

**Guidelines concerning commercial activities in accordance with Part 6
Division 6 of the *Deakin University Act 2009***

Table of contents

Part 1 – Preliminary

1. Authorising provisions
2. Purpose and Commencement
3. Application of other laws
4. Definitions

Part 2 - Guidelines

5. Guideline 1 – prior to entering a commercial activity
 6. Guideline 2 – indemnities
 7. Guideline 3 – after entering a commercial activity
 8. Guideline 4 – register of commercial activities and report
 - 9-11. Guideline 5 – corporations and joint ventures
 - 12-16. Guideline 6 – university controlled entities
 17. Guideline 7 – audit of income and expenditure
 18. Guideline 8 – financial risk
 - 19-20. Guideline 9 – borrowing
 21. Guideline 10 – making assessments
-

1. Authorising provisions.

These Guidelines

- (i) are made pursuant to sections 53 to 56 and other provisions of the *Deakin University Act 2009 (the Act)*;
 - (ii) are interim guidelines made by the Minister pursuant to section 55(2) of the Act pending the approval by the Minister of guidelines submitted by the University; and
 - (iii) unless sooner revoked by the Minister, will operate until the Minister approves guidelines submitted by the University.
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2. Purpose

The Guidelines provide a set of principles and outline processes for the development and conduct of commercial activities of the University, in order to maximise the benefits and to minimise the risks to the University of undertaking such activities.

Commencement

These Guidelines take effect on the date of their publication in the Government Gazette.

3. Application of other laws

The Guidelines:

- (a) are subject to:
 - (i) the *Higher Education Support Act 2003* (Comm.) and any conditions required by the Commonwealth in respect of funding agreements under that or other Acts;
 - (ii) the provisions of and any directions or regulations under the *Financial Management Act 1994* (Vic) (or its equivalent) that apply to the University;
 - (iii) the provisions of the *Audit Act 1994* (Vic) (or its equivalent) that apply to the University; and,
 - (iv) other Acts or laws that apply to the University;
- (b) are consistent with University statutes or University regulations.

4. Definitions

Words or expressions defined in the Act have the same meaning for the purposes of these Guidelines. In these Guidelines, unless the contrary intention appears -

Auditor -General has the same meaning as in the *Audit Act 1994*¹.

commercial activity includes the provision or sale by the University (or the University in partnership, joint venture or association with others) of property, goods, services or things with a view to a profit, and the acquisition by the University of property, goods, services or things for that purpose, but does not include:

- (a) the supply of educational services to students including students whose enrolment is governed by the *Education Services for Overseas Students Act 2000*, or the awarding of qualifications, degrees or other awards;
- (b) an activity that is conducted by the University which primarily supplies goods and/or services to students and staff of the University:

¹ Section 3 of the *Audit Act 1994* defines the Auditor-General as "the Auditor-General appointed under section 94A of the *Constitution Act 1975*".

- (c) an activity that is conducted on a not for profit basis;
- (d) an activity undertaken principally pursuant to a grant from or funding agreement with the Commonwealth, or a State or Territory;
- (e) research, or research that leads to the provision, sale or acquisition of the property, goods, services or things that are the result or product of that research;
- (f) the exercise of any of the investment powers in sections 40, 41, 42, 45 or 46 of the Act;
- (g) the sale of cars or other items that were purchased by the University principally for the purpose of conducting the non commercial functions of the University;
- (h) contracts for delivery of a service by the University for a fee;
- (i) leases or licenses on arms length commercial terms which relate to the provision of goods or services to students and staff of the University;
- (j) an activity undertaken by a legal entity that is not a controlled entity of the University, such as a company in which the University has an interest;
- (k) any activity the Council decides should be exempted on the grounds that the activity will commit the University to expenditure of less than an amount deemed to be significant having regard to relevant accounting standards during the life of the activity, and will not expose the University to liability of more than that amount.

company means a company registered under the *Corporations Act 2001* and includes a company limited by guarantee;

controlled entity is one that satisfies the test of control in s.50AA of the *Corporations Act 2001*²;

corporation means a corporation as defined in s.57A of the *Corporations Act 2001*;

² Note: *Protocol 2 of the national governance protocols for higher education providers* requires the university to: (e) approve and monitor systems of control and accountability, including general overview of any controlled entities.

