Joint request for legislative amendments

We, the undersigned Universities, in accordance with resolutions of our respective governing bodies, request the Honourable Minister to procure amendments to our respective enabling statutes as detailed in the following table.

As the Honourable Minister will observe, the following table is divided into 3 parts, as follows:

- Part A, being amendments that are essential so that each University will be compliant with the requirements of the National Governance Protocols issued under section 33-15 of the Higher Education Support Act 2003 (Cth) ("HESA") and therefore eligible for increased funding under that Act.

- Part B, being amendments that apply to all 4 Universities and that we request be implemented, although not required for the purpose of compliance with the HESA protocols.

- Part C, being amendments requested by individual Universities. Similar to Part B, these requested amendments are not required for the purpose of compliance with the HESA protocols, but are requested by the respective University.

Dr Ken Michael
CHANCELLOR
UNIVERSITY OF WESTERN AUSTRALIA

Emeritus Professor Geoffrey Bolton, AM, CIWA
CHANCELLOR
MURDOCH UNIVERSITY

Dr Eric C. C. Tan, AM, CIWA
CHANCELLOR
CURTIN UNIVERSITY OF TECHNOLOGY

The Hon, Justice Robert D Nicholson, AO
CHANCELLOR
EDITH COWAN UNIVERSITY
## Amendments requested to Universities’ enabling legislation

### Dictionary

In this table, the following expressions have the meanings shown opposite to them:

- **Curtin Act**: *Curtin University of Technology Act 1966 (WA)*
- **ECU Act**: *Edith Cowan University Act 1984 (WA)*
- **Murdoch Act**: *Murdoch University Act 1973 (WA)*
- **Protocol**: A protocol issued for the purposes of 33-15 of the *Higher Education Support Act 2003 (C’th)*
- **UWA Act**: *University of Western Australia Act 1911 (WA)*

### Part A – essential for HESA compliance

#### Protocol 3:

The higher education provider must have the duties of the members of the governing body and sanctions for the breach of these duties specified in its enabling legislation. Other than the Chancellor, the Vice-Chancellor and the Presiding Member of the Academic Board (s) each member must be appointed or elected ad personam. All members of the governing body must be responsible and accountable to the governing body. When exercising the functions of a member of the governing body, a member of the governing body must always act in the best interests of the higher education provider.

Duties of members must include the requirements to:

- **(a)** act always in the best interests of the higher education provider as a whole, with this obligation to be observed in priority to any duty a member may owe to those electing or appointing him or her;
- **(b)** act in good faith, honestly and for a proper purpose;
- **(c)** exercise appropriate care and diligence;
- **(d)** not improperly use their position to gain an advantage for themselves or someone else; and
- **(e)** disclose and avoid conflicts of interest (with appropriate procedures for that purpose similar to those for public companies).

There should be safeguards, exemptions and protections for members of a higher education provider’s governing body for matters or things done or omitted in good faith in pursuance of the relevant legislation. Without limitation, this should include such safeguards, exemptions and protections as are the equivalent of those that would be available were the member a director under the Corporations Act.

The higher education provider (with the exception of those subject to the Corporations Act) must have a requirement that the governing body has the power (by a two-thirds majority) to remove any member of the governing body from office if the member breaches the duties specified above included in its enabling legislation.

A member must automatically vacate if he or she is, or becomes, disqualified from acting as a Director of a company or managing corporations under Part 2D.6 of the Corporations Act.

#### UWA

Section 10 of the UWA Act needs to be amended in relation to ex officio positions as follows:

- **(a)** 4 persons appointed by the Governor;
- **(b)** 4 persons, who are not persons referred to in section 10(c), elected by Convocation as prescribed by Statute;
- **(c)** (see later change under Protocol 5)
- **(d)** the Chancellor *ex officio*;
- **(e)** the Chair of the Academic Board of the University *ex officio*;
- **(f)** the Vice-Chancellor of the University *ex officio*;
- **(g)** one member of the Council of the Guild of Undergraduates, elected by that Council;
- **(h)** one person who is enrolled as a student of the University, elected by students so enrolled;
- **(i)** one member of the Committee of the Postgraduate Students’ Association, elected by that Committee;
- **(j)** 3 persons selected and co-opted as members of Senate by the other members of the Senate;
- **(k)** (see later change under Protocol 5)

The terms of office for the members listed in paragraphs 10(g) and (i) need to be stated as previously these members were ex officio. It is suggested that subsections (2) and (3) of section 10A be renumbered (3) and (4) respectively and that a new clause (2) be inserted as follows:

> “Subject to section 11, the tenure of office of a member of Senate referred to in section 10 (g) and (i) is one year from the date of appointment of the member.”

Section 11 of the UWA Act needs to be amended to provide that a member of Council must automatically vacate office if he or she is, or becomes, disqualified from acting as a director of a company or managing corporations under Part 2D.6 of the *Corporations Act 2001 (C’th)*.

