

THE LEGAL CAPACITY AND DECISION-MAKING WITHIN AUSTRALIAN PUBLIC UNIVERSITIES*

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ABSTRACT

Australian universities generally promote and undertake activities including scholarship, free inquiry, and research and provide teaching and courses of studies in higher education. They also exercise public and commercial functions to promote their main objects of teaching and research. Universities have significant real estate and property portfolios, they enter into contracts, own copyright and, when involved in legal disputes, have a legal right to sue or be sued in the university's name. Universities can do all of these things because they have legal capacity to do so. The legal capacity of universities is generally accepted, however, the source of such capacity and the meaning of 'legal capacity' do not appear to be well-understood, and the purpose of this article is to shed some light on this area. To this end, the aims of this article are to consider, firstly, what is meant by the term 'legal capacity'; secondly, to examine legal capacity in the university context; and thirdly, to assess the application of ultra vires to the legal capacities of Australian public universities.

This article concludes that a statutory statement of objects or functions in a university's enabling legislation is the dominant determinant of a university's legal capacity. Australian public universities, as statutory corporations, are each caught by the well-settled ultra vires doctrine. Members of a university governing body and other university decision-makers must use their university's legislation as the touchstone in determining all university matters and there must be a clearly identifiable nexus with the powers, objects and functions as provided by their university's legislation.

I INTRODUCTION

The legal status of a university can be verified through its enabling legislation and through such things as its status on government registers — for example, a university's charitable status can be verified through its registration with the Australian Charities and Not-for Profits Commission ('ACNC'). Having a recognised legal status will enable legal capacity to engage in activities and enter into legal relations with other recognised legal entities, for example, to enter into contracts.

While Australian universities are separate legal entities with legal rights and duties, there is a dearth of research in this area and the aims of this article are threefold: firstly, to shed light on the broader question concerning what is meant by the term 'legal capacity'; secondly, to examine legal capacity in the context of Australian public

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universities; and thirdly, to assess the limits of a university's legal capacity due to the doctrine of ultra vires.

Australian public universities are corporate creatures of statute — they are created by parliaments as statutory corporations and, as such, are established, enabled and governed by legislation. Each Australian public university is created by their enabling legislation as a 'body corporate', typically by a provision simply stating 'the University is a body corporate under the name of the [name] University'.¹ The corporate legal status of public universities enables parliaments to lay down their intentions for universities to advance the public good through, for example, providing teaching and learning of higher education and the development and dissemination of knowledge through research.

Australian public universities can only act for the purposes stated in the objects and functions clauses of their statutory constitution, which will define and limit the activities a university can engage with. The members of the university's governing body are only authorised to act through the statutory powers conferred on them by the university's enabling legislation and must exercise those powers as defined by the legislation. In this sense, the legal capacity of public universities is determined by their enabling legislation. Legal capacity as a term is often used but is not often explained. So, what does the concept 'legal capacity' mean and how does it relate to universities?

II LEGAL CAPACITY – WHAT IS IT?

In a broad sense, the term legal capacity encompasses three interconnected constituent elements: firstly, the recognition of legal personhood; secondly, the possession of legally recognised rights and duties; and thirdly, the capacity to determine activities in the exercise of those legal rights.² The existence and recognition of legal capacity is vital to a person's (natural or juridical) self-determination. In the case of Australian public universities, it is fundamental to their freedom and independence, especially from interference from the state and essential to autonomy in self-governance and self-determination in decision-making.

To assist with an understanding of legal personhood and legal capacity a brief statement should be made about some terminology. Legal persons are either divided into natural persons, or artificial.³ According to Blackstone:

¹ See, eg, *Southern Cross University Act 1993* (NSW) s 5. Similar words are used in all New South Wales public universities.

² See generally, Legal Capacity Taskforce, International Disability Alliance, *Legal Opinion on Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)* (21 June 2008) <www.leeds.ac.uk/disability-studies/.../LegalOpinion_Art12_FINAL.pdf>; United Nations, Office of the High Commissioner for Human Rights ('OHCHR'), 'Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights - Legal capacity' (August 2005) UN Doc A/AC.265/2005/CRP.5.

³ W Blackstone, *Commentaries on the Laws of England*, Vol 1 Chapter 1 (Clarendon Press, 1765).

Natural persons are such as the God of nature formed us: artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.⁴

In the ordinary sense of the word, a ‘person’ is:

any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man (sic). Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance.⁵

‘Personality’ means ‘[t]he legal status of one regarded by the law as a person; the legal conception by which the law regards a human being or an artificial entity as a person – also termed “legal personality”’.⁶

‘Legal personality’ is understood to mean, ‘the particular device by which the law creates or recognises units to which it ascribes certain powers and capacities’.⁷

The ordinary meaning of ‘legal capacity’ is ‘a person’s capability and power under law to engage in a particular undertaking or transaction or to maintain a particular status or relationship with another’.⁸

As noted by Blackstone, not all legal persons are human and the law is able to recognise other things as legal persons.⁹ In *Bank of NSW*, Dixon J said ‘[i]n other legal systems an abstraction or even an inanimate physical thing has been made an artificial person as the object of rights and duties’.¹⁰

Similar to Blackstone’s principles, Maitland gave a brief summary of recognised legal actors in 1900 that ‘[p]ersons are either natural or artificial. The only natural persons are men (sic). The only artificial persons are corporations. Corporations are either aggregate or sole.’¹¹

On reviewing the above statement, the first sentence is a universally sound statement that encompasses all within the given dichotomy; the second sentence no longer reflects accepted language and should read ‘only natural persons are individuals’, or perhaps

⁴ Ibid.

⁵ Bryan A. Garner (ed) *Black’s Law Dictionary* (West Group, 7th ed, 1999) 1162, cited in OHCHR (n 2) [11].

⁶ Ibid.

⁷ Ibid.

⁸ *Webster’s New Millennium Dictionary of English*, Preview Edition (Lexico Publishing Group, 2003–2005), available at www.dictionary.com, cited in OHCHR (n 2) [19].

⁹ *Re Body Corporate, Villa Edgewater CTS 23092 and Commissioner of Taxation* (2004) 55 ATR 1162, 1164 [12] (Senior Member McCabe), citing *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (Dixon J). Juristic persons are usually body corporates but note, the Privy Council, recognised a stone idol of a household god as a juristic person – with its own guardian – (the shebait); see Judicial Committee of the Privy Council in *Pramatha Nath Mullick v Pradyumna Kumar Mullick* (1925) LR 52 Ind App 245 cited in *Re Body Corporate, Villa Edgewater CTS 23092 and Commissioner of Taxation* (2004) 55 ATR 1162, 1164–5 [13] (Senior Member McCabe).

¹⁰ *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 361 (Dixon J).

