Controlled Entities Procedure

Version 1.0 Effective 14 February 2022

Controlled Entities Procedure

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Purpose

To describe the framework for the governance and oversight of Controlled Entities to ensure compliance with the University of New South Wales Act (1989) (‘UNSW Act’) and other applicable legislation.

Scope

This Procedure applies to the whole lifecycle of a Controlled Entity, from establishment to winding up or disposal, including Controlled Entity reporting, and transactions between UNSW and a Controlled Entity.

It applies to new Controlled Entities and existing entities of the University as at the approval date that meet the definition of a Controlled Entity under s15A of the UNSW Act (see Definitions below), whether in Australia or overseas.

Advice should be sought from the UNSW Legal Office if there is any inconsistency between this Procedure and any agreement relating to a Controlled Entity.

This Procedure must be complied with by all UNSW staff.

Are Local Documents on this subject permitted?

☐ Yes, however Local Documents must be consistent with this University-wide Document
☒ No
1. Objectives

The Controlled Entities Procedure:

- describes the principles which the University applies with respect to the establishment, operations and oversight of Controlled Entities. These principles are derived primarily from the University of New South Wales Act (1989) ("the UNSW Act") and the Voluntary Code of Best Practice for the Governance of Australian Public Universities (2018).

- provides the operational framework in which the principles are given effect.

Implementation of this Procedure will facilitate good governance and assist the Council to meet its responsibilities under the UNSW Act in relation to Controlled Entities. It clarifies the interface between the University and Controlled Entities, including the requirements attaching to transactions between the University and a Controlled Entity, the role of Controlled Entities within the University’s Legislative Compliance Framework and Risk Management Framework, and reporting by Controlled Entities to the University.

2. Principles

- UNSW may establish Controlled Entities, both domestic and offshore, to conduct activities within the scope of UNSW's statutory functions, where there are sound business, education or research reasons for doing so.

- The Council is responsible under the UNSW Act for the monitoring and oversight of the functions, governance and activities of UNSW's Controlled Entities.

- To enable Council to discharge its responsibilities, there must be an appropriate governance, financial and operational framework for UNSW's Controlled Entities.

- UNSW will ensure that Council meets its responsibilities relating to Controlled Entities under:
  - the UNSW Act;
  - other applicable legislation (which, in the case of offshore entities, includes applicable foreign legislation); and
  - the Voluntary Code of Best Practice for the Governance of Australian Public Universities.

- To the maximum extent possible, and having regard to the size, objects, nature and complexity of the Controlled Entity in question, UNSW will apply a consistent approach to its Controlled Entities, including in relation to the following:
  - the establishment or acquisition, oversight and winding up of Controlled Entities
  - the content to be included in the constitution of a Controlled Entity
  - the governance requirements applicable to Controlled Entities and the Boards of Controlled Entities
  - the powers and responsibilities of Controlled Entities
  - transactions and arrangements between UNSW and Controlled Entities (such as supply of services or secondments) and
  - reporting responsibilities of Controlled Entities.

- In considering the establishment of the Controlled Entity, the University must take into account how decisions will be made, particularly when a majority of the directors on the Controlled Entity Board are University staff.
3. What is a Controlled Entity?

Controlled entities are those entities over which UNSW has control. UNSW has control over an entity when it is exposed, or has rights, to variable returns from its involvement with the entity and has the ability to affect those returns through its power over the entity. Power over the entity exists when UNSW has existing rights to direct the relevant activities of the entity. The specific facts and circumstances of each entity must be considered. The following are examples of circumstances in which an entity will be considered to be a Controlled Entity of the University:

- Where the University owns, either directly or indirectly, more than half of the voting shares in the entity unless it can be clearly demonstrated that such ownership does not constitute control (for example, because of contractual restrictions which UNSW has agreed to in regard to the exercise of its voting rights).
- Where although the University does not own more than half of the voting shares in the entity, it nonetheless has power:
  - over the voting rights attaching to more than half of the voting shares in the entity by virtue of an agreement with other shareholders
  - to determine the financial and operating policies of the entity
  - to appoint or remove the majority of the Board of Directors and control of the entity is by that Board.

