

***The Governance of Merger
in South African
Higher Education***

***Research Report
prepared for the Council on
Higher Education***



Martin Hall, Ashley Symes and Thierry Luescher

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African Higher Education***

**A Research Report prepared for CHE
by Martin Hall, Ashley Symes and Thierry Leucher**

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CONTENTS

Preface	v
Executive Summary	ix
1. Terms of Reference and Approach	1
1.1 Objectives, Scope and Definitions	1
1.2 Methodology	4
1.3 Summary: Terms of Reference and Approach	9
2. Background and Context	11
2.1 Merger Governance in International Perspective	11
2.1.1 The Lexicon of Mergers: Terminology and Typology for Governance	13
2.1.2 Key Governance Themes in the Literature	16
2.1.3 Linking International Perspectives to the South African Context	27
2.1.4 Summary: Merger Governance in International Perspective	29
2.2 Policy and Legal Framework for Restructuring South African Higher Education	30
2.2.1 The Trajectory of Policy Development	31
2.2.2 The National Commission on Higher Education	31
2.2.3 The White Paper on Higher Education	32
2.2.4 From the White Paper to the National Plan: The Advice of the CHE Report	34
2.2.5 The National Plan for Higher Education	37
2.2.6 Giving Effect to the National Plan	40
2.2.7 The Legal Basis for Mergers and Incorporations	45
2.2.8 Summary: Policy and Legal Framework	50
2.3 An Analytical Framework for Merger Governance	51
2.3.1 System-level Governance: Co-operative Governance and Conditional Autonomy	51
2.3.2 Institutional Governance: A Matrix of Governance	53
2.3.3 Concepts to Evaluate Merger Governance	56
2.4 Conclusion: Principles for Good Merger Governance	63
2.5 Summary: Background and Context	64
3. System-level Governance for Mergers	67
3.1 State-sector Relationships and Restructuring	67
3.2 Clarification regarding Mergers and Incorporations	71
3.3 Definition of Comprehensive Institutions	72
3.4 Role of the Merger Unit	73
3.5 Financing of Mergers and Incorporations	75
3.6 Monitoring the Restructuring Process	79
3.7 Implications of Restructuring by Political Will	80
3.8 Summary: System-level Governance for Mergers	81
4. Institutional Governance and the Process of Merger	83
4.1 The Phases of Merger	83
4.2 Pre-merger Phase	84

4.2.1 Institutional and Joint Structures to Facilitate Merger Process	84
4.2.2 Statutory Governance Structures and Merger Governance Structures	89
4.2.3 The Project Management of Mergers	92
4.2.4 Critical Outcomes of the Pre-Merger Phase	94
4.3 Transitional Phase	111
4.3.1 Interim Council	112
4.3.2 Interim Governance Structures	119
4.3.3 Interim Management	122
4.4 Integration Phase	124
4.4.1 Forging a New Institutional Culture and Identity	125
4.4.2 Governance and Merger Integration	128
4.4.3 Governance and Academic Integration	130
4.4.4 Critical Considerations in Multi-Campus Governance	135
4.5 Summary: Institutional Governance and the Process Of Merger	139
5 Conclusion	141
5.1 Enabling Merger by Good Governance	141
5.2 System-level Governance: State-sector Relationships	143
5.3 Institutional Governance: Phases of Merger	144
5.3.1 Governance in the Pre-Merger Phase	144
5.3.2 Governance in the Transitional Phase	153
5.3.3 Governance in the Integration Phase	157
6 Bibliography	161
6.1 South African Higher Education Policy and Legislation	161
6.2 Books, Academic Journals and Reports	162
6.3 Other Documentary Sources	167
6.3.1 Newspaper Reports and Articles	167
6.3.2 South African Higher Education Websites	167
Appendix A: Extracts from Policy and Legislation Concerning Restructuring of Higher Education	169
A.1 Extracts from the White Paper of 1997	169
A.2 Extracts from the CHE 'Shape and Size' Task Team Report	172
A.3 Extracts from the National Plan For Higher Education (2001)	181
A.4 Extracts from the Higher Education Act 101 of 1997 (with amendments)	189
Tables and Figures	
Table 1: Phases in the Legislative Conceptualisation of Merger	47
Figure 1: Matrix of Institutional Governance	55
Figure 2: Unintended Merger Governance Consequence 1	60
Figure 3: Unintended Merger Governance Consequence 2	60
Figure 4: Merger Reaction Maps	61

PREFACE

In a period of great transformation in South African higher education, of which the reconfiguration of the landscape of public institutions by means of mergers and incorporations is a key strategy, effective governance is a crucial element for success.

At the beginning of 2001, the Council on Higher Education (CHE) established a task team on governance to investigate the state of governance in higher education. The task team commissioned research with the brief of

- Describing and analysing the state of governance at public higher education institutions with special focus on the role of councils, senates, institutional forums and executive management and the relationship between these four structures;
- Establishing whether, how effectively and with what consequences co-operative governance had been implemented at higher education institutions in South Africa; and
- Making recommendations on how to improve efficiency, effectiveness and accountability in higher education governance with due cognizance of such principles as democracy, academic freedom and equity.

The CHE investigation resulted in a *Policy Report*,[†] which represented the CHE's intended advice to the Minister on the governance of higher education institutions, and a substantive *Research Report*,[‡] which reflected the theoretical and empirical work on which the Policy Report drew.

At the time of the release of the reports, the reconfiguration of the landscape of public higher education in South Africa – as per proposals on mergers and incorporations accepted by Cabinet in May 2002 – was gaining momentum. The report[§] by the Ministry's National Working Group had highlighted that no focused study existed on the governance implications of institutional reconfiguration. It was in this context that the CHE decided in September 2002 to commission research into the governance implications of institutional mergers and incorporations, including consideration of multi-campus governance.

[†] Council on Higher Education (2002). Promoting Good Governance in South African Higher Education. Pretoria, Council on Higher Education.

[‡] Hall, M., A. Symes and T.M. Luescher (2002). Governance in South African Higher Education. Pretoria, Council on Higher Education.

[§] Department of Education (2001). The Restructuring of the Higher Education System in South Africa. Pretoria, Department of Education: Appendix 5.

The research consultants were requested by the CHE to produce

- A conceptual framework for thinking about merger governance issues in South Africa;
- Case studies based on documentary research and interviews, and
- Identify and analyse key governance implications with respect to
 - System-wide governance, including the policy and legislative framework;
 - Institutional governance structures (council, institutional forum, senate);
 - Management, generally and in areas such as finance, human resources, and management information; and
 - Academic departments and academic administration.

To these ends

- A wide-ranging review of the international experience of mergers and amalgamations in higher education was conducted;
- The trajectory of South African policy development in the area of higher education reconfiguration was examined in detail;
- An analytical framework for merger governance was developed; and
- A number of case studies were undertaken, included multi-campus governance in higher education.

Since the completion of the study in June 2003, the reconfiguration of public higher education in South Africa has gathered momentum. At the time of research, only one merger had been completed, which established the Durban Institute of Technology (the former ML Sultan and Natal Technikons merged in April 2002). A further four new institutions were established through merger with effect from January 2004:

- KwaZulu-Natal University (from the former University of Natal and the University of Durban-Westville);
- North-West University (including Potchefstroom University for Christian Higher Education and the University of the North-West);
- University of South Africa (including the old UNISA, Technikon SA and Distance Education Campus of Vista University) as a dedicated distance education institution; and
- Tshwane University of Technology (from the former Pretoria Technikon, Technikon Northern Gauteng and North-West Technikon).

Vista University has been unbundled and its satellite campuses incorporated into designated higher education institutions. Some universities have been requested to broaden their programme offerings to include previously technikon qualifications. A number of technikons have been renamed as universities of technology.

Further mergers are to occur in early 2005. These are

- Peninsula Technikon and Cape Technikon (to form the Cape Peninsula University of Technology);
- Rand Afrikaans University and Technikon Witwatersrand (University of Johannesburg);
- University of the North and Medical University of South Africa (University of Limpopo);
- University of Port Elizabeth and Technikon of Port Elizabeth (Nelson Mandela Metropolitan University); and
- University of Transkei, Border Technikon and Eastern Cape Technikon (to form the Walter Sisulu University of Technology and Science).

The CHE publishes this report as a contribution to thinking about the governance of mergers and incorporations and as a stimulus to research on the governance of higher education in general and of mergers and mergers and incorporations in particular.

The CHE extends its gratitude to

- The researchers who so professionally executed the CHE's research commission;
- The institutions, organisations and individuals that assisted the research in various ways;
- The members of the CHE Secretariat that assisted in the production of this report, and in particular Dr Lis Lange who managed the research resulting in this publication; and
- The United Kingdom Department for International Development and the Ford Foundation for the funding of the research.

The Research Report can also be viewed on the CHE website – <http://www.che.ac.za>

Researchers seeking access to the original source materials that have gone into the production of this research report may request permission for access from the Chief Executive Officer, Council on Higher Education, P.O. Box 13354, The Tramshed 0126. E-mail to ceo@che.ac.za, Tel: (012) 392 9121, Fax: (012) 392 9110

Prof. Saleem Badat
Chief Executive Officer, CHE
Pretoria, July 2004

EXECUTIVE SUMMARY

The restructuring of the South African higher education system ranges widely across mergers, incorporations, the creation of new institutional forms, and regional-level programme collaboration and rationalisation. The focus of this investigation is the governance of merger in South African public higher education, with a subsidiary focus on governance in the contexts of incorporation and multi-campus institutions. Merger is taken to mean the combination of two or more separate institutions into a single entity with a single governing body and chief executive body. Incorporation refers to the process whereby a subdivision of one institution is incorporated into another institution, without affecting the latter's legal status. The term multi-campus is used to refer to unitary institutions with geographically distant delivery sites. By governance is meant the structures and processes of policy design, decision-making and oversight of policy implementation.

The **first chapter** of this report sets out the objectives, scope and methodology of the investigation. The enquiry's three primary objectives are:

- To develop a conceptual and contextualised framework for merger governance in South African public higher education;
- To interrogate the state of preparation, with respect to governance capacity, of the higher education system and its institutions, for the complex process of restructuring on which they have embarked; and
- To make proposals regarding system-wide and institutional-level governance to facilitate effective and efficient restructuring that will enable a sustained focus on transformation in the higher education sector.

The methodology was developed on the basis of four key considerations:

- The work needed to build upon prior research into how to promote effective governance in South African higher education;
- The timing of the investigation meant it had to take into account theoretical, policy and legal viewpoints affecting mergers, as well as rapidly emerging realities to be interpreted and commented upon;
- The study had to be sensitive to the position of institutions directly affected by restructuring; and
- The study had to achieve a sharp and manageable focus in a complex field.

The **second chapter** draws together frameworks that support the enquiry, namely: a review of international perspectives on higher education mergers and their governance, a review of the policy and legal framework for restructuring South African higher education, and the development of an analytical framework for merger governance against which the findings of the report can be interpreted and tested. Finally, the chapter derives from these frameworks a set of principles for good merger governance in South Africa's restructuring higher education system.

The chapter argues that, given South Africa's history, higher education restructuring in this country is essentially *sui generis*: it is a politically-driven process that aims in the first instance to achieve the fitness of purpose of all institutions. Thus international perspectives serve to provide useful experience and insights, but not to define, in and of themselves, the policy directions South Africa should take. The policy and legal framework for restructuring must be evaluated in terms of what it reveals about, and how it supports, specifically South African reasons for structural change. An analytical framework for the governance of restructuring must ascribe values of good governance that are consistent with the transformative goals of South African policy.

The **third chapter** focuses on issues which arise at the point of intersection between higher education system-level governance and institutional governance. It discusses key questions of substance, capacity and resources in the process of merger which could influence the nature of the relationship between state and sector, and hence the nature of restructuring outcomes. In particular, this part of the report highlights potential mismatch in the respective expectations of the state and the higher education sector, especially as these relate to the nature of capacity and support provided by the state, and the Ministry's framework for financing mergers and incorporations.

The chapter argues that a key danger of South Africa's higher education restructuring process, as driven by political will, is the absence of alternatives to mandatory mergers. Yet if restructuring is to be a means to the achievement of the goals of national policy, state and sector must see their way clear to negotiating mergers and incorporations to common benefit.

The **fourth chapter** considers institutional (and inter-institutional) governance in the process of merger, linked to three distinct phases, namely: pre-merger, transitional and integration phases. A particular focus of the chapter is to highlight potential 'unintended consequences' of the merger process, drawing on the perspectives of institutions in the study sample, and to make suggestions for good merger governance in each of the phases.

The study finds that the pre-merger phase is characterised by institutional merger structures, as well as joint merger structures. It investigates the necessary linkages to be established between such structures, and with statutory institutional governance structures and stakeholders, in order to give effect to 'equal partnership' and participation. The study considers critical outcomes of the pre-merger phase, in so far as these are required to support effective merger governance. In addition to those items required by the Minister for gazetting a merger or incorporation, the report gives particular attention to due diligence investigations, the Memorandum of Agreement and the merger plan. It argues that these are essential elements in ensuring sound decision-making and adequate preparation for transition to a merged institution.

With respect to the transitional phase, the report gives particular attention to the Interim Council which is the key statutory governance structure of this phase. It finds that key

challenges are posed for and by the Interim Council in constructing effective linkages between the pre-merger and integration phases. Accordingly, it argues that institutions must prepare carefully for the transitional phase, in order to ensure that the Interim Council, interim management, and other interim governance structures, which are set out in the Standard Institutional Statute, serve the needs of the merger process to an optimal degree.

The integration phase of merger is the period during which the merged institution establishes and implements its vision and mission, establishes its culture, integrates teaching and research, and aligns policies, systems and procedures. The integration sections of this chapter evaluate how governance can best support these aspects of the merger. Particular attention is paid to Council's overall accountability for merger integration and the establishment of institutional culture and identity, to the complexities and needs of academic integration, and to considerations in creating a governance model for multi-campus institutions resulting from merger.

The **final chapter** draws together and summarises the key findings, interpretations and conclusions of the foregoing chapters and formulates them as a set of observations that are seen as important for informing a full consideration of the governance of merger. Thus the chapter may be read on its own as a summary of this investigation. Conclusions include:

- Successful restructuring outcomes will depend upon the ability of state and institutions to negotiate specific mergers and incorporations to common benefit.
- There is a danger that the principle of 'equal partnership' in mergers, and especially in incorporations, may not be applied consistently in practice; governance in the pre-merger phase must give careful attention to this.
- Councils should carefully assess the specific due diligence needs of the merger or incorporation in which they are involved, notwithstanding the due diligence guidelines that have been published by the Ministry.
- A Memorandum of Agreement and merger plan are key frameworks for merger governance that should be developed in the pre-merger phase; mechanisms are required to ensure that goodwill and momentum established through these mechanisms are carried through to the transitional and integration phases of the merger.
- Given inherent challenges posed by and for the Interim Council, institutions must take into account the specific circumstances of their merger in selecting a preferred model for the Interim Council.
- In governance terms, the process of establishing institutional culture and identity requires conscious attempts to plan, implement and monitor institutional development; the Council of the merged institution must exercise its accountability in this respect.
- Decisions respecting academic integration should be driven by a defined vision and mission and should be taken only once that is in place.
- Models for multi-campus governance should be evaluated in terms of their likely impact on effective operational and academic integration, as well as on the creation of a new institutional culture and identity in the merged institution.

1. TERMS OF REFERENCE AND APPROACH

1.1 OBJECTIVES, SCOPE AND DEFINITIONS

This investigation of the governance of merger in South African higher education has three primary objectives.

The first objective is to develop a conceptual and contextualised framework for merger governance in South Africa. An understanding of the governance of restructuring South African higher education needs to be embedded in a review and interpretation of the trajectory followed by national higher education policy, an interrogation of the prevailing policy environment, and an analysis of early experiences of mergers and reactions to restructuring proposals. Given that South African higher education is itself situated in a global higher education environment, some review and interpretation of international experience in the restructuring arena adds dimension to this line of enquiry. In particular, it is important to develop an understanding of the evolving balance between state steering and institutional autonomy in South Africa's higher education system, and how this is given expression or effect through governance in the context of mergers.

The second objective is to interrogate the state of preparation – with respect to governance capacity in place, as well as grasp of the needs of governance – of South Africa's higher education system and institutions for the highly complex processes of mergers and incorporations on which they have embarked. The Ministry and Department of Education (DoE), higher education institutions themselves, as well as their coordinating bodies, have applied their minds to some extent to issues of merger governance during the period following the publication of the 2001 National Plan on Higher Education (NPHE). Ideas and questions put forward during this period of reflection, as well as during the more intensified period of preparation for implementation of restructuring decisions announced on 9 December 2002, have been analysed for any key indications they may give of directions to be followed for successful restructuring at both system and institutional levels. Attention in this report ranges from actions and support required of the state; to considerations regarding the governance structures and processes required at the institutional level in merging institutions; the implications of merger for governance in the academic and operational spheres; and the path to be followed by merging institutions to ensure that interim governance progresses appropriately towards steady-state governance.

The third objective is to make proposals regarding system-wide and institutional-level governance in South Africa's restructuring higher education system. The intention is to identify structures, processes and mechanisms of governance that will facilitate effective and efficient restructuring and at the same time enable a continued transformation focus in the higher education sector and its institutions, respect the principles of co-operative process in higher education transformation, and support high-quality academic delivery. In essence, the key purpose of this study is to determine whether 'ideal' governance conditions are achievable under prevailing conditions of policy, law, state-sector relationships and institutional capacity, and to make proposals that will support an ideal outcome.

As stated, the focus of this report is the governance of merger in South African public higher education. By *governance* is meant the structures and processes of policy design, decision-making and oversight of policy implementation. By means of these structures and processes, governance encompasses configurations of power, relationships, values and principles – since governance is about authoritative steering on the one hand, and about formal and informal interactions between stakeholders on the other hand. Higher education governance in this study is seen as incorporating these configurations in both the higher education system as a whole, and in individual institutions, with an intersecting terrain between these two spheres.¹ Given this definition, the report considers both system-level and institutional governance questions, although the predominant focus is institutional. In particular, this includes a focus on structures, processes and mechanisms of institutional governance at each phase of the merger process, including statutory governance structures (Council, Senate and Institutional Forum; the investigation does not include an in-depth focus on the Students' Representative Council and student governance issues).

In particular, the scope of this report is to consider governance in merging public higher education institutions (as defined in the Higher Education Act and dealt with in Section 23 of the Act)² and attention is given to governance needs in multi-campus institutions that will result from the merger process. The definition of *merger* adopted for the purposes of this study, which is widely used and consistent with Section 23 of the Act, is the one supplied by Leo Goedegebuure:

A merger in higher education is the combination of two or more separate institutions into a single new organisational entity, in which control rests with a single governing body and a single chief executive body, and whereby all assets, liabilities, and responsibilities of the former institutions are transferred to the single new institution.³

The Act states that merger is 'the process contemplated in Section 23 in terms of which two or more public higher education institutions lose their status as juristic persons on the date that they are merged into a new juristic person.'⁴ *Multi-campus* in this report is used to denote unitary institutions with geographically distant delivery sites – where geographically proximate delivery sites are being referred to, this is specified.

1 References underpinning this concept and definition of governance include Marginson, S. and Considine, M (2000). *The Enterprise University: Power, Governance and Reinvention in Australia*. Cambridge, Cambridge University Press; and Hyden, G. and Hoon, P (In Press). 'Governance and Sustainable Livelihood' in W. Rosenbaum and H. Bressers (eds): *The Politics of Sustainable Development*. Praeger Publishers, Westport, Connecticut, USA. Available at http://sustsci.harvard.edu/ists/TWAS_0202/hoon_hyden_in_press.pdf (31 March 2003).

2 Republic of South Africa (1997). Higher Education Act No. 101 of 1997. *Government Gazette* No. 18515, Notice 1655, 19 December 1997. Pretoria: Government Printers: Section 23. Hereafter referred to as HE Act 1997. Section 23 has been amended by the following Higher Education Amendment Acts: Republic of South Africa (2001). Higher Education Amendment Act No. 23 of 2001. *Government Gazette* No. 22808, Notice 1104, 02 November 2001. Pretoria: Government Printers: Section 6 – hereafter referred to as HE Amendment Act 2001; Republic of South Africa (2002). Higher Education Amendment Act No. 63 of 2002. *Government Gazette* No. 24187, Notice 1598, 19 December 2002. Pretoria: Government Printers: Section 5 – hereafter referred to as HE Amendment Act 2002.

3 Goedegebuure, L. (1992). *Mergers in Higher Education*. Utrecht: Centre for Higher Education Policy Studies: p 16. Hereafter referred to as Goedegebuure 1992.

4 HE Act 1997: Section 1, as amended by HE Amendment Act 2002: Section 1(c).

Another related, but subsidiary focus is on governance needs in those instances where a subdivision of one institution is being incorporated (as defined in the Higher Education Act and dealt with in Section 24 of the Act)⁵ into another public higher education institution. The Act states that ‘incorporation of a subdivision’ refers to the situation when

An identified subdivision, faculty, school, department, section or component of a public higher education institution or education institution becomes part of another public higher education institution while the latter institution’s legal personality ... is not affected.⁶

In this instance, ‘the assets, liabilities, rights and obligations of the subdivision concerned devolve upon the public higher education institution with which the subdivision has been incorporated.’⁷ It is difficult to find a good general definition of *incorporation* as envisaged in the South African context. One definition that might be applicable in principle, given the broad transformation intent of current higher education restructuring, is Daniel Lang’s notion of ‘transformative acquisition’ in which ‘one partner absorbs the other but changes substantially as a result.’⁸ However, while this definition might express an intention, it would need to be tested in practice.

The report excludes from its focus the following:

First, the report does not revisit first principles to the extent that it does not contend the wisdom of the decisions that have been made with respect to restructuring higher education in South Africa. It takes as its starting point the fact that decisions have been made in line with the strategic goals of the 2001 National Plan, and that institutional mergers will occur, and will require conditions of good governance to attain their objectives.

Second, the report does not trace the detail or development of proposals for specific institutions in the context of restructuring the South African higher education landscape. It restricts itself to an overview of the key documents in this regard, highlighting what they have to say about governance in a restructuring system.

Third, the report does not focus on the operational complexity of mergers and incorporations. Many of the concerns within affected South African institutions at present – understandably – are on detailed aspects of implementation. While this report alludes to these aspects in so far as they have implications for governance, it is not within the ambit of the report to make detailed proposals on operational issues. Thus, for example, while the report addresses governance mechanisms to facilitate a proper focus on the intricate and often vexed questions of human resources and labour relations that inevitably arise from a merger process, it does not propose how an institution should handle human resources and labour relations questions operationally.

⁵ HE Act 1997: Section 24, as substituted by HE Amendment Act 2002: Section 6.

⁶ HE Act 1997: Section 1, as amended by HE Amendment Act 2002: Section 1(b).

⁷ HE Act 1997: Section 24(2), as substituted by HE Amendment Act 2002: Section 6.

⁸ Lang, D.W. (2002). There Are Mergers, and There Are Mergers: The Forms of Inter-institutional Combination. *Higher Education Management and Policy* Vol. 4 No. 1:42. Hereafter referred to as Lang 2002.

1.2 METHODOLOGY

A range of considerations informed the development of a methodology for this study.

First, the project marks the second phase of a broad investigation by the Council for Higher Education (CHE) into South African higher education governance, undertaken in order to advise the Minister of Education. As a 'phase two' study, the current investigation is broadly informed by the phase one work and needed to establish explicit links with it, without being unduly constrained by its terms of reference or its methodology. The first phase of the work was carried out from October 2001 to May 2002 under the auspices of the CHE Governance Task Team. The investigation set out to describe and analyse the prevailing state of governance in South African public higher education institutions; to establish whether, how effectively and with what consequences the specific concept of 'co-operative governance' has been implemented in these institutions; and to make proposals on how to improve efficiency, effectiveness and accountability in higher education governance. The study resulted in the publication of a research report, as well as a policy report which formulated specific recommendations with respect to Councils, Senates, Institutional Forums and broader recommendations for the promotion of effective governance in higher education.⁹ The research study further proposed a matrix of governance as a means to understanding the prevailing state of institutional-level governance and to interpreting the requirements of effective higher education governance. In this study, the matrix is used as a basis for developing a normative analytical framework for merger governance.

A second consideration to be taken into account in designing the methodology of the current (phase two) study was timing. The National Working Group (NWG) was still at work during the early months of the phase one study, and no formal merger proposals had been put forward by the conclusion of the study. For this reason, merger governance did not form a part of the investigation's focus. However, it became clear in the course of the study that if mergers were to be implemented, then the mergers themselves, and multi-campus institutions established as a consequence of mergers, would require specific attention at the level of governance. Furthermore, there was a significant gap in attention to issues of governance in South African policy documents and other reports (such as the report of the NWG)¹⁰ that dealt with restructuring, and that had appeared by late 2002. Policy advice to the Minister in these areas would need to be timeous, but could not be pre-emptive. The CHE Secretariat commissioned the researchers to begin phase two project research in November 2002. This was shortly after the deadline for institutional submissions to the Minister regarding restructuring proposals as gazetted in June 2002, and a few weeks before

9 Hall, M., A. Symes and Luescher, T.M. (May 2002), *Governance in South African Higher Education: Research Report prepared for the Council on Higher Education*. Pretoria: Council on Higher Education – hereafter referred to as Hall, Symes and Luescher 2002; Council on Higher Education (2002). *Policy Report: Promoting Good Governance in South African Higher Education*. Pretoria: Council on Higher Education.

10 National Working Group, (2001). *The Restructuring of the Higher Education System in South Africa: Report of the National Working Group to the Minister of Education*. *Government Gazette* No. 23549, 21 June 2002. Pretoria: Government Printers (Appendix 3 of the Notice). Hereafter referred to as NWG 2001.

the announcement of Cabinet-approved restructuring decisions on 9 December 2002 which led to the subsequent launch of the Department of Education Merger Unit in early 2003. Thus the project itself was launched at a time when in-principle theoretical positions became realities to be dealt with, interpreted and commented upon. In order to bridge this gap, the project had to include a review of policy and legislation from the mid-1990s to the present, a review of institutional responses to restructuring proposals, and an assessment of issues pertaining to merger governance uppermost in the minds of the higher education sector. It also had to take account of developing approaches to mergers, particularly from the Ministry and DoE. In April 2003, the Ministry published guidelines for mergers and incorporations. The study has included reference to these as appropriate and relevant in light of its concern with governance, without in any sense trying to encompass or replicate the guidelines, and without venturing into the operational territory they cover.

A third consideration to be borne in mind in designing the project approach was sensitivity to the position of institutions directly affected by restructuring proposals. Institutions were variable in their reactions to the proposals – some positive, some negative; some placing their comments in the public domain, some regarding their views on the matter as completely confidential; sometimes prospective merger partners were at different ends of these scales. The methodological approach needed to situate an enquiry into specific institutional viewpoints within an objective and neutral investigative framework. The phase one work had demonstrated the inestimable value of speaking to institutions directly in their own institutional environments, and it was decided to carry this aspect of the methodology into the second phase of the project. In this case, interviews could not (with one exception) delve into the ‘lived experience’ of institutions engaged in mergers, but rather had to seize upon the ‘anticipated experience’ of these institutions. This was not always an easy exercise, and institutions who ultimately agreed to be in the study sample experienced some unease with it. At the same time, they welcomed an opportunity to explore the territory of merger governance which they were about to negotiate – or were beginning to negotiate – in reality. In almost all cases, the researchers in this study were the first people to engage the institutions on these issues. This, together with the fact that the research had already accumulated learnings from its first phase – with which many of the institutions in the sample were familiar – appeared to add a developmental value to the interviews for some institutions. A further consequence of investigating ‘anticipated experience’ is that the study has not been in a position to generate ‘thick descriptions’¹¹ of merger cases. First, any such ‘thick description’ as could possibly have been made was confined to details of experience of institutional and joint governance structures in the early stages of the merger process. These forms of governance were, of necessity, still finding their feet – and in some cases, their rightful shape – at the time of the interviews. Any attempt to generate detailed descriptions of potential directions and arrangements beyond this point would have required

¹¹ ‘Thick description’ is a term borrowed from ethnography and is ‘like trying to read (in the sense of ‘construct a reading of’) a manuscript – foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalised graphs of sound, but in transient examples of shaped behaviour.’ Geertz, C. (1973). *Thick Description: Toward an Interpretative Theory of Culture* in *The Interpretation of Cultures*. New York: Basic Books: 10.

revealing viewpoints that had been shared in confidence by individual institutions with researchers, at a stage when merger negotiations were sensitive and ongoing. In addition and for obvious reasons, data provided was in large part conjectural or at least embedded in a shifting reality. This – while indicating fascinating possibilities – did not allow for a clear reading of the merger as a whole. Instead the study used interview material as an essential basis for highlighting key themes for investigation and development, and for formulating recommendations.

A fourth methodological consideration was how to hone the focus of the study, as the restructuring of the South African higher education system ranges widely across mergers, incorporations, the creation of new institutional forms – such as comprehensive institutions (mergers of universities and technikons)¹², and unitary institutions with widely dispersed delivery sites (multi-campus institutions) – and regional-level programme collaboration and rationalisation. A decision was taken to focus primarily on merger governance, with a subsidiary focus on incorporation and multi-campus governance. The motivation for doing so was the particular complexities posed by unitary mergers, including those resulting in multi-campus institutions, as well as the desire to achieve a sharp and manageable focus. For the same reason, a decision was taken to focus narrowly on governance and not to stray too far into the associated territories of management, administration and complicated operational and implementation issues.

Specific efforts were made to engage South African institutions in the study. A request was sent to all institutions to forward their submissions regarding restructuring proposals, with a guarantee to review these on a confidential basis. Ultimately, institutional submissions and/or commentaries from 26 institutions (out of a possible 35) were reviewed. Approximately 85% of these were institutional submissions made to the Minister in response to merger proposals gazetted in June 2002, and most were the official Council responses. The remaining 15% were public statements made by institutions in response to the merger proposals of June 2002, including comments published on institutional websites and press releases.

Eleven institutions – or approximately one third of the pre-restructuring universe of institutions – were invited to form part of the study sample and to participate in institutional interviews. The ‘invitation sample’ was structured around creating a balance between universities and technikons, historically advantaged and disadvantaged institutions,¹³ geographical locations of institutions, and different types of merger (horizontal or vertical/comprehensive merger, merger with accompanying incorporation or without, proximate campuses or multi-campus

¹² Technikons in South Africa are the equivalent of universities of technology, technological universities, technical universities or institutes of technology found in countries such as the USA, Britain, Australia, New Zealand and Hungary; the Hogescholen in Belgium and the Netherlands; or the Fachhochschule in Germany. Technikons are administered along with universities, by the Higher Education branch of the national Department of Education.

¹³ These terms are generalisations; briefly ‘historically-advantaged institutions’ (HAIs) in South African parlance are institutions that under apartheid had exclusively or predominantly white student enrolments, and benefited from the resources of the state. ‘Historically-disadvantaged institutions’ (HDIs) are institutions that had black enrolments, were under-resourced, and were often set up to mirror the apartheid geography of separate development in urban townships, self-governing territories and homeland states.

institution as outcome of merger). Ultimately, two of the institutions approached declined the invitation. For them, as prospective merger partners, the merger in question was controversial and, at the time the request was made, the institutions felt they would be compromising their position by participating in the research. Ultimately, the study sample comprised:

- One medium-sized technikon in its first year of merger implementation – the merged institution was created from two small technikons with under 10 000 students, one historically-advantaged, and one historically-disadvantaged; the technikon now has two metropolitan campuses and the merger involved three small satellite campuses at some distance.
- One large historically-advantaged university (HAU), with more than 20 000 students, due to merge with a small historically-disadvantaged university (HDU), with less than 10 000 students; the merger was to involve five campuses of which two were at some geographical distance but of which all were metropolitan or urban.¹⁴
- One small HAU, with less than 10 000 students, due to incorporate a subdivision of a HDU (approximately 3 000 students) and then to merge with a small historically-advantaged technikon (HAT), with less than 10 000 students; the merger/incorporation was to involve two main metropolitan campuses and six satellite campuses, three within 25 kilometres, and three significantly further away; all campuses but one are metropolitan or urban.
- One small HAT with less than 10 000 students, due to merge with a small historically-advantaged university following the university's incorporation of a subdivision of another university; the merger was to involve the technikon's five satellite campuses – two within 25 kilometres, and three significantly further away; all satellite campuses but one are urban.
- One small HDU, with less than 10 000 students, due to merge with a medium-sized historically-advantaged university, with between 10 000 and 20 000 students; each institution has one main urban campus and one satellite urban campus – each of these is on average 200 kilometres apart from the next nearest campus.
- One medium-sized HAU, with between 10 000 and 20 000 students, due to merge with a small HDU; the merger was to involve the university's satellite urban campus about 200 kilometres away and this satellite campus was to incorporate the staff and students of a subdivision of a historically disadvantaged university.
- One large historically-advantaged distance-education university, with over 100 000 students, due to incorporate the distance-education subdivision of a historically-disadvantaged university (approximately 10 500 students), and to merge with a large historically-advantaged distance-education technikon of approximately 100 000 students.

¹⁴ The partner university was not included in the sample as it was in the midst of a leadership change at the time of the interviews.

- One large historically-advantaged distance-education technikon, with approximately 100 000 students, due to merge with a large historically-advantaged distance-education university, following the university's incorporation of a subdivision of another university.
- One large historically-disadvantaged university, with over 20 000 students of whom approximately two-fifths are distance students, and three-fifths are contact students at seven campuses across the country; the university is essentially being dismantled with its component subdivisions being incorporated into other universities and technikons.

In summary, this sample includes institutions involved in a total of five merger processes and three incorporation processes – to this extent, institutions in the sample ‘cluster’ into groups around these mergers and incorporations. The sample comprises six universities and three technikons, including five historically-advantaged institutions (HAI), three historically-disadvantaged institutions (HDI), and one institution that has already merged one historically-advantaged and one historically-disadvantaged partner; four regions (with an almost exclusively urban focus); three horizontal and two vertical/comprehensive mergers, and four mergers resulting in multi-campus institutions (i.e. with campuses at a significant geographical distance), at least one of which is an extreme example of this type.

Institutional interviews took the form of site visits by the researchers.¹⁵ Interviews were conducted in all instances with groups¹⁶ comprising members of one institution. The option of setting up joint group interviews, comprising members of two or more merging institutions, was offered but declined in all cases. Interviews were semi-structured in nature and revolved around four key themes. In some instances separate groups addressed each respective theme; in other cases, one group examined all four themes; this choice was at the discretion of the institution being interviewed. The four themes were:

- Institutional perspectives on guiding principles and mechanisms desirable for system-wide governance in South Africa's restructuring higher education system;
- Institutional governance structures and processes required in merging institutions (with a special focus on Interim Councils);
- Academic governance in merging institutions, (with a special focus on Senates, ‘Academic Boards’ and key decision processes in the academic sphere); and
- Governance and management in merging institutions (with a special focus on key decision processes in the operational sphere and how to ensure a successful transition from interim to steady-state governance).

To enable the researchers to prepare for the interviews, institutions were asked to provide background documentation such as position papers or discussion documents regarding the merger, or minutes of Council, Senate, Institutional Forum or other meetings where

¹⁵ This approach was used in preference to a questionnaire or survey approach.

¹⁶ With one exception where the interview was restricted to a one-on-one session with the Vice-Chancellor.

relevant issues had been discussed. The documentation reviewed was qualitatively varied and generally low in volume. Documentation provided comprised at a minimum the formal institutional submission to the Minister in response to restructuring proposals gazetted in June 2002, as well as public statements accessible through institutional websites. In some cases, this was supplemented with other confidential documentation related to the envisaged merger process, in the form of brief memoranda. In one case, fairly extensive material documenting the institution's perspectives on a range of issues relating to the governance of restructuring and mergers was provided. It was the impression of the researchers that institutions in the study sample were reluctant to share confidential written information with respect to the merger process at the stage at which interviews took place. In addition, in many cases, it seemed unlikely that detailed documentation in fact existed: discussions may not have been formally minuted, for example, even if they had taken place; and relatively little in-depth formal attention (with one or two exceptions) appeared to have been given to the issues of governance which formed the focus of the project. In general, then, this project did not have access to the fascinating range of documentary material that was willingly provided by institutions for the phase one work.¹⁷ There was also a sense that, although institutions gave generously of their time in participating in the study, they were operating under greater constraints of time and resources than in the phase one work. This was wholly understandable given the demands being placed upon institutions by the impending mergers as well as by other change processes flowing from a range of national policy interventions and change implementation initiatives.

These points made, it is nevertheless essential to note the high quality and enthusiasm of participation in institutional interviews, without which the study would not have been able to deliver this report and its proposals. As it was, the quality and frankness of observations and insights offered by all participants allowed the researchers to develop proposals using a comparative methodological approach, with the institution as the key unit of analysis.

1.3 SUMMARY: TERMS OF REFERENCE AND APPROACH

This chapter has set out the objectives, scope and methodology of the investigation embodied in this report.

The focus of the investigation is the governance of merger in South African public higher education, with a subsidiary focus on governance in the contexts of incorporation and multi-campus institutions. Merger is taken to mean the combination of two or more separate institutions into a single entity with a single governing body and chief executive body. Incorporation refers to the process whereby a subdivision of one institution is absorbed by another institution, without affecting the latter's legal status. The term multi-campus is used

¹⁷ All phase one participating institutions provided, for example, agendas and minutes for all meetings of Council, Senate and the Institutional Forum over an 18-month period; many provided additional material as well.

to refer to unitary institutions with geographically distant delivery sites. By governance is meant the structures and processes of policy design, decision-making and oversight of policy implementation.

The investigation's three primary objectives are to develop a conceptual and contextualised framework for merger governance in South African public higher education; to interrogate the state of preparation, with respect to governance capacity, of the higher education system and its institutions for the complex process of restructuring on which they have embarked; and to make proposals regarding system-wide and institutional-level governance to facilitate effective and efficient restructuring that will enable a sustained focus on transformation in the higher education sector.

The methodology was developed on the basis of four key considerations. First, the work needed to build upon prior research into how to promote effective governance in South African higher education. Second, the timing of the investigation meant it had to take into account theoretical, policy and legal viewpoints affecting mergers, as well as rapidly emerging realities to be dealt with, interpreted and commented upon. Third, the study had to be sensitive to the position of institutions directly affected by restructuring. Finally, the study had to achieve a sharp and manageable focus in a complex field. This was done by focusing primarily on merger governance, with care taken not to stray into associated territories of management, administration and operations.

2. BACKGROUND AND CONTEXT

This chapter of the report aims to draw together a range of frameworks – contextual, conceptual, theoretical, policy and legal, and analytical – that support the enquiry, namely: a review of international perspectives on higher education mergers and their governance, a review of the policy and legal framework for restructuring South African higher education, and the development of an analytical framework for merger governance against which the findings and proposals of the report can be interpreted and tested.

Before elaborating these frameworks, it is important to foreground at least briefly, the specific nature of higher education restructuring in South Africa. First and foremost, this restructuring exercise is politically driven. Mergers and incorporations have been prescribed by the state as part of an explicit agenda of transformation, redress and equity in the sector. Restructuring has as its goal the dismantling of the apartheid landscape of higher education and the configuration of a new landscape which will allow higher education to achieve the goals set for it in national policy.¹⁸ As a critically related point, it must be noted that the South African state has taken the route of mandatory restructuring in the face of failure by institutions to explore such solutions voluntarily. Through mandatory restructuring, the state is thus recasting institutions in terms of a transformed ‘fitness *of* purpose’ – i.e. institutional fitness in terms of national policy goals, priorities and targets. Once institutions have grasped this challenge by formulating visions and missions for merged entities that align them with transformation goals, it is then their task to achieve ‘fitness *for* purpose’ – i.e. conditions that will allow them to implement these visions and missions. Higher education governance, in the South African restructuring context, needs to support both levels of fitness.

Given South Africa’s history, higher education restructuring in this country is essentially *sui generis* and this must be borne in mind as this chapter broaches each of its frameworks. If the South African case is unique, then international perspectives can serve to provide useful experience and insights, but not to define, in and of themselves, the policy directions South Africa should take. The policy and legal framework for restructuring must be evaluated in terms of what it reveals about, and how it supports, specifically South African reasons for structural change. An analytical framework for the governance of restructuring must ascribe values of good governance that are consistent with the transformative goals of South African policy.

2.1 MERGER GOVERNANCE IN INTERNATIONAL PERSPECTIVE

The literature on mergers and other forms of inter-institutional combination and co-operation in higher education, has become fairly extensive. However, this body of literature poses several challenges, both intrinsically and from a South African perspective in particular.¹⁹ The introduction to this chapter has established the uniqueness of South African higher education

¹⁸ Many would argue – and have argued – that the means, in this case, does not justify the end. However, as already noted in the first chapter, this study has not entered this debate.

¹⁹ For another South African commentary on the literature, see Jansen, J. (ed.) (2002). *Mergers in Higher Education: Lessons learned in Transitional Contexts*. Pretoria: Unisa Press: 2–3. Hereafter referred to as Jansen 2002.

restructuring as a politically-driven process with the specific goal of dispelling the ills of apartheid. While the South African experience of restructuring is unfolding in a context of reconstruction and development, the international literature is largely devoted to the experience of developed countries such as the United States, Canada, the United Kingdom, the Netherlands, Norway and Australia. Literature regarding experience in other countries and contexts, such as China, Hungary and Vietnam, is much more difficult to locate, if it can be found at all.²⁰ As a more general critique of the international literature, the observation has become commonplace in the literature itself, that research in this area lacks theoretical and analytical rigour. Goedegebuure, writing in 1992, commented that:

It is a remarkable feature of the higher education literature that, although merger is a long-standing fact of institutional life, little attention in terms of research effort has been paid to this phenomenon. Admittedly, there is substantial documentation available from administrators and scholars directly involved in higher education mergers. However, in general, these articles and conference papers are not based on specified research designs derived from something like a theoretical framework. Basically they are accounts of events and recollections from informed insiders. Valuable in their own right as illustrations of the problems, pitfalls and intricacies associated with merger, they unfortunately provide little knowledge in the strict sense of the word on the motivations, dynamics and results of these processes. In short, from a theoretical point of view the study of merger is almost a barren field.²¹

These observations remain true 10 years later with one or two notable exceptions. These exceptions, and the handful of theoretical frameworks that are scattered across the literature, tend to dominate most literature reviews (including this one). Finally, from the perspective of researchers interested in merger governance in particular, the literature gives surprisingly little attention to the policy-making and decision-making processes and structures (e.g. interim structures) that should guide mergers. The literature tends to give far more attention to the role of management, and Vice-Chancellors in particular, making many observations on the importance of leadership and the influence that key personalities have had in particular instances.

Notwithstanding the challenges and limitations referred to above, it is worth highlighting the most striking themes that emerge from the literature with respect to merger governance, both at system and institutional levels. These are outlined in the sections that follow, beginning with a rapid tour of some of the main variants of terminology and typology that appear in the literature, and their implications for governance.

²⁰ For example, a recent special issue of the Higher Education journal, dedicated to international perspectives on mergers in higher education contains three case studies from Australia, two from Norway, one perspective on staff perceptions from South Africa, and two more general papers that draw on examples from developed countries exclusively. Harman, K., and V. L. Meek (ed.) (2002). Special Issue on Merger Revisited: International Perspectives on Mergers in Higher Education. *Higher Education* Vol. 44 No. 1.

²¹ Goedegebuure 1992: 8.

2.1.1 *The Lexicon of Mergers: Terminology and Typology for Governance*

As noted above, this study has adopted the Goedegebuure 1992 definition of merger which it believes to be fully compatible with the South African Higher Education Act. However, the terminology used around mergers in international literature is far from consistent or clear. For example, the word ‘merger’ is used in a number of instances to refer to what, in South African terms, would be considered an ‘incorporation.’²² Certain terms have a greater currency in some contexts than in others – for example, the Australian literature tends to use ‘amalgamation’ most frequently; other countries, such as Canada and the United States, use ‘consolidation’.

Without wishing to go into exhaustive detail on terminology, it must be noted that terminology is important because the nuances implied by specific words have a direct impact on governance arrangements. This is borne out by efforts that have been made to develop a ‘continuum’ of inter-institutional combination and co-operation, along which mergers are only one point. The first such continuum, proposed by Grant Harman and Lynn Meek, runs from voluntary co-operative agreement on the *co-operation* end of the scale, through modes of *coordination* such as formalised consortium and federation, to the *unitary structure* end of the scale represented by amalgamation in the form of a new unitary organisation.²³ Clearly governance needs and approaches are going to differ along this continuum, as the goal shifts from loose co-operation between institutions to absolute integration of institutions.

More recent versions of the continuum have been developed by Julia Eastman and Daniel Lang,²⁴ and by Lang,²⁵ to include such elements as management-by-contract, affiliation and ‘merger with responsibility-centre budgeting’. Again, such variants as these would have variable governance (and legal) requirements. Even more interesting is the reasoning behind expanding the continuum:

Harman’s model, which may explain inter-institutional co-operation, especially mergers, in Australian post-secondary education, and perhaps in the Netherlands ... does not fully refer to the institutional motives for co-operation. That it does not is neither surprising nor unexplainable. In Australia and the Netherlands, the initial motivation for inter-institutional co-operation came from government and was part of a broad scheme for rationalising and reorganising post-secondary education ... But when there are institutionally generated reasons for considering merger the model requires elaboration.²⁶

²² The ‘merger’ of the Ontario Institute for Studies in Education and the University of Toronto is a case in point. Eastman, J. and Lang, D. (2001). *Mergers in Higher Education: Lessons from Theory and Experience*. Toronto: University of Toronto Press. Hereafter referred to as Eastman and Lang 2001.

²³ Harman, G. and V. L. Meek (eds) (1988). *Institutional Amalgamations in Higher Education: Process and Outcome in Five Countries*. Armidale: Department of Administrative and Higher Education Studies, University of New England: 3. Hereafter referred to as Harman and Meek 1988. Harman has subsequently developed this continuum – see for example Kotecha, P. and Harman, G. (2001). *Exploring Institutional Collaboration and Mergers in Higher Education*. Pretoria: South African Universities Vice-Chancellors Association (SAUVCA): 10.

²⁴ Eastman and Lang 2001.

²⁵ Lang 2002: 21.

²⁶ Lang 2002: 20–21.

This contrast between sources of motivation for mergers provides a sharp illustration of how national policy objectives and the prevailing conditions of system-level governance will impact directly on the types of inter-institutional co-operation and governance arrangements that may flourish – or not – at institutional level.

With this in mind, it is important to emphasise the distinction between federal and unitary mergers, as these different institutional forms are not necessarily equally welcome or appropriate across different national higher education systems engaged in restructuring. John Fielden and Yvonne Greenop note that federal institutions resulting from a merger do not fit the Goedegebuure 1992 definition (adopted for this report).

An integrated model has a single corporate identity and management structure, whereas a federated model allows for recognition of sub-institutional entities, such as campuses with a high degree of autonomy.²⁷

The University of London, the National University of Ireland, California State University, and Quebec University are all cited as examples of this type. The wave of mergers in Australian higher education between 1987 and 1991, which aimed amongst other things to abolish the binary system and to achieve major consolidation of institutions through mergers, did not prescribe the form mergers should take; and both federal and unitary mergers were attempted.²⁸ In the Netherlands the restructuring of the non-university sector launched in 1983 resulted in the merging of 348 institutions into 51 new institutions while 34 remained independent. In this case mergers were guided by ‘limiting conditions’ laid down by the state, including that ‘an institution should function as an administrative and educational unit, implying one board of governors, one board of directors and one participation body (formed by staff and students).’²⁹

Mergers themselves have been classified in three principal ways. One of these has already been referred to: the classification of mergers in terms of organisational outcome, such as unitary merger, federal merger, incorporation, and so on.

The second type of classification is in terms of impetus with a common distinction in the literature between ‘voluntary’ and ‘involuntary’ mergers. Taking issue with this classification as used by Harman, Goedegebuure states that

²⁷ Fielden J. and Greenop, Y. (2000). *Federal University Structures: Models and Lessons*. CHEMS Paper 32. London, Commonwealth Higher Education Management Service. Hereafter referred to as Fielden and Greenop 2000.

²⁸ Two examples of federal mergers in the Australian case were the University of New England/UNE network with three colleges of advanced education, and the University of Western Sydney/UWS network university. Both mergers subsequently dismantled owing to conflict (UNE – which split into two separate universities) and an unsteady alliance (UWS – which has returned to a unitary structure). See Harman, G. (1993). *A Merger that Failed: The Case of the University of New England*. *Higher Education Quarterly* 47(2): 120–141 – hereafter referred to as Harman 1993; and Fielden and Greenop 2000: Appendix I and Appendix IX.

²⁹ Goedegebuure, L.C.J. and Vos, A.J. (1988). *Mergers and the Restructuring of Higher Vocational Education in the Netherlands* in Harman and Meek 1988: 202. Hereafter referred to as Goedegebuure and Vos 1988.

No merger is voluntary as such ... Merger is always an offensive or defensive action in response to certain environmental developments, ranging from specific government initiatives to weavings of the 'invisible hand' of the market.³⁰

This implies that the underlying causes of mergers are actually a function of the dynamics between the higher education system as defined by national policy goals, and the institutions within that system who respond to the environment so conditioned. Even if all mergers are to some extent 'involuntary' however, the scope that institutions have to choose their partners varies. Thus the designation of polytechnics in the United Kingdom in the late 1960s implied mergers between specified institutions, while institutions in Australia, the Netherlands and elsewhere have been free to choose their partners. Institutions may perhaps be imputed as most at liberty to choose their partners in the instance of 'mergers for mutual growth' explored by James Martin and James Samels.³¹ They are least at liberty where specific mergers are laid down or forced by the state,³² and in this case the critical issue becomes the response of institutions to imposed combinations.

A third classification type groups mergers in terms of the academic focus and activities that the merging institutions bring together. This classification was introduced to the literature by Goedegebuure,³³ drawing on private sector merger typologies that use 'line of business' and 'type of product' as structuring dimensions. Substituting 'field of academic activity' and 'type of academic product' (teaching and research), Goedegebuure describes four types.

- A *horizontal* merger is 'between institutions which operate in similar academic fields and are oriented towards a similar type of product';
- A *vertical* merger is 'between institutions which operate in similar academic fields and are oriented towards a different type of product';
- A *diversification* merger is 'between institutions which operate in different academic fields and are oriented towards a similar type of product'; and
- A *conglomerate* merger is 'between institutions which operate in different academic fields and are oriented towards a different kind of product.'³⁴

One might predict that these types would influence the governance structure directly in systems where institutions are free to choose the form of their merger. But in any instance, including unitary merger, one can equally predict that these types would influence quite strongly the process and timing leading to merger, and the complexity of implementation.

³⁰ Goedegebuure 1992: 22.

³¹ 'In this model, mission-complementary institutions combine to enhance the vision and will of each. These mergers are not taking place for the traditional bankruptcy-bailout reasons; rather, the strategies outlined ... reward institutions willing to move forward boldly and to consider merger as one of their most creative planning options in the coming decade.' Martin, J. Samels, J.E. and Associates (1994). *Merging Colleges for Mutual Growth: A New Strategy for Academic Managers*. Baltimore, The Johns Hopkins University Press: ix-x. Hereafter referred to as Martin and Samels 1994.

³² See for example Kyvik, S. (2002). The merger of non-university colleges in Norway. *Higher Education* Vol. 44 No. 1: 53-72.

³³ Goedegebuure 1992: 16-24

³⁴ See also: Pritchard, R.M.O. (1993). Mergers and Linkages in British Higher Education. *Higher Education Quarterly* Vol. 47 No. 2: 79-102. Hereafter referred to as Pritchard 1993.

Where institutions are oriented around different academic fields and products, differences in institutional style and culture would be wholly unsurprising, and could impact quite strongly on merger process and outcomes.

2.1.2 Key Governance Themes in the Literature

It is possible to distinguish three levels of governance in talking about higher education mergers. The first level is the system level, and links to the impetus behind mergers. The intermediate level is the inter-institutional level, and links to the process for mergers ‘pre-merger’ and in transition. The third level is the institutional level, and links to the process of merger implementation and the move to steady-state governance (including governance arrangements for faculties and departments). These levels are used as an organising framework for key governance themes emerging from the literature.

2.1.2.1 System-level Governance and the Impetus for Mergers

Mergers – and other forms of inter-institutional combination and co-operation – have been a general feature of higher education over the past 20 to 30 years, especially in developed countries where some sources estimate that there had been at least five hundred mergers in the public higher education sector by the 1990s.³⁵ In publicly funded systems of higher education in such countries (including the United Kingdom, the Netherlands, Germany, Sweden, Norway and Australia), the prominence of mergers has often tended to be linked to the changing nature of the relationship between state and education during the same period. A fundamental shift has occurred from a ‘state control’ model, to a ‘state supervision’ model,³⁶ strongly influenced by notions of the marketisation and commodification of higher education. Concerns over funding constraints, widened access, accountability, quality and management efficiency, have led governments to adopt quasi-market approaches in higher education resource allocation. They have sought to align accountability and control by delegating to the institutional level increased authority over inputs and resource use, while increasing institutional accountability for outputs and performance (thus creating what is in effect an artificial higher education market).³⁷ In this context, restructuring of higher education systems has been seen by some governments as an important mechanism for improving the effectiveness and efficiency of the system as a whole and of individual institutions.

The exact nature of policy goals and approaches has differed from country to country and over time. Thus starting from the 1960s, some waves of mergers were associated with the creation of binary higher education systems – the British government used mergers to create polytechnics and thus to expand the system, and the Australian government used them to

³⁵ Goedegebuure 1992; Martin and Samels 1994; Eastman and Lang 2001.

³⁶ Neave, G. and van Vught, F. (1994). Government and higher education in developing nations: a conceptual framework in *Government and Higher Education Relationships Across Three Continents*. Oxford, Pergamon: 1–21.

³⁷ Amaral, A. and Magalhaes, A. (2001). On markets, autonomy and regulation: the Janus Head revisited. *Higher Education Policy* Vol. 14: 7–20.

create colleges of advanced education. In due course, mergers were used instead to contract these higher education systems. During the 1970s and the early 1980s higher education mergers in the United Kingdom, the Netherlands and Australia were used as a mechanism for rationalising teacher education. From 1983, the Dutch government set conditions for mergers to rationalise the non-university sector, and from 1987, the Australian government used mergers once again to dismantle binary higher education and create the Unified National System (UNS). During these successive waves of mergers, direct government intervention gave way to steering by incentives. The case of the Australian UNS is particularly well known:

In order to join the UNS and to be assured of continued government funding, institutions were required to meet particular criteria, the most important elements of which applied to enrolment. To be eligible for even basic funding, institutions had to have at least 2000 EFTSU [equivalent full-time student units], while to be funded for a broad teaching profile with some specialised research activity at least 5 000 EFTSU was required. Further still, to be funded for comprehensive involvement in teaching and research, institutions had to have at least 8000 EFTSU ... Immediately the Government's plan and its criteria ... were announced large numbers of institutions began a frantic search for partners.³⁸

In China, a system traditionally characterised by highly centralised planning, mergers have been associated with decentralisation efforts to achieve more competitive institutions and greater coordination across the system.

The main target of reform [starting in the 1990s] was to change the obsolete system under which universities were owned and run by a variety of central industry ministries, in order to establish a fairly decentralised, two-tiered management system. In this system, administrative powers would be shared by both central and local governments, but with the local governments being required to play a major role ... The entire process rested on two basic premises. First, all top-rate universities should be comprehensive, should include most disciplines, and should be big enough to handle large enrolments. Secondly, most medical universities should be incorporated into comprehensive educational institutions, and recognised as essential parts of first-class universities.³⁹

These selected examples show that the motives behind state-initiated merger processes are complex and not static. Kay Harman and Lynn Meek have identified the principal drivers behind the many and varied efforts as: increased efficiency and effectiveness; overcoming

³⁸ Harman, G. (2000). Institutional Mergers in Australian Higher Education since 1960. *Higher Education Quarterly* Vol. 54 No. 4: 353.

