

The University of New England

GUIDELINES FOR COMMERCIAL ACTIVITIES

As required by Section 21B of the *University of New England Act 1993*

INTRODUCTION

The University of New England's core objects are the promotion of:

- scholarship;
- research;
- free inquiry;
- the interaction of research and teaching; and
- academic excellence.

In addition to these core objects (provided under section 6(1) of the *University of New England Act 1993*), the University has various functions provided under sections 6(2) and (3) of the Act. In particular, section 6(3) provides that the University may exercise *commercial functions*. These *commercial functions* comprise the commercial exploitation or development, for the University's benefit, of any facility, resource or property of the University or in which the University has a right or interest (including, for example, study, research, knowledge and intellectual property and the practical application of study, research, knowledge and intellectual property) whether alone or with others.

In an effort to regulate these *commercial functions*, Division 3 of the Act requires the Council to adopt Guidelines for Commercial Activities (section 21B), to maintain a Register of Commercial Activities (section 21C), to report to the Minister on commercial activities (section 21D), and permits the Minister to refer a commercial activity to the Auditor-General for investigation or to the Ombudsman for investigation as a complaint (section 21E). **Commercial activities** are defined in section 21A to mean:

- (a) any activity engaged in or by or on behalf of the University in the exercise of *commercial functions* of the University, and
- (b) any activity comprising the promotion of, establishment of or participation in any partnership, trust, company or other incorporated body, or joint venture, by or on behalf of the University, that is for the time being declared by the Guidelines to be a University commercial activity.
- (c) In the assessment of risk the following matters should be taken into account:

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| (i) Financial Exposures | (ii) Currency Exposures |
| (iii) Reputation | (iv) Deliverability |
| (v) Corruption | (vi) Legislative Requirements |
| (vii) Fraud | (viii) Competition |
| (ix) Liability exposure | |

These Guidelines provide a set of principles and processes for the development and conduct of **commercial activities, which** aim to achieve optimal benefits for the University while minimising the risks to it. Due to the significant use of public resources any proposed **commercial activity** must be established and undertaken prudently within clear and systematic arrangements. Essential elements include requirements for undertaking feasibility and due diligence assessments, identifying appropriate governance and administrative arrangements, undertaking risk assessment and risk management measures, and monitoring and reporting on **commercial activities**.

The Guidelines have a key focus on the evaluation of proposed **commercial activities** and procedures for their approval and monitoring. However, all operations of established **commercial activities** should also be conducted under the relevant principles of these Guidelines and related University manuals and procedures.

Any action taken in the context of these guidelines should also be taken in the context of other relevant University Policies. Including:

- Fraud and Corruption Prevention Policy
- Entrepreneurial Guidelines
- Risk Management Strategy
- Code of Conduct

1 Preliminary Evaluation of a Proposal

- (a) The Council delegates to the Vice-Chancellor (VC) or nominee, the responsibility to establish and maintain procedures for the preliminary evaluation of whether a Proposal involves a commercial activity, as defined in these Guidelines.
- (b) The Council delegates to the VC, or nominee, the role of evaluating each Proposal submitted to the University to determine whether it:
 - (i) involves no Benefit or Risk and does not have to have to be assessed under the procedures for the evaluation of Proposals detailed in paragraph 2 of these Guidelines; or
 - (ii) involves a Benefit or Risk and must be assessed under the procedures for the evaluation of Proposals detailed in paragraph 2 of these Guidelines.
- (c) Without limiting the Council's right to determine other criteria, any commercial activity which involves the exposure (including funding) of the University, following evaluation by management, of;

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- (i) up to **\$1,000,000** may be authorised by the Vice-Chancellor or nominee, with the proviso that where an approved activity has an exposure in excess of \$500,000 the Finance Committee is to be advised;
- (ii) more than **\$1,000,000**, may only be authorised by the Council.

2 Evaluation of a Proposal

The Council must establish and maintain procedures for the evaluation of any Proposal identified under paragraph 1(b)(ii) as requiring assessment under these Guidelines. The procedures for evaluation must take into account the following principles and methods of analysis:

- (a) Whether, on balance, the Proposal benefits the University, taking into account the Benefits, Risks, opportunity costs, effect on the University's activities and non-financial benefits to the University.
- (b) Appropriate methods to perform financial analysis, identification of Benefits and Risks, analysis of projected cash flow models and expected rates of return to the University (where applicable), to assess compliance with competitive neutrality principles in NSW and recommend an appropriate level of funding from the University required to implement the Proposal or carry out the Proposal.
- (c) Appropriate analysis of Benefits and Risks (including liability exposure) and recommended risk management procedures for the Proposal.
- (d) The analysis must identify the source of the university funding required to undertake or initiate the proposed activity.
- (e) Performance of financial accounting and legal due diligence of the Proposal and relevant assets required for the Proposal, including due diligence of each Proposal participant.
- (f) Considerations arising from whether the University is required to establish a legal structure for the undertaking of the Proposal, whether the Proposal is to be performed solely by the University or with other parties.
- (g) Assessment of whether the Proposal will impact on the University's intellectual property (IP) ownership and value, and to recommend a strategy for protecting the University's interests in the IP.
- (h) Assessment of what is the prudent insurance coverage, and limitations, if any, required for the Proposal, accompanied by recommendations as to the appropriate kinds and levels of insurance needed taking into account both insurable and uninsurable risk. The threshold for uninsurable risk should be \$100,000.

