

## THE MINISTER FOR TRAINING AND WORKFORCE DEVELOPMENT MINISTERIAL GUIDELINES RELATING TO COMMERCIAL ACTIVITIES BY TAFE COLLEGES 2017

Issued by the Minister for Training and Workforce Development to TAFE colleges under section 13 of the *Vocational Education and Training Act 1996*.

### Citation

These guidelines may be cited as the *TAFE colleges commercial activity guidelines 2017*.

### Interpretation

In these guidelines, unless the contrary intention appears –

**‘the VET Act’** means the *Vocational Education and Training Act 1996* as amended;

**‘college’** means a college established under section 35 of the VET Act;

**‘commercial activity’** means any activity undertaken by a Governing Council for the purpose of generating funds of the kind referred to in section 48 (b) of the VET Act;

**‘TAFE college’** is a term used to describe colleges as defined under the VET Act and throughout the *TAFE colleges commercial activity guidelines 2017*.

In these guidelines, unless the contrary intention appears, a term that is used in the VET Act and in these guidelines has the same meaning as is given to the term in the VET Act.

### Application of these guidelines

These guidelines apply with respect to the functions of the TAFE colleges and their Governing Councils in relation to the commercial activities undertaken by the college.

### Undertaking commercial activity

The Governing Council is to ensure that the TAFE College:

- includes proposed commercial activities in its strategic and annual business plans;
- where necessary, seeks legal and other advice (for example Departmental) when deciding to undertake commercial activities through contracts or business arrangements;
- seeks Ministerial approval before entering into ‘business arrangements’ as defined in Section 9 (4) of the VET Act;
- when considering commercial activities, implements risk management practices as set out in the Public Sector Commissioner’s Circular 2015/03 Risk Management and Business Continuity Planning; Western Australian Government Risk Management Guidelines (RiskCover, Third Edition); Treasurers Instruction 812 Insurance; and Treasurers Instruction 825 Risk Management and Security; and
- considers impacts on other businesses (eg. private RTO fee for service market).

**Commercial activities outside Australia**

A Governing Council is not to proceed with any proposal to exercise its functions outside the States and Territories of Australia without first obtaining the approval of the Minister.

**Commercial activity Guidelines**

A Governing Council is to ensure that the TAFE College complies with the attached – *TAFE colleges commercial activities guidelines 2017*.