³⁹ Chen, D.Y. (2002). The Amalgamation of Chinese Higher Education Institutions. Education Policy Analysis Archives 10(20). Available at <http://epaa.asu.edu/epaa/v10n20.html> (16 September 2002). Mok comments of the post-Mao higher education system that 'instead of exercising a 'micro' control', that is, imposing a very tight control on all details of the operation of the higher education system, the central government now maintains a 'macro control' over higher education by giving policy directions and issuing policy principles.' Mok, K.-H. (2002). Policy of Decentralization and Changing Governance of Higher Education in Post-Mao China. *Public Admin and Development* Vol: 22 No. 3: 262.

problems of institutional fragmentation and non-viable institutions; widening student access and implementing broader-scale equity strategies; differentiating course offerings to cater for student diversity and to improve the quality of graduates; and increasing government control of the overall direction of higher education systems.⁴⁰

In instances where mergers do not flow directly from government policy,⁴¹ institutions may merge – as has occurred particularly in the United States, and also in the United Kingdom – in order to create a larger resource base, as well as to win greater prestige in competing for students and research funds. Bikas Sanyal, for example, cites the disappearance of the binary system in the United Kingdom since 1992 as an impetus ‘to mergers of polytechnics and colleges in order to create institutions worthy of the name of a university and able to compete with older institutions.’⁴² Mergers for resource and competitive reasons continue to occur in these countries as recent activity in the United Kingdom will testify – for example, the merger of Manchester University and the University of Manchester Institute of Science and Technology (to go ahead), Bradford University and Bradford College (impending), and the mooted merger of University College London and Imperial College (scuppered).⁴³ Martin and Samels mention instances of ‘state legislators, chief executive officers and system-wide coordinating boards [who] have explored the benefits of merging universities, state colleges, and community colleges for mutual growth in Arkansas, California, Florida, Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oklahoma, Oregon and Texas’; while ‘recent private sector higher education merger activity has been impelled by a recognition of complementary missions and the legitimate need to preserve strength and competitiveness.’⁴⁴

The mergers-for-mutual-growth motivation⁴⁵ is a fresh spin on the resource-dependency explanation of mergers, and its associated natural selection perspective.⁴⁶ The resource-dependency view tends in fact to dominate much of the literature. It holds that institutions depend on others for their resources and will accordingly respond to pressures in their environment through mergers and other forms of inter-institutional co-operation in order to survive.⁴⁷ However, neither of these perspectives is particularly satisfactory for explaining the underlying causes and dynamics of mergers in public higher education systems as a whole.

40 Harman, K., and Meek, V. L. (2002). Introduction to special issue: Merger revisited: International Perspectives on Mergers in Higher Education. *Higher Education* Vol. 44 No.1: 1.

41 Bearing in mind that they may nevertheless flow indirectly.

42 Sanyal, B.C. (1995). *Innovations in University Management*. Paris: UNESCO Publishing: 54. He cites the example of the University of Greenwich, established in 1992.

43 The Times Higher Education Supplement during 2002 and 2003 has been filled with news of these and other mergers.

44 Martin and Samels 1994: 6–12.

45 Martin and Samels have recently retracted their emphasis on mergers, predicting that ‘over the coming decade, strategic alliances will outnumber mergers by at least 20 to 1’. Martin, J. and Samels, J.E. (2002). We Were Wrong; Try Partnerships, Not Mergers. *Chronicle of Higher Education* Vol. 48 No. 36: 10.

46 See for example Goedegebuure, L. and Meek, L. (1994). A Resource Dependence Perspective on Mergers: comparing Institutional Amalgamations in Australia and the Netherlands. in Goedegebuure L. and F. van Vught (eds.): *Comparative Policy Studies in Higher Education*. Utrecht: Centre for Higher Education Policy Studies.

47 ‘Burton Clark, in his study of entrepreneurial universities (1998) described the problem well with this succinct term: ‘demand overload’. Demand overload refers to a situation in which the resources that support a college or university become more and more limited while the services demanded of it increase, along with their concomitant costs.’ Eastman and Lang 2001: 11.

Of more apparent value in this respect is the notion of ‘political economy of merger’ put forward by Eastman and Lang. They argue that the essence of the political economy of any higher education institution is striking a balance between five attributes: scale (economies of scale or capabilities of sound management); breadth (array of academic offerings, or array of institutions in the system); quality (internal or externally-determined standards); distribution (modes of programme delivery and geographical location of campuses); and economy and efficiency (the expense and efficacy of delivering programmes while keeping the other four attributes in balance).

This [model] explains why, in public systems of higher education, governments may be interested in merger even though it is essentially an institutional phenomenon. Governments as well as individual colleges and universities seek to strike a balance ... The juxtaposition of the four attributes that correlate positively with cost [scale, breadth, quality, distribution] and the one that does not [economy and efficiency] represents the fundamental problem in the political economy of higher education, whether at the system level or the institutional level. Where this correlative ‘dissonance’ exists, the interest in merger as a means of striking the balance grows.⁴⁸

From the frame of governance, this model constructs a way to understand how and why national policy goals and institutional missions could be in tension, or alternatively could support each other, when restructuring through mergers is on the agenda for higher education. It also indicates the dimensions in which merger policy is most needed, and where it should be most closely monitored.

The difficulty of holding all parts of the ‘political economy model’ in balance helps to explain another key theme in the literature of higher education mergers that is most relevant at system level. This is that mergers may quite easily lead to unintended consequences and policy distortions. Writing in 1994 about the UNS wave of restructuring of higher education in Australia, Miriam Henry cites a sobering range of these:

- Although the aim underpinning the UNS was to create a more flexible and responsive system, funded on the basis of function, not status, the emerging system was dominated by the status considerations of former universities. ‘Rather than promoting diversity and flexibility, this may result in an unhealthy homogenisation of role, function and character across all higher education institutions.’
- The restructuring was informed by a belief that economies of scale would be achieved, but ‘assumptions about the administrative efficiencies of large, multi-campus institutions are ... being contested.’
- While many institutions in the UNS enjoyed a greater autonomy in some ways than before, ‘such autonomy is however conditional, a point deeply resented by the vice-chancellors, especially those from the former universities.’

⁴⁸ Eastman and Lang 2001: 12–13.

- The ‘deregulatory logic’ of the mergers seemed to have resulted in ‘market anarchy, rather than market discipline’ with crises in over-enrolment, space, resources, personnel and morale.
- Finally, increased equity accountability in the system seemed to have enhanced ‘the propensity for economic rationalism to distort or undermine equity goals’ as the gap between equity rhetoric and the achievement of targeted reforms widened.⁴⁹

There are many comments in the literature on the unconvincing evidence of mergers to achieve economies of scale⁵⁰ and their tendency to lead to homogenisation rather than diversity.⁵¹ While it is not necessary to go into the detail of these findings, from a system governance perspective, it is important to make the point that policy integration is critical if negative outcomes are to be avoided on the one hand; on the other hand, institutional outcomes from mergers must be tracked across the system in order to take account of such policy distortions or other surprising results that occur.

2.1.2.2 Governance and the Inter-institutional Process for Mergers

The literature gives surprisingly little attention to the process of higher education mergers at the level of key considerations for governance. Given the case-study orientation of much of the literature, when there is discussion of process, this tends to give specific detail of the case under discussion and is anecdotal rather than principled – it also focuses on individuals rather than governance bodies or actors. However, some of the general points made about inter-institutional dynamics and contextual factors in the period leading up to merger are of relevance for conceptualising key governance considerations in this phase.

Goedegebuure refers to four stages of merger process, in terms of their beginning and ending events as well as the different factors considered to operate at each stage. Thus stage one runs from ‘pre-existing condition’ to ‘initial contact’ and environmental, community and economic factors are prevalent. The second stage runs to ‘initial integration of resources’, with sociological factors and inter- and intra-organisational bargaining predominant (this is the stage under discussion in the current section of this report). The third stage runs to ‘full integration of resources’ with operating factors being managerial, psychological and individual. The fourth stage concludes with the ‘revised and accepted organisation’ with institutional and evaluative factors in operation. Goedegebuure observes that higher education merger studies, sometimes undertaken in the social sciences tradition and frequently from an atheoretical perspective, tend to focus on process ‘not so much based on a rationalist perspective as on a perspective stressing the political nature of mergers through

⁴⁹ Henry, M. (1994). *The Restructuring of Higher Education in Australia*. Paris: UNESCO International Institute for Educational Planning: 25–30.

⁵⁰ For example: Pritchard 2003: 83; Eastman and Lang 2001: 201ff.

⁵¹ For example: Brown, R. (2001). Collaboration and Restructuring. *Perspective* Vol. 5 No. 4: 96; Taylor, M. (1994). *Amalgamation at the University of Sydney, Australia: The Institutional Viewpoint*. Paris: UNESCO International Institute for Educational Planning: 26 – hereafter referred to as Taylor 1994; Eastman and Lang 2001: 252.

emphasis on interests, (inter) organisational bargaining and conflict, power, etc.’⁵² This is an interesting observation because in part it explains why so little attention is given to formal governance during what we have called ‘inter-institutional process’. Furthermore it is an accurate description of actual preoccupations in the literature, alerting us to the fact that if these are central, they must serve as a critical backdrop for governance in higher education mergers in any case.

Eastman and Lang appear to broadly agree with Goedegebuure’s phases, labelling three stages of a higher education merger: *negotiations* between institutions and including government if necessary, *transition* during which institutions plan and prepare for merger, and *implementation* which is likely to last for months or years.⁵³ John Welsh also implies these phases in highlighting four critical roles of governing boards in the merger process: assessing the feasibility of a merger; negotiating a merger proposal; approving a merger proposal; and implementing a merger agreement.⁵⁴ Eastman and Lang detail 12 process steps⁵⁵ and 12 substantive steps⁵⁶ to merger, as well as suggesting detailed steps for what they call ‘unit-level transition planning’ for mergers of faculties or equivalent units. Against the background of this suggested framework, they ultimately find, on the basis of cases studied, that

There is no single best approach to merger. How the steps involved should be tackled, and the best sequence in which to tackle them, depends very much on the *context*. Thus, for example, the most effective approach to merger negotiations depends on the relative size of the parties, the compatibility of their positions, and other factors. Similarly, the appropriate balance between rational planning and incrementalism depends on the particular *context*.⁵⁷

There are a number of important ideas in the paragraph above which need to be disaggregated. One way to do so is to understand what underlies the insistence on the importance of ‘context’, and what is meant by ‘context’. The word seems to be used here in relation to two factors, both of which have implications for the process and governance needs of mergers in their ‘negotiation’ and ‘transition’ phases.

⁵² Goedegebuure 1992: 25–28.

⁵³ Eastman and Lang 2001: 102.

⁵⁴ Welsh, J.F. (1994). The Role of Trustees and Governing Boards in College and University Mergers, in Martin and Samels 1994: 44. Hereafter referred to as Welsh 1994.

⁵⁵ Eastman and Lang 2001: 217. The steps are: 1) getting to know the other party; 2) deciding to pursue the option of a merger; 3) setting objectives for merger; 4) preparing the organisation for merger; 5) entering discussion of merger; 6) performing due diligence; 7) agreeing to merge; 8) securing government sanction (if necessary) and continuity of funding; 9) putting in place transition planning and management mechanisms and resources; 10) giving legal effect to the merger; 11) putting the old order to rest; 12) implementing the new organisation.

⁵⁶ Eastman and Lang 2001: 217. The steps are 1) articulating the vision; 2) naming the successor institution and/or new unit/s; 3) governance; 4) administrative structure; 5) finance; 6) budget framework and process; 7) new administrative leadership; 8) developing plans for merged units; 9) setting and reallocating budgets; 10) putting personnel in place (labour relations issues, personnel policies, pensions, benefits, redeployment and severance); 11) policy and procedural transition; 12) academic planning.

⁵⁷ Eastman and Lang 2001: 243. Emphasis added.

The first contextual factor is the type of merger in view. Eastman and Lang develop a model of magnitude of change for merger partners, and conclude that consolidations will entail more profound change for the partners than any other type (e.g. pure acquisition, or 'transformative acquisition')⁵⁸ and presumably will entail greater process complexities as well. Vertical mergers are generally held to be more difficult to achieve than horizontal mergers.⁵⁹ Thus Martin and Samels promote mutual-growth mergers for 'mission-complementary' institutions, rather than for institutions oriented towards different kinds of academic product. Meek notes that 'cross-sectoral mergers raise special difficulties ... with regard to matters such as funding, coordination and course accreditation' and perhaps for traditions and loyalties as well: 'in cross-sectoral university/college mergers, the outcome [...] is always a university.'⁶⁰ Merger partners need to be quite clear beforehand what type of merger it is that they are embarking upon, so that misunderstandings do not threaten the entire process later on: 'the initial phase of assessing the problem contains the seeds of the solution'⁶¹ writes John Wyatt with reference to a successful merger; while 'a fundamental misunderstanding of the nature of the amalgamation'⁶² was at the root of a merger that failed, according to Harman.

Secondly, 'context' is a reference to power dynamics of mergers that influence both process and outcome. An oft-repeated observation in the literature is that the relative size and power of merging institutions matter; with a related observation that mergers of equal partners are rare and extremely difficult where they do in fact occur. Such mergers are also most likely to be of the consolidation type, unequal partnerships effectively leading to acquisitions. These are important observations for the resource-dependency perspective on mergers, for example. Thus Goedegebuure distils a range of assumptions and propositions including that 'if power differentials exist between organisations ... the organisation in the more dependent position will attempt to adjust the relationship through the use of balancing operations' and 'the more institutions are balanced in terms of their possession of critical resources, the less likely it is that they are found within the same group of institutions that constitute the merged institution.'⁶³ In short, this suggests that differences in size and power will actually facilitate merger, as a dependent partner seeks to secure resources from a more dominant partner/s. On the other hand, the picture is not so simple: where institutions are of relatively equal size and power, there may be the best potential to create something truly new through a merged institution – especially where academic programmes are complementary.⁶⁴ A great deal may depend on the manner in which negotiations are undertaken, and this may in turn explain the apparent contradiction between these two perspectives.

⁵⁸ Eastman and Lang 2001: 115.

⁵⁹ See Harman, K. (2002). Merging Divergent Campus Cultures into Coherent Educational Communities: Challenges for Higher Education Leaders. *Higher Education* Vol. 44 No.1: 91. Hereafter referred to as K. Harman 2002; Eastman and Lang 2001: 98.

⁶⁰ Meek, V.L. (1988). Notes on Higher Educational Mergers in the United Kingdom in Harman and Meek 1988.

⁶¹ Wyatt, J. (1998). A Rapid Result: The Achievement of a Merger in Higher Education. *Higher Education Review* Vol. 31 No. 1: 31.⁶² Harman 1993: 133.

⁶³ Goedegebuure 1992: 132–3.

⁶⁴ Eastman and Lang 2001: 99, 128.

Eastman and Lang describe a spectrum for merger negotiations running from ‘courtship to combat’, embracing at its midpoint collaborative bargaining in which parties acknowledge their differences, exchange information about their preferences and seek to find mutually acceptable resolutions; further along the spectrum, attitudes harden, trust weakens and parties employ tactics designed to get the other to accept its position.

Combat is associated with short-term damage to relationships and morale. However, it does have advantages. Precisely because the parties do not trust each other, they tend to want to spell everything out in detail. The result is clearer, more comprehensive agreements ... Courtship may be associated with issue avoidance and ambiguity if lead negotiators are intent on preserving a harmonious façade ... Combat tends to produce clarity and comprehensiveness in any resulting agreement.⁶⁵

Thus where one partner is relatively smaller or weaker, negotiations may be entered into in courtship mode and may consequently go more smoothly (even if this does not guarantee plain sailing at implementation). Where partners are relatively equal in size and strength, negotiations may be tougher, but if conflicts can be worked through and resolved, outcomes may be consequently more resilient.

It is Eastman and Lang once again who give the most focused attention to roles in the merger process, including suggestions as to who should lead and/or be included in merger negotiations, and how to achieve a balance of top-down and bottom-input in discussions. Many of these observations are context-specific in terms of relative positions of the parties. They are also rather specific to a concept of governance in which participation and representation are above-all choices rather than imperatives.⁶⁶ However, their observations on the role of trustees have more general application, and move from the political to the pragmatic.

They point out that mergers will test to the utmost the duty of care, diligence and skill entrusted to governors, and that governors need to apply due diligence broadly – to finance as well as academic health and regulatory compliance.

Governors of institutions should ensure that due diligence is not only done *a priori*, but also projected to an *ex post facto* state – that is, they should ensure that the terms of the merger agreement are clear and that their implementation is feasible. There is a third dimension of due diligence that applies in the case of mergers. It involves the extent to which the trustees of a not-for-profit institution are required to inform themselves about the various factors that constitute due diligence as applied to merger. This requirement applies to all trustees equally, regardless of their individual expertise or ability ... If, for whatever reason, trustees believe that the information available to them is not sufficient for them to discharge their fiduciary and due diligence responsibilities, it is their legal duty to demand further information, and the duty of management to provide it.⁶⁷

⁶⁵ Eastman and Lang 2001: 136–140.

⁶⁶ See for example Eastman and Lang 2001: 223–5.

⁶⁷ Eastman and Lang 2001: 205–7.

Welsh, discussing the role of trustees in growth mergers, underscores these points generally, in addition to emphasising the roles that boards of governors should play in setting up task forces to explore the feasibility of merger, in determining an effective bargaining approach, in controlling communication about merger negotiations and in approving the merger proposal. 'It is critical over time for the board to ensure that each task has been assigned and monitored to completion, and, in this way, to acknowledge that mergers affect every unit and constituency within the institution.'⁶⁸

2.1.2.3 Institutional Governance and Merger Implementation

At the level of institutional governance and merger implementation, the literature is disappointing in what it has to say of the formal requirements of governance. However, it introduces key themes that should be taken account of by institutional governance.

One of the commonest of themes is the influence of personalities, and especially of leadership personalities, at each stage of merger, whether this be negotiation, transition or implementation. Thus many case studies refer to individuals by name and note the personal characteristics which have influenced merger process and implementation.⁶⁹ Rosalind Pritchard asserts that

The most important single factor in assuring the success of a merger is good management from the top. This has consistently been found to be true of corporate mergers ... The leadership style characterising the early years of a successful merger is strongly directive (some would even say brutal!) and it is important to state that the style needs to change as the HEI matures. As normalisation replaces crisis, less attention should be paid to controlling people and more to developing institutional loyalty and raising institutional morale.⁷⁰

Kay Harman notes that leadership needs to elicit new loyalties and establish new institutional identity. The chief executive needs to perform a macro-managerial role and must become the conceptualiser for the whole organisation in terms of vision and assessing carefully the forces that will affect the destiny of the new institution.⁷¹ These views of the role of senior executives, and the Vice-Chancellor in particular, are striking, and probably valid, but they tend to ignore the wider governance context within which such leadership is exercised, as well as the importance of distributed leadership. Gudrun Curri's study of mergers in New South Wales, Australia, notes that 'many respondents realised that they, and in particular

⁶⁸ Welsh 1994: 58.

⁶⁹ See for example: Hatton, E.J. (2002). Charles Sturt University: A case study of institutional amalgamation. *Higher Education* Vol. 44 No. 1: 5–27. Hereafter referred to as Hatton 2002; Harman, G. and Robertson–Cunninghame, R. (1995). *The Network UNE Experience: Reflections on the Amalgamated University of New England, 1989–1993*. Armidale: Department of Administrative, Higher and Adult Education Studies, University of New England; Eastman and Lang 2001: chapter 3.

⁷⁰ Pritchard 1993: 85.

⁷¹ K. Harman 2002: 110.

their academic leaders, lacked the specific skills or knowledge to negotiate and implement effectively the change resulting from the federation or amalgamation.⁷² Eastman and Lang note that

The impact of leadership varies by level of organisation. In [the case under discussion] it appeared that presidential leadership had relatively more influence on the merger's occurrence and timing and that decanal leadership had relatively more impact on its outcome. The impact of leadership at various levels on whether potential mergers take place, on their timing, and on what they produce appears to be a very interesting topic for further research.⁷³

The key point in governance terms is that while force of leadership – be it coercive, persuasive or supportive – is acknowledged as a significant variable, the success or failure of a merger cannot be allowed to rest on personality alone, and possibly the individual interests that go along with it. Good governance, in terms of structures and processes of policy- and decision-making and monitoring, is an essential support and counterbalance to individual leadership and the play of personalities, as well as an essential condition for the flourishing of sound management of complex merger implementation.

Institutional culture is another key variable noted in higher education merger studies, whose relationship to governance needs to be pinpointed.

Attempts to merge uncomplementary campus cultures into a coherent, workable system in a newly merged institution present sizeable challenges for higher education leaders. When deeply entrenched organisational and academic cultures are forced together they can present a considerable force in preventing or severely retarding change. As merging denotes radical change, cultures or 'souls' of the partners are as deeply affected as the changes in systems of governance ... The 'thicker' the culture where a greater degree of shared beliefs and values is evident, the more potent will be the culture's influence.⁷⁴

The implications of managing cultural dynamics for leadership have already been suggested above; implications for governance are no doubt similar, albeit at systemic rather than individual level. Thus key governance bodies too will have a clear role to play in directing change, and building new institutional loyalties and identities. They will need to pay attention to fostering and monitoring the development of an integrated culture, although they cannot decree it. One particular point made about formal governance and the cultural complexities of merger is that

72 Curri, G. (2002). Reality versus perception: Restructuring tertiary education and institutional organisational change – a case study. *Higher Education* Vol. 44 No. 1: 139. Hereafter referred to as Curri 2002.

73 Eastman and Lang 2001: 242.

74 K. Harman 2002: 97.

Integrated, unitary structures of governance, as opposed to federal structures, appear to work better in developing academic coherence and loyalty in newly merged institutions. Integration, however, does not necessarily mean assimilation ... many different models and levels of cultural integration are possible and retaining some elements of the old cultures is desirable.⁷⁵

Thus higher education governance needs to address the merging of cultures through both structure and content, meaning that direct attempts to manage cultural and style differences across campuses may well be embedded in organisational and governance design. The Charles Sturt University case in Australia is a good example.

Given its vast geographical spread, and the extent to which there were known historical animosities between the three principal sites, the university faced distinctive problems in finding a workable, stable management model for the new entity. The 'decentralised integrated' amalgamation model employed at CSU has woven it together in a way which makes disamalgamation difficult, even unthinkable.⁷⁶

Key features of this model – in a federated, network university – include giving campus principals trans-campus responsibilities – effectively making them deputy or pro vice-chancellors; deciding not to give campus principals budget; and having the majority of staff assuming – to varying degrees – university-wide responsibilities, while remaining based at their member campuses. This solution was chosen to counter the inherent push for independence by individual campuses that may result from a devolved structure matched with relative campus autonomy.⁷⁷

The Charles Sturt case illustrates the complexities of governing and managing a multi-campus institution, and this is another common fairly theme in the literature of higher education mergers. Jorunn Dahl Norgård and Ole-Jacob Skodvin investigate these difficulties from both practical and organisational development perspectives, exploring the hypotheses that a network college created through merger (Telemark College in Norway) is more expensive to run than an integrated institution, and that it is more difficult to achieve collaboration and integration across programmes in such an institution. With reference to network theory, they point out the danger of 'structural holes' in already loosely-coupled academic institutions that have now merged, resulting in potentially weak organisational and academic ties, weak infrastructural links, lack of social connections and cultural differences. Their findings support their hypotheses, and confirm that structural holes create tensions that have a long-term effect on the academic development of the new institution, which will be exacerbated where geographical distance between campuses is also a factor. While technology or travel

⁷⁵ K. Harman 2002: 110.

⁷⁶ Hatton 2002: 5.

⁷⁷ As another example, at the University of Sydney, 'the powers of the Vice-Chancellor ... vis-à-vis the principals of the three former colleges have not been easy to define'; Taylor, 1994: 26. In tension is this 'suggestion 'by Eastman and Lang: 'an institution that wants to carve out a unique role within the acquiring institution should attempt to negotiate a form of acquisition that will give it a measure of autonomy'; Eastman and Lang 2001: 135.

can be applied to counter geographical distance, adoption and embedding of these solutions may take some time; there are also infrastructural and other associated costs.⁷⁸ Thus, one can conclude that multi-campus institutions are especially complex and difficult at the level of personal and professional relationships, that they may hinder achievement of objectives such as co-operation in teaching and achievement of programme diversity, and that attempts to achieve integration across distances may offset envisaged economies of scale. These are significant and fairly intractable challenges to be broached by the governance and management of a newly merged institution.

Attempts to meet the multiple challenges posed by merger tend to increase institutional bureaucracy quite sharply in the short term, and to increase a managerial institutional style, as attempts are made to direct merger implementation and to keep a handle on the efficiency of the merged institution (whether through a centralised or a devolved structure, and whether or not this involves retrenchments and redeployments). These results, too, can be exacerbated in a multi-campus merged institution, even if attempts are made to cut out administrative duplications.⁷⁹ The effect of this complex of factors is marked upon all members of the institution, including academics, who are either frustrated by an increased administrative workload and/or perceive the merger to be an organisational, managerial and budgetary exercise, rather than an academic one.⁸⁰ The possible disaffection of academics is a serious threat: 'Given the collective power and the individual autonomy enjoyed by faculty members, and the extent to which institutional success depends on their performance and achievement, it is especially important to attend to the human side of higher education mergers.'⁸¹ Thus a tension is established at the heart of the newly merged institution and it brings us back to the importance of balancing diverse imperatives and objectives in higher education mergers. How does one keep in balance at institutional level academic quality and delivery, and economy and efficiency, while at the same time managing the human impact of merger implementation? Governance and management will be stretched across the spectrum as efforts are made to attend to practical imperatives, such as integrated planning and budgeting, management information and administrative computing systems, as well as to human and cultural ones.

2.1.3 Linking International Perspectives to the South African Context

International perspectives on merger governance have been presented as a comparative context within which this specifically South African investigation may be situated. They have been highlighted for their potential to contribute to an analytical framework for this study, and other analytical perspectives which will emerge in the investigation. While the issues highlighted in this review have been selected precisely because they are viewed as having relevance – in comparison or contrast – for the South African restructuring scene, general

78 Norgård, J.D. and Skodvin, O.J. (2002). The Importance of Geography and Culture in Mergers: A Norwegian Institutional Case Study. *Higher Education* Vol. 44 No. 1: 73–90. Hereafter referred to as Norgård and Skodvin 2002.

79 See Curri 2002: 140–145; Hatton 2002: 11–16.

80 Norgård and Skodvin 2002: 84.

81 Eastman and Lang 2001: 176.

and specific qualifications upon these international perspectives are required and should be broadly noted here.

As a general qualification, it must be reiterated that the South African restructuring of higher education is unique to the extent that it is driven by a political agenda of transformation, redress and equity which explicitly seeks to break the apartheid mould of higher education. In effect, restructuring is occurring through an exertion of political will that the state has seen to be lacking in the institutions themselves. Thus restructuring decisions have emerged during a period of demonstrable intensification of state steering in higher education and mark a specific moment in the evolution of state-sector relationships in higher education in South Africa. Against this background, specific qualifications upon the relevance of international experience emerge from the policy and legal framework within which South African higher education restructuring is taking place. While this framework is more fully outlined and discussed below, some of the most striking of these qualifications are listed here, as an indication of issues and themes to be more broadly developed in the rest of the report:

- Distinctions drawn between voluntary and involuntary mergers in the international literature are largely irrelevant as South African mergers are mandatory and are not linked to incentives.
- Resource dependency explanations of merger may be said to fail to apply for the same reason.
- Notions of ‘mission complementary’ mergers for mutual growth transmute in the South African context into notions of mission complementarity as defined by government in terms of equity, access, regional programme coordination and rationalisation, among others.
- The distinction between unitary and federal mergers which may be relatively neutral in the international experience is not neutral at all in South Africa in 2003, where federal mergers have been explicitly rejected as non-conducive to transformation. Thus both unitary and federal mergers, as types, are value-laden in the South African context.
- The distinction between vertical and horizontal mergers (and between diversification and conglomerate mergers) is a useful one in the South African context to the extent that a particular type of vertical merger may be said to be one of the explicit goals of a number of South African mergers, namely: the merger of a university and technikon to create a ‘comprehensive institution’. A merger leading to a comprehensive institution may be more narrowly defined in terms of diversification or conglomeration according to the degree of similarity or difference in the academic fields of the merging institutions.
- The dynamics of relative size and power which are generally seen as affecting mergers acquire even greater complexity in South Africa where ‘historically advantaged’ and ‘historically disadvantaged’ are explicit qualifiers of institutions in the system, and in light of a national policy at pains to underscore the equality of merger partners.
- The dynamics of historical advantage and disadvantage can be expected to play themselves out as an additional and crucial dimension of the challenge of integrating different institutional cultures.

- The importance of effective leadership as an indicator of successful merger outcomes in international experience raises critical concerns in South Africa, where the lack of adequate management capacity across the sector has been cited as one of the reasons for mergers to take place.

2.1.4 *Summary: Merger Governance in International Perspective*

The international literature on mergers in higher education poses a challenge from a South African perspective, in that it focuses largely on the experience of developed countries. Furthermore, the literature tends to lack theoretical and analytical rigour, and gives surprisingly little attention to the policy-making and decision-making structures and processes that should guide mergers. This literature review has focused on sources which are exceptions to the atheoretical tendency and has tried to draw out lessons for governance that are likely to have a particular relevance in the South African context.

The terminology of higher education merger differs from country to country and from case to case. In interpreting international experience from a governance perspective, it is important to be clear about the type of merger that is being discussed. For example, a critical distinction must be made between unitary mergers (an amalgamated institution with a single governing body) and a federal merger (which allows for recognition of sub-institutional entities). Mergers are variously classified in terms of their organisational outcome, in terms of the type of academic focus and activities that merging institutions bring together, and in terms of whether they are voluntary or involuntary. However, the concept of voluntary merger is suspect, as mergers are inevitably a consequence of national policy or of market forces.

Mergers have featured in higher education – especially in developed countries – for over 30 years. Approaches to merger have differed across time and space, with merger being adopted by publicly-funded systems as a strategy for both expansion and contraction, and with varying degrees of choice given to institutions in respect of merger partners. The policy drivers of merger differ as to specifics, but improvements in efficiency and effectiveness are invariably held in view. In some countries, impetus for merger has arisen from institutions themselves for reasons related in some instances to resource scarcity, and in others to strategic growth. The efficiency and economy goals of merger may be in tension with other goals respecting scale, scope, standards and modes of delivery for higher education institutions and the system as a whole. This tension may present precisely the reason why the state opts to use merger as a means of steering higher education in the first place. However, keeping all the elements in balance is a complex task requiring attentiveness to unintended consequences and policy distortions.

International experience has found that the negotiation stage of merger is one in which political and process dimensions can come strongly into play. Associated factors influence merger negotiations: for example, cross-sectoral mergers are likely to pose more difficulty than horizontal mergers, and consolidations are likely to entail greater process complexity than other forms of merger, such as acquisition. Chief among the influencing factors appears

to be the relative size and power of merging institutions. Where partners are of equal size and power, merger negotiations may be particularly difficult. However rigorous attention to detail in difficult negotiations may facilitate a positive outcome for such mergers in the long run. Where negotiations fail to surface difficult issues – as may be the case in instances which are effectively takeovers – the merger outcome may be flawed. Whether the mood of negotiations is combative or collaborative, boards of governors must exercise to the utmost their duty of care, diligence and skill during the period preceding the effective date of merger.

A range of factors have the potential to influence merger outcome, either absolutely, or in terms of the speed with which integration can be achieved. These include quality of leadership and the personalities of leaders, compatibility or lack of compatibility between institutional cultures, geographical distance between the campuses of merging institutions, and the handling or mishandling of the human impact of mergers. The international literature tends to give inadequate attention to the governance context within which such challenges should be addressed. However, it seems self-evident that good governance, in terms of structures and processes of policy- and decision-making and monitoring, is an essential support and counterbalance to individual leadership, as well as an essential condition for the flourishing of sound management of complex merger implementation.

The international perspectives highlighted in the review were selected for their relevance – in comparison or contrast – for the South African restructuring scene. However, general and specific qualifications upon these perspectives are required. These have been broadly noted and are further developed in sections that follow.

2.2 POLICY AND LEGAL FRAMEWORK FOR RESTRUCTURING SOUTH AFRICAN HIGHER EDUCATION

Restructuring the higher education system, as part of the process of redressing the legacies of apartheid and transforming South African higher education, has been an imperative of higher education policy discourse since the early 1990s. However, there have been changing emphases in different phases of policy making. In 1996, the presumed expansion of enrolments – coupled with a policy focus on redress funding, targeted capacity building and infrastructure provision – permitted a view that all existing institutions could be made viable and equal partners in the national higher education system. This had changed by the end of the decade. Enrolment figures had dropped, some institutions counted less than half the students for which they had capacity, and funding for redress was not forthcoming. Restructuring by means of the voluntary regional coordination of programmes was an ineffectual policy option in a contracting higher education system. Where regional consortia existed, their focus was, in general, limited to support services and infrastructure, with little or no academic impact.⁸² Smaller student numbers had in practice meant increased competition at the regional and national levels and an expansion into profitable programmes. Thus, the

⁸² Gibbon, P.A. and Parekh, A. (2001). *Uncommon Wisdom: Making Co-operation Work for South African Higher Education*. A Study Commissioned by the Network of Executive Directors of Academic Consortia: 24. Hereafter referred to as Gibbon and Parekh 2001.

need for more radical restructuring solutions emerged: a principal and insistent focus on restructuring through mergers is evident from the moment in 1999 when the Ministry called for the advice of the Council on Higher Education (CHE).

The purpose of this section is to explicate the legal and policy framework for merger governance in South Africa. Following the trajectory of policy development, the section traces the changing definition of restructuring of South African higher education; it attempts to describe and interpret the trajectory followed and highlights the phases in policy development and the development and modification of legislation (amendments). Primary concern with the governance of merger is highlighted with regard to policy proposals on the process of restructuring, as well as the provisions in policy and legislation for facilitating structures and mechanisms at different levels of merger (system, inter-institutional, institutional) and different phases of merger (pre-merger, transition, and implementation).

2.2.1 The Trajectory of Policy Development

The trajectory of higher education policy development, as far as it applies to the immediate issue of mergers and the governance of mergers, is illustrative of wider concerns over the evolution of the relationship between the Ministry of Education and individual institutions.⁸³ That such concerns have emerged is the outcome of several factors that have led to a more interventionist attitude by the Ministry and a set of subsequent amendments to the Higher Education Act of 1997, which have tended to confine powers at the national level.⁸⁴ The case of mergers shows that the reasons for such a development path can be found both at the institutional level and at the national level. The following sections trace the development of the restructuring policy, and merger governance in particular, from the National Commission on Higher Education in 1996, via the White Paper on Higher Education of 1997, and the CHE Report on Size and Shape of 2000, to the National Plan for Higher Education of 2001. The provisions on merger and the conceptualisation of the merger process in the Higher Education Act are specially highlighted.

2.2.2 The National Commission on Higher Education

The roots of the policy framework for the restructuring of South African higher education can be traced to the work of the National Commission on Higher Education (NCHE) between 1995 and 1996.⁸⁵ The Commission endorsed the need for the transformation of the higher

⁸³ Compare recent discussions in Hall, Symes and Luescher 2002; in Hall, M. and Symes, A. (2003). *Co-operative Governance or Conditional Autonomy? Principles for Governance of South African Higher Education*. Kagisano CHE Higher Education Discussion Series 2. Pretoria: Council on Higher Education; and in Moja, T., N. Cloete and Olivier, N. (2003). *Would Moving from Co-operative Governance to Conditional Autonomy Contribute to Effective Governance?* Kagisano CHE Higher Education Discussion Series 2. Pretoria: Council on Higher Education.

⁸⁴ The Higher Education Act of 1997 can claim the questionable fame of being one of the most frequently amended Acts in recent South African legal history.

⁸⁵ Prior to the National Commission, policy options and positions for the restructuring of South African higher education were developed by the Mass Democratic Movement as documented in the Report of the Post-Secondary Education Research Group: National Education Policy Investigation (NEPI) of 1992. However it was the NCHE which moved the process of developing policy into a firm set of policy proposals for the new government (Gibbon and Parekh, 2001: 7–8).

education system and asserted that if the legacy of the apartheid past were to be overcome, higher education would have to be planned, governed and funded as a single co-ordinated system. While the Commission recommended principles for restructuring the system, it did not make concrete proposals regarding the size and shape of the system. The Commission recommended nine goals for the higher education system, including goals

To conceptualise, plan, administer and fund higher education in South Africa as an effective and efficient system which provides a full spectrum of advanced educational opportunities for as wide a range as possible of the population, irrespective of race gender or age' and 'to provide for diversifying the system in terms of the mix of institutional missions and programme offerings that will be required to meet the national and regional needs in the fields of social, cultural and economic development.⁸⁶

Importantly, the National Commission conceptualised 'co-operative governance' as the model desirable for higher education governance at both system and institutional levels. The National Commission proposed its philosophy of co-operative governance as a version of the 'state supervision' model that had been well tried in a number of other countries. In state supervision systems (as distinct from either state control or state interference systems)

The state sees its task as supervising the higher education system to ensure academic quality and maintain a certain level of accountability ... In this model the government is an arbiter who watches the rules of the game played by relatively autonomous players and who changes the rules when the game no longer obtains satisfactory results.⁸⁷

This concept of government as arbiter has particular resonance when it is the system itself that is not obtaining satisfactory results, and therefore needs to be restructured.

2.2.3 *The White Paper on Higher Education*

Many of the NCHE proposals were written into official policy in the White Paper on Higher Education of 1997. Hence, policy on restructuring and mergers in the White Paper is also centrally informed by the notion that higher education should be planned, governed and funded as a single national co-ordinated system.⁸⁸ To move the process of restructuring forward, the White Paper proposed that the Ministry should develop a National Plan for Higher Education which would provide specific and measurable targets for the 'size and shape' of the system.⁸⁹ Higher education institutions should in turn develop institutional

⁸⁶ National Commission on Higher Education (NCHE) (1996). Report: A Framework for Transformation. Pretoria, HSRC Publications: Section 5.3. Hereafter referred to as NCHE 1996.

⁸⁷ NCHE 1996:175.

⁸⁸ Department of Education (1997). A Programme for the Transformation of Higher Education. Education White Paper 3. *Government Gazette* No. 18207, 15 August 1997. Pretoria: Government Printers: Section 2.1. Hereafter referred to as White Paper 1997.

⁸⁹ White Paper 1997: Section 2.10–2.11.

rolling plans within the framework of the National Plan as a mechanism to promote regional planning and coordination in the system.⁹⁰

The White Paper mentions a number of strategies by which the restructuring and diversification of the institutional landscape should be attained. Firstly, the White Paper proposes collaboration between different institutions at the level of academic programmes. The programme-based approach to planning and development should eventually result in greater articulation, flexibility and diversity in the offered educational programmes. Programme-based planning and development would foster co-operation between institutions, eventuating in the emergence of structural changes and a reconfiguration of the institutional landscape.⁹¹

Secondly, the White Paper advocates the development of regional consortia and partnerships to co-ordinate and rationalise the provision of higher education programmes, to build administrative and academic capacity, to refocus institutional cultures and mission and to make higher education more responsive to national and regional needs. Regional co-operation and partnerships should also lead to new institutional and organisational forms in the long run.⁹²

The third policy strategy mentioned in the White Paper is assessment of the institutional landscape, with a possible view to higher education restructuring including mergers, closures, and the development of new institutional forms. Such assessment should be undertaken in collaboration with the CHE. Ultimately, it should provide the Minister with the ability to make informed decisions about restructuring.⁹³ The role of the CHE in the restructuring of the higher education landscape is noted specifically as including advice to the Minister with regard to regional collaboration, rationalisation, mergers and closures of institutions.⁹⁴

The first two strategies of restructuring in the White Paper – both centred on a new national and institutional planning mechanism with a defining element of regional coordination – are largely voluntary means. Within the national policy framework spelled out in the White Paper, the largely autonomous institutions should move towards greater collaboration in the provision of educational programmes, in infrastructure development, and in academic and administrative capacity development in general. The assumption was that in the process of increased collaboration, new partnerships between institutions would emerge, and the vast discrepancies between historically advantaged and disadvantaged institutions would be bridged by earmarked redress funds, regionally co-ordinated development plans and funding incentives for collaboration.⁹⁵ Eventually, voluntary regional collaboration would lead to a diverse and differentiated system and the development of the new institutional and organisational forms contemplated in the White Paper.

90 White Paper 1997: Section 2.16.

91 White Paper 1997: Section 2.42.

92 White Paper 1997: Section 2.43–2.44.

93 White Paper 1997: Section 2.45.

94 White Paper 1997: Section 3.25.

95 White Paper 1997: Section 2.18, 2.51, 2.59.

2.2.4 From the White Paper to the National Plan: the Advice of the CHE Report

Between the formulation of the White Paper in 1997 and the National Plan for Higher Education in 2001, a number of significant developments occurred in the higher education sector. Many institutions, especially historically disadvantaged universities, were in a worse shape than ever before, mostly because a veritable exodus of black students from historically black universities to historically white universities and to technikons had taken place. This coincided with a general drop in student numbers. Institutional collaboration at the regional level remained limited to infrastructure and support services. A new Minister, impatient to see positive change, started to gather around him the necessary support to assert himself as the head of the system: co-operative governance should not be conceived of as a 'laissez-faire approach' but as a model where government steers and institutions implement.

In accordance with the White Paper,⁹⁶ the new Minister of Education formally requested advice from the CHE on the 'size and shape' of higher education in South Africa. In early 2000 he approved the establishment of a CHE Task Team to investigate the issue further and provide him with 'a set of concrete proposals' for restructuring the higher education system.⁹⁷ According to the Report of June 2000, the Task Team committed itself to the goals and purposes advanced in the White Paper, including equity and redress, quality, development, effectiveness and efficiency. South African higher education should be transformed to be 'responsive to the needs of students of all ages and the intellectual challenges of the 21st century'. Higher education is, they believed, vital 'to democracy, social justice and the economic and social development of this country.'⁹⁸ While there is fundamental agreement over the ends of restructuring, the recommendations of the Task Team break with the White Paper at the level of the means by which such restructuring – or reconfiguration to use the CHE's preferred term – should occur. The report underscores the realisation that two of the three restructuring strategies outlined in the White Paper have failed so far, namely those based on institutional voluntarism. Thus it declares: 'The Task Team is convinced that the problems and weaknesses of the higher education system will not disappear on their own or be overcome by institutions on their own. They must be confronted and overcome in a systemic way.'⁹⁹ Hence the Task Team's recommendations are based on the assumption of a far more interventionist attitude by the Ministry. Restructuring the higher education system, it is argued, would now require a political will at the system level that had not been forthcoming at the institutional level.¹⁰⁰

The CHE Report offers primarily two interconnected sets of recommendations to the Minister.¹⁰¹ Those recommendations relating to restructuring and mergers are mostly found

⁹⁶ White Paper 1997: Section 2.45.

⁹⁷ Council on Higher Education, Size and Shape of Higher Education Task Team (CHE) (2000). *Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21st Century*. Pretoria: Council on Higher Education: 2. Hereafter referred to as CHE 2000.

⁹⁸ CHE 2000: 2.

⁹⁹ CHE 2000: 2.

¹⁰⁰ CHE 2000: 2.

¹⁰¹ CHE 2000: 8–9.

in the sections on the 'shape' of the system. 'Size' proposals relate more precisely to access and participation; only on one occasion does the report refer to the number of institutions as an important consideration in relation to the size of the system.¹⁰² Regarding the system's 'shape', the CHE Task Team recommends that there should be a differentiated and diverse system brought about through the reconfiguration of institutional mandates and the adequate resourcing of institutions to make them 'fit for purpose.'¹⁰³ Ultimately, institutional combinations should lead to a reduction in the number of institutions, yet no closures should occur; the number of higher education delivery sites should be maintained.¹⁰⁴

Institutional mandates are understood in the report as the principal orientations and core foci of an institution.¹⁰⁵ They are meant to define the emerging system of higher education by delineating the roles and functions of higher education institutions, ensuring 'fitness of purpose'. The Report recommends that in a new reconfigured system, the range of mandates should be defined as (1) bedrock institutions whose orientation and focus would be 'quality undergraduate programmes; limited postgraduate programmes up to a taught masters level; research related to curriculum, learning and teaching with a view to application'; (2) 'institutions whose orientation and focus is quality undergraduate programmes; comprehensive postgraduate taught and research programmes up to the doctoral level', and who have 'extensive research capabilities (basic, applied, strategic and developmental) across a broad range of areas'; and (3) institutions with the mandate to provide 'quality undergraduate programmes; extensive postgraduate taught and research programmes up to the masters level; selective postgraduate taught and research programmes up to the doctoral level; and select areas of research (basic, applied, strategic and development)'. In addition there should be a dedicated distance education institution, as well as private higher education institutions.¹⁰⁶

The Report lists many compelling reasons for institutional combination, relating to national, regional and institutional social and educational goals, including: overcoming the historical legacy of apartheid, improving access and staff and student equity, improving the quality of higher education outputs, and increasing effectiveness, efficiency and ultimately ensuring institutional viability and the sustainability of the system and institutions. These diverse goals translate into a number of key considerations in making the final decision about mergers. The recommendations also seek to address the geographic distribution of institutions (to best serve socio-economic needs) and the need for greater levels of regional collaboration among higher education institutions. The Task Team stresses that 'combination is not an end in itself; it is a means towards the achievement of social and educational goals.'¹⁰⁷ The Department of Education should monitor the progress towards achievement of set and agreed-upon goals whilst the CHE should evaluate that progress.¹⁰⁸

102 CHE 2000: 50.

103 CHE 2000: 64.

104 CHE 2000: 56–57.

105 CHE 2000: 64.

106 CHE 2000: 64.

107 CHE 2000: 57.

108 CHE 2000: 67.

The report recommends a four-step process of consultation and planning to arrive at a reconfigured system. The process would start with consultations around the CHE reconfiguration proposals, followed by an iterative process around institutional mandates and missions, which would inform the development of a national plan. The National Plan should lay down the framework for the development of new institutional missions and concomitant strategic plans in line with the new mandates. Institutional combinations would follow.¹⁰⁹ The actual process of combining institutions should be facilitated by the establishment of appropriately resourced co-operative structures to steer the combination; with institutional involvement and open lines of communication; and with realistic time frames. Planning the combinations should take place in an atmosphere of openness and integrity, where all principal actors are co-operatively included. Emphasis is placed on the need for a ‘strategic planning process and detailed action plans with clear and explicit goals and outcomes, planning phases and realistic time frames’. ‘Financial and other instruments’ should be used as ‘pulleys and levers’ by the Ministry.¹¹⁰ For the first three activities, the Task Team anticipates a time frame of a minimum of six months. The fourth step, especially where it would involve combining institutions, could require between one and three years. The Report also cautions that neither every dimension of reconfiguration nor all the combinations could be implemented at once. Instead,

Implementation should be carefully planned and rolled out over a number of phases, which combine goals, strategies and human and financial resources. Overall, achieving a new higher education landscape with the qualities that are desired is likely to take a decade.¹¹¹

To the CHE Task Team, reconfiguration has become an exercise where system-level concerns must override certain institutional sensitivities. It states categorically that ‘the approval of mandates and the development of institutional missions and strategic plans must be informed by high levels of realism.’¹¹² A critically sensitive area identified in the Report is that of human resource issues and consequences. Thus, the CHE recommends the development of a ‘social plan’ for merging institutions, which should serve as a framework for addressing various issues relating to labour relations.¹¹³ Associated costs for reconfiguration should be paid for by system-level ‘savings’ (due to smaller student numbers). In addition, donor and private funding should be sought. In the long run, however, the CHE Task Team anticipates savings from economies of scale, from the elimination of duplication and rationalisation of programmes, and from reduced numbers of councils, senates and senior management.¹¹⁴

The primary legal basis for institutional combination is Section 23 of the Higher Education Act, namely that ‘the Minister may, after consulting the Council on Higher Education ... and by notice in the Gazette, merge two or more public higher education institutions into a

109 CHE 2000: 67.

110 CHE 2000: 66.

111 CHE 2000: 66–67.

112 CHE 2000: 66.

113 CHE 2000: 66–67.

114 CHE 2000: 68.

single public higher education institution.’¹¹⁵ By evoking that Section, the CHE Task Team shows, firstly, that what is meant by institutional combinations is indeed mergers, and secondly, that it is advising the Minister to use regulatory powers to force where necessary the reconfiguration of the system, rather than relying on funding and other incentives. The time for voluntarism is over.

The CHE Task Team’s notion of a diverse and differentiated system was very much in line with the earlier NCHE proposals and the White Paper intent. However, the proposal to entrench diversity in institutional mandates and the implications of doing so – essentially distinguishing most of the historically white universities as some type of ivy league, while the historically disadvantaged and rural institutions (the ‘face-bricks’) would be relegated to undergraduate teaching – caused havoc in the system. To some, the CHE Report was tantamount to an assault on black higher education in South Africa. Yet, as an attempt to present a radically different model for a reconfigured system, the Report was path-breaking.

The lasting contribution of the CHE Report is its realism. With the Task Team’s Report, the language of ‘fit for purpose’ was introduced and the old categories of historically white/black institutions were seriously questioned. Official mandates rather than history should define an institution and dictate its range of programme offerings. Thus, the Report rang in a new way of thinking about the South African higher education system; it represents a radical departure from the increasingly idealist and nostalgic discourse of legacy and redress, and attempts to seriously engage the central questions of access and quality in higher education, focusing on an evaluation of the capacity to deliver. Secondly, the Report’s sober assessment of the failure of institutionally-led restructuring and its resulting appeal to the Ministry to play a more proactive, steering role in the restructuring process found their way into the National Plan. So have the CHE proposals for the merger of specific institutions become the focal point of subsequent investigations.

What the Task Team did not anticipate, however, was the fact that the Minister would take up its proposals on mergers, while essentially setting aside its proposals on process, and hence on the co-operative governance of mergers. That the Minister has done so underscores the essentially political agenda of higher education restructuring and the determination of the state to drive change in the face of institutional reluctance.

2.2.5 The National Plan for Higher Education

The National Plan brings to a close a six-year long process of consultation on the restructuring of the South African higher education landscape. It professes to be the implementation framework for the restructuring of the higher education system and a response to the CHE

¹¹⁵ CHE 2000: 57–58; HE Act 1997: Section 23(1).

Report.¹¹⁶ Despite an acute awareness of the delicacy of the relationship between institutional autonomy and public accountability, it expresses in tone and content the insistence of the Ministry to provide a leadership role in the dragging process of transformation and restructuring.¹¹⁷ The Ministry asserts:

The fundamental principles and framework outlined in the National Plan are not open for further consultation. This is not to suggest that there is no room for consultations on the details of implementation or on the outcomes of the further investigations that are indicated in the National Plan. However, the focus must now be firmly on implementation.¹¹⁸

Mergers are mentioned in the context of the restructuring of the higher education landscape and in response to the Report of the CHE Size and Shape Task Team. The National Plan outlines a number of strategies of restructuring, including the creation of new institutional and organisational forms, institutional collaboration at the regional level, and mergers. In particular, the National Plan's first restructuring strategy is programme and infrastructural co-operation, including the regional-level rationalisation of the provision of costly programmes and specialised postgraduate programmes, the establishment of new higher education institutes in Mpumalanga and the Northern Cape (by means of programme-level co-operation of higher education providers operating in the provinces), and collaboration in infrastructure development.¹¹⁹ To facilitate regional-level programme rationalisation and collaboration, the Ministry requires the establishment of regional programme clearing-houses.¹²⁰

The second restructuring strategy of the National Plan is the development of new institutional and organisational forms by means of a process of mergers, led by National Working Groups. Firstly, the National Plan endorses existing merger plans and the establishment of two new institutions. Secondly, it proposes the establishment of a National Working Group to investigate mergers and other forms of institutional combination, and another Working Group to facilitate the merger between the three designated public distance education providers into a single dedicated distance education institution.¹²¹ While the number of institutions should be reduced by means of mergers, the number of geographical delivery sites (campuses) should be maintained.¹²²

The strategies in the National Plan are congruent with the White Paper, yet the emphasis has changed. This can be seen in the National Plan's Outcome 16 where the Ministry's objectives and strategies to arrive at new institutional and organisational forms are spelled out in detail.¹²³ As previously mentioned the Ministry shares the basic premises of the CHE Report

¹¹⁶ Ministry of Education (2001). National Plan for Higher Education. Pretoria: Ministry of Education: Executive Summary. Hereafter referred to as NPHE 2001.

¹¹⁷ NPHE 2001: Sections 1.5.1 and 1.6.

¹¹⁸ NPHE 2001: Section 1.6.

¹¹⁹ NPHE 2001: Sections 6.3 and 6.5.1.

¹²⁰ NPHE 2001: Section 6.5.1.2.

¹²¹ NPHE 2001: Section 6.5.2.

¹²² NPHE 2001: Section 6.4.

¹²³ NPHE 2001: Section 6.4.

and in many ways directly responds to CHE proposals; yet, it ignores the recommendation on institutional mandates and openly disagrees with the process proposed by the CHE. Instead, the National Plan proposes a less consultative, more centrally driven process.¹²⁴

The process of programme rationalisation at the regional level had always been policy. The way in which programme coordination should occur, however, was left to the institutions to decide. In the National Plan, the Ministry is still reluctant to introduce clear guidelines on programme-level coordination; the requirement that institutions must establish regional programme clearing-houses (in whatever form), however, is a new policy. The process of programme coordination at the regional level is therefore becoming more regulated, starting with the non-voluntary establishment of regional structures.

The process of reducing the number of institutions outlined in the National Plan leaves little space for institutional definition. As little as the process is defined, it is clear that it will be centrally driven and there is no time for further debate. It starts with the investigation of the feasibility of restructuring, taking the White Paper principles as its starting point and assessing the CHE proposals specific to each institution. The National Plan charges a National Working Group with that investigation. This Working Group was duly set up by the Minister in March 2001 and reported and made recommendations to the Minister on restructuring the higher education system in December 2001.¹²⁵ The National Plan itself does not elaborate any further on the process of merger.

The single most compelling reason provided for the continued encouragement of institutional collaboration and the pursuit of a merger strategy in the National Plan is the goal of building new institutional identities and cultures.¹²⁶ There are, however, many more reasons given, many in agreement with those advanced in the CHE Report including low enrolments, low intake, small size of institutions, student and staff race and gender equity, and low outputs in certain provinces. Furthermore, the Ministry reckons that in the long run, mergers will produce savings by reducing apartheid planning inefficiencies, and eliminating programme duplication in the same region, thus increasing the rationality of the system.¹²⁷ Hence, the cost of merger and other resource and capacity constraints should not discourage the national agenda: 'The Ministry is confident that financial and capacity constraints can be addressed through mobilising the support and expertise from local and international agencies.'¹²⁸

Of a lasting concern to the Ministry is the quality of higher education provision. Increased participation and equity are only meaningful in a context where the quality of higher education provision can be raised in terms of academic programme offerings, research and graduate output, and infrastructure.¹²⁹

124 NPHE 2001: Section 6.4.

125 NPHE 2001: Section 6.4.1.

126 NPHE 2001: Section 6.2.

127 NPHE 2001: Section 6.4.

128 NPHE 2001: Section 6.4.

129 NPHE 2001: Section 6.4.

In the account of the National Plan, the governance of the merger process is therefore little defined beyond the investigation of the National Working Group. While the reasons for merger have not changed much since the inception of the debate on restructuring, the proposed strategies have shifted in emphasis, and in general a more centrally led process has emerged. While the Ministry initially failed to provide an enabling environment for voluntary partnerships and mergers to occur (e.g. by means of funding incentives), it has shifted its attention now to involuntary mergers. Yet again it appears to fail in formulating the detail of its policy. So, for example, it is clear from the policy that the merged institutions will be multi-campus institutions, yet the implications of geographically distant campuses on governance structures have been neither accommodated nor explored. Another example is the notion of ‘comprehensive institutions’, offering both technikon and university programmes and qualifications, which remain essentially undefined beyond this broad conception. Thus, with regard to new organisational forms and new institutional forms – envisaged as the outcomes of the restructuring drive – even at early implementation stage, policy fails to address core concerns.

