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## GUIDELINES CONCERNING COMMERCIAL ACTIVITIES SECTION 26B OF THE UNIVERSITY OF SYDNEY ACT 1989

### 1 INTRODUCTION

#### Legislative framework

- 1.1 Under the *University of Sydney Act 1989* (“**the 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, whether alone or with others.
- 1.2 **University commercial activity** is defined in the Act to include any activity engaged in by or on behalf of the University in the exercise of the commercial functions of the University. University commercial activities are distinct from the University’s principal functions (specified in section 6(2) of the Act) for the promotion of its object, that object being the promotion, within the limits of the University’s resources, of scholarship, research, free inquiry, interaction of research and teaching and academic excellence.
- 1.3 The Act makes provision for Guidelines to be approved requiring specified processes and procedures to be followed in connection with University commercial activities.
- 1.4 These Guidelines have been made by the Senate and approved by the NSW Minister for Education and Training in accordance with the Act.
- 1.5 These Guidelines apply to commercial activities in which the University or controlled entities of the University participate.

#### Dictionary

- 1.6 In these Guidelines, the following expressions have these meanings:

<b>Act</b>	<i>University of Sydney Act 1989</i> (as amended)
<b>commercial activity</b>	As defined in section 26A of the Act, <b>commercial activity</b> means : <ol style="list-style-type: none"><li>(a) any activity engaged in by or on behalf of the University in the exercise of <b>commercial functions</b> of the University; and</li><li>(b) 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 these Guidelines to be a <b>commercial activity</b></li></ol>

<b><i>commercial functions</i></b>	<p>As described in section 6(3)(a) of the Act the <b><i>commercial functions</i></b> of the University means:</p> <p><i>“[the] 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”</i></p>
<b><i>controlled entity</i></b>	<p>As defined in section 16A(6) of the Act, this means:</p> <p><i>“a person, group of persons or body of which the University or the Senate has control within the meaning of a standard referred to in section 39(1A) or 45A(1A) of the Public Finance &amp; Audit Act 1983”</i></p>
<b><i>Delegate</i></b>	A person, committee, authority or officer of the University or other body to whom the Senate delegates a function pursuant to section 17 of the Act
<b><i>Delegations of Authority</i></b>	Delegations of authority made by the Senate from time to time pursuant to section 17 of the Act
<b><i>Proposal Document</i></b>	A document, including the preliminary assessment of the nature and level of Risk of a proposed commercial activity, prepared in accordance with clauses 3.1 or 3.2 of these Guidelines
<b><i>Register</i></b>	The Register of Commercial Activities maintained in accordance with Section 26C of the Act
<b><i>Responsible Officer</i></b>	A person or persons specified in the approval, given under these Guidelines, of a commercial activity to be responsible for ongoing monitoring and review of that commercial activity in accordance with section 5 of these Guidelines
<b><i>Risk</i></b>	<p>Any actual or contingent risk of:</p> <ul style="list-style-type: none"> <li>(a) adverse financial loss or consequences, including taxation consequences</li> <li>(b) legal liability including liability in relation to occupational health and safety and discrimination.</li> <li>(c) loss or damage to the University’s reputation</li> <li>(d) impairment of the University’s ability properly to conduct its principal functions under the Act</li> </ul>

- (e) real or apparent lack of probity, maladministration or corruption;

and any other risk that the Senate or the Vice-Chancellor determines is a Risk for the purposes of these Guidelines

**Sponsor** A person or organisational unit within the University (regardless of whether that person or organisational unit is a Delegate) who or which proposes that the University or a controlled entity should enter into a particular **commercial activity**.

## 2 WHAT IS A COMMERCIAL ACTIVITY?

### How this is defined in the Act

- 2.1 The term **commercial activity** is used in these Guidelines as having the same meaning as **University commercial activity** which is defined in the Act (see definition in 1.6 above).
- 2.2 **Commercial activities**, like other University functions, may be exercised within or outside the State including outside Australia.

### Indicators used to consider whether an activity is a **commercial activity**

- 2.3 In considering whether an activity is a **commercial activity** for the purposes of the Guidelines, the following indicators should be used:
  - (a) If the principal 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 for goods or services and the managers of the activity have a degree of independence in relation to production or supply of the goods or services and the price at which the goods or services are provided, 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**;
  - (d) If the activity falls within the principal functions of the University and involves no significant commercial or other Risk to the University, then it is **unlikely** that it is a **commercial activity**; and

in determining whether an activity is a **commercial activity** for the purposes of these Guidelines, a preliminary assessment should be made of the Risk involved in the activity.

