Commercial Activities Procedure

Section 1 - Introduction

(1) This procedure must be read in conjunction with the Commercial Activities Policy.

Section 2 - Scope

(2) This document applies to any commercial activity conducted under the auspices of the University of Newcastle (University) where the Commercial Activities Policy directs that this Procedure applies.

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

Section 3 - Definitions

(4) 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 1989 No 68 a University commercial activity means: i. any activity engaged in, by, or on behalf of the University in the exercise of commercial functions of the University; and 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 Guidelines to be a University commercial activity.
Activity Owner	The person who is promoting the proposed commercial activity and who is responsible for the preparation of the proposal documentation.
Due Diligence	The process of investigating and assessing information about a third party who is potentially engaged in a University commercial activity to ensure risks associated with the third party are quantified and understood.
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 Category B commercial activities.
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 - Procedure

(5) Each commercial activity subject to this Procedure must follow a five-stage life cycle. The five stages are to be completed sequentially as follows:

Stage 1	Initiate

Stage 2	Approve
Stage 3	Negotiate and Execute
Stage 4	Manage
Stage 5	Review

Stage 1 – Initiate

(6) In determining whether an activity is a commercial activity for the purposes of this procedure, the Activity Owner should first review Section 4 of the Commercial Activities Policy.

(7) If the Activity Owner is unsure of the application of the Commercial Activities Policy, they should complete the Commercial Activity Decision Tree to determine which category of commercial activity, if any, they are pursuing.

(8) Where the outcome of the Decision Tree is a commercial activity that does not clearly satisfy the criteria of Category A or Category B Commercial Activity, the Impact Assessment Tool must be completed.

(9) For proposed new commercial activities that satisfy the criteria for Category A Commercial Activities, and are not subject to an alternate procedure, as detailed in the Commercial Activities Policy, a Commercial Activities Category A Business Proposal must be prepared.

(10) A Commercial Activity Category B Business Proposal must be prepared and evaluated for all new proposed commercial activities that satisfy the criteria of Category B commercial activities.

(11) The Stage 1 Checklist of Considerations may be used to help the Activity Owner collate the information required for the Category B Business Proposal.

(12) Due diligence assessments must be conducted on third parties to the activity, including key external stakeholders. A due diligence assessment considers:

a. Legal: legal and regulatory data and information (corporate structure, commercial contract, intellectual property, regulatory, environmental and safety compliance, litigations) of the other entity is gathered, validated and documented.
b. Financial: financial statements, data and information (cashflow, tax liabilities, solvency) of the other entity are gathered, validated and documented.
c. Strategic: alignment with the University's strategic goals is validated and documented.

(13) For any proposed commercial activity conducted outside Australia, additional independent expert legal, tax and other regulatory compliance advice must be obtained before a proposal can be submitted for approval.

(14) A commercial activities business proposal must be endorsed by the Sponsor following a preliminary evaluation of the proposal and its related documents.

Stage 2 - Approve

(15) Approval of a commercial activity should be undertaken in accordance with the requirements of the Delegation of Authority Framework, the relevant Delegation Schedule, and any associated documents (see Delegations Register).

(16) Where the prepared proposal document indicates the work is outside the University's risk appetite, the proposal must be considered for approval by the Vice-Chancellor.

(17) All proposals for commercial activities are subject to evaluation against the following criteria as a minimum

standard:

a. alignment with the functions described in the University of Newcastle Act 1989 No 68 s6(3)a and the current strategic plan;
b. availability and sustainability of funding source;
c. the identifiable benefit to the University is based on sound business case evaluation, risk and return considerations;
d. feasibility and cost of implementing the associated operational changes required to conduct the activity;
e. appropriate procedures and insurance for management of the identified risks in accordance with the nature and level of the identified risks;
f. suitability of the proposed structure for the commercial activity from a legal, accounting and tax perspective;
g. compliance with the University's policies and procedures, applicable laws and regulations; and
h. the principles for 'standard of judgement' as outlined in the Ethical Framework.