2.2.6 Giving Effect to the National Plan

The process of policy development has not stopped with the adoption of the National Plan for Higher Education. A sizeable number of documents originating in the Ministry of Education, speeches by the Minister, institutional responses to merger proposals, and reactions to those responses by the Ministry, have added to the number of documents in the public realm, each seeking to define more or less sharply the shape of the new higher education system and the course of implementation. As argued above, there remain many aspects of policy that require definition before one can move boldly towards implementation, yet the Ministry can certainly not be accused of incremental policy making or of failing to make good on its latter-day promises. Following the publication of the National Plan, a National Working Group (NWG) was duly set up to investigate how (not whether) the number of institutions could be reduced. Other working groups were set up to look into the establishment of National Institutes of Higher Education in the Mpumalanga and Northern Cape provinces.

In December 2001, the NWG reported to the Minister, having considered not only the CHE proposals but all possibilities for mergers by region. Its report was released to the public in early 2002. In the report, the NWG referred back and forth between the White Paper, the CHE Report and the National Plan in an attempt to situate an investigation which was otherwise criticised as ill-informed, lacking rigour, using inaccurate data, and having been conducted in a non-consultative manner.¹³⁰ According to the NWG’s interpretation, none of the 36 South African higher education institutions was ‘fit for purpose’. Under one view, commentators felt this conclusion may have been rooted in the inadequacy of the NWG’s

¹³⁰ Even the Ministry could not ignore these criticisms when presenting the report to the public, as documented in Ministry of Education (2002). *Transformation and Restructuring: A New Institutional Landscape for Higher Education. Government Gazette* No. 23549, 21 June 2002. Pretoria: Government Printers: 7. Hereafter referred to as *Government Gazette* (Transformation and Restructuring) 21 June 2002.

analytical framework and benchmarks. An alternative view, of course, is that all institutions have become ‘unfit for purpose’ because they have developed within an apartheid frame. Whatever view is taken, the NWG’s recommendations on restructuring – which it defined as regional collaboration and institutional mergers – were a further formal step and added valuable detail to the policy.¹³¹

In its general recommendations on regional collaboration, the NWG restates the former policy positions. It acknowledges the successes of consortia in the area of joint purchasing, the sharing of facilities and provision of infrastructure, recognises that there is more room for institutional collaboration at the micro and meso-levels, and recommends the use of sanctions and incentives in order to rationalise the provision of higher education programmes at the regional level. Increased regional collaboration, however, should not lead to an additional tier of regional statutory bodies.¹³²

The NWG’s recommendations on institutional mergers are not significantly different from those of the CHE. Yet its reasoning for and against specific mergers is far more detailed and underpinned with data from the fledgling higher education management information system.¹³³ The Report makes more strongly the case for the incorporation of nursing and agricultural colleges in the higher education system (and into specific institutions), a policy position that can be traced as far back as to the NCHE.¹³⁴ It reiterates the need for a strong commitment by government to avail necessary financial resources and political will, and the need for institutional constituencies to buy into a merger.¹³⁵ Other systemic problems, such as the provision of distance education by traditional contact institutions and the unregulated proliferation of satellite campuses, are also addressed briefly in the report, yet without adding significantly to the policy development.¹³⁶

With respect to both sets of proposals, the general and the specific ones, the NWG therefore does not add substantive new policy; it is rather a progression, extension and refinement of policy in a process of policy formulation that leads via the Ministry to the level of the Cabinet. Here, despite the NWG’s elaborate reasoning, political imperatives dictate certain changes – particularly to accommodate the demands of interest groups such as the Association of South African Historically Disadvantaged Institutions (ASAHDI) and, possibly, the preferences and affiliations of members of the Cabinet.¹³⁷

From the perspective of the policy trajectory, the substantive contribution of the NWG is found not in its specific proposals for mergers, but in side-remarks in the conclusion and

131 NWG 2001: 12–14.

132 NWG 2001: 16–17.

133 NWG 2001: 19–53.

134 NWG 2001: 18; NCHE, 1996: 154–157.

135 NWG 2001: 54–55

136 NWG 2001: 18–19.

137 Asmal, K., (2002a). Press Statement by the Minister of Education, Professor Kader Asmal, MP, on the Transformation and Reconstruction of the Higher Education System. 30 May 2002. Pretoria. Available at http://education.pwv.gov.za/Media/Statements_2002/May02/he.htm (26 February 2003). Hereafter referred to as Asmal 2002a.

the appendices to the Report, where it addresses such issues as the content of the new organisational and institutional forms and the question of ‘how’ the number of institutions can be reduced, making reference to process and structure. For example, the NWG explicitly proposes to the Ministry, that ‘comprehensive institutions’ should be introduced as a new institutional form which would provide access to technikon and university qualifications, particularly in rural areas, without, however, blurring the distinction between technikons and universities in an essentially dual higher education system. Moreover, it introduces the National Institute (proposed for the Mpumalanga and Northern Cape provinces) as a new institutional and organisational form at the regional level that may be prototypical for regional collaboration.¹³⁸

More importantly, the NWG recognises the central role and function of the Interim Council as the facilitating governance mechanism; a structure that was introduced into the legislation by means of the Higher Education Amendment Act of 2001.¹³⁹ In the Report, the NWG stresses the important role of the Minister in ensuring that the members of the Interim Council of a merged institution have the calibre, quality, commitment, expertise and integrity to oversee the implementation of a merger and govern the institution in the transitional phase.¹⁴⁰

For the process of transition at the institutional level, the NWG emphasises that the authority and power to drive the merger process must reside with the Interim Council.¹⁴¹ In addition to the Interim Council’s responsibility to appoint the day-to-day management team for the merged institution, the NWG recommends that Interim Councils should appoint full-time merger managers with the explicit task ‘to help coordinate and facilitate the merger process.’¹⁴² In its elaborations, the NWG makes an important distinction between the formal aspect of the merger process (‘in terms of the establishment of the Interim Councils’) and the substantive merger process, by which it refers to the range of issues that require addressing. These include:

- Establishing new governance structures, including the necessary institutional statutes;
- Developing new academic structures and the integration of academic programmes;
- Developing new conditions of service and remuneration;
- Coordination of tuition fees;
- Integrating administrative, financial and computer systems and procedures;
- Consolidating budgets;
- Integrating support services such as libraries and student services;
- Planning the utilisation of facilities and infrastructure;

¹³⁸ NWG 2001: 17–18, also see: Ministry of Education, (2002). The Establishment of a National Institute for Higher Education in the Northern Cape: Report of the Working Group. Pretoria: Ministry of Education: Section 2.12. Hereafter referred to as Northern Cape Institute Working Group Report; and Asmal 2002a. It is also significant that the CHE’s proposed typology of institutional mandates was ignored completely.

¹³⁹ NWG 2001: 54 and HE Amendment Act 2001: Section 6.

¹⁴⁰ NWG 2001: 55.

¹⁴¹ NWG 2001: 55.

¹⁴² NWG 2001: 55.

- Reconciling institutional cultures and ethos; and
- Development of ‘a social plan.’¹⁴³

The prerequisite to addressing the list of identified issues is the effective governance of mergers. According to the NWG’s self-conception, this fell outside its terms of reference and thus the issue was not further developed. Its recommendation that governance in higher education needed urgent investigation provided the impetus for such studies by the CHE as the present one.

Subsequent to the NWG and the initial Cabinet response in May 2002, the Ministry published its own merger proposals in June as a response to the NWG Report. In the Ministry’s response, a number of policy details were clarified and the essentially political agenda of restructuring was underscored (in some instances through changes to the content of specific merger proposals, not easily explainable under any other mode of reasoning). Importantly for the conceptualisation of the mergers, the Ministry emphatically restated its case for unitary mergers. It thereby endorsed a recommendation by the NWG and remained consistent with one of the key original premises for mergers, namely, that a merger should produce an institution with a completely new identity.¹⁴⁴ It also repeated that the mergers were mandatory: ‘The Ministry accepts, in principle, the desirability of voluntary mergers. However, it is not convinced that institutional restructuring in the South African context can be left to the voluntary action of institutions.’¹⁴⁵

Three days later, the Department of Education formally announced on behalf of the Minister, the Minister’s intent to merge the identified institutions.¹⁴⁶ In the statutory period of three months during which representations could be made, the Minister received 71 submissions and met with the Councils of almost all affected institutions. In a press statement of 9 December 2002, the Minister announced a last set of changes to the merger proposals and the approval of the final proposal by the Cabinet.¹⁴⁷ The first group of mergers should take place in January 2004, a second group in 2005. This restructuring, the Minister reiterated, would occur parallel to the continued rationalisation of academic programmes at the regional level, the establishment of higher education institutes in Mpumalanga and the Northern Cape provinces, the incorporation of Vista Campuses into proximate institutions, and the merger between the three distance education providers, University of South Africa (UNISA), Technikon SA and the Vista University Distance Education Campus (VUDEC). The legal process of merger had set its course.

143 NWG 2001: 55.

144 *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 6.1.

145 *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 6.2.

146 Department of Education, (2002). Government Notice: To invite Representations regarding the Proposal to Merge Certain Public Higher Education Institutions or Subdivisions of Public Higher Education Institutions. *Government Gazette* No. 23550, Notices 857–869, 24 June 2002. Pretoria: Government Printers.

147 Asmal, K. (2002b). Press Statement by the Minister of Education, Professor Kader Asmal, MP, on the Transformation and Reconstruction of the Higher Education System. 9 December 2002. Pretoria. http://education.pwv.gov.za/Media/Statements_

In giving effect to the National Plan, the Ministry followed the steps outlined therein, of which the establishment and reporting of a National Working Group was the key feature. After further consultation around its proposals, including the formal request for representations, a new institutional landscape emerged for implementation reducing the original number of public higher education institutions from 36 to 11 universities, five technikons, six 'comprehensive institutions', and two National Institutes for Higher Education¹⁴⁸ (a total of 22 institutions plus two institutes).¹⁴⁹

Since the National Plan, the formal process of implementation may have taken its course in a marshalled way, yet in its definition it is still lacking in many areas. Following the alert given by the NWG as to the distinction between formal and substantive merger phases and processes, the Ministry has started to elaborate more consciously on both.¹⁵⁰ Possibly the most important outcome of this has been the Ministry's commitment to providing not only the financial resources for merger but also additional administrative capacity at the institutional and national levels. At the institutional level proposed strategies have included capacity building initiatives and skills development. At the systemic level, the Ministry aimed to establish 'a merger office with full-time staff within the Higher Education Branch of the Department to co-ordinate the provision of technical support to the affected institutions, including guidelines to facilitate the merger process.'¹⁵¹ Details of a Merger Unit in the Department of Education, its functions and services, as well as specific merger guidelines, have indeed emerged during the first half of 2003 and the 2003 national budget has indicated a budget allocation of approximately R800 million to assist the merger process in each of the next three budget years.¹⁵² The question of state funding being made available for mergers is certainly going to be critical, with most institutions estimating their merger costs at several hundreds of millions of rands.

The process of giving effect to the National Plan is illustrative of the increasing independence of the Ministry in the way it conceives of its role at the helm of the higher education system. Given continued gaps in the detail of policy, the Higher Education Act – as the core regulatory instrument at the centre – is determinant in the last instance.

148 11 universities: University of Fort Hare, Rhodes University, University of the Free State, University of the Witwatersrand, University of Pretoria, merged University of Natal/University of Durban–Westville, merged University of the North/Medical University of South Africa, merged Potchefstroom University for Christian Higher Education/University of North–West, University of Cape Town, University of Stellenbosch, University of the Western Cape; 5 technikons: Technikon Free State, merged Technikon Northern Gauteng/Technikon North–West/Technikon Pretoria, Vaal Triangle Technikon, merged Durban Institute of Technology/Mangosuthu Technikon/Umlazi campus of University of Zululand (pending outcome of legal action as at March 2003), merged Cape Technikon/Peninsula Technikon; 6 comprehensive institutions: merged University of Port Elizabeth/Port Elizabeth Technikon, merged Border Technikon/Eastern Cape Technikon/University of Transkei, merged Rand Afrikaans University/Technikon Witwatersrand, refocused University of Zululand, refocused University of Venda, distance education institution created through merger of UNISA, VUDEC and Technikon South Africa.

149 Asmal 2002b. According to the Ministry of Education (*Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 5), the CHE will be tasked to advise the Minister on the nomenclature of the higher education system, especially regarding 'comprehensive institutions'.

150 *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 9.2.

151 *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 9.3.

152 This does not appear to be the total allocation. Reports in the national media during December 2002 referred to a total amount of R3.1 billion for the restructuring of higher education, with R1.3 billion of this to be used to assist institutions already in financial trouble.

2.2.7 *The Legal Basis for Mergers and Incorporations*

In 1997, the Higher Education Act rang in a new chapter in the history of South African higher education. It was published shortly after the White Paper and it laid down the foundation for the single, coordinated national higher education system.

There are several sections in the Act that have applicability to institutional restructuring in general. Section 23, however, gives the Minister of Education the explicit power to merge two or more public higher education institutions into a single institution. It is this section, which is repeatedly evoked in the policy discourse – particularly in the Report by the CHE Task Team on Size and Shape and in the National Plan for Higher Education.

In 1999 and for every subsequent year until 2002, the Higher Education Act has been amended. With each amendment, the regulatory power at the centre, represented by the Minister of Education, has been consolidated further. Section 23, the section that outlines the process that the Minister must follow to effect mergers, was amended in 2001 and 2002. Earlier developments, such as the publication of a Standard Institutional Statute in 2002,¹⁵³ are also of significance to mergers.

In brief, the 2001 amendment of Section 23 of the Act introduced the constitution of a small Interim Council to the process and governance of merger. The relationship between the Interim Council and existing governance structures is not fully clear, other than the (rather obscurely worded) provision that the Interim Council must consult any structure that may be affected by one of its decisions.¹⁵⁴ The 2002 amendment of Section 23 slightly expands the size of the Interim Council and also deals with the case if nominations for members of the Interim Council are not forthcoming from a merging institution. In addition, the 2002 amendment addresses labour relations issues and student concerns in the process of merger. These amendments are addressed in further detail below.

Beginning with the 2002 amendment, the Act makes a clear distinction between merger, which is conceived of as the process whereby ‘two or more public higher education institutions lose their status as juristic persons’ and ‘are merged into a new juristic person’ and the process of incorporation, which applies to the incorporation of a subdivision of a public higher education institution (e.g. department, faculty or school) into another institution. While in the latter process, the receiving institution’s legal personality is unaffected, in the process of merger the affected institutions lose their legal personality and, on the date of establishment, a completely new institution is born.¹⁵⁵ While a number of incorporations have taken place in recent years in South African higher education, notably

¹⁵³ Ministry of Education (2002). Standard Institutional Statute. *Government Gazette* No. 23061, Notice 85, 25 January 2002. Pretoria: Government Printers. Hereafter referred to as Standard Institutional Statute 2002.

¹⁵⁴ HE Act 1997: Section 23(11), as added by HE Amendment Act 2001: Section 6.

¹⁵⁵ HE Act 1997: Section 1, as amended by HE Amendment Act 2002: Section 1(a)–(c).

the incorporation of colleges of education into universities and technikons documented and analysed by Jonathan Jansen and others, only one case of merger has been effected to date: the merger between ML Sultan Technikon and Natal Technikon, which became the Durban Institute of Technology in April 2002.¹⁵⁶

The legal process of merger contemplated in Section 23 of the Higher Education Act potentially has three phases, although these are not made explicit in the Act. For purposes of clarity as to the type of process seemingly envisaged for mergers by the Act, three phases are posited here: an inter-institutional or pre-merger phase; a transitional or interim phase of a possible 6 to 12 months; and a post-merger integration phase (see Table 1).

The pre-merger phase starts at the point where the Minister gives written notice of his intention to merge two or more institutions, to the institutions concerned. At the same time the Minister must publish a notice declaring his intention publicly and giving the reasons for the proposed merger. Publication must occur in one or more newspapers circulating in the area in which the public higher education institutions concerned are situated. By means of the notice, the Minister gives the institutional Councils as well as any other interested persons the statutory opportunity to make representations and respond to his intention. This opportunity must last for at least 90 days following which the Minister must consider these representations.¹⁵⁷ The Minister must also consult the CHE on the intention to merge¹⁵⁸ and consult with the Councils of the institutions concerned on the date of establishment, type, name, physical location and official address of the new institution.¹⁵⁹ Finally, the Minister must invite nominations for members of an Interim Council from the institutions concerned.¹⁶⁰ The pre-merger phase must therefore last for a minimum of three months.

The transitional merger phase begins after the Minister's official notice of the merger in the Government Gazette.¹⁶¹ This notice announces first and foremost the date of establishment of the merged institution and thus the end of the legal existence of the public higher education institutions that have merged into this single entity. Furthermore the notice announces the merged institution's type, name, and location. More important for the immediate merger process, the notice names an Interim Council for the merged institution. The Act could perhaps be more explicit on this point, but in fact, the date of the establishment of the Interim Council and the date of establishment of the new institution effectively coincide, although they may not coincide absolutely in practice. The Interim Council is the outward and visible sign of transition, yet it has not been party to negotiations between the merging institutions in the pre-merger phase, nor can its decisions be legally binding on the new Council in the integration phase of the merger.

¹⁵⁶ Jansen 2002.

¹⁵⁷ HE Act 1997: Section 23(2).

¹⁵⁸ HE Act 1997: Section 23(1).

¹⁵⁹ HE 1997: Section 23(3)b, as substituted by HE Amendment Act 2002: Section 5(d).

¹⁶⁰ HE Act 1997: Section 23(8), as added by HE Amendment Act 2001: Section 6.

¹⁶¹ HE Act 1997: Section 23(1).

Table 1: Phases in the Legislative Conceptualisation of Merger

<p>Phase 1: Pre-Merger Phase (lasts a minimum of 90 days)</p> <ol style="list-style-type: none"> 1. The Minister gives written notice to inform Councils of affected institutions of the intended merger, and publishes the intention and reasons to merge (Section 23(2)a-b) 2. The affected Councils and interested persons have 90 days to respond (Section 23(2)c) 3. The Minister must consider responses (Section 23(2)d) 4. The Minister must consult Councils on the date of establishment, type and name, location and address of the merged institution (Section 23(3)b) 5. The Minister must consult the CHE (Section 23(1)) 6. The Minister must invite nominations for the Interim Council from institutions (at least 60 days prior to the publication of the Gazette notice) and appoint Interim Councillors (Section 23 (12), Section 23(8) and Section 23(13)) 7. The merging institutions can still rationalise the workforce according to applicable labour legislation and agreements (Section 23(2G)) until the date of establishment of the merged institution 8. The Minister publishes a merger notice in the Gazette with the date of establishment, type and name, location and address of the merged institution (Section 23(1))
<p>Phase 2: Transitional Phase (lasts up to 12 months from the date of establishment)</p> <ol style="list-style-type: none"> 9. On the date of establishment of the merged institution (previously announced in the Gazette), the merged institution formally comes into legal being (Section 23(3)b(i)) 10. On the date of establishment, the Interim Council starts its function for 6 to 12 months (Section 23(5 – 6)) 11. The Interim Council governs the merged institution (Section 23(5)) in consultation with existing governance structures (Section 23(11)) 12. The Interim Council must appoint an interim management body, and establish institutional governance structures in accordance with the Standard Institutional Statute (Section 23(10)) – including ensuring that a new Council is constituted 13. All assets, liabilities, rights and obligations of the former institutions devolve upon the merged institution (Section 23(4) [Section 22(1)b]) 14. The existing workforce is transferred automatically to the merged institution (Section 23(2A-2F)) 15. All academic programmes offered by the former institutions (and the associated rules) immediately before the date of the merger must continue until such programmes and rules are amended or restructured by the new Council of the merged institution (Section 23(2H)i)
<p>Phase 3: Integration Phase (from the appointment of the new Council)</p> <ol style="list-style-type: none"> 16. The Interim Council may carry out its operations until such time as determined by the Minister (maximum of 12 months' existence), whereafter the new institutional Council becomes accountable for the governance of the merged institution, and makes an Institutional Statute

An Interim Council can consist of up to nine regular members and three non-voting, co-opted members of the interim management. Of the regular Interim Council members, six to eight must be appointed by the Minister from nominations received by the merging institutions. These persons can be neither staff nor students of the institutions concerned. The appointment of the chairperson is at the discretion of the Minister.¹⁶² In a case where an institution fails to provide nominations for appointment, the Minister can appoint the members from the nominations received from the other institution or he can appoint members at his own discretion.¹⁶³ In effect this provision means that the legally independent merger process may proceed even in the absence of agreement by an affected institution.

The Act sets out a life span of the Interim Council of six months only (extendable to a maximum of 12 months), during which the Interim Council has ‘to perform the functions relating to the governance of the single public higher education institution ... except the making of an institutional statute.’¹⁶⁴ Most importantly, the Interim Council must appoint an interim management body and ensure that the institutional governance structures determined in Section 26 of the Act are constituted along the lines contemplated in the Standard Institutional Statute. That includes ensuring the constitution of a Council for the merged institution.¹⁶⁵ A complicating factor in the Interim Council’s work is the provision that ‘any decision of the Interim Council which may affect the right of any structure of the public higher education institution may only be taken after consultation with such structure.’¹⁶⁶ The fate of the former Councils of the merging institutions, and the relationship between the existing Senates and Institutional Forums and the Interim Council remains ill-defined.

On the date of establishment announced in the Gazette notice, the merged institution becomes a legal persona and all assets and liabilities, rights and obligations of the former institutions are transferred to the merged one.¹⁶⁷ The merged institution also receives the workforce and students of the former institutions, and has to continue the contractual agreements entered into by the former institutions with them.¹⁶⁸ The date of establishment marks the birth of the new institution, and the beginning of the transitional phase; clearly merger implementation begins at this time too, but the real hard work of integration begins once the life of the Interim Council comes to an end, and the new Council of the merged institution assumes accountability for the institution.

During the integration phase, the institution will have to mould its new organisational and institutional form, and develop an identity and coherence from class and staff room level to senior management. The fate of the Interim Council is not explicitly spelled out – plausibly

¹⁶² HE Act 1997: Section 23(7–9), as added by HE Amendment Act 2001: Section 6, and substituted in part by HE Amendment Act 2002: Section 5(e–f); and HE Act 1997: Section 23(12), as added by HE Amendment Act 2002: Section 5(g).

¹⁶³ HE Act 1997: Section 23(13), as added by HE Amendment Act 2002: Section 5(g).

¹⁶⁴ HE Act 1997: Section 23(5) and (6), as added by HE Amendment Act 2001: Section 6.

¹⁶⁵ HE Act 1997: Section 23(10), as added by HE Amendment Act 2001: Section 6.

¹⁶⁶ HE Act 1997: Section 23(11), as added by HE Amendment Act 2001: Section 6.

¹⁶⁷ HE Act 1997: Section 23(4).

¹⁶⁸ HE Act 1997: Section 23(2A–2H), as added by HE Amendment Act 2002: Section 5(c).

it will continue operating until its mandate is finished (maximum 12 months). Once the new Council assumes its role, amongst others things it will have to develop a new Institutional Statute (in terms of the Act, the institution operates under the Standard Institutional Statute in the interim). The process after the date of establishment is not further elaborated in the Act.

The legislation does not differentiate between what might be viewed as ‘voluntary’ mergers (such as the case of the Durban Institute of Technology) and ‘involuntary’ mergers, which are (or at least initially were) the bulk of the mergers to be implemented in the short to medium term. As far as the legal process and the role of the Ministry are concerned, there is no distinction and this is of course consistent with the stated policy position that restructuring cannot be left to the voluntary action of institutions.¹⁶⁹ It is also in some sense characteristic of the legislation (as well as the policy and policy advice that produced and developed it) which ensues and elaborates upon system-level concerns and choices of merger. The consecutive amendments to Section 23 of the Act have sought principally to define those aspects in the governance of the merger which may raise problems in the potential case of institutional non-cooperation. Thus, the 2001 amendment to this Section, which made provision for the Minister to constitute an Interim Council for the merging institutions comprising nominees of the merging institutions and a chairperson of his own choice¹⁷⁰ has been modified in 2002 so that the Minister can constitute an Interim Council without the co-operation (nominations) of the merging institutions, entirely at his own discretion.¹⁷¹

As already mentioned, the outcome of merger contemplated in the Act is a unitary institution, although the Act itself does not explicitly say this; the clear preference for unitary solutions comes from policy statements that have followed the work of the National Working Group.¹⁷² Constituted in accordance with the Higher Education Act’s Section 26 and the Standard Institutional Statute, the new institution will have a single Council, a Senate and an Institutional Forum, a Vice-Chancellor and a number of other officers. It would be difficult to interpret this legal requirement, together with the policy intent whereby a merger should produce a new institution with a new identity, as flexible enough to bring forth federal institutions. The new institutional and organisational forms envisaged in policy do not include federal forms, but rather refer to the ‘comprehensive institutions’ offering both technikon and university programmes and qualifications, and the ‘higher education institutes’ for the Mpumalanga and Northern Cape provinces.

The legal process of incorporation contemplated in Section 24 of the Higher Education Act occurs under the auspices of the Councils of the institutions concerned.¹⁷³ It is worth noting that all sections added by the Higher Education Amendment Act of 2002 to Section

169 *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 6.2.

170 HE Amendment Act 2001: Section 6.

171 HE Amendment Act 2002: Section 5(g).

172 See for example *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 6.1.

173 HE Act 1997: Section 24(2), as substituted by HE Amendment Act 2002: Section 6.

23, with reference to labour relations and student concerns, also apply in the case of an incorporation, 'with the changes required by the context.'¹⁷⁴ These contextual differences may in practice be more complex than the simplicity of the wording indicates, especially in those instances where a merger is to follow directly upon an incorporation already effected by one of the merging institutions.

2.2.8 Summary: Policy and Legal Framework

The trajectory of higher education policy development with respect to restructuring highlights a process that was initially characterised by extended consultation. Yet, in the light of its own inability to implement a policy of sanctions and incentives, and perceived unwillingness of institutions to initiate change, the Ministry of Education has become more interventionist and demanding of institutions to implement. The White Paper of 1997 envisaged a process of restructuring that was largely driven by institutions voluntarily coordinating and collaborating in the provision of academic programmes at the regional level, a process which would ultimately witness the emergence of partnerships between institutions and new organisational and institutional forms. Yet by 2001, the National Plan, similar to the CHE Report to which it is a response, saw restructuring mainly as an exercise of combining institutions in mergers. Unlike the CHE who had advised on an elaborate process of consultation and iterative planning, the National Plan insisted on leadership from the centre.

The impetus for merger had become strong, whether looking at the system as a whole and whose apartheid irrationality continued unabatedly, or at institutions with large discrepancies of quality, equity and capacity between them. The reasons for restructuring had become more pronounced, while institutions seemed unlikely to embark on the process on their own. Not surprisingly, in giving effect to the National Plan, the Ministry emerged as the main driver of restructuring in both its definitions, as mergers and as rationalisation of academic programmes. The Ministry has also increasingly disengaged from vested interests at the institutional level (and their systemic interest groups). Since the Higher Education Amendment Act of 2002, a legislative framework is in place that allows the Minister to force through a merger. The extent to which it will be possible in practice to govern higher education in this way is another question.

With respect to mergers, policy development has not yet arrived at a conceptualisation of governance in the fullness of its meaning. The structures, processes and mechanisms necessary to facilitate the democratic, effective and efficient implementation of mergers remain vaguely or ambiguously defined. The division of labour between the national and the institutional levels in this process has not been conceptualised to any great degree. While it will ultimately be at the inter-institutional and institutional levels that implementation has

¹⁷⁴ HE Act 1997: Section 24(3), as substituted by HE Amendment Act 2002: Section 6, with reference to Section 23(2A-2G) as added by HE Amendment Act 2002: Section 5(c).

to occur and work, policy and legislation tend to ignore these two dimensions of merger, and their governance, almost completely. The only merger facilitating structure envisaged in legislation is the Interim Council. Yet its relationship with other institutional governance structures, its powers and functions, remain under-specified in the Act.

2.3 AN ANALYTICAL FRAMEWORK FOR MERGER GOVERNANCE

Restructuring has already given rise to a range of governance responses as spelled out in policy and legislation. This investigation requires an analytical framework that will enable it to give an account and interpretation of these developments, as well as to anticipate responses that may yet emerge, and to recommend responses that will best promote effective governance for mergers. In developing an analytical framework for the current study, links can thus be usefully established with the first phase of CHE research into promoting effective governance in South African higher education.

2.3.1 System-level Governance: Co-operative Governance and Conditional Autonomy

A key element of the brief of the phase one research was to establish whether, how effectively and with what consequences the specific concept of ‘co-operative governance’ has been implemented in South African public higher education institutions. It is necessary to pause for a moment to define briefly what co-operative governance in higher education is, as this concept dominates the explicit policy framework and most higher education institutions believe that is what they are meant to achieve in their own governance.¹⁷⁵

Co-operative governance is a philosophy grounded in the South African Constitution which determines that all ‘organs of state’ (including government departments and any institution exercising a public power or performing a public function) must co-operate with one another in mutual trust and good faith.¹⁷⁶ This philosophy recognises that governance reflects values about the distribution and exercise of authority, responsibility and accountability. It acknowledges that different interests exist and that contestation is inevitable, but aims for governance which will enable co-operative rather than conflicted negotiation of these differences. Co-operative governance is also a system in which autonomous higher education institutions work in a range of co-operative partnerships with a proactive government and with other stakeholders. While for their part institutions must achieve a balance between autonomy and public accountability, government must drive the transformation of higher education in a manner which respects academic freedom, is transparent and steers clear of the micro-management of institutions. Finally, at the institutional level, co-operative governance is a set of structures and processes which enable differences to be negotiated in participative and transparent ways.¹⁷⁷

¹⁷⁵ For a much fuller explication of co-operative governance, see Hall, Symes and Luescher 2002: Chapter 2.

¹⁷⁶ Republic of South Africa (1996). Constitution of the Republic of South Africa, Act No. 108 of 1996. *Government Gazette* No. 17678, Notice No. 2083, 18 December 1996. Pretoria: Government Printers: Chapter 3, Section 41.

¹⁷⁷ White Paper 1997: Sections 3: 2–9.

The phase one research evaluated South African higher education governance on the basis of the values espoused in the policy of co-operative governance. Ultimately the report found that significant difficulties had been encountered with co-operative governance at both system and institutional levels and recommended that debate on the vision and principles underlying the policy and legislation framework for higher education should be renewed.

Critically, the first investigation found that South African higher education has witnessed a steadily intensifying degree of state steering that has seen more and more procedural conditions set upon the substantive autonomy of institutions.¹⁷⁸ By definition there can be no absolutely autonomous system of public higher education: if there were, the potential undesirable consequence would be the elimination of the notion of the public good from higher education. However, shifts in the nature of institutional autonomy within the system are significant and must be examined. Restructuring decisions that specifically determine merger partners, as well as the type of institution that will be the outcome of any given merger, are perhaps the most extreme example of procedural controls placed upon higher education institutions, coming on the heels of a range of other procedural controls that have emerged in the areas of funding, accreditation and in the Higher Education Act itself.¹⁷⁹ The phase one work proposed that, given the increasing number of procedural controls on substantive autonomy, higher education governance at the system level in South Africa could be conceptualised as one of ‘conditional autonomy’. Such a shift in understanding would allow the sector to acknowledge the practical difficulties of ‘co-operative governance’ – in which all decisions are the outcome of partnerships that set vested interest aside – and to grasp the reality of a system in which policy directions and their impacts need to be negotiated in a terrain that recognises the centrality of institutional autonomy in a viable higher education sector, as well as the legitimate role of the state in intervening to ensure the public good.

It could be that ‘conditional autonomy’ will ultimately be judged a contingency required by the history of higher education in South Africa, rather than the abiding rule of state-sector dynamics, and one whose features moderate once again, following the intense era of change of which restructuring is a central feature. Be that as it may, mergers are currently taking place in an environment in which a policy of co-operative governance is the explicit framework, but the dynamics of conditional autonomy are the implicit reality. The fact that mergers are mandatory is the best evidence of this. This situation has considerable potential to create complexity in the terrain where system-level and institutional governance intersect, as institutions seek not only to come to terms with the complex internal and inter-institutional processes and politics of merger, but simultaneously seek to come to terms with

¹⁷⁸ Hall, Symes and Luescher 2002: Chapter 5.

¹⁷⁹ For example, amendments to the HE Act 1997 have allowed the Minister to appoint an Administrator (Republic of South Africa (1999). Higher Education Amendment Act No. 55 of 1999. *Government Gazette* No. 20651, Notice 1399, 19 November 2000. Pretoria: Government Printers: Section 6; HE Amendment Act 2001: Section 15); to determine the scope and range of an institution’s activities (Republic of South Africa (2000). Higher Education Amendment Act No. 54 of 2000. *Government Gazette* No. 21784, Notice 1196, 22 November 2000. Pretoria: Government Printers: Section 2); and to determine the seat of an institution (HE Amendment Act 2001: Section 24).

a new basis of relationship with the state. A study by Jansen and others of early experience of mergers in South African higher education, supports this view:

The origins, forms and outcomes of mergers are conditioned by, and contingent on, the specific forms of interaction between institutional micropolitics, on the one hand, and governmental macro-politics, on the other, especially in turbulent or transitional contexts.¹⁸⁰

Thus the notion of conditional autonomy provides an analytical basis for considering potential (and actual) developments in higher education governance at the system level. Some examples serve to illustrate this:

- In an environment where merger is essentially a limit on the autonomy of formerly independent institutions, the potential for serious conflict between state and sector has not evaporated, even though such conflicts have to this point been deflected.
- In an environment where the concept of institutional autonomy is being reinterpreted, there may be a mismatch in the expectations of state and sector with respect to the level of support and resources that will be provided by the state to merging institutions; as to the extent of independent action to be assumed by institutions, or alternatively the extent of 'guidelines' they are required to follow; and as to the required outcomes at each stage of the merger process. Such mismatches may in themselves precipitate conflicts as the restructuring process unfolds.
- Insistence on the public accountability of autonomous institutions could become a flashpoint if institutional governors find cause to exert their fiduciary responsibility in opposition to merger as troublesome facts come to light. Where will fiduciary responsibility lie in the state's view in such a case – with support for a merger that has been approved by the Cabinet in the interests of transformation, or with the safeguarding of public money already invested in the institution that governors have been appointed to serve?

2.3.2 Institutional Governance: A Matrix of Governance

While acknowledging that shifts had occurred and were needed in conceptualising higher education governance, the phase one work did not reject the fundamental values underpinning existing policy. An analytical framework for institutional governance in the current study takes root in a matrix of governance and four notional types of governance for South African public higher education institutions, generated by the phase one work and derived from a reading of higher education policy, distilled in the White Paper of 1997.

¹⁸⁰ Jansen 2002: 157. This study actually deals primarily with incorporations of colleges of education into universities, supplemented by one study of faculty mergers and one of an institutional merger. It does not give specific attention to governance (each case study begins with a general description of merger process, and then analyses merger outcomes in terms of equity, efficiency, curriculum, organisational, student, staffing and physical integration effects). However, as something of a landmark study, it offers some salutary insights for the purposes of this enquiry.

The White Paper emphasises that institutions, and their systems of governance, are at the same time autonomous¹⁸¹ and publicly accountable.¹⁸² Policy further highlights the principle of democratisation¹⁸³ as one of the critical underpinnings of good governance in the South African context on the one hand, and requires effective and efficient¹⁸⁴ governance to deal with the complex demands of transformation on the other. These principles of the White Paper are the most critical for the nature and process of higher education governance; other principles (equity and redress, development, quality, and academic freedom)¹⁸⁵ may be viewed as dealing more with the content of governance decisions and the substantive outcomes of good governance process.

On the basis of this reading of policy, two axes for governance were generated: ‘public interest and representative governance vs self-referential governance’, and ‘extensive delegation of authority vs limited delegation of authority.’ Delegation was used as a critical indicator of governance effectiveness by virtue of a governance process appropriately dispersed through the institution by the mechanism of formally delegated authority. It is also important to recall that certain powers and responsibilities are explicitly delegated to governance bodies and actors by the Higher Education Act. These structures of governance are in turn accountable for the good governance and management of the institution, and are obliged to act and report upon the performance of the institution in line with principles of good governance established by the King Report (e.g. openness, integrity, accountability) and in terms of South African Generally Accepted Accounting Practice (GAAP).¹⁸⁶

Finally, recognising that any system of governance requires implementation capacity, a third dimension was added to this matrix through analytical assessment of the efficiency with which governance structures were supported and with which effect was given to decisions emanating from the institutional governance process (this was diagrammatically represented

181 ‘The principle of institutional autonomy refers to a high degree of self-regulation and administrative independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government. However, there is no moral basis for using the principle of institutional autonomy as a pretext for resisting democratic change or in defence of mismanagement. Institutional autonomy is therefore inextricably linked to the demands of public accountability.’ White Paper 1997: Section 1.24.

182 ‘The principle of public accountability implies that institutions are answerable for their actions and decisions not only to their own governing bodies and the institutional community but also to the broader society. Firstly, it requires that institutions receiving public funds should be able to report how, and how well, money has been spent. Secondly, it requires that institutions should demonstrate the results they achieve with the resources at their disposal. Thirdly, it requires that institutions should demonstrate how they have met national policy goals and priorities.’ White Paper 1997: Section 1.25.

183 ‘The principle of democratisation requires that governance of the system of higher education and of individual institutions should be democratic, representative and participatory and characterised by mutual respect, tolerance and the maintenance of a well-ordered and peaceful community life. Structures and procedures should ensure that those affected by decisions have a say in making them, either directly or through elected representatives. It requires that decision-making processes at the systemic, institutional and departmental levels are transparent, and that those taking and implementing decisions are accountable for the manner in which they perform their duties and use resources.’ White Paper 1997: Section 1.21.

184 ‘The principles of effectiveness and efficiency are related though distinct. An effective system or institution functions in such a way that it leads to desired outcomes or achieves desired objectives. An efficient system or institution is one which works well, without unnecessary duplication or waste, and within the bounds of affordability and sustainability. It does things correctly in terms of making optimal use of available means.’ White Paper 1997: Section 1.22.

185 White Paper 1997: Sections 1: 18, 20, 21 and 23.

186 Department of Education (2001). Manual for Annual Reporting of Higher Education Institutions 2nd Edition (Revised Draft). Pretoria: Department of Education. Hereafter referred to as DoE Manual for Annual Reporting 2001.

by the size of any institution represented on the matrix). The matrix was used to generate four notional types of institutional governance:

- Contested institutions (self-referential governance and shallow delegation with weak implementation capacity);
- Management-focused institutions (self-referential governance and deep delegation with high implementation capacity);
- Democratic institutions (public interest/representative governance and shallow delegation with average implementation capacity); and
- Democratic, well-managed institutions (public interest/representative governance and deep delegation with good implementation capacity).

The matrix and its notional types are illustrated in Figure 1.

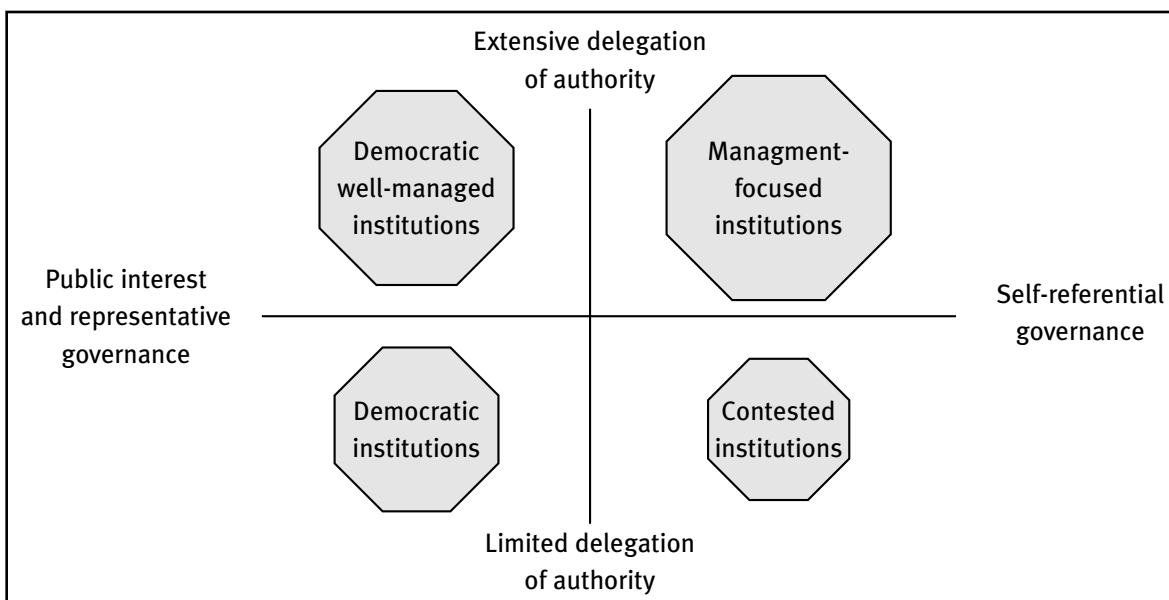


Figure 1 Matrix of Institutional Governance

The matrix of institutional governance was intended to be both descriptive and analytical. However, given that it took its basis in a reading of policy which attributes value to certain qualities (representativeness, effectiveness and efficiency), it allowed interpretation¹⁸⁷ of what the qualities of good institutional governance are likely to be: namely, orientation around national transformation objectives and the public interest; formal delegation of authority to embed effective governance deeply within the institution; and high management and administrative capacity to enable efficient governance process and to ensure efficient action against decisions emerging from the governance process. The matrix also aimed to show that these attributes of good governance need to be achieved in balance with each other. Highly

¹⁸⁷ This interpretative dimension of the matrix was backed up in the phase one research with the illustrative experience of institutions who participated in the study, as well as of institutions whose governance crises were a matter of public record in the reports of Independent Assessors.

capacitated, self-referentially governed institutions might work with machine-like efficiency – but could be deficient in terms of their ability to interpret and act upon the public interest, and prey to some of the pitfalls of managerialism (for example, undermining collegial relationships). Reasonably well-capacitated democratic institutions could nonetheless fall into the trap of cumbersome decision-making slowed down by the need to consult at every step. The attributes of good governance could be viewed as being best in balance in the case of democratic, well-managed institutions; it follows that this is a governance model towards which all South African public higher education institutions could aspire. However, it is worth noting that only one institution in the phase one study sample of 12 fell within this category, implying that such a balance is not easily achieved.

2.3.3 Concepts to Evaluate Merger Governance

The matrix of governance has been introduced in detail because one must assume that it remains highly relevant for merging institutions in South Africa. In particular, in a restructuring exercise whose primary goal is to break the apartheid mould of the higher education system and to forge transformed institutional identities, missions and cultures, the achievement of democratically governed and well-managed institutions is an accompanying and critical goal. The restructuring of higher education is taking place within a policy framework which has not changed in respect of the value it places upon representativeness, effectiveness and efficiency. On the contrary, the decision to proceed with large-scale restructuring of the sector has underscored central government's preoccupation with achieving radical transformation (i.e. the 'fitness of purpose' of institutions). Its intention to align transformation objectives with a system that is in addition effective and efficient (i.e. the 'fitness for purpose' of institutions) is a secondary goal consistent with key drivers of higher education mergers already noted as typical in other parts of the world.

From a governance perspective, then, the ideal outcome of South African higher education restructuring would be a set of institutions that are democratically governed, well-managed and equipped with capacity to address themselves effectively and efficiently to substantive issues of ongoing transformation and higher education delivery. A key purpose of this study is to determine whether the ideal is achievable under prevailing (explicit and implicit) conditions of policy, law, state-sector relationships and institutional capacity, and to make proposals that will support an ideal outcome. The following sections develop key concepts and descriptors as a 'language' within such an exercise of evaluation can be framed.

2.3.3.1 Unintended Governance Consequences of Merger

It is consistent with the values of national policy to argue that one intended outcome of a merger in higher education is to achieve a democratically governed, well-managed institution. Thus a merger would be a success to the extent that the institution has acquired the necessary governance conditions (representative governance oriented in the public interest, effective governance through depth of delegation, and efficient governance through

strong implementation capacity). A measure of failure – or an unintended consequence – of merger would be if the merger were to result in the opposite conditions, and thus in a situation of ‘contested’ governance (self-referential governance, shallow delegation and weak implementation capacity). Such an outcome could occur in the event that merger creates significant internal dissonances in the areas of policy, systems and procedures. It might also occur if the process of merger breaks with the fundamentals of good governance as determined in policy or in prior institutional practice. It would appear to be a particular risk in those instances where merging institutions have had a history of, or currently display characteristics of, ‘contested’ governance. Given that policy aims through restructuring to overcome apartheid legacies which are frequently at the root of contested institutions, such protraction of contestation and incapacity in governance would certainly be an unintended consequence of merger, and thus a risk which both the Minister and institutions would need to acknowledge, and prepare to manage.

This is not to suggest that there is one best-practice governance process for merger that must be followed to the letter, nor a ‘one-size-fits-all’ governance model for merged institutions. The range of institutional histories and contexts in South African higher education strongly suggests that neither is likely. The Jansen study of early experience of merger in South African higher education found precisely that

Mergers unfolded in completely different ways. Even when the same kinds of institutions (e.g. colleges into universities) were to be combined, using the same legal and planning script, the forms and effects of the mergers were vastly different.¹⁸⁸

However, using the dimensions of good governance already set out, it is possible to conceptualise in broad terms how disruptions of good governance practice might occur in the process of merger, and to infer how these might impact ultimately on good governance in the merged institution. As examples, the process of merger could potentially disrupt good governance, and possibly result in ‘contested’ governance in the merged institution, under the following conditions:

- If the process of merger were to unfold without clear agreement between the merger partners on matters of principle and approach, or without necessary agreement by the Minister of Education;
- If the Councils of merging institutions were not to exercise to the full their fiduciary duty;
- If pre-merger and interim structures and processes of governance were not to conform to the standards of representativeness, participation, consultation and disclosure established (or aspired to) by the merging institution/s prior to initiation of merger;
- If the merger were to proceed without adequate communication to internal and external stakeholders, or without sufficient engagement of the community;

¹⁸⁸ Jansen 2002: 154.

- If decision-making at any stage of the merger process were to be inappropriately concentrated in the hands of a small group at the centre – whether formally or informally constituted;
- If the basis of authority for decision-making by individuals, or by structures of governance, in the merger process, were not established in law, agreed in principle, or transparent to all;
- If the merger process were to unfold without a clear, agreed and prioritised plan of action;
- If incompatibilities in institutional culture were to translate into policy and system inefficiencies that disable governance after merger;
- If geographical distance between campuses were to lead to gaps, duplications and redundancies in the administration of the merged institution;
- If the merging institutions (prior to merger), or the merged institution, were to ignore key developments in the external environment, owing to preoccupation with the process of merger.

The extent to which a merger process exemplifies good governance, or to which it supports the outcome of good governance for the new, merged institution, would need to be evaluated not only in terms of the positive qualities achieved in the system of governance itself. Good merger governance must also enable the merged institution to achieve the balance of factors that constitute the ‘political economy of merger’¹⁸⁹ and the goals of higher education transformation. This is the critical link between the process and content of governance in a merger scenario. Thus a well-governed merger should result in an institution that achieves *inter alia*: a transformed institutional culture; an appropriately diverse array of academic offerings; an appropriate system of measurable academic standards that are implemented, monitored and evaluated effectively; integrated programme delivery across campuses; economies of scale; sound management capabilities; and efficient administrative systems.

A second unintended consequence of merger in governance terms, would be if merger were somehow to move institutions completely outside the parameters of policy values held for public higher education institutions. Institutions could determine their governance arrangements with a priority on internal values and goals rather than on the public goals of representativeness, effectiveness and efficiency. Alternatively, the dynamics that come into play between merger partners – for example, practical or political dominance by one partner – could divert the model of governance in the new institution from these desirable characteristics of good governance. The following are illustrative instances:

- The complexities of merger – posed, for example, by contrasting or incompatible institutional cultures, or significant geographical distance between campuses – could induce a merged institution to create a system of governance characterised by ‘disguised compliance’. Under such a model, the institution might meet the formal requirements of unitary governance declared desirable for merged South African public higher education

¹⁸⁹ This concept, developed in Eastman and Lang 2001, is detailed under the international perspectives section of this report System-level Governance and the Impetus for Mergers (Section 2.1.2.1).

institutions (i.e. a single governing body, single Senate and single chief executive body), but could decompose in practice into federal arrangements. This would occur for example if unitary structures of institutional governance were supplemented with governance and management arrangements at, for example, the campus and faculty levels, to perpetuate former separate traditions and ways of working. This would seem to be a particular risk for multi-campus institutions. The risk could also exist for comprehensive institutions, or in the case of incorporation of a subdivision into another institution, if, for example, academic governance were not to support integration and articulation of academic programme offerings. In such ways as these, ‘institutions within the institution’¹⁹⁰ could persist, inhibiting genuine transformation in the public interest and limiting gains in effectiveness and efficiency.

- In the opposite case, and still within a model of unitary governance, the system of governance could be skewed by ‘unilateral predominance’ – i.e. governance would reflect the predominant values of one of the original merger partners rather than reflecting a new institutional identity. This outcome is perhaps most likely in the case of incorporation – and under some conceptions of incorporation may be almost inevitable. However, the danger may exist in any merger where equal partnership is not a functional reality.¹⁹¹ In this instance, a ‘legacy’ culture would predispose governance in the merged institution to take on characteristics of a predecessor institution, rather than seeking the characteristics of representativeness, effectiveness and efficiency as worthy governance values in their own right.
- Vertical mergers, which require that institutions embrace different kinds of academic product, may run the risk of inducing ‘mission fragmentation’ in the merged institution. In the South African case, the notion of a ‘comprehensive institution’ remains completely undeveloped (an area that will be explored in greater depth elsewhere in this report). This may mean that the new comprehensive institution struggles in the short and medium terms – and even in the long term – to forge an integrated institutional identity or to craft a well-articulated range of academic programmes. In practice, this situation could lead to internal misunderstandings or power struggles – perhaps most significantly at faculty board level – that undermine governance values of public interest, effectiveness and efficiency.
- Institutions seeking to redefine their vision and mission through merger may develop an emphasis that moves them in the direction of public/private partnerships that fundamentally undermine the notion of public good implicit in higher education. As it is in South African higher education, private sector providers tend to cluster around public sector providers in geographical terms, as they seek affinity with the public institution’s name and reputation, and seek access to its resources. Public institutions themselves

¹⁹⁰ Jansen has cited ‘protected enclosure’ as one type of result of incorporation, naming a case in which ‘the College was able to secure a separate dispensation of finances (the reserves), appointments, promotions, reporting lines, curriculum autonomy and campus status than was allowed in the formal body of institutional regulations governing departments, schools and faculties’. Jansen 2002: 164.

¹⁹¹ Jansen cites two results of incorporation linked to this idea: ‘obliteration’ and ‘subsumed integration’.

could seize upon merger as an opportunity to forge private sector relationships that will, it believes, assist it to serve the economic development needs of its region. Even if these new relationships are carried out with great effectiveness and efficiency in light of the new institution's stated objectives, the public interest dimension of good governance could well be derailed. Thus while public-private partnerships are not intrinsically a bad idea, their consequences could certainly be unintended.

Unintended consequences of mergers for governance are illustrated in Figures 2 and 3 below.

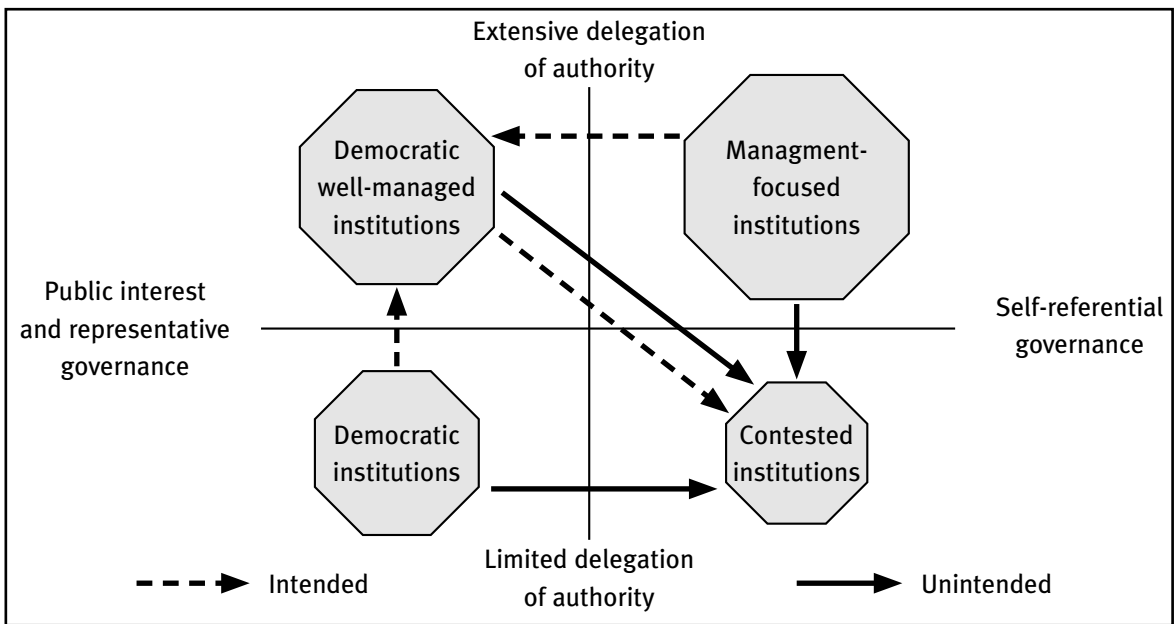


Figure 2 Unintended Merger Governance Consequence 1

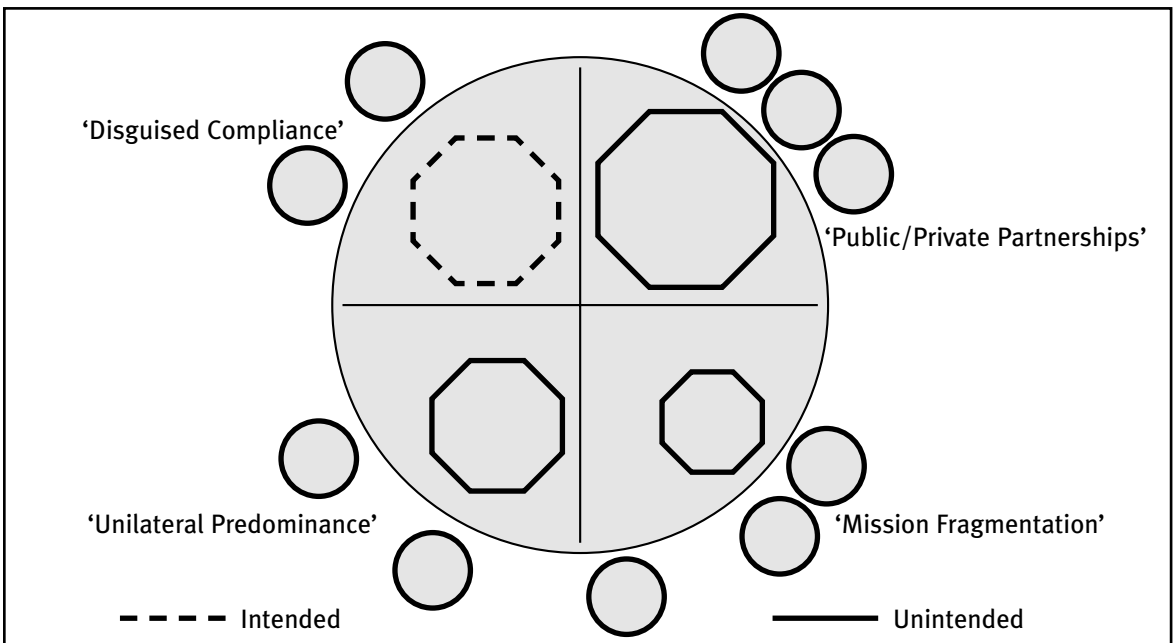


Figure 3 Unintended Merger Governance Consequence 2

2.3.3.2 Impact on Governance of Differentiated Response to Merger

Of the three dimensions of good governance (representative governance/public interest, extensive delegation of authority, good implementation capacity), representative governance may be comparatively most easily achieved – at least formally – in merged institutions. In terms of the Higher Education Act, representativeness is in part a function of the composition of the new Council. Mergers and new institutional forms may provide key opportunities to optimise the representativeness of Councils through careful selection of external governors who represent the range of perspectives and expertise required in terms of the newly formulated institutional mission. In addition, other participative and representative structures such as the Institutional Forum and Senate are required of the merged institution in terms of the Higher Education Act (and of the Standard Institutional Statute in the transitional period). Finally, representativeness can be achieved through proper attention to the composition of committee structures established in terms of the new Institutional Statute and/or as established by Council and Senate. In less formal terms, public interest orientation may be harder to sustain during the merger process as attention turns inwards to integrating policies, systems and procedures. It is also true that the achievement of representativeness in merger structures in the pre-merger and interim phases may be one of the dimensions of good governance that is most difficult to achieve.

