# Commercial Activities Policy

# Section 1 - Introduction

### Legislative Framework

(1) This Commercial Activities Policy is made by the University Council pursuant to Section 21B of the University of Newcastle Act 1989 (the Act).

(2) Whilst the Act requires the Council to make "Guidelines" in respect of University commercial activities, this document, in consideration of the University's Policy Framework and Hierarchy of Policy documents, is deemed to satisfy that requirement.

(3) The University has power under the Act to carry on commercial activities as part of its functions under Section 21A of the Act.

# Section 2 - Purpose and Scope

(4) This policy provides a set of principles for the development and conduct of commercial activities of the University, and to ensure that commercial activities comply with legislative requirements.

(5) This document should be read in conjunction with other University documents including but not limited to:

a. Commercial Activity Procedure;
b. Contract Research Procedure;
c. Governance Framework for Controlled Entities;
d. Micro-Credentials Policy;
e. Delegation of Authority Framework and associated Guidelines;
f. Project and Consultancy Work Procedure;
g. Spinout Procedure; and
h. Intellectual Property Policy and its associated Procedure.

(6) This document applies to any commercial activity conducted under the auspices of the University that meets the definition of a commercial activity as per the criteria provided in Section 4 of this Policy.

(7) This document does not apply to:

a. those activities which comprise the principal functions of the University as prescribed by the Act section 6 (2) (a) – (g); and
b. those activities listed in Table 3 of this Policy.

(8) This document should be read and understood by all staff of the University.

# Section 3 - Definitions

(9) In the context of this document, the following definitions apply:

| Term | Definition |
|---|---|
| Commercial Activity | As defined by section 21A of the University of Newcastle Act, a University commercial activity means<br>i. any activity engaged in, by, or on behalf of the University in the exercise of commercial functions of the University; and<br>ii. any other 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 this Policy to be a University commercial activity. |
| Commercial Functions | Under section 6(3)(a) of the University of Newcastle Act, the University may exercise commercial functions comprising 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. |
| Activity Owner | The person who is promoting the proposed commercial activity and who is responsible for the preparation of proposal documentation. |
| Significant Influence | Has the same meaning as defined in the AASB 128(5). The University Annual Report further defines this as 20% to 50% or more of the voting power. |
| Sponsor | The person who provides endorsement of the proposal prior to its approval. |
| Nominated Executive | The member of the Executive Leadership Team who is not the Sponsor or Delegate and who receives reports for the ongoing monitoring and review of a Category B commercial activity. |
| Responsible Officer | The person(s) responsible for the ongoing monitoring and review of Category A and B commercial activities. This role should be allocated to the person(s) most likely to have real-time information about the ongoing activity. |

# Section 4 - Determining What Constitutes a Commercial Activity

(10) The University of Newcastle Act 1989 defines what constitutes a commercial activity.

(11) In considering whether an activity is a commercial activity for the purpose of this Policy, the following indicators should be used:

a. if the sole purpose of the activity involves the commercial exploitation or development of any facility, resource or property of the University, then it is likely that it is a commercial activity;
b. if the activity involves user charges or fees for goods, services, or access to facilities, then it is likely that it is a commercial activity;
c. if the activity involves the promotion of, establishment of, or participation in, a joint venture, company or other vehicle to carry on an activity that is predominantly a commercial activity, then it is likely that it is a commercial activity.

(12) Council has within its power under the Act the ability to prescribe specific activities as University commercial activities.

(13) Category A Commercial Activities are commercial activities that:

a. are aligned with the University strategic plan; and

b. where applicable, are bound by a standard leasing or licensing arrangement using pre-existing templates with minimal negotiation; and
c. do not fall within the parameters of Table 2 – Category B Commercial Activities; and
d. are not listed as an activity that does not constitute a commercial activity (Table 3); and
e. may be subject to an alternate procedure depending on the nature of the activity, per Table 1 – Category A Commercial Activities and their Relevant Procedures.