Dated this 3rd day of December 2017



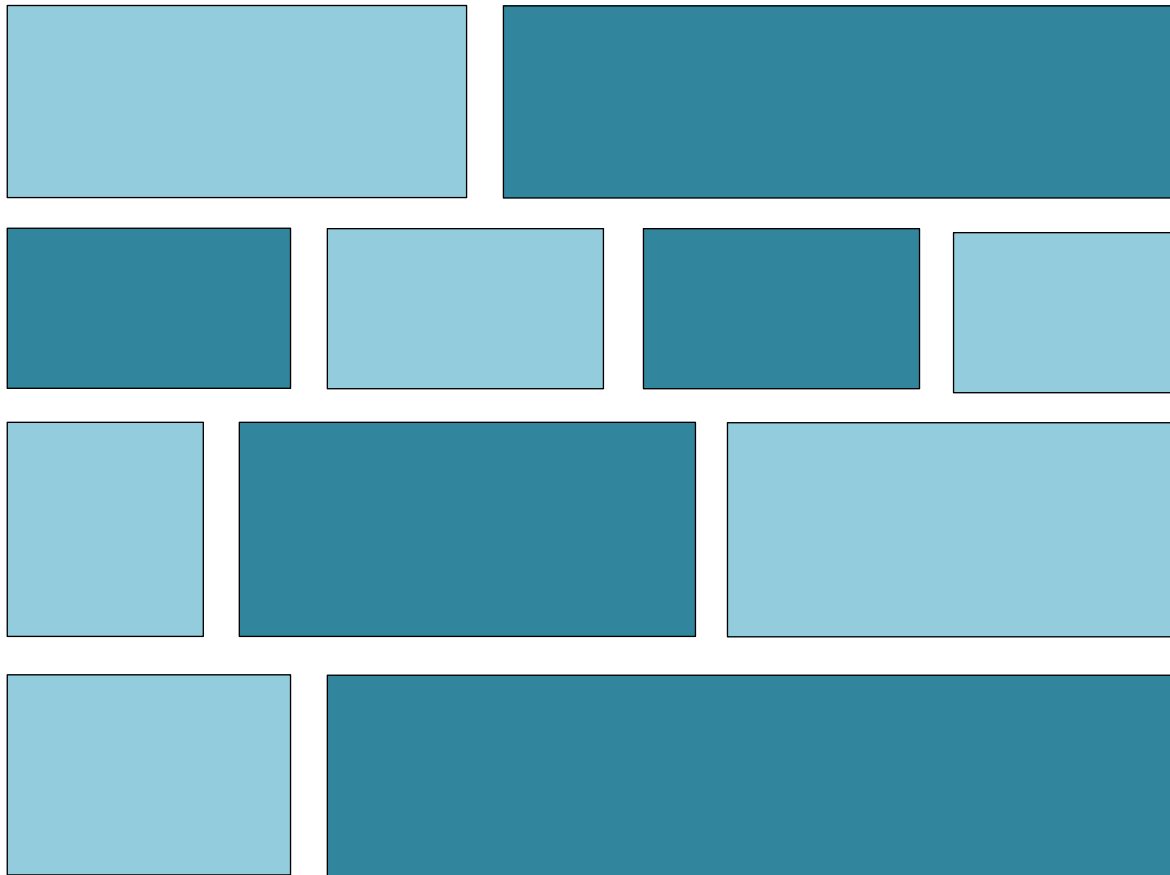
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**SUE ELLERY MLC**  
**MINISTER FOR EDUCATION AND TRAINING**



# Ministerial Guidelines

## TAFE colleges commercial activities guidelines 2017



# TAFE COLLEGES COMMERCIAL ACTIVITY GUIDELINES 2017

## 1. Background

The *Vocational Education and Training Act (1996)* ('the VET Act') authorises TAFE colleges to engage in commercial activities through fee-for-service contracts to provide products, consultancy or other services, and by participation in business arrangements.

These Ministerial Guidelines for TAFE colleges' commercial activities entitled *TAFE colleges commercial activities guidelines 2017* includes details for implementation and replaces the previously issued *TAFE colleges commercial activities guidelines 2016*

## Scope

The *TAFE colleges commercial activities guidelines 2017* covers TAFE colleges' involvement in commercial activities where the college is the "seller" as permitted by their functions in the VET Act Section 37(1) and by the Minister's Delegations and Authorisations Instruments.

The guidelines do not relate to college contracts where the college is the "buyer" of services or goods that support their general operations, as covered by the State Supply Commission Act and related policies.

## Relevant legislation or authority

- Vocational Education and Training Act 1996.
- Financial Management Act 2006.
- Public Sector Management Act 1994.
- Treasurer's Instructions.
- VET (WA) Ministerial Instrument of Delegation (Colleges) No 1 of 2017.
- VET (WA) Ministerial Corporation Instrument of Authorisation (Colleges) No 1 of 2017.
- Economic and Expenditure Reform Committee – Handbook.
- Costing and pricing of Government services: Guidelines for use by agencies in Western Australian Public Sector.

## TAFE College involvement in domestic commercial activities

The VET Act provides for four paths by which TAFE colleges may engage in commercial activities:

- contracts to provide fee-for-service training programs - section 37 (1) (ba) and (bb);
- contracts to provide products, consultancy or other services - section 37 (1) (ca);
- commercial exploitation of intellectual property – section 37(1)(da); and
- participation in business arrangements - section 37 (1) (f).

#### 4.1 Fee-for-service training programs

The authority for colleges to provide training programs on a fee-for-service basis is conferred by section 37 of the VET Act - *Functions of a College*.