The achievement of good implementation capacity will depend on systematic attention to enablers of operational efficiency in merger, such as due diligence studies at the outset, integrated management information systems and ensuring continuous high quality management capacity in the process. Initial success in these areas may depend on the level of implementation capacity in the partner institutions.

Achieving extensive delegation of authority in a merged institution could present extremely complex challenges and issues. This is because the true effectiveness of delegation depends not on formal mechanisms such as codified authorities, but crucially upon the willing participation of all those in the line of delegation, and the stakeholders whom they represent. This in turn requires recognition that mergers may elicit different reactions and consequences at different layers in the institution. The interests of senior leadership in a merger may well differ from the interests of deans, heads of department or students, just as these may differ from each other. Generic ‘reaction maps’ are illustrated in Figure 4.

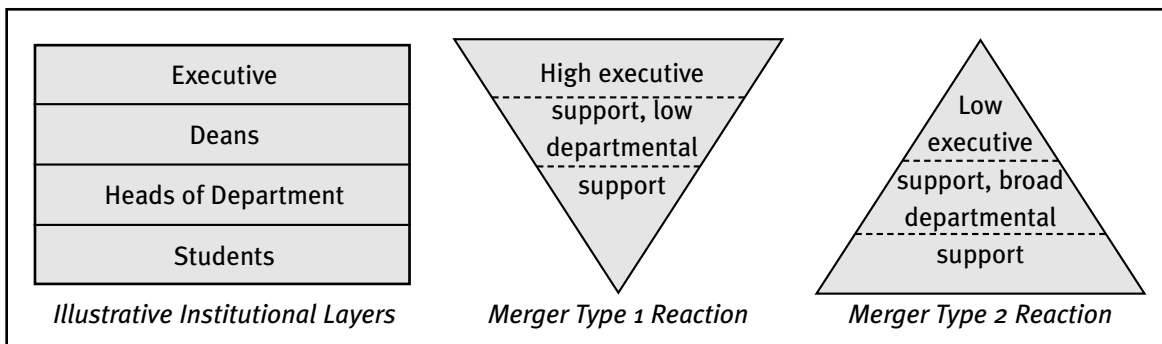


Figure 4 Merger Reaction Maps

It is possible to predict – at least in general terms – that the nature of reactions will be linked to the type of merger in progress. Having said this, it must be remembered that the emphasis in this discussion is on reactions at different levels in the institution. Models of reaction within the institution will interplay with other reactive tendencies at other levels, to which this report has already referred: for example, inter-institutional merger negotiations are likely to be most difficult where institutions are of equal size and power.¹⁹²

Where institutions resemble each other (i.e. horizontal mergers where merging institutions operate in similar fields, with similar types of products, as in the case of a university/university or technikon/technikon merger), one can hypothesise a Type 1 reaction (with reference to Figure 4). In this instance, senior institutional leaderships are likely to share a common purpose and be able to forge a new institutional mission within a common frame of reference. However, departments will inevitably be alert to the dangers of significant competition: in the future there will be one department (or faculty), and one head of department (or dean) rather than two.

Where institutions are different (i.e. vertical mergers where merging institutions operate in generally similar or related academic fields, but are oriented around different types of products, as in the case of a university/technikon or ‘comprehensive’ merger), a Type 2 reaction seems a more likely hypothesis. In this case, executives do not share a common mission. Rather, they are expected to lead the process of forging one and finding a path to a shared identity that will escape the pitfalls of ‘academic drift’. The gap between leaderships may be suppressed, especially in the polite early stages of merger negotiations, but will almost certainly become visible as discussion moves beyond rational issues of progress to substantive issues of mission, identity and branding. For their part, departments are likely to see the opportunities of compatibility, rather than competition, as synergies between disciplines (economics/financial services, accounting/bookkeeping, medicine/paramedicine) become possible through merger.

The degree in differences of reaction may emerge or be recognised only as the merger progresses and as the process touches upon interests specific to certain actors. Recognising this provides an excellent motivation for involving as many stakeholders as possible in the process of merger from the beginning, and supporting and encouraging collaborative discussions between academic departments, so that support for the merger can be built from the bottom up as well as from the top down.

Another aspect to be considered under the heading of ‘differentiated response to merger’ is that a mandatory merger, by its nature, may run the risk of cutting across principles of collegial and co-operative governance and could therefore present considerable difficulties for the process of governance.

¹⁹² See discussion around the relative size and power of merging institutions, in the international perspectives section of this report dealing with Governance and the Inter-Institutional Process for Mergers (Section 2.1.2.2).

Co-operative governance can be viewed as a uniquely South African variant of, or advance upon, the ideal of collegial decision-making that has traditionally dominated higher education institutions and particularly universities. Under this conception, co-operative governance extends the notion of the college to embrace a community of stakeholders. Thus while collegiality is a model of decisions by tacit consent using the mechanism of the college, co-operative governance is a model of decisions by consensus or ‘sufficient consensus’ using the mechanism of partnerships. Mergers originate in the corporate view of a hierarchical line of decision-making authority with dominant and subservient parties who, so long as they observe their given roles, can drive through major organisational restructuring. This model applied wholesale to higher education institutions denies the validity of the college in governance, and of governance stakeholder partnerships, and is therefore potentially disastrous for higher education. Mandatory mergers in higher education have the potential of presenting considerable difficulties of process for the following reasons:

- A merger that is mandatory, and is thereafter perceived to be effected through an imposed process which is neither collegial nor co-operative, could do considerable harm to the credibility of, and levels of participation in, governance in the new institution.
- Academics and other key stakeholders may feel alienated by the unfolding process and frustrated at their inability to access decision-making. This may lead to resistance, obstruction or disengagement from the merger in each of its phases (pre-merger, transition and integration).
- The ‘college’ is by definition a self-organising network in the academic sphere with established traditions, channels, loyalties and rivalries and a distinctive identity and culture. There is a danger that merger, in seeking to enforce a meshing of two or more self-organised networks could destroy them all. The consequence would be the ‘structural holes’ already alluded to in the international literature review.¹⁹³ Alternatively, attempts to enforce new networks could mobilise existing networks against the ‘other’ – i.e. the merged institution. Either of these eventualities would have serious consequences for academic development in the new institution.

2.4 CONCLUSION: PRINCIPLES FOR GOOD MERGER GOVERNANCE

This chapter has covered a wide and varied territory to provide a background and context for the sections that follow and which will develop key themes, and formulate proposals, for merger governance going forward. As a kind of ‘summary context’ for the rest of the report, an attempt is made here to draw together the frameworks that have been developed, into a set of guiding principles for good merger governance in South African higher education:

- Good governance is an essential support to the unfolding and complex process of merger at the system, inter-institutional and institutional levels; good governance will require sustained focus on national policy objectives for higher education, due process, clear roles and responsibilities, and appropriate capacity and resources at each of these levels.

- Merger governance at both system and institutional levels needs to take account of a complex balancing act between different elements – essentially between transformation of higher education on the one hand ('fitness of purpose'), and effectiveness and efficiency of the system and of institutions ('fitness for purpose') on the other. Merger governance therefore needs to be alert to unintended consequences and policy distortions which may occur if these elements are not held in proper balance.
- The process of mandatory mergers engages state and institutions in a complex terrain whose effective governance will require recognition of the substantive autonomy of institutions to carry out teaching and research on the one hand, and of the state's right to steer higher education in order to achieve national transformation objectives on the other.
- Against this background and in light of the particular history of higher education in South Africa, system-level governance should acknowledge that there is unlikely to be a 'one-size-fits-all' approach to merger, and that the state and merging institutions should negotiate as required in respect of specific merger needs and outcomes.
- Institutional (and inter-institutional) governance at each stage of the merger process must enable appropriate participation by all stakeholders, facilitate proper communication of decision-making process and outcomes, and ensure that merger process and outcomes are continuously orientated around the public good – i.e. high quality academic delivery in a transformed higher education system.
- Institutional (and inter-institutional) governance at each stage of the merger process must ensure that decision-making is legitimate and transparent, and allows a sufficient balance of top-down and bottom-up inputs to policy and outcomes.
- Institutional (and inter-institutional) governance at each stage of the merger process must be underpinned and enabled by good information and sound management capacity, to be sourced as needed – whether internally, from external experts, or from the state.

2.5 SUMMARY: BACKGROUND AND CONTEXT

This chapter has drawn together frameworks that support the enquiry, namely: a review of international perspectives on higher education mergers and their governance, a review of the policy and legal framework for restructuring South African higher education, and the development of an analytical framework for merger governance against which the findings and proposals of the report can be interpreted and tested.

As a prelude to developing these frameworks, the chapter emphasises the specific nature of higher education restructuring in South Africa. Given that this politically-driven process aims to dismantle an apartheid landscape, higher education governance in the current context must enable institutions to achieve both 'fitness of purpose' – i.e. institutional fitness in terms of national policy goals, priorities and targets, and 'fitness for purpose' – i.e. conditions that

¹⁹³ This concept, referenced in Norgård and Skodvin 2002, is detailed under the international perspectives section of this report dealing with Institutional Governance and Merger Implementation (Section 2.1.2.3).

will allow them to implement these visions and missions.

The review of international perspectives highlights the fact that mergers have featured in higher education for over 30 years, particularly in developed countries. Both theoretical frameworks and a focus on governance are weakly developed in the international literature, but relevant insights can be gleaned. Approaches to merger have differed across time and space and mergers have been initiated both by governments and by institutions themselves. However, the concept of voluntary merger is suspect, as mergers are inevitably a consequence of national policy or of market forces, and concern with efficiency and effectiveness is an almost universal driver. Maintaining all the elements – scale, scope, standards, mode of delivery, economy and efficiency – of higher education merger in balance is a complex exercise which may have unintended consequences and policy impacts as the process unfolds. Merger outcomes may be determined even in their negotiation, depending on the complexity of the type of merger under way and the degree to which negotiations are combative or collaborative; outcomes can also be influenced by issues pertaining to leadership, institutional culture and the human impact of mergers. Although the literature tends not to state this explicitly, good governance is clearly an essential support to the unfolding and complex process of merger.

The relevance of international experience of mergers is qualified by the policy and legal framework within which South African restructuring of higher education is taking place. This framework clarifies that the restructuring of higher education is primarily driven by a political agenda of transformation, redress and equity. Achieving efficiency and effectiveness of the system is a secondary goal. The trajectory of higher education policy development with respect to restructuring highlights a process initially characterised by consultation but distilled to an exercise of primarily combining institutions through mergers. Given its own inability to implement a policy of sanctions and incentives, and the perceived unwillingness of institutions to initiate change, the Ministry of Education has become more interventionist and demanding of institutions to implement. It remains to be seen if it will be possible in practice to govern higher education in this way, especially as the division of labour between the national and institutional levels in this process has been under-defined and given that implementation has to occur and work primarily at the inter-institutional and institutional levels.

The analytical framework draws upon earlier research to suggest that mergers are currently taking place in an environment in which a policy of co-operative governance is the explicit framework, while the implicit reality is that institutional autonomy is being conditioned by procedural controls (such as mandatory mergers), imposed by the state in order to achieve national policy goals. This has the potential to create complexity in the terrain where system-level and institutional governance intersect. An aspirational model of good merger governance at the institutional level is based on the values which continue to underpin national policy and suggests that the ideal outcome of South African higher education restructuring would

be a set of institutions that are democratically governed, well-managed and equipped with capacity to address themselves effectively and efficiently to the substantive issues of higher education transformation and delivery. Potential dangers to this outcome exist. Such gains in good governance as have been made by individual institutions could be disrupted by merger under certain conditions, impacting negatively on the process of merger, on the quality of governance within the merged institutions, and on the governance characteristics of the system as a whole. The willing participation of stakeholders in governance of merger/the merged institution could be complicated by the fact that merger elicits different reactions and consequences at different levels in the institution. A process of merger which is perceived to be cutting across the principles of collegial and co-operative governance could alienate academics and other stakeholders, with serious consequences.

Finally, the chapter has derived from the frameworks which it has set out, a set of principles for good merger governance in South Africa's restructuring higher education system.

3. SYSTEM-LEVEL GOVERNANCE FOR MERGERS

The following two chapters develop key governance themes on the basis of perspectives that emerged from institutional interviews and other documented institutional perspectives shared with the researchers.

The study has conceptualised higher education governance as a terrain in which the spheres of the higher education system and its institutions intersect. Thus although the predominant focus of the report is institutional governance, it is appropriate and necessary to focus on issues of governance which arise at this point of intersection. Such issues are the focus of this chapter.

3.1 STATE-SECTOR RELATIONSHIPS AND RESTRUCTURING

This study has found, on the basis of its review of the policy and legal framework for restructuring, as well as prior research which analysed the prevailing state of governance in South African public higher education, that the relationship between the state and the higher education sector is at present a dynamic one. The study has suggested that while co-operative governance is the explicit policy framework for higher education, and its underpinning values remain valid for the promotion of good governance, the implicit reality is that state steering of higher education has intensified to a significant degree. Accordingly the state is increasingly setting procedural conditions upon the substantive autonomy of institutions, rather than relying on their voluntary co-operation in pursuit of national policy goals. While there may be no direct or fundamental infringement of academic freedom – the right of institutions to teach and conduct research without outside interference – the state is determining as far as it can the environment within which academic freedom is exercised by institutions. The scope of such determination includes the shape of the system and the form of its institutions. The fact that restructuring is proceeding on the basis of mandatory mergers is key evidence of the actuality of a higher education system which is essentially *not* co-operative in its governance at present. Yet acknowledging and working within this context seems to be a pragmatic necessity allowing state and sector a basis upon which to negotiate restructuring to common benefit. In essence, state and sector need to achieve a balance in understanding, on the one hand, that institutional autonomy is essential to the viability of higher education, and on the other, that it cannot be absolute, as the state has a legitimate role in ensuring that the public good is served by public higher education institutions.

Institutions, in their early reactions – and even in some of their later reactions – to restructuring proposals, had not achieved such a pragmatic grasp of the situation; and neither, it would seem, had the Minister. Thus the exercise of restructuring was launched with a fiery exchange of directives and legal challenges between the Minister and the University of South Africa (UNISA). Confidential institutional submissions to the Minister with respect to restructuring, complained loudly:

The Minister [...] sought Cabinet's endorsement of his decision without consulting the two institutions involved. This is completely incompatible with the spirit of co-operative governance of the higher education sector and is inimical to administrative law principles;

The Minister has been given extraordinary powers to re-plan the higher education sector. This is understandable within the historical context of South Africa. It nevertheless behoves the Minister to consider the limits to social planning; Preoccupation with structures and mechanisms ignores the critical interior transformation of the educational process ... Construction of a new social identity is not a simple structural matter.¹⁹⁴

For his part, the Minister insisted that ‘this [restructuring] process has involved a level of consultation and dialogue that is unprecedented and unparalleled anywhere in the world.’¹⁹⁵

By the time that institutional interviews were conducted as part of this study during 2003, reactions on both sides appeared to have been tempered. Legal challenge to merger appeared to be a possibility in only one or two cases at that time; institutions were by and large supportive in their public statements of the mergers under way; and institutions were beginning to develop a more detailed sense of how they wished to work with the Ministry and the Department going forward. Most institutions appeared to be cautiously hopeful that state and sector could work in a mutually compatible way around the business of merger implementation, while acknowledging the dangers of failing to do so. In the words of one Vice-Chancellor:

Co-operative governance as it was conceptualised by the National Commission and the White Paper has largely failed. The reasons for this cannot be laid entirely at the door of the state – institutions have not been willing to think systemically and nationally. If the Department of Education and institutions can move into mergers in a way that recognises the needs of each, this may restore some semblance of faith. But if the Department does not involve itself in the nitty-gritty of the process, this will not occur. Institutions will feel the Minister has abandoned them to the process.¹⁹⁶

These words encapsulate the general tenor and mood conveyed by institutions in the study sample. Their perspectives signalled that flashpoints in the relationship between state and sector were still highly possible around issues of substance, capacity and resources.¹⁹⁷

With respect to issues of substance, all institutions in the study sample conveyed their view that the restructuring process needed to acknowledge the particular circumstances of specific mergers and incorporations. Without exception, these institutions were clear on the point that a ‘one-size-fits-all’ model of merger implementation was undesirable, unachievable, and needed to be treated as such by the Minister. Several institutions commented that the Higher Education Act appeared to have been drafted with a uniform model in mind and that this was unfortunate. At the same time, the policy framework had remained vague on issues that

¹⁹⁴ Unattributed quotations taken from 2002 confidential institutional submissions to the Minister.

¹⁹⁵ ‘Asmal settles for six techs, 11 varsities’ in *Cape Times*, 9 December 2002.

¹⁹⁶ Unattributed quotation from a confidential institutional interview conducted as part of this study.

¹⁹⁷ The following three paragraphs summarise these flashpoints, with reference to unattributed comments made by institutions in the study sample during the course of confidential interviews.

they judged critical to the success of restructuring. These included clarity on the distinction between merger and incorporation (highlighted by five institutions in the sample) and the definition of comprehensive institutions (highlighted by five institutions in the sample).

With regard to the issue of capacity, all institutions in the sample emphasised that the government needed to recognise limits on institutional capacity to deal with multiple change initiatives at the same time. ‘Demand overload’ was a real threat to these institutions as they entertained the prospect of trying to plan and implement the vast and complex change process of merger, at the same time as responding to requests from the Minister to enable, amongst others, determination of the programme and qualifications mix for institutions, regional coordination of programme offerings, and the establishment of an integrated national information and applications system. Furthermore, all the institutions in the study sample were concerned that capacity provided by the Department of Education’s Merger Unit should be of an optimal nature and degree. An ‘imposed blueprint’ for merger was not favoured by any institution. Instead they cited the need for continuous two-way communication between the Unit and institutions, facilitated where possible by the use of central databases, interactive websites and harnessing merger expertise inside institutions to assist others with lesser expertise. Institutions also hoped for quick and responsive input on technical, financial and legal issues, and for assistance in resolving conflict where necessary.

Institutions in the study sample were most forceful in their views on the need for financial resources to support the process of restructuring. They were unanimous in their view that available state funding for mergers (outside of the normal funding formula), as well as clear protocols and criteria for its application, were essential. They were worried by the apparent inadequacy of national budget provisions for merger. In addition, they were concerned about the impact of the new funding formula on merged institutions, especially as decisions taken in the process of merger were likely to be informed primarily in terms of the old funding formula. Finally, they were concerned about the time frames within which funding needs would be acknowledged and met.

Since the institutional interviews conducted as part of this study were concluded, the Ministry has published its merger guidelines.¹⁹⁸ These guidelines seem to respond in both spirit and content to a number of the issues and concerns that have been raised in preceding paragraphs. With respect to the spirit of the relationship between state and sector in the restructuring process, the guidelines open by stating that

The Ministry recognises that implementing the restructuring proposals will be complex, time-consuming and place an enormous burden of additional work on the affected institutions as well as on the Department. This is made all the more onerous given capacity

¹⁹⁸ Ministry of Education (2003). Higher Education Restructuring and Transformation: Guidelines for Mergers and Incorporations. April 2003. Pretoria: Ministry of Education: Section 2.1.1. Hereafter referred to as Ministry Merger Guidelines 2003.

constraints, both systemic and institutional. The Ministry is therefore committed to ensuring that the appropriate human and financial resources are leveraged and mechanisms set in place to support the merger and incorporation process.¹⁹⁹

The Ministry further clarifies that

How these guidelines are taken up and used is, for the most part, a matter of choice. Some institutions may find these suggestions helpful for the development of a model for the merger process. Others may feel they have the capacity and confidence to proceed with models and processes that they have already developed or begun to develop. In all instances, the guidelines may serve as a useful checklist against which to measure progress and to fill in gaps. There will almost certainly be occasions when institutions have to make decisions that are dependent on their own particular circumstances or in relation to their specific vision and mission. In these instances, the guidelines will, at a minimum, try to highlight what needs to be attended to.²⁰⁰

These statements provide indications that space is being created by the Ministry within which the particular circumstances and constraints of specific mergers may be taken into account, negotiated and resolved.

In addition, and with particular application to the focus of this study, the merger guidelines in their proposals for how institutions should approach merger governance give clear evidence of having assimilated and responded to issues and concerns highlighted by institutions. This study's evidence for forming such an opinion is that it was preparing its conclusions on the basis of institutional interviews, quite independently but at much the same time as the merger guidelines were being prepared. Considerable convergence between this study's conclusions and those reflected in the merger guidelines (which are highlighted especially in the next chapter) thus suggest that both were centrally informed by institutional perspectives.

One or two examples, drawing on institutional concerns that have been highlighted in this chapter, further serve to illustrate the point. As already noted, 'demand overload' is recognised by the Ministry in general terms, and allusions to this risk are made in specific terms as well, in terms of setting out and providing reasonable justification for instances in which merger and other complex change initiatives are likely to intersect. For example, with reference to regional review for programme collaboration and rationalisation, the guidelines explain that:

Where proposals for rationalisation only involve institutions that are in the process of merging or incorporation, the institutions would not have to submit programme collaboration and rationalisation proposals in June 2003. However, in cases where the identified programmes cut across merging institutions and other institutions in the region,

¹⁹⁹ Ministry Merger Guidelines 2003: Section 1.

²⁰⁰ Ministry Merger Guidelines 2003: Section 1.1.

programme collaboration and rationalisation proposals would have to be submitted in June 2003. The Ministry recognises that this would be complicated but it is necessary to provide the institutions affected by the proposed mergers with a platform on which to plan and rationalise the programme offerings of the merged institutions.²⁰¹

As a second example, institutions emphasised the need for two-way communication with the Ministry; the guidelines indicate that one of the services provided by the Merger Unit will be communications, including a merger website and ongoing dialogue between the Ministry and key constituencies.²⁰²

Obviously, the preliminary indications given by the merger guidelines that the Ministry is open to establishing a 'negotiable' relationship with institutions in the process of restructuring will need to be tested in practice. In particular, these intentions are likely to be tested around those flashpoints of substance, capacity and resources identified by institutions. Thus the rest of this chapter considers in more detail some of the issues cited by institutions as areas of potential misunderstanding or conflicting expectations between the state and the higher education sector with regard to the merger guidelines.

3.2 CLARIFICATION REGARDING MERGERS AND INCORPORATIONS

Institutions felt that greater clarity was required regarding the distinction between mergers and incorporations, in policy terms. In legal terms, the Higher Education Act deals with mergers (Section 23) and incorporations (Section 24) separately, while the subsection of Section 23 dealing with gazetting of the merger and transfer of staff, students, disciplinary codes, programmes and awarding of qualifications, is applicable to Section 24 (incorporation) as well. The Act clarifies (Section 1) that a merger terminates the legal status of former institutions that have merged, while an incorporating subdivision becomes part of another institution without that institution's legal status being affected. The merger guidelines published in April 2003 have further clarified that, with respect to the Minister's information requirements for the gazetting of mergers and incorporations, the only legal requirement that applies to incorporations is the date of the incorporation. Furthermore, none of the legislative requirements and few of the activities associated with interim arrangements for mergers apply to incorporations.²⁰³

Some (receiving) institutions in the study sample questioned the legal distinction between merger and incorporation in terms of the extent to which an incorporating subdivision was to be taken on as a going concern. In fact, the application of Section 23(2) 2A-2H to incorporations would mean precisely that the receiving institution must treat the subdivision as a going concern. Uncertainty on this issue appeared to be more a function of policy confusion around the 'equal partner' status of incorporating subdivisions, given

²⁰¹ Ministry Merger Guidelines 2003: Section 1.2.1. This and the following section of the guidelines highlight other policies and change initiatives which institutions must factor into their merger planning, including the Language Policy for Higher Education, the New Academic Policy and the new funding formula.

²⁰² Ministry Merger Guidelines 2003: Section 2.1.1.

²⁰³ Ministry Merger Guidelines 2003: Section 4.3.1 and Section 4.7.

that the Ministry has applied the notion of equality to both mergers and incorporations in its communications. This issue is explored in more detail – and in a particular context, for clarity – in the next chapter.²⁰⁴ However, for the purposes of this chapter, it is important to note that it may be dangerous to assume that the Ministry and institutions are at one in their understanding of how the notion of equal partnership is to be applied as far as incorporations are concerned. Such a lack of mutual understanding could lead to clashes of perspective between incorporating subdivisions and receiving institutions, or between such institutions and the Minister, if separate discussions between these parties and the Minister have interpreted the basis for incorporation differently. The point of view of an institution involved in more than one incorporation gives stark evidence of the deep political undercurrents present in this issue:

Our substantive point of departure has always been in terms of the Act: that incorporation will come about through substantive agreement of the Councils of the institutions. Some – including the Minister – may wish to reduce this to a discussion of liabilities and assets, but the Act clarifies the right of incorporating subdivisions to teach, to provide access and to admit students. We will insist that our strengths be retained – or we cannot agree to the process.²⁰⁵

3.3 DEFINITION OF COMPREHENSIVE INSTITUTIONS

All institutions in the study sample involved in comprehensive mergers (five in all) expressed concern at the lack of definition in policy as to the nature of comprehensive institutions. One set of merging institutions had obtained a planning grant from an international funder to research the concept. Accordingly, it established a task team to investigate the issue and each of the institutions to form part of the merged entity appointed a principal researcher for the project. Another set of merging institutions appeared to anticipate that the definition of ‘comprehensive’ would be a process of discovery. This set of institutions was particularly concerned with what the market would demand of a comprehensive institution and the extent to which the market would therefore determine a ‘new product portfolio’.

The broad intention of South African higher education policy is the achievement of a single, co-ordinated higher education system, in which the binary divide of university and technikon education no longer applies; in this context, comprehensive institutions are intended as one important vehicle for the achievement of a unitary system. Technikons within the ‘comprehensive’ subset of the study sample were particularly concerned to emphasise the industry-led nature of co-operative education in the technikon sector, and the importance of vocational, technological and experiential education for students, the higher education sector and the community alike. Co-existing views were present – often in the same group – on the potential fate of co-operative education in comprehensive institutions.

²⁰⁴ See the section in Chapter 4 of this report which deals with Joint Structures, Incorporations and Equal Partnership (Section 4.2.1.1).

²⁰⁵ Unattributed quotation from a confidential institutional interview conducted as part of this study.

Technikon leadership in particular expressed a fear that through the process of merger, a sense of ‘university is best’ would prevail as it has tended to in cross-sectoral mergers in other parts of the world: the tendency commonly labelled as ‘academic drift’. On the other hand, institutional leaders – and more particularly academics – were hopeful that merger could give genuine effect to the intentions of policy for comprehensive institutions to be an innovative institutional form, and to that extent enhance rather than erode the value of ‘technikon-type’ education as the binary divide is bridged. For technikon academics this hope presumably had the associated benefit of creating a role for different kinds of academics in one merged institution. However, all of these hopes, fears and interpretations were abstract in the absence of ‘comprehensiveness’ as a known quantity.

The Ministry’s merger guidelines promise that

As an adjunct to these guidelines, the Ministry will also be undertaking work to assist with the further elaboration of policy in a number of areas, including models of academic arrangements in comprehensive institutions. This will be done in consultation with institutions.²⁰⁶

It has to be said that this intention broaches a wide territory and one in which bones of contention, both general and specific, are likely to emerge – in the debate between state and sector, between merging institutions, in the merged comprehensive institution, or all of the above. As an illustration at the state-sector level the issue of nomenclature of comprehensive institutions (should they be called universities, as recommended by the National Working Group?)²⁰⁷ is unresolved and the CHE has been asked to advise the Minister accordingly. This particular issue may be peaceably resolved (and resolved by default in the naming agreements of merging institutions), but other issues respecting academic models for comprehensive institutions and their implications for institutional culture and academic interests could well be more intractable.

3.4 ROLE OF THE MERGER UNIT

The process of higher education restructuring is one in which the different roles and responsibilities of state and sector need to be established and acknowledged. In principle, in South Africa’s system of higher education governance, these roles can be defined in terms of a system of state steering which endorses institutional autonomy – i.e. the state sets policy and enables institutional responsiveness, while institutions implement policy. Expressed another way, the Ministry is responsible for providing policy, law, guidance, technical and financial support for mergers, while institutions are responsible for implementing mergers within national legal and policy frameworks. Institutions in the study sample readily grasped and articulated this configuration of roles, but had questions as to whether reality would

²⁰⁶ Ministry Merger Guidelines 2003: Section 1.1.

²⁰⁷ NWG 2001: Section 2.2.

actually play out in this way. Aside from issues of finance – to be addressed in the next section, their principal concern was the extent to which central provision of guidance and technical capacity would optimally support merging institutions, without impinging on their institutional autonomy. This concern needs to be understood in the light of dual factors. Firstly, the mandatory nature of mergers and incorporations, and consequent fears of further impositions by the state, informed institutions’ anxiety about their rights of autonomy in the unfolding process. Secondly, the capacity challenges posed by mergers and incorporations informed institutions’ anxiety about the availability of sufficient and appropriate guidance and support from the centre.

The principal vehicle for state support is the Merger Unit, located within the Higher Education Branch of the Department of Education. The Unit is intended to

Oversee, support and monitor mergers and incorporations, including providing technical support to institutions in the following areas: academic and research issues; information systems; human resource policies and procedures; staffing and industrial relations; administrative and financial matters, including properties and services administration; legislation and legal matters; governance, management and decision-making issues; student support and administration; [and] the merger implementation process.²⁰⁸

Specifically, the Merger Unit is to provide the following services:

- Develop guidelines outlining key issues to be addressed during the merger process;
- Provide and coordinate the provision of technical support to affected institutions;
- Assist institutions in identifying specialised expertise;
- Assess and make recommendations on requests from institutions for financial assistance;
- Monitor institutional management of the merger implementation process;
- Convene workshops for merging institutions to discuss matters of common concern;
- Respond to queries and concerns from key constituencies and stakeholders relating to the merger process;
- Set in place a merger communications strategy;
- Mediate in cases of dispute and conflict between merging institutions, where required or requested; and
- Submit regular progress reports on mergers to the Minister of Education.

This set of roles and responsibilities for the Merger Unit is, at least in outline, compatible with the optimal role for such a unit as envisaged by institutions. However, much is likely to depend on the manner in which the Ministry delivers its services, in terms, for example, of the speed of response by the Unit to requests for technical support, and the depth, content and authority of guidance on specified issues. Institutions expressed a particular hope

²⁰⁸ Ministry Merger Guidelines 2003: Section 2.1.1.

that guidance would be available from the Unit on how to resolve differences in merging institutions' staff remuneration and student fees – but also cited rumours that these issues would be left to institutions to manage on their own. In addition, the manner in which the Unit facilitates requests from institutions for financial assistance, as well as the monitoring of merger and incorporation processes, is sure to be critical. Approaches by the Unit on issues such as these seem likely to determine whether the relationship that develops between itself and institutions is close and reciprocal, or fragmented, frustrated and possibly conflicted.

3.5 FINANCING OF MERGERS AND INCORPORATIONS

The issue uppermost in the minds of institutions involved in mergers and incorporations, as expressed in institutional submissions to the Minister and in interviews conducted as part of this study, was the question of the provision of state finance to cover the costs to institutions of these processes. Details of the Ministry's framework for financial support to mergers and incorporations were published just as this study's interviews were completed. It is thus worth pausing to summarise this framework, in order to revisit concerns expressed by institutions against this background.

The Ministry has clarified that it requires all institutions involved in a merger/incorporation to provide an institutional operating plan for the new entity, subject to approval by the Ministry. The plan is in almost all instances a prerequisite for requests by institutions for state finance. The plan should outline the impact of academic and institutional restructuring on academic and financial projections, and on the operating and capital budgets of the new institution for the first three years, as well as assumptions on which the line items of income and expenditure have been estimated.

As a general rule it will be necessary ... to include operational budgets that demonstrate the achievement of at least a 'break even' position within 18 months of the date of the merger or incorporation and indications that such financial viability is sustainable in the long term. The auditors of the new entity will be expected to comment on this aspect on the completion of their first audit.²⁰⁹

In addition the Ministry has outlined the prospective provision of financial support to institutions affected by mergers and incorporations under three categories:²¹⁰

- Funds provided to 're-capitalise' institutions identified for merger or incorporation that are under-capitalised as going concerns. A satisfactory institutional operating plan is a pre-requisite for provision of funds under this category. Under-capitalisation is to be computed according to a formula provided, which will calculate the quantum of funds necessary to bring the institution to a level of funding adequate for continued

²⁰⁹ Ministry Merger Guidelines 2003: Section 3.2.

²¹⁰ Ministry Merger Guidelines 2003: Section 3.

operations in the short to medium term. In essence an under-capitalised institution must give evidence from its audited financial statements that its current liabilities and non-current liabilities outweigh in value its current assets, non-current investments, equity funds and depreciation provisions. The formula may give a reduced weighting to extraordinary items or previously unrecorded items, such as accumulated leave or post-retirement benefits.

- Reimbursement of expenditure incurred by affected institutions as a direct consequence of the merger/incorporation, and which would not otherwise have been incurred. Expenditure under this category might include expert assistance from external parties – including facilitators, consultants, replacement support for existing personnel and, under special circumstances, due diligence investigations. Other categories of allowable expenditure include costs incurred through administrative reorganisation and harmonisation of policies, procedures and systems in such areas as human resources and information and communication technologies; costs incurred through alteration of physical facilities or provision of specialised or additional facilities; and design and printing costs for signage and stationery.

In each individual circumstance in which a liability is to be incurred for which reimbursement will be expected, the Ministry must be consulted and a project plan presented which details the nature of the expenditure and an estimate of the amount involved. Approval from the Ministry must be sought before any commitment is made. Once the expenditure has been incurred a claim must be submitted to the Ministry with supporting documentation certified by the institution's auditors including, where required, certificates from appointed auditors or quantity surveyors.²¹¹

Reimbursement will not be provided to allow for financial effects of adjustments to personnel compensation, tuition or residence fees; to enhance overall levels of functional services (unless upgrading is specifically required to align the levels of service of partner institutions); or to cover costs of outside contractors who have carried out work that could and should have been done by employees of the entities involved. The submission of an institutional operating plan is a pre-requisite for reimbursements for any major extension or alteration to plant, property and equipment essential to the operational activities of the new institution. In cases where a substantial building is to be erected

The financial grant commitment from the Ministry cannot be expected to cover the full amount involved and the Ministry will assist in facilitating access to loan facilities. Any such loans will need to be serviced by the institution in the normal way.²¹²

Where there is a significant backlog of deferred maintenance of property, plant and equipment, the amount involved in eliminating such backlogs is to be provided for as

²¹¹ Ministry Merger Guidelines 2003: Section 3.2.

²¹² Ministry Merger Guidelines 2003: Section 3.4.4.

‘additional depreciation’ and taken account of in the formula for re-capitalisation.²¹³ In some cases, a direct consequence of merger/incorporation could be the incurring of taxation that would not otherwise have applied – this issue should be referred to the Ministry as a particular aspect of the institutional operating plan.²¹⁴

- Reimbursement of expenditure incurred to ensure that the merged institution/entity resulting from an incorporation will be operationally and financially viable (but explicitly excluding recurrent expenditure). A satisfactory institutional operating plan is a pre-requisite for provision of funds under this category. Measures designed to reduce costs and make an institution financially viable must be referred to the Ministry before implementation so that the basis of reimbursement can be agreed upon. In any case where expenditure for financial viability is related to retrenchment or voluntary severance of staff, the extent of financial support to be expected must be negotiated with the Ministry. In turn, the Ministry

Will reserve the right of input in the terms of the retrenchment/voluntary severance packages, subject to legal obligations as well as previously negotiated terms and conditions. Reimbursement of the costs thereof will be limited to not more than two weeks’ salary per year of service.²¹⁵

The state’s contribution to the ‘top up’ of any defined benefit retirement fund or to accumulated leave may comprise an outright grant or a grant in instalments and will be assessed in terms of the requirement for disclosure of such liabilities and their effect on the computation of the re-capitalisation amount.

Finally, the Ministry has clarified that the payment of amounts due to institutions under the three categories as stipulated will be dependent on ‘the ‘roll out’ of funds by the Treasury’. Where funds are not available at the time they fall due, the Ministry will seek to assist institutions in obtaining access to short- and medium-term borrowing and will refund interest on such loans.²¹⁶

This framework seems generally both reasonable and fair. However, it does not speak to all of the issues, concerns and expectations raised by institutions. First, the framework is retrospective in its three categories. Yet in the view of some institutions and as expressed by one of these, ‘unfunded mandates’ in the merger process could doom it from the start, as institutions who are able to engage stakeholders on the basis of a certain vision of merger may ultimately be unable to fund such a vision. These institutions felt that the Ministry should match institutional undertakings of good faith with respect to merger, with a vote of confidence in the form of an interim upfront payment to facilitate the merger process. Related to the Ministry’s retrospective approach to financing mergers, the framework is notably

²¹³ Ministry Merger Guidelines 2003: Section 3.4.5.

²¹⁴ Ministry Merger Guidelines 2003: Section 3.4.6.

²¹⁵ Ministry Merger Guidelines 2003: Section 3.5.1.

²¹⁶ Ministry Merger Guidelines 2003: Section 3.6.

lacking in any financial incentives to institutions – a trend observable more broadly in policy approaches towards mandatory restructuring. Second, the categories of reimbursement do not allow for costs incurred by institutions in the period prior to publication of these guidelines, where these have not been explicitly agreed with the Ministry. Such costs pertain, for example, to travel and resources engaged in task team investigations, and in some instances, these have been substantial. One institution in the study sample estimated that its engagement in fairly protracted joint task team investigations in the early stages of pre-merger discussions had incurred costs to the institution of more than R500 000; a request for reimbursement had reportedly been turned down by the Ministry on the basis of no prior approval for this commitment. Third, the framework sets a number of conditions on state financing of due diligence investigations, whose importance was emphasised by all institutions in the study sample, and by many institutions in their written submissions to the Minister. In effect, the Ministry finds that professional due diligence is unlikely to be ‘cost-justified’; further attention is given to this issue in the following chapter.²¹⁷

With more general reference to the financing of mergers and incorporations, institutions were extremely concerned that the overall allocation of national budget to restructuring could be inadequate, and that the new funding formula could be disadvantageous to merged institutions. Sectoral estimates of the quantum of money required to finance restructuring, based on estimates of different scenarios, calculated a need for between R4.8 billion and R5.7 billion, or an annual amount of R1 billion over five years.²¹⁸ Figures quoted in the press in December 2002, at the time of the announcement of the Cabinet-approved restructuring decisions, cited an amount of R3.1 billion to be set aside by the government. The national budget of 2003 allocated R800 million to higher education restructuring in each of the next three budget years (presumably not the total allocation). With respect to the impact of the new funding formula for merged institutions, the Ministry’s merger guidelines have the following to say:

The full planning process linked to funding has not yet been introduced for two reasons: first, because of the need to finalise the institutional restructuring proposals, and secondly, because of the need to introduce a new funding framework, which is critical to ensure the effective use of funding as a steering lever. [...] It is anticipated that the new funding framework will be finalised in the first half of 2003 and will be phased in from the 2004/2005 financial year. It is important that the affected institutions take into account the implications of the new funding framework in the merger planning process. The Ministry is currently modelling the impact of the new funding framework on merged institutions and will be more than willing to share this information with the affected institutions once this exercise has been completed.²¹⁹

²¹⁷ See the section in Chapter 4 of this report that deals with Due Diligence (Section 4.2.4.6).

²¹⁸ SAUVCA/CTP Finance Committees (2002). *A Broad Framework for Determining the Costs of the Proposed Restructuring of Higher Education Institutions*. Pretoria: South African Universities Vice-Chancellors Association and Committee of Technikon Principals Finance Committees.

²¹⁹ Ministry Merger Guidelines 2003: Section 1.2.2.

Thus, the full ramifications of financing for mergers and funding for merged institutions remain unknown and, as such, questions of finance remain a potential area of mismatched expectations, and even conflict, between state and sector for some time to come.

3.6 MONITORING THE RESTRUCTURING PROCESS

The merger guidelines explain that the Ministry intends establishing a Reference Group

To monitor ‘on the ground’ merger planning and implementation processes with a view to ensuring that the central principles underpinning the restructuring agenda, namely, transformation, equity, efficiency and development are infused into the merger implementation process. Furthermore, they will seek to ensure that institutional management of the process accords due regard and sensitivity to issues of participation and decision-making, so that the process is validating of the voices and concerns of all institutional stakeholders and constituencies. The role would also include offering clarification and guidance to institutions and, where required or requested, assistance with facilitation and mediation.²²⁰

Members of the reference group are to be selected as highly respected individuals who have experience of higher education institutions and other large-scale organisations, and who are sensitive to transformation imperatives. They will be clustered into teams several months prior to the establishment of Interim Councils, with each team assigned specific responsibility to monitor and assess one or two mergers. The intention is that the Reference Group will be an additional link between the Merger Unit – and the Minister – and institutions, enabling feedback on restructuring progress, alertness as to problems and areas of contestation, and gauging of the effectiveness of the Merger Unit’s service delivery.

The establishment of a monitoring infrastructure is certainly essential to system-level governance of the restructuring process, and continuous constructive support by the state to higher education institutions involved in mergers and incorporations. The idea of a Reference Group with sub-linkages to specific mergers may be a good one in terms of providing continuous feedback to the Ministry as to progress in achieving the goals set out for restructuring in the National Plan and with respect to the participative nature of the process. Institutional interviews conducted as part of this study did not touch upon the Reference Group – it had not yet been announced. Yet from an institutional perspective, the close ties of the Reference Group to the Merger Unit, under whose auspices it will work, may suggest that the state’s monitoring process will tend to be self-referential or, in instances of conflict, biased in favour of the state. This would seem to underscore a need for more informal monitoring of the process through two-way dialogue between the Ministry and institutions, and the sector as a whole. At a more formal level, it could be advisable for the CHE to monitor the higher education system’s transformation and restructuring, as

²²⁰ Ministry Merger Guidelines 2003: Section 2.1.1.

appropriate to its terms of reference and within the framework of its broader monitoring and evaluation initiative to generate information and analysis that will be of use for the effective steering of higher education by government.

3.7 IMPLICATIONS OF RESTRUCTURING BY POLITICAL WILL

This study has highlighted the uniqueness of the South African case of mandatory higher education restructuring. It is important to recapitulate and elaborate this point in terms of its ramifications for the relationship between state and sector and difficult choices that may be implicit under the long view.

In South Africa the prime impetus for merger is the political will to overcome the legacy of apartheid in higher education, and thereby improve the rationality, efficiency and effectiveness of the system as a whole. At the system-level, mergers are driven by a concern for the 'fitness *of* purpose' of institutions. Fitness of purpose requires an institution to identify an appropriate role for itself within a higher education system that seeks to be responsive to national, regional and local needs and to achieve national policy goals, priorities and targets. This question centrally informs the national transformation agenda as contemplated in the White Paper, which explicitly states that 'all existing practices, institutions and values' have to be 'rethought in terms of their fitness for the new era.'²²¹ At the systemic level, there can only be a secondary concern for 'fitness *for* purpose', despite the prominence of this rhetoric. Fitness for purpose is concerned with the relation between the specified mission of an institution and its resources and environment. While both questions are equally crucial to the efficiency and effectiveness of the South African higher education system, the former necessarily has to precede the latter.

In the view of this study, there is some confusion between the two notions of 'fitness'. In particular, where institutions perceived themselves to be adequately equipped to serve their purpose, the insistence on structural change through merger seemed unfair. Yet this type of reaction has been informed by a 'fitness *for* purpose', rather than a 'fitness *of* purpose' perspective. Higher education mergers are primarily a mandatory exercise for institutions to examine their origins, to reassess and remould their purpose to fit the imperatives of transformation, and to determine a niche for themselves that will respond to the labour and educational market and situate the institution in the overall process of reconstruction and development. Only once this reassessment and repositioning has occurred can institutions seek to assure themselves that they are 'fit for purpose' i.e. that they have the appropriate strategies and resources in place to fulfil their new mission.

²²¹ 'South Africa's transition from apartheid and minority rule to democracy requires that all existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era. Higher education plays a central role in the social, cultural and economic development of modern societies. In South Africa today, the challenge is to redress past inequalities and to transform the higher education system to serve a new social order, to meet pressing national needs, and to respond to new realities and opportunities. It must lay the foundations for the development of a learning society which can stimulate, direct and mobilise the creative and intellectual energies of all the people towards meeting the challenge of reconstruction and development.' White Paper 1997: Section 1.1.

A central assumption of this study is that intended consequences of merger are those functional to the achievement of the purpose of the system, namely those that further higher education institutions' ability to deliver a public good to South African society.²²² Because the definition of higher education as a public good ultimately transcends the concerns of the national political will, the exercise of restructuring must be acknowledged to be a transitional exercise and exceptional as an intervention by the Minister in the system. The current configuration of state-sector relationships characterised by this study as 'conditional autonomy' poses a substantial challenge over the long term. Primarily, institutions should respond by autonomous assessment to needs and desires for higher education as sensed in the public realm, rather than responding under imposition of political will.

Moreover, from the perspective of governance, a process of mergers purposed primarily by political will is set to become problematic should mandatory outcomes show themselves to be unachievable. The question of what will happen when a specific merger runs into difficulties is currently unanswered. While the Ministry has indicated its willingness to assist and support the processes and negotiate details of the implementation of specific mergers, it has not indicated alternatives in the event of looming merger failure. Will the Minister dispatch an Independent Assessor and, upon the Assessor's Report, appoint an Administrator to manage directly the merger of affected institutions?

The absence of alternatives to the Ministry's merger proposals constitutes the reverse of the lack of voluntary co-operation by higher education institutions, in its turn probably due to the lack of positive incentives and negative sanctions on the part of the Ministry. In the present context, it is important to stress that good governance at the system level requires provision of a coherent and adequate framework of rules to align institutions with national imperatives in the first place, but thereafter to create conditions that allow institutions to exercise discretion in serving the public good, and to achieve fitness for purpose within their own contexts and constraints.

3.8 SUMMARY: SYSTEM-LEVEL GOVERNANCE FOR MERGERS

This chapter has evaluated the nature of the relationship between the state and the higher education sector in the context of restructuring, and found it to be an evolving one. It has found that mandatory mergers provide evidence for a prevailing mode of relationship between state and sector, in which the state is setting procedural conditions upon the substantive autonomy of institutions. By restructuring the institutional landscape of higher education, the state is determining the environment in which academic freedom is exercised. These developments mark the failure of the explicit policy framework of co-operative governance, to the extent that institutions have been forced to set their vested

²²² For a discussion of the public good in South African higher education compare Council on Higher Education (2001). Re-inserting the 'Public Good' into Higher Education Transformation. Kagisano CHE Higher Education Discussion Series 1(1) (Summer).

interests aside. As a strong assertion by the state of its right to steer higher education in the pursuit of national policy goals, these developments make it plain that a key factor in successful restructuring outcomes will be the ability of state and institutions to negotiate specific mergers and incorporations to common benefit. Preliminary indications from the Ministry, in its delineation of state and sector responsibilities in the process of restructuring and in its first set of published merger guidelines, are that there is a willingness to create space for such negotiation. However, this willingness will need to be tested in practice as the Ministry and institutions broach complex issues of substance, capacity and resources in which the expectations of state and sector could reveal themselves to be substantially mismatched. Issues of particular concern in this regard include the application of the notion of 'equal partnership' to incorporations; the definition of 'comprehensive institution' and the implications of this for institutional culture and academic interests; the manner in which capacity and support are delivered by the Merger Unit; the extent of state finance available for mergers and incorporations; and the objectivity of processes established to monitor restructuring. As an overarching concern in the long run, a process of restructuring driven by political will leaves unanswered the question of what alternatives are available should mandatory merger outcomes show themselves to be unachievable.

4. INSTITUTIONAL GOVERNANCE AND THE PROCESS OF MERGER

This chapter focuses on institutional governance in each of the phases of merger, and also includes attention to inter-institutional governance in the pre-merger phase. While there are many operational concerns and issues for institutions at each stage of the merger process, the focus here, as elsewhere in this report, is firmly on governance; operational questions are raised only in relation to their implications for governance.

Given the timing of the institutional interviews (as institutions were preparing requirements for the gazetting of mergers and incorporations), some findings with respect to the pre-merger phase may have a retrospective flavour for some readers, while findings in respect of the transitional and integration phases may be better positioned to influence policy and institutional actions. However, as merger is playing out in different ways and at different paces across the sector, all the findings of this chapter have the potential to afford key learnings to institutions following unique merger paths. It is also worth reiterating a comment made in the previous chapter: considerable convergence between this study's conclusions and those reflected in the Ministry's April 2003 merger guidelines show that the guidelines have been as centrally informed by institutional perspectives as this study has been. To this extent, institutional experience has already influenced policy. The recording and analysis of institutional commentary in the unfolding process of merger is a critical input to achievement of good governance in the restructuring process over time.

4.1 THE PHASES OF MERGER

The international literature of higher education mergers supports recognition of at least three substantive phases of merger.²²³ South African institutions – both study sample institutions and other institutions in their 2002 submissions to the Minister – agree that a grasp of the distinct phases of merger is likely to contribute to effective process and implementation. This report's reading of the Higher Education Act²²⁴ has found that it is possible to map three phases in existing South African legislation too:

- The pre-merger phase;
- The transitional phase (or interim phase); and
- The integration phase (or post-merger phase).

Accordingly the three phases have already been referenced at several points in the report.

The phases are important conceptually and for governance, in particular for (inter-institutional and) institutional governance. Conceptually they give clarity to the overall shape of the merger process which can be instrumental in institutional and joint planning, as well as in communicating a broad understanding of the process to stakeholders. In governance terms, distinct phases require distinct governance structures, processes and

²²³ See the section in Chapter 2 of this report which deals with Governance and the Inter-institutional Process for Mergers (2.1.2.2).

²²⁴ See Table 1 of this report.

instruments. Thus it is critical to recognise these different modalities as the outward markers of new institutional forms, progressive process logic, and the legal transition of authority. Yet the three phases of merger also give some cause for concern in terms of governance continuity, and the interests of good governance imply that linkage mechanisms between the phases are necessary. The Higher Education Act as amended up to 2002 has not explicitly recognised the distinct phases of merger and may in fact be in danger of conflating them, particularly with respect to the Interim Council. However, the Ministry's merger guidelines²²⁵ are explicitly structured around three phases of merger, in an effort to clarify the different governance and operational concerns that pertain to them, and how to link them.

The following sections of this chapter highlight key structures, processes and mechanisms of governance that apply, or could apply, at the institutional (and, in some cases, inter-institutional) level, linked to the three phases of merger.

4.2 PRE-MERGER PHASE

The pre-merger phase is the period during which institutional and inter-institutional deliberations and negotiations around the impending merger take place. It ends upon the formal date of establishment of the merged institution.

4.2.1 *Institutional and Joint Structures to Facilitate Merger Process*

Research and interviews conducted as part of this study showed that higher education institutions engaging in a merger process have tended to establish joint merger structures in the pre-merger phase to open discussions between merger partners, to agree certain fundamentals of the merger ahead of the establishment of the Interim Council, and to begin to give detail to specific academic and operational issues. The joint merger committees encountered in the study have generally (although not always) been underpinned at institutional level by an internal merger committee which is broadly advisory in function and representative of all stakeholders. Some detailed consideration of these structures is warranted as, although they properly belong to the pre-merger phase of the process, they and their work have implications for the transitional phase and beyond.

Where *institutional-level* committees exist, these appear to have been convened in different ways or in different configurations. The following selected – but representative – examples are illustrative:

- A university in the study sample had convened a large (46 members) merger committee as a sub-committee of Senate. Chaired by the Vice-Chancellor, the committee included

²²⁵ Ministry Merger Guidelines 2003: 1.3. The guidelines use the term 'interim phase' where this study uses 'transitional phase' and 'post-merger phase' where this study uses 'integration phase'. However, the phases are defined identically with respect to the Higher Education Act, as delineated in Table 1 of this report.

all members of the Executive and the Registrar, all Deans, representatives of Council, Senate the Institutional Forum, unions, academic and non-academic staff, students and the members of the institution's merger secretariat.

- Another university in the sample had convened a Merger Committee of Council, chaired by the chairperson of Council and including in its membership the Vice-chairperson, chairperson of Audit Committee, chairperson of Finance Committee, two other external Council members, the Vice-Chancellor and Vice-Principal. This committee submitted issues for final decision by the Executive Committee of Council, as mandated by Council. In addition, the University had an internal Merger Steering Committee consisting of management,²²⁶ unions and staff.
- A technikon in the sample had convened an internal merger committee reporting via its Rectorate to the Executive Committee of Council, as mandated by Council. Chaired by the Vice-Chancellor this committee included representatives of management, staff, unions and students, and also had representation from geographically distant satellite campuses.

Different internal arrangements are to be expected given different institutional contexts and histories, and different governance styles. For example, and with reference to the matrix of governance that has been introduced in this report, an institution whose governance is 'democratic' is more likely to have a large, representative internal merger committee; one that is 'management-focused' is more likely to have a smaller committee or one which reports via management; one that is, or has been, 'contested' will be faced with particular challenges in giving effect to well-functioning merger governance devices that actively safeguard the merger process from the governance problems of the existing institution. Thus, while there is no need to be prescriptive about the exact composition and reporting lines of internal merger advisory structures, good governance principles need to inform these. What is most noticeable about the examples highlighted above is the fact that each illustrates in its own way an attempt to arrive at a structure aligned to the principles and provisions of co-operative governance: institutional merger structures report to statutory structures of governance and internal stakeholders are to be consulted and represented in all discussions.

The study found that *joint* merger committees take their basis in the established governance principle that the Council has overall accountability and a fiduciary responsibility for the institution that is merging. On this basis, they generally take one of two forms. In the first – 'participative' – model, members of Council (commonly the chairpersons, deputy chairpersons and honorary treasurers) sit on the joint merger committee, as well as the Vice-Chancellors and other members most likely selected on a representative basis from labour and students. In the second – 'management-driven' – model, the joint merger committee tends to comprise the Vice-Chancellors and selected advisors, including members of executive management and the Merger Manager, if such persons have been appointed

²²⁶ Students are represented on the executive management team of this institution.

by the institutions. Under either model, a critical issue is the mandate given to institutional representatives on the joint structure by the institutional Council, so that discussions may progress and proposals may be made. For this reason, it is difficult to draw a line in terms of the qualitative difference between the so-called participative and management-driven models of joint merger committees, as both are ultimately accountable to a Council that is representative in principle.

Obviously, reportback mechanisms must be established to ensure the work of the joint structure is constantly fed back to the Council and issues referred to it for approval, or to a mandated body, such as a Council Merger Committee or the Executive Committee of Council, which was so mandated by at least two institutions in the study sample. Frequency of meetings of the various joint structures and/or of reporting to the Council or its mandated body, appeared to be quite variable across institutions at the time the study was undertaken. As a general principle, it could be observed that joint structures began their meetings with some weeks' interval between sessions, but that a plan was in place to escalate the frequency of meetings thereafter, as work intensified in preparation for the establishment of the merged institution.