(18) A commercial activity must not commence before formal approval has been obtained from the relevant Delegate.

(19) A Delegate is restricted from approving any commercial activity where they will be engaged in the activity, or where they are the Sponsor of the activity. An alternate Delegate with authority to approve a commercial activity must be identified.

(20) Where the proposal is approved by the Vice-Chancellor in accordance with clause 16, the Vice-Chancellor must report the matter to Council at the next Council meeting.

(21) The Council is responsible for establishing and authorising the participation by the University in controlled entities per the Governance Framework for Controlled Entities, which outlines the requirements for the final 3 stages of the commercial activity life-cycle.

(22) The Delegate shall notify the University Secretary and the Activity Owner of the approval (or otherwise) of the commercial activity.

(23) The University Secretary, or their nominee, will ensure that approved commercial activities are entered into the University Register of Commercial Activities in accordance with the Commercial Activities Policy.

Stage 3 – Negotiate and Execute

(24) Once the business proposal for the commercial activity has been approved in stage 2, the next stage is to negotiate a written agreement (in whatever form is appropriate) and have it executed by the appropriate Delegate.

(25) All commercial activities must be properly structured from a legal, tax, regulatory or other perspective in line with any recommendations given by Legal and Compliance, legal or other professional advisers, and documented.

(26) The following issues must be considered by the Activity Owner at a minimum when preparing a written agreement to govern the commercial activity:

a. Which stakeholders need to be consulted with and approve the terms of the arrangement?
b. Who will negotiate the arrangement with the third party and is there a University template that can be used?
c. What are the essential terms and conditions (for example, ownership and use of intellectual property, indemnities, warranties, insurance requirements) of the arrangement?
d. Has the full scope of the engagement (including deliverables and milestones) been included and clearly articulated in the arrangement?
e. Are there appropriate exit arrangements including termination and asset distribution and liability payment

obligations to protect the interests of the University?

f. Is a rights and obligations register required to clearly monitor roles, responsibilities and milestones?
g. How will information be managed, including security and confidentiality of records, compliance with privacy laws for handling of personal information or health information, public right of access to information?
h. Is any additional due diligence or documentation required at the point of execution?
i. If the agreement is with an overseas-based entity, has the agreement been reviewed by the Legal and Compliance unit and the Global Office prior to execution?
j. Who is the appropriate Delegate who can sign the agreement?

(27) Before signing the agreement, contract or similar, the Delegate must receive the completed and signed Commercial Activities Business Proposal to ensure that all required stakeholders have been consulted and the necessary approval to proceed has been obtained.

Stage 4 - Manage

(28) Once a commercial activity is approved (regardless of the category) and any contract or agreement executed, it needs to be managed in a manner that provides assurance that the commercial activity complies with:

a. the University's legal rights and obligations;
b. the contract that it is subject to;
c. applicable policies of the University; and
d. any conditions of approval imposed by the Delegate.

(29) Ongoing management and monitoring should also ensure that the University achieves optimal benefits from the activity while minimising the risks to the University.

(30) The Responsible Officer is responsible for managing and regularly monitoring the commercial activity throughout the life of the activity to ensure the ongoing viability of the commercial activity.

(31) If the commercial activity is a Category B commercial activity the Responsible Officer will provide monitoring reports to the Nominated Executive.

(32) Periodic monitoring must be completed at least annually using Part A of the Commercial Activity Report.

(33) If the commercial activity concerns the establishment of a controlled entity, the Governance Framework for Controlled Entities outlines the ongoing monitoring and reporting requirements.

(34) Regular monitoring seeks to provide assurance to the University of:

a. compliance with the University's obligations as a public authority;
b. compliance with any conditions of approval for that commercial activity;
c. compliance with all relevant University policies and procedures;
d. compliance with all contractual and legislative obligations;
e. prompt notification of any changes that materially impact commercial or financial viability;
f. ongoing assessment of risks, risk reporting and notification of any changes in risk ratings.