With regard to duties, and as a generalisation, the Protocol requires amendments to the UWA Act that mirror the provisions of sections 180(1) to 183, 191, 192 and 195 of the *Corporations Act*. The Australian National University has already amended its enabling legislation to conform to the Protocols and as discussed in the attached analysis prepared by Murdoch’s General Counsel, UWA requests that the UWA Act be similarly amended.

The amendments to be effected to the UWA Act will also need to provide for the same protections and defences available to a director of a company. As discussed in the attached analysis, this includes the provisions of sections 180(2) (business judgment rule), 189 (bona fide reliance) and 1318 (honest and reasonable conduct) of the *Corporations Act*.

With regard to sanctions, UWA requests that the UWA Act be amended to implement the objectives discussed in paragraph 3.2 of the attached analysis. On implementation of the amendments discussed above with regard to duties, sanctions and protections, the UWA Act will effectively duplicate the
requirements of the Statutory Corporations (Liability of Directors) Act 1996 (WA). In order to remove the potential for confusion and conflict between this Act and the new provisions in the UWA Act, UWA requests that the UWA Act also be amended to exclude the operation of the Statutory Corporations Act (see subsection 5(3) of that Act).

Murdoch

Paragraph 12(1)(c) of the Murdoch Act needs to be repealed to remove the President of the Guild of Students as an ex officio member of the Senate.

Sub-section 15(3) of the Murdoch Act needs to be amended to provide that a member of Senate must automatically vacate office if he or she is, or becomes, disqualified from acting as a director of a company or managing corporations under Part 2D.6 of the Corporations Act 2001 (C’th).

With regard to duties, and as a generalisation, the Protocol requires amendments to the Murdoch Act that mirror the provisions of sections 180(1) to 183, 191, 192 and 195 of the Corporations Act. The Australian National University has already amended its enabling legislation to conform to the Protocols and as discussed in the attached analysis, Murdoch requests that the Murdoch Act be similarly amended.

The amendments to be effected to the Murdoch Act will also need to provide for the same protections and defences available to a director of a company. As discussed in the attached analysis, this includes the provisions of sections 180(2) (business judgment rule), 189 (bona fide reliance) and 1318 (honest and reasonable conduct) of the Corporations Act.

With regard to sanctions, Murdoch requests that the Murdoch Act be amended to implement the objectives discussed in paragraph 3.2 of the attached analysis.

On implementation of the amendments discussed above with regard to duties, sanctions and protections, the Murdoch Act will effectively duplicate the requirements of the Statutory Corporations (Liability of Directors) Act 1996 (WA). In order to remove the potential for confusion and conflict between this Act and the new provisions in the Murdoch Act, Murdoch also requests that the Murdoch Act be amended to exclude the operation of the Statutory Corporations Act (see subsection 5(3) of that Act).

Curtin

At its 04/03/2004 meeting, the Council (part (vi) of Resolution C90/03) resolved to recommend to the Minister for Education the repeal of sections 9(1)(ia) and 9(1)(j) of the Curtin Act and their substitution with a new section to read: “Not less than two members to be appointed by the Council, from amongst the Chairpersons of Boards for Campuses or other designated organisational entities of the University.”

As this would be non-compliant with the requirements of Protocol 3, the 04/04/2004 meeting of the Council resolved to:

• advise the Minister of the Council’s decision to withdraw part (vi) of Resolution C90/03; and

• recommend to the Minister the substitution of section s 9(1)(ia) and 9(1)(j) of the Act with the following”

“Not less than two members to be appointed by the Council, from amongst the members of Boards for Campuses or other designated organisational entities of the University.”

Section 10 of the Curtin Act needs to be amended to provide that a member of Council must automatically vacate office if he or she is, or becomes, disqualified from acting as a director of a company or managing corporations under Part 2D.6 of the Corporations Act 2001 (C’th).

With regard to duties, and as a generalisation, the Protocol requires amendments to the Curtin Act that mirror the provisions of sections 180(1) to 183, 191, 192 and 195 of the Corporations Act. The Australian National University has already amended its enabling legislation to conform to the Protocols and as discussed in the attached analysis prepared by Murdoch’s General Counsel, Curtin requests that the Curtin Act be similarly amended.

The amendments to be effected to the Curtin Act will also need to provide for the same protections and defences available to a director of a company. As discussed in the attached analysis, this includes the provisions of sections 180(2) (business judgment rule), 189 (bona fide reliance) and 1318 (honest and reasonable conduct) of the Corporations Act.
With regard to sanctions, Curtin requests that the Curtin Act be amended to implement the objectives discussed in paragraph 3.2 of the attached analysis.

On implementation of the amendments discussed above with regard to duties, sanctions and protections, the Curtin Act will effectively duplicate the requirements of the Statutory Corporations (Liability of Directors) Act 1996 (WA). In order to remove the potential for confusion and conflict between this Act and the new provisions in the Curtin Act, Curtin requests that the Curtin Act also be amended to exclude the operation of the Statutory Corporations Act (see sub-section 5(3) of that Act).

