

# DL Newsletter

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## University Legislation — Special Issue

### *Universities as law-makers*

The public universities of Australia are created by University Acts (laws enacted by Australian parliaments). The Acts give them the powers of a legal person to enter contracts, employ people and to sue and be sued. The power to do these things can be exercised by their supreme decision-making bodies (university councils) or by others on whom decision making-power has been conferred by legislation or delegation.

There is something else that public universities can do – they can make laws, or, more specifically, subordinate (or “secondary”) legislation. Their legislative power is additional to their power as legal persons to regulate their staff under employment contracts or their students under (for want of a better name) contracts for education services.

Typically, in Australia, university legislative powers are arranged in a structure comprising the University Act and two levels of subordinate legislation made by the university. These pairs of subordinate legislation have (confusingly) various names – for Victorian they are statutes and regulations, while, under the *Australian National University Act 1991*, they are statutes and rules. The *Charles Darwin University Act* (Northern Territory) uses the terms by-laws and rules.

### **Legislative hierarchy**

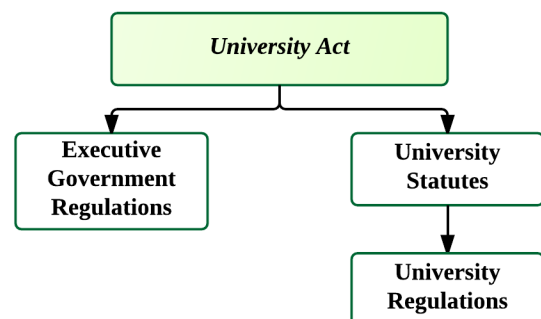
Legislation is hierarchical. A law is made under the authority of another law – the authorising law is above it in the hierarchy. In this sense, all of the legislation made by universities is subordinate to

the University Act under which it is made. The university's constituting Act (made by Parliament) itself sits in a hierarchy, ultimately deriving its authority from the constitution.

As is typical of legislation, University Acts commonly give the government power to make regulations. These may be of little importance if the scope of the power is limited, or of no importance at all if the power is not exercised.

More interestingly, University Acts make provision for *two* forms of university legislation, that is, legislation made by universities – university statutes and university regulations.

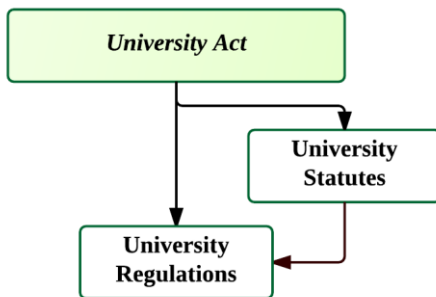
The complete hierarchy of primary and subordinate legislation applying to each Victorian university, as it would apply if the law-making powers were all exercised, is shown in Figure 1.



**Figure 1: Structure of university legislation in Victoria**

In a hierarchical relationship, subordinate legislation must not be inconsistent with the authorising law. So much is made explicit by a provision such as section 47 of the Northern Territory's *Charles Darwin University Act*, which provides that a rule must not be inconsistent with a by-law, nor with the Act. Victorian legislation

does not explicitly resolve the question of possible inconsistency between university statutes and university regulations. While the relationship may seem obvious (as shown in Figure 1), the University Acts make the relationships a little confusing by *both* conferring power to make regulations *and* enabling University statutes also to authorise the making of regulations. As a result, Figure 1 is, strictly, an over simplification of the relationships under Victorian legislation. To be completely accurate, it should show the dual sources of authority, as in Figure 2.



**Figure 2: University regulations in Victoria – at the bottom of the legislative hierarchy**

To look at it another way, university regulations may have multiple sources of authority.

### What are regulations good for?

Authorising provisions in University Acts may at times be a little untidy, but the intended structure is apparent enough – university legislation is to be a two-tier structure comprising university statutes and, below them, university regulations.

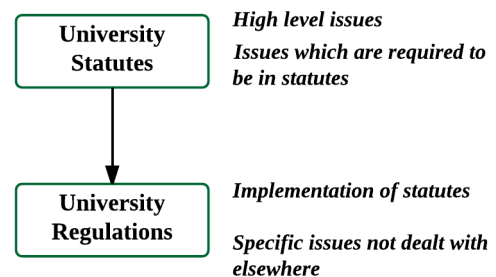
In a hierarchical relationship, laws which are lower in the hierarchy must be consistent with those above. Regulations made under statutes are sometimes referred to as “implementing” regulations. A similar concept is expressed in the Northern Territory’s Charles Darwin University Act, which provides (in section 27) that lower-level legislation may be made “for carrying into effect” provisions of higher level legislation.

In a well-designed legislative structure all of the laws are consistent with each other, and work together to achieve high-level objectives. Together they comprise an integrated legislative scheme.

There one circumstance in which the “implementing regulations” concept does not adequately describe what regulations are good for: regulations can deal with issues which have, intentionally or otherwise, not been dealt with in higher level laws. Those issues might be of limited application or matters of detail of little policy significance.

If university legislation is seen as constituting a scheme, the approval requirements of the University Acts can be understood. Commonly under University Acts a university statute does not come into operation until it has been approved by the Minister (or the Governor acting on the Minister’s advice). This gives the Minister the power to control the content of University legislation, although not a power to initiate it. It is, nonetheless, an important power, with the effect that statutes are not made unless the Minister assents. No corresponding restriction applies to university regulations, nor is needed if the regulations operate mainly in support of the statute under which they are made.

It can be seen, then, that university regulations have a place in the body of university legislation, as shown in Figure 3.



**Figure 3: Legislation made by universities**

There is something else as well that regulations are good for: inclusion of regulatory provisions into the body of university legislation, rather than in inappropriate places such as policies and guidelines. This benefit arises because, for a university, regulations can be relatively simple to make and the regulation-making power can (subject to the University Act) be decentralised. Further, in Victoria, the approval of the Minister is not required, removing a potential cause of delay and uncertainty (compared with making a statute). The

relative simplicity of process makes the exercise of the power more likely to occur.

## ***University governance instruments***

The instruments discussed above are all legislative, an exercise of the university’s law-making powers. Universities also make use of administrative instruments –policies and guidelines and procedures. These instruments are useful tools for achieving transparency and consistency of process.

The university’s ability to make decisions under its statutory powers can be allocated only through subordinate legislation or delegation, not through administrative instruments.

In the following table, we identify university governance instruments, some of their important features and the entities responsible for the making of the instruments.

<b>UNIVERSITY GOVERNANCE INSTRUMENTS</b>		
<b>Instrument</b>	<b>Important features</b>	<b>Responsible entity</b>
<b>University Act</b>	Legal status of the university, including powers and objectives. Specific restrictions on powers.	Parliament.
<b>University statutes</b>	High level issues, including rights and obligations and procedural protections. Also, issues which are required to be in statutes.	University Council (may require higher level approval, ie. if required by the University Act).
<b>University regulations</b>	Implementation of university statutes, specific issues not dealt with elsewhere.	Subject to the Act and statutes, lower-level decision-maker.
<b>Policies and guidelines</b>	Criteria for decision-making.	The relevant decision-maker.
<b>Procedures</b>	Documents which set out standard management processes, intended to produce consistency of process.	The relevant decision-maker.
<b>Delegations</b>	Delegations allocate decision-making power within the organisation.	The power to delegate should be conferred by The University Act. The delegate might be a person (usually the holder of an office) or a committee, and the delegation may be subject to conditions or limitations.