¹¹ Maitland, ‘The Corporation Sole’ (1900) 16 *Law Quarterly Review* 335, 335 cited in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, 192 [52] (Gageler J).

humans. This would expand the meaning of natural persons to include all genders of all ages, including adults and children. The third sentence is now also out of date. Corporations have been categorised as either corporate aggregate or corporation sole for at least the past five hundred years. However, a body corporate need not have incorporators and parliaments can create a juristic person without reference to natural persons¹² and a non-corporate entity with all the capacity and powers of a corporation can be deemed a corporation.¹³

It is generally accepted that the concept ‘legal capacity’ involves ‘the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights’.¹⁴

A recognised legal actor is said to have legal personality which is a prerequisite to legal capacity. The recognition that an entity as a legal actor within a legal system implies the legal actor has rights and duties, but the capacity to exercise those rights and duties can give rise to difficulties. The term ‘legal capacity’ implies that a legal person has both the existence of rights and the enforceable ability to exercise those rights. In this sense, recognised rights and duties are inherent in having capacity; for example, the capacity to exercise the rights to enter into and enforce contractual obligations.¹⁵

The issue of legal capacity becomes very important where a person is seen to have no or limited legal capacity. Historically, law has not provided all individuals with legal capacity; for example, under Roman law, slaves were possessions and degraded to being legal objects rather than legal subjects or legal persons, and deprived of all legal rights.¹⁶

¹² *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 361 (Dixon J).

¹³ In the context of a ‘constitutional corporation’ see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171. In this case, the HCA held an entity created as ‘not a body corporate’ under s 6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld) was a trading corporation.

¹⁴ Legal Capacity Taskforce, International Disability Alliance (n 2).

¹⁵ OHCHR (n 2) [20].

¹⁶ The owner was said to have a *jus vitae ac necis* (power of life and death); OHCHR (n 2) [6], citing S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 299.

Under the common law, legal capacity of individuals¹⁷ has been traditionally denied to alien enemies,¹⁸ convicts,¹⁹ infants,²⁰ lunatics²¹ and, prior to 1882, married women.²²

Legal capacity in contemporary times may also be subject to restrictions or additional requirements, such as: a minimum age; unsoundness of mind arising from defect of intelligence;²³ mental derangement causing incapacity;²⁴ or mental capacity to understand the meaning of one's actions and their consequences. Examples of areas where law requires specific capacities include contractual capacity, matrimonial capacity, testamentary capacity,²⁵ capacity to own and administer property and capacity to bring claims before courts.²⁶

Persons with legal capacity are 'basic actors'²⁷ in our legal system, for they are the bearers of rights and obligations. Generally, the law recognises sui juris individuals as persons with legal personality with civil, political and legal rights. Sui juris individuals, being natural persons — above the age of 18 years, of sound mind and not bankrupt — are legal persons who generally have broad capacities to enter into legal relationships, exercise rights and incur obligations.²⁸

As it applies to human persons, these sentiments are reflected in Article 6 of the *Universal Declaration of Human Rights*: 'everyone has the right to recognition everywhere as a person before the law'.²⁹

¹⁷ For example, the legal capacity to enter into contractual relations, see Robert Campbell, *Principles of English Law Founded on Blackstone's Commentaries* (Stevens and Sons, 1907) 329.

¹⁸ This term refers to persons subject to a sovereign actually at war with the sovereign of this country, who are, on grounds of public policy, deemed incapable of contracting with British subjects: Campbell (n 19) 329.

¹⁹ Convict is defined by the *Forfeiture Act, 1870* (33 & 34 Vict. c. 23) s 6, as 'a person against whom, after the passing of the Act, judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony': Campbell (n 19) 329.

²⁰ Note, at common law, a contract with an infant (under twenty-one years of age) is voidable; that is to say, it is in the option of the infant to make void the contract: Campbell (n 19) 329.

²¹ Note, a contract of a lunatic is, like that of an infant at common law, generally voidable. There is, however, no hard-and-fast rule by which the nature and degree of the unsoundness of mind to avoid a contract can be fixed; insane delusion as to enter into the subject-matter so that the person is incompetent to manage his affairs in respect of the matter in question: *Jenkins v Morris* (CA 1880), 14 Ch. D. 674. See, Campbell (n 19) 331.

²² *Married Women's Property Acts, 1882 and 1893*. At common law a married woman could not bind herself by contract. The creation, however, of a separate estate by the Court of Chancery, that is to say, what is called her separate estate in 'equity' was necessarily accompanied by a contractual capacity: Campbell (n 19) 331.

²³ *Donato v Mangravite; Estate of Donato* [2005] NSWSC 488, [29]–[30] (Burchett AJ).

²⁴ *Banks v Goodfellow* (1870) LR 5 QB 549 566 (Cockburn CJ), cited in *Szabo v Battye* [2006] NSWSC 1351 [60] (Biscoe AJ).

²⁵ See *Szabo v Battye* [2006] NSWSC 1351 [67] (Biscoe AJ); *Banks v Goodfellow* (1870) LR 5 QB 549, 565 (Cockburn CJ) approved by the High Court in *Bailey v Bailey* (1924) 34 CLR 558.

²⁶ OHCHR (n 2) [25].

²⁷ *Re Body Corporate, Villa Edgewater CTS 23092 and Commissioner of Taxation* (2004) 55 ATR 1162, 1164 [11]–[12] (Senior Member McCabe).

²⁸ Ibid.

²⁹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 3 May 2018] Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The Universal Declaration is available

However, recognition as a legal person alone does not automatically establish the extent of rights and obligations, but simply identifies that the person could have rights and obligations and be the object of legal relationships.³⁰ The mere recognition of legal capacity does not necessarily translate to broad enforceable rights. Legal capacity, in its broad sense, is the recognition of persons as bearers of legal rights and obligations, which are crucial, especially to the natural person, to individual liberty, freedoms and essentially dignity.³¹ More generally all legal persons, including bodies corporate (for example, universities) — have an inherent legal capacity, unless limited by law, to exercise rights and duties including: the legal capacity to engage in undertakings or transactions, enter into legal relations, including contractual relations; and establish and enforce those rights and duties by a legal entity's control or conduct.³²

Kelsen observed that the legal concept 'person' is a juristic construction, and the juristic person is totally different from the concept 'man' (sic) or 'human' referring to the natural person but concedes that traditional jurisprudence was inclined to concede that the so-called physical person, or natural person, is in truth a juristic person.³³ This, no doubt, coincides with the philosophical constructs in law, but the general curial or technical approach is to separate the 'natural person', in human form, as an individual, from the unnatural person, as the juristic person, in the corporate form. The typical juristic person is, as identified by Kelsen, a corporation, which includes universities. Corporate personhood is rooted in legal capacity. The legal capacity of the corporation is separate from the legal capacity of the individual members of the corporation.³⁴ Kelsen explains:

When one describes the situation by saying that the corporation as a juristic person enters into legal transactions, makes contracts, brings lawsuits, and so on, that the corporation as a juristic person has duties and rights, because the legal order imposes upon the corporation, as a juristic person, duties and confers rights upon it, all these statements are obviously only figures of speech. It cannot be seriously denied that actions and forbearances can only be actions and forbearances of a human being. When one speaks of actions and forbearances of a juristic person, it must be actions and forbearances of human beings which are involved.... They are actions of ...individuals who act as organs of the juristic person.³⁵

There are difficulties for law in dealing with a corporation acting as a person and the corporation as the subject of legal capacity — that is, the subject of legal duties and rights. The problem is in the legal order granting duties and rights to the juristic person, for example a university, for the conduct of the individual human beings, for example university governors, and determining when the duties and rights are those of the

in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights.

³⁰ OHCHR (n 2) [34].

³¹ Ibid [6], citing F. Volio, *Legal Personality, Privacy, and the Family*, in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 186.

³² OHCHR (n 2) [9].

³³ Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945) 96.

³⁴ The legal principle that a corporation is a separate legal entity with legal personality was established in *Salomon v Salomon & Co* [1897] AC 22.

