

# GUIDELINES FOR COMMERCIAL ACTIVITIES

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| Approved by          | Council                  |
| Date of Next Review: | August 2007              |
| Contact Officer:     | <u>Commercial Lawyer</u> |

## 1. Overview

Under the University of Wollongong Act 1989, the University has powers to undertake commercial activities.

These guidelines provide a set of principles and processes for the development and conduct of commercial activities.

Core 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.

These guidelines are supported by, and should be read in conjunction with, other University policies and procedures that underpin University activities. In particular, Purchasing and Procurement Policy, Delegations Policy, Consultancies and Contract Research Policy, Fraud and Corruption Prevention Policy, Conflict of Interest Policy and University Council Handbook.

## 2. Commercial Activity Definition

Commercial Activity means:

The exercise of a commercial function of the University. The commercial functions of the University are those where the University exploits or develops commercially any of its facilities, resources or property (including intellectual property).

Commercial activities, like other University functions, may be carried on outside or anywhere within Australia.

General indicators of commercial activity may include one or all of the following:

- The main purpose of the activity is profit and involves user charges for goods or services;
- The activity involves association with one or more third parties and requires or is likely to require University resources exceeding \$100,000. This amount is to include the full cost of service provision (i.e. cash and other forms of resources). Artificial separation of a commercial activity into component parts in order not to reach this threshold is prohibited.
- The degree of independence Managers of an activity can exercise in determining both the quantum and price of goods or services to be provided will also indicate whether an activity is commercial.

Specific activities that are commercial activities under these guidelines:

- The exploitation of intellectual property rights in which the University claims an interest, except where this occurs through research activities that are funded through National Competitive Grants;
- Any activity involving the University establishing or acquiring a controlled entity, except for the purpose of investing University funds as contemplated in Schedule 2 of the University of Wollongong Act;
- Any activity involving the University establishing or acquiring an interest in a company, or an incorporated association, except for the purpose of investing University funds as contemplated in Schedule 2 of the University of Wollongong Act;
- Any joint venture with a third party that involves a total contribution exceeding \$100,000;
- Consultancy services provided by the University (through its staff) to external parties for a fee;
- The acquisition, sale or management of real estate not used primarily for teaching or research purposes;
- The lease or licensing of real estate to third parties;
- The lease or licensing of real estate to bodies affiliated with the University where the term of that lease or licence exceeds 21 years;

Specific Activities that are not covered by these guidelines:

- The following activities are not covered by these guidelines, but may in some cases still be subject to evaluation, risk assessment and approval processes prescribed elsewhere. For example in the Purchasing & Procurement Policy:
- The acquisition of services, facilities, equipment or other assets by or on behalf of the University;
- The sale or provision of services, facilities or equipment to academic, administrative or support units within the University;
- The casual hire of University venues or facilities that are managed through faculty offices or other administrative units;
- The lease or licensing of University venues or facilities to bodies affiliated 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 21 years;
- A research activity that does not involve the exploitation of intellectual property rights;
- Any activity involving the management, maintenance, restoration or improvement of University lands or buildings in accordance with the University's capital management plan;

- Any activity involving the management, maintenance, restoration or improvement of other types of University assets, for example, libraries, art collections;
- Charitable fundraising or sponsorship activities conducted by or on behalf of the University;

### 3. Evaluation and Risk Assessment

3.1. Any proposed commercial activity must be subject to evaluation and risk assessment (see Appendix A).

3.2. Risk may be an actual or contingent risk that involves any:

- Adverse financial loss or consequences to the University, including, without limitation, tax consequences;
- Legal liability to the University, including, without limitation, indirect legal liability consequences such as occupational health and safety, discrimination, etc.
- Risk or loss or damage to the University's reputation;
- Impairment to the University in conducting its principal functions under the Act;
- Probity or compliance risk;

3.3. Evaluation and risk assessment will be managed by the Legal and Commercial Unit of the University.

3.4. Board of Directors of any controlled entities are responsible for ensuring that evaluation, risk management and accountability processes are in place, consistent with these Guidelines, for any commercial activities that are conducted by the entity.

3.5. The evaluation and risk assessment process includes the following steps:

- Ensure the activity proposed comes within the objects and functions of the University as prescribed in the Act;
- identify whether the proposal is for the overall benefit of the University, taking into account the risks, opportunity costs, effect on the University's activities and non-financial benefits to the University;
- ensure the structure for a particular activity is appropriate from a legal, tax and accounting perspective;
- ensure there is appropriate accounting, auditing and reporting mechanisms for the proposal;
- carry out financial analysis, identification of risks, analysis of projected cash flow models and expected rates of return to the University (where applicable);
- assess compliance with competitive neutrality principles as outlined by NSW Treasury from time to time, and assess compliance with relevant University pricing processes;

- determination of an appropriate level of funding from the University required to implement the proposal or carry on the proposal;
- carry out analysis of risks (including liability exposure) and recommended risk management procedures required for the proposal;
- Any third parties with whom the University contracts should be subject to appropriate due diligence checks and should have, where appropriate, a proven track record of reputation and capability in the area concerned;
- identify the effect of the proposal on IP ownership and value, and to recommend a strategy for protecting the University's interests in the IP;
- assess the insurance coverage and limitations and make recommendations as to appropriate insurance. If possible, uninsured risk in excess of \$100,000 is to be expressly noted;
- preparation of a summary of the evaluation and risk assessment outlining the risks and benefits and stating how any risks are to be managed. Appendix A provides a checklist for this purpose.

