



THIRTY-SEVENTH PARLIAMENT

REPORT 25

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***UNIVERSITY STATUTES: CURTIN UNIVERSITY OF
TECHNOLOGY - STATUTE NO. 7 - THE COUNCIL;
AND MURDOCH UNIVERSITY - AMENDING
STATUTES - NO. 5 AND NO. 17***

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

March 2008

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed: 28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“3. Joint Standing Committee on Delegated Legislation

3.1 A *Joint Delegated Legislation Committee* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –

- (a) is authorized or contemplated by the empowering enactment;
- (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
- (c) ousts or modifies the rules of fairness;
- (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
- (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
- (f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause –

“adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

“instrument” means –

- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

“subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

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Mr Tony McRae MLA

Hon Ray Halligan MLC (Deputy Chairman)

Hon Barbara Scott MLC

Hon Vincent Catania MLC

Mr Tony Simpson MLA

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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CHAPTER 1

CURTIN UNIVERSITY OF TECHNOLOGY - STATUTE NO. 7 - THE COUNCIL

INTRODUCTION

- 1.1 The Joint Standing Committee on Delegated Legislation (“**the Committee**”) resolved to prepare this information report to advise Parliament of the legal arguments as to the meaning of subsections 34(1)(e), (ea) and (eb) of the *Curtin University of Technology Act 1966* (“**the Curtin Act**”) and the different outcomes of each argument for Parliament’s ability to scrutinise subsidiary legislation made under that Act.
- 1.2 The Committee has recommended that the Curtin Act be amended to remove the current ambiguity as to whether the matters set out in subsections 34(1)(e), (ea) and (eb) are to be dealt with in statutes (which are scrutinised by Parliament) or rules (which are not).

THE CURTIN STATUTE

- 1.3 *Curtin University of Technology - Statute No. 7 - The Council* (“**the Curtin Statute**”) was gazetted on 24 July 2007 and was first considered by the Committee at its meeting on 21 September 2007. The Curtin Statute is **Appendix 1** to this report.
- 1.4 Subsection 34(1) of the Curtin Act provides that:

The [Curtin University] Council may make Statutes, not inconsistent with this Act, with respect to all matters pertaining to the University and in particular may make Statutes with respect to — ...

(e) the manner and time of convening, holding and adjourning the meetings of the Council, the manner of voting at those meetings, the powers and duties of the Chancellor, the conduct and record of the business, the appointment of committees of the Council and the quorum, powers and duties of those committees; ...

and that section 34(3) of the Curtin Act provides that:

The Statutes may provide for —

(a) empowering the Council of the University to make by-laws or rules, not inconsistent with this Act or with any Statute for regulating or providing for the regulation of, any specified matter with respect to which Statutes may be made, or for carrying out or giving effect to the Statutes, and any of those by-laws or rules shall have the same force and effect as a Statute;

(b) the manner of promulgation of those by-laws or rules; and

(c) the revocation or amendment of any of those by-laws or rules.

1.5 The Explanatory Memorandum accompanying the Curtin Statute stated:

This amendment was required to address the absence of Rules for the calling of and procedures for Council meetings. Where provisions did exist, these were frequently inconsistent or inappropriate. Statute No. 7 and the Rules will provide certainty, consistency and clarity in the running of Council and Committee meetings.¹

(However, the Curtin Statute was a new statute, not an amendment.)

1.6 As can be seen from Appendix 1, the Curtin Statute is sparse. It does not, in fact, provide the procedures for meetings. In the main, it merely repeats provisions of section 34 of the Curtin Act. The most significant provision of the Curtin Statute appeared to the Committee to be clause 9, which states:

The Council may make rules, not inconsistent with the Act or with any Statute, for:

(a) regulating or providing for the regulation of its procedures, and the procedures of its Committees, by way of standing orders; or

(b) carrying out or giving effect to this Statute.

1.7 The Committee was concerned that the Curtin Statute was not authorised by the Curtin Act in that it purported to authorise rules addressing matters that the Curtin Act appeared to contemplate would be in a statute.

¹ Explanatory Memorandum accompanying *Curtin University of Technology - Statute No. 7*, p1.

SIGNIFICANCE OF DISTINCTION BETWEEN STATUTE AND RULES

- 1.8 By its Term of Reference 3.5, an instrument stands referred to the Joint Standing Committee on Delegated Legislation upon its publication, whether under subsection 41(1)(a) of the *Interpretation Act 1984* or another written law. The Committee's Terms of Reference provide that "*instrument*" means :

(a) *subsidiary legislation in the form in which, and with the content it has, when it is published;*

(b) *an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;*

and "*subsidiary legislation*" has the meaning given to it by section 5 of the *Interpretation Act 1984*.

