25 July 2007

JCHE Review of the National Governance Protocols
Loc. 130
Department of Education, Science and Training
GPO Box 9880
Canberra ACT 2601

To whom it may concern

Deakin University submission to Review of National Governance Protocols

Please find enclosed Deakin University’s submission to the Review of the National Governance Protocols.

If you have any questions in respect of the submission, please contact:

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Yours sincerely

David M Morgan
Chancellor
1 Background

This submission responds to the Review of the National Governance Protocols (NGPs) which has been commissioned by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) and which is being coordinated by the Joint Committee for Higher Education. The Review is examining the impact of the NGPs and scope for their enhancement.

The 11 National Governance Protocols were introduced by the Commonwealth Government in 2004 and aim to establish a minimum standard for key aspects of university governance. 7.5% of each university’s Commonwealth Grant Scheme Funding (operating grant) is contingent upon complying with the NGPs and with the Higher Education Workplace Relations Requirements (HEWRRs).

2 Summary

There has been a significant increase in the emphasis on effective governance within the public and private sectors in recent years. In turn, the NGPs have contributed to a sustained focus on university governance. In general terms, the NGPs have clarified the duties and responsibilities of university council members and have influenced good governance in several other specific ways such as by enhancing the oversight and risk assessment of commercial ventures. Perhaps the most valuable aspect of the NGPs so far as the Council of Deakin University is concerned is that they have confirmed that the Council is complying with good practice.

Deakin believes the NGPs could be enhanced by being expanded to encompass a good practice guide, informed by relevant literature and specific examples of excellent practice within the sector. Promoting effective governance should be as much about leading by example as setting out compliance requirements.

This submission also makes a number of specific suggestions for improvement of the NGPs, including:
- their possible expansion to recognise the role and responsibilities of the council secretary
- the addition of provisions equivalent to the “business judgment rule” set out in the Corporations Act 2001 (Cth) within university enabling Acts to afford increased protection to university council members for actions undertaken or omitted in good faith
- the addition of provisions relating to the oversight of risk management
- the specification of requirements for an independent chair (and members) of the audit committee or equivalent.

Deakin does not favour the removal of staff and student members from university councils, or a blanket prohibition on appointing members for periods beyond 12 years. This submission argues that, in each case, specific factors should be taken into account prior to a decision being made. This submission is based on the view that important debate about the role and effectiveness of university governance should not be overshadowed by argument about governing body size.
3 Elaboration

3.1 The impact of the National Governance Protocols (NGPs) and their contribution to good governance

3.1.1 How have the existing Protocols influenced good governance?
There is no doubt that the introduction of the NGPs in 2004 has contributed to a sustained increase in focus on university governance. However, the NGPs are but one factor in an environment that has seen a significantly increased emphasis on good governance within the public and private sectors and within universities, since the late 1990s. Universities generally, and Deakin University in particular (amongst others), have been actively developing and implementing processes aimed at achieving effective governance, in an environment of steadily increasing standards and expectations, for some years. The significantly greater expectations which have been placed on university governing bodies have been influenced by many and varied factors including: significant growth in the size of university budgets; an increasingly competitive higher education sector; greater engagement by universities in commercial activity aimed at increasing non-government income; enhanced oversight by State and Commonwealth governments of the financial affairs of universities; the rapidly evolving nature of good practice governance in the corporate sector arising, at least in part, from a string of high profile corporate collapses and evidenced by the publication of new guides to effective governance practice;\(^1\) key overseas developments such as the Sarbanes-Oxley Act in the United States; and legal developments within Australia including a strengthening of the Corporations Act 2001 (Cth).

Thus, well before the introduction of the NGPs, Deakin University had in place a documented governance framework establishing such provisions (and providing for their regular review) as: the functions of the University Council; matters reserved for Council decision; the duties and responsibilities of Council members; an annual schedule of Council business; a system for the regular review by Council of its own performance and a cycle of continuous improvement in Council operations; the recording and regular review of Council delegations, standing resolutions and powers held by the Vice-Chancellor and certain senior officers; and comprehensive terms of reference, rules of operations, schedules of business and requirements for regular review of performance for standing committees of the Council.

In general terms it fair to say that NGPs 1 to 9 have not had a significant impact on governance at Deakin. Perhaps the most valuable aspect of those Protocols, so far as the Council of Deakin University is concerned, is that they have confirmed that the Council is complying with good practice.

Although amendments to the Deakin University Act 1974 (Vic.) (the Deakin Act) and the governance framework were required in response to the NGPs, those amendments were minor in nature and, in respect of the amendments to the Deakin Act, generally mirrored provisions Council had already established via other means. The one significant exception to this has been the introduction of powers enabling Council to “remove a member from office if it is of the opinion that the member has failed to comply with the responsibilities of a member of the Council”\(^2\). The amendments to the Deakin Act introduced in response to the requirements of the NGPs also provide that the office of a member of the Council “becomes vacant if that member becomes disqualified from managing corporations under Part 2D.6 of the

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\(^1\) See, for example, ASX Corporate Governance Council Principles of Good Corporate Governance and Best Practice Recommendations (currently under review), Standards Australia AS 8000 Good Governance Principles, the Investment and Financial Services Association (IFSA) Corporate Governance Principles (Blue Book), and the Australian National Audit Office (ANAO) Public Sector Governance: Better Practice Guide.