#### 4. Approval Process

For University activities, approval must be granted in accordance with the University's delegations policy. It is proposed approval of commercial activities be aligned with current delegations for general expenditure.

Accordingly, the delegations policy has been updated to include the following delegations:

##### Approval of commercial activity proposals after evaluation and risk assessment by the Legal and Commercial Unit

- |                            |  |
|----------------------------|--|
| • In Excess of \$3,000,000 | Not Delegated – Council Approval Required                      |
| • Up to \$3,000,000        | Vice-Chancellor & Principal<br>Vice-Principal (Administration) |

With countersignature of any one of the following:

- |                     |  |
|---------------------|--|
|                     | Chancellor, Deputy Chancellor                                    |
| • Up to \$1,000,000 | Vice-Chancellor & Principal<br>Vice-Principal (Administration)   |
| • Up to \$300,000   | Director, Financial Services<br>Deputy Vice-Chancellor, Research |

A delegate exercising their approval authority must not approve an activity for which they are the sponsor. Regard must always be had to the University's policies on Conflict of Interests and Corruption Prevention.

The Legal and Commercial Unit will ensure all approved commercial activities are entered into the Council's register of commercial activities.

The Legal and Commercial Unit is authorised to alter any details included in the register if:

- it considers that the details are inaccurate or incomplete;
- there is a change in a proposal or in a commercial activity that necessitates a change to the details included in the register.

## 5. Governance and Reporting

A report detailing approved commercial activities will be provided to each meeting of the Administrative Committee and to the University's Council on an annual basis. The report will provide the following information in respect to each commercial activity:

- The nature of the activity and the parties involved;
- The cost and benefits to the University of the activity;
- Contributions of any third parties;
- Benefits to flow to third parties;
- A summary of risks associated with the activity and how these are managed.

## 6. Register of Commercial Activities

A register of commercial activities will be maintained by the Legal and Commercial Unit. The register will be designated and dealt with as "Commercial-in-Confidence". It will contain the following information:

- A description of the activity;
- Names of all parties to that activity;
- The names of any people that the University appoints to the boards or other governing bodies overseeing that activity;
- Details of any meetings at which relevant matters were considered and approved for the purpose of compliance with these guidelines;
- Who approved the activity (for example, the Council, Vice-Chancellor or other authorised delegate);

- Each member of the Council and of any committee appointed by the Council, and any University Officer acting within authorised delegation in relation to commercialisation of any of the University's resources will be required to notify [the registrar] of any financial interest in any company, institution or other entity which is involved in a commercial activity with the University. A notification may be made generally or with respect to a particular activity or proposal.
- Any member of the Council or of a relevant committee or any University Officer acting within authorised delegation who has a financial interest in any company, institution or other entity which is, or is proposed to be, involved in any commercial activity of the University shall be required to:
  - not vote in respect of the commercial activity or the proposal;
  - not participate in any discussion by the Council or the relevant committee about the commercial activity or the proposal.
- The register of commercial activities 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 Minister or the Treasurer.

## Appendix A – Checklist for Commercial Activity Evaluation & Risk Assessment

1. Identify:
  - a) The nature of the activity and the parties involved;
  - b) The structure proposed to facilitate the activity;
  - c) The expected term or duration of the activity;
  - d) The cost and benefits to the University of the activity;
  - e) Accounting & reporting arrangements
  - f) Contributions of any third parties;
  - g) Benefits to flow to third parties;
  - h) Source of funds for the activity.
2. Determine:
  - a) The purpose for any third party's involvement in the activity;
  - b) How any third party was identified and selected;
  - c) What due diligence has been performed with respect to third parties, ie. Inquiries made and their outcome as to the third party's reputation, experience, financial and other resources, and legal status;
3. Assess and state:
  - a) The risks associated with the activity, e.g.
    - Financial
    - Probity/compliance risks
    - Liability/indemnity/insurance coverage
    - Reputation
    - Occupational Health & Safety
    - Fraud and Corruption
  - b) How those risks are to be managed;

4. State:

- a) Whether expert advice been obtained from sources external to the University;
- b) The nature of such advice.

#### Modification History

| Date: | Resolution no: | Authority: | Details: |
|-------|----------------|------------|----------|
|       |                |            |          |