standard to the regulation, it is clear that individual economic interests are allowed to penetrate deeply and that revenue generation has increased substantially. Thus, from this perspective, the regulatory framework has been a success. By all other measures, however, the Australian university institution and its university organisations are in a poor condition in terms of reputation, finance, capacity, academic profession and organisational coordination and institutional cooperation. The neoliberal model of the university is incoherent with the institution and so its regulation is predictably incoherent.

Federal government funding has had a variety of positive and negative outcomes. On the positive side, the increase in the size of the institution affording an increasingly large number of Australians to participate in university education has been a significant positive. It has been a positive socially, in providing avenues for social mobility for an increasing proportion of the population to improve their circumstances. It has been positive economically allowing Australia to improve its goods and services, improving the standard of living and the knowledge not only of the nation but of the globe.
On the negative side, the Federal government has used its power to force changes that are incoherent or at best incompatible with the better functioning of the institution and its organisations. These effects can be seen in such things as decreased quality of education, decreased variety in offerings, and the damage resulting to the organisations resulting from a normative preference for private economic goods. The legal framework in which university corporations discharge legally mandated objects does not shelter from governmental interference because the university corporations are coerced by economic instruments employed by the Federal government to exercise their legal autonomy.

The public functions of teaching and research are entrenched by law and granted status over the private benefits. The need for revenue generation imposed by the government too transforms the university’s focus. Certainly, university corporations must and do engage in a number of non-knowledge activities; however, the purpose and focus of university activities and attentions must stay knowledge oriented. Moving to financial speculation as recent developments indicate,\(^\text{925}\) diverts attention from the legal public mandate.

The regulatory framework for the institution of the Australian university forces a shift in its objects to revenue generation disrupting the public good mission and academic norms which rank scholarship, integrity and transformation ahead of economic values. This shift in normative ordering is not a minor matter. Dislodging this ordering is dislodging the foundation of the institution of the university, dislodging the intrinsic, public value placed upon knowledge. It is not that the university must never change or must be permanently funded without limit or only funded publicly. Rather, it is that a decision to dismantle and shift the normative foundation of such an institution that has successfully adapted and responded to one of society’s increasingly critical organising problems and which institution has evolved over the course of nearly a millennium in doing so, such shifting of foundational norms must be done with great caution. The

\(^{925}\) ABC News (2008) "Financial crisis hits university coffers."

If the organising problem to which the university responds no longer exists, the university has lost its function—a case not made by any political party. If the regulatory response, however, changes merely as a consequence of ideology, the decision to dismantle and shift the normative foundations of the institution requires public debate and caution.

The normative change under neoliberalism marks an important change in the university’s relationship vis-à-vis the government. It has been described as a shift from the government as the “patron of the university to the government as a consumer of higher education services” \footnote{McWilliam, E A. Lawson, et al. (2005). "Silly, soft and otherwise suspect: Doctoral education as risky business." \textit{Australian Journal of Education} 49(2): 214-227. citing McWilliam, E. and P. O’Brien (1999). “Jonathan Livingstone, I Presume: Teaching as a ‘High-Flying’ Profession.” \textit{Asia-Pacific Journal of Teacher Education} 27: 95-105.} and has resulted in a change in the mission of the university. Whereas the university formerly functioned as an institution of embedded liberalism in the welfare state, the shift to the neoliberalism necessitated an attack on the university among other institutions, to change how societal organization is perceived. As noted in chapter 3 the notion of “public good” requires a site for debate about a society’s direction, projects and prospects—fundamental in a democratic society\footnote{Mansbridge, J. (1998). On the Contested Nature of the Public Good. \textit{Private Action and the Public Good}. W. Powell and E. Clemens. Cambridge, Yale University Press.}—and the university is the ideal site for this contestation.

The regulatory framework and resulting normative re-ordering has forced the university to focus more on vocational, business orientated training and away from critical thought. Whereas the university traditionally promoted a broader vision of humanity, a multitude of perspectives and brought a critical perspective to political debate, the re-orientated university is less able to do so.
In terms of the knowledge missions of creation, preservation and transmission the better approach appears to remove decisions about knowledge away from the political arena and allow the problems to remain with knowledge specialists, the academics and the students who choose to study particular areas and types of knowledge in the organisational, legal form of the statutory corporation. The current regulatory framework in which there is no independent advisory body limits Parliament’s ability to understand the university and its public mission.

It is not that the regulatory framework precludes the public institutional mission of the university. On the contrary, for example, section 4A(d) of the *Melbourne University Act 1958* (Vic) reads: “[the university is to dedicated to] (i) enrich... cultural and community life; (ii) elevating public awareness of educational, scientific and artistic developments; (iii) promoting critical informed intellectual discourse and public debate within the University and in the wider society.”*929* These objects clearly refer to public good. They are focused on the community, not on individual advancement at the expense of or without regard to the community. They identify the dissemination of knowledge about the development of humanity’s higher faculties—of thought, understanding and emotion—as being a key objectives of the university.

