

# Guidelines for Commercial Activities

## Section 1 - Introduction

### Legislative Framework

(1) Guidelines for Commercial activities ('Guidelines') are required by Section 21A of the [University of Newcastle Act 1989 No 68](#) (the Act).

## Section 2 - Purpose

(2) The purpose of the Guidelines is to provide a set of principles for the conduct of commercial activities of the University. The Guidelines ensure commercial activities comply with legislative requirements and require commercial activity owners to:

- a. assess the feasibility of commercial activities in a consistent manner
- b. assess and manage the risks arising from commercial activity
- c. perform adequate due diligence prior to engaging in a commercial activity
- d. ensure adequate governance controls and administrative records are maintained
- e. avoid conflicts of interest.

## Section 3 - Commercial activities

### Definition

(3) University Commercial activities are defined in s21A of the [University of Newcastle Act 1989](#) and comprise those activities associated with "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" (s6(3) The definition includes the commercial exploitation of intangible property and resources including knowledge, research, and intellectual property.

(4) The University of Newcastle may engage in commercial activities in order to provide services and facilities for students and staff, meet the needs of the community through teaching and research or generate resources for the promotion of the object and functions of the University.

(5) Commercial activities include, but are not limited to:

- a. the promotion, establishment or participation in any companies, partnerships, trusts, other incorporated bodies, or joint ventures
- b. retail activity (including the sale of publications)
- c. the leasing or licensing of real estate to external entities
- d. continuing education (including conferences, off-shore programs, non-award and tailored professional programs)

- e. overseas projects
- f. certain contract research (refer to the exclusions listed in clause 6 below)
- g. project and consultancy services provided to external parties for a fee
- h. the commercial exploitation of intellectual property rights.

(6) Contract research activities that are excluded as non-commercial activities include:

- a. research conducted under a scheme listed on the Australian Competitive Grants Register
- b. research that is wholly funded by the Australian government or an Australian government body
- c. contract research where the contract specifies that the University, or its wholly owned controlled entities, shall own all of the intellectual property rights arising from the contract research and no licence or other mechanism is granted to any other party to exploit those intellectual property rights.

(7) A commercial activity is distinguished in some cases by the Activity owner or Faculty or Division having a degree of independence in controlling the production or supply of the goods or services, and in setting the price at which they are provided.

(8) The collection of fees or income for goods, services or access to facilities is an indicator that an activity is commercial. However, activities that deliver non-financial benefits to the University can be commercial activities and an activity need not generate a financial profit in order to meet the definition of a commercial activity. Internal activities within the University and internal charges are not commercial activities.

(9) Low risk contract research and consultancies are defined as having a low risk rating, a financial impact less than \$100,000, being completed within three years and using an unaltered contract agreement from the Legal Office's Legal Precedents database. Approval of these activities is delegated to the Faculty Head or Divisional Head.

(10) The thresholds that apply to commercial activities are summarised in the [Thresholds for Commercial Activities](#). These thresholds align with the Approval Authority.

## Section 4 - Other Definitions

### Activity Owner

(11) The Activity owner is the person who is promoting the proposed commercial activity and who will be responsible for the preparation of the proposal documentation.

### Approval Authority

(12) Approval Authority means the authorities as stated in relevant University documents.

### Responsible Officer

(13) The Responsible Officer of a commercial activity is the person or persons responsible for the ongoing monitoring and review of that commercial activity. This role should be allocated to the person or persons most likely to have real-time information about the ongoing activity.

## Section 5 - Evaluation and Approval Process

### Submitting a Proposal for a New Commercial Activity

(14) The preliminary stage includes the Activity owner completing the Commercial Activity Checklist (available from

Finance Business Partners and from the Legal Office) and preparing a proposal document, such as a summary business case.

(15) The proposal should identify the category of commercial activity and include a preliminary risk assessment, risk management actions and details of additional insurance cover required. The proposal must identify any University funding, resources, personnel, equipment, or facilities required for the proposed activity, and include full details of all external parties to be involved in the conduct of the activity.

(16) For more complex proposals, the legal requirements, governance and corporate structure of the activity should be described. Complex proposals may include several categories of commercial activity and require extensive consultation.

(17) Consultation with Assurance Services (Risk and Insurance) and a Finance Business Partner is mandatory for all commercial activities. Consultation with the Legal Office is mandatory for all activities above \$100,000 or where the activity will involve signing a legal agreement that is not included in the Legal Precedents section of the University website.

## **Endorsement**

(18) Preliminary evaluation of the proposal in accordance with these Guidelines should be conducted by the head of Faculty or Division to whom the Activity owner reports. The proposal shall not be submitted to an Approval Authority without the prior endorsement of the head of Faculty or Division.