**ECU**

Sub-sections 9(1)(g) and (h) of the ECU Act need to be repealed to remove the chairs of the ECU South West Campus (Bunbury) Advisory Board and the WAAPA Board as ‘ex officio’ members of the Council.

Section 11 of the ECU Act needs to be amended to provide that a member of Council must automatically vacate office if he or she is, or becomes, disqualified from acting as a director of a company or managing corporations under Part 2D.6 of the Corporations Act 2001 (Cth).

With regard to duties, and as a generalisation, the Protocol requires amendments to the ECU Act that mirror the provisions of sections 180(1) to 183, 191, 192 and 195 of the Corporations Act. The Australian National University has already amended its enabling legislation to conform to the Protocols and as discussed in the attached analysis prepared by Murdoch’s General Counsel, ECU requests that the ECU Act be similarly amended.

The amendments to be effected to the ECU Act will also need to provide for the same protections and defences available to a director of a company. As discussed in the attached analysis, this includes the provisions of sections 180(2) (business judgment rule), 189 (bona fide reliance) and 1318 (honest and reasonable conduct) of the Corporations Act.

With regard to sanctions, ECU requests that the ECU Act be amended to implement the objectives discussed in paragraph 3.2 of the attached analysis, except that where a member is removed from office, he or she will be ineligible for re-election or re-appointment to Council for a period of 5 years.

ECU further requests that any power vested in the Minister or the Attorney-General to take enforcement action be subject to ECU’s Council having the first opportunity to take that action.

On implementation of the amendments discussed above with regard to duties, sanctions and protections, the ECU Act will effectively duplicate the requirements of the Statutory Corporations (Liability of Directors) Act 1996 (WA). In order to remove the potential for confusion and conflict between this Act and the new provisions in the ECU Act, ECU requests that the ECU Act also be amended to exclude the operation of the Statutory Corporations Act (see sub-section 5(3) of that Act).

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**Protocol 5:**

The size of the governing body must not exceed 22 members.

There must be at least two members having financial expertise (as demonstrated by relevant qualifications and financial management experience at a senior level in the public or private sector) and at least one member with commercial expertise (as demonstrated by relevant experience at a senior level in the public or private sector).

There must be a majority of external independent members who are neither enrolled as a student nor employed by the higher education provider.

There must not be current members of any State or Commonwealth parliament or legislative assembly other than where specifically selected by the governing body itself.

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**UWA**

The following changes are proposed:

8. **Membership**

(1) The Senate shall consist of 21 persons appointed or elected as hereinafter provided.

(2) No person who is a principal of any secondary, continuation or technical school, or school of mines, or similar educational institution, or is a teacher engaged therein, shall, on that account only, be incapable of being appointed or elected, or of acting as a member of the Senate, but the number of such persons in the Senate at the same time shall not exceed 2.

10. **Members of the Senate**

The Senate shall consist of the following members –

…..

(c) 3 persons, elected by and from those who hold an ongoing or fixed term appointment at the University as an academic staff member other than members of the Executive and the Chair of the Academic Board;

