

# Not-For-Profit Guidelines for Non-Government Schools

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## **Minister's Foreword**

These Not-For-Profit Guidelines for Non-Government Schools highlight the importance of the role that the non-government education sector provides to achieving the educational initiatives and goals for students in NSW.

The intent of these Guidelines is to provide clear guidance to non-government education providers (both schools and proprietors) in relation to their obligations under the Not-For-Profit provisions of the NSW Education Act and help to ensure that every student enrolled in a registered NSW non-government school receives the full benefit of any government funding provided.

It is also acknowledged that where the NSW Government provides financial support generated from tax-payer funding then, to facilitate open, transparent, accountable and responsible government, it must also provide clear and unambiguous guidance to the recipients of such financial support.

These guidelines, together with the long-term support of the non-government education sector, signals the government's commitment to work in a collaborative way with the sector to advance education in NSW.

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## 1 Definitions

In these Guidelines:

<b>Ancillary service</b>	means an onsite service provided by a proprietor or school to staff or students (including their parents or carers) ancillary to the purpose of operating the school, such as childcare, long day care, early learning centres, preparatory school programs, Out of School Care (OOSC) or vacation care.
<b>Asset</b>	means an economic resource that may depreciate in value over time.
<b>Book value</b>	in relation to an asset of a non-government school, means the value of the asset on the school's balance sheet or other accounting records prepared in accordance with relevant accounting standards.
<b>Charity</b>	means an organisation registered under the provisions of the <i>Charities Act 2013</i> (Cth).
<b>Close member of a person's family</b>	means those family members who may be expected to influence, or be influenced by, that person in their dealings with the proprietor or school and include: <ul style="list-style-type: none"><li>(a) that person's children and spouse or domestic partner;</li><li>(b) children of that person's spouse or domestic partner; and</li><li>(c) dependants of that person or the person's spouse or domestic partner.</li></ul>
<b>Cost neutral</b>	means no net cost.
<b>Department</b>	means the NSW Department of Education.
<b>Ex-gratia payment</b>	an ex-gratia payment is a payment made without the giver recognising any liability or legal obligation to pay.
<b>Gross rent</b>	(commercial leasing) refers to where the rent is inclusive of all outgoings except utilities (as these are based on the extent used by the tenant such as power, gas, water, telephone and internet).
<b>Ground lease</b>	means a long-term lease of land with the tenant permitted to improve or build upon the land and to enjoy those benefits for the term of the lease.
<b>Ground rent</b>	means the net rent paid for the right of use and occupancy of a parcel of unimproved land, or that portion of the total rental paid that is considered to represent return upon the land only.

<b>Income</b>	means money, or other forms of consideration received periodically from the provision of property, goods or services, investments, gifts, donations, grants, financial assistance or any other gain obtained from the use of a school's assets or its proprietor's assets.
<b>Joint use</b>	refers to formal arrangements where investment is made jointly between the proprietor/school and a third-party to develop, upgrade or maintain a school's asset with the intent that the asset is then available for use by both the school and the third party for an extended period of time.
<b>Minister</b>	means the NSW Minister for Education and Early Childhood Learning.
<b>Net rent</b>	(commercial leasing) refers to where the rent is exclusive of outgoings.
<b>Not-for-profit requirements</b>	means the obligation of non-government schools in receipt of financial assistance from the NSW Government to not operate for profit within the meaning of Part 7, Division 3 of the <i>Education Act 1990</i> .
<b>Proprietor</b>	means the legal entity designated, in the school's certificate of registration, as the proprietor of the school.
<b>Reasonable market value</b>	means the price that a knowledgeable and willing third party would pay for property, goods or services in an arm's length transaction from the seller.
<b>Related entity</b>	means a person or a legal entity that is related to a proprietor or school either as a result of office, membership, management, control or influence or a personal/familial relationship and includes but is not limited to: <ul style="list-style-type: none"> <li>(a) a person or close member of that person's family is a related entity if that person: <ul style="list-style-type: none"> <li>(i) has control or joint control over the proprietor or school;</li> <li>(ii) has significant influence over the proprietor or school;</li> <li>(iii) is a member of the key management personnel of the proprietor or school.</li> </ul> </li> <li>(b) an entity is a related entity to a proprietor or school if any of the following conditions apply: <ul style="list-style-type: none"> <li>(i) the entity and the proprietor or school are members of the same group;</li> <li>(ii) the entity is an associate or joint venture of the proprietor or school;</li> </ul> </li> </ul>

- (iii) the entity and the proprietor or school are joint ventures of the same third party;
  - (iv) the entity is a joint venture of a third entity and the proprietor or school is an associate of the third entity;
  - (v) the entity is controlled or jointly controlled by a person identified in (a);
  - (vi) a person identified in (a)(i) has significant influence over the entity or is a member of the key management personnel of the entity (or parent of the entity);
  - (vii) the entity, or any other member of a group of which it is part, provides key management personnel services to the proprietor or school or to the parent of the proprietor or school.
- (c) an employee of the proprietor, school or an entity identified in (b).

**Responsible person**

means:

- (a) the proprietor, and if the proprietor is a corporation, each director or person concerned in the management of the school;
- (b) a member of the school governing body; or,
- (c) the principal of the school.

**Regulations**

means the *Education Regulation 2017* (NSW) and includes any amendments, additions or alterations to that legislation.

**School**

means a non-government school registered under Part 7 of the *Education Act 1990* (NSW).