Excerpt from the VET Act

S.37(1) *The functions of a college are as follows —*  
(bb) *to provide vocational education and training on a fee-for-service basis;*

##### *Ministerial Approval*

Colleges are to detail proposed commercial activities in the annual business plan.<sup>1</sup>

The Minister may issue *Guidelines for the Annual Business Plan* each year regarding the detail required for commercial activities to be included in the college annual business plan.

For proposed commercial activities that arise after the annual business plan has been approved and have not been included in the plan colleges must:

- gain Governing Council approval and the Minister's approval if the contract value is over \$1 million over the life of the contract; and
- include an overview of all new contracts in the subsequent annual business plan.

#### 4.2 Contracts to provide products, consultancy or other services

Excerpt from the VET Act

S.37(1) *The functions of a college are as follows —*  
(ca) *to provide, for a fee or otherwise, or enter into contracts to provide, products, consultancy or other services in the course of, or incidental to, the provision by the college of vocational education and training;*

##### *Ministerial Approval*

Colleges are to detail proposed commercial activities in the annual business plan.

The Minister may issue *Guidelines for the Annual Business Plan* each year regarding the detail required for commercial activities to be included in the college annual business plan.

For proposed commercial activities that arise after the annual business plan has been approved and have not been included in the plan colleges must:

- gain Governing Council approval and the Minister's approval if the contract value is over \$1 million over the life of the contract; and
- include an overview of all new contracts in the subsequent annual business plan.

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<sup>1</sup> VET Act Section 44A(2) A college's business plan for a year must set out-  
(a) the vocational education and training that the college plans to provide in the year;  
(b) the other functions that the college plans to perform in the year; and  
(c) any other matters that are prescribed.

### 4.3 Intellectual Property

Colleges are also authorised by section 37(1)(da) of the VET Act to market their training expertise by the sale of services and commercial exploitation of intellectual property.

Excerpt from the VET Act

S.37(1) *The functions of a college are as follows —*  
(da) *to turn to account the vocational education and training expertise of the college by means of the sale of services and the commercial exploitation of intellectual property including the assignment and licensing of such property;*

When a college enters into a contract or business arrangement to provide training expertise, the TAFE college is to ensure that the contract or business arrangement addresses the assignment or licensing of intellectual property at commercial rates. It is important to not disadvantage the TAFE college or the Minister, both in the short term and long term (for example sharing or selling IP that will enable competitors to secure future contracts at the expense of WA industry).

#### *Ministerial Approval*

Colleges are to detail proposed commercial activities in the annual business plan.

The Minister may issue *Guidelines for the Annual Business Plan* each year regarding the detail required for commercial activities to be included in the college annual business plan.

For proposed commercial activities that arise after the annual business plan has been approved and have not been included in the plan colleges must:

- gain Governing Council approval and the Minister's approval if the contract value is over \$1 million over the life of the contract; and
- include an overview of all new contracts in the subsequent annual business plan.

### 4.4 Participation in business arrangements

The authority for colleges to enter into business arrangements is conferred under section 37(1)(f) of the VET Act - *Functions of a College*.

Excerpt from the VET Act

S.37(1) *The functions of a college are as follows —*  
(f) *with the approval of the Minister, on terms and conditions approved by the Treasurer, to participate in business arrangements relating to the provision of vocational education and training;*

Colleges should refer to the supplementary information attached to these Guidelines for additional information and advice regarding the use of contracts and business arrangements. (Attachment 1)

#### *Ministerial Approval*

Under section 37(1)(f) of the VET Act, **business arrangements** under this provision require the approval of the Minister on terms and conditions approved by the Treasurer.

## 5. Offshore activities

Only the Minister has powers under the VET Act to engage in offshore commercial activity.

Excerpt from the VET Act

### **S.9. Powers of the Minister**

(2) Without limiting subsection (1) the Minister may for the purpose of performing any function —  
(i) enter into contracts and arrangements with overseas organisations for the provision of vocational education and training and related services.

