

# Commercial Activities Policy

## Section 1 - Definitions

(1) For the purpose of this Policy:

- a. Act means the [Southern Cross University Act 1993](#) (as amended).
- b. Authorised Negotiator is the University Staff member nominated by the Relevant Cost Centre Head to undertake negotiations with a third party in relation to a Commercial Activity.
- c. Commercial Activity means a University commercial activity of a kind prescribed in Sections (8), (12) and (13) of these Guidelines as a commercial activity.
- d. Delegate is a person, committee or other entity to which the University Council delegates a function pursuant to Section 17 of the [Act](#) and these Guidelines from time to time.
- e. Registrar is the Office of the Executive Director and Vice President Corporate Services.
- f. Register means the Register of Commercial Activities referred to in Section (38) to (41) of these Guidelines.
- g. Risk Analysis means the risk analysis which identifies and measures the risk associated with the proposal and states how the risks will be managed.
- h. Risk(s) is a possibility, chance or likelihood of harm, hazardous loss, actual or contingent including without limitation:
  - i. adverse financial or tax consequences to the University;
  - ii. risk of incurring a legal liability;
  - iii. risk of loss or damage to the University's reputation;
  - iv. impairment to the University in conducting its principal functions under Section 6 of the [Act](#);
  - v. risk of adverse tax or duty consequences of the University;
  - vi. risk of corruption;
  - vii. any other type of risk determined by the University Council to be risk for the purposes of these Guidelines. University Council or the Vice Chancellor may prescribe what is a Risk through policies, procedures and directives from time to time.
- i. Proposal means any proposal for the University to participate in a commercial activity.
- j. Total Contribution means the total value of financial or other resources, (including, without limitation, in kind or human resources) - whether actual or contingent - of any description that the University will contribute to a commercial activity over the whole of its life (including any renewal term).

## Section 2 - Policy Statement

### Part A - Policy Declaration

(2) All New South Wales universities have powers to undertake commercial activities. These commercial activities are distinct from a University's principal functions of teaching and research. Section 6(2) of the [Southern Cross University Act 1993](#) prescribes the principal functions of the University. Section 6(3) prescribes its other functions, including its commercial activities.

(3) Commercial activities are an important part of a university's research and development role, links to industry, contribution to national, state and regional economic advancement and a university's financial viability. Commercial activities are required to be established and undertaken prudently within clear, transparent and systematic arrangements.

(4) Under the [Southern Cross University Act 1993](#) ("the Act") the University has power to undertake commercial activities as defined in the Act.

(5) The [Act](#) requires the University to have guidelines, policy and procedures for the development and conduct of commercial activities, in order to achieve optimal benefits and minimisation of Risks to the University ("these Guidelines").

(6) These Guidelines have been made by the University Council and approved by the NSW Minister of Education and Training in accordance with Section 21B of the [Act](#).

## **Part B - Policy Description:**

### **Objectives**

(7) The purpose of these Guidelines is to provide a set of principles and processes for the evaluation, approval and monitoring practices of commercial activities of the University. These Guidelines are supported by and are to be read in conjunction with other University policies, procedures and manuals.

### **Scope**

#### **General Indicia of Commercial Activities**

(8) While it is not possible to prescribe exhaustively in these Guidelines what might come under the heading of a Commercial Activity, the following general criteria apply in determining what might be a Commercial Activity:

- a. Does the principal purpose of the activity involve the commercial exploitation, development or provision of University property, facilities or resources to members of the public (including corporations)?
- b. In particular, is the existence of the unit undertaking the Commercial Activity dependent upon the funding to be derived from that activity?
- c. Does the Commercial Activity involve user-charges for goods and services?
- d. Do managers of the Commercial Activity have a degree of independence in relation to production or supply of the good or service and the price at which it is provided?
- e. Does the Commercial Activity involve the establishment of a joint venture with one or more other parties that involves the commitment of University resources- whether actual or contingent?
- f. Other than an investment activity contemplated by Schedule 2 of the [Act](#), does the activity, regardless of what it is, involve the commitment of University finances or other resources?
- g. Even when a Commercial Activity exists primarily for the purpose of providing facilities for students and staff, it may be a commercial activity or may contain a significant commercial component that should be subject to the Guidelines.