³⁵ See generally Kelsen (n 33) 96.

individual or those of the juristic person — for they are not the same, as a legal consequence, but are the result of the same conduct. For lawyers, the solution to identifying which person, natural or juristic, is the recipient of the duties and rights, is found in the governing rules of the corporation. In the context of Australian public universities, it is found in the enabling legislation. Provided the individual human actor is acting in accordance with the special governing rules of the juristic corporate person (university), the individual (university governor) will be acting as an organ (governing body) or agent of the corporation (university) and the duties and rights will be that of the corporation (university).³⁶ This applies in full to a university, for the university is a corporation and as an artificial entity, relies on humans, for example university governing body, as its agent to exercise its rights, duties and obligations.

III AUSTRALIAN PUBLIC UNIVERSITIES AND LEGAL CAPACITY

Australian public universities are creatures wholly of statute³⁷ and unlike the older universities in the United Kingdom, are not created by Royal Charter³⁸ but are statutory corporations. The words ‘statutory corporations’ speak for themselves and simply mean a body corporate which is created by statute and whose legal capacities, objects, functions and powers are conferred by statute.³⁹ Each university in Australia is constituted as a body corporate and endowed with legal capacity by statute; and, as such, are each a statutory corporation within the ordinary meaning of the term.⁴⁰ Universities are created by legislation as bodies corporate but are a special species of corporations, not created as common law corporations, but created as statutory corporations and bestowed qualities that the particular enabling statute creating it so provides. Most universities provide for the creation and dissemination of knowledge and the provision of higher education for the benefit of a particular community and or the broader public. In determining what this species of statutory entity is capable of, one must look at its specific objects, functions and powers stated in the enabling legislation.

As stated previously, Australian public universities are ‘statutory creatures’ and as we have long been told ‘to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this...creature’.⁴¹ An Australian public university, like other statutory corporations, has only the special

³⁶ Ibid 97–8.

³⁷ *Griffith University v Tang* (2005) 221 CLR 99, 114 [33] (Gummow, Callinan and Heydon JJ). While the judgment was specifically referring to Griffith University, Queensland, this observation uniformly applies to all Australian public universities created by their own special legislation. Note Australian Catholic University is a public university established under the general Corporations legislation, originally the Victorian corporate legislation, but see now *Corporations Act 2001* (Cth).

³⁸ *R v Aston University Senate, Ex parte Roffey* [1969] 2 QB 538, 543 cited in *Griffith University v Tang* (2005) 221 CLR 99, 114 [33] (Gummow, Callinan and Heydon JJ).

³⁹ *Construction, Forestry, Mining and Energy Union v CSBP Limited* [2012] FCAFC 48 [52] (Keane CJ, Siopis & Rares JJ) re submission made and accepted by the Court.

⁴⁰ See, eg, *Construction, Forestry, Mining and Energy Union v CSBP Limited* [2012] FCAFC 48 [52] (Keane CJ, Siopis & Rares JJ).

⁴¹ *Baroness Wenlock v The River Dee Company* (1883) 36 ChD 674n (685) (Bowen LJ) cited in *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 415 [69] (Barrett J).

qualities endowed by the enabling legislation, or as stated by the oft quoted words of Bowen LJ:

Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do... It... can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had.⁴²

The legal capacity of a public university will typically be determined by its body corporate status and by limits to its capacity, specified within the objects and or functions of its enabling legislation. For example, the enabling legislation of public universities in South Australia, empower their public universities as bodies corporate 'invested with full juristic capacity.'⁴³ The 'full juristic capacity' of a body corporate, includes:

perpetual succession, the right to have a corporate seal, the right to take proceedings and be proceeded against in its corporate name and the ability to deal with property.⁴⁴ In addition, to enable the exercise of its statutory objects and or functions, a body corporate has the right to do and suffer all other things that bodies corporate may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its objects and or functions.⁴⁵

Public universities in the State of Victoria are created as bodies politic and corporate with perpetual succession; and may sue and be sued in its corporate name; and may acquire, hold and dispose of real and personal property. The university legislation in Victoria empowers their public university to do and suffer all acts and things that a body corporate may by law do and suffer, including entering into contracts; fixing fees and charges, employ and terminate employment of persons, (subject to guidelines) be a member of or form a company, association, trust, partnership or other joint venture.⁴⁶

⁴² Ibid.

⁴³ *University of Adelaide Act 1971* (SA) s 4; *Flinders University Act 1966* (SA) s 3; *University of South Australia Act 1990* (SA) s 4.

⁴⁴ Re the statutory corporation holding all real and personal property whatsoever vested in them; see *Government Savings Bank v Temora Municipal Council* (1919) 19 SR (NSW) 111, cited in *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 662 (Dixon CJ, Fullagar, Menzies and Windeyer JJ).

⁴⁵ In the State of New South Wales see *Interpretation Act 1987* (NSW) s 50(1). Not all jurisdictions have comparable provisions within their interpretation legislation. The relevant Act in each jurisdiction is: *Acts Interpretation Act 1901* (Cth): no reference to statutory corporation; *Legislation Act 2001* (ACT): a statutory corporation is included in the definition of 'body', at Sch 1, Pt 1; *Interpretation Act 1987* (NSW) s 50; *Interpretation Act* (NT): the term statutory corporation is defined in s 17; *Acts Interpretation Act 1954* (Qld): no reference to statutory corporation; *Acts Interpretation Act 1915* (SA): no reference to statutory corporation; *Acts Interpretation Act 1931* (Tas): no reference to statutory corporation but re statutory bodies, see ss 23AB and 23C, statutory authority s 40; *Interpretation of Legislation Act 1984* (Vic): no reference to statutory corporation; *Interpretation Act 1984* (WA): no reference to statutory corporation but re statutory bodies see ss 50, 54, 57.

⁴⁶ See Section 6 in the enabling legislation of the public universities in the State of Victoria:

The objects, functions and powers, as specified in each university legislation determine the limits on what they can do. Members of governing bodies and other university decision makers must use their university's legislation as the touchstone in determining what is in the best interests of the university. The university's vitality, or what it can do, is restricted by the terms of the university's legislation. Australian public universities cannot go beyond their legal capacities, as provided by their enabling legislation. Typically, a university's enabling legislation limits the powers of university governors to acting for and on behalf of the university. This is so especially when university governors are controlling, managing and monitoring the affairs of the university, in the exercise of their functions to best promote the objects and interests of their university.⁴⁷ All matters concerning the university must have a clearly identifiable nexus with the powers and functions as provided by the university's legislation.

Universities Australia and the University Chancellors Council have developed a code of best practice for the governance of public universities ('the Code') and encourages Australian universities to adopt this code to best meet university governance challenges.⁴⁸ The Code operates in conjunction with each university's enabling legislation and recommends that the objects and or functions should be specified in the university's enabling legislation.⁴⁹ However, there is no uniform approach to enabling the legal capacities to these universities. Some university enabling legislation adopts a classic approach to enabling statutory corporations with objects, functions and powers; other universities do not identify primary objects but bestow statutory functions and powers; and one, the University of Western Australia, does not provide express statutory objects or functions but does confer statutory powers on the university.