### **Examples of activities that are considered to be *commercial activities***

2.4 Commercial activities may include:

- (a) the commercial exploitation of intellectual property rights;
- (b) project and consultancy services provided by the University to external parties for a fee;
- (c) the acquisition or sale of real estate not used predominantly for the provision of facilities for scholarship, research and teaching;
- (d) the leasing or licensing of real estate to third parties;
- (e) the leasing or licensing of real estate to bodies affiliated with the University (for example, student bodies) for the conduct of retail services; and
- (f) contract research.

## **3 ASSESSMENT, DOCUMENTATION AND APPROVAL OF A COMMERCIAL ACTIVITY**

### **Preliminary Assessment of Risk**

- 3.1 In the event that a proposed activity has a Sponsor, a proposal document should be prepared by the Sponsor and should include a preliminary assessment of the nature and level of Risk of the proposed activity (“***Proposal Document***”). In preparing the Proposal Document, the Sponsor should provide sufficient information for the activity to be adequately assessed in accordance with the factors detailed in 3.3 below, and with sound business principles. The Proposal Document should be provided to the Dean of the Faculty to whom the Sponsor reports, or any other person nominated by the Chief Financial Officer, for consideration. The Proposal Document and a written confirmation of support for the proposed activity from the relevant Dean of the Faculty, or any other nominated person, should be provided to the Chief Financial Officer.
- 3.2 In the absence of a Sponsor for a proposed ***commercial activity***, a Proposal Document including the preliminary assessment of the nature and level of Risk of the proposed activity should be prepared by the Chief Financial Officer, or any other person nominated by the Chief Financial Officer.

### **Assessment of Commercial Activities**

- 3.3 After the preliminary assessment of Risk has been completed in accordance with clause 3.1 or 3.2, as the case may be, and any Proposal Document and written confirmation from the relevant Dean of the Faculty or any other nominated person has been provided to the Chief Financial Officer, the proposed ***commercial activity*** should be assessed by the Chief Financial Officer for its overall feasibility and evaluated in accordance with the following factors to the extent that they are appropriate to the nature and level of Risk of the activity and to the type of activity:

- (a) consistency with:
  - (i) the object, and principal or other functions, of the University as prescribed in the Act;
  - (ii) the constitution of the controlled entity (if applicable); and
  - (iii) any National Governance Protocols in effect for higher education providers, including in relation to oversight of controlled entities;
- (b) the identifiable benefit to the University (irrespective of whether that is a direct financial or other benefit) based on sound business case evaluation principles and Risk and return considerations;
- (c) the source of funding (external, internal or a mixture of both) for the life of that activity;
- (d) appropriate procedures for management of the identified Risks in accordance with the nature and level of the identified Risks, including the potential for corruption;
- (e) insurance of identified Risk, on the basis that insurable Risk exceeding \$100,000 should be insured, if it reasonable to do so;
- (f) the suitability of the proposed structure for the commercial activity, from a legal, tax and accounting perspective;
- (g) accounting, auditing and reporting mechanisms which may be appropriate to the type of activity; and
- (h) compliance with any applicable:
  - (i) University policies relating to cost recovery;
  - (ii) competitive neutrality principles as outlined by NSW Treasury from time to time.

#### **Documentary requirements**

- 3.4 After the Chief Financial Officer has completed the assessment of the commercial activity as provided for in clause 3.3 and, if the Chief Financial Officer considers it appropriate to proceed, the transaction documents for the proposed **commercial activity** should be prepared and/or reviewed by, as appropriate, the Office of General Counsel or, at its request, the Director of the Business Liaison Office.
- 3.5 Depending on the type of activity involved, transaction documents will vary in length and complexity. The following matters should be addressed as appropriate:
  - (a) names and status of the parties (including ABN numbers);
  - (b) description or specification of the activity to be undertaken;
  - (c) when the activity starts and ends (including any option periods for renewal);

- (d) what each party is required to do in relation to that activity, including any milestones or deadlines;
- (e) the rights of each party (including default obligations and rights);
- (f) liability limits of parties – actual or contingent;
- (g) ownership, use or exploitation of any assets created out of that activity (including intellectual property rights);
- (h) accounting, auditing, reporting and record-keeping procedures (including those required under the Act, these Guidelines and the *State Records Act 1998*);
- (i) appropriate procedures for and on termination of the commercial activity (whether by notice or for breach);
- (j) insurance of Risk;
- (k) confidentiality requirements, including obtaining any third party consents to the inclusion of such information as may be considered necessary on the Register; and
- (l) any other matters that the Director of the Business Liaison Office, Chief Financial Officer, General Counsel or other professional or legal advisers recommend should be dealt with in the transaction documents.

**Seeking internal or external advice**

- 3.6 Advice from General Counsel and, where considered appropriate by the General Counsel, external legal advice must be obtained. Advice from the Chief Financial Officer and, where considered appropriate by the Chief Financial Officer, external accounting or other professional or business advice must also be obtained.