(9) Specific activities that are Commercial Activities under these Guidelines:

- a. The exploitation of intellectual property rights in which the University has or claims a legal or equitable interest.
- b. Any activity involving the University establishing or acquiring a controlled entity except for the purpose of investing University funds as contemplated by Schedule 2 of the [Act](#).
- c. All joint ventures with a third party.

- d. Any agreement with a third party (other than a student) for the provision of teaching services in consideration of a fee, regardless of whether:
  - i. the teaching program is an award or non-award program of the University;
  - ii. the fee is paid by the third party or students;
  - iii. students will be enrolled as student of the third party or of the University.
- e. Consultancy services provided by the University (through its staff) to external parties for a fee.
- f. The acquisition or sale of real estate not used primarily for teaching or research purposes.
- g. The lease or licensing of real estate to third parties.
- h. The lease or licensing of real estate to bodies affiliated with the University where the term of that licence or lease exceeds 21 years.
- i. The development, promotion or exploitation of educational services through or jointly with another education provider.
- j. Any activity even if it is a specific activity referred to below as not being covered by these Guidelines -that involves a Total Contribution exceeding \$200,000.

### **Specific activities that are not covered by these Guidelines**

(10) Activities excluded from coverage by the Guidelines are only those that are clearly not commercial and involve no significant Risk to the University (such as publicly funded core higher education teaching and research).

(11) The following activities are not covered by these Guidelines, unless they involve the commitment of the University financial or other resources exceeding a \$200,000 Total Contribution. However, they will still be subject to evaluation, Risk assessment and approval processes prescribed elsewhere, for example, the University's Purchasing Policy, the Delegations of Authority and these Guidelines (where applicable).

- a. The acquisition of services, facilities, equipment or other assets by or on behalf of the University.
- b. The sale or provision of services, facilities or equipment to academic or administrative units within the University.
- c. The casual hire of the University venues or facilities that are managed centrally through an administrative unit.
- d. 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.
- e. Any research activity that does not involve the exploitation of intellectual property rights.
- f. Any research activity funded by National Competitive Grants.
- g. Any activity conducted or managed by a controlled entity of the University which has its own Board of Directors and is subject to the Corporations Act.
  - i. The Board of Directors of controlled entities are responsible for ensuring that evaluation, risk management and accountability processes are in place, and that these are consistent with the requirements of the [Act](#) in relation to commercial activities.
  - ii. The University Council is responsible for approving, monitoring and overseeing controlled entities. The third party has been made aware of the University's obligations under the [Act](#) and these Guidelines.
- h. Any activity that involves development, promotion, staging or exploitation of cultural, sporting, professional, technical or vocational services to members of the public, for example theatre productions, music concerts, conferences and so on.
- i. Any activity involving the management, maintenance, restoration or improvement of University lands or buildings in accordance with any capital management program approved by the Council from time to time.
- j. Any activity involving the management, maintenance, restoration or improvement of other types of University assets, for example, libraries and museum collections.
- k. External funding of academic positions within the University.

- I. Charitable fundraising or sponsorship activities conducted by or on behalf of the University.

## Part C - Content and Implementation:

### What is a Commercial Activity?

#### Definition

(12) Section 21A of the [Act](#) describes a University commercial activity as:

"(a) any activity engaged in by or on behalf of the University in the exercise of commercial functions of the University; and (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 the Guidelines to be a University commercial activity."

(13) Section 6(3)(a) of the [Act](#) describes the commercial functions of the University as follows:

"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. "

(14) Commercial Activities like other University functions may be carried on outside or anywhere within Australia. See Section 6(4) of the [Act](#).