(l) one person elected by and from those staff who hold an ongoing or fixed term appointment at the University other than as a member of the academic staff.
<table>
<thead>
<tr>
<th>Murdoch</th>
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<tbody>
<tr>
<td>Sub-section 12(1) of the Murdoch Act needs to be amended to reduce the size of the Senate from its current 25 to 19 members. Murdoch requests that this reduction be effected as follows:</td>
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<tr>
<td>• The existing categories of appointees described in paragraphs 12(1)(b), (g), (i) be merged into a single category comprising 6 members to be appointed by the Governor, who must not be eligible to be elected to the Senate</td>
</tr>
<tr>
<td>• Paragraph 12(1)(c) of the Murdoch Act needs to be repealed to remove the President of the Guild of Students as an ex officio member of the Senate (see above in relation to Protocol 3)</td>
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<tr>
<td>• The number in paragraph 12(1)(d) be reduced to 3 (elected academic staff)</td>
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<tr>
<td>• The number in paragraph 12(1)(f) be reduced to 2 (elected members, being graduates of Murdoch. Please see Part C, all references to ‘Convocation’ to be replaced with ‘graduates of the University’)</td>
</tr>
<tr>
<td>Murdoch also requests that the amending legislation include transitional provisions to the effect that so long as the size of the Senate does not exceed 22 in total:</td>
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<tr>
<td>• the existing members of Senate at the time that the amending legislation comes into force, will continue to be members until the expiry of their respective appointments or elected positions, as the case may be;</td>
</tr>
<tr>
<td>• the incumbent of the position on Senate nominated by the Minister under paragraph 12(1)(b) cease to be a member on the enactment and implementation of the amending Act; and</td>
</tr>
<tr>
<td>• all vacancies arising after the amending legislation comes into force will be filled in accordance with the provisions of the Murdoch Act as amended.</td>
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<tr>
<td>Finally, for the sake of clarity, Murdoch would prefer these changes to be implemented by way of a repeal and replacement of section 12 of the Murdoch Act, rather than by partial repeal and re-writing of certain paragraphs within the section.</td>
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<thead>
<tr>
<th>Curtin</th>
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<tr>
<td>No amendment required.</td>
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<tr>
<th>ECU</th>
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<tr>
<td>To ensure a majority of external members on Council and clarity on the nature of ‘externality’, sub-section 9(3) of the ECU Act needs to be amended to provide that:</td>
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<tr>
<td>• members co-opted by Council are not to be members of staff, otherwise engaged by the University or enrolled students of the University</td>
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<tr>
<td>• members appointed by the Governor shall not be members of staff, otherwise engaged by the University or enrolled students of the University;</td>
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<tr>
<td>• members elected from the student body are not primarily to be members of staff or otherwise engaged by the University; and</td>
</tr>
<tr>
<td>• members elected from the Alumni shall not primarily be members of staff, otherwise engaged by the University or enrolled students of the University.</td>
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<td>Part B – not required for HESA compliance, but applicable to all Universities</td>
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<td>---------------------------------------------------</td>
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<tr>
<td><strong>Gender neutral language.</strong></td>
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<tr>
<td>Each of the enabling Acts contain numerous, gender-specific references. The Universities request that all such references be replaced with gender neutral reference. ECU has yet to consider its position in relation to this issue.</td>
</tr>
<tr>
<td><strong>Replace specific monetary penalties with amount fixed by internal regulation.</strong></td>
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<tr>
<td>Currently, the enabling Acts specify specific maximum penalties that may be imposed under by-laws (e.g. paragraph 24(1)(d) of the Murdoch Act specifies $50 as the maximum penalty that may be imposed for a breach of any by-law). The Universities request that such references be replaced with reference to a maximum penalty to be prescribed by statute. Alternatively, replace the references with penalty points, the value of which may be specified by a resolution of the respective governing body, or alternatively, the respective regulations. ECU has yet to consider its position in relation to this issue.</td>
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<tr>
<td><strong>Role of the Visitor</strong></td>
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<tr>
<td>Currently, the Visitor has two roles, one purely ceremonial, the other quasi-judicial. Given that the quasi-judicial role is rendered redundant by way of recourse to various administrative review bodies, including the Ombudsman and Equal Opportunity Commission, the Universities request that their enabling Acts be amended to restrict the role of the Visitor to one that is purely ceremonial. ECU has yet to consider its position in relation to this issue.</td>
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<tr>
<td><strong>Removal of casual vacancies</strong></td>
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<tr>
<td>Casual vacancies should be removed so that when one arises, it can be filled for up to a full term, rather than simply the balance of the term. This will reduce turnover in Senate/Council membership, by giving a full 3 year term for members appointed/elected to a casual vacancy. Murdoch sent a request to this effect to the Minister in 2001.</td>
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Part C – not required for HESA compliance, and requested by individual Universities

**UWA requests**

**Removal of outdated terminology**

Amend section 8 of the UWA Act concerning membership to remove the category of staff title “reader” since this terminology is no longer used for current staff, nor is it used in the academic staff agreement. This change has been reflected in the proposed amendments for section 8 which take account of the National Governance Protocols.

**Quorum**

Amend the quorum for the Senate in section 25 of the UWA Act to be 11, instead of 8. This will bring the Act and the Senate’s Standing Orders into alignment.

**Convocation**

Amend paragraph 17(3)(a) of the UWA Act concerning membership of Convocation by the deletion of the words “by postal vote” in order to provide for the manner of conducting elections to be entirely as prescribed by statute without reference to the Act.

Amend paragraph 31(4)(b) of the UWA Act concerning the process of making statutes so that if a conference between the “Senate and Convocation” is requested, this conference be between the Senate and the Council of Convocation. This change would make the process logically more manageable.

Amend section 18 concerning the election of the Warden so that (1) reads “Convocation shall elect its Warden in the manner and for a term as prescribed by statute”. Sub-section(2) is to be deleted as it becomes redundant. This will provide increased flexibility with details to be prescribed by statute. A consequential amendment will also be needed to section 21 to replace “other than annual retirement” with “other than expiry of the term of office”.

**Term of office for elected student member**

Amend sub-section 10A(2) of the UWA Act so that it is explicit that the student elected under section 10 (i) for two years serves the first year as a Senate observer and the second year as a full member.

**Authorised person in respect of the by-laws**

Amend the definition of “authorised person” in sub-section 16A(1) of the UWA Act in relation to the by-laws to replace the words “member of the staff of the University” with the word “person”. This will enable the Vice-Chancellor to authorise appropriate college staff who patrol college grounds which are covered by the University’s by-laws.

**Guild of Undergraduates – Proposed change of name**

Amend section 28 of the UWA Act (and all other references) to change the name “Guild of Undergraduates” to “Student Guild”. This proposed new name is a more appropriate name because any student, as indicated in sub-section 28(2) is eligible to be a member of the Guild i.e. postgraduates as well as undergraduates.