**School governing body**

means any body or bodies responsible for making decisions that affect the whole, or a substantial part, of a school's operations. Schools may be required to substantiate that individual persons are or are not members of the school's governing body or bodies if requested to do so.

**Shared use**

refers to arrangements where existing school assets are hired out for non-school purposes, usually for a limited or definite time and the asset subject of the shared use remains within the control of the school or proprietor.

## Acronyms

The following acronyms are used in these Guidelines:

<b>ACL</b>	Australian Credit Licence
<b>ACNC</b>	Australian Charities and Not-For-Profits Commission
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ATO</b>	Australian Taxation Office
<b>CPI</b>	Consumer Price Index
<b>DGR</b>	Deductible Gift Recipient (ATO endorsement scheme)
<b>NCAT</b>	NSW Civil and Administrative Tribunal
<b>NESA</b>	NSW Education Standards Authority (formerly Board of Studies, Teaching and Educational Standards, BOSTES)

## 2 Purpose and Effect of these Guidelines

These Guidelines are approved by the Minister under section 83L of the *Education Act 1990* (the Act) and apply to all proprietors/schools in NSW. The purpose is to assist proprietors/schools in receipt of NSW Government funding to understand the not-for-profit funding requirements established under the Act.

All proprietors/schools in receipt of NSW Government funding should adhere to the statutory obligations under the Act. The Guidelines provide examples of documentary evidence that may be used to help demonstrate compliance with the Act, and address transactions commonly carried out by proprietors/schools but are not exhaustive.

The Guidelines do not restrict the operation of section 83C or any other provisions of the Act, or any other laws. In the event of any inconsistency between these Guidelines and the Act (or regulations), the provisions of the Act (or regulations) prevail to the extent of any inconsistency.

Proprietors/schools may have obligations and duties under other relevant legislation and should inform themselves of those responsibilities.

### 3 Overview of Not-For-Profit Requirements under the Education Act

Section 83C of the Act (see table below) requires all schools to operate on a “not-for-profit” basis within the meaning of the Act in order to be eligible for funding from the NSW Government.

This requirement is distinct from the not-for-profit status that proprietors or schools may enjoy through registration with the ATO or the ACNC as a registered charity.

#### **Section 83C (Part 7, Division 3) – Education Act 1990**

##### **83C Financial assistance not to be provided to schools that operate for profit**

- (1) The Minister must not provide financial assistance (whether under this Division or otherwise) to or for the benefit of a school that operates for profit.*
- (2) A school operates for profit (without limiting the circumstances in which it does so) if the Minister is satisfied that:
  - (a) any part of its proprietor’s assets (in so far as they relate to the school) or its proprietor’s income (in so far as it arises from the operation of the school) is used for any purpose other than the operation of the school, or*
  - (b) any payment is made by the school to a related entity or other person or body:
    - (i) for property, goods or services at more than reasonable market value, or*
    - (ii) for property, goods or services that are not required for the operation of the school, or*
    - (iii) for property, goods or services that is in any other way unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister, or**
  - (c) any payment is made by the school to a person in connection with the person’s activities as a member of the governing body of the school unless it is in reimbursement for a payment made by the person in connection with the operation of the school.**

## **4 Role of the Non-Government Schools Not-For-Profit Advisory Committee**

Section 83K of the Act establishes the Advisory Committee. The Act and Regulations set out the role of the Committee, which includes:

- Advising the Minister on individual school compliance and sanctions – s83K(2)(a)
  - Making recommendations on the making of ‘for profit’ or ‘non-compliance’ declarations – s83K(2)(b)
  - Advising the Minister on investigations of 21A (old definition) and 83C (new definition) – s83H
  - Developing Not-For-Profit Guidelines for Non-Government Schools – s83L
  - Advising the Minister on directions to schools – s83I
- Any other function relating to financial assistance agreed by the Minister and the Committee – s83K(2)(b)

## **5 Schools Operating for Profit**

On recommendations from the Committee, schools that fail to comply with not-for-profit requirements could be declared to be operating ‘for profit’ by the Minister under section 83D of the Act and have the following sanctions imposed:

- cancellation of government financial assistance;
- subject to a formal investigation (both schools/proprietors); or,
- be declared to be a non-compliant school under section 83E(3) of the Act.

In addition, the Minister may take action to recover any financial government assistance provided while the school was operating for profit.

## **6 Non-Compliant Schools**

Schools found to be operating for profit may also be declared non-compliant under section 83F of the Act. A school is also a non-compliant school if it has been the subject of an investigation into for profit activity and failed to provide reasonable assistance to the conduct of that investigation, has not complied with a direction of the Minister or because of any other circumstances set out in the regulations on recommendation from the Committee. Following such a declaration, the following sanctions may be imposed on schools:

- suspension of government financial assistance;
- have the amount of government financial assistance reduced; or,
- have conditions imposed on any government financial assistance they receive.

In addition, the Minister may take action to recover any financial government assistance provided while the school was non-compliant.

## 7 Section 83C Review – Demonstrating Compliance

Schools/proprietors may be required to demonstrate their compliance with section 83C of the Act if they are subject to an investigation under section 83H or if they receive a direction under section 83I of the Act.

In general, schools/proprietors should be able to demonstrate compliance by ensuring the following types of policies and business records are kept and made available if requested by the Department:

- implementation of appropriate financial controls and governance systems to manage the financial affairs of a school;
- evidence that financial transactions and decisions are transparent, at arm's length and of reasonable market value;
- evidence that conflicts of interest between personnel and related entities are being appropriately managed in relation to school operations; and,
- records of audited annual financial statements.

