

Controlled Entity Guidelines

Section 1 - Rationale and Scope

- (1) The Council ("Council") of the University of New England ("University") has certain obligations under the University of New England Act 1993 ("UNE Act") in respect of its controlled entities: see Section 16A of UNE Act.
- (2) The Council has made rules ("Controlled Entity Rules") in relation to its controlled entities.
- (3) These guidelines have been made to supplement the Controlled Entity Rules and provide guidance, administrative details and procedures in relation to those rules.
- (4) These guidelines apply in relation to the controlled entities of the University and bind the University and, to the extent possible, also bind the officers, staff, contractors and other representatives of the University and its controlled entities.

Section 2 - Principles

Controlled Entity Guidelines

- (5) The Council makes the guidelines ("Controlled Entity Guidelines") set out below in relation to its controlled entities.
- (6) These Controlled Entity Guidelines must be read in conjunction with the Controlled Entity Rules and, to the extent of any conflict or inconsistency between the two, the Controlled Entity Rules prevail.
- (7) References to 'the University' in these Guidelines are to be construed as 'the University Council' except where provided for otherwise, whether expressly or by implication.

Guidelines

What is a "controlled entity"

- (8) The term "controlled entity" is defined in Section 16A(6) to mean a person, group of persons or body of which the University or Council has control within the meaning of a standard referred to in Section 39(1A) or 45A(1A) of the Public Finance and Audit Act 1983.
- (9) The relevant standard is AASB 127 Consolidated and Separate Financial Statements, which defines 'control' as:
 - a. 'The power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.'
- (10) This definition broadly reflects the definition of control in the Corporations Act 2001.
- (11) In each case, control is determined by reference not merely to the right a person can enforce, but to the practical influence that the person can exert. Control of another entity will always be a question to be decided in the light of the prevailing circumstances, depending on substance rather than form.
- (12) As it was put in one Court decision "the issue is whether one entity will do as it is told by another entity". As a

starting point, control generally will exist when an entity owns (directly or indirectly) more than half of the voting rights in an entity (eg where the first entity owns a majority of the shares, or is the sole member in relation to companies limited by guarantee).

(13) Control also exists when the first entity owns half or less of the voting power of an entity where there is:

- a. Power over more than half of the voting rights in the second entity because of an agreement with the other investors of the second entity;
- b. Power to cast the majority of votes at meetings of the governing board of the second entity;
- c. Power to appoint or remove the majority of the members of the second entity's governing board;
- d. Power under legislation or an agreement to govern the financial and operating policies of the second entity;
- e. Power to cast, or to control the casting of, a majority of votes that are likely to be cast at a general meeting of the second entity (eg if the first entity owns less than half of the voting shares in the second entity but, because the other shares in the second entity are owned by a wide number of investors, it has the capacity to have influence to determine the policy of the second entity);
- f. Where the control is demonstrated by the controlled entity acting in the interests of the controlling entity for a period of time. This can be seen as effective control, even if the mechanics of actual control are absent;
- g. Another indicator is where the first entity is able to access the internal records of the second entity on request (eg financial information, management forecasts, budgets);
- h. Dependence by the controlled entity on funding from or business of the first entity in order to continue its operations, but only where the first entity has a practical influence over the financial and operating policies of the second entity; and
- i. Power to approve or veto significant decisions regarding the second entity's financial or operating policies, taking into consideration:
 - i. the practical influence the first body can exert (rather than the rights it can enforce); and
 - ii. the practice or pattern or behaviour affecting the second body's financial and operating policies.

(14) The existence of control might also be specified by legislative or executive authority or by administrative arrangements where there is power to give policy directions. In determining whether a control relationship exists, the power of a central authority to appoint and remove members of the board may also be relevant.

Establishing a controlled entity

(15) A person who is seeking to propose the establishment or proposed acquisition of a controlled entity must consult with the University's Legal Counsel about the entity's structure. The structure may be a company (usually limited by guarantee or by shares), an incorporated association, a trust, a partnership or other appropriate structure and this may vary depending on the field and the country in which the entity will operate.