\(^2\) Deakin University Act 1974 (Vic.), section 9 (2B).
Corporations Act. Although it has not yet been necessary to act on these provisions at Deakin, their introduction marks a significant increase in the onus on an individual member of Council and on the Council itself with respect to the duties and responsibilities of Council members.

In addition, the NGPs have influenced good governance in several other specific ways, particularly in respect of NPGs 10 and 11 regarding Council’s oversight of commercial entities. This is addressed in greater detail in section 3.1.4 below.

3.1.2 Has the requirement to comply with the existing Protocols had any negative or unintended consequences?
The requirement to comply with the existing Protocols has not had any particular negative or unintended consequences. However, it is noted that in her speech to the Australian Financial Review Higher Education Summit held in Melbourne in April 2007, the Federal Minister for Education, Science and Training, the Hon. Julie Bishop MP, referred to the need for a fifth pillar of higher education policy reform: good governance and efficiency and for a significant strengthening of the NGPs. Although there is a need for university governance to improve continuously, it is important to weigh up the benefits derived from further accountability requirements against the resources consumed by those requirements. In his recent article ‘Decision Making Goes by the Board’ Gavin Moodie suggests that “it is not possible to regulate for good decision-making. Indeed, extensive regulation undermines responsible decision-making because the bodies spend much of their time complying with regulation rather than taking responsibility for their institution’s performance”.

3.1.3 Are there other factors and influences that impact on governance practices which ought to be addressed in the Protocols?
This submission will set out in greater detail, in subsequent sections, areas in which Deakin University believes specific aspects of the NGPs can be improved. In general terms, it is noted that the NGPs do not reflect current discourse on ways of improving governance practices or provide exemplars of good practice. This is in contrast to the approach taken by the Higher Education Funding Council of England (HEFCE) which has embraced the work of the Committee of University Chairmen (CUC) and expects all universities to comply with the CUC Guide for Members of Higher Education Governing Bodies in the UK. The CUC Guide (a document of some 150 pages) is aimed at governors of higher education institutions in the UK. It shares current good practice and encourages appropriate adoption of such practice across the higher education sector. The CUC has also published a number of other excellent documents in which various alternatives aimed at good practice or best practice university governance are explored, several of which are relevant to changes to the NGPs mooted by Minister Bishop. These publications include a Report on the Monitoring of Institutional Performance and the Use of Key Performance Indicators and A final Report to the CUC on: Good Practice in Six Areas of the Governance of Higher Education Institutions. Although literature addressing governance abounds both within Australia and abroad, what is significant about the CUC material is that it is written specifically for the higher education sector. Of course, the material is not perfect and is by no means the only exemplar; it does, however, serve to highlight a current gap in the Australian environment. Broadening the NGPs to

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3 Deakin University Act 1974 (Vic.), section 9 (2) (a).
5 The Australian, 20 June 2007.
encompass a good practice guide, informed by relevant literature and specific examples of excellent practice within the sector, in addition to the compliance requirements, would be welcomed by Deakin University.

3.1.4 How have the existing Protocols been instrumental in guiding and shaping institutions’ own governance structures and relationships?
Council's oversight of the University's controlled incorporated and commercial entities has been significantly enhanced due to the specific provisions set out in NGP 10. Although Deakin (under the leadership of Council's Finance and Business Affairs Committee) was in the process of establishing a detailed framework for such oversight prior to the introduction of the NGPs, that framework was subsequently expanded in response to the requirements of the NGPs. It is also likely that compliance with the framework has been improved by the requirement that Council satisfy itself annually that the specific requirements of NGP 10 have been met. In the spirit of continuous quality improvement, the framework is now in the final stages of review to ensure that it is streamlined and entirely appropriate for the Deakin context, while at the same time being robust and (continuing to be) consistent with the NGPs.

With respect to NGP 11, regarding those entities in which the University is a part owner or member, the requirements of that Protocol, coupled with enhanced annual reporting requirements introduced by the Victorian Government, have encouraged Council to exercise greater control and oversight. In particular, the Audit and Risk Committee has been vigilant in monitoring and refining the processes and reporting that enable it to provide assurance to Council on the University's involvement in these entities.

3.1.5 How have the existing Protocols addressed the concerns about university governance raised in the ‘Higher Education at the Crossroads’ and the ‘Meeting the Challenges: the Governance and Management of Universities’ papers?
The NGPs were introduced, in part, in response to concerns about university governance raised in the ‘Higher Education and the Crossroads’ and the ‘Meeting the Challenges: the Governance and Management of Universities’ papers. Those concerns were largely about:
- encouraging universities to pursue commercial activities and, at the same time, ensuring adequate oversight of such activities; and
- the reported tendency of elected members to believe they were representing an elected constituency rather than a university as a whole.

In respect of commercial activities, it is Deakin’s view that, as previously discussed, NGPs 10 and 11 have encouraged universities to improve their governance in the areas of commercial activity.

With respect to the second item of concern noted above, the NGPs also required amendments to university Acts to specify that members of governing bodies must act in the interests of their university as a whole rather than as a representative of any constituent group that may have elected or appointed them. Members of the Deakin University Council were well aware of this obligation prior to the establishment of the NGPs as this formed (and still forms) a key component of the detailed statement of Duties and Responsibilities of Council Members approved by the Council. In practical terms therefore, the addition of this requirement to the Deakin University Act (a mirroring of pre-existing common law obligations) has not had any discernable impact on Council effectiveness.