Schools/proprietors may be required to maintain records to meet other legislative/regulatory requirements (e.g. for the ATO, ACNC, ASIC and NESAs) and as part of internal school management practices. In many cases these records can be used to demonstrate compliance with the not-for-profit requirements under the Act.

## 8 Payment for Property, Goods or Services

This section provides guidance on complying with the not-for-profit funding requirements when carrying out common financial transactions. Common areas of expenditure for proprietors/schools include:

- **Property:** including land (or rent), plant and equipment, buildings, intellectual property.
- **Goods:** including office consumables, books and texts, food-stuffs, teaching aids.
- **Services:** human resources/employment, specialist consultants, utilities (water/electricity), telecommunications, maintenance contractors, transport providers.

Both proprietors and schools have obligations under the not-for-profit requirements of the Act in relation to their use of assets and income. The tables below identify the obligations of proprietors and schools. Where the proprietor and the school are the same organisation then all of these obligations apply.

### Proprietors

Any part of a proprietor's assets (in so far as they relate to the school) or its income (in so far as it arises from the operation of the school) must only be for the operation of the school.

## **Schools**

Any payment made by the school to a related entity or other person or body for property, goods or services:

- must not be more than market value;
- services must be required for the operation of the school;
- must be reasonable in the context that the school is receiving government financial assistance;

The school must not make any payment to a person in connection with that person's position as a member of the governing body of the school unless it is reimbursing that person's costs incurred in connection with the operation of the school.

Examples of relevant policies and records that could be used by schools/proprietors to demonstrate compliance with section 83C are listed below, however this is not an exhaustive list.

### **8.1 Related Entity Transactions**

A definition of related entity is included in section 1 definitions. A related entity transaction is a transfer of resources, services, liabilities or obligations between a proprietor/school and a related entity. There does not need to be expenditure of money. Related entity transactions can include:

- purchases, sales, donations;
- receipt of goods, services or proper
- leases;
- transfers of property including intellectual property;
- loans;
- guarantees; or
- provision of employees on a paid or complementary basis.

Proprietors/schools should exercise great care if contemplating entering into related entity transactions to ensure that they can demonstrate reasonable market value where the relationship between the proprietor/school and related entity is not at "arm's-length".

The recommendations below for record keeping and polices should be closely adhered to by proprietors/schools when engaging in any related entity transaction to assist in ensuring compliance with section 83C of the Act. Any related entity transaction carried out by a school should also be disclosed to the school's governing body.

## 8.2 What is Reasonable Market Value?

Under section 83(C)(2b(i)) of the Act, a school may be considered as operating for profit if any payment is made by the school to a related entity or other person or body for property, goods or services at “*more than reasonable market value*”.

Generally, reasonable market value can be defined as the price that a knowledgeable and willing third party would pay for property, goods or services in an arm’s length transaction from the seller. Reasonable market value may be influenced by a range of factors including, but not limited to:

- the quantity and consistency of provision of the good or service;
- the location of the school;
- if the good or service is required urgently, in an emergency or at short notice or must be completed within a specified timeframe (for example, outside of normal business hours);
- if the good or service is in short supply at the required standard;
- heritage or related issues (in relation to building and related works);
- the types of warranties provided (if any);
- installation costs and ongoing maintenance and parts;
- relevant procurement standards; or,
- local government requirements.

### Relevant Policies

Proprietors/schools can implement policies and procedures to help ensure they are getting the best value for their money and not paying more than a reasonable market value. Such policies and procedures may include some of the elements below:

- using evaluation criteria to assess reasonable market value;
- getting more than one quote when purchasing property, goods or services;
- consolidated/bulk ordering and purchasing;
- forecasting to identify future business needs;
- using a tender process for higher-value items or long-term contracts;
- establishing a list of preferred suppliers; and,
- having appropriate business governance policies (conflicts of interest, anti-fraud & corruption, staff delegations, supplier performance monitoring, staff awareness and training in contracting and procurement).

In addition, proprietors/schools should have specific policies and procedures for situations where an urgent procurement may be required to address an emergency.

### Other Requirements

It is a NESAs school registration requirement that all related entity transactions carried out by a school be disclosed and recorded in the school’s audited related party transactions register.

For further information on NESA school registration requirements, refer to the *'Registered and Accredited Individual Non-Government Schools Manual'* and the *'Registration Systems and Member Non-Government Schools Manual'*.

Also note that there are various other legislative obligations placed upon organisations who engage in related entity transactions. For further information proprietors should contact ASIC, ACNC or seek professional legal or financial advice.

### **Examples of records or policies that may be kept**

The table below provides examples of the records and policies that may assist to demonstrate compliance with section 83C in relation to related entity transactions.

- (a) an up to date related party transaction policy and centralised register which contains both related party and related entity transactions;
- (b) proper recording of related entity transactions in business accounts;
- (c) a 'Conflict of Interest Policy';
- (d) a policy dealing with fraud and corruption (including reporting such incidences);
- (e) a process clearly defined within the purchasing/recruitment or related entity transactions policy detailing how market value can be shown in relation to employing/contracting a related entity and appropriate delegations and segregation of duties set and adhered to; and,
- (f) adequate recording of Board minutes/approvals.