A TAFE college may enter into discussions regarding potential opportunities but it must be made clear that no agreement can be made without the Minister's approval.

#### *Ministerial Approval*

The Minister has not delegated this power to colleges. If a college wishes to proceed with a commercial activity offshore, a business case must be submitted to the Minister for approval. It is expected that colleges will comply with the current "*Ministerial Guidelines for International Commercial Activities of TAFE Colleges*".

## Leasing out TAFE College facilities

The Minister has the power to lease out college facilities.

Excerpt from the VET Act

### **S.9. Powers of the Minister**

(2) Without limiting subsection (1) the Minister may for the purpose of performing any function —  
(f) authorise, by lease, licence or other arrangement, the use for commercial, community or any other purpose of any land, buildings, equipment, facilities or services used or provided for, or in connection with, the provision of vocational education and training as long as the use for such a purpose does not detract from the provision of vocational education and training.

Colleges are encouraged to make full use of their facilities and allow third party access in accordance with the *Facilities third party access policy*. (under development).

The Minister has delegated this power and authorised execution of contracts on behalf of the VET (WA) Ministerial Corporation with conditions and limitations.<sup>2</sup>

Where TAFE colleges identify opportunities to lease out TAFE facilities they are limited to arrangements where the total contract value is up to \$500 000 including the cost of outgoings and the contract period is less than 12 months including former and subsequent contracts. Departmental advice is available should it be required. The Department must be consulted for all other leasing contracts.

## Commonwealth agreements

With respect to the negotiation and decision making of Commonwealth contracts, agreements and grants Colleges must follow the processes outlined in the *Economic and Expenditure Reform Committee – Handbook*<sup>3</sup>.

<sup>2</sup> VET (WA) Ministerial Instrument of Delegation (Colleges) No 1 of 2017. Item 2.

VET (WA) Ministerial Corporation Instrument of Authorisation (Colleges) No 1 of 2017. Item 3.

## CONSIDERATIONS TO APPLY TO ALL COMMERCIAL DECISIONS/PROPOSALS

### 8.1 Risk management

Risk management is an important issue to be addressed by TAFE colleges when negotiating commercial activities.

The Auditor General has recommended that TAFE colleges<sup>4</sup>:

- determine whether they have the necessary authority before entering into any arrangement (e.g. assessing whether an arrangement meets the definition of a 'business arrangement');
- ensure that all arrangements are subject to proper business planning or cost benefit analysis;
- ensure that all arrangements include clearly detailed objectives and outcomes and where necessary, performance measures;
- obtain legal advice as to the most appropriate form of agreement;
- ensure that all arrangements are appropriately monitored to ensure that contractual conditions are complied with and outcomes are achieved; and
- maintain appropriate records of all arrangements.

It is critical that TAFE colleges comprehensively address this issue. In addition to the above advice, references to four risk management documents are included in the footnotes<sup>5</sup>.

### 8.2 Impact on the training market

Colleges should consider the impact that a proposed commercial activity will have on other businesses (eg. private RTO fee for service market).

### 8.3 Commercial activity pricing

Colleges must ensure that they refer to the Department of Treasury *Costing and Pricing Government Services: Guidelines for use by agencies in Western Australian Public Sector*.<sup>6</sup>

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<sup>3</sup> Department of Premier and Cabinet, *Economic and Expenditure Reform Committee – Handbook*

<sup>4</sup> Auditor General for Western Australia, June 2001, Report on Public Universities and TAFE colleges. 2000 Annual Reporting Cycle. Report No.5.

<sup>5</sup> Public Sector Commissioner's Circular 2015/03 Risk Management and Business Continuity Planning; Western Australian Government Risk Management Guidelines (RiskCover, Third Edition); Treasurers Instruction 812 - Insurance; Treasurers Instruction 825 - Risk Management and Security.

<sup>6</sup> Department of Treasury: *Costing and Pricing Government Services: Guidelines for use by agencies in Western Australian Public Sector*, 6<sup>th</sup> edition June 2015.