In almost all cases, the study found that task teams attached to both internal merger committees and to joint merger structures. Institutional task teams were generally convened in the first instance to collect information on the basis of which to inform both the institution (management and Council) and meetings of joint merger committees. They generally reported to the institutional merger committee and were investigating such areas as Academic Affairs, Human Resources, Student Services, Academic Administration, Information Technology, Buildings and Infrastructure. Joint task teams established by joint merger committees were being convened – or were envisaged – as particular issues arose for investigation in the pre-merger discussion process. Typical joint task teams to be given priority included ones focusing on the drawing up of a Memorandum of Understanding, Joint Vision and Mission, Branding and Marketing as well as the content areas already indicated for institutional-level merger committees.

As already intimated, the existence and/or lifespan of both the institutional and joint merger structures described would appear to depend very much on the process adopted by individual institutions and their merger partners. An illustrative example serves to make the point. For example, one of the institutions in the study sample had convened a Council merger task team for only one month before a joint task team of the institution and its single merger partner (four a side, led by the two Vice-Chancellors) was convened with a mandate from its respective Councils to take forward discussions with the provincial department of education and to present recommendations to internal governance structures. Over the next two months, the Joint Task Team meet three times; the partner institution's own task team presented recommendations – including on the nature of a joint response to the Minister – to its Senate (three times), Institutional Forum (twice) and Convocation (once), while the task team of the institution in the study sample presented recommendations to its Senate.

Each institution met separately again with provincial officials. Finally, the two Councils met separately to consider the draft joint response to the Minister and then met jointly to develop the consensus proposal. As part of this consensus, the two institutions agreed to establish a joint oversight committee (of the two Councils, to be the final negotiating body of the merger) and a joint operational team (of the two managements and institutional stakeholders) to take the process forward and prepare the ground ahead of the establishment of the Interim Council. In addition, a joint Senates committee was established to apply its mind to academic aspects of the merger, including the issue of language policy. It can be noted that the two institutions in this merger took quite different approaches on their internal merger teams (whose members met in the joint operational team). One of the institutions (which could be characterised as ‘democratic’) had stakeholders on its internal team; the other (which could be characterised as ‘management-focused’) did not, but this institution had found other means of accessing stakeholder views, including a web-based referendum of students. It remained to be seen what impact, if any, these asymmetrical approaches would have on joint merger discussions.

At the time institutions in the study sample were interviewed, no joint merger secretariat had yet been established. However, at least two of the merger ‘clusters’ in the sample were engaged in discussions for doing so. The Ministry has also strongly recommended that all merger partners establish a single merger office to support and co-ordinate the merger processes. This issue is examined in more detail in the section dealing with the Project Management of Mergers below.

Finally, questions remained for the institutions in the study sample as to whether the intensive effort put into pre-merger structures was ideally placed and how this effort could be optimally leveraged for the ultimate good of the merger process. In essence, institutions were pondering the extent to which joint merger structures in the pre-merger phase could set directions for the yet-to-be-established institution. This conundrum has substantive, practical and legal dimensions.

In substantive terms, discussions initiated by institutional and joint pre-merger structures around such crucial issues as the vision and mission of the merged institution are unlikely to be conclusive. In the first instance, while development of the vision and mission requires time and application, both are likely to be limited in the intense pressure of the pre-merger phase. In the second instance, there are legal considerations. In legal terms, there would be no obligation at all upon an Interim Council or upon a new Council to stick to agreements made and plans drawn up in the pre-merger phase. In the specific instance of the vision and mission of the merged institution, development and approval of these is almost certainly one of the first substantive tasks of the new Council.

The answer to questions around how best to leverage the work of pre-merger structures seems to lie in a consideration of certain key elements of the pre-merger phase, including due diligence investigations, a Memorandum of Understanding/Agreement and a merger

plan, and how these can support the governance role of the Interim Council, whose establishment inaugurates the transitional phase, and the role of the substantive Council which is accountable for the work of merger integration. This theme and specific ideas relating to it, are developed in later sections of this chapter.

4.2.1.1 *Joint Structures, Incorporations and Equal Partnership*

It should be noted that in two cases in the study sample involving an incorporation as well as a merger, the joint merger structures included representatives of the subdivision of the institution to be incorporated on an equal basis. In the third case, the subdivision to be incorporated was not yet included in discussions, although these were otherwise proceeding apace. In one of the cases, the involvement of the ‘incorporation partner’ was unquestioned – perhaps as a result of a prior process around this particular merger, set in motion by the Minister over a year before. In the two other cases, the status of the incorporation partner appeared to be viewed as a rather troublesome issue.

The status of ‘incorporation partners’ in merger discussions is an important issue and one which signals the complexity not only of the process, but also of the environment surrounding the merger, and even of the legislation. In terms of the Higher Education Act – and with particular pains taken by the Higher Education Amendment Act of 2002, as highlighted in the discussion of the legislative framework – merger and incorporation are intended to be legally distinct processes. However, through the application of subsections of Section 23 of the Act (mergers) to Section 24 (incorporations), as discussed in the previous chapter, and certainly in policy and practice, the line has actually blurred. Legally speaking, some of this blurring may have to do with the indeterminate status of South African jurisprudence with regard to what constitutes a going concern.

For its part, policy has been at pains to emphasise the equality of partners in *mergers*, at least. For instance:

In short, it requires a commitment from all institutions to accept that the merger process is a process between equals, irrespective of the current strengths and weaknesses of the merging institutions, which is a legacy of apartheid. The Ministry wishes to indicate that it intends to closely monitor the merger process to ensure that the principle of equality between the merging institutions is not breached in the development of the policies, procedures and structures of the merging institution.²²⁷

In a restructuring exercise that has transformation of the entire sector as its most central goal, this insistence on equality is neither unanticipated nor misplaced. Nor is it out of place in a higher education environment operating within a co-operative governance framework. In practice, it remains to be seen whether equality will be a fully functional feature of mergers:

²²⁷ *Government Gazette* (Transformation and Restructuring) 21 June 2002: Section 9.2.

the risk of one merger partner assuming predominance by virtue of capacity, or sheer force of will, is always present.

What is even less clear is whether the equality principle implies in practice as much to *incorporations* – a legally distinct process – as to mergers. Institutions in the study sample pointed to a serious inconsistency in the use of the terms incorporation and merger in official correspondence. This had not aided conceptual clarity.

In terms both political and pragmatic, it has seemed wisest to institutions involved in two of the cases in the study, to engage all affected parties – whether merging or incorporating – in joint merger discussions and structures from the very beginning.²²⁸ In one of these cases, the subdivision of a historically-disadvantaged institution is being incorporated by a historically-advantaged institution which will subsequently merge with another historically-advantaged institution. Under these circumstances, it would be politically foolhardy indeed to stick rigidly to the letter of the law regarding incorporation. Pragmatically, it would be extremely difficult for the acquiring institution to move ahead in the incorporation process without engaging its merger partner. In fact, the merger partner could well insist on its equal partner status being recognised at this juncture, in an effort to preclude any agreements between the councils of the acquiring and the incorporating institutions that could be binding upon the merged institution, and could compromise its own interests.

The dynamics highlighted here make it very clear that mergers in South African higher education cannot be reduced to the simple model of takeover that predominates in corporate environments, and which the international literature suggests remains typical of higher education mergers in other contexts. Instead, mergers and incorporations must take account of national policy objectives in respect of transformation, and political realities in driving towards successful outcome. Mergers and incorporations will need to give appropriate effect to the notion of ‘equal partnership’ through governance process and structure in the pre-merger phase.

4.2.2 Statutory Governance Structures and Merger Governance Structures

The discussion of institutional and joint structures to facilitate merger has illustrated through examples that purpose-designed merger structures and process can be made to work with institutional governance process as set out in the Higher Education Act, in order to ensure that consideration of substantive issues is initiated in the pre-merger phase. At the same time, it should be noted that different institutions appear to place emphasis differently in the nature of the relationship between statutory governance structures (referring specifically to the major institutional governance bodies – Council, Senate and Institutional Forum) and merger governance structures.

²²⁸ In both cases the incorporating subdivision was included as a partner on an equal footing in a Memorandum of Understanding.

As has already been highlighted, the linkage most consistently – and critically – observed between the two sets of structures is the linkage with the Council. The Council's accountability, and thus fiduciary responsibility, for the institution is recognised in each case through the mechanism of an appropriate mandate as the basis of the work of merger governance structures.

In both structural terms, and certainly in terms of the emphasis that was conveyed to the researchers in institutional interviews, linkage with the Senate tended to be emphasised to a lesser degree, and linkage with the Institutional Forum to an even lesser degree than that. Yet these governance structures have clear roles as set out in the Higher Education Act (and the Institutional Statute), and these should be asserted as proper and appropriate in the merger context.

In terms of the Higher Education Act, the Senate 'is accountable to the council for the academic and research functions of the public higher education institution and must perform such other functions as may be delegated or assigned to it by the council.'²²⁹ A central role for the Senate in the decision-making process regarding merger, especially as this pertains to the institutional and academic model of the merged institution, is clearly indicated by this formal role definition.

One institution in the study sample had explicitly convened its representative institutional merger committee as a sub-committee of the Senate. This seemed to be exceptional in the sample – other institutional merger committees tended to be committees of the Council or to be convened by management. One set of merging institutions had established a Joint Senates Committee – again this seemed to be exceptional in the sample. Senate members of the institution in the sample that had already merged commented that the joint merger committee in its case, which had been representative and generally functioned well, had reported to the Council but not to the Senate. In their view, this had been a weakness in the process and they felt that the Senate should in principle be the 'hub' of a merger. This notion of the Senate as hub appears in fact to be rather far from the truth, as institutions wrestle with the practical, legal and operational aspects of merger. Senate responsibility for academic governance is in no way questioned, but in-depth focus on the academic implications of merger is apparently being deferred to a later stage in the merger process.

This said, proper and effective mechanisms for linkage between the Senate and the pre-merger process need to be effected. At institutional level, one possibility could be for the Senate to delegate oversight of the pre-merger process to the Senate executive committee. It would also be important for the Senate and its committees, including Faculty Boards, in the pre-merger phase, to support the merger process through such steps as undertaking an audit of all academic programmes, quality assurance systems, and research projects and programmes. The exercise of comparing and evaluating academic activities of merging

²²⁹ HE Act 1997: Section 28(1).

institutions will enable the Senate to make necessary recommendations to the Council. Members of the Senate could also engage in pre-merger discussions with counterparts, to begin to explore possibilities and needs for programme structure, rearticulation and so on. Institutions in the study sample indicated that such discussions were taking place in most instances; however these discussions were generally taking place informally and on the basis of pre-existing relationships and initiatives, and not through any specific directive as part of the pre-merger process. A joint Senates committee could assist in facilitating and overseeing all such processes, as well as coordinating responses on specific issues requiring the concurrence of, or consultation with, Senate.

Turning to the Institutional Forum, the Higher Education Act assigns to the Institutional Forum the role of advising the Council ‘on issues affecting the institution’, not excluding any issue, but specifically including advice with respect to the implementation of national policy; race and gender equity; selection of candidates for senior management positions; codes of conduct, mediation and dispute resolution procedures; and ‘the fostering of an institutional culture which promotes tolerance and respect for fundamental human rights and creates an appropriate environment for teaching, research and learning.’²³⁰ This menu of items speaks to the essence of why South African higher education mergers are taking place: the need to create new institutional identities consistent with national transformation objectives. Thus the Act affirms the key advisory role that the Institutional Forum should occupy in merger governance.²³¹

The voice of the Institutional Forum was extremely muted in institutional submissions regarding merger proposals and in institutional interviews (even though Institutional Forum representatives were generally included in these). Institutional merger governance structures usually included a range of stakeholders and joint merger governance structures included them to a greater or lesser degree. It was apparent from the various descriptions given by institutions of the pre-merger process they were following, that Institutional Forums had been asked to comment on proposals as part of this process. Nevertheless the emphasis remained strikingly weak. This lack of participation is of particular concern given the formal responsibility of Institutional Forums to advise the Council on issues of institutional culture, in turn at the heart of the state’s ‘fitness of purpose’ agenda in remoulding institutional identities formed under apartheid. Thus there is a strong sense that more concerted effort must be made to use the Institutional Forum as a sounding board for institutional actions in the merger process, as a merger discussion forum and as a conduit to stakeholder groupings. The consequence – and perhaps the implication – of not doing so, could be the ultimate disablement of the Institutional Forum within the configuration of institutional governance.

These findings suggest that the nature of merger, as a complex event that needs to be strongly driven, leads almost inevitably to governance that is dominated by processual and

²³⁰ HE Act 1997: Section 31(1).

²³¹ The role of the Institutional Forum in institutional governance requires resolution in policy and practice. See discussion of this issue in Hall, Symes and Luescher 2002: Chapters 4 and 6.

legal concerns. The focus on collegial and co-operative governance weakens accordingly, even where intentions are good. That such a pattern would develop in practice has already been anticipated by the study in principle, given the nature of mandatory merger in addition to the inherently ‘corporate’ flavour of merger. It gives cause for considerable concern in a system whose restructuring is informed by a central agenda of creating new institutional identities and cultures, in whose development the inputs of all stakeholders must surely be vital. It gives further cause for concern in a model of merger governance whose principal transitional mechanism is a non-representative Interim Council (albeit operating within the framework of a Standard Institutional Statute which establishes an interim Senate and Institutional Forum). In a conscious effort to counter the processual tendency of merger governance, merging institutions in the pre-merger phase should make every effort to ensure that appropriate linkages are established and diligently observed between statutory institutional governance structures, and merger governance structures.

4.2.3 The Project Management of Mergers

This report has suggested that, under any conditions, good governance requires strong implementation capacity to support and give effect to decisions emanating from the governance process.²³² Given the complexity of merger, the need for defined and well-equipped implementation capacity would seem to be especially acute.

Most institutions in the study sample had appointed merger managers, or were giving consideration to the appointment of merger managers. Merger managers were in some cases special appointments and in other cases secondments of persons judged by the institution to have suitable capabilities for such a role (sometimes, but not always, senior academics). In every case where a merger manager had been appointed, that individual had a close linkage and regular contact with the Vice-Chancellor, and was sometimes a special appointment within the Vice-Chancellor’s Office. In general, merger managers were at the head of merger offices with a core staff, and charged with ‘coordinating’ the process of merger at the institutional level. Coordination involved a complex set of roles and linkages, including: responsibility for drawing all sections of the institution into the merger process; for ensuring a consistent flow of communication about the merger both inside and outside the institution; for putting in place the basics of change management within the merging institution; for providing practical support and capacity to institutional and joint merger governance structures, including task teams; tracking and establishing linkages between different entities in the merger ‘project’; for overseeing and coordinating the input of external consultants, where these are engaged; and for providing resource assistance to members of executive management who must fulfil their governance role by driving and giving direction to the merger.

Institutions have thus arrived rapidly for themselves at the conclusion – which may be said to be in line with best practice for corporate mergers, and to be consistent with the ‘processual’

²³² See the section in Chapter 2 of this report which deals with Institutional Governance: A Matrix of Governance (Section 2.3.2).

tendency noted above – that the complexity and time frames of merger require a project management approach driven around distinct project objectives, activities, deliverables and timelines. It needs to be remembered, however, that such a mode is not necessarily natural for higher education institutions and may be completely foreign. Even though it may come more easily to ‘management-focused’ institutions than it does to ‘democratic’ institutions, the latent danger of a project-driven approach to merger is its capacity to undermine collegial and co-operative networks (already cited as a potential risk to good merger governance when the likelihood is acknowledged of differentiated response to merger within an institution). The project management approach seems likely to pose the most difficulty for those institutions involved in mergers and incorporations which are relatively weakly capacitated in management terms (typically, ‘contested’ institutions). In cases where a merger brings together more than one such institution, a particular unintended consequence of the merger could be in view: while the merger is meant to produce a more effective and efficient institution, the process could be weakly driven, impacting directly on the implementation capacity of the new institution. In cases where a weakly managed institution is merging with a strong one, another unintended consequence could come into play: that the weaker party could find its merger agenda effectively driven by the stronger. This could have disturbing implications, from a transformation point of view, in a case where a strongly capacitated historically-advantaged institution is merging with a weakly capacitated historically-disadvantaged institution. One set of merger partners in the sample seemed to pose such a potential danger. In this case, a very well-capacitated institution had appointed a merger manager; its merger partner had not done so and in addition was operating in the absence of certain key appointees, such as a registrar and a human resources director. The balance in this case seemed set to come from the determination of the Council of the ‘weaker’ partner, to assert a transformation agenda in the merger process. Accompanying dangers seemed to be the possibility of drift in the perspectives of the ‘weaker’ institution’s management and Council, and the emergence of potential conflict as something of a surprise at the highest levels of merger negotiation.

Key considerations and risks for merger managers and merger offices were pointed out to the researchers by some of the incumbents, who are quoted directly in some cases below:

- The merger office and its linkages must be clearly and transparently situated within the web of institutional and inter-institutional linkages that make up pre-merger governance; the merger office should ideally be situated outside normal structures.
- Merger offices should be small and effective replacements must be made where institutional members are seconded.
- ‘The work of the manager and the merger office must be clearly defined in terms of project management principles and process.’
- ‘Steps should be taken to safeguard against burgeoning institutional tensions that may develop around role diffusion and the negative impact of removing staff from the going concern.’

- Lack of authority with substantial responsibility could hamstring the merger manager if the appointee is not part of executive management. ‘This relation is essential to maintain the institutional authority approval and action loop and to work at a pace appropriate to a merger process.’²³³

Going beyond the notion of one merger manager and office in one institution, the Ministry has recommended that institutions establish a single merger office as

A centre for organisational, logistical and administrative support for merger planning and implementation. With the agreement of the affected institutions, it could be staffed by a small core of dedicated personnel temporarily seconded from their substantive positions. It should be directly accountable to the senior managers and the councils of the merging institutions ... It is strongly recommended that one person be appointed to take responsibility for the overall management of the merger, who will report on progress to the councils and senior executive managers of the institutions and communicate with the Merger Unit of the Ministry.²³⁴

From the Ministry’s point of view, a single merger office provides an important point of contact for itself and for other stakeholders, serving to streamline the provision of support and services by the Merger Unit, streamlining the internal management of merger processes, and ensuring timely and accurate communication with stakeholders. At least two of the merger ‘clusters’ forming part of the interview sample were in the process of setting up, or at least discussing the establishment of such a joint merger office. The Ministry’s preference is eminently suitable as a proposal. However, cognisance of some of the potential dangers and consequences already highlighted with respect to institutional merger offices should be borne in mind in establishing such an entity, and could perhaps be more acute in a joint scenario.

4.2.4 Critical Outcomes of the Pre-Merger Phase

Following the announcement of the Cabinet-approved mergers and other restructuring decisions in December 2002, the Ministry of Education issued letters to all affected institutions with requests for responses by June 2003 against the following items: date of the merger or incorporation,²³⁵ preferred name of the merged institution, the physical location and address of the merged institution, the process to be followed for compliance with labour legislation and nominees for appointment to the Interim Council. These requests are consistent with the amended Higher Education Act which states that

The Minister must, after consultation with the councils of the public higher education institutions that are to be merged, determine ... i) the date of the establishment of the new

²³³ Unattributed quotations from confidential institutional interviews/documents that formed part of this study.

²³⁴ Ministry Merger Guidelines 2003: Section 2.1.1.

²³⁵ ‘The only legal requirement that applies to incorporations is in relation to the effective date of incorporation.’ Ministry Merger Guidelines 2003: Section 4.7.

institution; ii) the type and name of the new institutions; and iii) the physical location and official address of the new institution.²³⁶

The Minister must further ‘establish an interim council for a period not exceeding six months.’²³⁷ The provision that the Minister must ‘be satisfied that the employers at the public higher education institutions concerned have complied with their obligations in terms of the applicable labour law’²³⁸ has been amended in 2002²³⁹ with some significant implications.

Responses against the Minister’s requests constitute a preliminary set of decisions required of the Councils of merging institutions in the pre-merger phase. At the time of institutional visits conducted as part of this study, institutions in the study sample were preparing their responses against these items, and accordingly engaging institutional and merger governance structures in the decision-making process. Each of these decision items is dealt with in more detail below. In addition a range of other elements that are currently specified neither by the Higher Education Act, nor in statements of policy, have emerged as critical outcomes of the pre-merger phase, in so far as they support the requirements of effective merger governance.

4.2.4.1 Date of Merger or Incorporation

In December 2002, it was announced by the Minister that mergers and incorporations would most likely occur in two waves, namely 1 January 2004 and 1 January 2005. The Ministry’s preferences in terms of dates for specific mergers have been published subsequently (but, as highlighted in the previous chapter, there has been no talk as yet of punitive measures if institutions fail to meet these targets).²⁴⁰ Clearly, it is critical that the state set a framework timetable for the restructuring process, or risk confusion and paralysis in the process. The politically-driven nature of the process – that seeks to transform the higher education system inherited from apartheid into a system that supports the achievement of the country’s democratic goals – underscores the need even further. Institutions in the study sample recognised this and were in broad terms satisfied with the high-level timetable indicated by the Minister; none of them had plans to request a change in effective date for the merger or incorporation.²⁴¹ However the requirements of fulfilling a national restructuring timetable need to be balanced by the requirements of effective governance in the merger process, and of adequate preparation for the transition to a merged institution.

²³⁶ HE Act 1997: Section 23(3), as amended by HE Amendment Act 2002: Section 5(d).

²³⁷ HE Act 1997: Section 23(5), as added by HE Amendment Act 2001: Section 6. In terms of Section 23(6) (also added by section 6 of HE Amendment Act 2001), the Minister may extend the life of the Interim Council for ‘a further period not exceeding six months’.

²³⁸ HE Act 1997: Section 23(2)e.

²³⁹ HE Amendment Act 2002: Section 5(b) and (c).

²⁴⁰ Ministry Merger Guidelines 2003: Appendix 1. Four mergers and all incorporations are envisaged for 1 January 2004; six mergers are envisaged for 1 January 2005, with one of these dependent on further discussion following withdrawal of a legal action.

²⁴¹ It should be reiterated that the study sample did not include any institutions with plans to contest the merger decision.

These requirements are likely to translate into tangibles such as a completed due diligence study, an agreed and signed Memorandum of Agreement between merger partners, a detailed merger plan, and a thorough estimate of merger costs whose implications have been discussed with the Ministry of Education and in the light of which appropriate guarantees of state funding have been agreed. Some limited flexibility around the date of merger could perhaps be allowable in the interests of getting these tangibles in place. For example, the Minister could publish notice of the merger date with an allowable extension of three months to ensure that the stated outcomes of the pre-merger phase are in place. Clearly the Minister would need to communicate to all institutions in advance and in writing that these outcomes are expected. The Ministry has indeed undertaken communication on such issues with institutions,²⁴² although not in terms of specific timelines. By specifying to institutions that the date of merger is dependent upon these outcomes, the Minister would be giving guidance to institutions who may not independently prepare all of them, as well as ensuring a number of safeguards for the inception of the merger. An alternative approach could be that institutions who have not achieved these outcomes would agree with the Minister on a set of target dates for their completion after the merger (at least in respect of due diligence and a merger plan; the time for a Memorandum of Understanding would naturally have passed). The teams of Reference Group members being established by the Ministry – provided these are in place as intended – would be in a position to judge on the need for such steps in specific cases, in terms of fulfilling their role of monitoring and assessing merger implementation process and progress.

4.2.4.2 Physical Location and Address of Merged Institution

Institutions in the study sample were reticent in discussing the issue of physical location and address of the merged institution. Presumably, this matter was still an issue under discussion in all cases. Even in those cases where institutions intimated that the issue was not highly significant, it seemed that merger partners actually had different notions of what was ‘obvious’ in terms of what the merged institution’s official seat would be. The criteria for choice being applied in the decision-making process reflected once again the familiar divide between ‘management-focused’ and ‘democratic’ tendencies in the governance styles of merging institutions. Thus on the one hand the criteria that were emphasised included optimal use of resources and existing infrastructure; on the other they included convenience for students and the community at large, and the importance of giving a visible signal of change. In at least two cases, the proposal appeared to be to use the addresses of both merger partners. (Use of the address of a subdivision being incorporated was complicated by the resolution of the problem of a legal successor to the parent institution of these subdivisions, which was itself to be dissolved.)

This issue was most striking in the case of a merger to result in a multi-campus institution with considerable extremes of distance between campuses. In this case, one merger partner

²⁴² For example in the Ministry Merger Guidelines 2003.

had proposed the establishment of a physical seat at an address different to any of its campus addresses. Executive management and central administration would be based at this physical location and from it would work to establish unitary policies, systems and procedures for the institution. The governance implications of such an idea would seem to be that individual campuses would operate under a fair degree of autonomy and with freedom to establish (or possibly maintain) their individual campus identities, at least in the short and medium terms. The merits and demerits of such a concept under a particular set of circumstances, will be discussed elsewhere in this report. For now, it is simply worth noting that the determination of physical location and address of the merged institution can ultimately play out significantly in terms of the merged institution's configuration and governance. As such, it should be an issue for careful consideration by merger partners.

A broader governance issue is associated with the question of institutional seat: this is related to the fact that, with the advent of information and communication technology, academic delivery modes are 'no longer discrete points or opposing poles, as they were formerly, but have become accidental poles along a continuum of possibilities' and to this extent the definition of institutional seat becomes arbitrary. National policy on the issue of the seat of higher education institutions has swung back and forth over the years. Current policy in favour of a designated seat for institutions²⁴³ supports other ideals of restructuring – i.e. a higher education system of optimal size and shape, which overcomes geographical, as well as other, distortions of apartheid. Ultimately, the concept of seat may be most significant, with respect to the outcomes of merger, in defining areas for potential (regional) co-operation, rather than areas based on coincidental metropolitan boundaries. 'The course of history dictates that the focus should shift from preventing competition and duplication (in seats) – which has already happened – to investigating collaboration (in regions).'²⁴⁴

4.2.4.3 *Name of Merged Institution*

A number of institutional submissions in response to the Minister's restructuring proposals, referred to the choice of name for the merged institution as an emotional issue for staff and students. Certainly the Minister's (apparently imposed) choice of a name for a merged distance education institution, as announced in 2001, unleashed protest from affected institutions and stakeholders, given the lack of consultation around it. At the same time, institutions in submissions and interviews identified the choice of name for the merged institution as a significant opportunity for rallying support for the merged entity from students, staff, and

²⁴³ 'The seat of a public higher education institution is the physical location of the institution ... where the institution carries out its teaching activities and must be defined in the institutional statute ... Subject to the approval of the Minister, a public higher education institution may conduct its teaching activities beyond the seat contemplated ... If the teaching activities ... fall within the seat of another public higher education institution or at a place where the teaching and research activities of another public higher education institution are conducted, the Minister's approval is subject to consultation with such other public higher education institution.' HE Act 1997: Section 65A, as added by HE Amendment Act 2001: Section 24.

²⁴⁴ Acknowledgement for quotations in this paragraph is made to a confidential draft document being prepared by a university (as at March 2003), for consideration by the Minister. Allusion to the preparation of this document was made in the university's response to the Minister regarding restructuring proposals as made in June 2002.

the community (including the international community in the view of some institutions). The use of the institutional name as rallying point has both content and process dimensions that need to be addressed as part of the merger governance process.

In content terms, according to institutions interviewed, the ideal name for the new institution would possess certain key attributes such as: association with the community, association with the vision and mission of the institution, uniqueness, and so on. In the content dimension, it is fair to say that comprehensive institutions are faced with a particular challenge in choosing a name. Given that the nature of a comprehensive institution remains essentially undefined, issues that arise for these institutions include: is the new institution a university or not; should it associate itself explicitly with science and technology or not? A number of merging institutions (including one that has already merged) have opted to set content parameters around the choice of name, such as that the name may not be that of a person living or dead, that it should unify without undermining the identities of the merger partners, and others.

In process terms, the search for a name needs to be linked to a consultative process (internal and external) on the one hand, and to a comprehensive and visible branding and marketing process (likewise internal and external) on the other. With these issues in mind, a number of merging institutions have implemented and/or proposed specific kinds of name-finding processes: a consultative and public approach being one option, and an independently-commissioned piece of research, including market research, being another. The two options are not mutually exclusive, although once again the two broad tendencies of 'participative' and 'management-focused' are visible. In either case, institutions indicated that their chosen approach would lead to a recommendation being made by a joint naming committee and most indicated that such a committee would be representative in its structure. However, tensions between the substance of consultation and the substance of branding/marketing introduce tensions at the level of process: consultation and transparency ideally take time, while the nature of merger itself demands an intensive branding campaign to build a new identity as quickly and effectively as possible. More challenging still is the fact that institutional name should ideally be linked to institutional vision and mission. Yet, as has already been pointed out in an earlier section of this chapter, it is unlikely that vision and mission can be adequately formulated under intense pressure in the pre-merger phase: their development will require application and time.

In practice these issues present real governance pitfalls, at least in the experience of a recently merged institution whose name search began in 'participative' mode, but ultimately became somewhat 'contested'. In this case, a public search for a name was conducted in the pre-merger phase, within certain parameters established by the joint merger committee. Submissions were duly received and processed but there was insufficient transparency on the final choice made, to the extent that a list of ranked alternatives was not made generally available. Worse, the name selected had not been checked against the register of companies and turned out to be the property of someone else (a situation that was

rectified at considerable expense by the Interim Council). A range of process difficulties were raised by this example: a well-intentioned public search culminated in some mistrust and undercurrents around the naming process due to insufficient transparency at the end; the legal authority of the Interim Council to establish the branding of the new institution was in question; practical questions around the choice of the name were neglected. In content terms, it seems that the choice has also been problematic in the view of some people. The name gives a very specific identity to the institution in terms of its academic product, yet the process of developing a strategic vision for the institution had not properly begun even by the time institutional interviews were conducted. In the interim, the faculty structure and even the names of some academic departments have been changed to align to the institutional name, and some interviewees felt this could create distortions in the nature of the institution itself. Generally, there seemed to be a view that the process of building a brand and identity for the new institution had been rushed and this had impacted negatively on the success of the process. As an illustration, while campus names had been carefully chosen for the adjoining campuses of the new institution, taking into account the views of the community, one of these names was not used at any time by any of the 19 people interviewed. Instead the old institutional name was used. This detailed example serves to illustrate that the choice of name can be loaded in terms of the consequences it may produce for institutional orientation, configuration and governance.

In summary, it seems that the search for the name of the merged institution should be linked *as far as is feasible* to the process to determine the merged institution's vision and mission. Ideally, naming proposals should emerge from joint merger structures and processes, to be consulted appropriately with all stakeholders using institutional structures where needed, in the pre-merger phase. The Minister should seek assurances that the preferred name put forward for the new institution is the product of a due process, and is viable. In addition the process of building the new institutional identity around the name should be defined as an explicit part of the merger plan.

4.2.4.4 *Process for Compliance with Labour Legislation*

Merging institutions are required to give to the Minister assurances of their efforts to comply with labour legislation in the merger process. Institutions in the study sample were aware that at the most basic level, this can be done by supplying supporting documentation, such as minutes of discussions with unions. However, they also acknowledged that the notion of compliance needs to be matched with efforts to achieve a genuinely co-operative and consultative decision-making process.

The Higher Education Amendment Act of 2002 added substantially to the second subsection of Section 23 of the Act, and provides *inter alia* that contracts of employment are automatically transferred to the merged institution, but that redeployment after the merger is subject to labour laws; that the rights and obligations of employer and employee continue unchanged after the merger; that a merger does not affect continuity of employment; and

that pre-merger rationalisation may nonetheless occur in terms of operational requirements under Section 189 of the Labour Relations Act.²⁴⁵ These subsections replace and amplify the previous paragraph 23(2)e which simply required the Minister to be satisfied that the merging institutions have complied with labour legislation.

In the view of a confidential written position of one of the institutions in the study sample, these changes have ridden

Roughshod over the rights of employees to be informed of the impending merger and its implications and to be afforded an opportunity of prior negotiations and bargaining to protect their rights. In effect, this vital jurisdictional fact to be considered by the Minister before proclaiming a merger [is] erased by the amendments.²⁴⁶

As an observation on in-principle infringements upon due consultation with labour, this is a serious indictment of the Act, and highlights the obligation that is upon the Councils and managements of merging institutions to ensure that consultative principles are observed as far as possible within the framework of the legislation. In practical terms, it has to be said that the human resource and labour relations implications of mergers are amongst the most complex facets of the process. Thus it is perhaps ambitious to suppose that due consultation could occur within the envisaged time frames of the pre-merger phase in any case. To this extent the Act may be viewed as eminently realistic.

A key labour relations issue for merging institutions is to safeguard against the pre-merger negotiation of binding agreements between any partner and its union/s, which could impact adversely on the human resource needs, or the financial viability of the new institution. Avoiding such a situation would necessarily require a range of factors operating together in the governance and management of the institution in the pre-merger phase: good communication to engender greater levels of trust between management and unions, good information on which to base future decisions, and good institutional and joint merger process to begin to address issues in an orderly and prioritised way.

In the pre-merger phase, merging institutions should lay the ground for potentially complex human resources and labour relations change through such steps as: opening discussions with recognised unions as to how they plan to organise and/or consolidate in the new institution; ensuring staff and unions are represented on institutional merger committees and if judged appropriate on joint merger structures as well; establishing an institutional task team to conduct an audit of human resources policies, practices and procedures (as well as of academic and non-academic staff profiles, if this is not taken care of through a due diligence exercise). And, once an audit is complete, institutions should establish a joint human resources task team to begin to consider such key issues as the migration curve of salaries and benefits, and to ensure that parity can be achieved across the new

²⁴⁵ HE Act 1997: Section 23(2A)-(2C), (2G), as added by HE Amendment Act 2002: Section 5(c).

²⁴⁶ Unattributed quotation from a confidential 2002 institutional submission to the Minister.

institution over time. Such a task team could also generate proposals with regard to specific agreements to be negotiated with unions in advance of the merger, e.g. regarding cessation of accumulated leave and other such benefits.

4.2.4.5 Nominees to Interim Council

The Higher Education Act's original conception of the Interim Council was a five-person body, whose four members would be appointed by the Minister from nominations received from the institutions (members of staff and students prohibited for nomination), and with a chairperson to be appointed by the Minister.²⁴⁷ The Higher Education Amendment Act of 2002 amends the composition of the Interim Council to 'a minimum of six members and a maximum of eight members.'²⁴⁸ In addition the amendment specifies that institutions must provide to the Minister, within 60 days of a written request, no fewer than four nominations, and that in the absence of such nominations being received, the Minister may appoint the members from the nominations received from the other institutions, or at ministerial discretion.²⁴⁹

The increased membership of the Interim Council has generally met with the support of institutions, a number of whom pointed out in their submissions to the Minister that this was required in their view. One institution in the study sample pointed out, however, that the paragraph giving the Minister the right to appoint members in the absence of nominations by any institution is ill-judged. The only reason that an institution would withhold nominations would be owing to resistance to the merger going ahead or to some key issue unresolved in the pre-merger phase. For the Minister to proceed in such a way could doom the merger to failure. A further concern emerging from interviews with institutions in the study sample was the question of the appointment of the chairperson of the Interim Council. Although nominations for members of the Interim Council would most likely be drawn from those with strong institutional connections (chairpersons and vice-chairpersons of Council, honorary treasurers) as a means of trying to ensure continuity, a strong view emerged that the Interim Council chairperson should be independent and should have no prior association with any institution involved in the merger. In one institution in the study sample that had already merged, the chairperson of the Interim Council had in fact been the former chairperson of one of the two institutional Councils. This had created perceptions of bias in the Interim Council, and hence in the merger, from the time of the Interim Council's establishment. In addition, there was no neutral force in the Interim Council to mediate points of contestation carried forward from the previously existing institutions.

The example cited above had been fairly well disseminated in the higher education sector, so that merging institutions interviewed as part of the study seemed to be applying their

²⁴⁷ HE Act 1997: Section 23(7)-(8), as added by HE Amendment Act 2001: Section 6.

²⁴⁸ HE Act 1997: Section 23(7)b, as amended by HE Amendment Act 2002: Section 6(e). This distinguishes the Interim Council of merging institutions from the Interim Council of newly established institutions which have four members – HE Act 1997: Section 20(8)b, as added by HE Amendment Act 2001: Section 4(b).

²⁴⁹ HE Act 1997: Section 23(12), as added by HE Amendment Act 2002: Section 6(g).

minds carefully to all aspects of the nomination of Interim Councillors. In one merger case, the two institutions seemed to be moving towards a position in which the names of Interim Council nominees would be submitted to the Minister a few weeks after submission of other details in respect of name, date and address (but in time for simultaneous gazetting with these details). This was because the institutions involved wished to have enough time to secure commitment from their (separate as well as joint) nominees that they would serve not only on the Interim Council, but on the new institutional Council as well.

As a means to overcoming some of the problems envisaged in the process of nominating members of the Interim Council, joint merger structures should be put to use in ensuring that there is a co-operative process between merging institutions in determining nominations, including recommendations to the Minister as to a possible chairperson.

4.2.4.6 Due Diligence

This study has found that the international literature on higher education mergers emphasises how merger tests to the utmost the duty of care, diligence and skill entrusted to institutional governors. The literature warns governors (Councils, in the South African context) to ensure that they have the necessary information on which to base merger decisions, and so to discharge properly their fiduciary responsibilities to the merging institution.²⁵⁰

Due diligence as conducted in corporate mergers in the private sector is a process of investigation – generally by an independent party – into the details of the entities to be merged (or acquired). Respective assets, liabilities, obligations, systems and controls are disclosed as a means to testing the viability of the future enterprise. In effect, due diligence constitutes an effort to get behind financial statements, examining items off the balance sheet, and including full strategic, operational and management review, with verification of material facts. While due diligence is often associated with discovery of potential nasty shocks, it is also a process used to put practical information out in the open to be managed as part of the merger process, to enable risk analysis and to contribute to a change management strategy (cultural due diligence can be a critical component).

In the context of higher education mergers, institutions in the study sample were united in their opinion that due diligence would extend to an investigation of issues that are critical to academic and institutional planning, including academic programme and course structures (and duplication of courses across institutions), qualification levels of staff, equity profiles of staff and students, student throughput rates, student fees and analysis of fees outstanding.

The case for due diligence in the mergers currently under way in South African higher education is somewhat complicated by the fact that mergers are mandatory and take place on the principle of equality between partners. As there is no ‘acquiring partner’,

²⁵⁰ See the section in Chapter 2 of this report that deals with Governance and the Inter-institutional Process for Mergers (Section 2.1.2.2).

the drive for due diligence may appear to be diluted and some institutions quibble with the applicability of the term; in one case institutions have chosen to substitute the term ‘compatibility review’, for example, and in another ‘feasibility study’ is sometimes used with reference to due diligence. Yet, in their submissions to the Minister and in interviews for this study, institutions have emphasised the need for due diligence in South African higher education mergers. A selected comment is illustrative of general concern (although it does not highlight the concern with academic and institutional due diligence that emerged clearly from interviews):

Institutions should not embark upon the merger in ignorance of each other’s financial status and without all parties, including National Treasury, being aware of precisely what will be involved financially. It is therefore proposed that extensive professional due diligence studies, with full disclosure, and detailed human, contractual and financial inventories of [partner] institutions, be undertaken by a single team of external experts as a matter of urgency. It is essential that this exercise be funded by the State.²⁵¹

In part institutional emphasis on due diligence has been fuelled by one well-publicised merger experience in which information about significant institutional debt carried by one of the merger partners (and not insignificant merger debt carried by the other) emerged relatively late in the day and threatened perceptions of good faith in the process. But the emphasis is also driven by an in-principle desire for good governance in the process of merger and a practical need for good information. A number of external members of the Council interviewed expressed the opinion that, if they are to fulfil their fiduciary role, they must assure themselves that they are not, by committing their institution to a merger, endangering the financial health, viability, or prospects for long-term survival of the new institution. Under this view, due diligence is completely in tune with the accountabilities set out for the Council in the Higher Education Act and full disclosure is consistent with due process and with democratic process.

In an ideal world, due diligence would be conducted for all mergers by an external party, with the same external party carrying out the process for all merger partners. Institutions in the study sample and in their submissions were aware that this had implications in terms of both time and cost and, at the time of the interviews, were reluctant to embark upon the process until such time as the Ministry indicated a willingness to cover the costs of due diligence. Institutions also acknowledged that there are qualitative differences in due diligence needs, and conceded that the 80/20 principle could be applied. In some cases merger partners have sufficient trust in the reliability of information each provides to suggest that internal due diligence processes would be adequate or that an external due diligence brief limited to particular issues would cover the most critical issues; in other cases, the absence of reliable information from one or more sources makes the need for external due diligence more acute.

²⁵¹ Unattributed quotation from a confidential 2002 institutional submission to the Minister.

Guidelines published by the Ministry in April 2003 have taken the following approach: 'In view of the financial back-up being provided by the Ministry and the inter-institutional relationships that exist between institutions within the higher education sector, the value obtained from a 'due diligence' study undertaken by outside professionals is not likely, in normal circumstances, to be cost-justified. The Ministry is of the view that recent audited statements, an audited register of liabilities and other obligations, access to the

Management letters' arising from the most recent audit and engagement with the auditors of each institution concerned could provide the Ministry and the institutions concerned with a realistic insight into the accuracy of the records, controls and processes of an institution. However, where there are justifiable grounds for assumptions that the representations in the books and records are suspect an investigation may be necessary ... A full motivation for such a study ... must be submitted for written approval.²⁵²

This position is to some degree consistent with conclusions drawn by institutions under their own reckoning: the need for due diligence may be greater in some circumstances than in others. It is also understandable that the Ministry may be wary of the semi-automatic appointment of management consultants who will duplicate the work of the public sector at unnecessary expense. However, in taking its position, the Ministry's focus appears to be too narrowly upon the financial elements of due diligence, and it may have erred too much on the side of circumspection; meaning there is a risk that due diligence may not occur in all cases where it is desirable. Be this as it may, the onus is firmly upon institutions to make a case for state funding of due diligence under a broader conception.

In conclusion then, in an effort to optimise the place of due diligence in higher education mergers, the Minister has indicated guidelines for due diligence to be carried out and conditions under which due diligence will be funded. Working within this framework and within the early stages of the pre-merger phase, management, with the input of institutional merger structures where appropriate, should make recommendations to the Council regarding due diligence needs for the merger. Proposals should be discussed by joint merger structures and a consensus decision on the due diligence process to be carried out (whether internal or external) should be agreed by each Council whose institution is involved in the merger. Requests for funding can then be made to the Ministry if appropriate. Councils should also be given an opportunity to respond to due diligence findings.

4.2.4.7 Memorandum of Agreement

Institutions interviewed by the researchers as part of this study expressed an intention to draw up a Memorandum of Understanding and/or a Memorandum of Agreement. This document, agreed and signed by the Councils of the merging institutions, would serve as a framework and guide for the partner institutions' approach to the merger.

²⁵² Ministry Merger Guidelines 2003: Section 3.4.2.

The terms Memorandum of Understanding and Memorandum of Agreement appeared to be being used interchangeably by some institutions and by others with the sense of a Memorandum of Agreement formalising preliminary approaches indicated by a Memorandum of Understanding. Thus, in one instance, a Memorandum of Understanding had already been signed by all parties to the merger and the notion of a Memorandum of Agreement was under discussion. In other cases, a joint task team was beginning to consider the necessary content of a Memorandum of Understanding/Agreement, and in others the issue was on the agenda but as yet to be addressed.²⁵³

Questions regarding the Memorandum had already raised their heads – for example, what aspects should a Memorandum cover as a matter of course; should the Minister be party to the Memorandum; would there be any legally enforceable means of applying a Memorandum of Agreement, and so on. Indications against some of these questions have been subsequently provided from the point of view of the Ministry of Education, which issued a template Memorandum of Agreement²⁵⁴ as the study's institutional visits were coming to an end. The Minister had also made clear to one set of merging institutions his view that the Minister could not be a signatory to any Memorandum.

On a broad understanding of the nature of merger process, it would seem strongly advisable – and the Ministry has recommended it – that a Memorandum between merger partners and adopted by their Councils should be drawn up early in the pre-merger phase and should set the parameters within which the merger partners work up to the date of merger. Without such a Memorandum, there is a danger that scenarios surrounding the unfolding merger process will continually shift. In addition, agreements on certain practical issues are necessary to enable accurate calculation of the costs of merger integration.

Based on developed examples of Memoranda shared with the researchers by institutions in the interview sample, as well as the Ministry guidelines, it is proposed that this document should outline *inter alia*:

- Preamble setting out background and context for the merger, including parties to the agreement.
- Declaration of intent.
- Principles on which negotiations between parties will be conducted and the manner in which the merger process will be advanced. This section should set the basis of understanding with respect to such matters as full disclosure of information, joint decision-making, equal status of merger partners, full participation of stakeholders, day-to-day functioning of going concerns during the merger, and so on.
- Manner in which the agreement will be coordinated and monitored, including how liaison with the Minister and Department of Education will be handled, how liaison with

²⁵³ For simplicity, this report refers henceforward to a Memorandum of Agreement and sometimes uses Memorandum as shorthand.

²⁵⁴ Ministry Merger Guidelines 2003: Appendix 2.

media and staff will be handled, how day-to-day management issues will be handled, and conflict resolution procedures.

- Areas of co-operation and joint decision-making, including academic planning and management issues. The Memorandum will need to cover issues that can be anticipated as arising in any event (e.g. agreements with respect to staffing, contracting, capital expenditure and resource sharing), while creating conditions for the appropriate addressing of new or unspecified issues.
- Joint understanding of the merger process to be followed, with respect to such matters as the phases of the merger, how long each is likely to be, governance structures to be established in each of these phases (including interim ones) and their terms of reference.
- The Memorandum could also append other key documents such as the merger plan, or other schedules covering issues such as the name, herald and logo of the new institution.

The period for which the Memorandum is in effect is relevant to the issue of continuity in the merger process. One way to conceptualise the Memorandum is as an agreement that sets conditions for a productive engagement of merging institutions prior to the effective date of the merger only. The Ministry's understanding seems to be this, as it suggests in its template Memorandum of Agreement that the purpose of the agreement is

To facilitate co-operation between the merging institutions in the period prior to the date of merger, as well as to ensure that operational decisions by the merging institutions in this period do not adversely impact on the operational and organisational integrity of the single higher education institution.²⁵⁵

However, there is nothing in principle precluding application of the agreement beyond this date and, for purposes of continuity, it would in fact seem almost essential to do so. The Memorandum seems in essence to be a kind of 'foundational script' for the governance of merger and to have application throughout the process. It applies not only in practical terms – for example, agreements reached with respect to modes of conduct during the merger, modes of conflict resolution and more operational matters such as moratoria on new recruitment and salary increases, would usefully pertain throughout the transitional period – but also with respect to the spirit of the institutional change taking effect. Clearly, however, for this kind of continuity to be established, the right procedural mechanisms would have to be found, as the Memorandum does not carry any legal status. For example, while the original signatories may no longer legally exist after the date of merger, the agreement could nonetheless be recommended as a founding document to be adopted by the Interim Council, and thenceforth by the new Council. The utility of these ideas is explored further in the section under the Interim Council below.

²⁵⁵ Ministry Merger Guidelines 2003: Appendix 2, Section 4.

4.2.4.8 Merger Plan

Institutions interviewed as part of the study frequently referred to the necessity of a merger and a business plan. However, these references tended for the most part to be rather abstract, given that the institutions were still in the early weeks of pre-merger planning, and were only beginning to convene task teams whose findings would ultimately contribute to the development of this plan. Not surprisingly, the institutions that had the most to contribute on the subject were one institution that had already undergone a merger, and a group of merger partners whose discussions about merger had been in place (albeit under changing circumstances) for well over a year already. A participant in the merger that had already been effected maintains that

It is critical to develop and communicate a [business and] master plan for building the unified institution, as well as to develop a detailed map of discrete tasks, activities, and deadlines for the integration process. [...] Beyond project management and functional integration, defining the change enabling programme is crucial for a successful merger.²⁵⁶

The set of institutions who had been discussing their merger for over a year had developed a proposed framework for their merger plan on the three-phase model, listing critical objectives and key activities against each phase. In both these instances it was clear that merger planning was conceptualised as an integral part of merger governance, in the same way that strategic planning is a central component of the governance of any higher education institution.

The Ministry requires all institutions involved in a merger/incorporation to produce an ‘institutional operating plan’ for the entity, and has prepared indications of how such a plan should be developed and what it should contain (including 12 tables in the categories of academic programmes, enrolment and staff, to be submitted as part of the operating plan proposals).²⁵⁷ The Ministry requires that the institutional operating plan be submitted no later than 12 months following the date of merger or incorporation, and as approved by the Interim Council or new Council. The institutional operating plan is intended as an instrument

To help institutions involved in a merger or incorporation to decide upon, and subsequently make adjustments to, the direction that the new entity will take over the next three to five years. It is also intended to help the Ministry to assess whether the changes envisaged for the new entity are realistic and will result in academically and financially viable and sustainable outcomes.²⁵⁸

²⁵⁶ Padayachee, A. (2002). Process Issues: Planning, Time frames and Funding for the Successful Implementation of Mergers. Paper presented at the UNISA Merger Conference, 13–15 November 2002 in Pretoria. Hereafter referred to as Padayachee 2002.

²⁵⁷ Ministry Merger Guidelines 2003: Appendix 3. All details with reference to the institutional operating plan are drawn from this appendix.

²⁵⁸ Ministry Merger Guidelines 2003: Appendix 3: Section A.1.

Furthermore, the institutional operating plan is a prerequisite for the provision of state financial support for the merger. The Ministry envisages as a foundation for the institutional operating plan, the development of the merged institution's vision and mission. Thereafter the institutional operating plan would take as its starting point the combined programme and qualification profiles of the merging institutions. In brief, these would be used to develop an 'initial *status quo* scenario' organised around capital projects, primary activities and support services, and in turn supported by a budget approved by the institution's finance committee. Thereafter the institutional operating plan should evaluate the initial scenario, develop 'change scenarios', document these in both non-financial and financial terms for a minimum three-year period – tracked against the initial scenario – and select and recommend a preferred scenario to the Ministry.

The institutional operating plan required by the Ministry, in effect, is a critical sub-set of required information which would have to be formulated by drawing on an overall merger plan, be formally adopted by Council, and guide the merger process. To this extent, merger planning has governance, 'project management' and reporting dimensions. The emphasis in this section is on a broad conception of a merger plan which would facilitate all three dimensions.

Clearly a large part of the effort of institutional merger offices and joint merger structures during the pre-merger phase needs to be directed towards the development and actioning of just such a detailed merger plan. Informed as far as possible by information marshalled internally by the merging institutions (and available, for example, in annual financial statements, three-year rolling plans, programme and qualification mix documents) from due diligence, and critically from internal and/or joint task team investigations, the merger plan will need to address all the essential organisational components of a higher education institution. A list of the 'steps to merger' proposed by Eastman and Lang²⁵⁹ and ideas formulated by Anshu Padayachee²⁶⁰ have served as a useful framework for this study. Building on these sources, it is suggested that a merger plan could contain the following elements, which are listed with high-level comment in some cases. It should be noted that while the elements are listed as far as possible by a 'logic of institutional change', the listing does not intend to reflect priority linked with a timeline; all are priority areas.

- Vision and mission of the merged institution. This section of the plan would need to include definition of a 'fit for purpose' model of the merged entity that responds to government imperatives as set out in the strategic goals and objectives of the National Plan, as well as to institutional interests. Such definition is almost certainly going to pose particular challenges for comprehensive institutions. The model should include assessment of: the reach of the institution in terms of its location, gaps in the market and the level of specialisation of the merging institutions, opportunities to fast-track transformation, opportunities to improve viability and sustainability through the merger,

²⁵⁹ Eastman and Lang 2001: Ch. 9.

²⁶⁰ Padayachee 2002.

educational, financial and other benefits of the self-defined model of the institution, possible economies of scale and scope, synergies and risk, and the impact of the proposed merger on higher education in the region, on the community, on staff and students. While vision and mission are a logical precursor for other elements of the plan, it has to be said that institutions will be hard-pressed to formulate them perfectly and completely at the beginning of the merger process, especially as vision and mission must be developed co-operatively with the involvement of all stakeholders. While vision and mission debates and consultations need to begin early in the pre-merger phase, they will unfold well into the integration phase and the merger plan will need to take account of these developments.

- Name of the merged institution. This section should set out the procedure for determining the name (and possibly also address) of the merged institution and the name of new units within it.
- Branding and marketing plan. Details would be needed as to the process for developing the new entity's branding and marketing approach, as well as how this will be implemented.
- Communication plan. This section would have to reference in the first place the process that will ensure consultation and communication around the merger plan itself. Thereafter it would need to spell out both the internal and external communication plan through the process of merger.
- Governance. Elements to cover in the plan would include envisaged structure and process for the merger (obviously incorporating such structures and processes as are statutorily required, both in the transitional phase and afterwards), steps to ensure the engagement of stakeholders, and any work that is planned to inform the development of an institutional statute by the new Council. It could also set out the institutional leadership and management needs of the new institution and could envisage time frames for appointments on the basis of process agreements set out in the Memorandum of Agreement.
- Change management plan. This section of the plan would need to embrace such considerations as steps to be taken to ensure the creation of a new institutional culture, in regard to which the change management plan would have to delineate linkages with other aspects of the merger plan, such as those dealing with vision and mission, branding and marketing, and communication. It would also need to address labour relations issues, including the broad process envisaged for dealing with these.
- Human resources plan. This element of the plan would have links with the change management plan and could be conceptualised as the institution's 'social plan' for the merger. It should address personnel policies, plans with regard to pensions (whether and how plans will be integrated), salary and benefits (harmonisation/renegotiation), and the development of a process which would assess whether any possible restructuring may ultimately be necessary in the new entity.
- Architecture and administration of the new institution, i.e. macro-organisational and administrative design.
- Finance. Broadly speaking, this section would map the envisaged flow of revenues to and within the institution. It would also need to set out plans for harmonisation of

income from student fees. Data as required by the Ministry for institutional operating plans would shape the substantive requirements of this element of the plan.

- Budget framework and process. This aspect of the plan should set out the form that the new institutional budget will take and, importantly, how and within what time frames it will be developed. It could also set out envisaged plans for reallocated budgets for institutional units.
- Draft operational plans for merged units, including envisaged micro-organisational design, roles and responsibilities, staffing and facilities.
- Plan for policy and procedural transition, including how to harmonise the disciplinary regime for staff and students.
- Plan for technology transition, including administrative computing and teaching elements.
- Plan for academic integration, i.e. the manner in which teaching and research programmes will develop in the new institution. This would need to reference principles for academic integration that have been set out in the Memorandum of Agreement, as well as giving detail to the academic structure (faculties and departments) and programme and qualifications profile envisaged for the merged institution and how this will be implemented. Once again, data as required by the Ministry for institutional operating plans would shape this element of the plan.
- Plan for integration of student development and services, and student administration. Implementing an integrated admissions policy and fee structure and planning an approach to dealing with pipeline students would be priorities in this area, given the need to reassure new and returning students, and to ensure academic integrity in the merged institution.
- Time frames, any necessary facilitation, consultancy or other required support, and estimate of merger costs. The specification of this element of the plan at the end of this list is in no way an indication of low priority. To the contrary, this element of the plan is critical and one which has reference to all other elements already listed.
- Contingency plans, should the merger plan fail in its implementation.

This suggested brief for a merger plan is comprehensive in scope (if not in specifics); clearly not all aspects of it can be determined in detail and in advance in the pre-merger phase. The experience of one institution which had merged 10 months prior to interviews forming part of this study underscores the point. According to its own reports, the institution was still in the development phase of parts of the plan and various interviewees, with the benefit of hindsight, commented on what should have been the priorities in planning the merger, and how failure to prioritise in these areas had directly impacted on the academic and organisational development of the new institution. There must be an acknowledgement of planning as an emergent process rather than a predetermined format. However, the merger plan should, as far as possible, aim to create a blueprint that the new institution can follow and develop as needed from the date of its establishment. Critically, the plan needs to set out – and communicate and consult where necessary – an overall framework for merger implementation in the dimensions of core academic business, people, operations, time and cost. The linkage of the merger plan in the pre-merger phase to estimates of costs is essential

and should give rise to a process that will enable cost implications to be discussed with the Ministry, lead to agreements and guarantees of state funding applying to these.