**Murdoch requests**

The following is a list of amendments to the Murdoch Act, most of which have been previously requested but currently still to be actioned. Murdoch requests that these be actioned as part of the amending legislation necessary for the purposes of compliance with the HESA protocols.

- Replace the title Pro Chancellor with Deputy Chancellor. This title would be better understood.  
  *Request sent to the Minister in 2003*
- Delete all references to Convocation, replacing them with ‘graduates of the University’. Senate wants to replace Convocation with an Alumni Board, and to include students awarded diplomas and certificates as graduates.  
  *Request sent to the Minister in 2002*
- Declare vacant the Senate position occupied by a general staff member if that person ceases to be a member of general staff. This will then be aligned with the situation for academic staff and student Senators.  
  *Request sent to the Minister in 2000*
- Define which staff are members of the University (all except those employed on a casual basis), rather than leaving this to statute, thus providing greater clarity.  
  *Request sent to the Minister in 2002*
- Delete the requirement for statutes to be ratified at a subsequent Senate meeting. Deleting the requirement for Senate to ratify statutes approved at an earlier meeting will remove a redundant step and expedite the process. UWA and Murdoch are the only Australian universities to require Senate to approve statutes twice. This is Murdoch’s interim position until a more significant change is made.  
  *Request sent to the Minister in 1999*
- Amend sections 10 and 11 (dealing with the terms of office for the Chancellor and Pro Chancellor) to permit appointments “up to” 3 years, thereby providing greater flexibility.  
- Amend sub-section 10(3) by deleting reference to “from the date of his election”. This unduly restricts the ability for an orderly handover from a retiring Chancellor to an incoming Chancellor. Murdoch intends by statute to provide, in effect that ‘a person elected to the office of Chancellor will, if the office to which he or she is elected is vacant at the time of the election, take office immediately upon election and, if the office is not vacant, will take office upon it becoming vacant’. This will provide much more efficiency and flexibility.  
- Amend paragraph 20(2d) by deleting “not being a member of the Guild” and in its place inserting “being or not being a member of the Guild”.  
- In amending section 16 of the Murdoch Act dealing with casual vacancies (see request in Part B):
- casual vacancies (other than in the case of elected students) be filled for up to a full term, rather than for the balance of the term vacated; and
- casual vacancies in the case of elected students be filled for the balance of the term, by a recount of the votes cast in the last election.

- Allow statutes to be made by Senate. To simplify and expedite the process of approving and amending statutes, enabling Murdoch to be more responsive to changing conditions. EXCO and Ministerial approval would no longer be required, but Parliament could disallow any statute change. This was recommended by the Hoare report, and is the practice at ANU and in Singapore. The 12/06/2000 WAHEC meeting was advised that the then Minister had agreed that each University governing body should approve statutes that would be submitted to the Minister, who would submit them to Parliament via the Joint Standing Committee on Delegated Legislation and be gazetted. A fall-back position would be to have the Minister (rather than EXCO) approve statute changes, as happens in Victoria.

*Request sent to the Minister in 1999*

Murdoch withdraws its request (sent to the Minister in 1994) to add the President of Academic Council as a member of Senate.

### Curtin requests

Curtin requests that sections 29(1) and (2) of the Curtin Act be repealed and replaced with the following:

“29. Preservation of rights of officers and employees

(1) Any person appointed under section 14 or 17 shall be deemed to have retained his or her accrued rights, if any, under the Superannuation and Family Benefits Act 1938 or the Government Employees Superannuation Act 1987.”

People who join Curtin from the WA public sector apply for their Curtin positions like all other applicants: they are not transferees or secondee from the WA public service. The current clause 29(1) is ambiguous in the intent of the term “accrued rights”. Presumably this means annual and sick leave entitlements and long service leave entitlements. It is inappropriate for people whose last positions were with the WA public service to carry over these entitlements upon appointment to Curtin. The proposed amendment recognises Curtin’s obligations under the state superannuation schemes named above, but makes clear that there is no automatic transfer of any leave entitlements.

Curtin makes the same request as ECU in terms of Guild accountability for allocation of and reporting on the amenities and services fee.

### ECU requests

**Competitive neutrality**

To ensure competitive neutrality, ECU requests that section 7 of the ECU Act be amended to provide the University with clear powers to:

- engage in commercial activities which further the objectives of the University both within and outside Western Australia and Australia; and
- carry out its operations and exercise its powers (including the power to enter into business arrangements) both within and outside Western Australia and Australia.
Amendments required to the Murdoch University Act 1973 (WA) by way of duties for Senators

Protocol 3 of the National Governance Protocols requires that the Murdoch University Act 1973 (WA) be amended to include:

1. Explicit legal duties for Senators that, as a broad generalisation, are equivalent to the duties imposed on directors of companies under the Corporations Act 2001 (C’th) (“Corporations Act”). The specific duties, together with a comparison with the way in which ANU’s enabling legislation has been amended1 and the relevant Corporations Act provisions, are as follows:

1.1. Senators must act always in the best interests of the University as a whole, with this obligation to be observed in priority to any duty a member may owe to those electing or appointing him or her.