### **8.3 Land (Mortgages & Loans)**

Proprietors/schools may need to arrange loans or obtain finance for the operation of the school including the purchase of land. This includes obtaining finance from a lender of their choice and determining the type and structure of finance most appropriate for the school.

Section 8.2 (reasonable market value) applies to the terms and conditions of any loans or finance facilities that a school may undertake.

Generally, proprietors/schools will borrow money from a financial institution (bank, credit union or building society). Features of mortgage loans such as the size of the loan, maturity of the loan, interest rate, method of repayment and other characteristics can vary.

## Examples of records or policies that may be kept

The table below provides examples of the records that may assist to demonstrate compliance with section 83C in relation to mortgages, loans and interest payments.

- (a) evidence that the school has tested the market with respect to obtaining finance;
- (b) written loan agreements which include relevant terms and conditions (for e.g. loan repayment schedules);
- (c) documents evidencing registration of land title and land valuations;
- (d) appropriate documented reasons to support any school loans or other finance with a combined rate of interest and fees that could be considered unusually high given the type of loan, security provided, loan valuation ratio or other relevant circumstances;
- (e) business records that document prior approval to enter the agreement by the board; or,
- (f) business records demonstrating the need to purchase property for the purposes of operating the school.

### 8.4 Land (Leasing/Rent)

Proprietors/schools may enter into commercial leases for the purpose of operating a school. Most commercial leases will generally include a clause specifying what type of business activities can be undertaken: the 'permitted use'. Proprietors/schools should ensure that the lease allows the land to be used for the purposes of operating a school.

Other terms of any commercial lease should include, but not be limited to:

- term of the lease and any options to renew the lease;
- amount of rent charged and when it is payable;
- provisions covering rent increases or reviews including timing and method used (fixed percentage, market-based or CPI);
- clauses setting out who is responsible for costs such as utilities, property rates taxes, insurance and repairs (outgoings)(two common ways to deal with outgoings include 'Gross Rent' or 'Net Rent');
- security in favour of the landlord payable by the tenant in the case that the tenant defaults in their obligations (such as the non-payment of rent). If the tenant is a company then personal guarantees from the company's directors may be required by the landlord. It is also common for landlords to request security in the form of a bank guarantee for an amount equal to three (3) months' rent;
- provisions clearly setting out who is responsible for maintaining/repairing the property and fixtures and fittings during the term of the lease;
- clauses that address what improvements or modifications can be made to the property by either party, who will pay for the improvements and whether the tenant is responsible for returning property to its original condition at the end of the lease.

## 8.5 Ground Rent/Leases for Unimproved Land

Ground lease is a lease of vacant land only without including any buildings/improvements on the land.

The tenant is permitted to develop the land during the lease. Generally, when the lease expires, both the land and the improvements to the land (including buildings) are placed into the ownership of the landlord (unless an exception is created).

As the tenant is responsible for improving the land, through the construction of buildings, etc., ground leases usually have longer terms than other types of commercial leases to allow the tenant to take advantage of the investment in improving the land (use and/or depreciation). Normally, all relevant taxes incurred during the lease period will be paid by the tenant.

The tenant usually pays ground rent for the use of the land and not rent based on the improved value of the land. Because a ground lease allows the landlord to assume all improvements once the lease term expires, the landlord may sell the property at a higher rate.

### Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C for property leases.

- (a) written lease agreements that contain at least basic commercial lease terms (see above);
- (b) documents evidencing registration of leases (where applicable);
- (c) business records that document prior approval to enter the agreement by the board; or,
- (d) business records demonstrating the need to lease property for the purposes of operating the school.

## 8.6 Plant and Equipment

Proprietors/schools purchase plant and equipment to use in operating a school. Some common examples of plant and equipment include:

- Buildings (see below);
- Motor vehicles;
- Machinery;
- Solar panels and battery storage; or
- Office and classroom equipment (furniture, computers, audiovisual equipment, etc.).

Costs of plant and equipment usually include the purchase price and taxes, as well as any related costs such as construction, installation, delivery and handling charges.

## Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the purchase of plant and equipment.

- (a) copies of quotes;
- (b) tax invoices and/or cash book records of daily receipts and payments;
- (c) written contracts relating to the supply of goods;
- (d) asset registers;
- (e) tender documentation;
- (f) business records that document prior approval to purchase property/plant by the board; or,
- (g) business records demonstrating the need to purchase property for the purposes of operating the school.

## 8.7 Buildings and Related Works

For building and related works, reasonable market value may be influenced by a range of factors including timeliness, quality of the building finish and materials, availability and reliability of contractors.

Where payments are made for building and related works, schools should ensure that they can readily substantiate that work of that value was completed at the school. For new buildings, this may include retaining copies of relevant planning approvals and construction certificates.

### Examples of records or policies that may be kept

The tables below provide examples of records that may assist to demonstrate compliance with section 83C in relation to building and related works.

- (a) written quotes received by the school for all building and related works (excluding routine maintenance work covered by contracts) that appropriately details the scope of works obtained in accordance with the school's purchasing manual;
- (b) appropriate approval to proceed from delegated staff member after reviewing all quotes;
- (c) appropriate records supporting all payments for building and related works made by the school (including all supplier invoices);
- (d) appropriate records supporting any payments for building or related works that could be considered unusual because of their higher value (for example, work to heritage-listed buildings or land remediation); or,
- (e) clear delegations in policy which include board involvement in the authorisation process for higher levels of expenditure.