The notion of a merger plan given substance during the pre-merger phase once again raises questions as to continuity in the transitional phase. In the words of a confidential document of one of the institutions in the sample study:

[Merger plan] development would have afforded the merging partners an indispensable opportunity to establish a working relationship and the trust required to make the merger work. It would identify critical areas for immediate attention by the 'new' governance and management structures. The process of the merger plan development would act as an early warning system for problems which might require outside intervention before or after the merger.²⁶¹

Yet once authority passes to the Interim Council in the newly merged institution, there is presumably no legal obligation on the Interim Council to follow the plan. As with the Memorandum of Agreement, mechanisms need to be found to ensure that momentum established through merger plan development in the pre-merger phase is not lost in the transitional phase of the merger. In balance with this, the merger plan would need to remain flexible to accommodate circumstances and needs that emerge at any phase of the merger process.

4.3 TRANSITIONAL PHASE

The transitional phase of merger can be defined in different ways. One set of merging institutions in the study sample had defined 'transition' as a specified two-year period in its merger plan, linking this to a particular set of objectives and deliverables within that period. The utility of this approach for planning purposes is clear. For the purposes of this report, however, the transitional phase is defined more formally, in line with the indications of the Higher Education Act. Thus the transitional phase is the period between the date of establishment of the merged institution and the constitution of the new Council. In governance terms, this is the period during which the Interim Council, the interim management body appointed by the Interim Council, and other interim governance structures as determined by the Standard Institutional Statute are in place.

It should be noted that the transitional phase and its governance arrangements are specific to mergers and do not apply in the case of incorporations. However, this report has already commented that there is a need to acknowledge the equality of all partners in mergers and incorporations, and to recognise that some mergers involve incorporations as well. Thus a Memorandum of Agreement would be advised to address the question of whether any incorporated campus is to be represented on interim governance (and management) structures, as well as on the substantive structures of the merged institution.

²⁶¹ Unattributed quotation from a confidential 2002 institutional submission to the Minister.

4.3.1 *Interim Council*

In the institutional interviews that formed a key part of this study the Interim Council – its composition, role, power, functions and term – was consistently an issue of interest, concern and, in some cases, perturbation. There were two main reasons for this, both of which seemed to speak to somewhat insufficient leadership from the Ministry with respect to this aspect of transition. First, the Interim Council is the only governance structure established in the Higher Education Act for the transitional phase of merger – clearly it is an important structure, yet its governance role is only vaguely specified in the Act. Second, the Interim Council that served in South Africa's first higher education merger, during 2002, had a complex and difficult term in office.

This landmark experience had already been well disseminated within the higher education sector by the time interviews for this study took place, in particular by virtue of a merger conference convened by the UNISA in November 2002. The critical difficulty for the institution and its Interim Council, as imparted during the course of this study's institutional visit, can be summed up as the fact that the six-month period of Interim Council governance represented a significant disruption, a break in continuity and loss of momentum in the merger process that had been pursued by the two merging institutions up to this point. The disruption was experienced in different ways. In governance terms, the representative and well-accepted joint merger committee established by the institutions, with clear terms of reference and a plan, came to an abrupt end with the establishment of the merged entity. It was replaced by an unrepresentative statutory body with undefined powers and terms of reference whose decisions were in consequence opaque, confused and confusing, and occasionally based on dubious authority. Worse, pre-existing contestations were perpetuated in the Interim Council by the fact that its members were drawn from the pre-existing Councils. The institutional links of councillors may not have counted for as much, but that the chairperson of the Interim Council, as appointed by the Minister, also had links to one of the partner institutions, creating an apparent unfair weighting of influence in the transitional governance phase. In management terms, there was a delay in appointing an interim management body and this resulted in a practical vacuum. A widely cited anecdote of this period of about a week is that 'there was no-one even to sign a cheque'. The co-option of three members of the interim management body to the Interim Council, as stipulated by the Act, created further problems. Their membership of the Interim Council, coupled with certain other decisions that were taken, was seen by many to add to the situation of 'unfair influence' already described. Other executives who transferred to the new institution, also in terms of the Act, found themselves not only disaffected, but at a loose end as well.

The landmark experience described above, had made all merging institutions in the study sample apply their minds in some detail to the issue of the Interim Council and to begin to develop ideas, separately and jointly, as to how this aspect of transitional governance should best be handled in their own merger processes. The heart of the matter was that institutions in the study sample were weighing the virtues of having the Interim Council in

place for the norm that seems to be indicated by the Higher Education Act (i.e. six months), for the maximum indicated by the Act (i.e. one year) or for a minimum period, which is not specified by the Act but as to which various theories were being advanced, ranging from two to six weeks. These estimates were presented by the various institutions as ‘the legal minimum’; in fact, as already mentioned, there is no such minimum in terms of the Act, and these estimates seemed to be more practical assessments of how long it would take the Interim Council to perform a minimum governance function of appointing a new Council.

It is worth pausing at this juncture to reflect briefly on the nature of ‘transition’ with passing allusion to South African examples. Transition is most simply the period between the old and the new; in the South African context it has frequently had the additional connotation of the period between the illegitimate and the legitimate. For example, the transition from an apartheid government to a democratically-elected government was presided over by the Transitional Executive Council as negotiated by the multi-party process. It also featured a host of participative negotiating forums that had no decision-making authority but began to develop policy as an input to the new democratic era. The transition from apartheid local government featured transitional local or metropolitan councils established by election, representative negotiating forums, and provincial Administrators whose word regarding local authorities in the province was final should the process have become bogged down.²⁶² Clearly, the nature of transitional authority differed from context to context, but basic principles can be said to have applied in all the above examples. First, broad-based stakeholder input in transition was seen to be critical if the new was to be better than the old and authentically legitimate. Second, transitional structures had to exist as legal mechanisms, marking a functional and symbolic break with the old. Third, transitional structures had to be precisely defined in terms of their powers and the limits of their authority; while their decisions could not be binding upon permanent structures to be established, they had to support the continuity of a specific (in this case, democratic) change process and embody its values.

Transition in higher education mergers represents a discontinuous or ‘step’ change from old to new institutional cultures and forms. Given the central transformation agenda of higher education restructuring, this transition is also about democratic legitimacy and values which need to be embodied in interim processes and structures. The examples that have been mentioned belong to an earlier stage of South Africa’s socio-political transition but this does not render them irrelevant in an era where the focus is more firmly on implementation. The Interim Council as established by the Higher Education Act needs to be evaluated against the central principles of transition as our South African context has defined them, as well as in terms of its ability to facilitate an effective and efficient transition.

To recapitulate: the Interim Council comprises six to eight members, appointed by the Minister from nominations received from the merging institutions (or in the absence of such

²⁶² Republic of South Africa (1993). Local Government Transition Act No. 209 of 1993. *Government Gazette* No. 15468, Notice No. 187, 2 February 1994. Pretoria: Government Printers.

nominations), and the chairperson is appointed by the Minister. The Interim Council performs the functions of governance for the merged institution for a six-month period (renewable for a further period not exceeding six months). A comment was made at the beginning of this section that the governance role of the Interim Council is ‘vaguely specified’. The Ministry has attempted to give further substance to the Act in its merger guidelines which highlight issues the Interim Council should attend to as priorities.²⁶³ The Interim Council does not, however, make a new institutional statute. Instead, it constitutes the new Council, which will fulfil this function after the transition. It constitutes such interim governance structures as are required in terms of the Standard Institutional Statute, and appoints an interim management body, three of whose members it must co-opt, without voting powers.²⁶⁴

The landmark experience of an Interim Council cited earlier in this section has suggested that, under these terms of reference, and as the single transitional structure for mergers identified by the Higher Education Act, the Interim Council may act as a particular kind of stumbling block, rendering the transitional phase of merger disrupting and paralysing, rather than bridging and enabling. In the following paragraphs each aspect of the Interim Council is analysed with a view to assessing the reality of these dangers for merger governance and possible options which would ensure good merger governance.

With respect to the composition of the Interim Council, challenges around nominations and chairing have already been highlighted in an earlier section relevant to the pre-merger phase. It has been proposed that joint merger structures in the pre-merger phase should ensure a co-operative process to determine nominations, including recommendations to the Minister as to a possible chairperson. A further critical issue with reference to composition is that the Interim Council, as a small non-representative structure, effectively leaves stakeholders out in the cold and possibly ignorant of key developments in the transitional phase of the merger. Although the Interim Council is required to establish interim governance structures as set out by the Standard Institutional Statute, it can be readily assumed that these structures will take some time to find their feet. In addition, difficulties can be foreseen for the Interim Council – as a small body with large responsibilities – in establishing and implementing functional and meaningful linkages with these other governance structures.

The powers and functions of the Interim Council may be said to be generally problematic owing to under-definition, combined with the fact that the Interim Council as a transitional body is not the body to take major merger decisions. However, the powers as set out in the Act are perfectly logical in their relationship to steps that must be taken to give the newly

²⁶³ Priorities include ‘approving the annual budget of the institution; determining an admissions policy; agreeing on the fee structure and terms of payment for new and returning students; deciding on criteria and processes for financial aid and student loans; setting up audit, finance and human resource committees of council; deciding on a disciplinary code and rules for new students and new employees; determining conditions of service for new employees; developing an institutional operating plan; determining the language policy of the new institution, in consultation with the senate’. Ministry Merger Guidelines 2003: Section 4.5.3.

²⁶⁴ HE Act 1997: Section 23, as amended by HE Amendment Act 2001 and HE Amendment Act 2002. Section 23 is the general reference for details which are cited in the remainder of this section. More detailed references to the provisions of the HE Act regarding the Interim Council have been provided elsewhere in this report.

merged institution day-to-day functional capacity (the power relating to appointment of an interim management body) as well as stable governance capacity and legitimacy (the power relating to constitution of a new Council). Constituting a new Council is the most essential task of the Interim Council, enabling the fledgling merged institution to move beyond transition. Presumably, this task will require a practical minimum of 14 to 28 days. A minimalist view could therefore be entertained that the Interim Council should simply fulfil this task as quickly as possible and make way for the new Council. In terms of the Act, however, the Interim Council may rightfully be in place for up to a year, performing all functions relating to the governance of the new institution. This provision of the Act imposes a large burden on an Interim Council coming into being in a vacuum; there is no Vice-Chancellor in place (the Interim Council itself must appoint an interim management body) and no extant committee structure. In fact, the Interim Council may be hard pressed to establish a committee structure, given its limited size and consequently limited resources. The obvious danger is that the Interim Council itself will become a management committee, without sufficient checks, balances and fiduciary controls. While an engaged Interim Council may be to some extent a practical need in transition, it sets dangerous precedents for infringements of the governance/management boundary in the newly merged institution. It also creates confusion with respect to the needs of consultation, as one might predict a lesser tendency in a management committee to consult than in a governance body conscious of its duty not to interfere in day-to-day management issues but rather to safeguard the interests of good governance. Should the Interim Council be tempted to step into a management committee role with its attendant dangers of lack of accountability, participation and transparency, two possible reactions can be foreseen on the part of the institution: stakeholders may ‘step back and watch the Interim Council get it all wrong’ (in the prediction of one institutional interviewee)²⁶⁵, or stakeholders may step in to destabilise agreements made without their input.

In fact, the Act stipulates that, prior to taking a decision, the Interim Council is obliged to consult any structure that may be affected by its decision. Yet this wording is rather obscure and it is unclear what structures are being referred to, beyond the obvious inference of unions and staff bodies having to be consulted as to decisions that will affect the employment of their members. One interpretation of the provision is that it is a reference to the relationship between the Interim Council and the new Council it has to constitute. The Council of the merged institution will certainly be affected by the Interim Council’s decisions, but it cannot be consulted by the Interim Council. Hence the decisions of the Interim Council cannot be binding upon the new Council. Effectively this creates a crisis of authority for the Interim Council, if not legally, at least in terms of perceived legitimacy. (This aspect of the challenges confronting the Interim Council was commented on frequently by the merged institution in the study sample). With respect to Senate, the needs of consultation in the academic sphere are clear in terms of the Standard Institutional Statute, provided an Interim Senate is established and functioning. Likewise with respect to the Interim Institutional Forum,

²⁶⁵ Unattributed quotation from a confidential institutional interview conducted as part of this study.

which presumably acts as a standing advisory committee to the Interim Council, as the Institutional Forum acts to the Council: it can be consulted and offer advice, provided it has been effectively constituted by the Interim Council. It has to be said, however, that in the transitional context, the Institutional Forum is likely to find its existing frustrations with trying to play a meaningful role in institutional governance, only exacerbated. Finally, the Interim Council is unlikely to consult Convocation, unless it is in place for the extended one-year period allowable under the Act, in which case at least one meeting of the Convocation (now consisting of the joint alumni of the merger partners) would need to be convened.

It has already been mentioned that the small Interim Council would have limited resources with which to establish its own committees (or joint committees with the Interim Senate). However, it would clearly have to establish a minimal committee structure in the event of its being in place for six months or more. Formal reporting and planning requirements would necessitate the existence of at least an Audit Committee, a Finance Committee and a joint Planning Committee. In addition, the Interim Council should establish a Council Nominations Committee for the purposes of constituting the new Council, as its most fundamental task. Other structures for the purposes of advice on human resources and operational matters would perhaps best be constituted as task teams advisory to the Interim Council.

On this basis merger implementation – the most fundamental imperative for the new institution – could at least proceed relatively smoothly in terms of any merger plan that has been prepared or begun to be developed in the pre-merger phase. Obviously, this last statement is based on an assumption that the merger plan would in some manner have been adopted by the Interim Council. If not, the potential for major loss of momentum in the merger implementation process would certainly loom large.

It is clear from the discussion to this point that the fundamental challenges posed for and by the Interim Council are its lack of representivity; the potential loss of momentum that could occur if the Interim Council does not construct effective linkages between the pre-merger and integration phases; and a set of under-defined governance powers matched with a potential crisis of authority for the Interim Council, given that its decisions cannot be binding on the new Council. Given these inherent pitfalls, the Interim Council as established in the Higher Education Act, does not measure up very well to the principles established for transition in the South African context, neither does it bode well for effectiveness in the transitional phase. The Interim Council risks lacking both legal power and practical legitimacy, being potentially without authority, participation or information. The solution to the problem seems to lie in designing governance in the transitional phase with more careful attention to the manner and the time frame within which the merger process unfolds, and with more flexibility than a first reading of the Act might imply is possible. In any event, as this report has stated before, it is unlikely that a ‘one-size-fits-all’ model is achievable or desirable for higher education mergers. The transitional phase of merger would best be designed with the circumstances of a specific merger in mind. Four models seem possible, two of which can be executed in terms of the Act as it stands, and two of which would require amendment to the Act.

4.3.1.1 Model 1: Extended Interim Council

Under this model, the Interim Council would be constituted within the current provisions of the Act. It would be in place for the maximum allowable term (one year), and would need to constitute interim governance structures as well as a basic committee structure (Audit, Finance, Planning and Council Nominations Committees) with all possible speed. Ideally, Interim Council members would have had the opportunity to engage with the merger process in the pre-merger phase, so that they would be well-versed in the framework established via the Memorandum of Agreement and the merger plan and would have been able to make inputs to the developing plan. Ideally the Interim Council would adopt these frameworks on the basis of a consensus recommendation agreed by the Councils of the former institutions. In formal terms, this could be tabled by a member of the interim management (appointed at the Interim Council's first meeting). The Interim Council and other interim governance structures would continue to act within these frameworks, engaging in full consultation should substantial changes to either be envisaged. This model could be advantageous in the event where a merger plan has remained under-developed in the pre-merger phase.

4.3.1.2 Model 2: Minimal Interim Council

Under this model, the Interim Council would be constituted within the current provisions of the Act. It would be in place for the minimum practicable period (14-28 days) and would focus on constituting the new Council and ensuring preparation of a full brief to the new Council, on the basis of its consideration of the Memorandum of Agreement and merger plan developed in the pre-merger phase. Ideally, Interim Council members would have had the opportunity to engage with the merger process in the pre-merger phase, so as to be familiar with these frameworks. The Interim Council would appoint an interim management body at its first meeting. This model possesses the advantages of speed and simplicity.

4.3.1.3 Potential Model 3: Discretionary Interim Council

Under this model, ministerial discretion would be invoked to allow the joint merger committee established in the pre-merger phase, to act as the Interim Council. As this model bypasses the current provisions of the Act, amendment to the Act would be required. Should this be contemplated, the Minister might wish to make such provision on the basis of the joint merger committee's having given assurances of its ability to deliver critical outcomes of the pre-merger phase, of having used suitably consultative processes and having the support of all its stakeholders. A joint merger committee that can give convincing evidence against these criteria would presumably be better placed to play a constructive transitional role than either of the models suggested so far.

4.3.1.4 Potential Model 4: Administrator

Under this model, the Minister would appoint an Administrator to take over the governance functions of the merged institution in the transitional phase. As this model bypasses the

current provisions of the Act, amendment to the Act would be required. This model would have the advantage of simplicity as a transitional mechanism in instances where a merger plan has been successfully developed in the pre-merger phase. Alternatively, it could be useful in the event where powerful contestations are present in the merger and have the potential to obstruct progress in the transitional phase. By the same token, it could have significant disadvantages by association with the situation in which an Administrator is appointed by the Minister following institutional governance collapse. It could also alienate stakeholders from the merger process though creating an impression of severely reduced access to decision-making in the transitional phase.

4.3.1.5 Preparing for the Interim Council

Speaking practically rather than theoretically, the time frame within which mergers are taking place (first set of merging institutions to be established 1 January 2004) effectively precludes the amendments to the Higher Education Act which would be needed to make provision for the discretionary Interim Council and Administrator²⁶⁶ models that have been suggested here. These are more than purely abstract models, to the extent that they have been contemplated by institutions in the study sample as potentially desirable alternatives. However, the model which seemed to be gaining most favour at the time of the institutional interviews undertaken by this study, was the minimal Interim Council.

Whether institutions are envisaging an extended or a minimal model for the Interim Council, it is clear that proper preparation is required. At a minimum, this preparation would need to take the form of clear agreements – set out in a Memorandum of Agreement – as to the envisaged nature and process of the transitional phase of the merger, supported where possible by consensus proposals by Councils that can be adopted by the Interim Council where necessary. In addition, the merger plan should support these agreements with attention to the implementation issues requiring focus in the transitional phase, so that momentum in the merger process is not lost. Such linking mechanisms as these between the pre-merger and transitional phases clearly do not have legal status and much faith would be placed in the Interim Council acting within these frameworks. For this reason it would seem ideal to engage nominated Interim Council members in joint merger discussions prior to the formal date of the Interim Council's constitution. This step was suggested – and intended – by at least two sets of merging institutions in the study sample. They clearly intended to reinforce the process through membership of the Interim Council as well, nominating members who would have been closely engaged in joint negotiations already (and in one case already mentioned, who would continue to be involved after the transition through membership of the new Council). Advance engagement of Interim Councillors was seen as a way of gaining Interim Council input and understanding with regard to key merger frameworks. It was

²⁶⁶ Under the current provisions of the Act it is, however, possible for the Minister to appoint an Administrator in the case of severe contestation and following the report of an Independent Assessor. HE Act 1997: Sections 41A as amended by HE Amendment Acts of 1999, 2001 and 2002, and Sections 45-47. In such an instance, resorting to an Administrator in the process of merger would be a worst-case contingency.

hoped that transfer of contestation from the pre-merger phase into the transitional phase could be at best avoided, or at least managed, by having established good principles for the resolution of conflict in the Memorandum of Agreement. These ideas are clear evidence of institutions' efforts to take account of the political and power dimensions of merger, although the reality remains that there is ultimately no legal protection for good intentions.

Finally, it is important to note that, subsequent to institutional interviews cited here, Ministry guidelines for mergers as published in April 2003

Strongly recommend that existing councils make use of the opportunity to work with the 'interim council elect' to ensure a smooth transition. Proposals and recommendations made by the existing councils to the 'interim council elect' must, to the extent that proposals and recommendations are approved, be ratified by the interim council after the merger date to ensure that these decisions have proper legal standing.²⁶⁷

4.3.2 Interim Governance Structures

4.3.2.1 Standard Institutional Statute²⁶⁸

In terms of the Higher Education Act, the Interim Council must constitute interim governance bodies – e.g., Senate, Institutional Forum, Students' Representative Council, Convocation – as set out in the Standard Institutional Statute. One institution, in a confidential position paper, commented that the Statute does not distinguish at all between the three kinds of institution for which it is meant to serve, namely *de novo*,²⁶⁹ declared²⁷⁰ and merged institutions. Given that merged institutions derive from institutions with established traditions and histories, and that they are also in the throes of trying to craft a new institutional mission and identity, the Standard Institutional Statute becomes an unsatisfactorily bland framework. Several institutions, in their submissions to the Minister, as well as in interviews forming part of this study, commented that the composition of governance bodies, as specified in the Standard Institutional Statute, would not be optimal for their own particular circumstances.

Three institutions highlighted their Senates in particular. Two of these institutions had forged particular Senate models (elected/*ex officio* models) with care and in the particular light of transformation goals, and feared that such gains as these that had been made by themselves and their merger partners would be lost for the merged institution under the Standard Institutional Statute's conception of a joint, traditional Senate (based on membership by full professors of disciplines). The third institution had already merged and in its experience the Statute's model of the Senate had effectively led to unequal representation in the Interim Senate. This was because the merging institutions had different Senate models

²⁶⁷ Ministry Merger Guidelines 2003: Section 4.4.

²⁶⁸ Ministry of Education (2002). Standard Institutional Statute. *Government Gazette* No. 23061, Notice 85, 25 January 2002. Pretoria: Government Printers. Hereafter referred to as Standard Institutional Statute.

²⁶⁹ HE Act 1997: Section 20.

²⁷⁰ HE Act 1997: Section 21.

– one oriented around programmes, and *ex officio* in nature, and the other oriented around academic departments and traditional in nature. In the opinion of Senate members, now 10 months into the merged institution, the Interim Senate was functioning on the basis of an inequality and this was a serious matter, particularly as the new Council was still some way off from making a new Institutional Statute.

In addition, some institutions commented that the Statute makes no allusion at all to interim management, which they viewed as a serious shortcoming in the merger context.

While these comments are important, it should also be said that there appears to be no need to interpret the Standard Institutional Statute as an absolute tool. The system of institutional governance set out in the Statute is abstract or *in vacuo*. It can only be useful as an operational part of an institution, and this implies it may be adapted in order to be fit for purpose. Acknowledging that the Statute needs to provide more than a formal transitional mechanism, but should be a bridge to a new institutional identity as well, institutions could make provision in advance for deviations from the Statute, in terms of the interim governance structures they envisage for the merged institution. These deviations could be negotiated and agreed as part of the Memorandum of Agreement, with advice sought from the Minister as needed.

4.3.2.2 *Interim Senate*

Some of the compositional complexities implied for the Interim Senate have already been alluded to in the previous section. Most academics interviewed as part of this study appeared to have some difficulty in conceptualising what the Interim Senate should look like and how it should function. Additional complexities for the Interim Senate seemed to present themselves for merger partners whose merger would result in a comprehensive institution. They felt that Interim Senate functioning could be significantly complicated by the different teaching and learning strategies pursued by universities and technikons.

In the view of most institutions, it might be difficult to engage the Interim Senate in the transitional phase of merger, given the infrequency of its meetings, as well as the transitional nature of authority in this phase. In one institution that had already merged, the Interim Senate had deferred decisions until the appointment of the substantive Council and this had ultimately meant that the establishment of new Faculties had occurred by a relatively poor process.

Despite the difficulties highlighted, all institutions in the study sample acknowledged that it would be critical to ensure that the Senate sector not be marginalised in the merger process and that mechanisms to overcome this danger needed to be found. One institution made the explicit suggestion that the Interim Senate should delegate oversight of the transition process (as in the pre-merger phase) to an executive committee. Such a mechanism would facilitate ongoing input from the Senate sector to the merger process. In addition, institutions

emphasised that the Interim Senate, through its members, would need to give sustained attention to questions of academic integration and new academic structures, during the transitional phase, so as to have specific proposals to make to the new Council.

The transitional phase clearly poses particular difficulties for an Interim Senate. On balance, the nature of these difficulties suggests that the shortest possible time between the establishment of the merged institution and the appointment of the permanent Council would best enable effective Senate input to the process of merger and effective governance of academic integration.

4.3.2.3 Interim Institutional Forum

As was true in the discussion of the pre-merger phase, merging institutions appeared to have given little thought to the role and function of the Interim Institutional Forum in the transitional phase. Nevertheless, the constitution of the Interim Institutional Forum by the Interim Council as early as possible in the transitional phase seems to be advised. The Interim Council itself is a non-representative structure and therefore needs this statutory advisory committee as a key communication channel with stakeholders. This might imply that it would be wise to convene campus forums with appropriate representation on the Interim Institutional Forum, particularly in the case of multi-campus institutions. In addition, the Interim Institutional Forum – along with the Interim Senate – must be engaged in a fair process of selection of interim management and executive management for the merged institution²⁷¹ (the Interim Council may wish to initiate an executive search process in preparation for the substantive Council).²⁷² The Interim Institutional Forum would also be strongly advised to take up a brief to investigate issues of institutional culture, ethos and identity for the merged institution. These questions are going to require active attention in the merged institution for several years to come, and form one of the most critical aspects of the Institutional Forum's brief as established by the Higher Education Act.²⁷³

4.3.2.4 Other Interim Governance Structures

In its consideration of the Interim Council, this report has already noted difficulties posed for an Interim Council coming into existence without an extant committee structure, and hence with minimal fiduciary controls or avenues to secure participation. Accordingly it has suggested that the Interim Council should establish a basic committee structure (Audit, Finance, Planning, Council Nominations Committees) with all possible speed, especially in the instance where it is to be in place for more than 14–28 days. The Standard Institutional Statute appears to require the Interim Council to establish an 'executive committee, an audit

²⁷¹ Advising the Council on the senior management appointments is a key role of the Institutional Forum (and hence its interim counterpart) – see HE Act 1997: Section 31(1).

²⁷² Further attention is given to the issue of appointments processes under the section dealing with Interim Management (Section 4.3.3).

²⁷³ HE Act 1997: Section 31(1).

committee, a finance committee, a remuneration committee, and such other committees as may be required.’²⁷⁴ However, this is not reinforced by any provision of the Higher Education Act and appears to be one of those instances where the lack of specificity of the Standard Institutional Statute serves the merger process badly.

A single Interim Students’ Representative Council is indicated by the Standard Institutional Statute.²⁷⁵ Presumably this would not preclude the existence of Interim Campus SRCs, with appropriate representation on the statutorily established Interim SRC. The mechanism of Campus SRCs is likely to be of particular importance for multi-campus institutions in the transitional phase, and possibly beyond.

An ‘Interim Convocation’ would to all intents and purposes be identical with the Convocation of the merged institution as constituted by the substantive Council. However, it would probably be convened only in the event of an Interim Council being in place for a full year. The Ministry has clarified that ‘in the event that the election of new office bearers does not take place during the interim council’s term of office ... the existing office bearers should jointly fulfil the duties and functions of convocation.’²⁷⁶ With respect to the Chancellor, the Standard Institutional Statute states that ‘the registrar designated by the interim council fixes a closing date for the return of voting papers and sends notices calling for nominations for the election of a chancellor.’²⁷⁷ The Ministry has however suggested that, ‘while the interim council has the authority to elect a new chancellor for the merged institution ... it would be advisable to leave this appointment up to the new council to finalise and until such time, the Interim Vice-Chancellor should perform the functions of the chancellor for the new institution.’²⁷⁸

4.3.3 Interim Management

The Higher Education Act stipulates that the Interim Council must appoint an interim management body and co-opt three members of this body to the Council as non-voting members. However, no specifics are provided in the Act, or in the Institutional Statute, as to how the interim management should be constituted. Institutions in the study sample expressed a range of concerns around interim management and its potential impact, in combination with the Interim Council, on governance in the transitional phase of the merger.

These concerns revolved, in the first instance, around a possible leadership vacuum through delay in the appointment of interim management. The Ministry has suggested a means of avoiding such a vacuum by suggesting that

²⁷⁴ Standard Institutional Statute: Section 18.1(a-e).

²⁷⁵ Standard Institutional Statute: Sections 36-43. ‘However, this may not be possible due to the timing of SRC elections, which usually take place in the latter half of an academic year. If this is not possible, then in the transitional period the existing SRCs remain in place but should jointly fulfil their functions.’ Ministry Merger Guidelines 2003: Section 4.5.1.

²⁷⁶ Ministry Merger Guidelines 2003: Section 4.5.2.

²⁷⁷ Standard Institutional Statute: Section 6(a).

²⁷⁸ Ministry Merger Guidelines 2003: Section 4.5.2.

The 'interim council elect', as part of its preparatory work for taking office should appoint the *interim vice-chancellor* for the new institution on the understanding that this appointment would only take effect on the date of the merger. In arriving at its decision the 'interim council elect' must consult with the senates and institutional forums of the merging institutions on the *process* of appointment. The responsibility for deciding on the appointment, however, resides with the 'interim council elect'.²⁷⁹

Institutional concerns revolved in the second instance around practical considerations. As the Interim Council cannot appoint members of management for any period extending substantially beyond its own mandate, it would not be in a position to offer any management contract for longer than six months (potentially renewable by a further six months or until such time as the appointment of the new Vice-Chancellor).²⁸⁰ For any incumbent, this presents a period of considerable insecurity, as well as potential subjection to successive rounds of very public selection processes. Some interviewees concluded that the transitional phase would therefore serve to deplete the merged institution of its most capable members of senior management, as these departed to take up more stable and longer-term appointments at other South African institutions, or at institutions abroad. This is a real concern, given the current shortage of leadership in the South African higher education sector, and particularly given that restructuring has as one of its objectives the resolution of this shortage. An additional question raised by the institutions was the fate of those institutional executives who do not serve on the interim management body. While the Higher Education Act stipulates that they would transfer to the merged institution on their existing conditions of service, their role would be unclear and highly-qualified people could be at an effective loose end. Caution would need to be exercised by the Interim Council (and the substantive Council) with respect to the contractual conditions in force for these and other management appointments. Once again, the Ministry has attempted to address these concerns through suggestions in its merger guidelines. The Ministry suggests, first, that the Interim Council should assign roles and functions to existing vice-chancellor/s, taking into account the demands of managing multiple campuses. Second, all other existing managers should continue in the positions they occupy in an interim capacity until such time as institutional structures have been consolidated and substantive appointments made. Third, while there should be no expectation that contracts which terminate before the date of merger will be extended, the Interim Council could decide to extend such contracts for operational reasons.²⁸¹

A third set of institutional concerns highlighted political sensitivities having to do with interim management. The co-option of three members of the interim management body to the Interim Council appeared to the institutions to risk exacerbating problems of non-

²⁷⁹ Ministry Merger Guidelines 2003: Section 4.4.1.

²⁸⁰ The Ministry has clarified that 'the period of appointment of the interim management must not extend beyond the appointment of the substantive vice-chancellor and other managers, which appointments must be made by the new council, after following the processes as determined in the Standard Institutional Statute'. Ministry Merger Guidelines 2003: Section 4.4.1.

²⁸¹ Ministry Merger Guidelines 2003: Section 4.4.1.

representivity and opacity associated with the Interim Council and discussed in an earlier section of this report.²⁸² Institutions suggested that these arrangements, if badly handled, could alienate the trust and loyalties of institutional members and stakeholders at the very start of the new institution. The experience of one institution in the sample that had already merged suggested that this risk was very real.

On the basis of observations made by institutions in the study sample a number of conclusions can be reached. First, the appointment of interim management by the Interim Council should be a transparent process, conducted with the advice of the Interim Institutional Forum and Interim Senate (or Institutional Forums and Senates, if this process is undertaken by an 'Interim Council elect'). Second, interim management should not include an Interim Vice-Chancellor unless there is a good chance that this individual will be considered for a substantive or an acting executive post in the merged institution. Third, as in the case of the Interim Council and the Interim Senate, the temporary nature of interim management suggests that good governance in the merger process would best be served by as short an interval as possible between the establishment of the merged institution and the constitution of its new Council, which would in turn appoint a Vice-Chancellor and executive team. The Interim Council could aid this process by initiating a search process as a means of support to the new Council. Fourth, the development of key frameworks in the pre-merger phase should support the appointment of interim management. This can be achieved if the Memorandum of Agreement sets out principles to be applied in the appointments, and the merger plan clarifies the longer-term leadership and skills needs of the merged institution.

Pre-merger discussions could surface innovative approaches to the question of interim management. One institution in the study sample suggested, for example, that the joint merger secretariat established in the pre-merger phase might serve as an effective interim management. Under this model, an administrator ('Interim Merger Manager') would be appointed, with the necessary support, to ensure smooth implementation of the merger through the transition. No Vice-Chancellor would be guaranteed a role in the interim management body, and no member of the interim management body would be guaranteed an executive role in the future. Such a model could be viable in a situation where the transitional phase is short (a few weeks); in the longer term it may run the risk of creating a vacuum in institutional leadership.

4.4 INTEGRATION PHASE

The integration phase is the longest phase of merger. It begins with the constitution of the new Council and is likely to continue, in almost all estimates, for a period of at least five years, and up to ten years. This is the period during which the merged institution establishes and implements its vision and mission, establishes its culture, ethos and identity, integrates teaching and research, and aligns policies, systems and procedures. As such, this is the phase during which institutional management must tackle and resolve operational aspects

²⁸² See the section in Chapter 4 of this report which deals with the Interim Council (Section 4.3.1).

of the merger. As it is not within the brief of this report to investigate operational issues, the following sections seek to draw out the implications for governance of this phase.

4.4.1 Forging a New Institutional Culture and Identity

National policy emphasises that the creation of new institutional cultures and identities is the critical driver behind higher education restructuring. Accordingly, the achievement of a distinctive institutional culture in the merged institution, aligned to national transformation objectives, will be a key measure of success of a merger. However, given that culture develops on the basis of vision, mission, strategy, policies, systems and procedures, it can be anticipated as an outcome of merger only after a period of time; as such consideration of culture and identity is appropriate to the integration phase of merger.

Defining 'culture' is notoriously difficult and this is not the place to enter into a theoretical debate for this purpose. An overview of relevant literature²⁸³ indicates that institutional culture encompasses values, beliefs, norms, expectations, assumptions, symbols, traditions, customs, behaviours, processes and products. As the focus of this study is governance, and not organisational development, this section attempts to draw out the relationship between structures and processes of governance and the elements of institutional culture.

The analytical framework for this study has anticipated where governance may pose challenges to the establishment of institutional culture and identity. First, it was anticipated that the mode of merger governance will have implications for the culture that ultimately develops in the merged institution. An institution whose governance in the process of merger has been 'democratic and well managed' will establish a very different culture from one whose governance has been 'management focused' or 'contested'. Second, the analytical framework anticipated that the complexities of merger could move institutions outside the parameters of policy values held for South African higher education institutions. Mergers of institutions with very different histories could result, for example, in 'institutions within an institution' or the survival of the predominant governance values of one institution and the obliteration of other kinds of values, regardless of the inherent worth of these values. Third, it was anticipated that different sections or layers of the institution could react differently to the unfolding merger. In other words, subcultures in the institution – based on organisational role, institutional position or possibly disciplinary affiliation – could set up variable patterns of acceptance or resistance to the merger. Such groupings would be more or less likely to participate in, or resist, the merger, depending on the extent to which the process employed modes of governance (e.g. collegial and co-operative) which they valued. Should groupings become disaffected, this could result in 'structural holes' that would impede institutional and academic development.²⁸⁴

283 Keup, J.R., Walker, A.A., Astin, H.S. and Lindholm, J.A. (2001). *Organisational Culture and Institutional Transformation*. *ERIC Digest* No. ED464521. Washington D.C., ERIC Clearinghouse on Higher Education. Available at http://www.ericfacility.net/databases/ERIC_Digests/ed464521.html. (7 April 2003).

284 See the section in Chapter 2 of this report which deals with Concepts to Evaluate Merger Governance (Section 2.2.3).

Perspectives offered by institutions in the study sample have borne out much of what was anticipated. First, institutions drew attention to issues and concerns around governance in the pre-merger and transitional phases that they believed could have negative or unintended consequences upon the nature of the merged institution. These have been highlighted in earlier sections of this chapter and, on the assumption that the ideal outcome of higher education restructuring would be a set of institutions that are democratic and well-managed, proposals have been made that it is believed would support governance of this kind, and the longer-term emergence of an institutional identity consistent with such governance.

Second, some institutions signalled that their merger could result in a type of institution that was a variant on the policy idea of a unitary institution, with a unitary culture oriented around the strategic goals of the National Plan. Institutions involved in comprehensive mergers spoke of the difficulty of creating a unified institutional culture in this situation. In the first place, institutions emphasised that the nature of comprehensive institutions was under-defined and as such could mean different things to different people. Most institutions had concluded that a process of discovery – via formal research, or less formal means – as to the meaning of ‘comprehensive’ would be followed, but remained unsure about what this might imply. Technikons, for example, frequently had the uneasy feeling that they might be relegated to the role of junior academic partner, either subject to the ineluctable pressure of ‘academic drift’, or somehow becoming that part of the merged institution that catered for students with the least impressive academic record. They tended to emphasise their orientation around programmes, while universities emphasised their traditional orientation around disciplines. Multi-campus institutions provide another set of challenges for the creation of a unified institutional culture. In one case of a multi-campus merger, one partner had developed a concept which would involve the setting up of a central seat to establish institutional brand, standard policies, systems and procedures, while the campuses would develop sub-brands and recruit students in the appropriate market niches for the sub-brand. This model appeared to encourage the existence of subcultures and to base the need for them upon significant geographical distance between campuses, and other factors such as variable language policy. The model was less clear as to how an institutional culture implemented from the centre would keep the subcultures in check or, at least, in a creative tension contributing to the overall identity of the institution. With respect to the impact of incorporation upon institutional culture, an institution which was being dismantled and whose campus subdivisions were being incorporated into other institutions, expressed concern that the distinctive culture it had built up as an African institution serving the academic development needs of black students, would be completely destroyed. In its experience, merger/incorporation processes in which it was involved focused on ‘logistics and technicalities’ while the ‘language of transformation’ – and hence the values it believed it could bring to a new institutional culture – was being lost.

Finally, most institutions spoke, or gave evidence in one way or another, of different layers of understanding of the merger process under way. In an institution that had already merged, executive management recognised the cultural differences between the partner institutions and how various perceptions of relative inferiority/superiority had influenced

– and continued to influence – the merger process. Academics certainly spoke of these things, but in the words of one academic:

At departmental level, there was a genuine willingness to merge. The problems actually started when we ran into different administrative systems and this created anxiety about how decisions would be made. What worries us is that we are introducing more autocratic layers, all the way to the top.²⁸⁵

The introduction of a centralised purchasing system – when half of the merged institution's staff were used to a decentralised system – was used as an example and had sparked sensitivities from the same 'half', who felt it implied they were not to be trusted (after all, their institution had incurred a large deficit). In another case, an institution's executives were concerned about how the vision and mission of the (comprehensive) institution would be formulated. Academics seemed more relaxed and focused at their own level, as conveyed in the following point of view: 'Programmes will probably not be substantially different from what we have, but there will be different streams. If governance allows for parallel servicing structures in the interim, we can make progress [in academic integration] almost immediately.'²⁸⁶ In a third example, members of management of a historically-disadvantaged institution merging with a historically-advantaged one, were impressed with the capacities and capabilities of the partner university and eager to embrace these benefits. For their part, Council members were less willing to be seduced and were oriented around the political transformation agenda of the merger, emphasising key questions about language policy, religious identity and branding.

It is clear from the examples given above that institutional culture spans the spectrum from institutional vision to day-to-day administrative procedures; from governance through management to administration; and across all institutional levels and stakeholders. This being the case, culture is furthermore likely to play out at the micro-level in ways that may appear insignificant but could prove to have a substantial impact on the ease with which institutions that have distinct traditions and codes are merged in practice. Incompatibilities with respect to different institutional conventions of dress, forms of interpersonal address, and even student and staff parking arrangements, are all examples of this kind. Misunderstandings and conflicts around such issues as these could unravel the new institutional mission from within, by fracturing the institutional identity and ethos that is meant to support that mission.

In governance terms, the process of establishing institutional culture and identity accordingly requires conscious attempts to plan, implement and monitor institutional development. This process could begin in the pre-merger phase with 'culture audits'²⁸⁷ and principles established

²⁸⁵ Unattributed quotation from confidential institutional interview conducted as part of this study.

²⁸⁶ Unattributed quotation from confidential institutional interview conducted as part of this study.

²⁸⁷ It has been suggested elsewhere in this report that an audit of institutional cultures could be an element of due diligence (see section 4.2.4.6). Alternatively, institutional and joint task teams could be established for this purpose and the Institutional Forum could be given a brief to investigate and advise upon issues of institutional culture, beginning in the pre-merger phase.

in a Memorandum of Agreement, enacted through the merger plan and, ultimately, the merged institution's organisation and governance design. In addition, the new Council would need to exercise its accountability for establishing the merged institution's culture and identity in a number of ways. For example, the Council could require inputs and advice from other governance actors and stakeholders. This could include the conducting of climate surveys by management, and specific reports by Senate. It should include specific requests for advice from the Institutional Forum, which holds institutional culture and equity policy – which is likely to intersect with issues of culture – as critical elements of its brief.²⁸⁸ Such requests for advice would need to be enabled by resources as needed, depending on the scope of the advice requested, and could require an expanded Institutional Forum budget. Council should evaluate and establish the Institutional Statute, institutional rules and policies it makes in the light of their likely impact upon institutional culture, and should ensure the institutional strategies, plans, targets and budgets it approves support the institutional culture as espoused in, for example, vision and mission statements. Finally, Council should provide a detailed report on institutional culture as one of the items of its annual report to the Minister.²⁸⁹

4.4.2 Governance and Merger Integration

The previous section highlighted the Council's role in both steering and monitoring the establishment of a new institutional culture and identity. Clearly, this role is embedded in the Council's overall role and responsibilities in the merged institution. The Council, as the supreme governance body of the merged institution, holds overall accountability for merger integration, including the establishment of institutional vision and mission and the approval of policy, strategy and budgets giving effect to them. The Council holds fiduciary responsibility for the use of public funds applied to the merger, and is publicly accountable for demonstrating the results achieved with these funds, in particular within the context of national policy goals and priorities. In addition, the Council is required to assess its own governance performance on an annual basis. Thus it will need to give evidence of how it has held management accountable for delivering against the institutional merger implementation plan and the institutional operating plan required by the Ministry, as well as evidence of how it has supported management in its efforts to do so.

In order to ensure its capacity to govern merger integration, as well as to fulfil its other responsibilities, including those with respect to reporting to the Department of Education, the new Council would need to make the new Institutional Statute and constitute other statutory governance structures with all possible speed. It has been suggested that work conducted in the pre-merger and interim merger phases could already have developed understanding of what the provisions of the Statute could be, to aid the new Council in its task. In addition, the new Council should establish a functioning committee structure

²⁸⁸ HE Act 1997: Section 31(1).

²⁸⁹ The manual on institutional reporting stipulates that the chairperson of Council's report should include 'developments, academic and other, that influence progress towards the attainment of the mission and objectives of the institution'. DoE Manual for Annual Reporting 2001: Section 3.1.1.

– including joint committees with Senate where needed – with an agreed schedule of delegated authorities, as soon as possible. Priority committees to be established would include Audit, Finance and Planning Committees. Depending on the degree of progress that has been made during the pre-merger and interim phases of the merger, it could be desirable to convene a Human Resources Committee as well, or to convene human resources and/or employee relations task teams to provide the Council with information and advice during the period that human resource migration is being planned and negotiated. Clearly the committee structure would need to be designed to support the particular merger integration agenda of the merged institution, as well as the ongoing governance needs of the institution. Institutions in the study sample, asked to cite what they believed would be the most critical operational decision areas facing the new Council and Senate in the merger integration period, named the following:

- The Institutional Statute, institutional rules, disciplinary codes, regulations and procedures;
- The institutional model – i.e. programme and qualification mix of the new institution, the teaching and learning strategy, the research focus of the new institution;
- The institutional plan and budget, including the process for determining these;
- Academic administration in the new institution, including the admissions policy, the student registration system, and fee structures;
- Human resources integration and labour relations issues, including harmonisation of staff policies and procedures, harmonisation of salaries and benefits, staffing plan for the new institution, and any restructuring and/or voluntary retrenchments required;
- Financial and technical services integration;
- Management information systems integration;
- Information technology integration;
- Libraries integration;
- Physical facilities integration and capital expenditure projects; and
- Student-related issues, including arrangements for registration, examinations, graduation, student services and student governance.²⁹⁰

Institutions emphasised that, as with any well-governed institution, committees established by the Council and Senate of the merged institution to support decision-making in such areas as these, should not usurp or become involved in day-to-day operational management. Suitable mechanisms would need to be found to manage the boundary between governance and management in the merger integration phase. Bearing its governance responsibilities in mind, as well as the continuing and sizeable agenda of merger integration, the Council may be advised to establish a Merger Integration Committee with appropriately delegated authority, or to delegate detailed oversight of merger integration to its Executive Committee. In this way, the designated committee would serve as a clearing house for key merger issues before these pass for ratification or approval by the substantive Council. Such a committee, if convened, should be constituted in accordance with the general rule of Council composition,

²⁹⁰ It is beyond the scope of this report to go into further detail on these issues. The Ministry's merger guidelines provide considerable additional detail and specific suggestions on all of them – see Ministry Merger Guidelines 2003: Sections 5-10.

namely: that no less than 60% of membership should be external, and no more than 40% of membership should be internal. Members could include, for example, the chairperson of the Council, the head of the Finance Committee, two other external members of the Council, the Vice-Chancellor and a member of the Council representing staff or students, as nominated by Council; the executive or member of senior management responsible for merger integration could be a member in attendance.

4.4.3 Governance and Academic Integration

The process of academic integration will configure the core business of the merged institution and as such will be the most critical process of all for creating a truly new institution, with a unique academic identity and mission. In the gamut of merger complexity, this is one of the most complex areas and it is not appropriate for this report to delve into all its aspects; however, this section highlights the most essential concerns for governance in academic integration.

Institutions in the study sample – all but one of whom were interviewed in the pre-merger phase – recognised that academic integration in the merged institution would be a detailed and time-consuming process, and one that would engage complex academic and stakeholder interests. In their view, a fully reconfigured academic enterprise would be achieved only several years into the integration phase. A number of reasons were given for this, and these are summarised and developed in the following paragraphs.

First, given the time frames of merger, it is not practicable to introduce a completely new suite of programmes for first-time enrolling students from the time of establishment of the merged institution. In the first place institutions are obliged to maintain existing programmes for all registered ('pipeline') students, during the period of institutional transition.²⁹¹ The merged (or incorporating) institution

Continues with all academic programmes offered by the old higher education institutions under the rules applicable to the respective higher education institutions immediately before the date of the merger, until such programmes and rules are amended or restructured by the new Council; and awards a degree, diploma or certificate to a student who qualifies before or after the date of the merger in its own name, but such degree, diploma or certificate must also reflect the name of the education institution at which the student was registered immediately before the date of the merger if the student was so registered.²⁹²

Secondly, in terms of the Programme and Qualification Mix exercise carried out during 2002 and now being implemented, institutions are not at liberty to offer programmes in non-approved areas and new programmes are subject to a process of regional review. Institutions were thus aware that, at the same time as they would be developing a new 'academic model', they would also be deciding – within a range of different processes, at different

²⁹¹ I.e. a period of a few years and not the 'transitional' period of merger governance as defined in this study.

²⁹² HE Act 1997: Section 2(2H)(i) and(ii), as added by HE Amendment Act 2002: Section 5(c).

levels, and with a greater or lesser degree of political sensitivity – how best to maintain, teach and apply academic rules to all existing programmes during the transition period, whether and when to suspend admissions for certain programmes, whether and when to phase out, discontinue or initiate any programmes, and how to assign academic staff during and after the transition.

Second, decisions with respect to how to select, develop, articulate and deliver programmes in the merged institution are far from simple in a context where policy states that no existing delivery sites should be closed, that access to higher education should be increased for students from all walks of life but particularly from disadvantaged communities, and that new institutional forms should be implemented. One of the institutions in the study sample, all of whose campus subdivisions were being incorporated into other institutions, expressed disquiet that given limited time available to plan programme integration it seemed easiest from the point of view of receiving institutions involved in mergers simply to close programmes being offered by the campus subdivisions being incorporated, with the implication that associated points of delivery might be closed as well. Furthermore, they pointed out that no provision had been made for staff development in the mergers and incorporations.

Yet our academic staff have been ‘wired’, even without knowing it, to a particular teaching methodology and process of curriculum development, which may not fit with that of the merger partners. If these issues are not addressed, most of our academic staff could end up being retrenched.

In comprehensive mergers, institutions were aware that the choice of programmes for the new institution would be complicated by the need to define clearly the mission of the comprehensive institution. Some institutions envisaged ‘parallel tracks’ as the practical solution, at least for some years during which these academic streams would ‘grow towards each other’. Others had a different point of view. They felt that the institution would have to go to the drawing board afresh, given that a comprehensive institution should not simply straddle both university- and technikon-type programmes, but should develop new and integrated products closer to the middle ground of this continuum. This process would necessitate parallel tracks in the interim, but these institutions did not envisage them simply converging in the process of time. Clearly, all of the internal and national policy issues – as well as the human and political issues – that are implicit in these examples would have to be processed by the merged institution in making decisions about its academic offerings.

Third, from a governance point of view, institutions cannot make final decisions affecting academic integration before the final phase of the merger, as no prior decisions may be taken which will be binding upon the new Council. Thus, while the Senate sector in the pre-merger and transitional phases can develop thinking as far as possible to inform agreements in principle as well as the developing merger plan, substantive decisions by definition have to be deferred to the integration phase. In addition to these considerations, institutions felt it would be unwise to base decisions informing academic integration in anything other than a formally adopted institutional vision and mission. This appeared to be

borne out by perspectives offered by academics in the one institution in the study sample that had already merged. They suggested that new faculty and departmental structures and physical relocations had been determined in the absence of a clarified vision for the merged institution, and that structure was in effect creating an institutional bias yet to be underpinned by an explicit institutional mission.

Finally, even once decisions have been taken as to the academic model and academic governance structures (i.e. faculty and department structures, academic leadership, Faculty Boards and Senate) for the merged institution, academic integration requires further planning, decision-making and management at multiple levels of the institution. For example, institutions were aware that decisions would need to be taken and implemented in such areas as administrative structure, positions and personnel, physical facilities and equipment, financial planning and budget allocation.²⁹³ Policies would need to be determined and implemented with respect to academic recruitment, appointment, performance and promotion. In this process, layers of complexity would no doubt become evident and need to be debated and resolved within the ambit of collegial self-governance, which could well be a site of academic interest group activities and power struggles as well. For example, in comprehensive institutions, there would be a need to take account of existing differences in the degree of teaching and research orientation amongst academic staff.

In the context of academic integration, an overarching policy challenge for the Council and Senate is to find an appropriate balance between quality and equity that can inform integration even at lower levels. Equity is a fundamental property of good governance in South African higher education and cannot be divorced from notions of quality provision respecting responsiveness to national, regional and local needs, or the imperatives of demographic representivity. Merging the 'academic heartland' has to bring into play at the level of programmes, departments, and the faculty the same notion of good governance as at higher levels of institutional governance. Thus even in the collegial setting, democratic practices and where feasible, stakeholder representation' are important. Associated with this should be a commitment to reciprocity, consensual decision-making, ethical leadership, and the mission of the institution – keeping in view the goal of establishing an excellent higher education institution that provides quality service to its students, develops staff members to their fullest potential and serves surrounding communities and society at large. No single merger partner's notion of quality or excellence should inform the process of academic integration; instead a consensus view should be formulated synergistically by all involved merger partners and stakeholders, informed by system-level policy concerns. Thus, the adequacy of any notion of quality, and decisions as to the continuation, change or closure of existing academic programmes and structures in the process of integration, should be negotiated in the co-operative setting.

The ultimate criterion to assess the level of academic integration will be the degree of consistency between the new institutional mission and the programme and qualification mix

²⁹³ A detailed and instructive list of 'unit-level transition planning' issues, applicable to the merger of faculties and departments, is provided by Eastman and Lang 2001: 155-157.

of the merged institution. A merged institution can only be considered fully integrated once it has achieved integration at the level of teaching, learning and research and is able to assure itself and the Higher Education Quality Committee (HEQC), that it is 'fit for purpose'.

4.4.3.1 Merger Governance, Quality and Quality Assurance

Awareness of academic quality-related issues is likely to be one of the most important factors determining the success of merger in the long term. As an approach to managing academic integration, due regard for quality is in line with the objectives of the restructuring process in general, and mergers in particular. At the systemic level the national quality assurer, the Higher Education Quality Committee (HEQC), has adopted a multi-faceted definition of quality:

- 'Fitness of purpose based on national goals, priorities and targets.
- Fitness for purpose in relation to a specified mission within a national framework that encompasses differentiation and diversity.
- Value for money judged in relation to the full range of higher education purposes set out in the White Paper on Higher Education. Judgements about the effectiveness and efficiency of provision will include – but not be confined to – labour market responsiveness and cost recovery.
- Transformation, in the sense of developing the capabilities of individual learners for personal enrichment, as well as the requirements of social development and economic and employment growth.'²⁹⁴

This definition of quality makes it clear that academic integration cannot be relegated to the programme or department level. Rather, academic integration is a process that needs high-level governance attention and open lines of communication between different levels of the academic organisation. The essential element of consistency between the merged institution's mission and its programme and qualification mix must be recognised in the process of quality assurance (and its integral component of programme accreditation) as part of merger.

In the context of merger, quality management entails ensuring a high level of consistency between the practices of teaching, learning, research and community service, and the objectives of national policy, institutional mission, labour market and social needs, efficiency and effectiveness, and transformation. While the specific functions of the HEQC are to promote quality assurance in higher education (i.e. audit the quality assurance mechanisms of institutions of higher education, and evaluate and accredit programmes in the higher education band of the National Qualifications Framework), the primary responsibility for quality management still rests with the institution.²⁹⁵ Thus, in the pre-merger phase, the HEQC encourages inter-institutional communication at the level of programme development

²⁹⁴ Higher Education Quality Committee (2001). 'Quality Assurance in Higher Education'. Pretoria: Council on Higher Education. Hereafter referred to as HEQC 2001.

²⁹⁵ HEQC 2001: 2.

and requires that new programmes submitted for accreditation by one merging institution must have been approved by the other merger partner/s. This approach resonates with the national policy approach that all new programmes must undergo a process of regional clearance – irrespective of whether an institution is involved in a merger.

In preparation for full academic integration, institutional quality management systems need to be integrated, and it is clear that the earlier this can be achieved, the better. While there are no specific guidelines on how to do this, the HEQC quality assurance, accreditation and audit frameworks, and particularly two recent documents, can assist institutions in the integration of their quality management systems and the development of a new system. One of these is the recently released HEQC discussion document on the proposed audit criteria for the first cycle of institutional audits (2004–2009).²⁹⁶ It highlights the importance of the fitness of the mission of institutions in relation to local, national and international contexts, and the need for formal links between planning, resource allocation and quality management. Good quality management is characterised by clear and efficient arrangements for the management of teaching and learning, which include a well-developed academic plan that articulates well with the institutional mission and goals; quality management mechanisms to ensure and enhance the quality of teaching and learning; a quality improvement focus with identified priority areas; staff development policies and practices that promote professional competence; mechanisms that promote student access and success, for example, by means of academic development programmes; and adequate staff and student information management systems. A number of expectations for the quality management of research and academic support services are also articulated in the document.²⁹⁷ The HEQC foregrounds the key role played by the institutional management, including deans and heads of academic support services.

Academic integration and the development of an integrated quality management system at the institutional level has to take into account that the national quality assurer requires *equivalence* of the quality of academic services across all campuses of an institution, including satellite campuses and tuition centres.²⁹⁸ This affects all merged institutions, given that mergers result in multi-site or multi-campus institutions. Such concerns as these, regarding the integration of quality management systems in the context of mergers, were raised by the HEQC in the course of one-day visits to institutions during late 2002 and early 2003.