- 1.9 Section 5 of the *Interpretation Act 1984* provides that:

"subsidiary legislation" means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

- 1.10 Section 35 of the Curtin Act provides that:

(1) *Every Statute made by the Council shall be sealed with the common seal of the University and shall be transmitted by the Council for the approval of the Governor, and when so approved —*

(a) *shall be published in the Government Gazette;*

(b) *shall take effect from the date it is so published or from a later date to be specified in the Statute.*

(2) *A copy of each Statute shall be laid before each House of Parliament within 14 sitting days after it is published in the Government Gazette if Parliament is then in Session, and if not, then within 14 sitting days after the commencement of the next succeeding Session of Parliament.*

(3) *If either House of Parliament within the next succeeding 14 sitting days after a copy of a Statute has been laid before it as provided in this section, resolves that the Statute be revoked in whole or in part, that Statute or that part is from the date of such resolution of no*

effect, but without affecting the validity of anything done pursuant to that Statute in the meantime.

- 1.11 There is no requirement for rules made pursuant to statutes containing a provision authorised by subsection 34(3) of the Curtin Act to be published or tabled. Accordingly, the provisions of statutes made under the Curtin Act are subject to Parliamentary scrutiny whereas rules made pursuant to those statutes are not.

WHETHER THE CURTIN ACT PERMITS CURTIN UNIVERSITY TO CHOOSE WHETHER THE MATTERS SET OUT IN SUBSECTION 34(1)(E) ARE SUBJECT TO PARLIAMENTARY SCRUTINY

- 1.12 The Committee considered subsection 34(1)(e) of the Curtin Act in the context of the section as a whole. It noted that the other subsections of section 34 read:

(1) The Council may make Statutes, not inconsistent with this Act, with respect to all matters pertaining to the University and in particular may make Statutes with respect to —

(a) the management, good government and discipline of the University;

(b) the use and custody of the common seal of the University, and the functions of the Council that may be exercised without the use of the common seal for that purpose;

(c) the organization and supervision of the teaching of enrolled students;

(d) the staff of the University, its branches and the Kalgoorlie Campus;

...

(ea) the manner and time of convening, holding and adjourning the meetings of a Board, the manner of voting at those meetings, the powers and duties of the chairman of a Board, the conduct and record of the business, the appointment of committees of a Board and the quorum, powers and duties of those committees;

(eb) the manner and time of convening, holding and adjourning the meetings of the Kalgoorlie Campus Council; the manner of voting at those meetings; the powers and duties of the chairperson of the Kalgoorlie Campus Council; the conduct and record of the business

of the Kalgoorlie Campus Council; the appointment of committees of the Kalgoorlie Campus Council and the quorum, powers and duties of those committees;

- (f) the entrance standards for students;*
- (g) the granting of appropriate degrees, diplomas and certificates or honorary awards by the University;*
- (h) the granting of scholarships, exhibitions, bursaries and prizes;*
- (i) the fees to be charged for courses of study or instruction, examinations, degrees, diplomas and certificates of the University and for such other facilities or privileges of the University as are prescribed;*
- (j) the admission of graduates and students of other educational institutions to any corresponding status in the University without examination;*
- (k) the recognition, instead of or for the purpose of any examination or course of study, of any course of study completed or examination passed in any educational institution;*
- (l) the establishment by the Council of hostels and halls of residence for enrolled students and the management, control and closing of any of those hostels and halls;*
- (m) the government of colleges, hostels and halls of residence that are under the control of the Council, the affiliation of colleges, hostels and halls of residence that are not under the control of the Council and the licensing and supervision of boarding houses catering for enrolled students and for the revocation of the licensing thereof;*
- (ma) the affiliation to or in connection with the University of any educational establishment, with the consent of the governing body of the educational establishment;*
- (mb) the establishment and conduct of external teaching and educational facilities within or outside the State;*
- (n) the control and investment of the property of the University; and*

(o) any matter authorised or directed by this Act to be prescribed by Statute.

- 1.13 It appeared to the Committee that while other subsections of section 34 anticipated broad guidance statutes, with significant detail in rules, subsections 34(1)(e), (ea) and (eb) were more specific. They stipulated the areas that were to be addressed in the event statutes were made concerning the matters set out in the relevant subsections.

COMMITTEE'S CONSIDERATIONS

Correspondence

- 1.14 The Committee wrote to the Department of Education Services ("**the Department**") on 26 September 2007 setting out its concerns and requesting the Department's response. The Committee's letter is **Appendix 2**.
- 1.15 Curtin University responded to the Committee's letter to the Department by letter dated 5 October 2007. Curtin University's letter is **Appendix 3**.
- 1.16 The Committee considered the response from Curtin University at its meeting on 17 October 2007.