Section 50AA of the *Corporations Act 2001* states:

- "(1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (2) In determining whether the first entity has this capacity:
- (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
 - (b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (4) If the first entity:
- (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
 - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;
- the first entity is taken not to control the second entity."

entity has the meaning given in section 64A of the *Corporations Act 2001*,³

joint venture means an association of persons which includes the University for the purposes of a trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with the University agreeing to contribute money, property or skill;⁴

Minister means the Minister responsible for administering the Act;

partnership means the relation subsisting between persons carrying on business in common with a view to profit.⁵

Guideline 1 - prior to entering a commercial activity

5. No new commercial activity above may be entered into until Council is satisfied that the following assessments and measures have been undertaken, as appropriate to the nature of the activity:
- (a) that the activity is consistent with the mission or strategic direction of the University or its objects or functions;
 - (b) a financial analysis, that assesses the level of exposure of the University's resources and assets;
 - (c) a cost/benefit analysis including, as appropriate, the social costs and benefits;
 - (d) a risk assessment of the activity and development of associated risk management measures;
 - (e) whether the governance arrangements, legal structures and audit requirements are appropriate for the size, risk and type of activity;
 - (f) whether the terms and conditions of the arrangements and agreement are appropriate including those dealing with governance, representation of the University on any board or decision making group formed for the purpose of the undertaking, risk (including insurance), taxation, intellectual property, the

³ Section 64A of the *Corporations Act 2001* states a reference to an entity:

"(a) is a reference to a natural person, a body corporate (other than an exempt public authority), a partnership or a trust; and

(b) includes, in the case of a trust, a reference to the trustee of the trust."

⁴ This definition is a modified version of the High Court's comments in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR at 10, per Mason, Brennan and Deane JJ "The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may, on occasion, be blurred."

⁵ *Partnership Act 1958*, s.5

rights of the University to terminate its involvement in the activity and any indemnities;

- (g) a due diligence assessment in a form appropriate for/commensurate with the activity;
- (h) whether there are any actual or perceived conflicts of interest for University staff or University Council members that may arise from the activity, and measures to address those conflicts;
- (i) in respect to activities conducted overseas, appropriate legal advice in respect of relevant overseas laws, having regard to the nature of the arrangement; and
- (j) any consequences of termination of the commercial activity, including contractual arrangements.

Guideline 2 – indemnities

- 6. The University must consider whether any indemnity it provides which is considered significant by the University, having regard to relevant accounting standards, should be backed by an insurance policy which indemnifies the University to the same value where insurance coverage is available.

Guideline 3 - after entering a commercial activity

- 7. After entering a commercial activity, the University must regularly monitor the activity as appropriate to the scale and nature of the activity.

Guideline 4 – register of commercial activities and report

- 8. The University must -
 - (a) maintain a register of its current commercial activities which discloses:
 - (i) all university commercial activity approved under section 8(3)(h) of the Act, and commercial activities of the University's controlled entities which it considers sufficiently important or of sufficient interest to list on the register;
 - (ii) other commercial activities which it considers sufficiently important or of interest to list on the register;
 - (iii) the University's involvement in each of those activities, and University staff or Council members that occupy a board seat or some other office in connection with the activity and the directors' and officers' liability insurance or other insurance arrangements that apply to the activity;
 - (iv) the results of any assessment undertaken (if any) to determine whether the activity is meeting its purposes and objectives;
 - (v) whether the activity is ongoing or its anticipated termination date; and

- (b) provide a summary of the above matters in the annual report of its operations under section 45 of the *Financial Management Act 1994*, together with the matters listed under paragraph 12(c) of Guideline 6.

Guideline 5 – section 48 of the Act – corporations and joint ventures⁶

9. Before exercising any of the powers in section 48(1) of the Act to be a member of, form, manage or participate in a company, association, trust, partnership, or enter into a joint venture (collectively referred to as an **undertaking**), the University must assess whether:
- (a) it will be doing so for a purpose (not necessarily the main purpose) of engaging in a commercial activity; and/or
 - (b) in the case of the University being a member of, forming, managing or participating in a company, the main object of the company is to engage in a commercial activity, despite whether the activity meets the definition of 'commercial activity' in paragraph 4.
10. If the assessment under paragraph 9 concludes that the University -
- (a) will be engaging in a commercial activity, the University must comply with Guidelines 1 to 4;
 - (b) will be a member of, forming, managing or participating in a company not engaging in a commercial activity, the University must comply with Guideline 2;
 - (c) will be engaging in an undertaking other than through a limited company and will not be engaging in a commercial activity, the University must make an assessment of the University's exposure to liability and, if that assessment is greater than an amount deemed to be significant having regard to relevant accounting standards, must consider which, if any, of Guidelines 2 to 3, should apply to the undertaking.
11. Before being a member of, forming, managing or participating in a company, the University should have regard to:
- (a) who will hold the shares or other interests in the company; and
 - (b) the legal relationship between the holders of shares and the Council.

⁶ Section 48(1) of the Act states the University may be a member of, form, manage or participate in a company, association, trust, partnership, or enter into a joint venture for the purpose of one or more of the objects in section 48(2). Not all the objects in section 48(2) involve a commercial activity, and the following Guideline 5 makes that distinction.