1.1.1. The Australian National University Act 1991 (C’th) (“ANU Act”) implements this requirement by new section 18A (member to act solely in the interest of the University). This section provides:

18A. A member of the Council must act solely in the interests of the University taken as a whole, having regard to its functions.

1.1.2. There is no direct equivalent in the Corporations Act, although there is some overlap between this requirement and section 181 (copy attached).

1.2. Senators must act in good faith, honestly and for a proper purpose.

1.2.1. The ANU Act implements this requirement by new section 18C (member to act in good faith). This section provides:

18C. A member of the Council must exercise his or her powers and discharge his or her duties:

(a) in good faith in the best interests of the University; and
(b) for a proper purpose.

1.2.2. The ANU Act provision mirrors section 181 of the Corporations Act (copy attached).

1.3. Senators must exercise appropriate care and diligence.

1.3.1. The ANU Act implements this requirement by new section 18B (member to exercise care and diligence). This section provides:

18B. (1) A member of the Council must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she:

(a) were a member of the Council in the Council’s circumstances; and
(b) occupied the office held by, and had the same responsibilities within the Council as, the member.

1.3.2. The ANU Act provision mirrors sub-section 180(1) of the Corporations Act (copy attached).

1.4. Senators must not improperly use their position to gain an advantage for themselves or someone else.

1.4.1. The ANU Act implements this requirement by new sections 18D (improper use of position) and 18E (improper use of information). These sections provide:

18D. A member of the Council must not improperly use his or her position to:

(a) gain an advantage for him or her or someone else; or

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2. Safeguards, exemptions and protections for Senators for matters or things done or omitted in good faith in pursuance of the relevant legislation. Without limitation, this should include such safeguards, exemptions and protections as are the equivalent of those that would be available were the member a director under the Corporations Act 2001 C’th).

1.4.2. The ANU Act provisions mirror sections 182 and 183 of the Corporations Act (copy attached).

1.5. Senators must disclose and avoid conflicts of interest (with appropriate procedures for that purpose similar to those for public companies).

1.5.1. The ANU Act implements this requirement by new section 18F (material personal interest). This section provides:

18F. (1) A member of the Council who has a material personal interest in a matter that relates to the affairs of the University must give the other members of the Council notice of the interest.

(2) Subsection (1) does not apply if the member of the Council is not, because of subsection 27F(2) of the Commonwealth Authorities and Companies Act 1997, required to give such a notice under subsection 27F(1) of that Act.

(3) A member of the Council who has an interest in a matter may give the other members of the Council standing notice of the nature and extent of the interest in the matter in accordance with section 27G of the Commonwealth Authorities and Companies Act 1997.

(4) A member of the Council who has a material personal interest in a matter that is being considered at a meeting of the Council must not:

(a) be present while the matter is being considered at the meeting; or

(b) vote on the matter;


1.5.2. The ANU Act provision largely mirrors sections 191, 192, and 195 of the Corporations Act (copy attached). There is no equivalent of the specific provisions of the Commonwealth Authorities and Companies Act 1997 to which the ANU Act provision refers.

2. Safeguards, exemptions and protections for Senators for matters or things done or omitted in good faith in pursuance of the relevant legislation. Without limitation, this should include such safeguards, exemptions and protections as are the equivalent of those that would be available were the member a director under the Corporations Act 2001 C’th).

2.1. The ANU Act partially implements this requirement by new sub-section 18B(2) (member to exercise care and diligence). This section provides:

18B. (2) A member of the Council who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if he or she:

(a) makes the judgment in good faith for a proper purpose; and

(b) does not have a material personal interest in the subject matter of the judgment; and

(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and

(d) rationally believes that the judgment is in the best interests of the University.

The member’s belief that the judgment is in the best interests of the University is a rational one unless the belief is one that no reasonable person in his or her position would hold.

2.2. However, this protection (by way of a ‘business judgment rule’) applies only to the duty prescribed in sub-section 18B(1) (see paragraph 1.3.1). The ANU Act provision mirrors sub-section 180(2) of the Corporations Act (copy attached).

2.3. In addition, any amendment to the Murdoch Act should mirror the Corporations Act protections via:

2.3.1. section 189 (bona fide reliance on information or advice provided by others (copy attached); and
2.3.2. section 1318 (power of court to relieve liability where a person has acted honestly and reasonably and the circumstance dictate relief).

3. Sanctions for breaching the duties described under paragraph 1, including the capacity for the Senate (by a two-thirds majority) to remove a Senator from office.

3.1. The ANU Act implements this and the next requirement by new paragraphs 15(1)(k) and (j), respectively.

3.2. It is recommended that the Murdoch Act be amended to provide that:

3.2.1. Where a member breaches any of the express duties in the Murdoch Act or any code of conduct for members, the Senate may (by a two third majority):

3.2.1.1. censure the offending member;

3.2.1.2. suspend the offending member; or

3.2.1.3. remove the offending member from office.

3.2.2. In addition to (or independently of) any of the powers proposed in the previous paragraph, the University has the power to take bring civil proceedings against the delinquent Senator.