### General Compliance Principles for Evaluation of a Proposal and a Commercial Activity

#### Introduction

(15) Each Proposal must be subjected to an evaluation, costing analysis, quality assurance assessment, due diligence review, and Risk assessment in accordance with these Guidelines and if as required, any other policies and procedures of the University.

(16) The following documents which are available on the University intranet at the sites indicated, will assist in complying with the evaluation requirements for the purpose of these Guidelines:

- a. Guidelines for the Preparation of Risk Assessments for Commercial Activities - See Section 6(4) of the [Act](#).
- b. Due Diligence Guide - Request documents from [SCU Legal Office \( \[legal@scu.edu.au\]\(mailto:legal@scu.edu.au\) \)](#)
- c. Business Plan Guide
- d. Quality Assurance Schedule within the Quality Guidelines for Offshore and Collaborative Programs
- e. NSW Government Policy Statement on the Application of Competitive Neutrality, January 2002 and Guidelines for Pricing of User Charges

#### Evaluation of a Proposal

(17) The University Council shall establish policies and procedures for evaluation, costing and Risk identification of a Proposal and a Commercial Activity, which incorporates the following principles and purposes:

- a. The Proposal and Commercial Activity must be 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;

- b. the Proposal and the Commercial Activity must come within the principal or other functions of the University as prescribed in the [Act](#) or other legislation;
- c. Where applicable, the Proposal and the Commercial Activity must comply with the competitive neutrality principles (as outlined in NSW Treasury publications: Policy Statement on the Application of Competitive Neutrality, January 2002 and Guidelines for Pricing of User Charges) marked as "Annexure E" to these Guidelines and recommend an appropriate level of funding from the University required to implement the Commercial Activity or carry on the commercial activity;
- d. an analysis of risks and risk management procedures must be carried out for the Proposal and the commercial activity;
- e. the structure of the Proposal and the Commercial Activity must be appropriate from a legal, tax and accounting perspective;
- f. the Proposal and Commercial Activity must not conflict with the principal function of the University;
- g. any third party with whom the University contracts must be subject to due diligence checks, and should have a proven good track record of reputation, capability in the area concerned and be financially solvent;
- h. identify the effect of the Proposal and the Commercial Activity on Intellectual Property ownership, and to recommend a strategy for protecting the University's legal and equitable interests in the Intellectual Property;
- i. the Proposal and Commercial Activity must be properly documented and any legal documents must be reviewed by the University Legal Counsel to ensure the University's legal rights and interests are protected;
- j. assess the insurance coverage requirements and limitations and make recommendations as to appropriate risk management requirements for the Proposal and the commercial activity;
- k. certify the Proposal as having satisfied the feasibility, due diligence and Risk analysis requirements.

## **Approval of commercial activities**

(18) The University Council may delegate authority, in accordance with Section 17 of the [Act](#), to approve commercial activities.

(19) Approvals may be given conditionally or as preliminary or final approvals.

(20) The University Council or the relevant Delegate (as the case may be):

- a. must be satisfied that the evaluation, Risk assessment and where appropriate, independent cost analysis and documentation processes set out in these Guidelines and, as appropriate, any other University policies or procedures, have been complied with;
- b. must be satisfied that any third party has been made aware in writing of the University's obligations under the [Act](#) and these Guidelines with respect to commercial activities;
- c. must be satisfied, where a conflict of interest has been identified, that it has been dealt with, or can be managed, according to University policies, procedures and any relevant legislation;
- d. where final approval is involved, be satisfied that any legal documents have first been reviewed or prepared by, as appropriate, the University Lawyer;
- e. is entitled to rely on the advice of the Vice Chancellor or other authorised Delegate in meeting the compliance requirements of these Guidelines.