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- (i) The delegated person, committee or entity must report to the Council or its delegate on each of the matters in sub-paragraphs (a) to (g) of this paragraph 2 inclusive.
- (j) The delegated person, committee or entity must certify that the Proposal satisfies the principles and concepts raised in sub-paragraphs (a) to (g) of this paragraph 2 inclusive.

3 Competitive Neutrality Policy

The assessment of commercial activities should include consideration of the application of the NSW Government Policy Statement on the Application of Competitive Neutrality.

This includes pricing commercial activities in a competitively neutral way and including the full cost of service provision unless that provision is provided on an ad hoc basis eg using surplus capacity.

When assessing a proposed activity the University's pricing policy and guidelines should be taken into account.

4 Conditional Approval

Under the procedures, a Proposal for which a certificate is given under paragraph 2(i) may be referred to the Delegate having responsibility for the Proposal, or to the Council where the Proposal involves exposure exceeding **\$1,000,000**, for approval conditional upon compliance with the Governance and Documentation requirements in paragraph 4 and final approval under paragraph 5.

5 Governance and Documentation

The Council must establish and maintain procedures for any Proposal for which conditional approval has been given under paragraph 3 for any one or more of the following purposes:

- (a) To recommend the corporate governance provisions, (including appointment of directors, and managers, control mechanisms in the Constitution or other constituent documents of the entity, and in any agreement between shareholders, partners or participants) for the Proposal.
- (b) To select the appropriate structure for the Proposal from legal, tax and accounting perspectives.
- (c) To prepare or supervise the preparation of the transaction documents (including warranties, indemnities and limitations of liability) appropriate for the Proposal.
- (d) To set up accounting and auditing procedures and requirements for regular reporting to the Council or its delegate which are appropriate for the Proposal.

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- (e) To identify and recommend appropriate exit arrangements including termination and asset distribution and liability payment obligations which protect the interests of the University.
- (f) To obtain insurance in accordance with any recommendations made under paragraph 2.
- (g) To procure any University funding approved under paragraph 2.
- (h) To obtain independent legal and/or accounting advice on the structure, tax and accounting consequences and on the documentation prepared under this paragraph 4 of the investment by the University if the Council or its Delegate determines that the liability Risks are such that legal and/or accounting advice should be obtained.
- (i) To certify that if the governance provisions and documentation of the agreement for the Proposal satisfy the requirements under this paragraph 4.

6 Final Approval

- (a) Subject to sub-paragraph (b) below, when the evaluation of a Proposal has been completed and certified in accordance with paragraph 2 and the Governance and Documentation procedures have been completed and certified in accordance with paragraph 4, the Proposal may be submitted to the appropriate Delegate under paragraph 5 for final approval.
- (b) Any persons approving a proposed activity under delegated authority must not also be the sponsor of the activity.
- (c) Any Proposal or commercial activity which involves the exposure (including funding) by the University in excess of **\$1,000,000** requires the approval by resolution of the Council.
- (d) The Council or its Delegate shall review the certificates and recommendations made under paragraph 2 and the documentation prepared in accordance with paragraph 4, and any legal and accounting advice obtained in relation to the Proposal, before giving final approval for the Proposal to be implemented.

7 Conflict of Interest

- (a) The Council must establish procedures to maintain a register of interests in accordance with procedures determined by the Council.
- (b) Under such procedures, Council members, senior officials, members of any committee, and sponsors and managers of commercial activities declare from the outset any interest, which has the potential to conflict with the commercial interests of the University.

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- (c) Under such procedures, the register of interests must be open to inspection by any member of the Council, the Auditor General of New South Wales and any representative of the Minister or the Treasurer.
- (d) Under such procedures, any member of the Council or of a relevant committee who has an interest in any company, institution or other entity which is, or is proposed to be, involved in any commercial activity of the University is required to:
 - (i) not vote in respect of the commercial activity or the Proposal;
 - (ii) not participate in any discussion by the governing body or the relevant committee about the commercial activity or the Proposal.