## **Evaluation**

(19) As a minimum standard, all proposals for commercial activities are subject to evaluation against the following common criteria:

- a. alignment with the object and functions described in the [University of Newcastle Act 1989](#), s6(3)a).
- b. cost to the Faculty or Division and the University generally in terms of financial and non-financial resources
- c. availability and sustainability of funding source
- d. benefits to flow to the University from the activity (financial and otherwise)
- e. benefits to flow to the community and/or to third parties from the activity
- f. risks arising from the activity, and the cost, practicality and availability of means to manage these risks
- g. feasibility and costs of implementing the associated operational changes required to conduct the activity. This may lead to a preference for activities that align with current processes or which are conducted at a scale that warrants the necessary changes to current operations.
- h. compliance with the University's Ethical Decision Making Framework, applicable laws, regulations, policies, and guidelines.

## **Avoidance of Conflicts of Interest**

(20) The management of conflicts of interest are separately addressed in the [conflicts of interest policy](#) and the University's [Code of Conduct](#).

(21) At all stages of the evaluation and approval process, parties must take care to avoid actual or potential conflicts of interest. Actual or potential conflicts of interest should be identified in the activity proposal, and by any person involved in the approval process. The Director, People and Workforce Strategy should be contacted where advice is required on the management of a conflict of interest.

## Keeping of Records

(22) Activity owners and Approval Authorities must ensure that all information relating to the proposed commercial activity, is recorded on an official Records Governance Services (RGS) file for that activity. The RMO file must hold a copy of the activity proposal document, along with completed evaluation checklists and all other supporting documents.

## Approval and Entry on the Register

(23) A commercial activity should not commence before formal approval has been obtained from the Approval Authority.

(24) The Approval Authority must notify the Chief Financial Officer of the approval or refusal of the commercial activity. The Approval Authority is also responsible for notifying all parties listed in the proposal that the activity has been approved or refused. The Activity owner is responsible for collating all relevant information for the RMO file.

(25) The Chief Financial Officer must ensure that approved activities are entered into the University's Register of Commercial Activities, subject to the thresholds approved by Council.

# Section 6 - Risk and Insurance

## Managing Risk

(26) In engaging in commercial activities, the Faculty or Division assumes additional commercial and reputational risks on behalf of the University. Failure to identify, assess and manage risks effectively may have severe consequences. Activity owners must comply with the University's [Risk Management Framework](#) in identifying, assessing and managing the risks of a commercial activity.

(27) Risks that arise from a commercial activity and which should be considered in developing a business case include:

- a. financial loss and opportunity costs
- b. health and safety issues that can result in injury to staff, students, members of the public
- c. loss of, or damage to, University equipment or facilities
- d. inadvertent or deliberate breach of legislation, policy, or ethical standards
- e. misuse of public resources, conflicts of interest or corruption
- f. legal liability
- g. reputational damage to the University, its staff members and its stakeholders.

## Insurance of Risk

(28) Managers of commercial activities must ensure that risks are covered by the University's current insurance policy and, if required, that additional coverage is obtained for insurable risk. Insurance requirements for commercial activities should be discussed with Risk and Assurance Services, who can advise whether the activity is or can be insured under the University's existing policies.

(29) Where a controlled entity of the University manages its own insurance policies, the insurance of commercial activities of the entity is the responsibility of the Management and Board of the entity.

(30) An activity should not commence or continue where an insurable risk with a financial value in excess of \$100,000 is uninsured.

# Section 7 - Operating Requirements

## Operation

(31) The conduct and operation of University commercial activities must be consistent with the object and functions of the University, and with all applicable laws, policies and regulations.

## Prevention of Corruption, Fraud, Maladministration and Waste

(32) Commercial activities must be managed in such a way as to comply with the University's obligations as a public authority, and to minimise the risk of corruption, fraud, maladministration or waste. Staff involved in the activity must adhere to the University's [Code of Conduct](#) and to all relevant policies, including those relating to the management of University resources. Members of the University community who identify possible instances of fraud, corruption, maladministration or serious waste have an obligation to report these in accordance with the University's [Complaints Resolution Policy](#) and [Code of Conduct](#).

## Pricing and Competitive Neutrality

(33) Commercial activities of the University are not required to comply with the principles set out in the NSW Government Policy Statement on the Application of Competitive Neutrality. However the University is committed to the principle of fair and effective competition in its markets and the pricing of commercial activities should, at a minimum:-

- a. seek to recover the full cost of providing the commercial activity. This includes the recovery of all administrative and operational overheads associated with the proposed activity.
- b. consider the market price for similar services and where a University commercial activity is priced below market rates, a valid reason should be included in the business case. Lower pricing might be justified for strategic, competitive or community benefits, for example, as part of a targeted market penetration strategy.