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10 Commonwealth of Australia, Meeting the Challenges: the governance and management of universities, 2002.
11 See Deakin University Act 1974 (Vic.), section 19 (1).
3.1.6 How have the Protocols contributed to the overall sustainability of individual higher education providers?

3.1.7 How have the Protocols contributed to improving the performance of individual higher education providers?

3.1.8 Has compliance with the existing Protocols enhanced the reputation of individual higher education providers?

It is fair to say that the increased focus on university governance, arising in part from the introduction of the NGPs in 2004, contributes to institutional accountability and, in a general sense, to institutional sustainability, reputation and performance.

However, it is a significant stretch to suggest that the NGPs have contributed in any specific way to improved organisational performance overall. It is therefore important to place the role and impact of the Protocols within an appropriate perspective. For example, with respect to the impact of governance enhancements generally, Deakin University agrees with Professor Geoffrey Kiel who suggests that “there is a singular lack of empirical evidence that recent changes in corporate governance have produced improved levels of organisational performance in the private sector” 13.

3.1.9 Have individual institutions developed their own governance practices and procedures sufficiently to satisfy the spirit of the Protocols?

3.1.7 Do the Protocols need to be improved? How could this be achieved?

This submission sets out in detail elsewhere examples of governance practices at Deakin University which satisfy the spirit of the NGPs and provides specific examples of how the NGPs could be improved.

3.2 The role and composition of the governing body

3.2.1 Are the existing Protocols adequate for defining the role, responsibilities and activities of governing bodies and the duties and obligations of individual members?

The existing NGPs would appear to adequately define the role, responsibilities and activities of university governing bodies and the duties and obligations of individual members. Arising from the NGPs, these requirements are now, appropriately, incorporated in university Acts. However, while it is necessary for university governing bodies to meet these obligations as minimum requirements, there is also a need for individual governing bodies to define more specifically, in greater detail and in a way that is informed by the goals and experiences of their own institution, their functions, obligations, rules of operation and the duties and obligations of governing body members. The governance framework established by the Council of Deakin University (referred to in section 1 above) achieves this objective and is reviewed on a regular basis. Documents comprising the governance framework are set out in a Council Manual, a copy of which is provided to each member of Council. Key documents are also available online.14

3.2.2 Is the maximum size of governing bodies appropriate? What would be an ideal size?

Protocol 5 requires that the size of any governing body must not exceed 22 members. Since 1998 the Deakin Act has provided for a University Council of 21 members. Although this is considerably larger than the average corporate sector board, the composition of the Council, comprising a majority of external appointed members, certain ex officio members and elected students and staff, has served Deakin University well.


The optimum size for a governing body has been a matter of substantial conjecture in recent times with suggestions by Minister Bishop in her 2006 speech to the National Conference on University Governance that a governing body of 14 members was her preferred limit. However, Geoffrey Kiel suggests that “there is little evidence that reducing council sizes from a maximum of twenty-two to a still large number of fifteen, will bring about by itself any substantial change in behaviours”\textsuperscript{15}. Although there is considerable literature exploring the impact of the size of corporate boards on their relative effectiveness, there is nothing to suggest that a body of 15 members would be any more efficient or effective than a body of 21 members. Gavin Moodie suggests that “…there is no association between a university’s performance and the size of its governing body. The average size of the governing bodies of the world’s top 100 universities is 30 members”\textsuperscript{16}. There is also a significant risk that, as the NGPs are reviewed, important debates about the role and effectiveness of university governance will be overshadowed by argument about governing body size. It is not how big councils are that matters, but what they do.

One outcome of the current 21-member size of the Deakin University Council is that some of the detailed work associated with certain aspects of Council’s functions is undertaken within the various standing committees of Council. In doing so, the committees provide Council with considered and informed advice and/or recommendations on specific matters. The committees each comprise members with particular expertise on matters relevant to their terms of reference and the system of standing committees enables Council to attain a level of detail on matters that would be difficult for Council to do on its own. In considering advice from its committees, Council is able to operate at a level ‘once removed’ and thereby exercises a more objective judgment about the particular advice or recommendation than would otherwise have been possible. Thus, the committee system is currently an integral part of Deakin University’s governance arrangements.

Reducing the size of the Deakin Council would lessen the ability of the Council to operate an effective committee system. University governing body committee systems have no direct parallel in the corporate sector as, for example, the requirement to oversee the maintenance and monitoring of academic standards applies only to universities. It is therefore important that the corporate model of governance is not simply applied to universities without due consideration of the potential impacts of such a model, both positive and negative. And we must be careful not to lose the benefits of the existing structures.

Thus, Deakin favors a retention of the current size of its governing body.

3.2.3 is the maximum term of appointment for board members appropriate? What would be a reasonable maximum term?

Deakin University agrees that there should be regular turnover of Council members and that a maximum term of 12 years should generally be appropriate. However, the particular circumstances of rural and regional universities need also to be taken into account when considering this matter.

3.2.4 Is there a need for the Protocols to provide additional requirements or guidance on the skill mix required for an effective governing body?