Legal arguments

- 1.17 The Committee was of the view that a purposive interpretation of subsection 34(1)(e) of the Curtin Act would support the Committee's preliminary position. In this respect, the Committee noted that subsections 34(1)(e) and 34(3) formed part of the original Curtin Act and that the Second Reading Speech for that Act stated:

*The council is empowered by the Bill to make Statutes with respect to all matters pertaining to the institute, and also to provide for the making of by-laws or rules for the regulation or giving effect to the Statutes.*²

suggesting that rules were meant to support, not supplant, Statutes.

- 1.18 However, on a strict interpretation of the actual words of subsection 34(3) of the Curtin Act, the interpretation put forward by Curtin University that:

"Parliament could have restricted the lawful content of rules to "regulating the matters specified in a Statute" (in addition to the usual powers to carry out or give effect to the statutes). Instead it

² Hon G. C. MacKinnon MLC, Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 1966, p2668.

chose to substantially equate the matters that could be lawfully regulated by means of rules, with the matters that could lawfully be regulated by means of a statute.

was arguable.

Conclusion

- 1.19 In the circumstances, the Committee concluded that the question of whether or not the Curtin Statute was authorised or contemplated by the Curtin Act was too finely balanced for it to recommend disallowance.
- 1.20 The Committee, therefore, resolved that the question of whether subsection 34(3) of the Curtin Act was intended to operate to provide Curtin University with a discretion as to whether its Council and committee standing orders be in a statute or rules should be resolved by Parliament, as the question was essentially one of whether Parliament wished to exercise power to scrutinise this particular class of delegated legislation.³
- 1.21 Accordingly, the Committee resolved to prepare this information report to advise Parliament of the competing legal arguments.

Recommendation 1: The Committee recommends that the Government amend the *Curtin University of Technology Act 1966* to clarify that the matters set out in subsections 34(1)(e), (ea) and (eb) of that Act are intended to be addressed by statutes, not rules, made under that Act.

³ Avoidance of Parliamentary scrutiny of delegated legislation is a longstanding concern for the Committee and previous Committee's- see, for example, Western Australia, Joint Standing Committee on Delegated Legislation, Report No 11, *Review of Operations 1991-1992*, December 1992, pp17-20 and Western Australia, Joint Standing Committee on Delegated Legislation, Report No 16, *Subordinate Legislative Framework in Western Australia*, November 1995.

CHAPTER 2

MURDOCH UNIVERSITY - AMENDING STATUTES - NO. 5 AND NO. 17

2.1 *Murdoch University - Amending Statute - No. 5 and Murdoch University - Amending Statute - No. 17* (together “**the Murdoch Statutes**”) were gazetted on 21 September 2007 and were considered by the Committee at its meeting on 21 November 2007. The Murdoch Statutes are **Appendix 4** to this report.

2.2 The Committee noted that section 27 of the *Murdoch University Act 1973* provides:

The provisions of section 36 of the Interpretation Act 1918 —

(a) apply to a by-law made by the Senate in the name and on behalf of the University;

(b) apply in relation to a Statute as though it were a regulation made by the Governor;

(c) do not apply to a regulation made by the Senate under section 26, which shall take effect from the date of its promulgation in the University or from such later date as may be therein specified.

2.3 The *Interpretation Act 1918* has been repealed. While the *Interpretation Act 1984* does preserve some provisions of the *Interpretation Act 1918*, section 36 is not one of those provisions.

2.4 The Murdoch Statutes do not fall within the extended definition of “*regulation*” for the purposes of section 42(2) of the *Interpretation Act 1984* and are not made disallowable by the Parliament pursuant to any other written law.

2.5 Absent a provision in the *Murdoch University Act 1973* equivalent to section 35(3) of the Curtin Act (see paragraph 1.10 above), or adopting the disallowance procedure of the *Interpretation Act 1984*, the Murdoch Statutes are not disallowable.

2.6 Consistent with the Committee’s long-standing resolution to only consider disallowable instruments (unless a member of the Committee refers for review a non-disallowable instrument falling within the Committee’s Terms of Reference), the contents of the Murdoch Statutes were not scrutinised by the Committee.

2.7 However, the Committee resolved to bring this matter to the attention of Parliament, noting that it had written to the Minister for Education on 4 October 2007 drawing this

problem to the Minister's attention and requesting consideration be given to the amendment of the *Murdoch University Act 1973*. That letter is **Appendix 5**.

- 2.8 At the date of this report, the Committee had received no response to its letter to the Minister.

Recommendation 2: The Committee recommends that the Government amends the *Murdoch University Act 1973* to provide for the tabling in Parliament of, and the application of disallowance procedures to, statutes made pursuant to that Act.



Mr Paul Andrews MLA
Chairman

20 March 2008

APPENDIX 1

CURTIN UNIVERSITY OF TECHNOLOGY - STATUTE No. 7 - THE COUNCIL

APPENDIX 1

CURTIN UNIVERSITY OF TECHNOLOGY - STATUTE NO. 7 - THE COUNCIL

24 July 2007

GOVERNMENT GAZETTE, WA

3669

ED402*

CURTIN UNIVERSITY OF TECHNOLOGY ACT 1966

STATUTE NO. 7—THE COUNCIL

This Statute is made by the Council of the University under the powers conferred on it by section 34 of the *Curtin University of Technology Act 1966*.