8 Register of Commercial Activities

- (a) The Council must establish and maintain in accordance with Section 21C of the Act a register of commercial activities of the University inclusive of its controlled entities.
- (b) The Council delegates the powers and functions of the registrar of the register to the Chair of the Entrepreneurial Committee (Chair).
- (c) Any commercial activity which was being carried on, or was in the course of being implemented, on 1 March 2002 must have its relevant details entered in the register by 31 December 2002.
- (d) The Council or its Delegate may authorise the Chair to alter any details included in the register of commercial activities if:
 - (i) the Chair considers that the details are inaccurate or incomplete;
 - (ii) there is a change in a Proposal or in a commercial activity which necessitates a change in the details included in the register.
- (e) The Council or its Delegate may determine at its discretion that small low risk activities be grouped together as a specific class and treated as a single activity for the purposes of the register.
- (f) The Register of Commercial Activities is to be presented to the Finance Committee by management on an annual basis or as requested by the Finance Committee, the Audit & Compliance Committee or Council.
- (g) Management are to review the register at least annually and each commercial activity listed on the register is to be fully reviewed at least every three years. Such reviews should identify any significant changes and justify the activity continuing for a further period if that is the outcome.

9 Council Delegations

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- (a) The Council may by resolution delegate any or all of its functions in relation to the commercial activities of the University (except this power of delegate) to a committee of the Council or to any authority or officer of the university or to any other person or body prescribed by the University's by-laws.
- (b) Where delegation occurs the delegation should take into account the requirement of the delegate(s) to have appropriate commercial experience or to have access to the advice of an appropriately qualified person.
- (c) The Council may rely on the advice of the Vice-Chancellor or other authorised delegate in meeting the compliance requirements of these guidelines.
- (d) Notwithstanding sub-paragraph (a), the Council must not delegate the power to give final approval to any Proposal under which the University would have an exposure in excess of **\$1,000,000**.
- (e) A delegation by Council under this paragraph 8 may limit the delegated authority by reference to the type of commercial activity, financial limits or any other criteria determined by the Council.

10 University Manuals

The Council must, not later than 31 December 2002, complete a review of each of the manuals of the University, which contain the procedures, criteria and standards for implementing these Guidelines.

The review will ensure that the manuals comply with the requirements of the Act for commercial activities, and with these Guidelines.

11 Controlled Entities

Boards of Directors of controlled entities are to be advised of the requirement to comply with Section 21 B of the Act – Guidelines for Commercial Activities and are to maintain a register of Commercial Activities in line with Section 21C of the Act. The Boards of Directors of the controlled entities are to be responsible for ensuring that evaluation, risk management and accountability processes are in place and that these are consistent with the requirements of university's Act in relation to commercial activities and with the University's guidelines.

The governing body of the university is responsible for approving, monitoring and overseeing controlled entities. As such the Boards of Directors will be required to submit for review the Entities Guidelines for Commercial Activities and on a quarterly basis its register of Commercial Activities.

11 Interpretation and Definitions

In these Guidelines:

“**Act**” means the *University of New England Act 1993* as amended.

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“Benefit” means:

- (a) potential financial gain;
- (b) potential enhancement or improvement to the reputation of the University;
- (c) potential improvement to the ability to perform the University’s principal functions under section 6 of the Act;
- (d) potential to offset or reduce tax or duty consequences for the University;
- (e) any other type of benefit determined by the Council to be a benefit for the purposes of these Guidelines.

“commercial activity” means:

- (a) any commercial activity as defined in section 21A of the Act or in any Regulations; and
- (b) any activity of the University that is being entered into for the purposes of income generation other than those that:
 - a. are publicly funded core higher education teaching and research, or
 - b. do not carry significant risk to the university.
- (c) any assessment of the significant risk should take into account the full costs of service provision (all resource inputs whether cash or other forms)
 - a. this assessment should not artificially separate an activity into components in order not to reach a threshold figure.

Indicators that should be used in assessing whether an activity is a commercial activity and is subject to the guidelines are:

- (i) the activity involves user-charges for goods and services, and
- (ii) the managers of the activity have a degree of independence in relation to production or supply of the good or service and the price at which it is provided.
- (iii) the risk assessment has indicated that the activity exposes the University to significant risk.

“Council” means the Council of the University as defined in section 8 of the Act.

“Delegate” means a person, committee or entity to which the Council delegates a function in accordance with paragraph 9 of these Guidelines.

“Proposal” means any proposal for the University to participate in a commercial activity.

“Risk” means:

- (f) risk of financial loss or adverse financial consequences for the University;
- (g) risk of incurring a legal liability;

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- (h) risk of loss of or damage to the reputation of the University;
- (i) risk of impairment of the conduct for the University's principal functions under section 6 of the Act;
- (j) risk of failure to comply with the law or probity risk;
- (k) risk of adverse tax or duty consequences of the University;
- (l) any other type of risk determined by the Council to be a risk for the purposes of these Guidelines.