(16) Once the proposed form of the entity has been determined, a proposal ("Proposal") must be submitted to the Vice-Chancellor and Chief Executive Officer (or the Vice-Chancellor and Chief Executive Officer's delegate in accordance with clause 2.4 of the Rules, henceforth 'the Vice-Chancellor and Chief Executive Officer's delegate').

(17) The Proposal must summarize the operational and financial objectives of the controlled entity and contain detailed plans and budgets showing how the objectives are to be realised. It should contain, in a short form, the necessary background to put the project in context.

(18) The Proposal should also:

- a. Set out the proposed name of the controlled entity;
- b. Describe the structure of the controlled entity including the identity of the members/shareholders and their

respective obligations;

- c. Describe the controlled entity's proposed role, as well as any significant matters in relation to the structure, procedure or theory of the work for which the controlled entity will be responsible;
- d. Explain what the University and other stakeholders expect to receive in return for their involvement in the controlled entity (eg revenue streams, intellectual property, access to research results and commercialisation opportunities);
- e. Demonstrate that the proposed controlled entity will comply with all relevant regulatory requirements, including those imposed by the Tertiary Education Quality and Standards Agency;
- f. Set out the nature and value of the respective contributions to be made by the University and other stakeholders and whether they will change over time;
- g. Identify the proposed members of the governing body of the controlled entity and outline their expertise and experience;
- h. Describe the method of reporting by the governing body of the controlled entity to the Council;
- i. Identify any applicable milestones and internal reviews;
- j. Set out detailed budgeted costs for at least the 12 months following creation/acquisition;
- k. Include a summary of the estimated costs and resources it is anticipated will be expended up to a date 12 months, and a date 3 years, after creation/acquisition; and
- l. Describe and assess and quantify so far as possible the benefits and risks to the University.

(19) The Vice-Chancellor and Chief Executive Officer or the Vice-Chancellor and Chief Executive Officer's delegate, taking advice as required, will consider whether a suitable case has been made to establish a controlled entity. The Vice-Chancellor and Chief Executive Officer or the Vice-Chancellor and Chief Executive Officer's delegate may recommend the establishment of the controlled entity, require further information or additional work to be performed, or decide that a controlled entity should not be created.

(20) If the Vice-Chancellor and Chief Executive Officer or the Vice-Chancellor and Chief Executive Officer's delegate has given initial approval to the Proposal, a constitution for the controlled entity will need to be prepared. Legal assistance will ordinarily be obtained from the Legal Counsel in preparing this document.

Constitution

(21) The constitution of a controlled entity should contain, at the minimum, provisions as follows:

- a. Purpose: the objects of the controlled entity, which should include a responsibility to act in the best interests of the University, and an authorization for the directors to act in the best interests of the University (see Section 187 Corporations Act 2001).
- b. Membership/shareholding: The members of the controlled entity and procedures relating to admission to membership/issue of shares and the circumstances where membership will cease.
- c. Governance structure: the establishment of a board, and procedures for appointment and removal of the chairperson and directors. The constitution would generally also specify the powers and duties of directors and address matters concerning directors' interests.
- d. Limits of authority: Certain limits on the entity's authority by providing that the approval of the University, as controlling member, is required and a majority vote of directors - for example, to:
 - i. materially change the controlled entity's activities;
 - ii. acquire an interest in another legal entity which could expose the University to significant risk;
 - iii. borrow funds without the knowledge or agreement of the Vice-Chancellor and Chief Executive Officer or the Vice-Chancellor and Chief Executive Officer's delegate;
 - iv. issue shares, or options to acquire shares, to other parties;
 - v. trade in derivatives except forward exchange contracts to cover known foreign currency commitments;