In relation to new buildings or other substantial works:

- (a) copies of development consent and stamped plans;
- (b) copies of construction or occupation certificates;
- (c) comparative analysis to ensure that the school is getting good value for the services the contractor will provide; or,
- (d) business records as evidence of prior board approval.

## 8.8 Intellectual Property

Intellectual property may form a valuable asset to a school or proprietor.

Intellectual property is intangible property which is protected by law relating to patents, trademarks, copyright or, in some circumstances, common law.

Patents and trademarks can be protected through registration with IP Australia. Like all property, rights in intellectual property can be transferred or sold to another party.

### Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to intellectual property assets.

- (a) appropriate evidence of the intellectual property provided to the school, such as a copy of the licence agreement, contract or other assignment document; or,
- (b) documents that prove the registration of intellectual property (e.g. trade mark registration)

## 8.9 Payment for Goods

Schools routinely purchase goods for the provision of education, including for school administration or accommodating the educational needs of students. Goods are tangible commodities or materials used in the operation of the school and may include items like:

- office consumables (e.g. paper, printer cartridges, stationary);
- student materials (e.g. art supplies, books);
- sanitary goods (e.g. cleaning supplies);
- perishable goods (e.g. foodstuffs).

## Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the purchase of goods.

- (a) a purchasing manual that includes policies and procedures for testing the market value of purchases at different thresholds (including testing existing suppliers) appropriate to the school;
- (b) financial reports (e.g. annual budgets, accounts payable, financial statements etc.);
- (c) tax invoices and quotations;
- (d) stocktake records;
- (e) cash book records of daily receipts and payments;
- (f) written contracts or agreements for the supply of goods;
- (g) appropriate records authorising school payments by a responsible person for the school or proprietor; and,
- (h) school credit card policy with procedures for the use of school credit cards, regular acquittal of school credit card expenditure by a responsible person for the school who is not the cardholder, and the submission/retention of purchase receipts.

## 8.10 Consultancy and Professional Services

Non-government schools may engage consultants and other professionals from time to time to provide specialist advice and/or services for school projects or operations. Engagements must be required for the operation of the school, be at market value and reasonable in the circumstances.

Some common consultancy/professional services that proprietor/schools may engage include:

- accountants;
- solicitors;
- architects or designers;
- horticulturists or arborists; or
- social workers, counsellors and education professionals.

## Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to consultancy or professional services.

- (a) appropriate evidence of the market value of the professional services being tested in accordance with the school's purchasing policy prior to the engagement of the consultant/expert;
- (b) a copy of a services agreement or contract detailing the nature of professional services provided by consultants or experts to the school, including an estimate of the total expected fees;
- (c) appropriate evidence that any professional services paid for by the school were received, such as copies of any reports or other documents produced by the relevant consultant or expert;
- (d) appropriate evidence of completion or adoption of the work by the school i.e. approval of policies/reports by board, follow-up work instigated, training provided to staff, signed check sheets noting new advice/policy by staff;
- (e) records (both decisions, rationale and evaluation of costs) that adequately demonstrate the need to engagement consultants/staff on a long term basis or at higher than normal rates; and,
- (f) approved Board minutes and reports to support actions (as required).

### 8.11 Payments to Members of Governing Body

From 29 January 2015, schools receiving NSW Government funding are no longer permitted to pay remuneration to members of school governing bodies in connection with their role on the school governing body.

Schools are permitted to reimburse school governing body members for reasonable expenses incurred as a necessary part of conducting school business, however reimbursed expenses should be supported by appropriate documentation (e.g. payment receipts).

Members of school governing bodies who are also a paid employee in another position within the school, such as the school Principal or a teacher, should be remunerated exclusively for their employment within the school and not their position on the school governing body. Information in section 8.10 (Payment for Consultancy and Professional Services) and section 8.1 (Related Entity Transactions) may also be relevant.

Alternative governance or management structures which are used to circumvent the prohibition of payment to governing body members under section 83C will be considered non-compliant.

Non-cash gifts of nominal value may be provided to school governing body members at the discretion of the proprietor or school (for example, on retirement as recognition of service to the school).

The table below highlights the requirements of section 83C of the Act in relation to payments to member of a school's governing body.

Schools must not pay remuneration of any kind to school governing body members in connection with their role on the school governing body.

However, schools may reimburse a member for a payment made in connection with the operation of the school.

### Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the reimbursement of members' expenses.

- (a) receipts for all purchases by school governing body members who have been reimbursed by the school;
- (b) documented reasons for all reimbursed purchases;
- (c) an employment contract and/or statement of duties for any other paid role in the school held by school governing body members in accordance with Employee salaries, benefits and severance packages in 8.11 above; and
- (d) yearly signed declarations from Board members noting their understanding and compliance with regulations (this can also include related parties information).

### 8.12 School-Related Travel

Proprietors/schools can pay for travel expenses if required for the operation of the school. This may include travel expenses incurred by board members, teachers or other employees as a result of their attendance at training, seminars, conferences and similar events relevant to their position and responsibilities. Personal travel must not be paid for by school funds.

Reimbursement for reasonable travel costs incurred by employees whilst performing their duties could also be specified in individual employment contracts.

## Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the reimbursement of school-related travel expenses.

- (a) receipts for all purchases by school governing body members who have been reimbursed by the school;
- (b) policies and procedures for the payment of school-related travel expenses appropriate within the context of the school;
- (c) appropriate evidence that all travel expenses paid for by the school were required for the operation of the school and not personal in nature; and,
- (d) appropriate evidence that all travel expenses paid for by the school were approved by the school Principal or another responsible person for the school.