3.2.3. A member who is suspended or removed from office is ineligible for re-election or re-appointment to the Senate for one term (based on the category of membership that the member held at the time of suspension or removal).

4. Automatic vacation of office if a Senator is, or becomes, disqualified from acting as a director of a company or managing a company under Part 2D.6 of the Corporations Act 2001 (C’th).

4.1. The ANU position is covered in paragraph 3.1.

4.2. Part 2D.6 of the Corporations Act covers both automatic and court ordered disqualification from acting as a director or managing a company. Automatic disqualification occurs where, as a generalisation, a person:

4.2.1. is convicted of an offence under the Corporations Act and is imprisoned for > 12 months, or the offence relates to dishonesty and the person is imprisoned for > 3 months; or

4.2.2. is an undischarged bankrupt.

I recommend that Murdoch adopts the ANU approach (i.e. mirroring the Corporations Act provisions) because it will enable clear and relatively unequivocal advice to be provided on what the provisions actually require by reference to pre-existing case law that has considered the equivalent Corporations Act provisions.

The amendments required in respect of duties for Senators are not as dramatic as one might initially think, bearing in mind that the University is subject to the requirements of the Statutory Corporations (Liability of Directors) Act 1996 (WA) (“Statutory Corporations Act”).

- In broad terms, section 5 of the Statutory Corporations Act provides that all members of Senate are in the same fiduciary relationship with the University and have the same duties to the University to act with loyalty and in good faith, as has a director of a company incorporated under the Corporations Act.

- The duties imposed under the Statutory Corporations Act are, therefore, effectively, a mirror of the Corporations Act provisions discussed above.

- The Minister for Education and the Attorney General have power to enforce the Statutory Corporations Act duties.

- The Statutory Corporations Act duties may be excluded (see sub-section 5(3)). There is also a protection in essentially the same terms as section 1318 of the Corporations Act.
Given that the amendments required to the Murdoch Act for the purposes of the National Governance Protocols will duplicate and therefore render the Statutory Corporations Act provisions essentially redundant, I recommend that any amendment to the Murdoch Act include an exclusion of the Statutory Corporations Act requirements. For the sake of maintaining the status quo, any amendments in this regard will probably have to confer power on the Minister for Education to enforce the duties, in addition to the Senate (see paragraph 3.2.2).

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06/05/2004
Division 1—General duties

180 Care and diligence—civil obligation only

Care and diligence—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
   (a) were a director or officer of a corporation in the corporation’s circumstances; and
   (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
   (a) make the judgment in good faith for a proper purpose; and
   (b) do not have a material personal interest in the subject matter of the judgment; and
   (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
   (d) rationally believe that the judgment is in the best interests of the corporation.

The director’s or officer’s belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

181 Good faith—civil obligations

Good faith—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:
   (a) in good faith in the best interests of the corporation; and
   (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

182 Use of position—civil obligations
Use of position—directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
   (a) gain an advantage for themselves or someone else; or
   (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

183 Use of information—civil obligations

Use of information—directors, other officers and employees

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
   (a) gain an advantage for themselves or someone else; or
   (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

185 Interaction of sections 180 to 184 with other laws etc.

Sections 180 to 184:
   (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
   (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

This section does not apply to subsections 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1).

189 Reliance on information or advice provided by others

If:
   (a) a director relies on information, or professional or expert advice, given or prepared by:
      (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
      (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person’s professional or expert competence; or
      (iii) another director or officer in relation to matters within the director’s or officer’s authority; or
      (iv) a committee of directors on which the director did not serve in relation to matters within the committee’s authority; and
   (b) the reliance was made:
      (i) in good faith; and
      (ii) after making an independent assessment of the information or advice, having regard to the director’s knowledge of the corporation and the complexity of the structure and operations of the corporation; and
(c) the reasonableness of the director’s reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director’s reliance on the information or advice is taken to be reasonable unless the contrary is proved.

Division 2—Disclosure of, and voting on matters involving, material personal interests

191 Material personal interest—director’s duty to disclose

Director’s duty to notify other directors of material personal interest when conflict arises

(1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.

(1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the director of a company has a material personal interest in a matter that relates to the affairs of the company.

Note: For strict liability, see section 6.1 of the Criminal Code.

(2) The director does not need to give notice of an interest under subsection (1) if:

(a) the interest:

(i) arises because the director is a member of the company and is held in common with the other members of the company; or

(ii) arises in relation to the director’s remuneration as a director of the company; or

(iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or

(iv) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or

(v) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or

(vi) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer); or

(vii) relates to any payment by the company or a related body corporate in respect of an indemnity permitted under section 199A or any contract relating to such an indemnity; or

(viii) is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate; or

(b) the company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relation to the affairs of the company; or

(c) all the following conditions are satisfied:

(i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company under subsection (1);

(ii) if a person who was not a director of the company at the time when the notice under subsection (1) was given is appointed as a director of the company—the notice is given to that person;

(iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or

(d) the director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest.