Other circumstances may be relevant to the issue of control and where there is doubt the Vice-President, Operations shall determine whether the entity is controlled by the University, based on a recommendation from the Director, Financial Control and Compliance that takes into account legal advice and other relevant matters including the view of the UNSW Audit Office.

4. Establishing a Controlled Entity

The approval of Council (or its Delegate for this purpose) is required to establish a Controlled Entity. The process described in this section must be followed.

Staff must not commit the University to any contracts or other legally binding commitments before Council or its delegate grants approval to establish the Controlled Entity, except for the engagement of legal and tax advice in relation to a proposal.

When acquiring an interest in an existing entity where the acquisition would give the University a controlling interest in the entity, whether in Australia or overseas, advice regarding the application of this Procedure must be sought from the UNSW Legal Office.

4.1. Reasons for establishing a Controlled Entity

Generally, the reasons for which UNSW may wish to establish a controlled entity include the following:

- To commercially make use of a particular facility, resource or research of the University
- To establish an appropriate operational environment for a particular function of the University
- To support the University in managing the risks associated with a particular project or activity
- To comply with regulatory requirements, such as where UNSW is undertaking an activity in another jurisdiction and is required to have a legal presence in that jurisdiction.

If these or similar reasons are not met, a Controlled Entity will not be established.

4.2. Process for establishing a Controlled Entity

Preliminary Proposal

- When a new Controlled Entity is proposed, an Applicable Management Board Member (see Definitions) must be identified.
- The Proposer (see Definitions) must prepare a brief written proposal with a request for in principle approval to proceed with the Controlled Entity business case. The proposal must address, at a minimum, points a), c), g) , h) and n) of Appendix A: Checklist of business case items required to consider the establishment of a Controlled Entity. The Proposer must also identify in this proposal which Deputy Vice-Chancellor/s and/or Vice-President/s will be asked to review the detailed business case if in principle approval is obtained.
• If supportive of the proposal, the Applicable Management Board Member shall submit the proposal to the Deputy Vice-Chancellor, Planning and Assurance and the Vice-President, Operations.

• If the Deputy Vice-Chancellor, Planning and Assurance and the Vice-President, Operations provide in principle approval of the proposal, the Proposer must prepare a detailed written business case.

Business case

• The Proposer must prepare a business case address each point set out in Appendix A and arrange a briefing session for the reviewers. The business case and all supporting documentation (e.g. draft constitution, business plan, initial budget and cashflow forecast) must be reviewed by the staff below, who will provide feedback based on their expertise.

• Reviewers for all proposals include the:
  − Chief Financial Officer (or nominee), and
  − Director, Risk and Safety Management (or nominee), and
  − Director of Governance & University Secretary (or nominee), and
  − General Counsel (or nominee)

• Depending on the core subject matter, reviewers will include one or more of the following:
  − Deputy Vice-Chancellor, Academic and Student Life (or nominee) for education proposals,
  − Deputy Vice-Chancellor, Equity Diversity and Inclusion (or nominee) for EDI proposals,
  − Deputy Vice-Chancellor, Research and Enterprise (or nominee) for research and enterprise proposals,
  − Vice-President, External Engagement (or nominee) for external engagement and philanthropy proposals and offshore Controlled Entities.

• In relation to a proposal and the business case and all other supporting documentation for the proposal:
  − Where the core subject-matter of a proposal crossed two or more areas identified above, then all the relevant reviewers above must review it.
  − Each reviewer must provide written comments within three weeks of receiving it.

• The business case and all of the comments from the reviewers must then be submitted to the Deputy Vice-Chancellor, Planning and Assurance and the Vice-President, Operations, who will decide whether the proposal for the establishment of the Controlled Entity proceeds to Management Board.

• Where Management Board supports the establishment of the Controlled Entity, the business case (plus other supporting documentation and any additional documents identified by Management Board) must be submitted via the Finance and Strategy Committee to Council for decision.

4.3. Joint Venture Agreements

• Where the Controlled Entity is a joint venture between the University and one or more other parties, the joint venture agreement should be consistent with the UNSW’s statutory obligations and the requirements of this Procedure. If any departure from these requirements are thought to be necessary for commercial reasons, advice from the UNSW Legal Office must be obtained.

At all stages of the proposal, evaluation and approval process, UNSW staff and Council members must ensure that their decisions and actions are not affected or influenced by actual, perceived or potential conflicts of interest. Conflicts of interest must be disclosed and managed in accordance with the Conflict of Interest Disclosure and Management Policy and Procedure.