The normative stresses currently on the university have led some to state that it is in a state of crisis.*930* This normative pressure, combined with the political pressure of answering different and conflicting demands of many stakeholders such as government, funding agencies, students, taxpayers, and academics may

---

*929* *Melbourne University Act 1958* (Cth) s 4A(d)
lead to its undoing as it is forced into a normative re-ordering, surrendering its foundational institutional public knowledge objectives.  

The regulation of the university is a complex affair. It requires a consensus on objects, a creation of appropriate policy, selection of appropriate instruments and an accountability to match. The Australian university has both waxed and waned in the environment created by politicians, perhaps more so than abroad. What is clear is that the current system is poorly conceived, incoherent, leading to dysfunction, and in conflict with the overall institution of the university. Ultimately, it is a recipe for regulatory failure. Perhaps the relationship between the university and society has been put best by Professor Perkin, the renowned scholar of the university:

No institution so flexible or so productive of new knowledge and adaptable experts has yet been discovered. Yet this flexibility and productivity still depend—as in the days of Abelard, Aquinas, Luther, Galileo, Newton, Descartes, Adam Smith, Kant, Humboldt and Einstein—on the academic freedom to teach and to pursue knowledge wherever it can be found. If the overbearing state, the all-mighty corporation or the heresy hunting churches crush that freedom, it may well kill the goose that lays the golden eggs. Without the ability to protect themselves from the threat of these powerful forces, the university may well suffer the fate of those institutions in the non-European world that never enjoyed the autonomy and freedom that the medieval division between church and state unintentionally bequeathed to academe.

It is hoped that Australian regulators are able to create the space necessary for the university to contribute in the future as it has in the past.

---

Bibliography

Legislation

An Act to incorporate and endow the University of Sydney 1850 (NSW).
Australian National University Act 1991 (Cth).
Commonwealth of Australia Constitution Act 1901 (Cth).
Higher Education Support Act 2003 (Cth).
Higher Education Funding Act 1988 (Cth).
Judicial Review Act 1991 (Qld).
Melbourne University Act 1958 (Vic).
Nation-building Funds Act 2008 (Cth).
National Security Act 1943 (Cth).
States Grant (Universities) 1950 (Cth).
University of Tasmania Act 1992 (Tas).
University of Ballarat Act 1993 (Vic).
University of Queensland 1998 (Qld).
University of the Sunshine Coast Act 1998 (Qld).
University of Adelaide Act 1971 (SA).
University of Sydney Act 1989 (NSW).
University of Western Australia Act 1911 (WA).

Foreign Legislation


Legislative Instruments and Parliamentary Debates

Other Grants Guidelines (Education) 2008 Commonwealth of Australia.
Other Grants Guidelines (Research) 2009 Commonwealth of Australia.

NSW, Parliamentary Debates, Legislative Council and Legislative Assembly.
Commonwealth, Parliamentary Debates, House of Representatives and Senate.

Cases

Australian National University v. Lewins (1996) 68 FCR 87
Carltona Ltd v Commissioner of Works [1943] 2 All ER 560.
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.
Ex parte Forster; Re University of Sydney (1964) 63 SR (NSW) 723.
Martin v Delaware Law School (1989) 884 F.2d, 3rd Cir.1384.
R v Aston University Senate ex parte Roffey (1969) 2 WLR 1418.
R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Professional Engineers' Association (1959) 107 CLR 208
R v University of Sydney [1943] 67 CLR 95.
South Australia v Commonwealth (Uniform Tax Case) (1942) 65 CLR 373.
University of Western Australia v Gray (2009) 259 ALR 224.
University of Western Australia v Gray (No 20) (2009) 246 ALR 603.
Victoria v Commonwealth (Second Uniform Tax Case) (1957) 99 CLR 575.

Books, Articles and Reports


Davis, R. The Unbalancing of Australian Universities. Wollongong: 83.


O'Meara, B. R. (2002). The recruitment and selection of Vice-Chancellors for Australian universities. Melbourne, Deakin University. PhD.


Senate Employment Workplace Relations Small Business and Education References Committee (2001). *Universities in Crisis: Report of the Committee of Inquiry into the capacity of public universities to meet Australia’s higher education needs*.


Thompson, J., P. Baird, et al. Report of the Committee of Inquiry on the Case Involving Dr. Nancy Olivieri, the Hospital for Sick Children, the University of Toronto, and Apotex Inc.: 527.