## Reporting

(34) Faculties and Divisions of the University are required to report annually to the Executive Committee about the commercial activities of their units. The Chief Financial Officer is required to report to the Finance Committee about the commercial activities of the University as a whole. The Directors of controlled entities are also required to report to the Controlled and Associated Entities Committee (CAEC) about their compliance with this policy and the applicable legislation each year.

(35) An approved commercial activity that involves the investment, expenditure or foregoing of revenue in excess of \$1,000,000 must be reported to the next Council meeting via the Finance Committee of Council (Delegation of Authority 1.12.1).

(36) Significant changes, including performance significantly higher or lower to that expected in business cases or other proposal documentation, and matters of risk and insurance coverage should be reported to the Executive Committee as they occur. Information reported may be used to update the Register of Commercial Activities.

## Change of Responsible Officer

(37) In the event that there is a change in the Responsible Officer the Chief Financial Officer must be notified to ensure the Register is updated. The Activity owner and Head of the Faculty or Division are responsible for notifying the Chief Financial Officer of such changes within 2 business days.

# Section 8 - Register of Commercial Activities

## Register of Commercial Activities

(38) The [University of Newcastle Act 1989](#) requires that the University maintain a Register of Commercial Activities (s21C). The Register of Commercial Activities is a central repository for information on the various commercial activities of the University. The Chief Financial Officer is responsible for the maintenance of the Register.

(39) All commercial activities with a financial impact greater than \$2,000,000 over the life of the activity, or with a residual risk rating of high or extreme are required to be entered into the Register of Commercial Activities. The financial impact is determined by reference to the higher of:

- a. the full cost of the activity over the life of the activity, or
- b. the investment required.

(40) Activities exempted from inclusion in the Register of Commercial Activities are not exempt from other requirements of the Act and these Guidelines.

(41) Records held in the Register are considered Commercial-in-Confidence. The Register is divided into component parts that reflect the major categories of commercial activities undertaken by the University and its controlled entities.

(42) The Heads of Faculties and Divisions and the Directors of controlled entities are accountable for ensuring that the details held on commercial activities for their area or entity are complete and current.

## Details to Be Held

(43) The Register of Commercial Activities shall hold, at a minimum, the following details which are required by the [University of Newcastle Act 1989](#), s21C (1):

- a. the following information on University commercial activities:
  - i. a description of the activity,
  - ii. details of all parties who participate in the activity,
  - iii. details of any appointment by or on behalf of the University to relevant boards or other governing bodies,
  - iv. details of any meetings at which relevant matters were considered and approved for the purposes of compliance with the Guidelines
  - v. such other details as the Guidelines may require.

## Access to the Register

(44) Full access to the Register of Commercial Activities is available to the following:

- a. Members of Council
- b. Members of the Executive Committee
- c. NSW Minister for Education
- d. NSW Audit Office
- e. such other details as the Guidelines may require.
- f. Relevant University personnel from Financial Services, Assurance Services, Legal Office
- g. Other parties as required under law or by authority of Council.

(45) Restricted access allows review only of entries in the Register specific to the area of accountability. Restricted

access is available to the following:

- a. those officers responsible for ensuring details of activities in their area of accountability are complete and correct
- b. Responsible Officers, Approval Authorities and Heads of Managing Units
- c. persons named within the Register entry, such as members of governing boards
- d. other University parties with the written approval of the Responsible Officer.

## **Annual Review of Register**

(46) The Register of Commercial Activities will be reviewed annually to ensure records are complete and accurate. The Chief Financial Officer is responsible for the annual review of the Register.

# **Section 9 - Monitoring and Review of Commercial Activities**

## **Monitoring**

(47) To enable the Chief Financial Officer to maintain an accurate Register the Activity owner, or Responsible Officer, must:

- a. monitor the commercial activity to ensure that:
  - i. the ongoing activity aligns with the approved parameters contained in the business case
  - ii. the University's legal rights and protected and its obligations are met
  - iii. the activity complies with the applicable policies of the University
  - iv. any additional conditions of approval imposed by the Approval Authority
- b. provide the Chief Financial Officer with information to ensure that the Register is complete and accurate at all times
- c. notify the Chief Financial Officer of any significant changes to an activity, including risk and insurance coverage, as and when these occur.

## **Review**

(48) A review of a commercial activity may be initiated by the Chief Financial Officer, or the Head of the Faculty or Division.