## CONTRACTS VS BUSINESS ARRANGEMENTS

Historically, nearly all college commercial activity with industry has been conducted through contracts to provide fee-for-service training programs, and contracts to provide products, consultancy or other services. This method has proved to be efficient, timely and effective.

Conversely, where a college has sought to engage in a commercial activity with industry through participation in a business arrangement, the path has been onerous, time consuming and convoluted.

All proposed business arrangements require the approval of the Minister and the Treasurer.<sup>7</sup> In addition, the Department of Treasury requires all proposals to satisfy extensive prudential requirements.

Although the VET Act allows colleges to participate in *business arrangements*, in nearly every instance there is adequate power through the use of contracts to achieve the same commercial outcomes without undue exposure to risk.

**Contracts are the most appropriate vehicle** with which TAFE colleges should engage in commercial activity with industry.

Colleges should be especially cognisant of the following sections concerning ‘**Commercial Terms**’ and ‘**Risk Management**’ when entering into contracts and be aware that a high degree of financial and contractual rigor needs to apply when negotiating and entering contracts.

## COMMERCIAL TERMS

In order for TAFE colleges to avoid any potential problems arising from language terms related to *business arrangements* when negotiating commercial activities, it is important to examine the definition of **business arrangement**<sup>8</sup> as provided in section 9 (4) of the VET Act.

Excerpt from the VET Act

### **S.9. Powers of the Minister**

(4) In subsection (2) (1) —

**business arrangement** means a company, a partnership, a trust, a joint venture, or an arrangement for sharing profits;

**participate** includes form, promote, establish, enter, manage, dissolve, windup, and do anything incidental to participating in a business arrangement.

If a TAFE college uses any of the terms in Section 9 (4) above during negotiations for a contract or in a signed contract with industry, then that contract could be construed or inferred as a business arrangement because of the way in which the commercial activity was described. That said, the use of any legal label, by itself, may not

<sup>7</sup> VET Act S.37(f)

<sup>8</sup> See below for definitions for company, partnership, trust, joint venture, arrangement for sharing profits, and other relevant commercial terms such as memorandum of understanding, contract, and fiduciary relationship.

necessarily be determinative. Courts will look at the substance of a transaction, not just its form (i.e. how it is labelled). That is why advice should always be sought when a TAFE college is entering into, or considering entering into, a commercial or business arrangement, agreement, transaction, activity, undertaking or venture.

The consequences would be that a TAFE college could be confronted with increased exposure to the risk of losses, legal disputation and adverse audit findings.

In order to avoid the consequences of any commercial misunderstanding, it must be emphasised that when TAFE colleges are conducting negotiations, it is imperative to ensure that those persons conducting the negotiations:

- are aware of the relevant provisions of the VET Act;
- use the correct terminology;
- take into account the proper identity of the parties to any proposed commercial activities;
- understand the nature of the transaction; and
- get legal advice where necessary or advisable.

### **Company**

A company is sometimes also known as a corporation. A corporation is formed by being registered under the Corporations Law or under corresponding earlier legislation. The defining feature of a corporation is that it has an artificial legal personality. It is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many reasons to a natural person.

The fictional entity acquires rights and liabilities by the acts of persons behind it. The people who operate a corporation on a day-to-day basis are its directors and its employees. However, its ultimate controllers are its members (i.e. its shareholders).

### **Partnership**

The *Partnership Act 1895* section 7 defines 'partnership' as 'the relation which subsists between persons carrying on a business in common with a view to profit'.

Unlike a company, a partnership does not have a legal existence independent of its partners. As a partnership is not a legal entity it cannot own property. Consequently, the property of a partnership is owned by the partners personally. Similarly, creditors of a partnership are creditors of the partners personally so that each partner is jointly and severally liable for debts and costs incurred by other partners in their role as partner.

Each partner is an agent of the other partners and can make contracts on their behalf for the purpose of the partnership's business. A partner cannot assign his/her interest in the partnership without the consent of the other partners. For these reasons each partner is a fiduciary of the other partners in the partnership.