NGP 5 requires that at least two (external) members of a university council must have financial expertise and financial management experience and at least one (external) member must have commercial expertise. These are modest requirements that are easily met and are appropriate in the increasingly commercial world in which universities operate. However, the skill requirements for a university council as a whole are considerably more complex and are

\textsuperscript{15} In ‘Managing Relationships on University Councils’, a paper presented at the University Governance: Managing Relationships Conference March 2007, Melbourne.

generally dealt with in detailed procedures for the appointment of council members established by each institution\textsuperscript{17}.

Although additional requirements on the skill mix required for an effective governing body could, in theory, be incorporated within a revised set of NGPs, it is appropriate that university councils determine the most desirable mix of skills and experience for their individual circumstances. For example, with two campuses in Geelong and one in Warrnambool, the Council of Deakin University believes it should have a minimum of one member from Warrnambool and several members from Geelong. Such considerations would be irrelevant to a metropolitan-based university.

3.2.5 Should representatives of staff and students be included in consultative rather than governing bodies?
Staff and student members of university governing bodies can play an important role in bringing to bear upon their responsibilities perspectives and experiences that are not generally open to external members of those governing bodies.

Deakin University does not accept that staff and student members of its Council have an inherent or unmanageable conflict of interest; nor does it believe that these members, by reason of being staff and students, are unable to act in the overall interests of the University at all material times.

With respect to the question of the extent to which staff and student members of university councils have a conflict of interest, the ASX Corporate Governance Council ‘Principles of Good Corporate Governance and Best Practice Recommendations’, describes a conflict of interest as “a situation where the interests of a private individual interfere or appears to interfere with the interests of the company as a whole.”\textsuperscript{18} The Deakin University Council Conflicts of Interest procedure provides that:

A conflict of interest may arise where at any time a Council member (or someone close to them) has, is entitled to obtain, or is contemplating or proposing obtaining, a significant shareholding, or holds an influential position in an organisation with which the University may deal.

Thus, student and staff members of university councils do not have an inherent conflict of interest simply by virtue of their election to the Council. A matter which might have an impact upon the group qualifying an individual for election or appointment to membership of the Council and which is not otherwise special or personal to that member of Council is not a conflict of interest (an example might include students voting on assessment policy).

3.2.6 Is the role of a secretary important to a governing body? Should the role be separated from that of the senior university administration?
3.2.7 Should the Protocols recognise the role, responsibility and powers of a Secretary? What should they be?
The role of secretary is central to the effective functioning of a university council. Although the secretary should be appointed by the council, it is not necessary (or practical) for that role to be separated from a senior administrative or managerial role within the institution provided that the secretary exercises care in maintaining a separation of the two functions.\textsuperscript{19} *Irrespective of

\textsuperscript{17} See, for example, the Deakin University Appointment of Council members procedure at http://theguide.deakin.edu.au/TheDeakinGuide.nsf/97cd7de212318aaecca256e2f007e8b07c420e87aecc952bb2ca2 5707e0013d8a8?OpenDocument
\textsuperscript{18} ASX Corporate Governance Council ‘Principles of Good Corporate Governance and Best Practice Recommendations’, 2003, p 26.
any other duties that the secretary may have within the institution, when dealing with governing body business the secretary will act on the instructions of the governing body itself.”\footnote{Ibid, p 21.} It may therefore be helpful for the NGPs to recognise the role, responsibility and powers of a council secretary. Useful guidance on this matter can be obtained from the CUC Guide, which sets out a generic description of the role, together with guidance on maintaining an appropriate separation of function.

3.2.8 Should the Protocols cover relationships between the governing body and key management roles in the institution?

3.2.9 Should the Protocols contain explicit guidance on the devolution of management responsibilities to the Vice-Chancellor/CEO?

It is essential that the roles and responsibilities of the university council and of senior university management be clearly documented, understood by all parties and regularly reviewed to ensure they are appropriate.

Senior management and, in particular, a university’s vice-chancellor, is appointed by and accountable to the council. The powers and duties of a vice-chancellor would generally be established by a combination of means, including conferral of powers by way of the enabling legislation establishing the institution, and through the university’s own legislation. In addition, the council may have delegated further authority to the vice-chancellor via one or more resolutions. The council may also have conferred certain powers upon, or delegated responsibility to, various senior university officers.

A university council is not a management committee and does not make or implement management decisions — to do so would detract from its governance role. However, a council is entitled to receive timely and full reports from the vice-chancellor (and other senior officers as appropriate) on the discharge of his or her responsibilities; and appropriate recommendations from the vice-chancellor in respect of those matters which are within the scope of the powers of the Council.

All delegations made by a university council should be documented and reviewed by that body annually. The powers, duties and responsibilities of the vice-chancellor and relevant senior university officers should also be reviewed for currency and appropriateness by the council (or a standing committee of the council) every two years or so. Moreover, the council should establish a schedule of matters reserved for its own decision, that is, a list of decisions that only the council itself may make.

The combination of the above provisions, each having been in place at Deakin University for some years, ensures that all parties understand the scope and limits of their responsibilities and powers. However, although such arrangements facilitate coordination and cooperation between relevant parties, they do not (and cannot) guarantee an appropriate relationship between the parties. The most important contributor to an effectively functioning university council is, arguably, the rapport between and among members of that council and between the council and the vice-chancellor. While the NGPs could potentially provide guidance on the manner in which devolution of management responsibilities to the vice-chancellor might occur, they could not reasonably aspire to influence the nature and the effectiveness of the relationship between the vice-chancellor and the council itself. In view of the extensive arrangements already in place at Deakin University regarding these matters, this University would not benefit from an expansion of the NGPs with regard to the devolution of management responsibilities to the Vice-Chancellor.
3.3 Leadership

3.3.1 Do the Protocols need to be improved to encourage a stronger role for governing bodies in guiding institutions in a more diverse higher education sector? If so, how could this be achieved?