A university's statutory objects are synonymous with its statutory purposes⁵⁰ and in the case of a public university, the university's public purposes. The university's statutory objects are pursued by the performing the statutory functions. The statutory functions are performed by the university exercising its powers conferred on it by its enabling legislation. However, a university is only able to exercise its powers as a means of pursuing its objects by performing its statutory functions.⁵¹

The somewhat diverse approach by Australian Commonwealth, State and Territory parliaments in enabling their public universities are as follows:

Federation University Australia Act 2010; La Trobe University Act 2009; Monash University Act 2009; Royal Melbourne Institute of Technology Act 2010; Swinburne University of Technology Act 2010; University of Melbourne Act 2009; Victoria University Act 2010; and Deakin University Act 2009.

⁴⁷ For example, *The Functions of Council: Southern Cross University Act 1993* (NSW) s 16.

⁴⁸ Universities Australia and the University Chancellors Council,

Voluntary Code of Best Practice for the Governance of Australian Public Universities, May 2018, <<https://www.universitiesaustralia.edu.au/ArticleDocuments/326/Voluntary%20Code%20of%20Best%20Practice%20for%20the%20Governance%20of%20Australian%20Universities%20-%20May%202018.pdf.aspx>>

⁴⁹ *Ibid* 1–2.

⁵⁰ *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 422 [94] (Barrett J).

⁵¹ *Ibid* 424 [103] (Barrett J).

Public universities in the State of New South Wales have uniform statutory objects and functions.⁵² The public universities in the State of Victoria have uniform statutory objects⁵³ but these objects differ from those provided for in universities in New South Wales.

Public universities in the State of South Australia are not uniform with the statutory objects and functions in their enabling legislation. The University of Adelaide has statutory objects but no express statutory functions.⁵⁴ Flinders University⁵⁵ and University of South Australia⁵⁶ have no express statutory objects and have statutory functions, but they are not uniform.

The enabling legislation for public universities in the State of Queensland are uniform in their statutory functions.⁵⁷ The Queensland universities do not have express statutory objects. The Territory universities, the University of Canberra in the Australian Capital Territory⁵⁸ jurisdiction and Charles Darwin University⁵⁹ in the Northern Territory, each have their own statutory functions but do not have express statutory objects. The sole university in the Commonwealth jurisdiction is the Australian National University (ANU).⁶⁰ The ANU does not have express statutory objects but has statutory functions. The same can be said for the sole university in the State of Tasmania, the University of Tasmania.⁶¹

In Western Australia, a varied approach is found. Two universities, Curtin University⁶² and Edith Cowan University,⁶³ have uniform statutory functions and no express objects; Murdoch University has separate statutory objects⁶⁴ and statutory functions⁶⁵ and the University of Western Australia (UWA) has neither express objects nor functions. The UWA is the only public university in Australia that does not have either express statutory objects or statutory functions. The decision by the Western Australian Parliament to create a university as a statutory corporation but

⁵² *Charles Sturt University Act 1989* (NSW) s 7; *Macquarie University Act 1989* (NSW) s 6; *Southern Cross University Act 1993* (NSW) s 6; *University of New England Act 1993* (NSW) s 6; *University of New South Wales Act 1989* (NSW) s 6; *University of Newcastle Act 1989* (NSW) s 6; *University of Sydney Act 1989* (NSW) s 6; *University of Technology Sydney Act 1989* (NSW) s 6; *University of Wollongong Act 1989* (NSW) s 6; *Western Sydney University Act 1997* (NSW) s 8.

⁵³ *Deakin University Act 2009* (Vic) s 5; *Federation University Australia Act 2010* (Vic) s 5; *La Trobe University Act 2009* (Vic) s 5; *Monash University Act 2009* (Vic) s 5; *Royal Melbourne Institute of Technology Act 2010* (Vic) s 5; *Swinburne University of Technology Act 2010* (Vic) s 5; *University of Melbourne Act 2009* (Vic) s 5; *Victoria University Act 2010* (Vic) s 5.

⁵⁴ *University of Adelaide Act 1971* (SA) s 4A.

⁵⁵ *Flinders University Act 1966* (SA) s 4.

⁵⁶ *University of South Australia Act 1990* (SA) s 5.

⁵⁷ *Central Queensland University Act 1998* (Qld) s 5; *Griffith University Act 1998* (Qld) s 5; *James Cook University Act 1997* (Qld) s 5; *Queensland University of Technology Act 1998* (Qld) s 5; *University of Queensland Act 1998* (Qld) s 5; *University of Southern Queensland Act 1998* (Qld) s 5; *University of the Sunshine Coast Act 1998* (Qld) s 5.

⁵⁸ *University of Canberra Act 1989* (ACT) s 6.

⁵⁹ *Charles Darwin University Act 2003* (NT) s 5.

⁶⁰ *Australian National University Act 1991* (Cth) s 5.

⁶¹ *University of Tasmania Act 1992* (Tas) s 5.

⁶² *Curtin University Act 1966* (WA) s 7.

⁶³ *Edith Cowan University Act 1984* (WA) s 7.

⁶⁴ *Murdoch University Act 1973* (WA) s 5.

⁶⁵ *Ibid* s 6.

not provide statutory objects or functions is not consistent with the modern approach to incorporating statutory corporations.

Before continuing, a brief comment should be made regarding the purpose or objective of the University of Western Australia, considering it is not provided with any express statutory objects or functions. The University came into being 100 years ago on February 16, 1911 with the passing of *University of Western Australia Act 1911* (WA).⁶⁶ The Western Australian Parliament has preserved part of the University's original statutory purpose by maintaining its original statutory Preamble, to provide for 'instruction in those practical arts and liberal studies which are needed to advance the prosperity and welfare of the people.'⁶⁷ While it may be beneficial for Parliament to specify statutory objects and or functions in university enabling legislation,⁶⁸ the purpose or object of the university can be construed from the university's enabling legislation read as a whole.⁶⁹ The Preamble to the University of Western Australia's enabling legislation⁷⁰ conferred on the university may be used⁷¹ to set the context in which the university's purpose and the purpose of the legislation is construed.⁷² In so doing, the primary purpose for the University of Western Australian could be construed as the advancement of education for the public benefit.

Universities as bodies corporate will be treated by the legal order as being legal actors with legal capacity. Australian parliaments have endowed their public universities with the status of juristic persons, that is artificial legal personalities and granted them with all the characteristics of a body corporate, specifically perpetual succession, common seal, authority to hold property in its corporate name, the capacity to enter into legal relations and the ability to sue and be sued in that name. While some universities are empowered with 'all the powers of an individual,'⁷³ others may do all acts that a body corporate may do. The university constituting legislation confers objects (public purposes), functions and powers upon public universities and empowers the university

⁶⁶ See University of Western Australia, 'Centenary celebration....A dinner date with history', *University News* (Web page) <<http://www.news.uwa.edu.au/201103233405/alumni/centenary-celebration-dinner-date-history>>; and William J Hancock, 'Presidential Address' (10th June 1919), *The Journal of the Royal Society of Western Australia* 13 <https://archive.org/stream/journalroyalsoc5roya/journalroyalsoc5roya_djvu.txt>.

⁶⁷ *University of Western Australia Act 1911* (WA).

⁶⁸ As noted in the Universities Australia and the University Chancellors Council (n 48).

⁶⁹ *Kathleen Investments (Aust.) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 130 (Barwick CJ); 138 (Gibbs J).

⁷⁰ Note the statutory powers conferred on the university may also be used, see eg, *University of Western Australia Act 1911* (WA) s 31 re power to make Statutes, for, inter alia, the promotion of teaching; holding of class, lectures and examinations; granting of scholarships and awards and the admission of students.