- vi. create employee share schemes;
 - vii. act, or purport to act, as agents/partners of the University or represent that the University is underwriting its activities;
 - viii. commit University resources into contractual arrangements with other entities, except that a controlled entity may commit its own resources in contractual arrangements with another entity;
 - ix. grant equity in an associated company to directors or to employees of the entity or the University;
 - x. provide any loans to directors and entity staff or associates of directors and entity staff;
 - xi. provide benefits to directors, in their role as director, other than directors' fees;
 - xii. charge, pledge or otherwise encumber its assets.
- e. Compliance with the University's Controlled Entity Rules and Controlled Entity Guidelines: a requirement to observe the University's Controlled Entity Rules and Controlled Entity Guidelines.
- f. Procedures for the operation of the board: Procedures addressing minimum legal requirements for the operation of a board including provisions relating to director's meetings. Each board should have at least 3 directors some of whom are appointees from outside the University (i.e. not members of the Council or members of staff or students of the University). The University Council should be empowered to appoint a majority of the directors, and to delegate this power to the Vice-Chancellor and Chief Executive Officer. Directors should have the skills and expertise appropriate to the entity's requirements. These may include:
- i. Subject matter expertise;
 - ii. Management expertise;
 - iii. Commercial experience/expertise;
 - iv. Ability to provide access to networks of people;
 - v. Marketing expertise;
 - vi. An appropriate mix of gender and background;
 - vii. Potential to avoid any likely conflict of interests;
 - viii. Time availability; and
 - ix. Other relevant qualities as determined by the University/or as recommended by the entity's board.
- g. Care should be taken to ensure that the board collectively has the requisite skills properly to fulfil its responsibilities.
- h. Appointments will be for up to a period of five years, and reappointment will be subject to satisfactory performance and continuing suitability of the appointee, to be assessed by the board. In addition to meeting any requirements under the constitution, a controlled entity should consult the Vice-Chancellor and Chief Executive Officer in relation to all appointments and reappointments.
- i. Management structure: The role and appointment of a managing director and company secretary (and other key positions, as required).
- j. Accountability arrangements: Annual reporting and accountability to the University, addressing requirements specified in the Controlled Entity Rules and these Controlled Entity Guidelines.
- k. General meetings: Provisions relating to the calling and holding of general meetings and the voting of members, including the respective voting rights to be enjoyed by the University and the other members.
- l. Taxation Office and other reporting requirements: Specific clauses that the constitution of a non-profit company must contain to be eligible for tax concessions as required by the Australian Taxation Office. Reporting requirements to bodies other than the University should be identified.
- m. Audits and accounts: The requirement of the directors to cause the controlled entity to keep written financial records in relation to the business of the controlled entity and, if relevant, to have those financial records audited in accordance with the requirements of any applicable NSW or Commonwealth legislation.
- n. Arrangements for winding-up or sale of a controlled entity and requirements of the members upon winding up, such that the University, as controlling member or shareholder, is empowered to require or approve the sale or

winding up of a controlled entity. The board and managing director will normally be responsible for ensuring that the sale or winding up occurs in accordance with the constitution of the controlled entity, and in accordance with any requirements specified by the University.

- o. Constitutional amendments: Amendments to the constitution will be made by the members in general meeting. The University, as controlling member, should have the power to approve any amendments to the constitution of a controlled entity on the recommendation of its board.
- p. Indemnity: The extent to which the controlled entity indemnifies its directors and secretary for liabilities incurred by those persons as officers of the controlled entity.

Management and governance of controlled entities

(22) The University recognises the need to maintain a balance between protecting the University's interests in terms of benefits and risks associated with the relationship, and providing controlled entities with the autonomy required to achieve their stated objectives. In order to achieve this balance, a controlled entity must, as a minimum:

- a. Adopt and evaluate appropriate governance principles, including the following:
 - i. Recognize and disclose the respective roles and responsibilities of board and management;
 - ii. The composition, size and commitment of the board should be adequate to discharge its responsibilities and duties;
 - iii. Actively promote ethical and responsible decision-making. In relation to companies limited by guarantee, responsible decision making includes being aware of and acting in furtherance of the objects of the company. To be successful, companies need to have regard to their legal obligations and the interests of a range of stakeholders including shareholders, employees, business partners, creditors, consumers, the environment and the broader community in which they operate. It is important for companies to demonstrate their commitment to appropriate corporate practices and decision making.
 - iv. Have a structure to independently verify and safeguard the integrity of the company's financial reporting.
 - v. Respect the rights of members and facilitate the effective exercise of those rights.
 - vi. Establish a sound system of risk oversight, risk management and internal control.
 - vii. Ensure that the level and composition of remuneration is sufficient and reasonable and that its relationship to corporate and individual performance is clear.
- b. Adopt a board charter against which the performance of the board as a whole and that of individual members, is regularly assessed.
- c. Document and keep updated, a corporate or business strategy containing achievable and measurable performance targets.
- d. Seek the approval of the Vice-Chancellor and Chief Executive Officer or the Vice-Chancellor and Chief Executive Officer's delegate in relation to the appointment and termination of appointment, of directors appointed by the University (University Directors), based on nominations or recommendations made by the Dean of the Faculty or other part of the University most associated with the controlled entity. Directors must possess the expertise and experience necessary to provide proper stewardship and control, and must comprise, where possible, at least some members who are not members of the Council, the staff, or students, of the University.
- e. Inform the University on an ongoing and immediate basis of issues such as: potential material exposures; changes of directors; identified conflicts of interest and related party transactions. It must also inform the Council in advance of any proposed agreements with University staff. The controlled entity must also maintain a register of pecuniary interests of staff in line with the expectations of the Auditor-General of NSW.
- f. The University may, in negotiation with a controlled entity, enter into such agreements as are required from time to time to define aspects of the entity's relationship with the University which are not addressed in the entity's constitution, which may include:
 - i. principles and procedures for dealing with key issues and areas of common interest to the controlled

- entity and the University (eg intellectual property);
 - ii. provision of services by the University to the entity or vice-versa;
 - iii. The application of specific University policies to the entity;
 - iv. risk management and insurance arrangements;
 - v. The University's interest in any relationships between a controlled entity and other entities, including other entities controlled by the University;
 - vi. in the case of a controlled entity which is not fully owned by the University, the University's relationship with the other members of the controlled entity;
 - vii. a dividend policy establishing the basis for payment of dividends to the University; and
 - viii. dispute resolution procedures.
- g. A controlled entity must comply with the University's Commercial Activities Guidelines, if it is engaging in commercial activity as defined in those guidelines.

Reporting by controlled entities

(23) The governing bodies of controlled entities must submit to the Council an annual report on the controlled entity's activities by each year (by a date specified by the Chief Operating Officer, in a format approved by the Chief Operating Officer from time to time. Information required in the annual report may vary according to the nature of the controlled entity but should include:

- a. a review of performance of the past year, as measured against the entity's approved objectives and key financial and non-financial performance indicators;
- b. current financial year or future year matters that influence the controlled entity's performance, including risks and opportunities and strategies adopted (or proposed) to manage them;
- c. a prognosis of performance for the next year, and longer term if appropriate;
- d. an analysis of the material business risks faced by the controlled entity, a description of the risk profile and a summary of risk management strategies and practices including those related to fraud;
- e. the annual audited financial statements (if not audited, then the board approved financial report);
- f. financial targets and projections for a three year forecast;
- g. a list of directors and the number of meetings each attended;
- h. a description of major investing and financing activities;
- i. disclosure of all benefits provided to directors and all transactions with entities in which directors have a financial interest;
- j. details of any indemnity or insurance against a liability given to a current or former officer;
- k. disclosure of fringe benefits provided to University staff (dollar value, description of the fringe benefit and name of each recipient), the reporting of which may be necessary for fringe benefits tax purposes (where generally a fringe benefit is non-cash remuneration provided to an employee by an employer or an associate of the employer in respect of that employment);
- l. details of any significant change in the commercial activity carried on and the risk of the commercial activity;
- m. disclosure of all agreements entered into with University staff;
- n. disclosure of any related party transactions;
- o. significant events that have occurred during the year;
- p. information about the controlled entity's subsidiaries (if any); and
- q. any other matters that the board, acting reasonably, considers relevant.
- r. The governing bodies of controlled entities must inform both the University's Director Audit and Risk and the University's Chief Legal and Governance Officer promptly and on an on-going basis in relation to:
 - i. any change of director;

- ii. details of any indemnity or insurance against a liability given to a current or former officer; and
- iii. disclosure of benefits, including non-cash benefits provided to individual University staff (as distinct from benefits accruing to the University generally by virtue of the activities of the controlled entity).
- s. The Council may also request such reports on other matters as the Council sees fit.
- t. A controlled entity will be subject to internal audit and external audit arrangements as specified in its constitution or by agreement with the University. The controlled entity must make its financial and other records available to the University's internal auditors, upon request.
- u. The accounts of each controlled entity will be reported in the consolidated accounts of the University to enable the University to meet its legal reporting obligations in relation to fully owned entities.