NGP 2 requires that each university council adopt a statement of its primary responsibilities, which must include: “approving the mission and strategic direction of the higher education provider”. However, most university councils would have adopted a more detailed statement which encompasses, but builds on, the requirements set out in NGP 2. For example, the Council of Deakin University has established 9 specific functions, one of which is headed ‘Strategic Direction’ as follows:

The strategic direction
- shaping, approving and reviewing the University’s mission and strategic and operational plans
- monitoring University progress generally against performance indicators and, more specifically, against targets
- determining the future development of the University’s campuses.

The Vice-Chancellor’s introduction to Deakin University’s Strategic Plan notes that the Australian higher education sector is currently undergoing significant change. It recognises that change brings with it uncertainties and insecurities, but also exciting opportunities and challenges. It asserts that the universities that will be best placed to meet the changing circumstances confronting the sector will be those that have a clear vision that addresses the university’s response to these developments and which distinguishes them from other Australian universities.

Neither NGP 2 or the ‘Strategic Direction’ function of the Deakin University Council currently have anything to say about diversity in the sector. However, in fulfilling its obligation with regard to “shaping” the University’s mission, it is clear to the Deakin Council that this means establishing a position of unique strength. In an environment of increasing competition, it is obvious that those universities which establish and build on a unique position in the market place will do best. The need for such diversity is already well recognised within the sector and governing bodies do not need assistance in this regard from the NGPs.

3.4 Accountability

3.4.1 Do the existing Protocols provide sufficient guidelines for the accountability of the institution through oversight of performance by the governing body?

3.4.2 Do the Protocols need to be enhanced to provide improved accountability?

Pursuant to the Deakin Act, the Deakin Council is the governing body of the University and is responsible for the “entire direction and superintendence of the University”. As such, the Council is publicly accountable for the University’s actions.

The NGPs primarily promote accountability through: the responsibilities of the governing body set out in NGP 2; the requirements relating to the establishment and oversight of controlled entities in NGP 10; and the risk assessment of associated entities in NGP 11.
The Council of Deakin University has established a much more comprehensive set of accountability requirements via a statement of its Functions, than is currently provided for in the NGPs.

Although the NGPs could potentially be enhanced to provide for improved accountability of higher education institutions, the Council of Deakin University would not wish to replace its set of Council Functions with a more generic set of responsibilities if that generic set did not capture all matters currently addressed in the Deakin document.

3.4.3 Do the existing Protocols provide sufficient guidelines for the fiduciary responsibilities of members of the governing body?

3.4.4 Should the Protocols include any additional provisions relating to the accountability of members?

Pursuant to the common law and section 19 of the Deakin Act, the Council of Deakin University has adopted a very detailed statement of Council Members Duties and Responsibilities which is consistent with, but far exceeds, the minimum duties set out in the NGPs. For example, amongst other matters, the Deakin statement also requires members to exercise appropriate skill, to act ethically and to maintain the confidentiality of information obtained in the course of one’s duties as a Council member — concepts which are not mentioned in the NGPs.

In requiring members to exercise ‘appropriate skill and care’ it is noted that the “business judgment rule” set out in the Corporations Act provides a ‘safe harbour’ for directors who in reaching a judgment:

- make that judgment in good faith and for a proper purpose
- have no material personal interest in the subject matter of the judgment
- have informed themselves to the extent reasonably necessary to make the judgment, and
- rationally believe the judgment to be in the best interests of the corporation.

However, the protections afforded to company directors by the “business judgment rule” are not currently available to members of Victorian university councils (this may not be the case in all Australian states) as there is no equivalent provision in Victorian university enabling Acts. The Council of Deakin University would welcome a requirement, arising from the review of the NGPs, that provisions equivalent to the “business judgment rule” be incorporated within all university enabling Acts.

3.4.5 Would the Protocols be improved with the provision of additional guidelines and requirements on the role of the governing body in risk management?

The NGPs currently make no mention of the role of the university council in risk management apart from the requirement in NGP 11 that “A higher education provider must assess the risk arising from its part ownership of any entity … partnership and joint venture”.

The Council of Deakin University has established as one of its documented primary functions the responsibility of overseeing University risk management and overseeing the protection and enhancement of the University’s reputation. The means of fulfilling Council’s obligations arising from that function are set out in Council’s Risk Management policy (and the associated procedures). Council requires a report on University risk management from its Audit and Risk

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Committee at each meeting and, pursuant to the Council Schedule of Business, receives at least annually a report on an assessment by the Audit and Risk Committee of the adequacy and effectiveness of the University’s risk management program. A report on University risk management must also be made to the Victorian Parliament in the University’s Annual Report.

In view of the provisions already in place at Deakin, the addition of requirements within the NGPs on the role of the governing body in risk management would not enhance governance at this University.

3.4.6 Would accountability be enhanced by requiring the audit committee to be a responsibility of the governing body?
3.4.7 Should an audit committee be required to have an independent chair?