1. Citation

This Statute may be cited as *Statute No. 7—The Council*.

2. Commencement

This Statute takes effect from the date that it is published in the *Government Gazette*.

3. Interpretation

In this Statute, unless the contrary intention appears—

‘Committee’ means a committee established by the Council under section 6(1).

‘Committee member’ means a member of a Committee.

‘Council member’ has the same meaning as ‘member’ in section 4(1) of the Act.

Note: section 4(1) of the Act defines ‘member’ to mean—

‘a member of the Council’.

‘Delegations Register’ means the register containing all resolutions of the Council made under section 15 of the Act relating to the delegation of all or any of the Council’s powers, authorities, duties and functions under the Act.

3670

GOVERNMENT GAZETTE, WA

24 July 2007

4. Status and role of the Council

The status and role of the Council are set out in sections 5(1) and 8 of the Act.

Note: section 5(1) of the Act states (in part) that the University—

‘... consist[s] of the Council, the members of the academic and other staff, and the enrolled students...’.

Section 8 of the Act states—

‘The governing authority of the University is the Council’.

5. Constitution and powers etc.

Provisions relating to the constitution, members, duties and powers of the Council are set out in Part 1, Division 2 (sections 8-21AA) and Schedule 1A of the Act.

6. Committees

(1) The Council may, by resolution—

- (a) appoint whatever Committees it considers to be appropriate to assist it in carrying out its functions;
- (b) appoint a Council member, or any other person, to be a Committee member; and
- (c) appoint a deputy or deputies for a Committee member.

Note: unless, in a particular case, the Council resolves otherwise, the Vice-Chancellor is a member of each Committee (see section 5(2) of Statute No. 6—Vice-Chancellor).

(2) A deputy may act temporarily in place of the Committee member for whom he or she was appointed as a deputy on any occasion on which, or during any period in which, the Committee member is unable to perform the functions of the position.

Notes:

- 1. Section 15(1)(a) of the Act enables the Council to delegate powers to ‘a committee consisting of members appointed by the Council’.
- 2. Section 15(3) of the Act requires that ‘[e]ach committee appointed by the Council shall report to the Council on its activities at such times as the Council directs’.

7. Delegation

(1) The Council’s power to delegate is set out in sections 15(1) and (2) of the Act.

Note: sections 15(1) and (2) of the Act state—

‘(1) The Council may —

- (a) in relation to any matter or class of matters, or in relation to any activity or function of the University, by resolution delegate all or any of its powers, authorities, duties and functions under this Act, except this power of delegation and its powers in relation to the making of Statutes or by-laws, to —
 - (i) any member;
 - (ii) a committee consisting of members appointed by the Council;
 - (iii) any officer or officers of the University; or
 - (iv) a Board;
- and
- (b) in relation to any matter or class of matters affecting the Kalgoorlie Campus, or in relation to any activity or function of the Kalgoorlie Campus, by resolution delegate all or any of its powers, authorities, duties and functions under this Act, except this power of delegation and its powers in relation to the making of Statutes or by-laws, to the Kalgoorlie Campus Council.

(2) The Council may by resolution revoke a delegation given under this section and no delegation so given prevents the exercise or discharge by the Council of any of its powers, authorities, duties or functions’.

(2) The Council Secretary is to ensure that the Delegations Register is established and maintained.

8. Council Secretary

The Council is to designate an employee of the University to be the Council Secretary.

9. Rules under this Statute

The Council may make rules, not inconsistent with the Act or with any Statute, for—

- (a) regulating or providing for the regulation of its procedures, and the procedures of its Committees, by way of standing orders; or
- (b) carrying out or giving effect to this Statute.

The Common Seal of Curtin University of Technology was hereto affixed on the 14th day of May 2007 by the authority of the Vice-Chancellor—

JEANETTE HACKETT, Vice-Chancellor.
PAMELA HASS, Administrative Secretary.

Approved by His Excellency the Governor in Council,

M. C. WAUCHOPE, Clerk of the Council.

APPENDIX 2

**LETTER FROM THE JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION TO THE DEPARTMENT OF EDUCATION SERVICES DATED
26 SEPTEMBER 2007**

APPENDIX 2

LETTER FROM THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION TO THE DEPARTMENT OF EDUCATION SERVICES DATED 26 SEPTEMBER 2007



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our ref: 3731/40 & 41

Mr Richard Strickland,
Chief Executive Officer,
Department of Education Services,
PO Box 1766,
Osborne Park WA 6916

Attn: Ms Linley Hine

By facsimile: 9441 1901

Dear Mr Strickland,

Curtin University of Technology - Statutes Nos. 6 and 7

I refer to these instruments, which were considered by the Joint Standing Committee on Delegated Legislation at its meeting on Friday, 21 September 2007.