A second key document on quality management, in the context of academic integration, is the chapter of the Ministry's merger guidelines that deals with academic planning, quality assurance and research, which was developed with significant input from the HEQC. It crucially recommends that an early inter-institutional agreement be reached on quality assurance policies and structures.²⁹⁹

²⁹⁶ Higher Education Quality Committee (HEQC) (2003). Proposed criteria for the HEQC's first cycle of audits: 2004–2009. Discussion Document. Pretoria: Council on Higher Education. Available at: www.che.ac.za (11 April 2003). Hereafter referred to as HEQC 2003.

²⁹⁷ HEQC 2003: 19–23.

²⁹⁸ HEQC 2003: 20–22.

²⁹⁹ Ministry Merger Guidelines 2003: Section 5.1.

Current experience at the institutional level indicates that quality management and quality assurance in particular are given too little attention in the early phases of merger, especially at the higher levels of governance. While agreement on basic policies and structures of quality management should indeed be sought early, preferably in the pre-merger phase, quality managers interviewed by the researchers typically felt marginalised by inter-institutional governance structures (and, in one instance where the process had progressed further, had felt marginalised by interim governance structures as well). Thus, in several cases, quality managers in merging institutions had initiated collaboration on a one-to-one basis, sharing information on policies, structures and systems and beginning to elaborate joint policy proposals.

In conclusion, given the complexity of academic integration, it seems fair to estimate (and institutions in the study sample have estimated) that the merged institution will only be in a position to offer its new suite of academic programmes some three or four years after the date of establishment. From examples given, it is also clear that academic integration, as with other aspects of merger, poses the risk of unintended consequences that could run counter to the intentions of policy. Thus the process of academic integration cannot and should not be rushed, although it can be aided from the earliest stages of the merger process through co-operative discussions between academics in partner institutions, appropriate academic audits conducted by Senate and Faculty Boards, the early integration of quality management systems and the institution of a basic quality cycle. Substantive decisions should be taken by Senate and Council in the integration phase, with input as necessary from Faculty Boards and other academic governance structures, and with due respect for an appropriate balance between equity and quality concerns. Decisions respecting academic structures, academic programmes, qualifications and curriculum, admissions, exit and student placement criteria, points of academic delivery, academic rules and other matters should be driven by a defined vision and mission and should be taken only once that is in place.

4.4.4 Critical Considerations in Multi-Campus Governance

This study has defined multi-campus institutions as unitary institutions with geographically distant delivery sites. Unitary mergers have been defined in this report and by policy as mergers that result in a single governing body (Council), a single Senate and a single chief executive body.

The study sample included seven institutions that had satellite, extended or other main campuses at some distance. The outcome of four of the mergers (some including incorporations) in the sample was a merged multi-campus institution. Consistent with the definition of 'multi-campus institution' as used in this report, each of the existing multi-campus institutions had a single Council, Senate, Senate Executive,³⁰⁰ chief executive body, and Institutional Forum.

³⁰⁰ One of the sample institutions had three Senate Executives (academic, staff, research), but these were institution-wide.

Student governance arrangements, however, differed across institutions. For example, one technikon with five satellite campuses had established Students' Representative Councils (SRCs) at its main site and at campuses at a significant distance, while campuses within the same metropolitan radius had representatives who met with other student bodies. One university with four campuses – two of which were at significant distance, and another university with two campuses at significant distance, had established SRCs at each one. A distance-education technikon with regional campuses³⁰¹ around the country had established regional SRCs with representation on the institutional SRC. A university with a distance-education campus and seven other campuses around the country had established campus SRCs and a University SRC.

Institutions in the sample took account of their campuses in the composition of statutory governance bodies as specified in their Institutional Statutes. Thus Institutional Forums might include representatives from each campus SRC, and Senate and staff representatives from each campus. Depending on the nature of the Senate, campus principals or regional directors might be specified as members of Senate. Campus SRCs might have individual representation on Senate. In one case, Senate members of Council were nominated with equal representation from each of the university's two main campuses. External Council members might be designated in the light of their affiliations with specific campus communities. In one case, regional 'councils' or advisory committees had been established, and these appointed one member each (external) to the Council.

Within the sample, varying arrangements had been made with respect to the authorities of campus principals, with a distinction generally drawn between the extent of authority appropriate for operational matters and that appropriate for academic matters. Thus, in most cases, the campus principal had specified authority for operational campus matters, working within the framework of unified policies and systems for key areas – such as academic administration and finance – and in some cases within the explicit framework of a schedule of delegated authorities as well. Over time, these authorities may have shifted and changed in response to particular circumstances. Academic affairs were handled within the framework of delegations established for the institution by Council and Senate. In some cases, campus academic boards and/or academic committees existed and their authorities were delimited in accordance with the roles and responsibilities of the single Senate and Senate Executive Committee. Institutions acknowledged that there were particular complexities with respect to governing programmes duplicated across campuses, and that campus academic boards had a particular role to play under these circumstances.

Suffice to say, without going into further detail, that a multiplicity of multi-campus governance arrangements are possible and have been tailor-made successfully by South African higher education institutions in the past. This suggests that there is no need for the

³⁰¹ Although a distance-education institution, the technikon has regional centres which serve as points of tuition contact for students.

Higher Education Act to be prescriptive about such matters, as they can be provided for by Institutional Statutes and internal institutional arrangements.

However, an important point needs to be made in the case of multi-campus institutions resulting from mergers. Existing multi-campus institutions have tended to develop 'outward' from the centre – i.e. satellite campuses have been established by an institution in response to market needs or opportunities. As a consequence, governance arrangements have likewise developed over time, with strong determination by the centre and with an essential adherence to a unitary conception of the institution. Yet multi-campus institutions resulting from mergers are coming into being out of a mandatory process in which 'equal partners' may have particular interests to defend. This could mean that there is a danger of multi-campus governance arrangements being informed by individual campus yearnings for as much autonomy as possible. Associated with this, is the temptation of turning multi-campus governance into federal governance by another name. This is problematic in a policy environment which has been at pains to stress the importance of unitary governance as an agent of genuine transformation in the overall shape of the higher education system, and the institutional identities and missions within it.

As a means of exploring these ideas further, it is useful to refer to the case of the University of Natal, with its two main campuses in Pietermaritzburg and Durban. This case is in the public domain and has been described in detail in a paper by David Maughan Brown.³⁰² The case is instructive because the university originated in Pietermaritzburg, but this campus had been outstripped, in terms of student and staff numbers, by its Durban campus by 1953, when the decision was taken to move the central administration to that location. Over the years, the university has grappled with how best to govern, manage and administer itself, given the geographical separation of its two main campuses, and the existence of two other campuses.

In the early 1990s, a formal review advocated administrative and budgetary devolution to the two main campuses, although explicitly rejecting a federal model. Under these arrangements, the offices of the Vice-Chancellor, Registrar, Deputy Vice-Chancellor (DVC) Planning and Resources and DVC Research and Development were established at the centre. Campus Principals (designated as Deputy Vice-Chancellors)³⁰³ and vice-principals were appointed, while Directors of Administration on each campus had overall responsibility for the budgeting process on the campus and line responsibility for campus support service divisions. Campus Academic Affairs Boards took over the functions of the former Senate Executive Committee and campus committees took responsibility for campus-based planning and resource allocation functions, student services and other areas. While devolution successfully brought planning and resource functions together, reduced levels of administrative delay,

³⁰² Maughan Brown, D. (2000). Swings and Roundabouts: Centralisation and Devolution in a Multi-Campus University in South Africa. *Higher Education*, Vol. 40 No. 2: 163-181. All details of the case, as presented here, have been sourced from this article.

³⁰³ The University used the term Centre Principals, consistent with its use of 'centre' to refer to campuses. These terms have been avoided here in an effort to avoid confusion.

and brought decision-making closer to the point of implementation, it also had significant disadvantages for the development of university-wide policy. Financial devolution effectively located the planning function at the campuses, rather than at the centre. Line management of university-wide initiatives was made very difficult. Co-operation and combination at faculty and departmental levels, which had been weak to start with, were weakened further. The Senate was sometimes presented with conflicting recommendations from the campus Academic Affairs Boards, and in the end the Boards 'agreed to differ on such important issues as degree structures, credit-point accumulation and course codes'.

Five years after devolution was introduced, it was reversed, with a strongly centralised structure put in place. Features of these governance arrangements included university-wide functional portfolios at DVC level, to replace campus Principals, and with the intention that DVCs would be present on each main campus for a minimum of two days a week. Campus-based support service divisions were centralised under University Directors, and Deans of Students and Student Development were appointed with university-wide portfolio responsibilities. The Senate Executive Committee was resurrected. Ultimately, recentralisation provided the 'enabling context' for a major academic restructuring: 16 faculties and some 120 departments were reorganised into nine faculties and 40 multi-disciplinary schools (although university-wide faculties were not established). Recentralisation did not affect to any marked degree the ethos of the Pietermaritzburg campus, which continued to fear being swamped in a unified system but accepted revised governance arrangements as a 'matter of survival'.

On the evidence of this case study – and allowing for the unique history of the University of Natal – some key conclusions can be reached: Extensive budgetary and administrative devolution in multi-campus institutions may inhibit the development of institution-wide policy, planning and strategy and make the implementation of institution-wide initiatives extremely difficult. Where academic governance becomes in effect campus-specific, academic co-operation across campuses may be hindered and even fundamentals, such as common rules for degrees, may disaggregate, meaning that the institution becomes federal in practice. Under these conditions, a unified institutional culture and identity may be unachievable.

Applied to an understanding of what is required for good governance in multi-campus institutions resulting from mergers, these conclusions suggest that planning, budgeting and key administrative and support functions should be managed from the centre under unified policy frameworks and supported by institution-wide executive portfolios. Academic matters should be governed by means of a single Senate, a single Senate Executive and Faculty Boards. These conclusions can be supplemented with observations made about existing multi-campus institutions: that statutory governance bodies should take account of campuses through appropriate representation as determined in the Institutional Statute; that campus-level academic boards may be required in some cases, depending on the structure of programmes in the institution; and that some latitude should be allowed to institutions with respect to student governance.

By and large, institutions in the study sample were in agreement with a unitary conception of governance for multi-campus institutions and acknowledged the importance of unified policies, systems and procedures. They were more reticent with respect to how they envisaged giving effect to these fundamentals in a merged multi-campus institution – most likely because these details were still being investigated, let alone negotiated. One institution had developed a concept which would involve the setting up of a central seat to establish institutional brand, standard policies, systems and procedures, while the campuses would develop sub-brands and recruit students in the appropriate market niches for the sub-brand. The same institution appeared to favour devolving authority to Campus Principals, to whom campus managers of functional areas would report and to whom Deans might also report (although this was unclear and would depend on the overall academic structure and governance of the merged institution). At the time this model was mentioned, the partner institution was apparently more in favour of a centralised governance model, with institution-wide executive portfolios and Deans reporting to a DVC. The devolved model mooted in this case is a particularly interesting and even controversial one, given that the merger partners are historically and culturally poles apart. The obvious danger, given learnings highlighted in this and other sections of this report, is that the merged, multi-campus institution could disaggregate in practice into a federal institution with campus subcultures that remain untransformed and with former institutional identities that remain somehow protected or isolated. The other way of looking at the case, is that it would create a governance framework enabling disparate institutional cultures to approach each other over time, while building overall institutional capacity, and retaining market niches in practice. Presumably, political buy-in for such a model at all levels – including most essentially the Minister – is a prerequisite. This, together with a full evaluation of all the motivating factors, would be necessary to make it work. Even so, on the evidence, implementing this model successfully would be a tall order for those attempting it. Thus, this scenario highlights once again the need for some sense of alternatives from the Ministry, should scheduled mergers fail in the implementation.

4.5 SUMMARY: INSTITUTIONAL GOVERNANCE AND THE PROCESS OF MERGER

This chapter has considered institutional (and inter-institutional) governance in the process of merger, linked to three distinct phases, namely: pre-merger, transitional and integration phases. A particular focus of the chapter has been to highlight potential ‘unintended consequences’ of the merger process, drawing on the perspectives of institutions in the study sample, and to make suggestions for good merger governance in each of the phases.

The study has shown that the pre-merger phase is characterised by institutional merger structures, as well as joint merger structures. It is suggested that institutions should be free to establish such structures as needed and without interference, provided that appropriate linkages are established between merger structures and statutory institutional governance structures, as well as with stakeholders, so that requisite authority and participation are assured. In addition, particular care should be exercised in giving effect to the notion of ‘equal

partnership' in pre-merger governance, with respect to both mergers and incorporations. The pre-merger phase needs to negotiate and deliver a range of critical outcomes in the interests of effective merger governance. These include responses against items requested by the Minister and necessary for the gazetting of the merger or incorporation. Additional key outcomes of this phase supported by the study include due diligence investigations where appropriate, a Memorandum of Agreement and a merger plan.

The Interim Council is the key statutory governance structure of the transitional phase. The investigation has found that key challenges are posed for and by the Interim Council in constructing effective linkages between the pre-merger and integration phases. Given inherent pitfalls, institutions should prepare carefully for the transitional phase, establishing frameworks which could be adopted by the Interim Council. In addition, institutions should take into account the specific circumstances of their merger, in selecting a preferred model for the Interim Council and tailoring the Standard Institutional Statute as far as possible to meet the needs of the merged institution in transition. The transitional phase poses particular difficulties for an Interim Senate, which suggests that the shortest possible time between establishment of the merged institution and appointment of the permanent Council would best enable effective academic governance in the merger. The Interim Institutional Forum provides a key communication channel between the Interim Council and stakeholders and should take up a brief to investigate issues of institutional culture for the merged institution. The appointment of an interim management body presents both practical and political challenges, once again suggesting that a minimal transitional phase would be optimal.

The integration phase of merger is the period during which the merged institution establishes and implements its vision and mission, establishes its culture, integrates teaching and research, and aligns policies, systems and procedures. In governance terms, the study has found that the process of establishing institutional culture and identity requires conscious attention. Accordingly, the new Council would need to exercise its accountability in this respect by, amongst others, requesting advice from the Institutional Forum and evaluating all institutional policies, plans and strategies in light of the espoused institutional culture. In exercising its overall accountability for merger integration, it is suggested that Council should make the Institutional Statute and constitute other governance bodies and a committee system with all possible speed and may wish to establish a Merger Integration Committee. Evidence suggests that substantive decisions affecting academic integration should be driven by a defined vision and mission and should be taken by the Senate and Council only once that is in place. Finally, the study suggests that any governance model developed for a multi-campus institution resulting from merger should be evaluated in terms of its impact on effective operational and academic integration, as well as on the creation of a new institutional culture and identity in the merged institution.

5. CONCLUSION

This report has focused on the governance of merger in South Africa's restructuring higher education system, with a subsidiary focus on governance in incorporations and in multi-campus institutions, thus addressing itself to issues that have received relatively little in-depth attention in policy. The study was informed by three objectives. Its *first objective* was to develop a conceptual and contextualised framework for merger governance in South Africa. The second chapter of this report addressed itself substantively to this objective by developing and drawing together a set of key frameworks for the enquiry: international perspectives, policy and legal framework and an analytical framework. The *second objective* of the study was to interrogate the extent to which South Africa's higher education system and its institutions are prepared in governance terms for the complex processes of merger and incorporation on which they have embarked. The third and fourth chapters of this report have undertaken this 'interrogation', presenting key findings and exploring the implications of these. In particular, these chapters have sought to amplify understanding of merger governance with reference to institutional experience (albeit limited to this point), and to institutional perspectives on the issues anticipated to be of most relevance and concern in merger governance.

This final chapter addresses the *third and last objective* of the study, namely: to make proposals regarding system-wide and institutional-level governance in the context of restructuring. The following sections draw together and summarise the key findings, interpretations and conclusions of the foregoing chapters and formulate them as a set of observations that are seen as important for informing a full consideration of the governance of merger.

In prefacing the conclusions set out below, it is important to reiterate that this study has used a normative framework for evaluating merger governance. It has suggested that the ideal outcome of South African higher education restructuring would be a set of institutions that are democratically governed, well-managed and equipped with capacity to address themselves effectively and efficiently to substantive issues of ongoing transformation and higher education delivery. The conclusions are intended to support governance of this kind throughout the merger process, as well as the longer-term emergence of institutional identities consistent with such governance.

5.1 ENABLING MERGER BY GOOD GOVERNANCE

Good governance is an essential support to the unfolding and complex process of merger at the system, inter-institutional and institutional levels. Good merger governance requires sustained focus on national policy objectives for higher education, due process, clear roles and responsibilities, and appropriate capacity and resources at each of these levels.

This report has emphasised the politically-driven and mandatory nature of South African higher education mergers and incorporations (Sections 2 and 2.1.3). Through mandatory restructuring, the state is recasting institutions in terms of a transformed 'fitness of purpose'

– i.e. institutional fitness in terms of national policy goals, priorities and targets. Merged institutions themselves must achieve ‘fitness for purpose’ – i.e. conditions that will allow them to implement transformed visions and missions. Higher education governance, in the South African restructuring context, needs to balance and support both levels of fitness (Sections 2, 2.4 and 3.7), underscoring this study’s conceptualisation of governance as a terrain in which the spheres of the higher education system and its institutions intersect (Section 1.1). Given the nature of merger, the inter-institutional terrain represents a further zone of intersection (Section 2.1.2).

This study has defined good governance for higher education within a framework drawing on earlier research that made proposals for promoting effective higher education governance (Section 1.2). At the system level, key values for higher education governance, as set out in the White Paper and linked to national policy goals, are public accountability, institutional autonomy and academic freedom (Section 2.3.1). Good governance at the system level needs to respect each of these principles equally and to assign roles to the state and institutions in the restructuring process accordingly (Section 3.4). Furthermore good system-level governance must provide a framework of rules adequate to align institutions with national imperatives in the first place, but thereafter to create conditions that allow institutions to exercise discretion in serving the public good, and to achieve fitness for purpose within their own contexts and constraints (Section 3.7).

At the institutional level, key values for governance are democratisation, effectiveness and efficiency, likewise set out in the White Paper and linked to national policy goals. These values have been used to develop a matrix whose indicators of good governance are public interest/representative governance, extensive delegation of authority, and strong implementation capacity (Section 2.3.2). Given that the ideal outcome of restructuring would be a set of institutions that fulfil these criteria in a balanced way (Section 2.3.3), institutions should aim to achieve these dimensions of governance in their institutional merger structures and processes, in joint (inter-institutional) merger structures and processes, and in the governance of the merged (or incorporated) entity. Failures of good governance – whether outright, or in terms of keeping the dimensions of good governance in balance – at any stage of the merger process could lead to a wide range of unintended consequences that negate the underlying policy goals of restructuring. These include lack of participation, transparency or engagement in the merger process; weak, imposed or illegitimate authority for merger decisions; and ineffective and inefficient merger implementation (Sections 2.3.3.1 and 2.4). Moreover governance models in merged institutions may develop on the basis of considerations other than the policy values held for public higher education institutions (Section 2.3.3.1). Finally, conflicting reactions to merger at different levels of the institution – caused by differentiated institutional interests and possible infringements of collegial and co-operative governance in the process of merger – may put at risk the achievement of a unified institutional culture and identity or of successful academic development in the merged institution (Section 2.3.3.2).

5.2 SYSTEM-LEVEL GOVERNANCE: STATE-SECTOR RELATIONSHIPS

Successful restructuring outcomes will depend upon the ability of state and institutions to negotiate specific mergers and incorporations to common benefit and to deal with potentially mismatched expectations with respect to complex issues of substance, capacity and resources.

Prior research which informed this study found that while co-operative governance continues to be the explicit policy framework for higher education, the implicit reality is that state steering is intensifying and increasingly setting procedural conditions upon the autonomy of institutions. The fact that mergers are mandatory is key evidence of this (Section 2.3.1). Against this background, this report has proposed two guiding principles for good merger governance at system level: first, both state and sector should recognise the substantive autonomy of institutions to carry out teaching and research, as well as the state's right to steer higher education in order to achieve national transformation objectives; second, given that there is unlikely to be a 'one-size-fits-all' approach to merger, state and merging institutions should negotiate as needed in respect of specific merger needs and outcomes (Section 2.4).

In a system of state steering which endorses institutional autonomy, the state sets policy and enables institutional responsiveness, while institutions implement policy. Thus, the Ministry is responsible for providing policy, law, guidance, technical and financial support for mergers, while institutions are responsible for implementing mergers within national legal and policy frameworks (Section 3.4). While both state and sector articulate and acknowledge this distribution of roles, institutions have signalled apprehensiveness as to whether these relationships will play out ideally in practice and have flagged key issues of concern (Section 3.1).

With respect to issues of substance, institutions felt that greater clarity was required regarding the distinction between mergers and incorporations in policy terms. In particular, there is a danger that Ministry and institutions are not at one in their understanding of how the notion of equal partnership is to be applied as far as incorporations are concerned (Section 3.2). The nature of comprehensive institutions is another under-defined aspect of policy in institutions' view, and further exploration of this model by the Ministry and/or institutions may surface conflicting assumptions (Section 3.3).

With respect to issues of capacity and resources, state and sector will need to develop a mutual understanding of the optimal role of the Department of Education's Merger Unit, if the relationship is to be close and reciprocal, rather than ineffective and possibly conflicted (Section 3.4). The provision of state finance to cover the costs of mergers and incorporations was the issue uppermost in the minds of institutions interviewed as part of this study. While the Ministry's published framework for the financing of these processes is reasonable and

fair, it does not address all the institutions' concerns, particularly given that the full extent of national budget available to support restructuring, and the impact of the new funding formula on merged institutions, are factors that remain unknown at the time of writing this report (Section 3.5).

The establishment of a monitoring infrastructure is essential to system-level governance of restructuring. However, from an institutional perspective, the close ties of the Ministry's envisaged Reference Group to the Merger Unit, under whose auspices it will work, may suggest that the state's monitoring process will tend to be self-referential or, in instances of conflict, biased in favour of the state. Additional informal and objective monitoring processes are therefore likely to be important, and could encompass monitoring by the Council on Higher Education as appropriate to its terms of reference (Section 3.6). An overarching concern in the long run, is that the current process of restructuring, as driven by political will, provides no sense of available alternatives should mandatory merger outcomes show themselves to be unachievable (Section 3.7).

5.3 INSTITUTIONAL GOVERNANCE: PHASES OF MERGER

Distinctive governance arrangements are appropriate to each of three substantive phases of merger: the pre-merger, transitional and integration phases. Care should be taken that these are not conflated in practice and that appropriate linkage mechanisms are established between them.

Three substantive phases of merger are acknowledged in international experience, as well as by South African institutions and the Ministry of Education. This report has defined the phases in terms of the Higher Education Act and designates them as the pre-merger phase: the period prior to date of establishment of the merged institution; the transitional phase – the period from establishment up to the appointment of the new Council, during which the Interim Council is in place; and the integration phase – the period of merger implementation under the auspices of the new Council (Sections 2.1.2.2, 2.2.7 and 4.1). The phases are important for conceptualising the merger process, for communicating it to stakeholders, and for defining the different governance modalities appropriate to each. The existence of separate phases, with distinct governance arrangements, also requires linkage mechanisms between them (Section 4.1).

5.3.1 Governance in the Pre-Merger Phase

5.3.1.1 Pre-Merger Governance Structures

Pre-merger governance structures, such as institutional merger committees and joint merger committees, should be established by the institutions concerned without interference. However, pre-merger governance structures must be informed by principles of good governance. In particular, joint merger committees must work

on the basis of mandates from the institutional Councils, with mechanisms in place to ensure reporting and feedback.

The study found that pre-merger governance structures are being established by South African institutions at two levels (fuller details with respect to these structures are set out in Section 4.2.1).

Institutional structures are broadly advisory and representative and are usually informed by task teams assigned to investigate and report on specific issues, such as academic affairs, human resources, and information technology. Task team information is ultimately used by management, Council and 'joint' merger structures to aid merger decisions.

Joint structures are established to facilitate merger negotiation and may also convene joint task teams, especially to investigate such questions as a Memorandum of Agreement, vision and mission, and branding and marketing for the new institution.

Pre-merger governance structures to a large extent reflect the particular context, history and governance style of the merging institutions and the particular merger process on which they are engaged (styles of governance are described in Section 2.3.2). Thus, in institutions whose style of governance is 'democratic', pre-merger governance structures tend to be participative in nature. In institutions whose style of governance is 'management focused', pre-merger governance structures may tend to be smaller and composed mainly of senior management and their advisers. However, both kinds of institution in the study sample gave evidence of having sought to align pre-merger structures with principles of good governance. Institutional merger structures reported to statutory structures of governance (usually Council, in one instance, Senate), and internal stakeholders were represented in discussions. Joint merger structures took their basis in the established governance principle that Council has overall accountability and fiduciary responsibility for the institution that is merging.

The structure and functioning of pre-merger structures may pose particular challenges for merging institutions that have had a history of, or currently display characteristics of 'contested' governance. Given that policy aims through restructuring to overcome apartheid legacies which are frequently at the root of contested institutions, protraction of contestation and incapacity in governance as part of the merger process, would certainly be an unintended consequence of merger. This risk in specified instances is one which both Minister and the affected institutions would need to acknowledge, and prepare to manage (Section 2.3.3.1).

There are substantive, practical and legal limitations upon the work of pre-merger governance structures. The answer to questions around how best to leverage the work of pre-merger structures seems to lie in a consideration of certain key elements of the pre-merger phase – including due diligence investigations, a Memorandum of Agreement and a

merger plan – and how these can support the governance roles of the Interim Council and the substantive Council.

5.3.1.2 Equal Partnership

Mergers and incorporations must take account of national transformation objectives and political realities in driving towards successful outcomes. Particular care will need to be exercised in giving effect to the notion of ‘equal partnership’ in pre-merger governance in the case of to both mergers and incorporations.

This study has found that the Ministry has been at pains to emphasise the equality of merger partners, but that there is some doubt as to whether this concept will acquire functional reality in all cases. In particular, the Ministry’s communications have been ambiguous with respect to the equality of partners in processes of incorporation. This is a matter of concern to both receiving and incorporating institutions (Section 3.2). In two cases in the study sample which involved incorporation as well as merger, the joint merger structures included representatives of the subdivision of the institution to be incorporated on an equal basis. In a third case, the subdivision to be incorporated was yet to be included in discussions. In both political and pragmatic terms, it would appear wise to engage all affected parties on an equal basis in pre-merger discussions.

Given that South African higher education restructuring is grounded in policy objectives that seek to break the apartheid mould of higher education, and given that merging institutions and incorporating subdivisions represent the full range of institutional histories and contexts, governance of these processes cannot be reduced to the simple model of takeover that predominates in corporate environments (Section 4.2.1.1).

5.3.1.3 Statutory Structures in Pre-Merger Governance

In order to counter the tendency of merger governance to focus on processual and legal issues, merging institutions in the pre-merger phase should make every effort to ensure that appropriate linkages are established and diligently observed between statutory institutional governance structures such as the Senate and the Institutional Forum and the merger governance structures. Statutory structures such as these should make input into the merger process, using such means as are appropriate within the framework of the Higher Education Act and the Institutional Statute.

The nature of merger, as a complex event that needs to be strongly driven, means that governance tends to become dominated by processual and legal concerns. The study has found (Section 4.2.2) that while Council accountability and fiduciary responsibility are likely to be well recognised in this context, focus on collegial and co-operative governance may be weakened as a result. Institutions in the study placed emphasis differently in the way they constructed relationships between statutory and merger governance structures. However,

Senates and Institutional Forums were generally observed to be on the periphery, despite the fact that the roles assigned to these bodies by the Higher Education Act are clearly central in the context of merger.

While institutions may find it difficult to make the Senate the 'hub' of discussions in the pre-merger phase, the Senate and the Senate sector should support the merger process through such steps as undertaking an audit of all academic programmes quality assurance systems, and research projects and programmes, as well as beginning to explore possibilities and needs for the programme structure in the merged institution. A joint Senates committee in the pre-merger phase could assist in facilitating and overseeing all such processes, as well as coordinating responses on specific issues requiring the Senate's concurrence or consultation with it.

Concerted efforts should be made in the pre-merger phase to use the Institutional Forum as a sounding board for institutional actions in the merger process, as a merger discussion forum and as a conduit to stakeholder groupings. The Institutional Forum has a formally established role to play in advising the Council on issues of institutional culture, which is a central issue of merger.

5.3.1.4 Managing Mergers

A project management approach to merger is necessary to support merger governance with implementation capacity. The appointment of institutional merger managers and merger office staff, as well as the establishment of joint merger offices where feasible, are thus to be recommended. However, institutions and the Ministry should be alert to potential unintended consequences for the merger process in cases where the role of a merger manager/office is ill-defined, where institutional capacity for project management is weak, or where there are significant differences in institutional capacity for project management between merger partners.

Most institutions in the study sample were following a project management approach to merger. The roles and responsibilities of institutional merger managers and their offices encompassed ensuring communication around the merger, establishing linkages between different entities in the merger 'project' and providing practical support and capacity (fuller details are provided in Section 4.2.3).

In this study's assessment, a project management approach is a sound support to merger governance. However, while it is well-adapted to the complexity and timelines of merger, it is less well-adapted to the traditional modes of operation of collegial and co-operative networks and must avoid undermining these.

The project management approach could pose the most difficulty for weakly capacitated or 'contested' institutions. Associated unintended consequences from a transformation point of

view could be that a weakly-driven merger process impacts negatively on the implementation capacity of the new institution, or that a weaker party finds its merger agenda effectively driven by a stronger partner. The Ministry has recommended that institutions establish a single, joint merger office in order to streamline internal and external coordination and communication around the merger process. While this is a good recommendation in principle, the potential risks associated with institutional merger offices may become more acute in a joint scenario.

5.3.1.5 Merger Date

Some limited flexibility around the date of merger could be allowable in the interest of delivering critical outcomes of the pre-merger phase that support effective governance. Ministry Reference Group teams would be in a position to monitor and recommend how these outcomes can best be achieved in specific merger instances, even after the date of establishment of the merged institution.

Critical outcomes of the pre-merger phase include in the first instance responses to the Minister on all items required for the gazetting of a merger or incorporation: date of the merger/incorporation, preferred name of the merged institution, the physical location and address of the merged institution, the process to be followed for compliance with labour legislation and nominees for appointment to the Interim Council (Section 4.2.4).

Additional tangible deliverables of the pre-merger phase could include a due diligence study, and should include a Memorandum of Agreement between institutions, a detailed merger plan and a detailed estimate of merger costs whose implications have been discussed with the Ministry and for which appropriate guarantees of state funding have been agreed. In this study's view, these additional deliverables will ensure adequate preparation for the transition to a merged institution and as such everything should be done to ensure their achievement. Thus, while the national timetable for mergers and incorporations is acknowledged as important and is widely accepted, some limited flexibility around the date of merger could be in the interest of effective governance and implementation. For example, the Minister could publish the notice of the merger date with an allowable extension of three months, to ensure that the stated outcomes of the pre-merger phase are in place. Alternatively, Ministry Reference Group teams could advise on target dates for the achievement of outcomes after the date of merger (Section 4.2.4.1).

5.3.1.6 *Seat of the Merged Institution*

The determination of the official seat of the merged institution can ultimately play out significantly in terms of the merged institution's configuration and governance. As such, it should be an issue for careful consideration by merger partners.

Institutions in the study sample intimated that the question of the physical location and address of the merged institution was not highly significant. Yet the research showed merger partners actually had different notions of what was 'obvious' in this regard. On the one hand, criteria for choice being applied were optimal use of resources and existing infrastructure (a 'management focused' approach); on the other hand, criteria included convenience for students and the community at large, and the importance of giving a visible signal of change (a 'democratic' approach). This study has concluded that such differences of approach could impact in the long-run on choices made regarding the overall configuration of the merged institution and its governance, particularly in the case of multi-campus institutions with considerable extremes of distance between delivery sites (Section 4.2.4.2).

5.3.1.7 *Naming the Merged Institution*

The search for the name of the merged institution should be linked, as far as is feasible, to the process to determine the merged institution's vision and mission. Proposals should emerge from joint merger structures in the pre-merger phase, on the basis of appropriate stakeholder consultation. The Minister should seek assurances that the preferred name put forward for the new institution is the product of a due process, and is viable. In addition the process of building the new institutional identity around the name should be defined as an explicit part of the merger plan.

Institutions generally perceived choosing a name for the merged institution as a significant opportunity for rallying support for the merged entity from students, staff, and the community. This study has found that the use of the institutional name as rallying point has both content and process dimensions that need to be addressed as part of merger governance. In content terms, the ideal name for the new institution should possess certain key attributes, such as association with the community, association with the vision and mission of the institution, uniqueness, and so on. In process terms, the search for a name needs to be linked to a consultative process, and to a comprehensive and visible branding and marketing process (both internal and external). Merging institutions have adopted two kinds of name-finding processes: either a consultative and public approach, or an independently-commissioned piece of research, including market research. In either case, institutions intended that their chosen approach would lead to a recommendation being made by a joint naming committee. The process of naming the merged institution turned out to be complex in the case of an institution in the study sample that had already merged. Problems were experienced in terms of the transparency of the process, the legality of the name ultimately chosen and the pre-emptive choice of a name in the absence of an agreed vision and mission for the new institution (Section 4.2.4.3).

5.3.1.8 *Good Governance and Compliance with Labour Legislation*

In the pre-merger phase, merging institutions should lay the ground for potentially complex human resources and labour relations change through key steps to engender a genuinely co-operative and consultative process.

Merging institutions are required to give to the Minister assurances of their efforts to comply with labour legislation in the merger process. The Higher Education Act provides *inter alia* that contracts of employment are automatically transferred to the merged institution, that the rights and obligations of employer and employee continue unchanged after the merger, and that pre-merger rationalisation may nonetheless occur in terms of operational requirements.

In this study's view, given that the human resource and labour relations implications of mergers are amongst the most complex facets of the process, it may be ambitious to suppose that due consultation can occur within the envisaged time frames of the pre-merger phase. However, the Councils and managements of merging institutions need to ensure that consultative principles are observed as far as possible within the framework of the legislation. They could take such steps as: opening discussions with recognised unions as to how they plan to organise and/or consolidate in the new institution; ensuring staff and unions are represented on merger governance structures; establishing an institutional task team to conduct an audit of human resources policies, practices and procedures; and establishing a joint human resources task team to consider such issues as the migration curve of salaries and benefits (Section 4.2.4.4).

5.3.1.9 *Interim Council Nominations*

Joint merger structures should ensure that there is a co-operative process between merging institutions in determining nominations to the Interim Council, including recommendations to the Minister as to a possible chairperson. The Minister should exercise the power to appoint members in the absence of nominations by any institution with caution, and should appoint an independent chairperson.

The amended Higher Education Act provides that the Interim Council has six to eight members with a chairperson appointed by the Minister; that institutions give to the Minister no fewer than four nominations; and that in the absence of such nominations the Minister may appoint the members from the nominations received from the other institution/s, or at ministerial discretion. The increased membership of the Interim Council has generally met with the support of institutions. However, the Minister would need to exercise the power to appoint members in the absence of nominations by any institution with caution. The only reason that an institution would withhold nominations would be owing to resistance to the merger going ahead or to some key issue unresolved in the pre-merger phase. For the Minister to proceed in any case could doom the merger to failure.

The study found that institutions were generally taking steps to ensure a joint process for nominations. However they remained concerned about the appointment of the chairperson of the Interim Council. Although nominations for members of the Interim Council would most likely be drawn from those with strong institutional connections as a means of trying to ensure continuity, a strong view emerged that the Interim Council chairperson should be independent and without institutional affiliations (Section 4.2.4.5).

5.3.1.10 Due Diligence

Bearing in mind the Ministry’s guidelines for due diligence, in the early pre-merger phase management should, with the input of institutional merger structures where appropriate, make recommendations to the Council regarding due diligence needs for the merger. Proposals should be discussed by joint merger structures so that a consensus decision on the due diligence process to be carried out may be agreed by institutional Councils, and so that requests for funding may be made to the Ministry if appropriate. Councils should also be given an opportunity to respond to due diligence findings.

South African higher education institutions have emphasised the need for due diligence in mergers and incorporations, extending beyond disclosure of assets, liabilities, obligations, systems and controls into an investigation of issues that are critical to academic and institutional planning. External members of the Council, interviewed as part of this study, were aware that if they are to fulfil their fiduciary role they must assure themselves that they are not, by committing their institution to a merger, endangering the financial health, viability, or prospects for long-term survival of the new institution. Institutions were prepared to concede that there are qualitative differences in due diligence needs. In some cases merger partners have sufficient trust in the reliability of information each provides to suggest that internal due diligence processes would be adequate or that an external due diligence brief limited to particular issues would cover the most critical issues. In other cases, the absence of reliable information from one or more sources makes the need for external due diligence more acute.

In an effort to optimise the place of due diligence in higher education mergers, the Minister has indicated guidelines for due diligence to be carried out and conditions under which due diligence will be funded by the Ministry. In the view of this study these guidelines have been framed with a fairly restricted focus on the financial elements of due diligence and may serve to prevent due diligence investigations in some cases where they would be desirable. Certainly the onus is upon institutions to make the case for state funding of the exercise.

Against this background, the study has concluded that institutions need to work both within the Ministry’s framework and within the appropriate structures and processes of pre-merger governance to determine and justify their due diligence needs (Section 4.2.4.6).

5.3.1.11 Memorandum of Agreement

A Memorandum of Agreement between merger partners should be agreed early in the pre-merger phase and should set the parameters within which the merger partners work at least until the date of merger. Consideration should be given to finding mechanisms to extend the applicability of the Memorandum beyond the pre-merger phase.

The Ministry has recommended, and institutions appear to concur, that a Memorandum of Agreement should be agreed to by merger partners and adopted by their Councils early in the pre-merger phase. Drawing on a Ministry template and other institutional samples, this study has proposed that the Memorandum should address key issues of principle, coordination and co-operation (further details are provided in Section 4.2.4.7). In addition, the Memorandum needs to set out a joint understanding of the merger process to be followed with respect to such matters as the phases of the merger, how long each is likely to be, governance structures to be established in each of these phases (including interim ones) and their terms of reference.

The research has found that the period for which the Memorandum is effective is relevant to the issue of continuity in the merger process. One way to conceptualise the Memorandum is as an agreement that sets conditions for a productive engagement of merging institutions prior to the effective date of the merger only. However, there is nothing in principle precluding application of the agreement beyond this date and, for purposes of continuity, it would seem almost essential to do so. For this kind of continuity to be established, the right procedural mechanisms need to be found as the Memorandum does not carry any legal status. The agreement could be recommended as a founding document to be adopted by the Interim Council, and thereafter by the new Council.

5.3.1.12 Merger Plan

A merger plan initiated in the pre-merger phase should create a blueprint that the merged institution can follow and develop as needed from the date of its establishment. The merger plan needs to set out an overall framework for merger implementation in the dimensions of core academic business, people, operations, time and cost. It should also facilitate the development of the institutional operating plan required by the Ministry for reporting purposes and enabling state funding of merger costs. Mechanisms are needed to ensure that the momentum established through merger plan development in the pre-merger phase is not lost in the transitional phase of the merger.

The Ministry requires all institutions involved in a merger or incorporation to produce an 'institutional operating plan' for the entity. This must be submitted no later than 12 months following the date of merger or incorporation as approved by the Interim Council

or new Council. In this study's view, the institutional operating plan is, in effect, a critical sub-set of required information which would have to be formulated by drawing on an overall merger plan guiding the entire merger process. To this extent, merger planning has governance, project management and reporting dimensions. This report has elaborated a broad conception of a merger plan which would facilitate all three dimensions (full details are given in Section 4.2.4.8).

It has been proposed that the merger plan should be initiated early in the pre-merger phase and be built as far as possible on the vision and mission being developed for the new institution. The comprehensive plan should incorporate a wide range of elements including plans for branding, marketing and communication, governance, operational and academic integration, change management, time frames, costs and contingency plans. While the plan should establish a blueprint for the merger, it would also need to be recognised as part of an emergent process, and one which both facilitates and develops with the momentum of that process. The momentum that has been established through merger plan development in the pre-merger phase should not be lost in the transitional phase and thus, as with the Memorandum of Agreement, mechanisms should be found to sustain the merger plan's applicability.

5.3.2 Governance in the Transitional Phase

5.3.2.1 Interim Council

Institutions should take into account the specific circumstances of their merger in selecting a preferred model for the Interim Council. In addition, given inherent challenges posed by and for the Interim Council, institutions should prepare carefully for the transitional phase, establishing frameworks which, while they cannot legally be imposed, could be adopted by the Interim Council.

The Interim Council – its composition, role, power, functions and term – was consistently an issue of interest and concern by institutions in this study. This was accounted for by the fact that the Interim Council is under-specified in the Act and that little guidance was forthcoming from the Ministry at the time interviews were conducted. Anxiety was exacerbated by a landmark, though unhappy, South African experience of an Interim Council, which has been examined in detail in this report. (A full consideration of the Interim Council is set out in Section 4.3.1.)

In terms of the Higher Education Act, the Interim Council comprises six to eight members appointed by the Minister from nominations received from the merging institutions (or in the absence of such nominations) and the chairperson is appointed by the Minister. The Interim Council performs the functions of governance for the merged institution for a six-month period, renewable for a further period not exceeding six months. The Interim Council constitutes the new Council, which will make the new Institutional Statute after the

transition. It constitutes such interim governance structures as are required in terms of the Standard Institutional Statute and appoints an interim management body, three of whose members must be co-opted without voting powers to the Interim Council.

This study has drawn attention to the fact that formal transitional structures provide an important functional and symbolic break with the old (and, in the South African context, often the illegitimate). It found that principles established by South African experience of transition include the need for broad-based stakeholder input to ensure legitimacy of process and post-transition legitimacy; and precise definition of the powers and limits of transitional structures, given that they must support the continuity of a specific, usually democratic change process while also embodying its values. Evaluated against such principles, the Interim Council did not measure well in this investigation. The fundamental challenges posed are its lack of representivity; the potential loss of momentum that could occur if the Interim Council does not construct effective linkages between the pre-merger and integration phases; and a set of under-defined governance powers matched with a potential crisis of authority for the Interim Council, given that its decisions cannot be binding on the new Council.

The study has concluded that the solution to these inherent challenges lies in designing governance in the transitional phase with more careful attention to the manner and the time frame within which the merger process unfolds, and with more flexibility than a first reading of the Act might imply as possible. Accordingly it has investigated four alternative models for the Interim Council (Sections 4.3.1.1, 4.3.1.2, 4.3.1.3 and 4.3.1.4) and emphasises the need for careful preparation by merging institutions for the transitional phase. At a minimum, it is recommended that preparation should take the form of clear agreements, set out in a Memorandum of Agreement, as to the envisaged nature and process of the transitional phase of the merger. The merger plan should support these agreements with attention to the implementation issues requiring focus in the transitional phase. While such frameworks cannot be legally imposed, they could be adopted by the Interim Council. The Interim Council's understanding of its importance would be especially enhanced if members were to be engaged in the merger process in the pre-merger phase, prior to the date of establishment of the merged institution.

Under an 'extended Interim Council model', allowable under the current provisions of the Act, the Interim Council would be in place for the maximum allowable term of one year, and would need to constitute interim governance structures as well as a basic committee structure (Audit, Finance, Planning and Council Nominations Committees) with all possible speed. The establishment of these structures would be vital to ensure checks, balances and fiduciary controls upon the Interim Council which are otherwise absent (Section 4.3.2.4). Under a 'minimal Interim Council model', also allowable within the current provisions of the Act, the Interim Council would be in place for the minimum practicable period (14–28 days) and would focus on constituting the new Council. A third alternative, that would require amendment of the Act, would be a 'discretionary Interim Council'. Under this model,

ministerial discretion could be invoked to allow the joint merger committee established in the pre-merger phase to act as the Interim Council. A final potential model for transitional governance is that of an Administrator, although it has unfortunate associations and could alienate stakeholders from the merger process through creating an impression of severely reduced access to decision-making in the transitional phase.

Indications by institutions forming part of this study were that, while all of these models had received a degree of consideration, the model gaining most favour was the minimal Interim Council. A number of institutions were considering ways to engage nominated Interim Council members in the pre-merger phase. The Ministry has recommended (subsequent to this research) that existing Councils make use of the opportunity to work with the ‘interim council elect’ to ensure a smooth transition.

5.3.2.2 Standard Institutional Statute

As there appears to be no need to interpret the Standard Institutional Statute as an absolute tool, institutions could make provision in advance for deviations from the Statute, in terms of the interim governance structures they envisage for the merged institution. These deviations could be negotiated and agreed as part of the Memorandum of Agreement, with advice sought from the Minister as needed.

The Standard Institutional Statute is intended to serve three kinds of institutions: newly established institutions, declared institutions and merged institutions. For merged institutions that bring with them the traditions and histories of former entities, this framework may well be unsatisfactory and a number of institutions have commented in this vein. However, in the view of this study, there appears to be nothing to prevent institutions from tailoring the Statute to the needs of the mission and identity of the merged institution in transition, provided necessary agreements are reached in this respect in the pre-merger phase (Section 4.3.2.1).

5.3.2.3 Interim Senate

The nature of difficulties posed for an Interim Senate suggests that the shortest possible time between the establishment of the merged institution and appointment of the permanent Council would best enable effective Senate input to the process of merger and effective governance of academic integration.

This study has found that a range of complexities are posed for the Interim Senate: composition, given that merging institutions may have very different Senate traditions; infrequency of meetings; and the transitional nature of Interim Council authority, meaning it cannot ratify Interim Senate decisions. It is suggested that mechanisms to guard against marginalisation of the Senate sector during the transitional phase could include delegating

oversight of the transition process to an Executive Committee. Institutions participating in the study emphasised that the Interim Senate, through its members, would need to give sustained attention to questions of academic integration and new academic structures during the transitional phase so as to have specific proposals to make to the new Council (Section 4.3.2.2).

5.3.2.4 Interim Institutional Forum

The Interim Institutional Forum should be constituted by the Interim Council as early as possible in the transitional phase. The Interim Institutional Forum has key inputs to make with respect to a fair process of selection of interim management and to investigating issues of institutional culture for the merged institution.

Merging institutions interviewed as part of this study appeared to have given little thought to the role and function of the Interim Institutional Forum in the transitional phase. Yet given that the Interim Council itself is a non-representative structure, it needs this statutory advisory committee as a key communication channel with stakeholders. Thus the early constitution of the Interim Institutional Forum by the Interim Council has been advised in this report. Consistent with two of the most critical aspects of the Institutional Forum's brief, as formally established by the Higher Education Act, the Interim Institutional Forum must be engaged in a fair process of selection of interim management (along with the Interim Senate), and should assist in preparing for merger integration by taking up a brief to investigate issues of institutional culture, ethos and identity (Section 4.3.2.3).

5.3.2.5 Interim Management

The appointment of interim management by the Interim Council must be a transparent process, conducted with the advice of statutory governance structures, and taking full cognisance of associated practical and political challenges.

The appointment of an interim management body presents both practical and political challenges which were of great concern to institutions participating in this study, once again suggesting that a minimal transitional phase could be optimal. Challenges include the possible creation of a leadership vacuum; complications surrounding terms of appointment and contractual issues; and the potential creation of a closed management group, given the requirement upon the Interim Council to co-opt three members of the interim management body it appoints to serve as non-voting members on the Interim Council.

Accordingly, this report has advocated that the appointment of interim management by the Interim Council should be a transparent process, conducted with the advice of the Interim Institutional Forum and Interim Senate (or, alternatively, with the advice of the pre-merger Institutional Forums and Senates, if this process is in practice undertaken by an 'Interim Council elect'). In addition, the development of key frameworks in the pre-merger

phase should support the appointment of the interim management. The Memorandum of Agreement should set out principles to be applied in this appointment, while the merger plan should clarify the longer-term leadership and skills needs of the merged institution. Pre-merger discussions could assist institutions to develop interim management solutions well adapted to the particular circumstances of the merger (Section 4.3.3).

5.3.3 Governance in the Integration Phase

5.3.3.1 Institutional Culture

In governance terms, the process of establishing institutional culture and identity requires conscious attempts to plan, implement and monitor institutional development. The new Council should exercise its accountability in this respect by engaging the viewpoints of all stakeholders and requesting advice from the Institutional Forum, as well as evaluating its decisions in terms of their likely impact on institutional culture.

Given the emphasis of national policy, the achievement of a distinctive institutional culture in the merged institution will be a key measure of success of a merger. Institutional culture spans the spectrum from macro-level issues (such as institutional vision) to micro-issues (such as conventions of dress on campus) and governance needs to contend with all of these. This study anticipated ways in which governance may pose challenges to the establishment of institutional culture and identity (Section 2.3.3, 2.3.3.1 and 2.3.3.2). Institutional perspectives have confirmed that governance approaches in the pre-merger and transitional phases will impact upon the nature of the merged institution, and that where governance approaches are problematic, they could impact in negative ways. Particular challenges with respect to establishing a unified culture in the merged institution appear to be posed for comprehensive institutions and for multi-campus institutions, as both of these institutional types will need to deal with distinctive traditions and subcultures. In addition, most institutions interviewed as part of this study gave evidence of different layers of understanding of the merger process under way, which would need to be addressed as part of the task of forging a unified identity for the merged institution.

Thus, in governance terms, this study has found the process of establishing institutional culture and identity requires conscious attention. This process could begin in the pre-merger phase with ‘culture audits’ and principles established in a Memorandum of Agreement, enacted through the merger plan and, ultimately, the merged institution’s organisational and governance design. During the integration phase, the Council would be accountable for establishing the merged institution’s culture and identity. The Council should give effect to this role by requiring inputs and advice from stakeholders, especially via the Institutional Forum which has a statutorily established role in this regard; by establishing the Institutional Statute, institutional rules and policies in the light of their likely impact upon institutional culture; by ensuring institutional strategies, plans, targets and budgets support the espoused

institutional culture; and by providing a detailed report on institutional culture as one of the items of its annual report to the Minister (Section 4.4.1).

5.3.3.2 Council and Merger Integration

The Council may wish to establish a Merger Integration Committee, or to delegate detailed oversight of merger integration to its Executive Committee. It should make the Institutional Statute and constitute statutory governance bodies and a committee structure with all possible speed.

The Council holds overall accountability for merger integration and fiduciary responsibility for the use of public funds applied to the merger. It is publicly accountable for demonstrating the results achieved with these funds, in particular within the context of national policy goals and priorities.

Bearing all of these responsibilities in mind, as well as the continuing and sizeable agenda of merger integration, this study has recommended that the new Council should make the Institutional Statute and constitute other governance bodies with all possible speed. In addition, it should establish as a matter of priority a committee system with appropriately delegated authority to support key operational decision-making (Section 4.4.2).

5.3.3.3 Academic Integration

The process of academic integration should not be rushed, although it can be aided from the earliest stages of the merger process through co-operative discussions between academics in partner institutions, appropriate academic audits conducted by the Senate and Faculty Boards, the early integration of quality management systems and the institution of a basic quality cycle. Substantive decisions should be taken by the Senate and Council in the integration phase, with input as necessary from Faculty Boards and other academic governance structures, and with due respect for an appropriate balance between equity and quality concerns. Decisions regarding academic integration should be driven by a defined vision and mission and should be taken only once that is in place.

The process of academic integration will configure the core business of the merged institution and as such will be the most critical process of all for creating a truly new institution, with a unique academic identity and mission. However, this study has found that for a number of reasons it cannot be expected to happen with speed. Given the time frames of merger, it is not practicable to introduce a completely new suite of programmes for first-time enrolling students from the time of establishment of the merged institution. Decisions as to how to select, develop, articulate and deliver programmes in the merged institution are far from simple in a context where policy states that no existing delivery sites should be closed, that access to higher education should be increased and that new institutional forms should be

implemented. Institutions cannot make final decisions affecting academic integration before the final phase of the merger, as no prior decisions may be taken which will be binding upon the new Council. In addition, taking such decisions prior to the adoption of an agreed vision and mission for the merged institution is ill-advised. Finally, even once decisions have been taken as to the academic model and academic governance structures for the merged institution, academic integration requires further planning, decision-making and management at multiple levels of the institution. Thus the process of academic integration is set to engage the merged institution in a complex and interrelated series of steps requiring governance that is alert to national policy issues, to questions of institutional culture and identity, and to human issues – including vested academic interests – as well. Academic integration cannot be relegated to the programme or department level but is a process that requires high-level governance attention and negotiation in a co-operative setting between different levels of the academic organisation (Section 4.4.3).

The essential element of consistency between the merged institution's mission and its programme and qualification mix must be recognised in the process of quality assurance as part of merger. Thus, in preparation for full academic integration, institutional quality management systems will need to be integrated. While it is clear that the earlier this can be achieved, the better, evidence suggests that quality managers have felt alienated from pre-merger processes (Section 4.4.3.1).

In general, it is evident that while academic integration cannot be rushed, the Senate sector needs to support this process with specific activities from the pre-merger phase on.

5.3.3.4 Multi-Campus Governance

Models for multi-campus governance should be evaluated in terms of their likely impact on effective operational and academic integration, as well as on the creation of a new institutional culture and identity in the merged institution.

In the context of South African higher education restructuring, multi-campus institutions resulting from mergers are intended to be unitary institutions with a single Council, Senate and chief executive body. The study has found that existing multi-campus institutions in this country have met these criteria successfully, while at the same time tailoring the details of their arrangements to their own institutional contexts and histories. However, in the merger context, where 'equal partners' may have particular interests to defend, it is a matter of concern that multi-campus governance may transmogrify into federal governance by another name.

The study has drawn on the history and experience of a multi-campus institution in existence for more than 80 years to conclude that good governance in multi-campus institutions has some quite specific requirements. These include that planning, budgeting and key administrative and support functions should be managed from the centre under unified

policy frameworks and supported by institution-wide executive portfolios. Academic matters should be governed by means of a single Senate, a single Senate Executive and Faculty Boards, allowing for campus-level academic boards in those institutions whose programme structure requires it. Statutory governance bodies should take account of campuses through appropriate representation as determined in the Institutional Statute, while some latitude should be allowed to institutions in respect of student governance.

At least one institution in the study sample, involved in a multi-campus merger, was giving consideration to a model that would tend to encourage the development (or maintenance) of separate campus identities. Given the thrust of national policy, this model has been assessed as not only difficult to implement but also as requiring political buy-in up to the level of the Minister as well.

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Eastern Cape Technikon	http://www.tktech.ac.za
Port Elizabeth Technikon	http://www.petech.ac.za
Rhodes University	http://www.ru.ac.za
University of Fort Hare	http://www.ufh.ac.za
University of Transkei	http://www.utr.ac.za
University of Port Elizabeth	http://www.upe.ac.za

Free State

Technikon Free State	http://www.tofs.ac.za
University of the Free State	http://www.uovs.ac.za

KwaZulu/Natal

Durban Institute of Technology (previously ML Sultan Technikon and Natal Technikon)	http://www.dit.ac.za
Mangosuthu Technikon	http://www.mantec.ac.za
University of Durban-Westville	http://www.udw.ac.za
University of Natal (Durban)	http://www.und.ac.za

University of Natal (Pietermaritzburg) <http://www.unp.ac.za>
 University of Zululand <http://www.uzulu.ac.za>

Gauteng

Rand Afrikaans University <http://www.rau.ac.za>
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North-West

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 Technikon North West <http://www.tnw.ac.za>
 University of the North West <http://www.uniwest.ac.za>

Western Cape

Cape Technikon <http://www.ctech.ac.za>
 Peninsula Technikon <http://www.pentech.ac.za>
 University of Cape Town <http://www.uct.ac.za>
 University of the Western Cape <http://www.uwc.ac.za>
 University of Stellenbosch <http://www.sun.ac.za>

Nation-wide Distance Education Providers

Technikon South Africa <http://www.tsa.ac.za>
 University of South Africa <http://www.unisa.ac.za>
 Vista University <http://www.vista.ac.za>

Higher Education Coordinating Bodies

Committee of Technikon Principals <http://www.technikons.co.za>
 South African Universities' Vice-Chancellors' Association <http://www.sauvca.org.za>

APPENDIX A: EXTRACTS FROM POLICY AND LEGISLATION CONCERNING RESTRUCTURING OF HIGHER EDUCATION

The focus of this report has been the governance of mergers in South African higher education. The brief was interpreted as an investigation of governance primarily at the inter-institutional and institutional levels, while also making reference to system-level concerns. Extracts making reference to institutional collaboration and mergers from the 1997 White Paper on Higher Education, the ‘Size and Shape Report’ of the Council on Higher Education (2000), the National Plan for Higher Education (2001) and the Higher Education Act (1997 with amendments 1999, 2000, 2001, 2002) are provided here for convenience.³⁰⁴

A.1 EXTRACTS FROM THE WHITE PAPER OF 1997

The **principles of institutional autonomy** and **public accountability** centrally inform concerns of the governance of mergers of public higher education institutions at the system-level.