## Table 1 – Category A Commercial Activities and their Relevant Procedures

| Commercial Activity Type | Relevant Procedure |
|---|---|
| A third-party interest resulting in the University holding less than 20% equity or voting power in another party. | Commercial Activities Procedure |
| Continuing education activities provided within Australia including micro-credentials and non-award short courses. | Micro-Credentials Policy<br>Micro-Credential Schedule<br>Course Design and Management Manual |
| Project and consultancy services (not research services) including tailored learning programs provided to a third party with a projected gross revenue of less than $1,000,000 over the life of the activity. | Project and Consultancy Procedure |
| Contract research commissioned by the Australian private sector or an international source with a projected gross revenue of less than $1,000,000 over the life of the activity and assessed as low risk under the Risk Management Framework. | Contract Research Procedure |
| The commercial exploitation or licensing of intellectual property rights in which the University claims an interest. Examples include spinouts. | Intellectual Property Policy<br>Spinout Procedure |
| The lease or licensing of University venues or facilities to bodies interconnected with the University for the purpose of those bodies providing facilities or other services to the University community, where the term of the lease or license exceeds 10 years. | Commercial Activities Procedure |
| The lease or licensing of University property, venues, or facilities to a third party where the arrangement is not in pursuit of the University's object per the Act. For example, the leasing of student accommodation during holiday periods to external parties. | Commercial Activities Procedure |
| Any other commercial activity where the outcome of the Impact Assessment Tool is a low-risk rating. | Commercial Activities Procedure |

(14) Category B commercial activities are commercial activities that:

a. are aligned with the University strategic plan; and
b. where applicable, are subject to a non-standard leasing or licensing arrangement with complex negotiations; and
c. do not fall within the parameters of Table 1 – Category A Commercial Activities;
d. are not listed as an activity that does not constitute a commercial activity (Table 3); and
e. are subject to the Commercial Activities Procedure.

## Table 2 - Category B Commercial Activities

| Commercial Activity Type |
|---|
| The purchase, development or management of real estate by the University that is not primarily for the provision of teaching, learning, or research activities under the Act s6(1) and (2). |
| Project and consultancy services provided to third parties with projected gross revenue of $1,000,000 or more over the life of the activity. |
| Contract research commissioned by the Australian private sector or an international source with projected gross revenue of $1,000,000 or more over the life of the activity. |

| Commercial Activity Type |
|---|
| The establishment and operation of any controlled entity or acquisition of any interest in a joint venture or joint operation. |
| The establishment, acquisition, promotion or participation in any company, partnership, trust, or other incorporated body, resulting in the University holding between 20% and 50% equity or voting power in another party. |
| Any activity, including teaching or research activity, conducted outside of Australia including as part of an arrangement with another entity. |
| Third party contracts involving an entity incorporated outside of Australia. |
| Retail activity conducted by the University. Examples include revenue generated from University owned car parks at Honeysuckle. |
| Any other commercial activity where the outcome of the Impact Assessment Tool is not a low-risk rating. |

(15) Specific activities that do not constitute a commercial activity, but may be subject to evaluation, risk assessment and approval processes prescribed in another University policy or procedure, are listed in Table 3.

## Table 3 – Activities that are not commercial activities

| Activity Type |
|---|
| Community engagement activities – for example, the operation of 2NURFM radio station. |
| Charitable fundraising activities conducted by or on behalf of the University. |
| Investment activities carried out under Schedule 2 of the Act. |
| Acquisition of services, facilities, equipment or other assets by or on behalf of the University in pursuit of its object under the Act. |
| Management, maintenance, restoration or improvement of lands, buildings or other assets owned by the University or under its control in pursuit of its object under the Act. |
| Management, maintenance, restoration, improvement of or additions to University library, art, heritage items or other collections not intended for re-sale. |
| Third party arrangements for the primary purpose of providing education in Australia per the Third-Party Arrangements – Education Policy and Procedure, and in accordance with the object of the University under the Act. |
| The lease or licensing of University venues or facilities to bodies interconnected with the University for the purpose of those bodies providing facilities or other services to the University community, where the term of the lease or license does not exceed 10 years. Examples include UNSA, student accommodation. |
| Any activity where the primary purpose of the activity is in support of the object and principal functions of the University per S6(1) and(2) of the Act. Examples include car parking bays at Civic West carpark, the co-location of the University & TAFE at Ourimbah. |
| The sale or provision of services, facilities or equipment to academic, administrative or support units within the University. |
| Contract research activities with the following conditions:<br>- research conducted under a scheme which is assessed as “Australian competitive grant R&D income” under the Higher Education Research Data Collection (HERDC) guidelines; or<br>- wholly funded by the Australian government or an Australian government body (Commonwealth, State, Territory or Local); or<br>- wholly funded by Australian or international philanthropy (donations, bequests, endowments or crowd funding); or<br>- 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 commercialise those intellectual property rights. |
| Any activity conducted by a controlled entity, for example, retail activity for goods and services. The Controlled entity itself is a commercial activity, but its operations are excluded from the definition of a commercial activity. |