5. The constitution of a wholly owned Controlled Entity

The constitution of a wholly owned Controlled Entity established after the Effective Date of this Procedure (new Controlled Entity) must:

• not authorise the Controlled Entity to exercise a function or engage in an activity that the University itself cannot exercise or engage in

• be consistent with the principles set out in this Procedure, unless departures are specifically approved by the appropriate reviewer (see section 4) given the nature of the proposal and based on
advice from the UNSW Legal Office and subject to any applicable legal requirements for offshore Controlled Entities.

Where the entity is an offshore entity, its Constitution must be reviewed by a legal practitioner in the relevant jurisdiction to ensure that local legal requirements are satisfied.

In the case of wholly owned Controlled Entities existing at the Effective Date (existing Controlled Entities), the Applicable Management Board Member is responsible for:

• identifying any inconsistencies between the Controlled Entity’s Constitution and the principles set out in this Procedure
• obtaining advice from the UNSW Legal Office on the inconsistencies, and
• deciding, based on the legal advice, whether changes need to be made to the Controlled Entity’s Constitution to align with the principles set out in this Procedure.

6. The composition of the Board of a Controlled Entity

The Board of a Controlled Entity must:

• meet all eligibility requirements for Directors under the Corporations Act (2001) (Cth) and any other applicable laws, including, in the case of an offshore Controlled Entity, any applicable foreign law;
• include one or more independent directors (see Definitions).

− Where the proposed composition of the Board of a new Controlled Entity does not meet this requirement, the rationale for the proposed composition of the Board must be explained in advance as part of the business case (see Appendix A).

− In the case of existing Controlled Entities where the Board does not include one or more independent directors, a rationale for the composition of the Board must be provided by the Applicable Management Board Member to the Director of Governance & University Secretary for inclusion in the annual assessment of the University’s compliance with the Voluntary Code of Best Practice for the Governance of Australian Public Universities (2018) which is presented to Council. The rationale must address how the existing Board composition aligns to the current and emerging business needs of the Controlled Entity by reference to matters such as the size, turnover, strategy, plans and risks of the business and any relevant regulatory requirements.

• possess the expertise and experience necessary to provide proper stewardship, control and good governance of the Controlled Entity. For UNSW employees who are appointed as a director of a UNSW Controlled Entity, they must have completed the Australian Institute of Directors Company Directors Course prior to appointment and be entitled to use the post nominal GAICD (Graduate of the Australian Institute of Company Directors).

• be of an appropriate size relative to the size, nature, strategic objectives and risks of the business carried on by the Controlled Entity, and with a minimum of three directors.

The Applicable Management Board Member must be consulted prior to the University nominating any proposed director of a Controlled Entity.

7. Obligations of the Board of a Controlled Entity

The Board of a Controlled Entity must

• adopt and evaluate its own governance principles and practices (for example, using the UNSW Model Board Charter or, in the case of an offshore Controlled Entity, a Board Charter that complies with local requirements and this Procedure) that are consistent with the UNSW Act and the Voluntary Code of Best Practice for the Governance of Australian Public Universities 2018 (as amended from time to time)
• develop and review at appropriate intervals a strategic plan containing strategic priorities and achievable and measurable performance targets and measures
• ensure development of an annual business plan to reflect and align with the strategic plan for the Controlled Entity;
• regularly assess its own performance and consider the training and development needs of Board members

1 Available from Governance on request
• ensure that its decision-making is transparent and ethical, including through adoption of appropriate processes governing disclosure and management of conflicts of interest
• establish its own Register of Delegations or Delegations Policy
• properly manage the resources and assets of the Controlled Entity, manage expenditure within budget, ensure that the Controlled Entity can meet ongoing financial obligations and remains solvent at all times, including where applicable, complying with any financial support agreements with the University
• meet regularly (at least twice a year, and in every case, so as to meet the entity’s statutory responsibilities)
• ensure the effective management of risk and safety, including development in consultation with the University’s Director, Risk and Safety Management, Risk Committee and Audit Committee as appropriate, of a risk management plan which is appropriate for the Controlled Entity and congruent with UNSW’s risk management plan; if appropriate developing a business continuity and crisis management plan, and ensuring regular reporting and reviews in respect of these plans
• ensure that to the University’s Management Board has the opportunity (via the Applicable Management Board Member) to review and comment on proposed strategic and risk management plans before they are finalised, in accordance with the reporting requirements of this Procedure (see Section 9 and Appendix B)
• ensure Directors fees are not paid to:
  − Directors who are UNSW staff members
  − external Directors, unless permitted under the Controlled Entity’s Constitution and the payment has been approved by the President and Vice-Chancellor
• ensure that the Audit Office of NSW is appointed as its auditor.