Note: Subparagraph (c)(ii)—the notice may be given to the person referred to in this subparagraph by someone other than the director to whose interests it relates (for example, by the secretary).

(3) The notice required by subsection (1) must:
(a) give details of:
   (i) the nature and extent of the interest; and
   (ii) the relation of the interest to the affairs of the company; and
(b) be given at a directors’ meeting as soon as practicable after the director becomes aware of their interest in the matter.
The details must be recorded in the minutes of the meeting.

**Effect of contravention by director**

(4) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

**Section does not apply to single director proprietary company**

(5) This section does not apply to a proprietary company that has only 1 director.

192 **Director may give other directors standing notice about an interest**

**Power to give notice**

(1) A director of a company who has an interest in a matter may give the other directors standing notice of the nature and extent of the interest in the matter in accordance with subsection (2). The notice may be given at any time and whether or not the matter relates to the affairs of the company at the time the notice is given.

Note: The standing notice may be given to the other directors before the interest becomes a material personal interest.

(2) The notice under subsection (1) must:
   (a) give details of the nature and extent of the interest; and
   (b) be given:
      (i) at a directors’ meeting (either orally or in writing); or
      (ii) to the other directors individually in writing.

The standing notice is given under subparagraph (b)(ii) when it has been given to every director.

**Standing notice must be tabled at meeting if given to directors individually**

(3) If the standing notice is given to the other directors individually in writing, it must be tabled at the next directors’ meeting after it is given.

**Nature and extent of interest must be recorded in minutes**

(4) The director must ensure that the nature and extent of the interest disclosed in the standing notice is recorded in the minutes of the meeting at which the standing notice is given or tabled.

**Dates of effect and expiry of standing notice**

(5) The standing notice:
   (a) takes effect as soon as it is given; and
   (b) ceases to have effect if a person who was not a director of the company at the time when the notice was given is appointed as a director of the company.

A standing notice that ceases to have effect under paragraph (b) commences to have effect again if it is given to the person referred to in that paragraph.

Note: The notice may be given to the person referred to in paragraph (b) by someone other than the director to whose interests it relates (for example, by the secretary).

**Effect of material increase in nature or extent of interest**

(6) The standing notice ceases to have effect in relation to a particular interest if the nature or extent of the interest materially increases above that disclosed in the notice.
Effect of contravention by director

(7) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

193 Interaction of sections 191 and 192 with other laws etc.

Sections 191 and 192 have effect in addition to, and not in derogation of:
(a) any general law rule about conflicts of interest; and
(b) any provision in a company’s constitution (if any) that restricts a director from:
   (i) having a material personal interest in a matter; or
   (ii) holding an office or possessing property;
   involving duties or interests that conflict with their duties or interests as a director.

195 Restrictions on voting—directors of public companies only

Restrictions on voting and being present

(1) A director of a public company who has a material personal interest in a matter that is being considered at a directors’ meeting must not:
   (a) be present while the matter is being considered at the meeting; or
   (b) vote on the matter.

(1A) Subsection (1) does not apply if:
   (a) subsection (2) or (3) allows the director to be present; or
   (b) the interest does not need to be disclosed under section 191.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the Criminal Code.

(1B) An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

Participation with approval of other directors

(2) The director may be present and vote if directors who do not have a material personal interest in the matter have passed a resolution that:
   (a) identifies the director, the nature and extent of the director’s interest in the matter and its relation to the affairs of the company; and
   (b) states that those directors are satisfied that the interest should not disqualify the director from voting or being present.

Participation with ASIC approval

(3) The director may be present and vote if they are so entitled under a declaration or order made by ASIC under section 196.

Director may consider or vote on resolution to deal with matter at general meeting

(4) If there are not enough directors to form a quorum for a directors’ meeting because of subsection (1), 1 or more of the directors (including those who have a material personal interest in that matter) may call a general meeting and the general meeting may pass a resolution to deal with the matter.

Effect of contravention by director

(5) A contravention by a director of:
   (a) this section; or
   (b) a condition attached to a declaration or order made by ASIC under section 196; does not affect the validity of any resolution.
Part 9.5—Powers of Courts

1318 Power to grant relief

(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person’s appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

(2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought.

(3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.

(4) This section applies to a person who is:
   (a) an officer of a corporation; or
   (b) an auditor of a corporation, whether or not the person is an officer of the corporation; or
   (c) an expert in relation to a matter:
      (i) relating to a corporation; and
      (ii) in relation to which the civil proceeding has been taken or the claim will or might arise; or
   (d) a receiver, receiver and manager, liquidator or other person appointed or directed by the Court to carry out any duty under this Act in relation to a corporation.

(5) For the purposes of this section, officer in relation to a corporation, means:
   (a) a director, secretary, executive officer or employee of the corporation; and
   (b) a receiver, or receiver and manager, of property of the corporation; and
   (c) an administrator of the corporation; and
   (ca) an administrator of a deed of company arrangement executed by the corporation; and
   (d) a liquidator of the corporation; and
   (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.