**Approval of transactions involving commercial activities**

- 3.7 Transactions involving *commercial activities* may only be approved by the Senate or by a Delegate of the Senate properly appointed in accordance with and subject to the principles and limits of the University’s Delegations of Authority - Administrative Functions.
- 3.8 A Sponsor of a *commercial activity* must not approve that activity, even if he or she normally has delegated authority to do so. The activity must be referred for approval to the Senate or a Delegate of the Senate who is more senior than the Sponsor, according to the Delegations of Authority - Administrative Functions.
- 3.9 Approval of a commercial activity may be given either conditionally or unconditionally and either as a preliminary or final approval.
- 3.10 Where a *commercial activity* is to be carried on by a controlled entity, then as a condition of approval of that commercial activity, the controlled entity must be required:
- (a) to comply with the requirements of the Act;
  - (b) to ensure that appropriate evaluation and risk management processes are followed by the management of the controlled entity;

- (c) to provide an annual report to the University in which any significant change in the commercial activity carried on and the Risk of the commercial activity is reported;
  - (d) to inform the Chief Financial Officer of any new or altered information which should be entered in the Register;
  - (e) to provide financial reporting according to Generally Accepted Accounting Principles, as amended from time to time; and
  - (f) to ensure that the accounts of the controlled entity are audited annually by the internal audit unit of the University or by an independent auditor.
- 3.11 Any approval given must specify the person or persons to be responsible for ongoing monitoring and review of the *commercial activity* in accordance with section 5 of these Guidelines (“*Responsible Officer*”).
- 3.12 Before approving a transaction involving a *commercial activity*, the Senate or Delegate must be satisfied that there has been compliance with the assessment and documentation procedures set out above.
- 3.13 In satisfying itself as to the matters referred to in clause 3.12 above, the Senate (or the relevant Delegate as the case may be) may rely on the advice of other appropriate authorised or qualified persons, including the Vice-Chancellor, the Chief Financial Officer or the General Counsel.
- 3.14 Where, in accordance with section 17 of the Act, the Senate wishes to delegate any of its functions in relation to commercial activities, the Delegate should have appropriate commercial experience or have access to the advice of an appropriately qualified person or persons.

**Senate members - real or apparent conflicts of interest re commercial activities**

- 3.15 Any Senate member (or Delegate to whom any functions in relation to a particular *commercial activity* have been delegated) who has a material personal interest in the commercial activity or a partnership, trust, company, other incorporated body, joint venture or controlled entity with or through whom or which *commercial activity* is to be carried on:
- (a) must disclose (and consent to entry into a Conflicts of Interest register to be maintained by the General Counsel of appropriate details recording) the full nature and extent of that interest;
  - (b) must comply with any University policy relating to conflicts of interest which may be in place, and as amended, from time to time;
  - (c) must not (subject to (d) below) be present at any meeting at which that commercial activity is being considered or participate in any discussion about whether to approve or participate in that *commercial activity*;
  - (d) may, notwithstanding (c) above, but *only* if the requisite majority of Senate Members present and voting (other than the Senate Member or Delegate disclosing the relevant interest) so resolves (and does so on the basis that the interest disclosed should not disqualify the discloser from being present at the said

meeting and participating in the discussion), be present at any meeting at which that commercial activity is being considered and participate in any discussion about whether to approve or participate in that commercial activity;

- (e) must not (subject to (f) below) vote for or approve that *commercial activity*;
- (f) may, notwithstanding (c) and (e) above, but *only* if the requisite majority of Senate Members present and voting (other than the Senate Member or Delegate disclosing the relevant interest) so resolves (and does so on the basis that the interest disclosed should not disqualify the discloser from voting for or to approve that commercial activity), vote for or approve that commercial activity.

### **Conflicts of Interest**

- 3.16 Without limiting clause 3.15 above, Senate Members and Delegates should take all reasonable steps to avoid conflicts of interest arising in relation to commercial activities. Throughout the assessment, documentation and approval process, the identification, disclosure and management of any real or apparent conflict of interest of any person involved in the approval process should be dealt with in accordance with any University policy relating to conflicts of interest which may be in place, and as amended, from time to time.

## **4 REGISTER OF COMMERCIAL ACTIVITIES**

### **Maintenance of the Register**

- 4.1 The University is required, pursuant to section 26C of the Act, to maintain a register of approved commercial activities ("*Register*"), in which the following details must be entered and kept:
- (a) a description of the *commercial activity*;
  - (b) details of all parties who participate in that activity;
  - (c) details of any appointment by or on behalf of the University to the relevant boards or other governing bodies; and
  - (d) details of any meetings at which relevant matters were considered and approved for the purposes of compliance with these Guidelines.
- 4.2 The Chief Financial Officer will be responsible for maintenance of the Register, and in particular, ensuring that the Register is reviewed annually.