(49) The Activity owner for each commercial activity listed in the Register is responsible for preparing a Commercial Activity Review Report on that activity at least once every 3 years and providing that Report to the Chief Financial Officer at least 1 month before the expiry of the 3 year review period.

(50) The Commercial Activity Review Report shall:

- a. assess the ongoing viability of the commercial activity, including whether the activity has achieved the object for which it was originally established
- b. identify any significant changes to that commercial activity, including changes to the risks (whether or not these risks were identified in the evaluation process)
- c. ascertain whether appropriate risk management processes are in place
- d. assess compliance with relevant law, policy and standards
- e. include a recommendation about what, if any, actions should be taken in light of the review.

## **Section 10 - Controlled Entities**

(51) By definition, controlled entities are commercial activities. The continued operation of a controlled entity is subject to the requirements of these Guidelines, including the minimum triennial review requirements of clause 49. In addition, any commercial activity or proposed commercial activity of a controlled entity is subject to the requirements of these Guidelines.

(52) The Boards of controlled entities are responsible for ensuring that preliminary evaluation, risk management and accountability processes are in place and are consistent with the requirements of applicable legislation and policy, including these Guidelines.

## **Section 11 - Further Information and Guidance**

(53) The Chief Financial Officer will assist with any difficulty or uncertainty about the application or use of the Guidelines.

## **Section 12 - Appendices**

(54) [Thresholds for Commercial Activities](#)



## Status and Details

<b>Status</b>	Historic
<b>Effective Date</b>	11th November 2016
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<b>Approval Authority</b>	University Secretary
<b>Approval Date</b>	11th November 2016
<b>Expiry Date</b>	22nd October 2018
<b>Enquiries Contact</b>	Paula Johnston Chief Financial Officer 02 4055 3099

## Glossary Terms and Definitions

**"Commercial activities"** - As defined in the University of Newcastle Act 1989.

**"Activity owner"** - The activity owner is the person who is promoting the proposed commercial activity and who will be responsible for the preparation of the proposal documentation.

**"Risk"** - Effect of uncertainty on objectives. Note: An effect is a deviation from the expected, whether it is positive and/or negative.

**"intellectual property"** - Intellectual property (IP), as defined by the World Intellectual Property Organisation, refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property is divided into two categories: Industrial property includes patents for inventions, trademarks, industrial designs and geographical indications; and Copyright covers literary works (such as novels, poems and plays), films, music, artistic works (e.g. drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television programs.

**"Student"** - a person formally enrolled in a course or active in a program offered by the University or affiliated entity.

**"Staff"** - Means a person who was at the relevant time employed by the University and includes professional and academic staff of the University, by contract or ongoing, as well as conjoint staff but does not include visitors to the University.

**"Establishment"** - When referring to an Award offered by the University, establishment means the process of approving an award that the University has decided to offer. For all other uses of this term, the generic definition applies.

**"Program"** - When referring to learning, a program is a sequence of approved learning, usually leading to an Award. For all other uses of this term, the generic definition applies.

**"External parties"** - Any individual or organisation external to the University.

**"Controlled entity"** - Has the same meaning as in section 16A of the University of Newcastle Act 1989.

**"Faculty"** - An organisational unit established within the University by the Council.

**"University"** - The University of Newcastle, a body corporate established under sections 4 and 5 of the University of Newcastle Act 1989.

**"Officer"** - Has the meaning given in section 9 of the Corporations Act 2001 (Cth).

**"Risk assessment"** - The overall process of risk identification, risk analysis and risk evaluation.

**"Risk Management"** - the co-ordination of activities to optimise the management of potential opportunities and reduce the consequence or impact of adverse effects or events.

**"Personnel"** - In relation to a party, any employee, officer, agent, contractor, sub-contractor, student or volunteer of that party.

**"University website"** - the registered domain [www.newcastle.edu.au](http://www.newcastle.edu.au) and all incorporated websites; the websites of all University Divisions, Units and Faculties and University -owned and/or controlled entities, all of which should be hosted on the registered domain: [www.newcastle.edu.au](http://www.newcastle.edu.au); websites hosted by the University including Research Centres and non-controlled entities; other websites that have approved University-branding or are considered to represent the University; and all resources accessible from within the above websites, except where these resources are not provided directly by the University (e.g. Turnitin). It does not include: linked websites and resources that are not owned or controlled by the University.

**"Law"** - All applicable statutes, regulations, by-laws, ordinances or subordinate legislation in force from time to time anywhere in Australia, whether made by the Commonwealth, a State, a Territory or a local government and, where the context permits, includes the common law and equity.

**"Council"** - The governing authority of the University established under section 8A of the University of Newcastle Act 1989.