# Section 5 - Principles

(16) All commercial activities of the University must:

a. align with the University's functions under the Act and its strategic goals;
b. achieve optimal benefits for the University;
c. be financially viable – financial and other resources must be appropriately allocated and managed over the life of the activity;
d. involve effective risk management throughout the life of the activity;
e. comply with relevant legislative requirements and University policies and procedures; and
f. promote transparency and accountability through robust systems of monitoring, control and reporting.

## Requirements for Approval

(17) A new commercial activity will only be considered for approval where the following has been undertaken:

a. feasibility and due diligence assessments,
b. identification of appropriate governance and legal arrangements;
c. assessment of financial viability;
d. risk assessment and identification of risk mitigation measures; and
e. establishment of monitoring and reporting mechanisms.

## Monitoring Requirements

(18) Once approved, the Responsible Officer must periodically monitor the commercial activity to ensure that it complies with:

a. the University's legal rights and obligations;
b. applicable policies of the University including but not limited to compliance management, risk management, conflict of interest, and intellectual property; and
c. any conditions of approval imposed by the delegate.

(19) A review of any ongoing commercial activity must be completed:

a. at least every 3 years by the Responsible Officer, unless requested sooner; or
b. where any significant changes to the commercial activity are identified, including changes to the risks associated with the activity.

## Governance

(20) All commercial activities must be properly governed via a framework that effectively controls the operation and management of the activity.

(21) The ongoing conduct and operation of University commercial activities must continue to be consistent with the principles of this Policy.

## Conflicts of Interest

(22) Staff involved in preparing, evaluating, or approving a business proposal for a Commercial Activity must comply with the Disclosure of Interest Policy and its associated procedure.

(23) Additionally, for commercial activities with a risk rating of medium or higher (Category B), any staff involved in preparing, evaluating, or approving a business proposal for the commercial activity must complete a Conflict of Interest Declaration, even if the declaration is of no conflict of interest. Conflicts of interest declared during the commercial activity process must also be disclosed via ServiceNOW, and managed according to the requirements of the Disclosure of Interest Policy and Procedure.

### Public Authority Obligations

(24) 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. Please see the Fraud and Corruption Framework.

(25) Staff involved in the commercial activity must adhere to the University's Staff 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 Fraud and Corruption Framework, Public Interest Disclosures Policy, Complaint Management Policy or Staff Code of Conduct.

# Section 6 - Register of Commercial Activities

(26) The Act requires the University to maintain a Register of Commercial Activities (s21C) (Register) which holds information on the various commercial activities of the University.

(27) All commercial activities that satisfy the criteria of a Category B Commercial Activity must be entered into the Register.

(28) Activities exempted from inclusion in the Register are not exempt from other requirements of the Act and this Policy.

(29) Records held in the Register are considered Commercial-in-Confidence and are maintained by the University Secretary or their nominee.

(30) The Register shall hold, at a minimum, the following details which are required by the Act s21C(1):

a. a description of the activity;
b. details of all parties who participate in the activity;
c. details of any appointment by or on behalf of the University to relevant boards or other governing bodies;
d. details of any meetings at which relevant matters were considered and approved for the purposes of compliance with this Policy;
e. disclosed conflicts of interest;
f. such other details as this Policy may require.

(31) The Register is required to be open to inspection by any member of the Council, the Auditor General of New South Wales and any representative of the NSW Minister or Treasurer.

(32) The Register will be reviewed annually to ensure records are complete and accurate. The University Secretary, or their nominee, is responsible for the annual review of the Register and reporting this to Council.

# Section 7 - Commercial Activity Structure

(33) The structure of a commercial activity will vary depending on the requirements, objectives, and involvement of the University and any relevant external stakeholders. A commercial activity may take one of a variety of structure types per the Table 4 below.