Conflicts of interest

(24) Directors of a controlled entity appointed by the University (University Directors) must disclose any conflict between their personal interests and those of the controlled entity or between their duties to the controlled entity, the University or another entity. In such cases, disclosures must be made at the first available opportunity to the Chair of the controlled entity and if necessary, the Vice-Chancellor, for a decision as to what action should be taken to avoid or deal with the conflict.

(25) A conflict of interest exists when there is a conflict between the duties owed by a person in their capacity as a director and:

- a. the personal interests of the director. This includes the situation where there is a real, sensible possibility that the director is or is likely to be influenced in the performance of their duties as a director by the competing personal interests; or
- b. the duties owed by the director to another entity.

(26) Unless the board decides otherwise, the director must not be present during any discussion by the board relating to the matter or during the vote on the matter, or otherwise take part in the decision of the board. Any such action should be recorded in the board minutes.

(27) The board or chair with the board's concurrence, may determine that the director who has a conflict of interest should be:

- a. authorised to continue his or her duties because, for example, the potential for conflict is minimal;
- b. requested to take action to remove the conflict or such other action as is seen to be appropriate under the circumstances;
- c. requested to sever the connection giving rise to the conflict.

(28) The conflicted director must not be present during any such deliberation or take part in the making of such a decision. The chair or the board may take external advice on any matter as they consider necessary.

(29) Similar principles apply in the case of members of the governing bodies of controlled entities (other than directors) and should be raised with the University's Chief Legal and Governance Officer for guidance.

Remuneration of directors

(30) Remuneration of directors, as may be recommended by the relevant entity's board, should be determined in consultation with the University. Remuneration should consider normal industry practice, the needs of the board to attract/retain relevant skills, its relationship to performance is clear and any other relevant matters. In some cases, entities may have volunteers as directors and remuneration may not be appropriate.

(31) Remuneration of directors, together with any other benefits provided to directors, must be disclosed in the annual financial statements and annual report provided to the University.

(32) The board will determine the remuneration for the managing director (if applicable) and this must be disclosed in the annual report to the University.

Financial reporting

(33) The controlled entity must provide annual statements to the University for inclusion in the University's annual accounts. These statements should segregate income and where relevant expenditure which may benefit the University (for example income or expenditure relating to research or philanthropic gifts or bequests). This is required for the University to meet its statutory reporting requirements. The format and timing of the provision of the statements will be determined by the Chief Operating Officer. Where controlled entities have control over other entities, the draft consolidated annual accounts must be provided.

Controlled entity employees

(34) Staff employed in controlled entities are not employees of the University unless they are seconded from the University and their letter of appointment specifies that they will remain an employee of the University. Exceptions to these arrangements may be negotiated with the University.

(35) Controlled entities are responsible for establishing their own staffing policies and conditions for their employees. Arrangements should normally be made by the controlled entity to cover superannuation of their employees, (which may include membership for employees in Unisuper) but not employees of the University that are seconded to the controlled entity.

Insurance

(36) Each entity should manage its own risk. All controlled entities should carry, at a minimum:

- a. Directors and officers insurance as appropriate;
- b. Workers compensation and related injury insurance as required by law; and
- c. Public liability insurance as appropriate.

(37) The governing bodies of controlled entities should liaise with the Director of Audit and Risk to determine whether the entity and its directors and officers are covered under any of the University's insurance policies.

Procedures

(38) The Chief Operating Officer of the University has responsibility for managing implementation of and compliance with the Controlled Entity Rules and Controlled Entity Guidelines.

(39) The Chief Legal and Governance Officer of the University has responsibility for advising the Council and University in relation to the Controlled Entity Rules and Controlled Entity Guidelines.

Status and Details

Status	Historic
Effective Date	27th July 2015
Review Date	22nd December 2020
Approval Authority	Council
Approval Date	24th February 2012
Expiry Date	23rd December 2020
Unit Head	Kate McNarn Director Governance and University Secretary
Author	Brendan Peet
Enquiries Contact	Office of the Chief Legal and Governance Officer +61 2 6773 3729