8. Management of a Controlled Entity

A Controlled Entity must:
• establish systems of governance, internal controls, management accountability and risk management which are appropriate for its business, align with the strategic, operational and risk management plans of the Controlled Entity and comply with all applicable legal requirements
• keep proper books and records in accordance with section 41 of the Government Sector Audit Act NSW (1983), the Corporations Act (2001) (Cth) and other applicable legislation and make such books and records available to UNSW’s internal and external auditors as and when required
• meet the requirements for reporting to Council, Management Board and specific officers, as set out in this Procedure
• maintain levels of remuneration for staff that are reasonable and clearly linked to organisational and individual performance
• ensure that its resources are managed efficiently and sustainably in accordance with annual budgets and business plans so as to remain solvent at all times and to achieve its strategic objectives and priorities
• establish appropriate systems and processes to monitor and manage compliance with legislative obligations, including obligations attaching to any statutory licence or permit, and provide evidence and assurance of effective compliance management to UNSW as required under the University’s Legislative Compliance Policy and Procedure
• establish appropriate systems and processes to manage conflicts of interest that are consistent with the University’s Conflict of Interest Management and Disclosure Policy and Procedure
• contact the Finance Help Desk to discuss and confirm insurance requirements and the Risk and Safety Unit to discuss and confirm workers compensation requirements
• comply with the principles of competitive neutrality set out in UNSW’s Competitive Neutrality and Pricing Policy, including the requirement to charge a competitive amount for services.
• ensure compliance with all University Policies and Procedures that apply to the Controlled Entity and subject to any applicable University policies and procedures, ensure that the Controlled Entity has appropriate and necessary policies and procedures in place to maintain controls and otherwise, manage risk, ensure compliance with legal obligations and align with strategic priorities.
− As a starting point, relevant UNSW policies and procedures will apply to controlled entities unless a Controlled Entity has in place its own policies and procedures on the relevant subject matter.
− For a Controlled Entity operating a business that supplies goods and services to customers and which does not have its own policies and procedures, the Board must consider whether the relevant UNSW policies and procedures require modification so as to be appropriate for the Controlled Entity’s circumstances.
− Upon establishment, a controlled entity must confirm if any UNSW policies and procedures will not apply.

- work with the University to ensure that if it provides services or grants rights to the University, or receives services from or is granted rights by the University, those arrangements are appropriately documented (for example, a licence will be required for the use of the University’s registered trademarks and other branding and any other IP such as course materials, a service level agreement will be required where UNSW provides services, including access to IT and Finance services and systems, a sub-lease may be required if the Controlled Entity will be using premises that the University leases from a third party). UNSW Legal Office advice should be obtained as to the appropriate form of documentation.

8.1. Provision of educational services by the Controlled Entity

A Controlled Entity that provides educational services in collaboration with the University or on the University’s behalf to offer a Higher Education Award or Foundation Program, for example under a third-party arrangement within the meaning of the Higher Education Standards Framework, must:

- appoint the Deputy Vice-Chancellor, Academic and Student Life (or nominee) to its Board
- establish an academic governance committee accountable to the Controlled Entity’s Board
- comply with the relevant requirements of the UNSW Framework for Managing Educational Third-Party Arrangements regarding the delivery of educational services, including processes for proposals, review, approval, monitoring, quality assurance and other relevant matters.

A Controlled Entity that provides educational services in collaboration with the University or on the University’s behalf to offer a CRICOS registered and/or UNSW badged non-award offering, for example under a third-party arrangement, must comply with the relevant requirements of the UNSW Framework for Managing Educational Third-Party Arrangements regarding the delivery of educational services, including processes for proposals, review, approval, monitoring, quality assurance and other relevant matters.