⁷¹ Re the Preamble, see *Singh v Minister for Immigration and Citizenship* (2012) 199 FCR 404, 421 [66] (Finn, Dowsett and Bennett JJ) referring to the use of a preamble to an act generally; see also *Wacando v The Commonwealth* (1981) 148 CLR 1, 23 where Mason J said the Preamble can be used to ascertain the meaning of the legislation.

⁷² *Singh v Minister for Immigration and Citizenship* (2012) 199 FCR 404, 420 [64] (Finn, Dowsett and Bennett JJ) where the Court noted *Acts Interpretation Act 1901* (Cth) s 15AA requires a construction of an Act that would promote the purpose or object underlying the Act.

⁷³ See for example, the public universities in Queensland: *Central Queensland University Act 1998* (Qld) s 6; *University of Queensland Act 1998* (Qld) s 6; *University of Southern Queensland Act 1998* (Qld) s 6; *University of the Sunshine Coast Act 1998* (Qld) s 6; *James Cook University Act 1997* (Qld) s 6.

to do certain things. However, the things a university can do are limited. The university enabling legislation limits the legal capacity of a university to that expressed or implied in its enabling legislation. The decision making and activities undertaken by a university must lie within the scope of its objects, functions and powers as expressed or implied in its constituting legislation.

IV AUSTRALIAN PUBLIC UNIVERSITIES AND THE ULTRA VIRES DOCTRINE

Corporate lawyers would be aware that the doctrine of ultra vires, as it relates to legal capacity, has essentially been abolished for companies registered under the *Corporations Act 2001* (Cth).⁷⁴ Companies registered under the *Corporations Act* have very broad legal capacity and powers of an individual and all the powers of a body corporate.⁷⁵ In addition to conferring broad legal capacity, the *Corporations Act 2001* (Cth) states that a company need not have objects in its constitution, but if it does, an act of a company that is contrary to any express restriction, prohibition or beyond any objects in the company's constitution is not invalid.⁷⁶ Most corporate entities conducting affairs on a day-to-day basis in Australia are registered under the *Corporations Act 2001* (Cth) and most people presume that the *ultra vires* doctrine has been abolished for all corporations. However, Australian public universities are not subject to provisions of the *Corporations Act 2001* (Cth)⁷⁷ and such a presumption is not warranted for corporations created by special legislation including Australian public universities.

The means by which a statutory corporation carries out its assigned purposes, objects, functions and powers were discussed in *Rail Signalling Services*, a case involving a body corporate created by special statute for public purposes.⁷⁸ A university, like other statutory corporations, relies upon natural persons to undertake its statutory objects and or functions by exercising their assigned powers. The natural persons that supply the 'corporate mind' and enable the university's activity are predominantly the members of the governing body acting collectively, and may include persons delegated with authority to do so. The following classic statement by Viscount Haldane, applies generally to corporation and provides focus to the discussion regarding universities as corporations in that:

a corporation is an abstraction, it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing

⁷⁴ See *Corporations Act 2001* (Cth) ss 124–5.

⁷⁵ *Corporations Act 2001* (Cth) s 124(1). See also *ACN 077 068 734 PTY LTD As Trustee For The E & C Unit Trust v Adelaide Cemeteries Authority & Anor* [2014] SASC 40 [19] (Blue J).

⁷⁶ *Corporations Act 2001* (Cth) s 125(1),(2). See also *ACN 077 068 734 PTY LTD As Trustee For The E & C Unit Trust v Adelaide Cemeteries Authority & Anor* [2014] SASC 40 [19] (Blue J).

⁷⁷ John Orr, 'Australian Corporate Universities and the Corporations Act' (2012) 17(2) *International Journal of Law & Education* 123.

⁷⁸ *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452 [49] (Vickery J).

mind and will of the corporation, the very ego and centre of the personality of the corporation.⁷⁹

Viscount Haldane's statement applies as much to universities as it does to any other corporation. University governing bodies are unable to bind their university to acts that are inconsistent with the explicit provisions of their governing legislation and to the extent of that inconsistency, such conduct would be invalid as being *ultra vires* the university.

The doctrine of *ultra vires* and its application in the university context are important considerations for university governance. A university is a corporation created by Parliament and 'like any other corporation, is subject to the general law of corporations to the extent that its incorporating statute does not make provision.'⁸⁰ Hence, a public university's enabling Act is 'only...part of a broader more complex environment of regulation.'⁸¹ Universities, their governing bodies and their agents need to examine whether activities undertaken for a purpose beyond those provided for in the university's establishing statute would invoke the *ultra vires* doctrine and, if so, what the legal consequences would be.

A court of law would not uphold an action undertaken by a university which was contrary to its enabling legislation or some other statutory provision. In addition, a court would not lend its support to enforce a contractual agreement entered into by a university that involved a breach of its statutory duties.⁸² Nor would a court uphold an attempt to oust the statutory jurisdiction of the Court;⁸³ nor conduct that was contrary to other legislation, such as the *Credit Acts*,⁸⁴ nor conduct or activity that would otherwise constitute an enforcement of an 'ultra vires' act.⁸⁵ The prohibition against 'ultra vires' acts by statutory corporations, including universities, is well entrenched in law. The doctrine of *ultra vires* has had a colourful history as it relates to corporations and some background information is warranted to gain a better understanding of its importance as a valuable regulator of public goods delivered by university activities.

⁷⁹ *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705, 713 (Viscount Haldane) cited in *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452 [50] (Vickery J).

⁸⁰ HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 11th ed, 2003) 37 [2.090].

⁸¹ See Phillips Fox Lawyers (2001) *The regulatory environment applying to universities*, Evaluations and Investigations Programme 01/19, 3 <<https://www.voced.edu.au/content/ngv/%3A29659>>.

⁸² *Wallis & Moore Pty Ltd v Sutherland Shire Council* [2005] NSWLEC 397, [49] where Cowdroy J cited *Hazell v Hammersmith and Fulham see London Borough Council & Ors* [1992] 2 AC 1 38-9. The *Hammersmith* case involved interest contracts entered into by the council that were held to be *ultra vires*.

⁸³ *Brooks v Burns Philp Trustee Co Ltd & Anor* (1969) 121 CLR 432.

⁸⁴ *Vital Finance Corporation Pty Ltd v Taylor & Anor* (1996) 40 NSWLR 25. Note in *Wallis & Moore Pty Ltd v Sutherland Shire Council* [2005] NSWLEC 397 the submission made at [23] wrongly records the relevant *Credit Act* as the '*Credit Act 1994*'. This should read *Credit Act 1984* (NSW) and refers to s 157(1). The *Credit Act 1984* (NSW) was repealed by *Credit (Commonwealth Powers) Act 2010* (NSW) Sch 1 (effective from 1 July 2010). See, now, the *National Consumer Credit Protection Act 2009* (Cth).

⁸⁵ *Wallis & Moore Pty Ltd v Sutherland Shire Council* [2005] NSWLEC 397, [49] (Cowdroy J).

The doctrine of *ultra vires* 'is one of considerable antiquity'⁸⁶ and, as it relates to corporations, has received much attention over its history. As early as 1925, a commentator made note that 'threshing over old straw is not a particularly exhilarating pastime' and that the subject of '*ultra vires*, as it relates to corporations, had been 'worn into fine chaff through constant handling.'⁸⁷ Nonetheless, in determining the legal capacities of universities, these statutory bodies are subject to the general law doctrine of *ultra vires*. Hence, the law of *ultra vires* is an important consideration to be had when assessing the legal capacity of universities created as statutory corporations by special legislation.