## 8.13 Other Common Payments and Financial Transactions

### Compensation, Settlements and Other One-Off Payments

From time to time schools may make payments to individuals in order to settle claims made against the school based on alleged breaches of the school's obligations under contract, statute or common law. Examples would include claims relating to breaches of duty of care, negligence or employment related disputes.

Where such payments are made, a school should ensure it has received legal advice that such payment is reasonable and not excessive in the circumstances.

### Ex-Gratia Payments

Legally, ex-gratia payments are sums of money paid when there is no recognised obligation or liability to pay. For example, a lump sum payment over and above the pension benefits of a retiring employee. In insurance claims, it may take the form of payment for which the insurer did not appear to be liable.

As there is no admitted legal liability for such payments, ex-gratia payments will generally not comply with section 83C requirements.

### **Examples of records or policies that may be kept**

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the payment of settlement costs or costs imposed by an external arbitrator.

- (a) appropriate legal documentation supporting any compensation or related payments made by the proprietor or school (such as a copy of a deed of settlement);
- (b) appropriate records detailing the reasons for any compensation or other payments made by the school or proprietor; and,
- (c) policies and procedures, including appropriate delegations and segregation of duties, to support any routine compensation or other payments made by the proprietor or the school.

### **Student Scholarships and Prizes**

Schools may exercise discretion in making reasonable payments to students in connection with cash prizes (or equivalent), scholarships and related expenditure.

### **Examples of records or policies that may be kept**

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to the payment of student scholarships and prizes.

- (a) policies and procedures supporting any student scholarship or cash prize routinely awarded by the school;
- (b) appropriate records supporting any payments made by the school in connection with a student scholarship or cash prize, including that the payment was authorised by the proprietor or a responsible person within the school; and,
- (c) documentary evidence that any conflicts of interest have been dealt with appropriately.

### **Student Fee Concessions**

Proprietors and schools may offer student fee concessions or remissions to existing or prospective students of the school.

### **Examples of records or policies that may be kept**

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to student fee concessions

- (a) policies and procedures supporting any student fee concessions, remissions or other adjustment to fees and charges offered by the school;
- (b) complete records and approvals, in line with procedures, on all student fees and remissions exercised; and,
- (c) documentary evidence that conflicts of interest (if any) have been dealt with appropriately.

## 8.14 School Fundraising and Donations

A school may make donations to other parties provided that such donations do not contravene the requirements of section 83C of the Act. To demonstrate compliance donations must be:

- related to the education of students of the school
- collected from fundraising activities that are separate or discrete from a proprietor's or school's normal sources of income (such as parent fees or government financial assistance); and,
- recorded as a third-party transaction and donated in a transparent manner which clearly records the beneficiary and the purpose of the donation.

### Sponsoring Registered Charitable Organisations

Before promoting a fundraising activity schools may wish to consider the validity of the organisation that will benefit from the fundraising activity. Schools wishing to be involved in more formal fundraising activities to support charitable causes (not associated with the operation of the school) could consider sponsoring fundraising activities that raise donations for "*charitable purposes*"<sup>1</sup> which are donated to registered "*charities*"<sup>2</sup>.

For further information about charitable purposes and charities, schools should contact the Australian Charities and Not-for-profits Commission on **13 22 62**, by email [advice@acnc.gov.au](mailto:advice@acnc.gov.au), or visit their website at <http://www.acnc.gov.au>.

### Examples of records or policies that may be kept

The table below provides examples of records that may assist to demonstrate compliance with section 83C in relation to fundraising and donations.

- (a) communications and correspondence to parents and community in respect of the collection of donations. These communications must clearly indicate when requesting a donation for a charity;
- (b) financial records that record the receipt and payment of donations as third-party transactions;
- (c) Annual Financial Statements (AFS) that note the receipt and payment of third-party transactions; and,
- (d) financial records linked to the administration of a special purpose fund established under the Deductible Gift Recipient (DGR) scheme regulated by the ATO.

<sup>1</sup> Refer to section 12(1), *Charities Act 2013* (Cth).

<sup>2</sup> Ibid at section 5.

## 8.15 Credit/Monetary Loans

A school may lend money to other schools provided that such loans:

- are provided at rates which are calculated at a reasonable market value;
- are required for the operation of the school that is providing the loan; and,
- would not be considered as unreasonable in the context that the school that is providing the loan is receiving financial assistance from the government.

## Loans to Non-School Entities

Generally, loans from a school to a non-school entity or a third-party (including a staff member) will not comply with the provision of section 83C because:

- they are unlikely to be for the operation of the school lending the money; or,
- they are likely to be considered as being unreasonable in the context of the school receiving government assistance.

## Consumer Credit Loans

Proprietors/schools should also note that the provision of a loan to a person (including an employee) or a strata corporation would be considered as a consumer loan under the provisions of the *National Consumer Credit Protection Act 2009 (Cth)* and subject to the requirement to hold an ACL.

## 8.16 Outstanding Debts

Proprietors/schools may consider writing-off or selling outstanding debts in accordance with an appropriate policy or procedure dealing with debt recovery/management.

Generally speaking, both proprietors/schools need to demonstrate that adequate efforts have been made to recover outstanding debts or that the cost of recovery of the debt would outweigh the benefit of receiving the outstanding debt prior to making a decision not to pursue a debtor.

