The National Governance Protocols are intended to influence good governance. It would be counterproductive, however, if they led to overregulation in a sector in which diversity is the aim and in a climate where flexibility and adaptability are increasingly important. Overregulation is not good governance. Good governance stems from a culture of appropriate core values within the institution. What constitutes good practices in governance will vary according to the goals and objectives of a particular institution and any enhancements to the Protocols should recognise this. We support the view that “effective tertiary governance cannot be simply secured by formulaic prescriptions and compliance measures or by adopting a ‘one size fits all’ approach. At its heart good governance is about strong relationships and shared understandings among people.”

1. Contribution of the National Governance Protocols to good governance
Prior to introduction of the National Governance Protocols, the Federal Government changed the Australian National University Act to create a model of what it had in mind under the National Governance Protocols viz, a reduction in the size of Council, the establishment of a Nominations Committee of Council and related procedures for the nomination of members to be appointed by the Minister, the appointment of members with financial and commercial expertise, and the duties of members. In reviewing its state of compliance with the National Governance Protocols when they were introduced in June 2004, the ANU needed to make very few changes to its governance arrangements.

By virtue of the ANU being a Commonwealth Authority, it is also subject to the Commonwealth Authorities and Companies Act 1997 (Cth), which includes a number of governance-related provisions that either go beyond what is required by the Protocols or are replicated in the Protocols. As a result, the requirement to comply with the existing Protocols has not had any negative or unintended consequences. An increased focus on governance practices has been a positive outcome.

2. The role and composition of the governing body
Consequent upon changes to the ANU Act, the size of Council reduced from 23 members to 15. This has proved to be a very effective working size. Equally important to the effectiveness of Council has been the balance of expertise. The eight members external to the University have brought a range of valuable skills and experience, including the mandated commercial and financial expertise. This input has been enhanced by the knowledge of the sector in general, and an understanding of the ethos and culture of the ANU in particular, brought to the board table by the elected staff and student members. While having staff and student members on governing bodies may raise particular issues of conflict of interest, the more important consideration is how such conflicts are managed when they arise. The governing body should have governance policies and practices which address this issue. The ASX Principles recommend that a majority of a board should be “independent directors” and that all directors “should bring an independent judgement to bear on board decisions”. Furthermore, the research literature appears to suggest that there is little, if any, correlation between having a majority of external board members and corporate performance. The ANU does not see the need for the Protocols to provide additional requirements or skill mix required for an effective governing body. The Protocols should be sufficiently flexible to allow for the composition of governing bodies to reflect the diversity of tertiary institutions in the sector and the range of skills which will best suit a particular institution.

There would be few, if any, Universities at which the Secretary to Council does not perform other functions within the institution. The ANU recognises that in providing a support service to Council, the Secretary should be seen to have an appropriate degree of independence from management but it would be inappropriate for the position to be set up in direct opposition to the Vice-Chancellor as a source of information to Council. In any event, the specific role and responsibilities of the Secretary should be a matter for the governing body to determine. The underlying issue is more important and that is that the governing body have a protocol for members to have access to independent advice if necessary. Likewise, the relationship between the governing body and key management roles in the institution should be determined by the governing body. While there may be considerable variation
across the sector in terms of the management responsibilities devolved to the Vice-Chancellor/CEO, to regulate on this would be a significant imposition on the independence of governing bodies to determine the parameters which best suit their individual institutions. The important issue is that each institution have a clear statement of the respective roles and responsibilities of the governing body and the Vice-Chancellor. (ANU’s Handbook for Council Members is enclosed as an example).

3. Leadership
Leadership is implicit in the exercise of the primary responsibilities outlined in Protocol 2. However, whether this should extend to “building management capability and developing close and productive working relationships with management at all levels” is debatable. The primary relationship of the governing body is with the Vice-Chancellor. Furthermore, if the Protocols dictate a level of management responsibility for governing body members, the divide between management and governance which is a central tenet in good governance would be at risk.

4. Accountability
In general terms, it would not be unreasonable to include additional guidelines in the Protocols relating to accountabilities of the institution and its governing body. However, the use of terms such as “effective” in connection with key accountabilities raises concerns about how compliance would be assessed.

The proposal to include in the Protocols more specific requirements relating to the role and operations of governing bodies is of particular concern. While governing bodies must be ultimately responsible for the appointment and remuneration of the Vice-Chancellor, the selection and remuneration of other key senior management positions is a function of the Vice-Chancellor. If the governing body is required to approve “all significant investment and business decisions”, this could place serious constraints on the ability of the Vice-Chancellor to manage, depending on how each governing body might choose to define “significant”. The ANU would be opposed to any specifications which would extend the authority of the governing body into operational matters more appropriately the province of management.

Members of the ANU Council are subject to the provisions of the CAC Act and the ANU Act that deal with the roles and responsibilities of governing board members. In this context, the University does not see a need to provide further clarification in the Protocols about the fiduciary responsibilities of members of the governing body.

5. Continuous improvement
Protocol 4 provides for governing bodies to assess their performance which, in turn, is intended to lead to improvement in governance practices. How this improvement might be achieved should be a matter for the governing body to determine.

6. Improving the form and clarity of the National Governance Protocols
In the interests of flexibility, it is important that the Protocols not be unduly restrictive or prescriptive. However, in the process of assessing compliance, DEST has determined some parameters in relation to the interpretation of aspects of the Protocols eg the definition of “regular intervals” (Protocol 4) and “financial” and “commercial” expertise. These requirements could be made more explicit in the language of the Protocols.

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