The existence of an audit committee or equivalent as a standing committee of a university council is one of the cornerstones of effective university governance. The council is also responsible for ensuring that that committee is able to, and does, operate effectively. In accordance with the ASX Corporate Governance Council ‘Principles of Good Corporate Governance and Best Practice Recommendations’, the audit committee should have access to the internal audit functions of the institution without the presence of management. It flows from this that the chair (and members) of the audit committee should be independent of university management. It would be appropriate for the revised NGPs to specify these requirements.

3.4.8 Should the Protocols be expanded to cover the relationship between the governing body and sub-committees within the institution?

The importance of the council committee system and its relationship to the effective functioning of the council as a whole is described in section 3.2 of this submission (above). In establishing standing committees of a university council, it is necessary that the council also establishes a detailed set of terms of reference (so that the responsibilities of each committee and the limits of its authority is clear), a specified composition for the membership of each committee, and rules governing the committees' operations (including requirements for periodic review by those committees of their own performance against their terms of reference and other governance requirements). It is also desirable for each committee to establish an annual schedule of business to enable the effective discharge of its responsibilities under its terms of reference, and for each committee to make an annual report to the university council demonstrating that its obligations under its schedule of business have been met (or not, as the case may be), with recommendations for any remedial action.

In the case of Deakin University, each of these requirements (including that relating to a schedule of business) has been in place for some years; this is operating effectively within a culture of continuous quality improvement.

Deakin University submits that the inclusion of provisions relating to the relationships between the university council and its standing or subcommittees is not necessary within the NGPs. The council committee system forms an integral part of each university's governance structure and decision making processes. It provides a means of ensuring that requirements for due process have been established and are followed. University councils should be experienced (and expert) in the establishment and oversight of standing committees of the governing body. Additional guidance in respect of these matters would not be a useful addition to the NGPs.

\[23\] ASX Corporate Governance Council ‘Principles of Good Corporate Governance and Best Practice Recommendations’, 2003, p 44.
With respect to other university committees that do not report directly to the governing body, it is noted that these are committees of management and, in the interests of maintaining an appropriate separation between governance and management, it would not be appropriate to include provisions regarding them within the NGPs.

3.4.9 Would the inclusion of additional provisions and requirements improve overall accountability?

Four additional requirements were mooted on page 12 of the Review of National Governance Protocols Issues Paper as being potential enhancements to the NGPs with respect to accountability. The first of these was the assigning of responsibility to the governing body to accept audited financial statements and the institution’s annual report. Such requirements are already in place within the state of Victoria and have been practised by the Council of Deakin University for some years (as is reflected in the annual Council Schedule of Business). As such, Deakin would have no objection to the inclusion of such provisions within the NGPs and notes that the practice is consistent with that in place within the corporate sector.

The second proposed addition to the NGPs was the inclusion of provisions for the protection of “whistleblowers”. It is noted that Victorian universities are currently subject to:

- the Whistleblowers Protection Act 2001 (Vic.)
- the Whistleblowers Protection Regulations 2001 (Vic.)
- the State Ombudsman’s Guidelines made pursuant to the Whistleblowers Protection Act 2001 (Vic.).

Pursuant to these requirements, Deakin University has established a detailed policy and procedure regarding the making and handling of whistleblower disclosures; these documents were recently revised and re-promulgated following changes to the Victorian Ombudsman’s Guidelines. Thus, comprehensive protection for whistleblowers and those who are the subject of disclosure is already provided under this legislative framework. The inclusion of provisions providing for the protection of whistleblowers from undue pressure of harassment could therefore not reasonably be expected to improve the overall accountability of any Victorian university governing body.

The third proposed addition to the NGPs was described as clarification with respect to delegation by the governing body of its key responsibilities. It is understood that the intention of this addition would be to limit the capacity of governing bodies to delegate the primary responsibilities as defined by NGP 2. The Council of Deakin University would have no objection to the addition of such provisions within the NGPs, which would potentially improve the accountability of governing bodies. The Deakin Council has not delegated any of the responsibilities listed in Protocol 2.

The fourth proposed addition to the NGPs was a requirement for mechanisms for reviewing and reporting by the governing body on its own performance, including periodic external evaluation. It is noted that NGP 4 currently requires the governing body to assess its own performance at regular intervals. The supporting evidence required by the Department of Education, Science and Training for assessment of adherence to the National Governance Protocols, includes, with respect to the performance review requirements of Protocol 4, “Documentary evidence of such requirements (eg. by-laws, rules, guidelines); and assessments (eg. minutes) indicating that this is a regular (not one-off) process”. Thus, the implementation of NGP 4 already requires mechanisms for regular review by the governing body of its own performance and, it may be inferred, for the reporting of the outcomes arising from those reviews. It is therefore assumed that the intent of this proposed addition is to introduce a requirement for periodic external evaluation of governing body performance. In response to this proposal, it could be argued that as the mandate of the Australian Universities Quality Agency (AUQA) includes an examination of the extent and effectiveness of governance
arrangements at each institution, such a requirement is already met. However, it is noted that a number of universities have also engaged external consultants to conduct reviews of the effectiveness of their governing bodies and the success (or otherwise) of such ventures has been reported at meetings of Australian council secretaries. It would appear that, in general, those universities have found the exercise unreasonably expensive and that little new information was gained as recommendations for improvement tended to focus on those improvement actions already identified (and, in some instances, already partially implemented) by the governing body.