9. Reporting requirements

9.1. Notifications to the University

A Controlled Entity must formally notify the Applicable Management Board Member and the Director, Risk and Safety Management in writing immediately (and in all cases no later than 72 hours after) it becomes aware of circumstances or events with the potential to adversely impact UNSW’s standing and reputation and/or the viability (including solvency) of the Controlled Entity and that have a high probability of occurring.

9.2. Reporting Protocol

A Controlled Entity must comply with the requirements of the Reporting Protocol set out in Appendix B and discussed in the following sections. Council may amend the Reporting Protocol at its discretion and independently of the Policy Framework Review process.

9.3. Business Plan

A Controlled Entity must submit an annual business plan that reflects and aligns with the strategic plan for the Controlled Entity and provide periodic updates in accordance with the Reporting Protocol (see Appendix B).

9.4. Financial Reporting

The Controlled Entity will be required to comply with the management and statutory reporting requirements communicated by UNSW Finance to fulfil internal and external financial reporting obligations. Reporting timelines are published on the UNSW Finance website. This is in addition to any reporting requirements applicable to an offshore Controlled Entity in its own jurisdiction.
9.5. Legislative Compliance Certification

In accordance with the University’s Legislative Compliance Policy and Procedure, the Board of each Controlled Entity will be required to annually certify to the University that in respect of the reporting period the entity:

- has systems and processes (and associated training and materials) in place to achieve compliance with all legislative obligations that apply to it (including compliance with obligations imposed by licences, permits and authorities granted under legislation) within each jurisdiction in which it operates; and
- is not aware of any breach of any such obligations or, if there have been any breaches, that in each case the appropriate remediation actions have been taken and the breach has been resolved.

9.6. Commercial Activities Reporting

A Controlled Entity will be required to comply with requirements prescribed by the University for the conduct of “commercial activities” (as defined by the UNSW Act), including reporting requirements.

9.7. Other reporting

Council or its Delegate may request additional reports to those specified in the Reporting Protocol from time to time.

10. Voluntary Winding up of a Controlled Entity

Winding-up a solvent Controlled Entity is a process whereby the company’s outstanding business is finalised, its assets are liquidated, and outstanding debts are paid.

- Winding-up of a solvent Controlled Entity may occur in two ways:
  - Voluntarily by the members/shareholders of the company in accordance with applicable law; or
  - Through an application to ASIC to have the company deregistered if the company is solvent but does not meet the requirements for voluntary winding up (e.g., it has assets worth $1000 or more).
- A decision to wind up a solvent Controlled Entity must be made by Council or its Delegate, in accordance with applicable law, based on legal, tax, and other relevant advice. Management Board must be notified of any intention to wind up the controlled entity and the reasons for it.
- A proposal must be developed that sets out the reasons for the proposed winding up and includes all relevant financial and other information to enable Council or its Delegate to make an informed decision.
- Further relevant information is available from the Australian Securities and Investments Commission.
- For overseas Controlled Entities, any winding up must be in accordance with the requirements in the relevant jurisdiction.

11. Disposing of a Controlled Entity

The disposal sale of the University’s interest (in whole or in part) in a Controlled Entity must be approved by Council or its Delegate. Disposal includes sale, transfer or surrender, with or without consideration.

The Applicable Management Board Member is responsible for developing a proposal that sets out the reasons for the proposed disposal and which includes all relevant financial and other information to enable Management Board to make a recommendation to Council or its Delegate regarding the disposal.

12. Acknowledgements

Some content within this Procedure has been sourced from Policies and Procedures of other Universities. The University gratefully acknowledges the assistance of those Universities.

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<th>Accountabilities</th>
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<td><strong>Responsible Officer</strong></td>
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<td><strong>Contact Officer</strong></td>
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<td>Supporting Information</td>
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<td><strong>Legislative Compliance</strong></td>
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<td><strong>Related Documents</strong></td>
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<td><strong>Superseded Documents</strong></td>
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<td><strong>Definitions and Acronyms</strong></td>
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<td><strong>Higher Education Award</strong></td>
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<td><strong>Independent director</strong></td>
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Appendix A: Checklist of business case items required to consider establishing a Controlled Entity