(35) Where any significant changes to the commercial activity are identified, including changes to the risks associated with the activity, Parts A & B of the Commercial Activity Report are to be completed within 60 calendar days of identifying the change. The completed Commercial Activity Report must be provided to the Nominated Executive and approval must be sought for the proposed management plan.

(36) The Responsible Officer is also responsible for the provision of all necessary information to ensure that the Register of Commercial Activities and the Contract Register are kept accurate and up to date.

(37) Additional monitoring requirements in addition to the Commercial Activity Report may apply to third-party interests per Table 1, depending on the level of control over the entity.

Table 1 Third-Party Interest Additional Reporting Requirements

Structure Type	Entity Reporting for Council oversight
20-50% equity holding / voting power – existing entity Joint Venture	Annual audited statutory accounts Annual assurance that legal, compliance & statutory obligations have been met and conflicts of interest are managed (where a Council or University staff member is a Director or Member of the entity board) Investments in the entity (where applicable)
Joint Operation	Annual financial report per terms of the arrangement Annual assurance that legal, compliance & statutory obligations have been met and conflicts of interest are managed (where a Council or University staff member is a Director or Member of the entity board) Investments in the entity (where applicable)
Spinout	Annual reporting of spinout company investments, where the University holds options, convertible notes, royalty rights or equity stake.
Start Up Investment 20-50% equity holding	Annual reporting of Start-Up company investments, where the University holds options, convertible notes, royalty rights or equity stake.

Stage 5 - Review

(38) The Responsible Officer for each commercial activity is responsible for completing Parts A, B and C of the Commercial Activity Report on that activity at least once every 3 years, unless requested sooner by the Executive Leadership Team (ELT) or Council, in order to:

a. assess the ongoing viability of the commercial activity, including whether the activity has achieved the object for which it was originally established;
b. assess compliance with relevant law, policy and standards;
c. identify any significant changes to that commercial activity, including changes to the risks associated (whether or not the risks were identified in the evaluation process); and
d. provide a recommendation about what, if any, action (continue until end of term/terminate early/renew) should be taken in light of the review.

(39) The Responsible Officer for each commercial activity must provide a copy of the review report to the Nominated Executive at least 1 month before the expiry of the 3 year review period.

(40) A Commercial Activity Report may be required sooner than the 3 year review period if there is a significant change in any of the above 5 criteria at clause 34 and the activity needs to be exited early.

Section 5 - Exit or Termination of Activity

(41) Exit of a commercial activity may be considered when:

a. the activity has fulfilled its purpose/objective; or
b. the activity has failed/is failing to meet its objective/purpose; or
c. the activity's residual risk rating is high or extreme; or

d. a controlled entity is no longer carrying on a business and/or its assets are worth less than $1,000; or
e. there is another legitimate reason for exiting the commercial activity.

(42) A Commercial Activity Exit Form is to be prepared and submitted to the Nominated Executive for consideration of the financial, commercial and legal aspects, before being issued to the Delegate for consideration and approval.

Section 6 - Appendices

(43) Stage 1 Checklist of Considerations.

(44) Commercial Activity Decision Tree

(45) Commercial Activity Impact Assessment Tool

(46) Commercial Activity Category A Business Proposal

(47) Commercial Activity Category B Business Proposal

(48) Commercial Activity Report

(49) Commercial Activity Exit Form

(50) Commercial Activity Compliance Management Plan

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Responsible Executive	Hamish Lithgow University Secretary
Enquiries Contact	Hamish Lithgow University Secretary

Glossary Terms and Definitions

"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 appetite" - Risk appetite is the amount and type of risk that an organisation (or individual) is willing to accept or pursue in order to achieve its objectives.

"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.

"Personal information" - Has the same meaning as in the Privacy and Personal Information Protection Act 1998 (NSW).

"Health information" - As defined in the Health Records and Information Privacy Act 2002, or any replacing legislation.

"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.

"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.

"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.

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