The Council of Deakin University would have no specific objection to the addition of a requirement for periodic external evaluation of governing body performance within the NGPs and notes that it would be consistent with practices already in place within this University for periodic evaluation of each Faculty and Division. However, it is requested that consideration be given to the importance of limiting the expense of the review process and, at the same time, maximising the potential for positive and useful outcomes.

3.4.10 Would the inclusion of additional provisions and requirements provide greater guidance on the role and operation of the governing body?

Page 13 of the Issues Paper suggests there may be further scope for specifying the operations of governing bodies and individual members. Seven suggested additions are listed and these will be discussed in turn below.

1 Approving the selection and remuneration of key senior management positions
   It is appropriate that selection of senior management staff reporting directly to the Vice-Chancellor be approved by the governing body, and these arrangements are already in place at Deakin University. However, Council's Senior Salaries Committee, which reviews the remuneration packages of all managers (senior managers and managers reporting directly to them) on an annual basis, has recently determined that it does not wish to approve the remuneration packages for such staff upon appointment as it would be unrealistic and unnecessarily cumbersome to seek approval in advance for the salaries of such a large number of staff members. The Committee further noted that the salaries of many of these members of staff are settled as part of the recruitment process and agreed that it was satisfied that the Vice-Chancellor was responsible for the negotiation of employment packages for prospective senior staff prior to the commencement of those staff at the University. Council's Senior Salaries Committee does, however, review the remuneration of these senior staff on an annual basis.

   In view of its detailed consideration of this matter, the Council of Deakin University does not consider that the introduction of requirements for the approval and remuneration of key senior management positions would provide useful guidance.

2 Reviewing the performance of senior management in achieving strategic plans, targets and measurable outcomes; and reviewing performance measures set or produced by DEST
   Responsibility for reviewing the performance of senior university management rests with the vice-chancellors to whom those staff report. In turn, vice-chancellors are accountable to their governing bodies for the achievement of strategic plans, targets and measurable outcomes. Pursuant to NGP 2, and in accordance with appropriate governance practice, university governing bodies are already responsible for appointing the vice-chancellor, for establishing provisions for the effective review of his or her performance, and for monitoring that performance. Indeed, these are arguably the most important tasks of a governing body. The NGPs would not be improved by the addition of a requirement that the governing body review the
performance of senior management as this would risk blurring the distinction between governance and management.

3 Approving all significant investment and business decisions
The Council of Deakin University already has in place clearly documented requirements that it approves individual major capital expenditure projects and the establishment and disestablishment of major University commercial ventures. The Council has specified that it must also approve the proposed purchase and sale of University land and buildings, approve proposals for borrowing funds and approve finance leases of a substantial nature. The Council must also establish the policy governing the investment of cash reserves, that policy being implemented by a committee of the Council with substantial external membership. In view of these arrangements, the addition of provisions such as those suggested to the NGPs would be unlikely to provide additional guidance to the Deakin Council.

4 The approval of a strategic asset management plan
Although Deakin has a capital development plan, approved by the University Council as part of the Business Plan, and has a comprehensive process for the planning, funding and undertaking of capital maintenance, it does not currently have a strategic asset management plan. Such a plan is, however, currently being developed. The addition of such a requirement to the NGPs could provide useful guidance to the Council in overseeing this important aspect of the University's ongoing development.

5 The establishment and operation of effective audit processes through an audit committee
Deakin’s Audit and Risk Committee is a standing committee of the Council comprising only external members appointed by the Council. Pursuant to its documented terms of reference established by Council,25 the Audit and Risk Committee is responsible for: approving the annual internal audit plan; considering the adequacy of the University’s internal audit coverage; considering internal audit reports and compliance with recommendations made in those reports; and for liaising with the Vice-Chancellor regarding the performance of the internal audit function and the adequacy of resources allocated to it. The Committee is required to report to each meeting of Council on its consideration of these, and other, matters.

In view of the detailed provisions already in place at Deakin University regarding the establishment of the Audit and Risk Committee and its review of audit processes, the Council would be unlikely to be assisted by the addition of provisions relating to such matters within the NGPs.

6 The adequacy and transparency of arrangements and processes for reporting of financial and non-financial information
Pursuant to its established Council Functions, annual Schedule of Council Business (which in turn forms an integral part of the University’s Annual Planning Cycle) and Matters Reserved for Council Decision, the adequacy and transparency of arrangements and processes for reporting financial and non-financial information to the Council of Deakin University is assured. For example, annual reporting to Council occurs in respect of the University’s performance against its longer term Strategic Plan objectives and targets, against annual Operational Plan targets and against a detailed set of performance indicators established by the Council. As part of the development of its next Strategic Plan, the Council will shortly review the University’s

Annual Planning Cycle, including the adequacy and effectiveness of the information it receives. There is also substantial guidance in respect of these matters available from external sources such as the UK Report on the Monitoring of Institutional Performance and Use of Key Performance Indicators and the excellent work by Professor Richard Chait and others. Additional provisions within the NGPs with regard to reports of financial and non-financial information would not be useful to this University.