The Latin phrase '*ultra vires* is used as a legal term literally means 'beyond the power.'⁸⁸ The concept of power used here means legal power derived from legal capacity. Traditionally, the doctrine of *ultra vires*, in its narrow sense, renders contracts or other transactions entered into by corporations, null and void if the transaction was beyond the corporation's legal capacity. For example, in the university context, where a university is created as a statutory corporation, the legal capacity of the university would be derived from its statutory statement of objects and or functions as stated in the university's enabling legislation. Transactions that are *ultra vires* the university are beyond the legal capacity of the university and are void as against third parties, including parties to the transaction.⁸⁹ The use of the *ultra vires* doctrine to determine the existence of legal capacity is generally referred to as *ultra vires* in a narrow or primary sense. The term '*ultra vires*' is also used in a 'wide sense' when referred to acts, dealings or transactions of a company or university which, although within the legal capacity of the university, 'are outside the powers conferred on the company to carry out [its]... objects.'⁹⁰ A transaction, which is within legal capacity of the university but beyond the authority of the governing body, would be *ultra vires* in the wider sense.⁹¹

The term *ultra vires* as it is used under the general law, in its strict or narrow sense, applies to transactions and acts that are beyond the legal capacity and power of the university. As noted above *ultra vires* is a term used in both a narrow⁹² (legal capacity)

⁸⁶ *The Owners of Metro Inn Apartments Strata Plan 11880 v Transmetro Corporation Ltd* (2000) 24 WAR 1, 9 [32] (Owen J).

⁸⁷ Albert J Harno, 'Privileges and Powers of a Corporation and the Doctrine of *Ultra Vires*' (1925) 35 *Yale Law Journal* 13.

⁸⁸ S Brice, *Treatise on The Doctrine Ultra Vires: Being An Investigation of The Principles Which Limit The Capacities, Powers, And Liabilities Of Corporations* (Stevens & Haynes 1874) 34, citing *Earl of Shrewsbury v North Staffordshire Railway Co.* 35 L. J. (Ch.) 156, 172 (Kindersley, VC). See also brief comments in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 163 (Mason CJ) and *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220 (Evatt J). See also *Haugesund Kommune & Anor v Depfa ACS Bank & Anor* [2010] EWCA Civ 579 [32] (Aikens LJ).

⁸⁹ *Duke Group Ltd (In Liquidation) v Pilmer* [1998] SASC 6529, where Mullighan J cites the oft-quoted UK case *Rolled Steel Products (Holdings) Ltd v British Steel Corporation & Ors* [1986] 1 Ch 246, 297 (Slade LJ), 303 (Browne-Willmott LJ).

⁹⁰ *Ibid.*

⁹¹ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 163 (Mason CJ).

⁹² Re capacity i.e. *ultra vires* (narrow) and *ultra vires* (broad) and incorporate public law as in judicial review of public authorities in accordance with *ultra vires* acts by universities or governing bodies as conduct *ultra vires* in exercising statutory powers and managerial discretion; see, especially *Griffith University v Tang* (2005) 221 CLR 99, and other Australian cases such as *Australian National University v Burns* (1982) 43 ALR 25; and from the UK, for example, *Inland Revenue Commissioners v*

and a broad sense (abuse of power) in administrative law and may give rise to judicial review. The first point to make about the ultra vires doctrine in its narrow sense, as it relates to Australian public universities, is that it refers to lack of legal capacity and the doctrine would be enlivened by these universities acting beyond their statutory objects or functions, as expressed in their enabling legislation. *Ultra vires* in its broad sense does not specifically refer to lack of legal capacity but a lack of power, for example where the governing body does not have the substantive power to make a decision or fails to make a decision as required by the power. Where a transaction or act, such as entering into a contract, is ultra vires (narrow) it will be void ab initio (from the beginning).⁹³ Where the term *ultra vires* is used in relation to a university, it usually means an act is void because it is beyond the university's legal capacity, as provided for in its statutory objects and functions.

In modern times, the *ultra vires* doctrine has been applied to statutory corporations.⁹⁴ The most instructive judgment from a modern case, that explores and applies the ultra vires doctrine to a statutory corporation created for a public purpose, is that of Barrett J in the *Darkinjung* case.⁹⁵ Barrett J offered a number of modern-day examples, from authoritative sources, of ultra vires the statutory corporation as follows:

- a corporation brought into existence for private purposes by virtue of strata titles legislation;⁹⁶
- a corporation which, although created by Royal Charter, resulted from an exercise of the prerogative in accordance with statute for public purposes;⁹⁷
- a statutory body formed under trade union legislation;⁹⁸ and
- a corporation created by statute for public purposes;⁹⁹

National Federation of Self-Employed And Small Businesses Ltd [1981] 2 WLR 722 (Lord Wilberforce, Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman and Lord Roskill).

⁹³ Note that in *Commonwealth Homes & Investment Co Ltd v Smith* (1937) 59 CLR 443, 455, Latham CJ said: 'a void contract is strictly a contradiction in terms, but the phrase is conveniently used to describe cases where what appears to be a contract is not really a contract and never has been a contract'. This statement was cited in *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 147 by Stephen J who further said: '[t]he consequence of a purported offer made ultra vires the objects of a company is that no contract can result, the contract is "wholly void" – see Cairns LJ in *Ashbury Railway Carriage and Iron Co. Ltd. v Riche* (1875) LR 7 HL 653, 673, citing the judgment of Blackburn J – and no different consequence will flow from an offer made by a statutory corporation which offer is ultra vires in the sense that it is made in excess of the extent of statutory capacity and power which the legislation has conferred upon that corporation.'

⁹⁴ *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1996) 22 ACSR 56, 63–64 (McLelland CJ in Eq); *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 417 [73] (Barrett J); and *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597, 618 (McHugh J). See also *Re Honey Pool of Western Australia (No 2)* (1988) 14 ACLR 621, 622; *Rail Signalling Services Pty Ltd v Victoria Rail Track* [2012] VSC 452 (Vickery J); *D'Agostino & Anor v Goulburn Murray Rural Water Corporation* [2011] VSC 668 [50], [52] (Emerton J); *Carlene Randall v City of Canada Bay Council (No 4)* [2015] NSWSC 1759 [140] (Kunc J); *The Owners of Metro Inn Apartments Strata Plan 11880 v Transmetro Corporation Ltd* (2000) WAR 1, 10 [38] (Owen J), but note 12 [44].

⁹⁵ *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394 (Barrett J).

⁹⁶ *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597.

⁹⁷ *Hazell v Hammersmith & Fulham London Borough Council* [1992] 2 AC 1.

⁹⁸ *Williams v Hursey* (1959) 103 CLR 30.

⁹⁹ *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Authority* (1977) 139 CLR 117.

These cases concerning the doctrine of ultra vires as it relates to statutory corporations created for public purposes¹⁰⁰ are of particular interest to assessing the application of ultra vires to universities. However, there are no cases that specifically deal with the application of the ultra vires doctrine to universities.