## Examples of records or policies that may be kept

The table below provides examples of records that may assist proprietors and schools demonstrate compliance with section 83C in relation to the provision of credit or monetary loans.

- (a) documented market research on options available to the school in respect to investing any excess funds;
- (b) a written loan agreement that contains provisions for:
  - (i) a fixed or definite term;
  - (ii) the payment of interest calculated at reasonable market rates and/or repayment schedules;
  - (iii) adequate security over the loan taking into account the risks of non-payment; and,
  - (iv) debt recovery;
- (c) business records demonstrating Board approval for the provision of the credit/loan; and,
- (d) written agreement on joint use of facilities when the school loaning the money gains rights with respect to the other party's premises (if appropriate).

In relation to debt management, both proprietors and schools should implement policies and retain records that include:

- (a) an appropriate policy or procedure for writing-off or selling outstanding debts; and,
- (b) written documentation supporting the premise that debts were only written off after options for recovery had been exhausted or that the costs of debt recovery outweighed the benefits of receiving the outstanding debt.

## 9 Proprietor/School Assets

Placing assets or income into the hands of third parties, such that they are beyond scrutiny by the Minister under sections 83H, 83I and, prohibit recovery of that income or assets under section 83J, would amount to payment that is unreasonable under section 83C(2)(b)(iii).

Where school income and/or assets is paid to a third party to purchase assets that are to be held on trust for the school, or otherwise held by a third party, that could amount to payment that is unreasonable under section 83C(2)(b)(iii).

### 9.1 Shared or Joint Use of Assets

It is a requirement of section 83C of the Act that school assets only be used for the operation of the school. However, it is common practice for schools to have various arrangements for the shared or joint use of school assets and facilities by other schools or sectors of the community, such as sporting facilities, school halls, classrooms, playgrounds and performance venues and such community use is regarded as being part of the broader operation of the school.

Proprietors and schools are encouraged to make their facilities available for use by the community when not required by the school, to meet increasing demand for facilities by communities. However, community use of a proprietor's or school's assets is discretionary.

Where a proprietor or school elects to share the school's assets with other sectors of the community, the following principles must be observed:

- assets should only be made available for shared or joint use when they are not required by the school;
- shared or joint use of assets must not detrimentally affect or obstruct the usual activities of the school;
- shared or joint use of assets must not cause the proprietor or school to incur a material liability;
- the income of a proprietor or school must not be used to subsidise a commercial (for profit) use of a proprietor's or school's assets;
- any shared or joint use of assets for a commercial (for profit) purpose must be at least reasonable market value; and,
- any shared or joint use of assets must be lawful and meet all relevant requirements (e.g. WH&S, child protection, student and staff welfare).

Proprietors and schools should prioritise the use of their assets for educational purposes where there is competing demand for the use of those assets for non-educational or commercial uses.

Schools are encouraged to use their facilities to support NSW school students, and prioritise use by other schools/students if there is competing demand between them and for-profit organisations.

### **Examples of records or policies that may be kept**

The table below provides examples of records that may assist proprietors and schools to demonstrate compliance with section 83C in relation to sharing school assets with the community.

- (a) copies of written agreements or contracts documenting arrangements for the shared or joint use of proprietor/school assets with third-parties;
- (b) cash book records of daily receipts and payments;
- (c) asset booking/management records;
- (d) policies and procedures that facilitate appropriate use (shared or joint use) of proprietor's/school's assets by third-parties or communities; and,
- (e) business records demonstrating Board approval for shared or joint use of school facilities.

## **9.2 Use of Income or Assets for Onsite Ancillary Services**

Ancillary services means services provided by a proprietor or school to staff or students (including their parents or carers) ancillary to the purpose of operating

the school, such as childcare, long day care, early learning centres, preparatory school programs, Out of School Care (OOSC) or vacation care.

The provision of ancillary services by proprietors and schools is important for students and their families, staff and school communities.

Proprietors and schools may provide ancillary services where the following principles are followed:

- For commercial (for profit) providers of ancillary services:
  - no proprietor or school income is used to pay for the provision of ancillary services; and,
  - any use of a proprietor's or school's assets for the provision of ancillary services must be at least reasonable market value.
- For not-for-profit providers of ancillary services:
  - no proprietor or school income is used to pay for the provision of ancillary services unless the provider of ancillary services directs their assets (surplus funds) back to the proprietor or school; and,
  - any use of a proprietor's or school's assets for the provision of ancillary services must not cause the proprietor or school to incur a material liability.

Transactions relating to the provision of ancillary services must be transparent and consistent with the intent of the Act. The provision of ancillary services must also be lawful and meet all relevant legal, regulatory and policy requirements (such as child protection, and the safety and welfare of students and staff).

### **9.3 Leasing School-Owned Property and Assets**

Proprietors/schools may lease school-owned property or assets to third parties. This may include leasing the school canteen or uniform shop to a private operator.

Where a school receives a non-financial benefit from the lease of school-owned property or assets to a third party (such as the school canteen), it is acceptable for the lease arrangement to be on terms that are reasonable in the circumstances. Other lease arrangements entered into by schools, such as the leasing of a school-owned investment property, should be at no less than reasonable market value.

#### **Examples of records or policies that may be kept**

The table below provides examples of records that may assist proprietors and schools to demonstrate compliance with section 83C in relation to leasing of assets.