A business case to support the establishment of a Controlled Entity must address the following points:

a) How it would align strategically with the University’s objectives and strategic priorities, and proposed KPIs for the Controlled Entity for years 1, 2 and 3.

b) The proposed name of the Controlled Entity and measures taken to ensure the name is legally available for UNSW.

c) Why it is proposed to establish a Controlled Entity rather than the University itself conducting the business or using an alternative operating structure (for example, an existing Controlled Entity, an unincorporated joint venture or other contractual arrangement).

d) The proposed Constitution of the Controlled Entity, as well as the proposed Board membership (including the Directors’ expertise, experience and affiliations).

e) Where the proposed Board does not include any independent directors (see Definitions), an explanation as to why there is not at least one proposed independent director (consistent with the requirements of this Procedure).

f) Details of any proposed directors’ fees, if applicable.

g) An identification of the benefits and risks to the University in establishing the Controlled Entity and assessment of risks in accordance with the UNSW Risk Framework, including whether the necessary controls and mitigants to risks are available, affordable and able to be implemented.

h) The principal commercial and financial assumptions, including start-up costs/initial investment and any non-financial contribution by the University to the Controlled Entity.

i) Financial forecast for the 3 years following the establishment or acquisition of the Controlled Entity - this should also include a detailed cash flow forecast which includes purchase costs, capital investment, start-up costs and any initial operating losses to enable an evaluation of the investment required as part of the proposal and the Controlled Entity’s financing needs.

j) Where the Controlled Entity will be an offshore entity, details of offshore compliance assurance processes and tax treatment.

k) Any other relevant issues applicable to the particular proposed Controlled Entity, including potential impact(s) on reputation and brand, students, staff, and compliance requirements including health and safety, licensing and accreditation.

l) How the Controlled Entity will identify and manage conflicts of interest in accordance with the Conflict of Interest Disclosure and Management Policy and Procedure, for example, by means of a disclosure process.

m) The proposed duration of the Controlled Entity (i.e., is it intended to operate for a limited time or will it be ongoing).

n) Any legal and/or tax advice regarding the establishment of the Controlled Entity. Where the proposal relates to:

   o a proposed offshore entity, the sponsor must obtain legal and tax advice in the relevant country.
   o a proposed entity in Australia, legal advice must be obtained via the UNSW Legal Office.
Appendix B: Reporting Protocol

Controlled Entities are required to comply with the following Reporting Protocol unless Council or its Delegate determine that specific Controlled Entities will be subject to a modified Reporting Protocol, considering the size, operations and risks relevant to the Controlled Entity:

<table>
<thead>
<tr>
<th>Time frame</th>
<th>What is required</th>
<th>All Controlled Entities or those operating a business that supplies goods and services to customers?</th>
<th>Notes</th>
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</thead>
<tbody>
<tr>
<td>Annually</td>
<td>Business Plan for next financial year and updated objectives and KPIs to Council via Finance &amp; Strategy Committee</td>
<td>Controlled Entities operating a business that supplies goods and services to customers</td>
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<tr>
<td>Quarterly</td>
<td>Quarterly Report against the Business Plan to Council via Finance &amp; Strategy Committee</td>
<td>Controlled Entities operating a business that supplies goods and services to customers</td>
<td>See Section 9 above</td>
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<td>Quarterly</td>
<td>Controlled Entity risk profile to be provided to the Risk Committee</td>
<td>Controlled Entities operating a business that supplies goods and services to customers</td>
<td>See UNSW Risk Framework</td>
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<td>Annually</td>
<td>Financial Reporting (includes audited accounts) to Council via Audit Committee</td>
<td>All Controlled Entities</td>
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<td>Annually</td>
<td>Legislative Compliance Certification to Compliance Unit</td>
<td>All Controlled Entities</td>
<td>See Section 9 above</td>
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<td>As required</td>
<td>Commercial Activities Report</td>
<td>All Controlled Entities</td>
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<tr>
<td>Annually</td>
<td>Submission of Audit Reports and Management Letters to Audit Committee</td>
<td>All Controlled Entities</td>
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<tr>
<td>As required</td>
<td>Notifications to the University of circumstances or events with the potential to adversely impact UNSW's standing and reputation and/or the viability (including solvency) of the Controlled Entity</td>
<td>All Controlled Entities</td>
<td>See Section 9 above</td>
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