Both instruments

The Committee noted that section 35 of the *Curtin University of Technology Act 1966* ("the Act") requires approval of the Governor prior to a statute being made and gazetted. There was no advice in the Explanatory Memorandum, or the gazetted instruments, as to that approval having been obtained. The Committee enquires when the Governor's approval of these statutes was obtained.

Statute No. 7

Section 34(1)(e) of the Act provides that Statutes may be made concerning:

the manner and time of convening, holding and adjourning the meetings of the Council, the manner of voting at those meetings, the powers and duties of the Chancellor, the conduct and record of the business, the appointment of committees of the Council and the quorum, powers and duties of those committees;

Clause 9 of Statute No.7 provides that:

The Council may make rules, not inconsistent with the Act or with any Statute, for:

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- (a) *regulating or providing for the regulation of its procedures, and the procedures of its Committees, by way of standing orders; or*
- (b) *carrying out or giving effect to this Statute.*

It appeared to the Committee that Statute No.7 provides that rules will contain the provisions that section 34(1)(e) of the Act contemplates will be in a statute. This distinction is significant as statutes are subject to Parliamentary scrutiny whereas rules are not. The Committee enquires as to the legislative basis for rules to be made concerning the matters set out in section 34(1)(e) of the Act.

The Committee requires your written response to the matters raised in this letter by **5pm on Monday, 15 October 2007.**

The last date for Parliament to disallow this Statute is 23 October 2007. Bearing in mind Standing Orders provisions regarding notices of motions to disallow, the Committee resolved on 21 September 2007 to place a 'protective' notice of motion of disallowance of Statute No.7. In the event that the Committee's concerns are resolved prior to debate of the motion, the Committee will seek leave to withdraw the motion.

If you have any queries, please contact the Committee's Advisory Officer (Legal), Ms Susan O'Brien, on 9222 7428

Yours sincerely



Mr Paul Andrews MLA

Chairman

26 September 2007

APPENDIX 3

**LETTER FROM CURTIN UNIVERSITY OF TECHNOLOGY TO THE JOINT
STANDING COMMITTEE ON DELEGATED LEGISLATION DATED
5 OCTOBER 2007**

APPENDIX 3
LETTER FROM CURTIN UNIVERSITY OF TECHNOLOGY TO THE
JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
DATED 5 OCTOBER 2007

PUBLIC

Curtin 
University of Technology

Your ref:
Our ref: PH:kl:S78/549/11

5 October 2007

The Hon Paul Andrews MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
Perth WA 6000



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Dear Mr Andrews

CURTIN UNIVERSITY OF TECHNOLOGY – STATUTES NO. 6 AND 7

I refer to your letter of 26 September 2007, a copy of which has been provided to me by the Department of Education Services. On behalf of the University, I thank the Committee for the opportunity to address its concerns.

1. Approval of Governor

A letter dated 4 July 2007 was received by the Vice-Chancellor from the Hon. Mark McGowan MLA, Minister for Education and Training informing the University that in accordance with section 35 the Governor in Executive Council had approved the establishment of Statute No. 6 – *Vice-Chancellor* and Statute No. 7 – *The Council*.

A copy of that letter and Executive Council Minute No. 0502 is **attached** for ease of reference.

2. Statute No. 7 – The Council

The Committee has questioned whether, in effect, section 34(1)(e) of the *Curtin University of Technology Act 1966* (**Curtin Act**) contemplates that the Council's *Standing Orders 2007* must be in a statute, rather than in rules. You have enquired as to 'the legislative basis for rules to be made concerning the matters set out in section 34(1)(e) of the Act'.

As you have pointed out, section 34(1)(e) gives the Council the power to make a **Statute** with respect to the matters described in that paragraph (which, for ease of reference, I will refer to standing orders). On its face, this may be seen as requiring the Council to make standing orders by way of a statute, and precluding it from doing so by way of rules instead.

However, section 34(3)(a) expressly permits the Council to make a statute:

shrd\2007Oct5 - Ltr Hon P Andrews MLA

“empowering the Council of the University to make by-laws or rules, not inconsistent with this Act or with any Statute for regulating or providing for the regulation of, any specified matter with respect to which Statutes may be made, or for carrying out or giving effect to the Statutes, and any of those by-laws or rules shall have the same force and effect as a Statute.”

Therefore, under the *Curtin Act*:

- (a) rules can be made “regulating ... any specified matter with respect to which [a Statute] may be made”; and
- (b) “those ... rules shall have the same force and effect as a Statute”.