Australian public universities owe their internal governance rules and legal status to Acts of Parliament. Public universities are incorporated, enabled and governed directly by the university's 'enabling legislation'. Parliaments (State, Territory and the Commonwealth) have established public universities as statutory corporations for special purposes of higher education and research as statutory statements of objects and or functions that define the permitted fields of activities.¹⁰¹ Some public universities in Australia will only have statutory objects, others will only have statutory functions, and some will have both, as the determinants of the permissible fields of university activities.¹⁰²

Examples statements of statutory objects mandating Australian public universities to advance higher education are as follows:

- 'the advancement of learning and knowledge, including the provision of university education';¹⁰³
- 'the promotion, within the limits of the University's resources, of ... free inquiry, the interaction of research and teaching, and academic excellence';¹⁰⁴ and
- 'to provide and maintain a teaching and learning environment of excellent quality offering higher education at an international standard'.¹⁰⁵

Examples statements of statutory functions mandating Australian public universities to advance higher education are as follows:

- 'the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry';¹⁰⁶
- 'to undertake and support education and its application to the advancement of knowledge';¹⁰⁷
- 'to preserve, extend and disseminate knowledge through teaching, research, scholarship';¹⁰⁸
- 'to provide tertiary education to meet the needs of any other section of the community';¹⁰⁹

¹⁰⁰ *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 417 [73] (Barrett J).

¹⁰¹ In a different context, involving a statutory corporation, see *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 422 [94] (Barrett J).

¹⁰² *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 422 [94] (Barrett J).

¹⁰³ *University of Adelaide Act 1971* (SA) s 4A.

¹⁰⁴ *Southern Cross University Act 1993* (NSW) s 6(1).

¹⁰⁵ *University of Melbourne Act 2009* (Vic) s 5(a).

¹⁰⁶ *Southern Cross University Act 1993* (NSW) s 6(2)(b).

¹⁰⁷ *Curtin University Act 1966* (WA) s 7(1)(d).

¹⁰⁸ *University of South Australia Act 1990* (SA) s 5(1)(a).

¹⁰⁹ *University of South Australia Act 1990* (SA) s 5(1)(b).

- 'to advance, transmit and preserve knowledge and learning';¹¹⁰
- 'to provide education at university standard';¹¹¹
- 'to undertake teaching activities that fulfil university education';¹¹²
- 'to transmit and advance knowledge by undertaking teaching and research of the highest quality';¹¹³ and
- 'the advancing and transmitting knowledge, by undertaking research and teaching of the highest quality.'¹¹⁴

From the above examples, it is clear that the principal purpose for the creation of public universities is the advancement of higher education, that is, the advanced knowledge through university teaching and learning.

A university's statutory objects and or functions prescribe the capacity, or power, of the university to act – and as such, they define the university's legal capacity. An act by the university will be *intra vires*, that is, within the university's legal capacity, if, and only if, the act falls within the bounds of the university's objects and or functions. The university's objects and or functions setup a demarcation line around the university's legally permissible activities. The universities activities must be in pursuance of one of the listed objects or functions – hence, a purpose of the statutory objects and functions of a public university is to limit their activities to the public purposes for which substantial public money has been provided.

It is well settled law that statutory corporations can do only those acts allowed by its enabling legislation and given the nature of the funds allocated to public universities, being public money for public purposes and it would be highly unusual for a university to take a different view. The relevant legal principle was stated as follows:

It is a broad and general principle that companies incorporated by statute for special purposes...which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.¹¹⁵

The above statement applies to all statutory corporations, including Australian public universities. The law in relation to the extent of the capacity and powers of statutory corporations has been long settled¹¹⁶ and a university, in carrying out its public

¹¹⁰ *University of Tasmania Act 1992* (Tas) s 6(a).

¹¹¹ *Central Queensland University Act 1998* (Qld) s 5(a).

¹¹² *Charles Darwin University Act 2003* (NT) s 5(a).

¹¹³ *University of Canberra Act 1989* (ACT) s 6(1)(a).

¹¹⁴ *Australian National University Act 1991* (Cth) s 5(1)(a).

¹¹⁵ *Amalgamated Society of Railway Servants v Osborne* (1910) AC 87, 94 (Lord Macnaghten) cited in *Stevens v Keogh* (1946) 72 CLR 1, 29 (McTiernan J).

¹¹⁶ *Ashbury Railway Co v Riche* (1875) LRR 7 HL 653 and *Attorney-General v The Great Eastern Railway Co* (1880) 5 App Cas 473, 478; see also Lord Halsbury L.C. in *London County Council v Attorney-General* (1902) AC 165, 167; all cited in *Attorney-General (Vic) v City of Geelong* (1914) 18 CLR 553, 556–7 (Griffith CJ). See, also, *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 362 (Lord Watson) and *Deuchar v Gas Light & Coke Co* [1925] AC 691, 695 (Cave LJ) cited in *Re Honey Pool of Western Australia (No 2)* (1988) 14 ACLR 621, 622 (Nicholson J).

purposes, may legitimately pursue only the purposes that can be ascertained from its enabling legislation.

The capacity and powers of a statutory corporation, including a public university, according to ‘long-standing authority, [are subject to] ...the doctrine of ultra vires [which] should be applied not unreasonably...The basic question, however, is to identify the relevant powers.’¹¹⁷

Any conduct determined by the governing body, or its delegation, that is beyond a public university’s legal capacities is both ultra vires the university and its enabling legislation. Ultra vires activities are unenforceable and are contrary to the best interests of the university. The continued application of the ultra vires doctrine to statutory corporations, including Australian public universities, is a related point regarding the ‘best interests of the university as a whole’. On this point, it is convenient to refer to *Westpac v Bell Group Ltd* where Drummond AJA reminds us that:

Many of the older cases, in discussing what is involved in acting bona fide in the interests of the company refer also to whether the challenged decision is within power. This generally involved a consideration only of whether the challenged action was ultra vires the powers conferred by the company’s articles.¹¹⁸

Australian public universities are largely funded by public money and are not-for-profit charitable higher education corporations created by Acts of Parliament with specific public purposes of advancing higher education and research.¹¹⁹ The statutory powers conferred by an Act of Parliament empower and enable universities to enter into contracts. Universities can only make contracts and spend public money pursuant to the public purposes for which the university was created as stated in the university’s enabling legislation.

It is also in the public interest in ensuring that decisions made by universities relating to the expenditure of public moneys, and the allocation of limited resources should be taken with the university’s public purposes in mind. The general community has an interest in knowing that a university’s activities, into which substantial public funds have been poured, are the activities for which the university was established. That is, activities within the statutory mandated objects and functions of the university which are designed to advance higher education and research for the public benefit. A public university should be restrained from exceeding its statutory powers, for ‘every

¹¹⁷ *Re Honey Pool of Western Australia (No 2)* (1988) 14 ACLR 621 622 (Nicholson J) citing *City of Winnipeg v The Canadian Pacific Railway Co* [1953] ADC 618, 619 applying *The Ashbury Railway Co v Riche* (1875) LRR 7 HL 653 and *Attorney-General v The Great Eastern Railway Co* (1880) 5 App Cas 473, 478. This observation made by Nicholson J was approved in *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452, [48] (Vickery J) and *Carlene Randall v City of Canada Bay Council (No 4)* [2015] NSWSC 1759, [140] (Kunc J).

¹¹⁸ *Westpac Banking Corporation v The Bell Group Ltd (In Liq) [No 3]* (2012) 44 WAR 1, 345 [1989] (Drummond AJA).