## **Governance and Documentation**

### **Governance**

(21) The University Council shall establish policies and procedures for governance and documentation, which incorporate the following principles for any Proposal and Commercial Activity:

- a. to recommend the corporate governance provisions, (including appointment of directors and managers, control mechanisms in the Constitution or other constituent documents of the entity, and in any transaction documents between shareholders, partners, joint venturers or participants) for the Proposal and the commercial activity;
- b. to select the appropriate tax, financial and legal structure for the Proposal and the Commercial Activity;
- c. to prepare or supervise the preparation of the legal documents appropriate for the Proposal and the Commercial Activity;
- d. to set up tax, accounting and auditing procedures and requirements for regular reporting to the University Council or its Delegate which are appropriate for the Proposal and the Commercial Activity;
- e. to identify and recommend appropriate exit arrangements including termination and asset distribution and liability payment obligations which protect the interests of the University;
- f. to obtain insurance in accordance with any recommendations made under these Guidelines;
- g. to procure any University funding approved under these Guidelines;
- h. to obtain independent legal and/or accounting advice on the structure, tax and accounting consequences and on the documentation prepared under this paragraph of the investment by the University or if the University Council or its Delegate determines that the Risks are such that independent legal and/or accounting advice should be obtained;
- i. to certify that the governance provisions and documentation of the transaction documents for the Proposal and the commercial activity satisfy the requirements under these Guidelines.

### **Documentation - General**

(22) Any legal documents involving a Commercial Activity must be prepared or reviewed by the University Lawyer.

(23) The University's Manager, Insurance and Risk Management must be consulted in connection with any insurance requirements.

(24) Where appropriate, external legal advice, accounting, tax and other professional advice must be obtained on recommendation from the Executive Director, Corporate Services, University Lawyer or the Director, Financial and Business Services.

### **Documentation - Requirements**

(25) Legal documents must deal with the following matters:

- a. The names and status of the parties (including ABN);
- b. A clear description of the commercial activity to be undertaken;
- c. When the commercial activity starts and ends;
- d. What each party is expected to do in relation to that commercial activity, including obligations, duties, responsibilities, reporting, any milestones or timelines;
- e. The rights of each party;
- f. Liability limits of parties;
- g. Ownership, use or exploitation of any assets created out of that commercial activity (including intellectual property);
- h. Accounting, taxation, audit reporting and record-keeping procedures, (including those required under the [Act](#), these Guidelines and the [State Records Act 1998](#));
- i. Appropriate exit arrangements including termination, effect of termination, survival of some obligations, distribution of assets;
- j. Indemnity provisions;
- k. Insurance Requirements;

- l. Where appropriate, protection of personal information under the control of the University must be subject to the Privacy and Personal Information Protection Act 1998;
- m. Confidentiality requirements;
- n. Relevant laws applicable to the Proposal;
- o. Any other matters recommended by the Executive Director, Corporate Services, Director, Financial and Business Services, University Lawyer or other professional advisers.

## **University Council Delegations**

(26) The University Council may by resolution delegate any or all of its functions in relation to the commercial activities of the University (except this power of delegation) to any member of the University Council, a committee of the University Council or to any authority or officer of the University or to any other person or body prescribed by the University's By-Laws. In doing so, the University Council should ensure that the person or people to whom the functions are delegated have the appropriate commercial experience or have access to the advice or an appropriately qualified person.

(27) The University Council may rely on the advice of the Vice Chancellor or other authorised delegate in meeting the compliance requirements of these Guidelines.

(28) Notwithstanding Section (26), the University Council shall only delegate the power to give final approval to any proposal under which the University's the Total Contribution is in excess of \$1,000,000, to the Chancellor's Committee.

(29) A delegation by the University Council under this Sections (26) to (30) may limit the delegated authority by reference to the type of commercial activity, financial limits or any other criteria determined by the University Council.

(30) While the Board of Directors of controlled entities are responsible for ensuring that evaluation, risk management and accountability processes are in place, and that these are consistent with the requirements of the University's Act in relation to Commercial Activities, the University Council is ultimately responsible for the activities of controlled entities and the University Council must be satisfied that the Board of Directors and any other third party has been made aware of the University's obligations under the Act and these Guidelines.