- (a) a written lease/ licence agreement supporting all leasing or hiring of school assets; and,
- (b) evidence that the terms of the lease are reasonable in the circumstances where the lease is for the benefit of the school.

## 9.4 Disposal of School Assets

Proprietors/schools that receive NSW Government funding should not dispose of school assets at a value below reasonable market value.

In some cases, reasonable market value may be less than the asset's book value, particularly where there is limited demand for the school asset being disposed. Therefore, whether a school asset is valuable (or not) will depend on the circumstances. For example:

- school computers approaching the end of their useful operational life will generally not be considered as valuable school assets; but,
- a mini-bus purchased by a school for transporting children would be considered to be a valuable asset.

Note that any money received through the sale of school assets is characterised as school income.

### Examples of records or policies that may be kept

The table below provides examples of records that may assist proprietors and schools demonstrate compliance with section 83C in relation to the disposal of assets.

- (a) a school asset register listing the details of all school assets above a nominated value appropriate within the context of the school;
- (b) appropriate evidence of annual asset stocktakes being completed by the school or evidence of other review of valuable assets being conducted by the school in line with the normal annual audit process;
- (c) policies and procedures for disposing or writing-off (depreciation/amortization) school assets;
- (d) appropriate records supporting the disposal or write-off (depreciation/amortization) of any school asset, including that the disposal or write-off was approved by a responsible person within the school.

### Asset Registers

It is suggested that asset registers should include:

- (a) a description of the asset;
- (b) the serial number of the asset if applicable;
- (c) the date and cost of purchase of the asset;
- (d) the invoice number for the purchase;
- (e) location of asset;
- (f) the date and method of disposal (if applicable); and,
- (g) any amount recovered at disposal (if applicable).

## 10 Useful Contacts and References

For more information on these Guidelines or the requirements of Part 7, Division 3 of the *Education Act 1990*, proprietors and schools should contact their relevant peak body or the External Relations Policy Directorate in the NSW Department of Education by email at [NGS-Compliance@det.nsw.edu.au](mailto:NGS-Compliance@det.nsw.edu.au).

The Non-Government Schools Not-For-Profit Advisory Committee publish periodic [newsletters](#) which can be found on the Department's website. If you would like to receive notification of newsletters and advice as they are published please email all relevant contact details (name/position and email address) to [NGS-Compliance@det.nsw.edu.au](mailto:NGS-Compliance@det.nsw.edu.au) to be added to the newsletter & updates distribution list.

For further information on the governance standards or any other school registration requirements for non-government schools, proprietors/schools should contact NESAs on (02) 9367 8432 or via their website at [www.educationstandards.nsw.edu.au](http://www.educationstandards.nsw.edu.au).

An up-to-date copy of the '[Registered and Accredited Individual Non-Government Schools Manual](#)' and the '[Registration Systems and Member Non-Government Schools Manual](#)' can also be accessed on NESAs's website.

A copy of the *Education Act 1990* (NSW) can be accessed at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

A copy of the *Education Act 2013* (Cth) can be accessed at [www.legislation.gov.au](http://www.legislation.gov.au).

### 10.1 Other Useful Contacts

Organisation	Contact Details
ACNC	<a href="http://www.acnc.gov.au">www.acnc.gov.au</a>
ASIC	<a href="http://asic.gov.au/">http://asic.gov.au/</a>

### 10.2 Disclaimer

Whilst all efforts have been made to ensure the accuracy of information contained in this document, both the Minister and the Department of Education, its officers, employees and agents disclaim any liability arising from any person's use or reliance on the information contained in this document.

The information contained in this document does not contain legal or financial advice. Any person seeking to rely on the information contained in this document should obtain their own independent legal or professional advice specific to their circumstances.

## 11 Appendix 1: Section 83C of the Education Act 1990

### 83C Financial assistance not to be provided to schools that operate for profit

(1) The Minister must not provide financial assistance (whether under this Division or otherwise) to or for the benefit of a school that operates for profit.

(2) A school operates for profit (without limiting the circumstances in which it does so) if the Minister is satisfied that:

(a) any part of its proprietor's assets (in so far as they relate to the school) or its proprietor's income (in so far as it arises from the operation of the school) is used for any purpose other than for the operation of the school, or

(b) any payment is made by the school to a related entity or other person or body:

(i) for property, goods or services at more than reasonable market value, or

(ii) for property, goods or services that are not required for the operation of the school, or

(iii) for property, goods or services that is in any other way unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister, or

(c) any payment is made by the school to a person in connection with the person's activities as a member of the governing body of the school unless it is in reimbursement for a payment made by the person in connection with the operation of the school.

(3) The regulations may specify whether or not a school operates for profit because of any particular use of assets or income, any particular payment in relation to the school or any other matter. Any such regulation has effect despite anything to the contrary in subsection (2).

(4) The Minister is not obliged to terminate the provision of financial assistance because of this section if, following an investigation under this Division, the Minister is satisfied that:

(a) termination of financial assistance is not justified because of the minor nature of the relevant conduct, or

(b) more appropriate action can be taken under section 83E.

(5) In this section:

**asset** means an economic resource that may depreciate in value over time.

**income** means money or other forms of consideration received periodically from the provision of property, goods or services, investments, gifts, donations, grants, financial assistance or any other gain obtained from the use of a school's assets or its proprietor's assets.

**payment** means a transaction involving consideration (including non-monetary consideration) and includes a commitment to spend or a liability incurred (whether or not the time for payment has arisen).