Applying these provisions to establish the legislative basis that you sought in respect of *Statute No. 7* and the *Council Standing Orders 2007*:

- (a) a statute may be made with respect to the procedures of the Council and its committees (see section 34(1)(e) of the *Curtin Act*);
- (b) a statute may be made empowering the Council to make rules with respect to the procedures of the Council and its committees (see section 34(3)(a) of the *Curtin Act*);
- (c) *Statute No. 7* empowers the Council to make rules with respect to the procedures of the Council and its committees (see section 9(a) of *Statute No. 7*); and
- (d) *Council Standing Orders 2007* is comprised of rules regulating the procedures of the Council and its committees.

These are the key propositions on which the University has relied in support of its conclusion that *Statute No. 7* and *Council Standing Orders 2007* are lawfully made under section 34(1)(e) and (3)(a) of the *Curtin Act*.

The University appreciates the Committee’s concern that “statutes are subject to Parliamentary scrutiny whereas rules are not”. By way of response, may I make two points.

Firstly, the University’s external legal advice is that the empowering provisions in section 34(3)(a) of the *Curtin Act*, referred to earlier, give a very broad lawmaking power to the Council to make rules, rather than statutes. Parliament could have restricted the lawful content of rules to “regulating the matters specified in a Statute” (in addition to the usual powers to carry out or give effect to the statutes). Instead, it chose to substantially equate the matters that could lawfully be regulated by means of rules, with the matters that could lawfully be regulated by means of a statute.

The power to make rules regulating “any specified matter with respect to which Statutes may be made” has the inevitable consequences that:

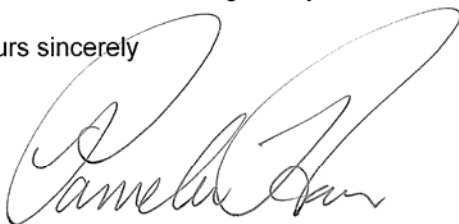
- (a) a "specified matter" (ie a matter specified in the *Curtin Act* in respect of which a statute may be made) may lawfully be regulated by the Council either by way of a Statute or by way of rules; and
- (b) if regulated by way of rules, it will not be subject to Parliamentary scrutiny and will have the same force and effect as a Statute.

Secondly, the fact that rules are not subject to Parliamentary scrutiny was not a factor in the Council's decision to make the *Council Standing Orders 2007* by way of rules, rather than by way of a statute. Indeed, the University has recently taken great care, in making all its subsidiary legislation, to follow the principles adopted by your Committee. I would welcome any comments that the Committee may have in relation to the content of the *Council Standing Orders 2007*, and its consistency with the principles adopted by the Committee. To this end I **attach** a copy for your information. The University has also made very significant efforts in recent times to improve the quality of its subsidiary legislation. I would welcome the opportunity to discuss with you or your officers ways that we might work more closely with you in continuing our quality improvement objectives.

If you would like to discuss any of these matters, or if I could be of any further assistance, please let me know. I would be happy to meet with you and if you wish to involve our external counsel Mr Neil Douglas.

I look forward to hearing from you.

Yours sincerely



Pamela Hass
General Counsel
and Director, Legal & Compliance Services

cc Mr Richard Strickland
Chief Executive Officer
Department of Education Services
PO Box 1766
OSBORNE PARK WA 6916

cc: Professor Jeanette Hackett, Vice Chancellor
Professor Gregory Craven, Deputy Vice Chancellor

Attach (3)



Hon Mark McGowan MLA
Minister for Education and Training; South West

197 St Georges Terrace, Perth WESTERN AUSTRALIA 6000
Telephone: (+61 8) 9222 9111 Facsimile: (+61 8) 9222 9410
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LEGAL SERVICES

- 5 JUL 2007

Our Ref: DES07123
Your Ref: AC:G50/675/11 v2

COPY
FOR YOUR INFORMATION ONLY

Professor Jeanette Hackett
Vice-Chancellor
Curtin University of Technology
GPO Box U1987
PERTH WA 6845

Dear Professor Hackett

MISCELLANEOUS STATUTES AMENDMENT STATUTE 2006

I am pleased to advise that in accordance with Section 35 of the *Curtin University of Technology Act 1966*, the Governor in Executive Council has approved the establishment of Statute No. 6 – *Vice Chancellor* and Statute No. 7 – *The Council*.

Arrangements have been made for the Statutes to be published in the next issue of the *Government Gazette* and to be tabled in both Houses of Parliament.

A copy of the Executive Council Minute is attached for your information.

Yours sincerely

**HON MARK MCGOWAN MLA
MINISTER FOR EDUCATION AND TRAINING; SOUTH WEST**

Att

cc Pamela Hass, General Counsel and Director, Legal Services

- 4 JUL 2007

APPENDIX 4

MURDOCH UNIVERSITY - AMENDING STATUTES - No. 5 AND No. 17

APPENDIX 4

MURDOCH UNIVERSITY - AMENDING STATUTES - No. 5 AND No. 17

21 September 2007

GOVERNMENT GAZETTE, WA

4737

EDUCATION AND TRAINING

ED401

MURDOCH UNIVERSITY ACT 1973 AMENDING STATUTE

It is hereby notified that the Governor in Executive Council, acting under the provisions of Section 25 of the *Murdoch University Act 1973*, has approved the amendment of Statute No. 5—Academic Council as set out in the attached schedule.