One exception to the partnership not being a separate legal entity is that partners may sue and be sued in the name of the firm in which they were partners, when the cause of action accrued.

## **Trust**

A trust is a fiduciary relationship where a person holds the title of property for the benefit of another person(s) or for the benefit of a purpose.

Normally, a trust is created by a settlor who causes the trust relationship to come into existence. However, in some cases a trust may be created unintentionally and in these cases there will be no settlor. A settlor creates a trust by passing property to a trustee who holds the trust property for the benefit of a beneficiary. Where a person simply declares that he/she holds his/her own property in trust for another person then he/she is both settlor and trustee.

The trustee is the person in whom the trust property is vested. The trustee holds the legal title to the property and controls the property. However, the trustee can only deal with the property for the benefit of the beneficiaries.

A beneficiary is the person who benefits from the trust. The beneficiary holds the equitable title to the trust property. This means that while they have a right to enjoy the property, they have no right to control the property.

In all trusts the trustee is under a personal fiduciary duty not to use the trust property for the benefit of anyone other than the beneficiary. This duty arises from the double form of ownership found in trusts - namely both the trustee and the beneficiary have a form of ownership in the trust property. The beneficiary's interest is beneath that of the trustee, and superimposed on the trustee's interest is a range of personal duties owed to the beneficiary.

## **Joint venture**

The term 'joint venture' is not a technical term with a settled legal definition. It has been described as 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. As between the joint venturers themselves, the relationship (when not a partnership) is governed by the terms of the agreement.

Although in some situations a joint venture may constitute a partnership, generally a partnership is concerned with an ongoing business of indefinite duration whereas a joint venture is concerned with a single project. Like a partnership, a joint venture is not a separate legal entity. This, therefore, distinguishes it from a company.

As a joint venture is not a separate legal entity, it cannot sue or be sued in its own name. Therefore, legal rights and obligations are borne by the joint venturers themselves, and the liability for debts of the joint venture is joint and several.

## **Arrangement for sharing profits**

This term may be used to describe the arrangement under which partners in a partnership or joint venturers in a joint venture agree to share profits.

Alternatively, this term may be used to describe an arrangement whereby employees are paid a share of the profits of the business enterprise in which they are employees. Such payments are distinct from and additional to regular earnings. Profit may be paid out in the form of cash or company stock. In deferred payment plans, profit may be paid into a trust fund from which employees can draw annuities in later years.

### **Memorandum of understanding**

This is a document recognising that the minds of the parties are at one that a proposed transaction between them should proceed on the basis of maintaining a particular state of affairs, or adopting a particular course of conduct. It will usually set out the principles, strategies and mechanisms for dealing with the common issues at hand.

These documents do not normally create legal relations between and are not legally binding on the parties concerned. A memorandum of understanding is therefore distinguished from a contract, as a contract is legally binding. A memorandum of undertaking on the other hand is usually a mere non-justiciable statement of intent.

### **Contract**

A contract is a legally binding promise or agreement. Before a contract can exist there must be an offer made and an acceptance of that offer. The offer and acceptance need not be in writing nor proved by a signature or handshake. With some exceptions (e.g. the sale of land) contracts can be made orally or by writing.

The parties to a contract must also display an intention to be legally bound by the contract. This intention need not be expressed, rather it may be inferred from the circumstances surrounding the creation of the contract.

Another requirement necessary for the formation of a contract is consideration. Consideration is the price or detriment given as the value for a promise. The price or detriment undertaken by each party under the contract need not be equal to the price/detriment of the other party.

Also, a contract may be void if it is made by parties who are not capable (e.g. minors, people who lack mental capacity) or if an illegal act must be committed for the contract to be performed.

### **Fiduciary relationship**

The fiduciary relationship is a relationship of confidence, responsibility and honesty to act for the benefit of another. There are different degrees of fiduciary relationships depending on the circumstances. Partners are under a fiduciary duty (to their other partners) and trustees are under the same (to their beneficiaries).