## **Conflict of Interest and Corrupt Conduct**

### **Conflict of Interest**

(31) The University Council shall establish procedures to maintain a register of interests in accordance with procedures determined by the University Council.

(32) Under such procedures, each member of the University Council and any committee appointed by the governing body in relation to commercialisation of any of the University's resources ("a relevant committee") will be required to notify the Registrar of any interest in any company, institution or other entity which is involved in a commercial activity with the University. Council members, senior staff, sponsors and managers of commercial activities must declare from the outset any interest which has the potential to conflict with the commercial interests of the University, rather than waiting until a particular situation of conflict of interest arises. A notification may also be made generally or with respect to a particular Proposal.

(33) Under such procedures, the register of interests shall be required to be open to inspection by any member of the University Council, the Auditor General of New South Wales and any representative of the Minister or the Treasurer.

(34) Under such procedures, any member of the University Council or of a relevant committee who has an 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:

- a. not vote in respect of the Commercial Activity or the Proposal;
- b. not participate in any discussion by any body of the University about the Commercial Activity or the Proposal.

(35) Under such procedures, Council must ensure that the person approving a proposed activity under delegated authority must not also be the sponsor of the Commercial Activity.

### **Corrupt Conduct**

(36) The University is committed to the prevention of corrupt conduct, the promotion of ethical behaviour and the protection of its staff disclosing corrupt conduct, maladministration or serious and substantial waste.

(37) The University has established the following policies and procedures dealing with this issue:

- a. The Code of Conduct ;
- b. Protected Disclosures - Internal Reporting Policy ; and
- c. Fraud and Corruption Policy

### **Register of Commercial Activities**

(38) In accordance with Section 21C of the Act, the University Council has established a Register of Commercial Activities ("the Register") of the University including the commercial activities of any controlled entities. This Register is maintained by the Office of the Executive Director and Vice President Corporate Services and contains the following information ("the Registrar"):

- a. A description of the Commercial Activity. Commencement, termination and review dates are to be included within this description;
- b. Names of all the parties to that Commercial Activity;
- c. The names of any other people that the University appoints to the Board of other Governing Bodies overseeing that Commercial Activity;
- d. Details of any meetings in which relevant matters were considered and approved for the purposes of compliance with these Guidelines, (for example, University Council, Finance Committee and so on);
- e. Any conflicts of interest notified in relation to the particular Commercial Activity;
- f. Who approved that Commercial Activity, (for example, University Council, Vice Chancellor or other authorised Delegate).

(39) The Register shall be open to inspection by any member of the University Council.

(40) The University Council or its Delegate may authorise the Registrar to alter any details included in the Register if:

- a. the Registrar considers that the details are inaccurate or incomplete;
- b. there is a change in a proposal or in a commercial activity which necessitates a change in the details included in the Register.

(41) The Register is to be reviewed annually.

### **Review**

(42) Each commercial activity listed on the Register is to be fully reviewed (including but not limited to; financial, quality and legal compliance matters) at least once every three years. Such a review must identify any significant changes in the Commercial Activity and justify the commercial activity continuing for a further period, should that be the outcome.



## **Establishment and Review of University's Policies and Procedures**

(43) The University Council shall ensure that the University establishes and reviews as appropriate policies and procedures with respect to compliance with these Guidelines, including without limitation:

- a. Delegations Register;
- b. Intellectual Property Policy;
- c. The Code of Conduct;
- d. Protected Disclosures - Internal Reporting Policy;
- e. Risk Management Policy;
- f. Outside Work Policy;
- g. Fraud and Corruption.

## Status and Details

<b>Status</b>	Historic
<b>Effective Date</b>	14th August 2012
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<b>Head of Work Unit</b>	Mark Dixon Director, Governance Services
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