¹¹⁹ *Inspector Selby v University of New South Wales* [2013] NSWIRComm 20, [23] (Haylen J).

deliberate and substantial excess of 'power by any statutory body many have a tendency to injure the public.'¹²⁰

V CONCLUSION

The term 'legal capacity' is freely used in discussing the rights and obligations of a person, but its meaning is rarely clearly articulated. To this end, this article began by giving a depth of discussion to the term. The discussion concluded the term 'legal capacity', as the name suggests, is a juristic construction, as noted by Kelsen,¹²¹ because it is the law, or legal order that has the power to recognise, limit, restrict or enforce capacity to rights, duties and obligations. The concept 'legal capacity' involves, firstly, the recognition of legal personhood as a bearer of rights, duties and obligations, and secondly, the legally recognised capacity to enter into legal relations, hold, exercise and enforce rights, including the right to sue, and incur obligations.¹²² In this sense, the recognition of legal personhood and capacity is the sole basis of having any 'juridical significance'.¹²³

The second part of this article examined the legal capacity of Australian public universities. In brief, the legal capacity of a public university will be determined by its body corporate status and by the statutory objects and or functions as mandated by its enabling legislation. Members of governing bodies must use their university's legislation as the touchstone in their undertakings, enabling activities, decision-making and in determining what is in the best interests of the university.

Lastly, this article assesses the limits of a university's legal capacity imposed by the doctrine of *ultra vires*. The law is settled¹²⁴ and the *ultra vires* doctrine applies to statutory corporations, including statutory corporations created for public purposes, such as public universities. The *ultra vires* doctrine serves to limit the legal capacity of universities to those within their statutory purposes as spelled out in their statutory objects and functions. *Ultra vires* activities are unenforceable and are contrary to the best interests of the university and as such university governors should be cognisant of the consequences of the *ultra vires* doctrine when exercising their decision-making powers on behalf of their university.

¹²⁰ *Attorney-General ex rel Moore v The Mount Gambier United Friendly Societies Dispensary Incorporated* [1920] SALR 176, 181 (Argument of counsel, Napier, for the plaintiff) citing *Ashbury Carriage v Rich* (1875) LR 7 HL 653, 678.

¹²¹ Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945) 96.

¹²² Legal Capacity Taskforce, International Disability Alliance, *Legal Opinion on Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)* June 21, 2008, <www.leeds.ac.uk/disability-studies/.../LegalOpinion_Art12_FINAL.pdf>.

¹²³ To reference the words from United Nations, Office of the High Commissioner for Human Rights, (OHCHR), 'Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights - Legal capacity' August 2005 UN Doc A/AC.265/2005/CRP.5 [11].

¹²⁴ See *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council and Ors* (2006) 203 FLR 394, 417 [73] (Barrett J).

The public purposes for which universities are created are specified in the university's statutory objects and functions and it is in the public interest to see that a university, as a statutory body, does not exceed its statutory capacity and/or powers.¹²⁵

A *Final comments*

Corporate legal status provides Australian public universities with the privilege of legal personhood and the formulation of a university in corporate form is by no means an accident. Australian law, like other common law sovereignties,¹²⁶ have developed well-established corporate law doctrines that make the corporate form ideal for universities. The statutory corporate status of Australian public universities means that there is a degree of 'Parliamentary input and scrutiny in their creation [with]... "tailor-made" provisions',¹²⁷ including provisions relating to legal status, legal capacities, accountability and university governance, which are built into each university's enabling legislation.¹²⁸ Parliament also oversees any subsequent amendments to the enabling legislation which enables further parliamentary scrutiny.¹²⁹ The 'body corporate' status of Australian public universities assist them to deliver their public objectives as defined by their enabling legislation. However, the separate legal entity capacities that come about because of a university's corporate status provides public universities with a level of independence from government interference, for example, form direct government control by government departments.

In the tradition of utilitarianism, universities were created for the 'greater good' and for all citizens and are sites where higher education is advanced and research is created and disseminated. Higher education is recognised as a charitable purpose and is a public good designed with a public purpose to benefit the community as a whole.¹³⁰ The social responsibility for universities to deliver crucial social and cultural benefits of higher education is contingent on these entities maintaining and developing the necessary standards, qualities of higher education open to all with the ability and capacity to succeed.¹³¹ This social responsibility is of grave importance, which has been adopted by our parliaments in establishing universities as statutory corporations with specific

¹²⁵ *Attorney-General ex rel Moore v The Mount Gambier United Friendly Societies Dispensary Inc* [1920] SALR 176, 181 (Argument of counsel, Napier, for the plaintiff) citing *Pearce v Madison*, 62 USR 441; *De la Vergne Co. v. German Savings Institute*, 17 DSR 58.

¹²⁶ Including, for example, the United Kingdom (England, Wales, Northern Ireland & Scotland), New Zealand, Canada (except Quebec), Hong Kong, India (except Goa, Daman and Diu) and Singapore (except Sharia Court jurisdiction).

¹²⁷ Stephen Bottomley, 'Regulating Government Owned Corporations: A Review of the Issues' (1994) 53(4) *Australian Journal of Public Administration* 522.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ In the John Stuart Mill sense. Although, as noted by Dimova-Cookson, 'Mill's passionate rhetoric is not on the public good but on the importance of personal freedom': Maria Dimova-Cookson, 'Bentham, Mill and Green on the nature of the good' (2003) 6 *Journal of Bentham Studies* 12, 12.

¹³¹ See W John Morgan and Ian White, 'The Value of Higher Education Public or Private Good?' (2014) 6 *Grudfragen und Trends, International, Weiterbildung* 38, 40. Note the German to English translation of *Weiterbildung* is 'furthering education'; see also United Nations Educational, Scientific and Cultural Organisation (UNESCO), *World Conference on Higher Education 2009, Final Report*, 2010, Paris, UNESCO Headquarters, 5 to 8 July 2009 24.

objects, functions and power to enable universities to deliver on the public purposes for which they were created.

In the case of Australian public universities, a university should, as a matter of course, ensure all of its activities and transaction are *intra vires* and ensure these come within the university's legal capacity as expressed in the statutory objects and functions, express or implied, in the university's enabling legislation. However, there are no statutory provisions to ensure university activity is *intra vires*. Unlike the ACNC legislation,¹³² no university enabling legislation expressly requires their university governors to specifically commit to furthering their university's statutory purposes.¹³³ Nor do they expressly require university governors to proactively carry out their functions in a manner that complies with their university's purpose and character.

Further research is needed to assess the appropriateness of amending enabling legislation of Australian public universities to articulate a clear nexus between the statutory duties of university governors and a university's mandated public purposes. For example, an express statutory provision could be added to university enabling legislation that clearly requires university governors to undertake and commit to furthering their university's obligation to deliver the public good through advancing higher education and research for the public benefit. This would reinforce the duty of university governors to ensure their university achieves the public purposes for which their university exists and delivery of the mandated public goods in higher education and research for the public benefit.

KEY WORDS

Australian public university, university enabling legislation, objects and functions, legal capacity, *ultra vires*.

¹³² *Australian Charities and Not-for-profits Commission Act 2012* (Cth); *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth): see esp Governance Standard 1, reg 45.5.

¹³³ To clarify this point, there are no express provisions in enabling legislation; however, there may be an implied obligation on university governors to further their university's purpose particularly within the duty to act in the best interest of the university.