PRINCIPLES

Institutional autonomy

1.24 The principle of institutional autonomy refers to a high degree of self-regulation and administrative independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government. However, there is no moral basis for using the principle of institutional autonomy as a pretext for resisting democratic change or in defence of mismanagement. Institutional autonomy is therefore inextricably linked to the demands of public accountability.

Public accountability

1.25 The principle of public accountability implies that institutions are answerable for their actions and decisions not only to their own governing bodies and the institutional community but also to the broader society. Firstly, it requires that institutions receiving public funds should be able to report how, and how well, money has been spent. Secondly, it requires that institutions should demonstrate the results they achieve with the resources at their disposal. Thirdly, it requires that institutions should demonstrate how they have met national policy goals and priorities.

The central notion informing the White Paper and its proposals on restructuring and mergers is that higher education should be planned, governed and funded as a **single national co-ordinated system**.

³⁰⁴ Full references for these policy and legal documents are provided in the bibliography of this report.

2.1 Higher education must be planned, governed and funded as a single national co-ordinated system, in order to overcome the fragmentation, inequality and inefficiency which are the legacy of the past, and successfully address the present and future challenges of reconstruction and development. This is a fundamental point of policy on which all stockholders [sic] in the higher education system are agreed.

The White Paper proposes that the Ministry should develop a **National Plan for Higher Education** which will provide targets for the ‘**size and shape**’ of the system.

2.10 The national higher education plan will establish indicative targets for the size and shape of the system, overall growth and participation rates, and institutional and programme mixes, which advance the vision, principles and policy goals for the system. In particular, attention will focus on:

- *establishing new programmes*
- *discouraging obsolete programmes*
- *building new capacities*
- *reshaping the institutional landscape*
- *promoting individual and institutional redress and equity goals.*

2.11 The national plan will provide the framework within which institutional plans will be developed, and will in turn be influenced by regional and institutional concerns and proposals. This interactive process will require entirely new consultative and negotiating processes, new databases and considerably enhanced modelling and computing capacities, at the national, regional and institutional levels.

The White Paper proposes that institutions should develop **institutional rolling plans** (within the framework of the National Plan) as a mechanism to promote regional planning and coordination.

2.16 In addition, emphasis will be placed on regional reviews of institutional plans as an integral part of the national planning process. This will be intended to promote regional coordination and collaboration as part of the national plan to enhance articulation of programmes, mobility of learners between institutions, the sharing of resources, including scarce academic and technical staff, library and information facilities. It is also intended to reduce programme duplication and overlap. The Ministry will provide incentives to encourage and facilitate regional planning and coordination.

The restructuring and diversification of the institutional landscape should emerge from a number of strategies. Firstly, the White Paper proposes the **collaboration between different institutions at the level of academic programmes**.

2.42 The programme-based approach to planning and development, by ensuring greater articulation between the different sectors of the higher education system, promoting

flexibility and diversity in the range of programmes offered, and fostering co-operation between institutions, will result in structural changes and a reconfiguration of the institutional landscape in the medium to long-term.

Secondly, the White Paper advocates the development of **regional consortia and partnerships** to build administrative and academic capacity and refocus institutional cultures and missions etc., eventually leading to new institutional and organisational forms.

2.43 The Ministry of Education encourages the development of regional consortia and partnerships involving a range of higher education institutions. They offer wide scope for collaboration in:

- *developing and delivering programmes, including the production of courseware*
- *reducing the overlap and duplication of programme provision*
- *refocusing the institutional culture and missions of both Historically White Institutions (HWIs) and Historically Black Institutions (HBIs) within the national system*
- *helping build academic and administrative capacity where it is needed, especially in HBIs, and*
- *enhancing responsiveness to regional and national needs, for academic programmes, research, and community service.*

2.44 The deeper import of such regional collaboration is that, by transcending the current divides in the system, it is a harbinger of new institutional and organisational forms.

Thirdly, the **assessment of the institutional landscape**, which may eventually lead to restructuring including **mergers, closures, and the development of new institutional forms**, should be undertaken in collaboration with the CHE.

2.45 A vital task, which the Ministry will undertake in collaboration with the CHE, is to assess the optimal number and type of institutions needed to meet the goals of a transformed higher education system. Many institutions either require consolidation or retooling for new missions and goals. Narrow self-interest cannot be allowed to preclude planning which may lead to institutional mergers and closures, and the development of new institutional forms where these are necessary. The new planning and governance systems will enable appropriate investigations to be undertaken, and consultation at national, regional and local levels. The Minister will then be in a position to make informed decisions on these matters in terms of the Higher Education Act.

In particular, the White Paper proposes that the **Council on Higher Education** should provide advice to the Minister particularly with regard to regional collaboration, rationalisation, mergers, closures etc.

3.25 In particular, the CHE will be responsible for advising the Minister on:

(...)

i the performance of the system, having regard to available performance indicators, to identify where efficiency gains have been made and need to be made (...) regional collaboration among providers, and other options for rationalisation of the system, and where appropriate, the merger or closure of institutions, the re-classification of institutions and the establishment of institutions

Finally, to promote the regional collaboration of institutions the White Paper identifies **public funding as a steering mechanism** (besides the planning and coordination function of the National Plan and institutional rolling plans).

4.18 (...) *Earmarked funds are also needed to drive an improvement in student completions, research capacity building, postgraduate development, programme-related capital development, and the building of planning capacity, and regional collaboration.*

(...)

4.51 *For the triennium 1998-2000, funding through this programme will focus on six specific purposes: improving student completions, research capability development, postgraduate training, capital works, development in planning capacity, and regional collaboration.*

(...)

4.59 *Regional collaboration. Incentive funding will be available on a selective basis to support the costs involved in regional collaboration among institutions which aim to consolidate, merge, share or otherwise collectively improve the efficient use of their facilities and resources for learning, teaching, research or community service.*

A.2 EXTRACTS FROM THE CHE 'SHAPE AND SIZE' TASK TEAM REPORT

The **impetus for the CHE Task Team Report** to the Minister was provided by the formal request by the Minister in 1999, in accordance with the policy outlined in the White Paper (CHE, 2000: 2).

The Minister asked the CHE to provide him with:

A set of concrete proposals on the shape and size of the higher education system and not a set of general principles which serve as guidelines for restructuring. I cannot over-emphasise the importance of the point. Until and unless we reach finality on institutional restructuring, we cannot take action and put in place the steps necessary to ensure the long-term affordability and sustainability of the higher education system.'

The Report documents the key **commitment and convictions** of the Task Team that shape the spirit of the recommendations in the following way (CHE, 2000: 2):

The Task Team's point of departure is the Education White Paper 3: A Programme for the Transformation of Higher Education 1997. The goals and purposes advanced in the White Paper – such as equity and redress, quality, development, effectiveness and efficiency – has [sic] guided the Task Team and inform this Report.

It also has a common commitment to transforming higher education so that it is 'responsive to the needs of students of all ages and the intellectual challenges of the 21st century'. The members of the Task Team share a passionate belief in the vital importance of higher education to democracy, social justice and the economic and social development of this country (CHE, 2000: 2):

As requested, the Task Team advances concrete proposals on the reconfiguration of the higher education system and institutions, and on the creation of a new landscape. It also recommends certain issues for further investigation.

The Task Team is convinced that the problems and weaknesses of the higher education system will not disappear on their own or be overcome by institutions on their own. They must be confronted and overcome in a systemic way.

This will require the reconfiguration of the present system and the creation of a new higher education landscape. It will entail extensive, integrated, iterative national planning as well as multiple co-ordinated interventions and initiatives. It will also require political will, sustained commitment and the courage to change at system and institutional level.

In summary, the CHE Task Team Report offers a number of **different types of recommendations** to the Minister (CHE, 2000: 8–9). For example, the Task Team Report:

- *Recommends that the present system should be reconfigured as a differentiated and diverse system so that there can be effective responses from institutions to the varied social needs of the country.*
- *Recommends that in a new reconfigured system, institutions should have a range of mandates (principal orientations and core foci) and pursue coherent and more explicitly defined educational and social purposes with respect to the production of knowledge and successful graduates. (...)*
- *Stresses that the Minister must be mindful that under apartheid, institutions designated for black South Africans and the technikons were disadvantaged in different ways. (...)*
- *Advocates that there should be no closure of institutions but that the absolute number of institutions should be reduced through combination.*
- *Argues that combination offers the opportunity for creating a more responsive higher education landscape. (...)*
- *Strongly recommends that the Minister should investigate the full range of possibilities for combination. (...)*

- *Proposes that as part of national planning and the development of a national plan, there should be an iterative process between the Minister and institutions around the reconfiguration of the system, combination and the mandates of institutions. (...)*

Thus, regarding the ‘Shape of the System’, the CHE Task Team recommends that there should be **a differentiated and diverse system**, brought about through **the reconfiguration of institutional mandates** (CHE, 2000: 64).

The Shape of the System

1. *The present system should be reconfigured as a differentiated and diverse system so that there can be effective responses from institutions to the varied social needs of the country.*
2. *In a new reconfigured system, institutions should have a range of mandates (principal orientations and core foci) and pursue coherent and more explicitly defined educational and social purposes with respect to the production of knowledge and successful graduates.*
3. *The mandates of institutions should be defined as:*
 - *Institutions which constitute the bedrock of the higher education system. The orientation and focus of these institutions would be:*
 - *quality undergraduate programmes;*
 - *limited postgraduate programmes up to a taught masters level;*
 - *research related to curriculum, learning and teaching with a view to application.*
 - *Institutions whose orientation and focus is:*
 - *quality undergraduate programmes;*
 - *comprehensive postgraduate taught and research programmes up to the doctoral level;*
 - *extensive research capabilities (basic, applied, strategic and developmental) across a broad range of areas.*
 - *Institutions whose orientation and focus is:*
 - *quality undergraduate programmes;*
 - *extensive postgraduate taught and research programmes up to the masters level;*
 - *selective postgraduate taught and research programmes up to the doctoral level;*
 - *select areas of research (basic, applied, strategic and development).*
 - *An institution whose orientation and focus is dedicated distance education.*
 - *Private higher education institutions.*

Institutional Combination should lead to a reduction in the number of institutions, yet no closures. The number of higher education delivery sites should be maintained (CHE, 2000: 56–57).

Institutional Combination

It is vital that a reconfigured higher education system be sustainable. This requires an effective regulatory framework. It also entails state funding of the public sector and the more efficient and effective use of scarce public resources. For this and other reasons indicated at the beginning of this chapter, the Task Team recommends reducing the absolute number of higher education institutions. This does not necessarily imply closing institutions and the concomitant sale or scrapping of buildings, facilities and plant, and retrenchment of staff, although Section 25 of the Higher Education Act makes provision for closure of institutions. The Task Team recommends that there should be no closures.

The Task Team instead recommends reducing the present number of institutions through combining institutions.

The CHE Task Team anticipates savings from economies of scale, from the elimination of duplication and rationalisation of programmes and from reduced numbers of councils, senates and senior management.

Savings should result from an increase in size of the institutions with reduction of unit costs. Further benefits will accrue through the elimination of unnecessary duplication and rationalisation of programmes. The possibility of cross-subsidising programmes will be enhanced. Reducing the number of institutions should also realise cost benefits by reducing the numbers of councils and senior management and administrative teams that would be required.

The key **reasons for institutional combination** are to be found in the need to achieve specific social and educational goals (CHE, 2000: 57).

Combination is not an end in itself; it is a means towards the achievement of social and educational goals. In South Africa, these goals relate to:

- *Overcoming apartheid fragmentation and the historical character and geography of institutions.*
- *Improving access for learners, particularly for blacks, women and learners from working class and rural poor backgrounds.*
- *Improvements in the quality of outputs of the higher education system and institutions.*
- *Improvements in student and staff equity overall, and in specific areas of the system.*

- *Increasing the effectiveness of the system and institutions with regard to mandates and missions.*
- *Increasing the efficiency (including administrative and financial) of the system and institutions.*
- *Ensuring a geographic distribution of institutions that best serves socio-economic needs.*
- *Ensuring greater levels of collaboration among higher education institutions, particularly on a regional basis.*
- *Ensuring a sustainable system and viable and sustainable institutions with capabilities to pursue their particular mandates and missions.*

The following **key considerations for merger** are provided in particular (CHE, 2000: 58–59).

Key Considerations

In making final decisions about the combination of institutions, a number of issues should be considered. These include:

1. *With respect to social and educational goals, how, or to what extent, combination:*
 - *Promotes the overall social and educational goals that have been set for higher education.*
 - *Contributes to the achievement of particular regional and local economic and social needs.*
 - *Contributes to the achievement of particular mandates and missions.*

2. *With respect to access and equity, how, or to what extent, combination:*
 - *Promotes access and equity through improvements in quality and efficiency or, at least, does not make access and equity more difficult to achieve.*
 - *Improves the student and staff equity profile.*
 - *Permits historically disadvantaged institutions to play an important and effective role in the new landscape.*

3. *With respect to improving quality and efficiency of provision, how, or to what extent, combination:*
 - *Builds synergy in terms of institutional orientation, broad areas of study, fields and disciplines, variety and levels of programme offerings, distribution of students across broad areas of study, etc.*
 - *Enables more effective provision of learning and teaching, and research and community service.*

- *Enables more rational and efficient use of buildings, facilities and human resources.*
 - *Enables economies of scale through the creation of larger multi-purpose institutions.*
 - *Provides enhanced leadership, management and administrative capacities.*
4. *With respect to overcoming the historical legacies of apartheid, how, or to what extent, combination:*
- *Creates institutions with new identities and cultures that transcend their past racial and ethnic institutional histories and contribute to their deracialisation.*
 - *Creates new institutions that transcend the past institutional histories as universities, technikons or colleges.*
5. *With respect to institutional viability and sustainability, how, or to what extent, combination:*
- *Overcomes the threat to the viability of institutions of low student Full-time Equivalents (FTEs).*
 - *Addresses the viability of institutions as single-purpose public institutions.*
 - *Develops potentially stronger, more viable and sustainable institutions.*

There must also be sensitivity to the historical contributions of institutions to the democratisation of South Africa, the identities and cultures of particular institutions and the language policies and medium of instruction of institutions. The characteristics (minimum student FTEs, distribution of enrolments across the three broad areas of study, staff qualifications and research outputs, etc.) that institutions should need to satisfy should be a further consideration when approaching combination. Finally, in considering combinations, the missions and orientations of institutions, their strengths and real capabilities, the existence of synergy and the prospects of creating robust new institutions should be taken into account.

The CHE Task Team report recommends a **four-step process of consultation and planning** stretching over several years to arrive at a reconfigured system (CHE, 2000: 67).

7. *A reconfigured system will not be realised overnight. Clear, explicit, and realistic time frames must be established for the processes and activities highlighted above:*
- *Consultations around the reconfiguration proposals.*
 - *An iterative process around institutional mandates and missions.*
 - *The development of a national plan.*
 - *Combinations and the development of institutional missions and concomitant strategic plans.*

The first three activities above are likely to require a minimum of six months. The fourth, especially where it involves combinations, could require between one and three years. It will not be possible to address every dimension of reconfiguration and pursue all the combinations at once. Implementation must be carefully planned and rolled out over a number of phases, which combine goals, strategies and human and financial resources. Overall, achieving a new higher education landscape with the qualities that are desired is likely to take a decade.

Consultations around the reconfiguration proposals with stakeholders should be the first step (CHE, 2000: 66).

1. *The Minister should begin a process of consultation with key national stakeholders on the proposed reconfiguration of the higher education system. An iterative process that involves the Department of Education and individual higher education institutions should follow these consultations. This should be part of the present institutional and national planning activities. The overall purpose of the iterative process would be to finalise the mandate of the institutions and, where relevant, institutional combination.*

The **National Plan for Higher Education** informed by the consultations should provide for performance agreements with institutions and establish the planning framework of institutions (CHE, 2000: 66).

2. *The above processes should inform the production of a national plan by the Department of Education. The national plan should also encompass agreed upon performance agreements and targets for the national system and for individual institutions related to the equity, quality, effectiveness and efficiency challenges identified in chapter one.*

The development of new institutional missions in line with approved institutional mandates **should be an initial step** at the institutional level **in the process of combining institutions.** (CHE, 2000: 66).

3. *Once the national plan is finalised, the process of combining institutions should be initiated and institutions should be required to develop missions according to their approved mandates. The Department of Education must develop efficient and effective steering and coordination mechanisms.*

The **process of institutional combination should be facilitated by** establishing appropriate co-operative **structures** and lines of **communication**, and should be premised upon such **principles** as co-operation, openness, integrity, realism, and sensitivity to human resource issues (CHE, 2000: 66–67).

4. *Due attention should be paid to the process by which combination is undertaken. This would require attention to:*
- *Appropriate structures with the necessary financial resources and human resources to steer the combination.*
 - *Institutional involvement in identifying their strengths and weaknesses and the advantages and disadvantages of combination, and in maximising the opportunities afforded by combination.*
 - *Planning in an atmosphere of openness and integrity with the engagement of all the principal actors.*
 - *strategic planning processes and detailed action plans with clear and explicit goals and outcomes, planning phases and realistic time frames.*
 - *Sensitivity to human resource issues and careful attention to labour relations, regulations and the rights and obligations all parties.*
 - *The use of financial and other instruments as ‘pulleys and levers’.*
5. *The approval of mandates and the development of institutional missions and strategic plans must be informed by high levels of realism. The goals and purposes of higher education, national and regional needs, as well as the specific histories, geographical location, key academic and other characteristics and capacities and potential capabilities of each institution must be taken into account.*

The CHE recommends the development of a ‘**social plan**’ for merging institutions (CHE, 2000: 67).

6. *A Social Plan should be developed within a three-month period to serve as a framework for addressing various issues relating to labour relations. These include:*
- *The commitments and interactions that would be required from the different social partners to ensure the success of reconfiguration.*
 - *The human resource implications of reconfiguration and combination.*
 - *Legal obligations in terms of the Labour Relations Act.*
 - *Possible new opportunities for staff as a result of a reconfigured system.*
 - *Measures to reduce or avoid retrenchments and alternatives to retrenchments.*
 - *Time frames for resolution of issues and decision-making.*

The **Department of Education should monitor** the progress towards the achievement of set and agreed-upon goals; **the CHE should evaluate** the progress (CHE, 2000: 67).

8. *The success of reconfiguration will require setting nationally negotiated priorities and targets, as well as monitoring and evaluation mechanisms to track their progress.*

9. *The Department of Education would need to effectively monitor progress towards achievement of the performance agreements and targets. As the Minister is required to consult with the CHE on the national plan, the CHE must also regularly assess progress around the national plan so that it is able to advise the Minister appropriately.*

The CHE cautions about the **costs** of reconfiguration and recommends that **'savings'** (due to smaller student numbers) should be used to reconfigure the system (which implies that the DoE will pay for it), **and** that **in addition donor and private funding** should be sought. (CHE, 2000: 68).

Resources

1. *Present levels of public funding of higher education should be sustained, despite the decrease in enrolments. 'Savings' should be used to reconfigure the higher education system.*
(...)
4. *Public, international donor and private sector funds should be mobilised for strategic interventions towards the reconfiguration of the system and the achievement of quality, equity and efficiency in higher education. (...)*

The CHE Task Team Report sets out as the primary legal basis for institutional combination Section 23 of the Higher Education Act and White Paper policy (CHE, 2000: 57–58).

Legislative Framework

The legislative basis for combination is provided for by the Higher Education Act of 1997. Section 23 of the Act states that:

...the Minister may, after consulting the Council on Higher Education (CHE) and by notice in the Gazette, merge two or more public higher education institutions into a single public higher education institution [Section 23 (1)].

Section 23 also outlines the process that must be followed by the Minister to effect mergers. Section 24 provides for the 'merger of subdivisions of higher education institutions'. Section 38 of the Act makes provision for institutions to co-operate to enable the optimal use of resources in the performance of their functions, and to establish regional structures in the interest of such co-operation. It also refers to the possibility of financial incentives to encourage such co-operation. The White Paper states:

...emphasis will be placed on regional reviews of institutional plans as an integral part of the national planning process. This will be intended to promote regional

coordination and collaboration as part of the national plan to enhance articulation of programmes, mobility of learners between institutions, the sharing of resources, including scarce academic staff, library and information facilities. It is also intended to reduce programme duplication and overlap. The Ministry will provide incentives to encourage and facilitate regional planning and coordination.

It also says:

Incentive funding will be available on a selective basis to support the costs involved in regional collaboration among institutions which aim to consolidate, merge, share or otherwise collectively improve the efficient use of their facilities and resources for training, teaching, research or community service.

A.3 EXTRACTS FROM THE NATIONAL PLAN FOR HIGHER EDUCATION (2001)

The National Plan brings to closure a long process of consultations on the restructuring of the South African higher education system (Section 1.6).

The fundamental principles and framework outlined in the National Plan are not open for further consultation. This is not to suggest that there is no room for consultations on the details of implementation or on the outcomes of the further investigations that are indicated in the National Plan. However, the focus must now be firmly on implementation. As the White Paper states:

‘Our democratically elected government has a mandate from its electorate and is responsible to Parliament for ensuring that the mandate is fulfilled. Ministers have a duty to provide leadership. When all the appropriate investigations and consultations have been completed, a minister must decide, and must take responsibility for the consequences of the decision’ (White Paper: 3.5).

That time has now come. The consultative process, which has lasted some six years, must rank as one of the most wide-ranging and all-encompassing that has taken place anywhere in the world on higher education. It began with the National Commission on Higher Education in 1995 and continued through the development of a Green Paper in 1996, the White Paper, including a Draft White Paper, in 1997 and the preparation of the Council on Higher Education’s Report last year. It must be brought to a close.

Mergers are mentioned in the context of the **restructuring of the higher education landscape**, and in response to the Report by the CHE ‘Shape and Size’ Task Team. The National Plan mentions a number of strategies of restructuring, including regional collaboration and mergers (Executive Summary: 3):

Restructuring of the Institutional Landscape

10. *The National Plan proposes that the institutional landscape of higher education must be restructured to create new institutional and organisational forms to address the racial fragmentation of the system, as well as administrative, human and financial capacity constraints. This will be achieved through:*

10.1 *Institutional collaboration at the regional level in programme development, delivery and rationalisation, in particular, of small and costly programmes, which cannot be sustained across all the institutions.*

10.2 *Investigating the feasibility of a more rational arrangement for the consolidation of higher education provision through reducing, where appropriate, the number of institutions but not the number of delivery sites on a regional basis. An initial analysis of the available data suggests that the number of institutions can be reduced. The key issue is to determine the number and form that this should take.*

10.3 *The Ministry will establish a National Working Group to undertake the investigation based on the principles and goals for the transformation of the higher education system, as outlined in the White Paper.*

In particular, the National Plan's first **restructuring strategy** is programme and infrastructure co-operation, including the regional level rationalisation of the provision of costly programmes and specialised postgraduate programmes, the establishment of new higher education institutes and collaboration in infrastructure development (Section 6.5.1).

6.5.1 Programme and infrastructural co-operation

6.5.1.1 *In order to improve and promote co-operation, the Ministry will:*

- *From the 2003/2004 financial year, only fund student places in small and costly programmes, where unit costs are above average, on the basis of a regional framework for the rationalisation of such programmes. The framework could either involve the joint offering of the programmes or agreement that the programmes would only be offered by a particular institution/s.*
- *From the 2003/2004 financial year, only fund student places in specialised postgraduate programmes on the basis of a common regional teaching platform. It will not fund student places for new programmes that overlap with or duplicate existing programmes offered in the region, unless there is clear and unambiguous motivation for the provision of the programmes.*
- *Establish Working Groups to develop a framework and implementation plan for the establishment of National Institutes for Higher Education in Mpumalanga and the Northern Cape respectively, based on the provision of higher education programmes*

largely through collaboration between higher education institutions currently operating in the two provinces.

- *Facilitate the funding of regional infrastructural projects through leveraging donor funds.*
- *From the 2002/2003 financial year, only fund student places at satellite campuses if this has been approved as part of the institution's plans. Approval will not normally be granted unless there is demonstrated regional and/or national need, especially for specialist or niche programmes and there are clear strategies to collaborate with other institutions in the region.*
- *The Ministry will not support requests for loan facilities to fund capital projects at satellite campuses, prior to the finalisation of the regional investigation.*

To facilitate regional level programme rationalisation and collaboration, the Ministry requires the establishment of **regional programme clearing-houses** (Section 6.5.1.2).

6.5.1.2 In order to facilitate collaboration, higher education institutions will be required from 2001 to:

Submit all proposed new programmes for regional clearance to avoid overlap and duplication, prior to the submission of the programmes to the Department of Education for funding approval and to the Council on Higher Education for accreditation. This will require that institutions establish a regional programme clearing mechanism, which will include criteria for assessing programme overlap and duplication.

Inform the Ministry of their intention to close down particular programmes at least one year before the intended closing date. The Ministry must also be informed of the reasons for the closing down of the programme and provided with an assessment of the impact on regional and national need and availability of such programmes.

The second **restructuring strategy** of the National Plan is mergers and the development of new institutional and organisational forms by means of a process led by National Working Groups. The National Plan endorses existing merger plans and the establishment of new institutions.

6.5.2 Mergers and new institutional and organisational forms

The Ministry, in order to facilitate mergers and the development of new institutional and organisation forms, will:

- *Establish a National Working Group to investigate and advise the Minister on the appropriate institutional structures on a regional basis to meet regional and national needs for higher education, including mergers and/or other forms of combination.*

- *Establish a Working Group to facilitate the merger, including the development of an implementation plan, of UNISA, Technikon SA and the incorporation of the distance education centre of Vista University into the merged institution. (...) The Working Group will also be asked to advise on the role of a single dedicated distance education institution in the development of a national network of centres of innovation in course design and development using the expertise and experience of the best scholars and educators throughout South Africa, as well as the broader role of distance education in higher education in the light of current and future international trends and the changes in information and communication technology.*
- *Initiate the process, including the development of an implementation plan, for the incorporation of the Qwa-Qwa branch of the University of the North into the University of the Free State.*
- *Request the Councils of the Natal Technikon and ML Sultan Technikon to complete plans for the merger of the two institutions.*

Outcome 16 in the National Plan for Higher Education amplifies the Ministry's strategies to arrive at **new institutional and organisational forms** (Section 6.4).

OUTCOME 16:

NEW INSTITUTIONAL AND ORGANISATIONAL FORMS

The Council on Higher Education advises that the restructuring of the higher education system to ensure its sustainability, including in particular, the efficient and effective use of resources, requires a reduction in the 'present number of institutions through combining institutions' (CHE: 56-57). This recommendation is based on the argument that the 'current landscape and institutional configuration of higher education has its roots in an apartheid past, is inadequate to meet socio-economic needs and is no longer sustainable. South Africa does not have the human and financial resources to maintain the present institutional configuration. Senior and middle-level leadership, management and administrative capacities are absent or lacking in parts of the system. New patterns in student enrolments mean that a number of institutions are at risk. Some institutions also do not satisfy the specification ... to continue as independent institutions' (CHE: 51).

The Ministry agrees with the Council on Higher Education that the sustainability and transformation of the higher education system requires a reduction in the number of institutions. The CHE's notion of combination may, however, be conceived too narrowly to refer specifically to mergers of institutions, as the institutional and other responses to the CHE Report have suggested. The Ministry's view is that the notion of combination must be broadened to include a variety of arrangements, including not only mergers but also programme and infrastructural collaboration as discussed above.

The National Plan disagrees with the CHE process recommendations and proposes a **less consultative, more centrally driven approach** (Section 6.4).

The Ministry does not, however, agree with suggestions from the higher education sector that combination processes should be essentially self-driven, although within a stronger policy framework. Voluntarism, as indicated above, has failed to encourage institutional collaboration. And while planning and funding mechanisms will play an important role in steering programme and infrastructural collaboration, they are insufficient on their own to alter the institutional landscape of higher education.

The Ministry firmly believes that if the institutional landscape of higher education is to be restructured, the Minister will have to exercise the full regulatory powers at his disposal in terms of the Higher Education Act (Act No 101 of 1997), that is, the power to merge two or more public higher education into a single institution. The Ministry will not shy away from this responsibility.

One set of reasons for the restructuring of the system advanced in the National Plan are **low enrolments, low intake, small size of institutions, student race and gender equity, and low outputs** in certain provinces (Section 6.4).

The Ministry's agreement with the Council on Higher Education's recommendation to reduce the number of institutions is informed by a preliminary analysis of the current state of the higher education system based on data and material drawn from the three-year 'rolling' plans submitted by higher education institutions, as well as from the national higher education management information system.

The analysis of the data available shows, for example, that:

- *Student enrolments in three provinces have declined over the past four years; by a total of 9 000 (or 9%) in 2000 compared to 1997. The inflows of new (or first-time entering) undergraduates have also fallen during this period to levels, which suggest that they will not be able to sustain even their 2000 enrolment total.*
- *The total intake of new undergraduates in the contact institutions (i.e. excluding Unisa and Technikon SA) in the three provinces averages only 2 300 per annum. This is a low average when account is taken of the need for public institutions to spread their enrolments across a wide range of fields of academic study.*
- *In another three provinces, the average full-time equivalent enrolment per contact institution had by 2 000 fallen to levels considerably below the national average. In one province the average full-time equivalent enrolment per institution was only 5 000 in 2000, and in 2 others it was below 7 000. The small size of institutions in these three provinces has had serious effects on their financial efficiency. For example, their average unit cost to government per full-time equivalent student in 2000 ranged from 25% to 45% more than the national average of government*

subsidy per full-time equivalent student. Their average costs to government per graduate produced were also as much as 30% higher than the national average.

- *Two provinces had proportions of black students and one a proportion of female students, which were considerably lower than the national averages. The proportions of enrolled black students were 54% and 56% compared to a national average of 72%. In another province, the proportion of female students was only 43% compared to a national average of 50%. These are indicators that inequities of access exist in these provinces.*
- *Three provinces had average output ratios well below national averages and the proposed national benchmarks outlined in section 2.3.1. The performance of institutions in these provinces is a consequence of their patterns of both staff and student recruitment and retention. They have not been able to recruit and to retain sufficient numbers of staff members to introduce research programmes, nor have they been able to recruit students into postgraduate programmes.*

The **number of institutions** should be reduced, while maintaining the number of geographical delivery sites (campuses) (Section 6.4).

The full picture presented by this preliminary analysis suggests that through processes of merger and other forms of institutional reorganisation, the number of public higher education institutions in South Africa could and should be reduced. However, reducing the number of institutions does not imply that some institutions would be closed and discontinue offering higher education programmes.

On the contrary, the Ministry firmly believes that the processes of institutional restructuring and merger must be premised on the principle that higher education programmes would continue to be offered at all the current geographical sites, but within new institutional and organisational forms and structures. The importance of this cannot be over-emphasised. The Ministry is in no doubt that increasing the participation rate, as well as addressing the equity imperative, requires the retaining of the current physical infrastructure of the higher education system.

In the long run, the **mergers should produce savings** by reducing apartheid planning inefficiencies (Section 6.4).

The Ministry is mindful of the costs associated with mergers and of the fact that substantial savings flowing from economies of scale are not likely in the short to medium-term. However, the Ministry is less convinced by the claims made that international experience suggests that there are few financial benefits associated with mergers or that mergers of higher education institutions in other countries have not been successful. Although cognisance should be taken of the international experience, it is important to assess the financial impact of mergers in a context in which apartheid planning often flew in the face of financial rationality.

International experience indicates a **90% success rate** of higher education mergers (Section 6.4).

Furthermore, the argument that mergers are not successful is usually based on the evidence of mergers in industry. However, a recent assessment of mergers in a range of countries shows that higher education mergers enjoy a considerably higher success rate than mergers in industry. The findings indicated that the failure rate for higher education mergers was only 10% compared to a 50% to 80% failure rate for mergers in industry (Fielden and Markham: 1999).

International experience shows that governments merge institutions to **enhance quality** and **strengthen their national higher education system** (Section 6.4).

It should also be noted that the merging of higher education institutions is a global phenomenon driven by governments to enhance quality and to strengthen national higher education systems in the context of declining resources. The international experience also indicates that successful mergers in higher education are dependent on a variety of factors, not the least of which is the will, commitment and dedication of all parties to change.

Cost of merger and **other resource and capacity constraints** should be carried by local and international agencies (Section 6.4).

The Ministry accepts that facilitating and managing mergers is demanding and time-consuming and will stretch the already limited capacity at systemic and institutional levels. The Ministry, however, firmly believes that financial and capacity constraints must not be allowed to stand in the way of setting a vigorous national agenda involving both mergers and other forms of collaboration. The Ministry is confident that financial and capacity constraints can be addressed through mobilising the necessary support and expertise from local as well as international agencies.

The National Plan acknowledges that the **factors** that influence the merger decisions **are specific** to different groups of institutions (Section 6.4.1).

6.4.1 Mergers and new institutional and organisational forms

The Ministry is of the view that there is no single factor that underpins the case for mergers or for new institutional and organisational forms. Instead, there are a range of factors linked to the specific context of different groups of institutions. For example, the rationale for merging a historically white and a historically black institution may well differ from that for merging two small institutions. In the one case, the purpose may be that of overcoming the racial fragmentation of the higher education system. In the other, it may be that of achieving economies of scale and/or scope. In yet other cases, the rationale

may be that of streamlining governance and management structures and improving administrative systems. Or it may be a combination of all of these factors. It may also be linked to improving the quality of provision and strengthening the sustainability of the national higher education system against the background of increasing competition from foreign and multinational institutions which are looking for new educational markets in response to economic and financial pressures within their own countries.

The Ministry's view is that potential mergers must be assessed in terms of the role they could play in contributing to the broader social, educational, economic and political goals for the transformation of the higher education system. This is especially important given the fragmentation and inherited inequities that continue to characterise the higher education system.

The Ministry therefore believes that to successfully reduce the number of institutions, all the possibilities of institutional combinations must be assessed, that is, as the Council on Higher Education argues, 'no public institution should believe that it is exempted from combination, from the need to change fundamentally and from contributing to achieving a new higher education landscape' (CHE: 60).

What is clear, and on this there can be no disagreement, is that the current institutional landscape is not suitable to meet the human resource and knowledge needs of South Africa. The Ministry believes that the restructuring of the institutional landscape cannot be delayed. It is long overdue. It has not occurred earlier because of the reluctance of all concerned to confront the difficult realities inherited from the apartheid past. This cannot continue. We must grasp the nettle and chart a new direction for the higher education system if it is to contribute to the reconstruction and development agenda.

The process of reducing the number of institutions should start with the **investigation of the feasibility of restructuring**, taking the White Paper principles as its starting point and assessing the specific CHE proposals (Section 6.4.1).

The Ministry therefore proposes to investigate the feasibility of reducing the number of institutions and establishing new institutional and organisational forms through a more rational arrangement for consolidating the provision of higher education on a regional basis. It is important to emphasise that the focus of the investigation would not be on whether the number of institutions can or should be reduced, but how they can be reduced and the form that restructured institutions should take.

The investigation would take as its starting point the principles for the transformation of higher education as outlined in the White Paper. It would, in addition, have to ensure that its recommendations address and promote the following goals within each region, which were identified by the Council on Higher Education as the basis for assessing combination of institutions:

- *Social and educational goals, in particular the contribution of higher education to social and economic development, both regionally and nationally.*
- *Access and equity goals in relation to both student and staff equity, as well as institutional redress.*
- *Quality and efficiency goals in terms of economies of scale and scope, both programme and infrastructural, as well as the spread and quality of programmes and graduation and retention rates.*
- *Institutional sustainability and viability goals in terms of student numbers, income and expenditure patterns and management and governance capacities.*
- *Institutional identity and culture goals in terms of overcoming the legacy of apartheid (CHE: 58–59).*

The demarcation of existing **higher education regions** (which have informed the establishment of regional consortia) should also inform regional assessment (Section 6.4.1).

The Ministry is aware of the potential concerns relating to the demarcation of regions. However, for the purposes of the investigation, the Ministry has decided to use the existing regional demarcations, which have informed the establishment of the regional consortia by higher education institutions, namely:

- *Eastern Cape.*
- *Free State.*
- *KwaZulu-Natal.*
- *Northern Metropolis, i.e. Gauteng, Northern Province and North West.*
- *Western Cape.*

In the case of the Northern Metropolis, given its size and spread, the Ministry will consider an appropriate sub-regional division.

The investigation should be undertaken by a **National Working Group** which will report and make recommendations to the Minister on restructuring the higher education system (Section 6.4.1).

The investigation will be undertaken by a National Working Group appointed by, and reporting to, the Minister. The Working Group will be expected to submit its recommendation to the Minister within six months of its establishment, and no later than December 2001.

A.4 EXTRACTS FROM THE HIGHER EDUCATION ACT 101 OF 1997 (WITH AMENDMENTS)

The Higher Education Amendment Act 63 of 2002 amends Section 1 of the principal Act by substituting the definition for **'higher education institution'** and inserting definitions for **'incorporation of a subdivision'** and **'merger'**:

DEFINITIONS

'higher education institution' means any institution that provides higher education on a full-time, part-time or distance basis and which is –

- (a) merged, established or deemed to be established as a public higher education institution under this Act;*
- (b) declared as a public higher education institution under this Act; or*
- (c) registered or provisionally registered as a private higher education institution under this Act'.*

'incorporation of a subdivision' means the process of incorporation as contemplated in Section 21(1)(b) or 24 in terms of which an identified subdivision, faculty, school, department, section or component of a public higher education institution or education institution becomes part of another public higher education institution while the latter institution's legal personality as contemplated in Section 20(4) is not affected by the incorporation, and 'an incorporated subdivision' has a similar meaning'.

'merger means the process contemplated in Section 23 in terms of which two or more public higher education institutions lose their status as juristic persons on the date that they are merged into a new juristic person as contemplated in Section 20(4)'.

According to the Higher Education Act of 1997, the **power to establish public higher education institutions** is vested in the Minister of Education.

20 Establishment of public higher education institutions

- (1) The Minister may, after consulting the CHE, by notice in the Gazette and from money appropriated for this purpose by Parliament, establish a university, technikon or college.*
- (2) Notwithstanding subsection (1), a university may also be established by an Act of Parliament and when so established it is deemed to be a public higher education institution established under this Act.*

The Higher Education Amendment Act 23 of 2001 deletes subsection (2), **giving the Minister the exclusive power** to establish a university, technikon or college.

- (3) The notice contemplated in subsection (1) must determine –*
 - (a) the date of establishment of the institution;*
 - (b) the type and name of the institution; and*
 - (c) the physical location and official address of the institution.*

- (4) *Every public higher education institution established, deemed to have been established or declared as a public higher education institution under this Act, is a juristic person.*

The Higher Education Amendment Act 63 of 2002 inserts the provision of **establishment by merger** into subsection (4):

- (4) *Every public higher education institution established, merged, deemed to have been established or declared as a public higher education institution under this Act, is a juristic person.*
- (5) *Notwithstanding subsection (4), a public higher education institution may not, without the concurrence of the Minister, dispose of or alienate in any manner, any immovable property acquired with the financial assistance of the State or grant to any person any real right therein or servitude thereon.*

The Higher Education Amendment Act 23 of 2001 amends Section 20 by the addition after subsection (5) of the following subsections, making provisions for the **constitution of an interim council** in the first six months of the establishment of a public higher education institution.

- (6) *The Minister must in the notice contemplated in subsection (1) establish an interim council for a period of six months, to perform the functions relating to governance except the function to make the institutional statute.*
- (7) *The Minister may extend the period referred to in subsection (6) once for a further period not exceeding six months.*
- (8) *The interim council contemplated in subsection (6) consists of –*
- (a) *the chairperson; and*
 - (b) *four other members.*
- (9) *The interim council must co-opt three members of the interim management contemplated in subsection (10)(a) and these co-opted members have no voting powers.*
- (10) *Apart from the functions contemplated in subsection (6), the interim council must in particular –*
- (a) *appoint an interim body to manage the day-to-day activities of the institution;*
 - (b) *ensure that a council is constituted in terms of the standard institutional statute contemplated in Section 33(3); and*
 - (c) *ensure that such other structures as may be determined in the standard statute contemplated in Section 33(3) are constituted.*

(11) Any decision of the interim council which may affect the right of any structure of the public higher education institution, may only be taken after consultation with such structure.

The Higher Education Act of 1997 gives the Minister the power and spells out the conditions **for declaring any education institution a public higher education institution.**

21 Declaration of education institutions as public higher education institutions

- (1) The Minister may, after consulting the CHE and by notice in the Gazette, declare any education institution providing higher education as –*
- (a) a university, technikon or college; or*
 - (b) a subdivision of a university, technikon or college.*

The Higher Education Amendment Act 63 of 2002 substitutes subsection (b) to make provisions for the incorporation of subdivisions of higher education institutions:

(b) an incorporated subdivision of a university, technikon or college.

- (3) The Minister may act under subsection (1) only –*
- (a) after consulting –*
 - (i) the governing body of the education institution, if it is a public institution;*
 - (ii) the council of the existing public higher education institution, if the education institution is to be declared a subdivision of such existing public higher education institution; or*
 - (iii) the responsible Minister, Member of the Executive Council or authority, if the education institution is administered, controlled or funded by an organ of state other than the Department of Education; and*
 - (b) after having –*
 - (i) published a notice in one or more daily newspapers circulating in the area in which the education institution provides higher education, containing the reasons for the declaration referred to in subsection (1), in all the official languages used as media of instruction by the education institution concerned.*

The Higher Education Amendment Act 63 of 2002 substitutes subsection (3)(b)(i) as follows:

- (i) published a notice in one or more newspapers circulating in the area in which the education institution provides higher education, containing the reasons for the declaration referred to in subsection (1), in all the official languages used as media of instruction by the education institution concerned.*

- (ii) *given any interested persons an opportunity to make representations; and*
- (iii) *considered such representations;*
- (c) *if it is a private institution, with the concurrence of the owner of the education institution and the Minister of Finance.*

The Higher Education Amendment Act 23 of 2001 inserts Section (3A) after Section (3), **extending the provisions for the constitution of an interim council** to newly-declared public higher education institutions.

(3A) Section 20(6) to (11), with the changes required by the context, applies to a declaration referred to in subsection (1) (a).

- (4) *Nothing contained in this Act or any other law may be regarded as obliging the Minister to declare an education institution to be a public higher education institution in terms of this section.*

According to the Higher Education Act of 1997, the **declaration** of a public higher education institution **is contingent upon compliance with labour legislation.**

- (5) *An education institution may only be declared a public higher education institution after the employer has complied with its obligations in terms of the applicable labour law.*

Subsection (5) is replaced by the Higher Education Amendment Act 63 of 2002 to make provision for the automatic transfer of the contracts of employment to a newly-declared higher education institution, to make provisions regarding redeployment, continuity of employment, disciplinary measures etc.

(5) (a) Notwithstanding Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), the contracts of employment between the education institution (herein referred to as 'the old employer') and its employees are transferred automatically to the declared higher education institution (herein referred to as 'the new employer') as from the date of the declaration contemplated in subsection (1), but any redeployment of an employee as a consequence of the declaration is subject to applicable labour legislation.

(b) If an education institution is declared a higher education institution as contemplated in subsection (1), all the rights and obligations between the old employer and each employee at the time of the declaration continue in force as if they were rights and obligations between the new employer and each employee and anything done before the declaration by or in relation to the old employer is deemed to have been done by or in relation to the new employer.

(c) A declaration referred to in subsection (1) does not interrupt the employee's continuity of employment.

- (d) *The provisions of this subsection do not affect the liability of any person to be disciplined for, prosecuted for, convicted of, and sentenced for any offence or misconduct.*
- (e) *An employee or a student is subject to the disciplinary codes and rules applicable to the higher education institution as from the date of the declaration contemplated in subsection (1), but if any enquiry into incapacity or any proceedings in respect of a charge of misconduct had been instituted or commenced against any employee or student before the date of the declaration, such enquiry or proceedings continue in terms of the codes and rules applicable to the education institution immediately prior to the declaration.*

The Higher Education Amendment Act 63 of 2002 adds two new subsections (6) and (7) to Section 21, giving an institution the opportunity to **dismiss staff members prior to declaration** and making provisions for the **continuity of academic programmes and qualifications**.

- (6) *Notwithstanding subsection (5)(a), the old employer may undertake rationalisation of its workforce according to operational requirements in accordance with section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), prior to the date of the declaration contemplated in subsection (1).*
- (7) *If an education institution is declared a higher education institution as contemplated in subsection (1), the higher education institution –*
 - (a) *continues with all academic programmes offered by the education institution under the rules applicable to the education institution immediately before the date of the declaration, until such programmes and rules are amended or restructured by its council; and*
 - (b) *awards a degree, diploma or certificate to a student who qualifies before or after the date of the declaration in its own name, but if the student started the course before the date of the declaration, such degree, diploma or certificate must also reflect the name of the education institution as it was before the declaration.*

22 Consequences of declaration as public higher education institutions

- (1) *From the date determined in terms of Section 21 (2) (a) –*
 - (a) *the education institution is deemed to be a public higher education institution established under this Act or a subdivision of such public higher education institution, as the case may be; (b) the assets, liabilities, rights and obligations of the education institution devolve upon the public higher education institution; and (c) any agreement lawfully entered into by or on behalf of the education institution is deemed to have been concluded by the public higher education institution.*

- (2) *Immovable property devolving upon the public higher education institution in terms of subsection (1) (b) must, subject to the concurrence of the Minister of Finance, be transferred to such institution without payment of transfer duty, stamp duty or other money or costs, but subject to any existing right, encumbrance, duty or trust on or over that property.*
- (3) *The officer in charge of a deeds office or other office where the immovable property contemplated in subsection (2) is registered must, on submission of the title deed and on application by the public higher education institution, make such endorsements on that title deed and such entries in the registers as may be required to register the transfer concerned.*
- (4) *The declaration of an education institution as a public higher education institution under Section 21 (1) does not affect anything lawfully done by the education institution prior to the declaration.*
- (5) *All funds which, immediately prior to the date determined in terms of Section 21 (2) (a), were vested in the education institution by virtue of a trust, donation or bequest must be applied by the public higher education institution in accordance with the trust, donation or bequest, as the case may be.*
- (6) *Notwithstanding subsection (2), any fees charged by the Registrar of Deeds resulting from such transfer must be paid in full or in part from funds appropriated by Parliament for that purpose.*

Section 23 of the Higher Education Act of 1997 gives the Minister **the power to merge** two or more institutions into a single institution.

23 Merger of public higher education institutions

- (1) *Subject to subsection (2), the Minister may, after consulting the CHE and by notice in the Gazette, merge two or more public higher education institutions into a single public higher education institution.*
- (2) *The Minister must –*
 - (a) *give written notice of the intention to merge to the public higher education institutions concerned;*
 - (b) *publish a notice giving the reasons for the proposed merger in at least one national and one regional newspaper circulating in the area in which the public higher education institutions concerned are situated.*

Subsection (2)(b) is substituted by the Higher Education Amendment Act 63 of 2002 with the following paragraph:

- (b) *publish a notice giving the reasons for the proposed merger in one or more newspapers circulating in the area in which the public higher education institutions concerned are situated.*
- (c) *give the councils of the public higher education institutions concerned and any other interested persons an opportunity to make representations within at least 90 days of the date of the notice referred to in paragraph (b);*
- (d) *consider such representations; and*
- (e) *be satisfied that the employers at the public higher education institutions concerned have complied with their obligations in terms of the applicable labour law.*

The **Higher Education Amendment Act 63 of 2002** deletes subsection (2)(e) and inserts after subsection (2) the following subsections (which are equivalent to Section 21(5)(a) to (7)(h)):

- (2A) *Notwithstanding Sections 197 and 197A of the Labour Relations Act, 1995 (Act No. 66 of 1995), the contracts of employment between the public higher education institution (herein referred to as ‘the old employer’) and its employees are transferred automatically to the merged single public higher education institution (herein referred to as ‘the new employer’) as from the date of the merger contemplated in subsection (1), but any redeployment of an employee as a consequence of the merger is subject to applicable labour legislation.*
- (2B) *If two or more public higher education institutions are merged into a single public higher education institution as contemplated in subsection (1), all the rights and obligations between the old employers and each employee at the time of the merger continue in force as if they were rights and obligations between the new employer and each employee and anything done before the merger by or in relation to the old employers is considered to have been done by or in relation to the new employer.*
- (2C) *A merger referred to in subsection (1) does not interrupt the employee’s continuity of employment.*
- (2D) *The provisions of subsections (2A) to (2F) do not affect the liability of any person to be disciplined for, prosecuted for, convicted of and sentenced for any offence or misconduct.*
- (2E) *An employee or a student is subject to the disciplinary codes and rules applicable to the new single public higher education institution as from the date of the merger contemplated in subsection (1), but if any enquiry into incapacity or any proceedings in respect of a charge of misconduct had been instituted or commenced against any employee or student before the date of the*

merger, such enquiry or proceedings continue in terms of the codes and rules applicable to the relevant public higher education institution immediately prior to the merger.

(2F) Until the new single public higher education institution has made disciplinary codes or rules, the disciplinary codes and rules of the respective old public higher education institutions are applicable to the respective employees and students.

(2G) Notwithstanding subsection (2A), the old employer may undertake rationalisation of its workforce according to operational requirements in accordance with Section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995). prior to the date of the merger contemplated in subsection (1) .

(2H) If two or more public higher education institutions are merged into a single public higher education institution as contemplated in subsection (1), the new single public higher education institution –

- (i) continues with all academic programmes offered by the old higher education institutions under the rules applicable to the respective higher education institutions immediately before the date of the merger; until such programmes and rules are amended or restructured by the new council; and*
- (ii) awards a degree, diploma or certificate to a student who qualifies before or after the date of the merger in its own name, but such degree, diploma or certificate must also reflect the name of the education institution at which the student was registered immediately before the date of the merger if the student was so registered.*

(3) The single public higher education institution contemplated in subsection (1) is deemed to be a public higher education institution established under this Act.

The Higher Education Amendment Act 63 of 2002 replaces subsection (3) **giving the councils** of merging institutions **the right to be consulted:**

(3) (a) The single public higher education institution contemplated in subsection (1) is deemed to be a public higher education institution established under Section 20.

(b) The Minister must, after consultation with the councils of the public higher education institutions that are to be merged, determine by notice contemplated in Section 23(1)-

- (i) the date of establishment of the institution;*
- (ii) the type and name of the institution; and*
- (iii) the physical location and official address of the institution.*

- (4) *Section 22 (1) (b) to (6), with the changes required by the context, applies to a merger referred to in subsection (1).*

Section 23 is amended by the Higher Education Amendment Act 23 of 2001 by the addition of subsections (5) to (11), making provision for the **constitution of an interim council** for six months.

- (5) *The Minister must in the notice contemplated in subsection (1) establish an interim council for a period not exceeding six months, to perform the functions relating to the governance of the single public higher education institution contemplated in subsection (1), except the making of an institutional statute.*
- (6) *The Minister may extend the period referred to in subsection (5) once for a further period not exceeding six months.*
- (7) *The members of the interim council contemplated in subsection (5) are appointed by the Minister and consist of –*
- (a) *the chairperson; and*
 - (b) *four other members.*

The Higher Education Amendment Act 63 of 2002 replaces paragraph (b) of subsection (7), thereby **increasing the number of interim council members** to a minimum of seven and a maximum of nine members (including the chairperson):

(b) *a minimum of six members and a maximum of eight members.*

- (8) *The four members contemplated in subsection (7)(b) –*
- (a) *must be appointed by the Minister from nominations received from the public higher education institutions concerned; and*
 - (b) *may not include any member of staff or student from the public higher education institutions concerned.*

The Higher Education Amendment Act 63 of 2002 substitutes subsection (8), retaining the Minister's power to appoint all members of the Interim Council.

- (8) *The members contemplated in subsection (7)(b) –*
- (a) *must be appointed by the Minister from nominations received from the public higher education institutions concerned; and*
 - (b) *may not include any member of staff or student from the public higher education institutions concerned.*

The Higher Education Amendment Act 23 of 2001 outlines the following **duties of the Interim Council**.

- (9) *The interim council must co-opt three members of the interim management contemplated in subsection (10)(a) and these members have no voting powers.*
- (10) *Apart from the functions contemplated in subsection (5) the interim council must in particular –*
 - (a) *appoint an interim body to manage the day-to-day activities of the institution;*
 - (b) *ensure that a council is constituted in terms of the standard institutional statute contemplated in Section 33(3); and*
 - (c) *ensure that such other structures as may be determined in the standard institutional statute contemplated in Section 33(3) are constituted.*
- (11) *Any decision of the interim council which may affect the right of any structure of the public higher education institution, may only be taken after consultation with such structure.*

The Higher Education Amendment Act 63 of 2002 gives the Minister the **power to appoint his own nominees to the interim council**, in case the merging institutions fail to provide such nominees.

- (12) *Upon a written request by the Minister and within 60 days thereof, each of the public higher education institutions referred to in subsection (1) must provide the Minister with no fewer than four nominations for appointment of the members as contemplated in subsection (8)(a).*
- (13) *Notwithstanding subsection (8), if any of the public higher education institutions fail to provide the nominations in terms of subsection (12), the Minister may appoint the members referred to in subsection (7)(b) from the nominations received from the other institution concerned or at his or her discretion.*

The **incorporation of subdivisions of universities, technikons and colleges** is governed by Section 24 of the Higher Education Act of 1997.

24 Merger of subdivisions of public higher education institutions

- (1) *The Minister may, after consulting the CHE and by notice in the Gazette, merge a subdivision of a public higher education institution with another public higher education institution.*

- (2) *The assets, liabilities, rights and obligations of the subdivision concerned devolve upon the public higher education institution with which the subdivision has merged in a manner agreed by the councils of the public higher education institutions concerned or failing such agreement, in a manner determined by the Minister after consulting such councils.*
- (3) *Sections 22 (2) to (6) and 23 (2), with the changes required by the context, apply to a merger referred to in subsection (1).*

The Higher Education Amendment Act 63 of 2002 substitutes Section 24 in the light of the revised definitions of ‘merger’ and ‘incorporation’.

24 Incorporation of subdivisions of public higher education institutions

- 24 (1) *The Minister may, consulting the CHE and by notice in the Government Gazette, after incorporate a subdivision of a public higher education institution with another public higher education institution.*
- (2) *The assets, liabilities, rights and obligations of the subdivisions concerned devolve upon the public higher education institution with which the subdivision has been incorporated in a manner agreed by the councils of the public higher education institutions concerned or failing such agreement, in a manner determined by the Minister after consulting such councils.*
- (3) *Sections 22(2) to (6) and 23(2), with the changes required by the context, apply to an incorporation referred to in subsection (1).*

The Higher Education Act of 1997 gives the Minister **the power to close a higher education institution**, after consultation with the CHE.

25 Closure of public higher education institutions

- (1) *The Minister may, after consulting the CHE and by notice in the Government Gazette, close a public higher education institution.*
- (2) *If a public higher education institution is closed under subsection (1), all assets and liabilities of such public higher education institution must after closure be dealt with according to law by the Minister and any assets remaining after payment of all liabilities vest in the Minister.*
- (3) *Sections 22 (2) to (6) and 23 (2), with the changes required by the context, apply to a closure referred to in subsection (1).*

The Higher Education Act of 1997 regulates the **regional and national co-operation** between institutions.

38 Co-operation between public higher education institutions

- (1) Public higher education institutions may co-operate with each other in any manner to achieve the optimal utilisation of resources and the performance of their functions.*
- (2) Public higher education institutions may establish regional or national structures to assist and facilitate the co-operation contemplated in subsection (1).*
- (3) The Minister may provide financial incentives to such structures and to public higher education institutions participating in such structures to achieve the aims of such co-operation.*