7 Reporting the operations of the governing body in a form consistent with the Financial Statement Guidelines for Australian Higher Education Providers

The Deakin University Annual Report, as approved by the Council, includes a comprehensive report on the operations of the governing body which meets the requirements of the Financial Statement Guidelines for Australian Higher Education Providers and which also meets the requirements of the Victorian government in respect of such matters. The inclusion of a provision setting out such a requirement within the NGPs would therefore not provide additional guidance to the Council of Deakin University, but would also not be inconsistent with the existing responsibilities of the Council in respect of the Annual Report.

3.4.11 Are there any other provisions that the Protocols should contain in relation to the governing body and its individual members in matters concerning accountability?

Other than those matters canvassed in section 3.4 of this submission, Deakin University does not consider that the Protocols should be expanded to include further provisions regarding the accountability of its Council and of individual members.

3.5 Continuous improvement

3.5.1 Do the existing Protocols encourage continuous improvement of governance arrangements?

3.5.2 Should the Protocols include further guidance for governing bodies on the regular review of their own performance, such as reporting the outcome?

3.5.3 Would the inclusion of additional provisions and requirements improve the Protocols?

The need for continuous improvement of university governance practices is implied, but not explicitly stated, within the existing NGPs. As mentioned throughout this submission, Deakin University has in place specific and documented requirements to review and continuously improve its governance arrangements; it could reasonably be expected that equivalent provisions would be in place at most other universities. In undertaking this task, the Deakin Council is greatly assisted by its Chancellor’s Advisory Committee standing committee, whose membership includes the Chancellor as Chair and the three Deputy Chancellors. The terms of reference of the Chancellor’s Advisory Committee include the establishment and regular review of a significant range of governance processes and practices, including those relating to Council’s own operations. The Committee also advises Council on the process for the biennial review by Council of its own performance, recommends to Council the approval of a comprehensive action plan arising from the results of each review, and oversees the implementation of that action plan.


The addition of provisions aimed at the continuous improvement of university governance arrangements would not enhance governance at Deakin in view of the extensive arrangements already in place. Moreover, the inclusion within the NGPs of further guidance for university governing bodies on the regular review of their own performance, such as reporting on the outcome, would not be useful. Further detail on the arrangements already in place for the regular review by the Council of Deakin University of its own performance and for reporting to Council on the outcome of that review is provided in section 3.4.9 above.

3.6 Improving the form and clarity of the National Governance Protocols

*Are there useful clarifications that could be made to any of the existing Protocols or the overall presentation of the Protocols?*

In addition to the improvements suggested throughout this submission, Deakin University would welcome a proposal to improve the overall structure and logical order of the NGPs and to provide greater certainty over the application of specific requirements; and the level of detail and evidence required in reporting against the NGPs.

3.7 Other issues

*Are there any other matters within the terms of reference or relating to the Protocols generally that have not already been mentioned on which you would like to comment?*

Deakin University wishes to comment on two additional matters relating to the review of the NGPs: the remuneration of university council members and a broader role for university Chancellors. These are discussed in turn below.

Remuneration of Council members

On Tuesday 10 October 2006 Minister Bishop gave the opening address to the National Conference on University Governance, held in Canberra. The Minister made general comments about the Australian Government’s action to date in respect of university governance and the response of Australian universities to the intention to create a “culture of good governance”. The Minister also foreshadowed changes to the National Governance Protocols to reflect those views. Minister Bishop suggested that she is in favour of the remuneration of university Council members.

As a result of amendments introduced in 2003 by the then Victorian Minister for Education and Training, the Hon. Lynne Kosky MP, the Acts of all Victorian universities currently provide for the remuneration of certain council members at the discretion of the council. In that year, the Minister set the remuneration levels for universities to use should they elect to pay members of their councils.

In April 2003, following detailed consideration of the issue and a confidential survey of all Council members at that time, the Council of Deakin University resolved that “the University does not adopt the Government proposal for the remuneration of Council members at this time”. In making this decision, Council had acted in accordance with its view that:

- Council members make a significant honorary contribution to higher education for its own sake and this should be preserved. It belittles the outstanding contribution of such members to suggest that they would “work harder” if they were remunerated.
- The duties of Council members are clearly documented and are established by law and by Council resolution. Members do not have a greater duty by virtue of being remunerated.

29 See sections 8(2) and 9(3) of the *Deakin University Act 1974* (Vic.).
Governance standards are steadily increasing and the Council of Deakin University has responded and will continue to respond to this changing environment regardless of whether members are paid.

Remuneration of Council members would not make it easier to recruit high caliber Council members and, conversely, not remunerating members does not make the appointment of appropriately skilled and experienced persons more difficult.

In 2007 Council’s Chancellor’s Advisory Committee reviewed its position on the remuneration of Council members and confirmed that the 2003 Council resolution on the matter remains appropriate at this time.

The Council of Deakin University respects the right of other university councils to decide to remunerate their members. In this spirit it is requested that any move to incorporate provisions for the remuneration of university council members within the revised National Governance Protocols preserve the right of individual councils to determine this matter with regard to their own members.

A broader role for Chancellors
In her speech to the National Conference on University Governance, Minister Bishop also suggested that university chancellors should serve as leaders rather than figureheads and that they have a vital role to play in enhancing the philanthropic and alumni efforts of their universities. Deakin University supports this view and notes that, for example, its Chancellor, Mr David M Morgan, hosts a group known as The Chancellor’s Circle, comprising highly influential people aimed at advancing fundraising and advocacy for the University.

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