MARK McGOWAN MLA, Minister for Education and Training.

M. C. WAUCHOPE, Clerk of the Executive Council.

The proposed amendments to *Statute 5—Academic Council*, as set out in the attached schedule, have been approved and ratified by an absolute majority of the members of the Senate in accordance with sub-section 25(1) of the *Murdoch University Act 1973* (WA).

The University has sealed this document in accordance with Senate resolution S/54/2004

TERRY BUDGE, Chancellor.

JEREMY RIGG, General Counsel & University Secretary.

By Command of the Governor,

M. C. WAUCHOPE, Clerk of the Executive Council.

STATUTE 5—ACADEMIC COUNCIL Final Version

Senate resolution number: S/04/2007

2. The members of the Academic Council shall be—

- (b) The persons holding the following offices, ex officio—
 - Vice-Chancellor;
 - Executive Deans of Divisions;
 - President of the Guild of Students;
 - Deputy Vice-Chancellor (Academic);
 - Deputy Vice-Chancellor (Corporate);
 - Deputy Vice-Chancellor (Research);
 - Deputy Vice-Chancellor (Enterprise & International);
 - Education Vice-President of the Guild of Students

4738

GOVERNMENT GAZETTE, WA

21 September 2007

ED402

MURDOCH UNIVERSITY ACT 1973**AMENDING STATUTE**

It is hereby notified that the Governor and deputy of the Governor in Executive Council, acting under the provisions of Section 25 of the *Murdoch University Act 1973*, has approved the amendment of Statute No. 17 as set out in the attached schedule.

MARK MCGOWAN MLA, Minister for Education and Training.
M. C. WAUCHOPE, Clerk of the Executive Council.

The proposed amendments to *Statute 17—Guild of Students*, as set out in the attached schedule, have been approved and ratified by an absolute majority of the members of the Senate in accordance with sub-section 25(1) of the *Murdoch University Act 1973 (WA)*.

The University has sealed this document in accordance with Senate resolution S/54/2004

TERRY BUDGE, Chancellor.
JEREMY RIGG, General Counsel & University Secretary.

By Command of the Governor,

M. C. WAUCHOPE, Clerk of the Executive Council.

STATUTE 17—GUILD OF STUDENTS**Final Version****1. Interpretation****(1) In this Statute, unless the context otherwise requires—**

'Guild' means the Guild of Students established in accordance with section 20 of the Act;

'Guild Regulation' means a regulation made by the Guild under the authority of and in accordance with section 6;

'Guild Rule' means a rule made by the Guild under the authority of section 7;

'Member' means a member of the Guild;

'Student Executive' means the Student Executive of the Guild referred to in section 7;

'Absolute Majority' means a majority of all the members of the Student Executive for the time being holding office;

'Student Society' means any club, society or association within or connected with the University which is affiliated with the Guild;

'Associate of the Guild' means a person other than a member admitted to associateship under the authority of section 3(m).

'General Meeting' means any general meeting of members held under the authority of section 8 at which all members may vote.

'Referendum' means any ballot on any subject held by the Guild under the authority of and in accordance with section 8.

(2) References to sections are references to the sections of this Statute.**2. Objects****(1) The objects of the Guild shall be, either alone or in association with any other organisation within the University—**

(a) to represent its members, to further the common interests of its members, and to co-ordinate joint activities of its members, and other members of the University; and

(b) such other objects as the Guild may by Guild Regulation from time to time adopt.

(2) The Guild shall be the recognised means of communication between the student body and the Senate.**3. Powers**

Subject to the Act, and the Statutes and By-laws of the University, the Guild shall have the power—

(a) to purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property and to sell, let, mortgage, or otherwise dispose of it;

(b) to borrow, raise or secure payment of any money for any of the objects of the Guild from time to time and in particular by mortgaging or charging the property of the Guild or any part thereof;

(c) to engage and dismiss employees;

(d) to expend and invest moneys;

(e) to operate bank accounts;

APPENDIX 5
LETTER FROM THE JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION TO THE MINISTER FOR EDUCATION DATED
4 OCTOBER 2007

APPENDIX 5

LETTER FROM THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION TO THE MINISTER FOR EDUCATION DATED 4 OCTOBER 2007



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Hon Mark McGowan MLA,
Minister for Education and Training,
21st floor, Governor Stirling Tower,
197 St Georges Tce,
Perth WA 6000.