### **Activities that are exempt from inclusion on the Register**

- 4.3 In accordance with section 26C(2)(a) of the Act, the following commercial activities are declared exempt from the requirements of clause 4.1 of these Guidelines:
- (a) any activity carried out by the University in exercise of its investment powers under Schedule 2 of the Act;



- (b) provision of non-award teaching programs by academic or administrative units of the University, for example, the Centre for Continuing Education, Centre for English Teaching and professional continuing education programs;
- (c) licensing or hire of University venues or facilities (such as the Seymour Theatre Centre, Great Hall, Darlington Centre) to external parties;
- (d) activities that involve the sharing of cultural, sporting, professional, technical or vocational services to members of the public (for example, theatre productions, music concerts, conferences), which have a principally break-even financial objective;
- (e) retail activities with an annual profit of less than \$100,000;
- (f) project and consultancy services provided by the University to external parties for a fee; and
- (g) receipt of licence fees and royalties.

#### **Access and confidentiality**

- 4.4 The following persons may inspect the Register upon request to the Chief Financial Officer:
- (a) Fellows of Senate;
  - (b) the Vice-Chancellor;
  - (c) Members of the University of Sydney Senior Executive Group;
  - (d) Members of the Internal Audit & Review Unit;
  - (e) General Counsel;
  - (f) Members of the New South Wales Auditor General's Office;
  - (g) the Responsible Officer (but only in relation to the commercial activity or activities for which he or she has been nominated the Responsible Officer);
  - (h) Manager, Risk Management Office; and
  - (i) any other person or body (or classes of people or bodies) authorised by the Senate.
- 4.5 All details entered in the Register are regarded by the Senate as being commercial-in-confidence and must be treated as commercially sensitive information.

## **5 MONITORING AND REVIEW OF COMMERCIAL ACTIVITIES**

### **Ongoing Monitoring**

- 5.1 For the purpose of enabling the Chief Financial Officer accurately to maintain the Register, the Responsible Officer for each particular *commercial activity* should:

- (a) monitor the *commercial activity* to ensure that it complies with:
  - (i) the University's legal rights and obligations;
  - (ii) the applicable policies of the University and, in particular, the policies referred to in clause 6.1 as amended from time to time;
  - (i) any conditions of approval imposed by the Senate or approving Delegate;
- (b) provide the Chief Financial Officer with information to ensure that the information on the Register is complete and accurate; and
- (c) notify the Chief Financial Officer of any significant changes to an activity, including Risk and insurance coverage as and when these occur.

**Review**

- 5.2 The Responsible Officer for each particular *commercial activity* is responsible for causing a review of that activity to be carried out at least once every 3 years, 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) identify any significant changes to that *commercial activity*, including changes to the Risks (whether or not identified in the evaluation process).
- 5.3 The Responsible Officer for each particular *commercial activity* must:
- (a) recommend what, if any, action should be taken in light of each review carried out pursuant to clause 5.2; and
  - (b) provide a copy of that review, and any recommendations, to the Chief Financial Officer.

**6 UNIVERSITY POLICIES AND PROCEDURES**

- 6.1 In applying these Guidelines, reference should be made as appropriate to any applicable University policies and procedures which may be in place from time to time in relation to any one or more of the following:
- (a) Codes of Conduct relating to officers and staff of the University;
  - (b) Corruption Prevention and Reporting;
  - (c) Delegations of Authority;
  - (d) Financial and Accounting Policies (Manual);
  - (e) Intellectual Property Rule;
  - (f) Occupational Health and Safety Policy;

- (g) Outside Earnings for Academic Staff;
- (h) Conflicts of Interest;
- (i) Risk Management Policies and Guidelines; and
- (j) Investment Management Policies and Guidelines.

## **7 CONTROLLED ENTITIES**

### **Legislative Framework**

- 7.1 Section 16A(1) of the Act provides that the Senate must ensure that a controlled entity does not exercise any function or engage in any activity that the University is not authorised by or under the Act to exercise or engage in, except to the extent that the Senate is permitted to do so by the Minister under section 16A of the Act.
- 7.2 The Senate may seek authorisation from the Minister, under section 16A(2) of the Act, to authorise a controlled entity to exercise a function or engage in an activity of the kind referred to in section 16A(1) of the Act.

### **Compliance with National Governance Protocols**

- 7.3 The Senate is required to comply with any National Governance Protocols in effect from time to time for higher education providers.

**Dated:**

**Approved by Senate Resolution:**