Guideline 6 - University controlled entities

12. Where an entity is a controlled entity of the University, the University will:
- (a) ensure that any amendment to the entity's constitution has had the prior approval of the Council before the University or its representative shareholder or member can vote in favour of that amendment (or where the entity is a trust, partnership, joint venture or other form of entity, similarly ensure that any amendments to the relevant constituent document or agreement governing that entity have the prior approval of the Council);
 - (b) ensure that a report by the Auditor General or a registered company auditor (as appropriate) on the accounts of the entity is made every twelve months and is submitted to the Council within three months after the end of each twelve month period to which the report relates, where the entity's total annual income exceeds, or may reasonably be expected to exceed, \$1 million;
 - (c) state in the report referred to in paragraph 8(b) of Guideline 4, the name of any entity formed or acquired in the year to which that report pertains, and the reasons the Council decided that the acquisition was in the interests of the management or conduct of the affairs or concerns of the University;
 - (d) where it is required to comply with section 45 of the *Financial Management Act 1994*, include in its annual report under that section 45 a copy of the accounts of the entity prepared in accordance with the requirements of the *Financial Management Act 1994* as if the entity was a public body within the meaning of that Act in respect of the financial year ending during the period to which the University's annual report relates, or if it is not required to comply with that section 45 to forward to the Minister a copy of those accounts by 30 June of each year; and
 - (e) within 14 days of lodging any material report, statement or return in respect of the entity with the Australian Securities and Investments Commission under the Corporations Act or the Australian Taxation Office, other than a routine report of changes in company officers, minor changes in a company's constitution or the like, submit a copy of the report, statement or return to the Minister and Treasurer.
13. Where the University forms, participates in the formation of or is a member of, an entity to which paragraph 12 applies, the University will:
- (a) where the entity is a corporation, ensure the entity seeks the Auditor General's approval for the Auditor General to be appointed as its auditor under the *Corporations Act 2001*; and
 - (b) where the entity is not a corporation, ensure the entity seeks the Auditor General's approval for the Auditor General to be appointed as its auditor; and

- (c) where the Auditor General approves a request under sub-paragraph (a) or (b), ensure the entity appoints the Auditor General as its auditor⁷.

This paragraph 13 is subject to any contractual obligation which the entity has in relation to any other auditor prior to the entity becoming a controlled entity of the University.

14. The requirements of paragraph 13 are in addition to the requirements of the *Corporations Act 2001* or any other legislation governing the relevant controlled entity.
15. The University must ensure the Auditor-General and any person assisting the Auditor-General under this Guideline -
- (a) has right of access at all times to the books, securities, accounts and vouchers of an entity to which paragraph 12 applies; and
- (b) is provided with any information, assistance and explanations necessary for the performance of the duties of the Auditor-General or person in relation to the audit.
16. The University must regularly monitor the significant activities of controlled entities (being activities which it considers sufficiently important or of sufficient interest to list on the register kept under paragraph 8(a), or which it considers sufficiently important or of sufficient interest to monitor), which will include regular reports to Council. Any such monitoring shall also include any proposals governing the transfer of ownership of the University's controlled entities or investments in controlled entities (whether the transfer is to a third party or pursuant to an internal University reorganisation).

Guideline 7 – section 47 of the Act - audit of income and expenditure of the university

17. The University must establish and keep full and complete books and accounts of all moneys received and paid by the University and ensure that an audit of the income and expenditure of the University is made at such intervals as the Council directs, but not exceeding one year.

Nothing in Guideline 7 is intended to affect any responsibilities which may apply to the University and its employees under the *Financial Management Act 1994*, and in particular section 44 which requires the accountable officer of a public body to ensure that there are kept proper accounts and records of the transactions and affairs of the public body and such other records as sufficiently explain the financial operations and financial position of the public body.

Guideline 8 – financial risk

18. The University must establish policies or procedures for protecting itself against financial risks arising from 'financial arrangements' (as defined in the *Borrowing and Investment Power Act 1987* (Vic)), as appropriate to the nature of the University's operations and the risk tolerance of Council.

⁷ The Guideline does not authorise entities to breach current contracts.

Guideline 9 - borrowing⁸

19. When considering whether to exercise its powers under section 45 of the Act, Council must ensure that an assessment is undertaken of the financial and operational impacts of the potential borrowings over the expected term of the loan and the university's ability to meet the required loan repayments.
20. When submitting a request for borrowing approval to the Treasurer, the University must submit the following matters, subject to any additional matters or changes required by the Treasurer :
 - (a) projected financial statements (operating statement, cash flow statement and balance sheet) over the life of the loan;
 - (b) assumptions underpinning the forecasts;
 - (c) information relating to the purpose of the borrowings (including, but not limited to project details, construction timelines, costs, risk and risk management measures);
 - (d) details of the proposed financial accommodation being sought (including interest rates, terms and conditions); and
 - (e) proposed drawdown and repayment schedule.

Guideline 10 – making assessments

21. The University may determine the manner in which it makes any assessment required under any of the guidelines and the processes it undertakes to approach and complete the assessment, including the manner of recording the outcome of the assessment.

Signed and approved by the Minister for Higher Education and Skills

on

21 JAN 2011



⁸ This section is intended to clarify the information the University is required to submit to the Victorian Department of Treasury and Finance in order to process a borrowing approval by the Treasurer. In undertaking this work, the University will be subject to appropriate consideration of its obligations over the term of the loan.