### Table 4 – Commercial Activity Structures

| Structure | Definition |
|---|---|
| Controlled entity | An entity over which the University has control and owns the majority of the equity. The Governance Framework for Controlled Entities outlines the governance requirements for the University's controlled entities which, by definition, are commercial activities. |
| Third party interest – <20% equity holding / voting power – existing entity. | A separate legal entity governed independently of the University in which the University has a shared interest but no control. The University holds less than 20% of equity (eg shares) or voting power in the entity. |
| Third party interest – 20-50% equity holding / voting power – existing entity. | A separate legal entity governed independently of the University over which the University maintains significant influence but not control. The University holds 20% to 50% of equity (eg shares) or voting power in the entity. |
| Third party interest – joint venture | Structured through a separate vehicle, the University and other party(s) with joint control have rights to the net assets of the arrangement. |
| Third party interest – joint operation | The University and other party(s) with joint control have right to the gross assets and obligations for the liabilities of the joint arrangement. It is not structured through a separate vehicle. |
| Third party interest – Spinout | A new entity formed to commercialise intellectual property (IP) owned by the University which the University and relevant staff may have a financial interest in. |
| Third party interest – Startup investment <20% equity holding | A newly established business led by students, alumni or community members in which the University has a shared interest but no control. The University holds less than 20% of equity (eg shares) voting power in the entity. |
| Third party interest – Startup investment 20-50% equity holding | A newly established business led by students, alumni or community members over which the University maintains significant influence but not control. The University holds 20% to 50% of equity (eg shares) or voting power in the entity. |
| Other | Commercial activities can be conducted between the University or its divisions, colleges, schools, centres or business units and a person, company or organisation external to the University and located in either Australia or overseas, in pursuit of a commercial activity. |
| Fee For Service | Activities such as project and consultancy services, leasing and licensing of University property, venues, facilities or intellectual property are included in this sub-category. |
| Other Contract or Arrangement | Activities may be formalised via a contract with a third party, being any written agreement (including in the form of a contract, agreement, Memorandum of Understanding, purchase order, deed, exchange of letters or emails) between:<br>a. the University or its divisions, colleges, schools, or centres in pursuit of a commercial activity; or<br>b. a person, company or organisation external to the University and located in Australia or overseas in pursuit of a commercial activity. |

# Section 8 - Compliance

(34) Breaches of this Policy or its associated procedures may constitute misconduct or serious misconduct, which may result in disciplinary action. Breach reports can be made here.

## Status and Details

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|---|---|
| **Status** | Current |
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| **Responsible Executive** | Alex Zelinsky<br>Vice-Chancellor<br>alex.zelinsky@newcastle.edu.au |
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## Glossary Terms and Definitions

**"Joint Arrangement"** - An arrangement for which two or more parties have joint control and are bound by a contractual arrangement.

**"Joint Operation"** - A Joint Arrangement where parties (which includes the University and another entity or entities, whether incorporated or not) share joint control and have rights to the assets and obligations for the liabilities relating to the arrangement.

**"Joint Venture"** - A Joint Arrangement (which includes the University and another entity or entities, whether incorporated or not) where control is equally shared and each party has joint rights to the net assets of the arrangement.

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

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

**"Risk management"** - The co-ordinated activities of assessing, controlling, monitoring, and reviewing risk in the pursuit of the University's objectives.

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

**"Asset"** - Any tangible or intangible item (or group of items) that the University owns or has a legal or other right to control and exploit to obtain financial or other economic benefits.

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

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

**"Disciplinary action"** - When used in relation to staff of the University, this is as defined in the applicable and current Enterprise Bargaining Agreement, or the staff member's employment contract. When used in relation to students of the University, this refers to the range of penalties that may be applied under the Student Conduct Rule.

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

**"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.

**"Research"** - As defined in the Australian Code for the Responsible Conduct of Research, or any replacing Code or document.

**"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.

**"Intellectual property rights"** -  All present and future rights to intellectual property including any inventions and improvements, trademarks (whether registered or common law trade marks), designs, copyright, any corresponding property rights under the Laws of any jurisdiction and any rights in respect of an invention, discovery, trade secret, secret process, know-how, concept, idea, information, process, data, or formula.

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

**"Delegate"** - (noun) refers to a person occupying a position that has been granted or sub-delegated a delegation of authority, or a committee or body that has been granted or sub-delegated a delegation of authority.