By facsimile: 9222 9410

Dear Minister,

Disallowance provisions in university Acts

The Joint Standing Committee on Delegated Legislation has recently had occasion to consider a number of university statutes made pursuant to powers conferred by the various university Acts. This has brought into focus a recurrent problem for the Committee: the limited time available for that consideration under the relevant Acts. Accordingly, the Committee resolved at its meeting on Wednesday, 26 September 2007 to draw this problem to your attention.

As you will be aware, most subsidiary legislation comes before the Committee by virtue of its Terms of Reference and section 42 of the *Interpretation Act 1984*, which provides:

(2) Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulations of which resolution notice has been given within 14 sitting days of such House after such regulations have been laid before it or if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.

However, the various university Acts have specific provisions which over-ride this general position:

- Section 35(3) of the *Curtin University of Technology Act 1966* provides:
(3) If either House of Parliament within the next succeeding 14 sitting days after a copy of a Statute has been laid before it as provided in this section, resolves that the Statute be revoked in whole or in part, that Statute or that

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part, is from the date of such resolution, of no effect, but without affecting the validity of anything done pursuant to that Statute in the meantime.;

- Section 27(3) of the *Edith Cowan University Act 1984* also provides:

(3) If either House of Parliament within the next succeeding 14 sitting days after a copy of a Statute has been laid before it as provided in this section, resolves that the Statute be revoked in whole or in part, that Statute or that part is from the date of such resolution of no effect, but without affecting the validity of anything done pursuant to that Statute in the meantime;

- Section 27 of the *Murdoch University Act 1973* provides:

The provisions of section 36 of the Interpretation Act 1918³, —

(a) apply to a by-law made by the Senate in the name and on behalf of the University;

(b) apply in relation to a Statute as though it were a regulation made by the Governor;

(c) do not apply to a regulation made by the Senate under section 26, which shall take effect from the date of its promulgation in the University or from such later date as may be therein specified.; and

- Section 33(2) of the *University of Western Australia Act 1911* provides:

(2) Copies of every such Statute shall be laid before Parliament forthwith, if then sitting, and if not then sitting, within 14 days after the commencement of the next ensuing session.

If either House of Parliament within the next subsequent 30 days resolves that any such Statute ought to be annulled in whole or in part, such Statute or part thereof shall, after the date of such resolution, be of no effect, without prejudice to the validity of anything done in the meantime under the provisions of such Statute.

As you will also be aware, the Committee operates under Legislative Council Standing Orders and, where it resolves to recommend disallowance of subsidiary legislation, proceeds by way motion for disallowance in that House. Legislative Council Standing Order 141 requires Notice to be given of Motions. A notice of motion for disallowance has precedence over other notices to be given on a particular day (Standing Order 143) and is automatically deemed to be moved after two sitting days (Standing Order 152(b)). Standing Order 153(c) requires a motion for disallowance to be put to the question after the expiration of 10 sitting days after the motion has been moved.

In providing that the resolution to revoke the Statute be made within 14 sitting days after a statute has been laid before the House, the *Curtin University of Technology Act 1966* and *Edith Cowan University Act 1984* make no allowance for the applicable Standing Orders. Nor do they make any allowance for

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the workload of the Committee or the Committee's practice of seeking to resolve issues with relevant departments or agencies, rather than proceeding down the path of recommending disallowance.¹

On the first point, the Committee reviews some 450-600 instruments each year, dealing with an average of 40 instruments at each meeting. Almost inevitably, the Committee is only able to consider an instrument shortly before the 14 sitting day period for giving of notice pursuant to the *Interpretation Act 1984* expires. If this is the case, and the Committee has serious concerns with an instrument, the Committee moves a protective notice of motion for disallowance, which enables it to consider any response made to its concerns and receive an undertaking to amend or repeal if those concerns remain.

However, where no provision or allowance is made in an empowering statute for notice to be given, the Committee must decide on its first consideration of an instrument whether or not to recommend disallowance and proceed to preparation of a report.

While every effort is made to identify instruments that are subject to short disallowance periods and move them more quickly onto the Committee's agenda, the volume of other instruments with pending disallowance dates may render this impossible and, in any event, even where possible, the time for resolving the Committee's concerns is curtailed.

These problems are even more severe with regard to statutes made pursuant to the *University of Western Australia Act 1911*. As can be seen, section 33(2) of that Act requires Parliament to resolve to annul a statute within 30 days, not 30 sitting days, of the statute being laid before it. With this Act, in the event a statute is laid before Parliament shortly before a recess, the Committee may not have any real opportunity to consider it.

As will have noted, the *Murdoch University Act 1973* refers to repealed legislation.

The Committee requests that you give consideration to amendment of the relevant Acts, in light of its concerns that the current provisions inhibit effective scrutiny of subsidiary statutes made pursuant to them.

Yours sincerely



Mr Paul Andrews MLA

Chairman

4 October 2007

¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 22, *Annual Report*, 28 March 2007, p5, paragraph 2.4.