

DRAFT Not-for-Profit Guidelines for Non-Government Schools

[October 2023]

**EXPOSURE DRAFTS FOR PUBLIC CONSULTATION THURSDAY 19 OCTOBER TO
FRIDAY 24 NOVEMBER 2023**

Acknowledgements

In the spirit of Reconciliation, the NSW Department of Education acknowledges the Traditional Custodians of Country throughout New South Wales and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

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1. Purpose of these Guidelines

To be eligible for financial assistance from the NSW Government, a non-government school (school) must not operate for profit (section 83C(1) of the *Education Act 1990 (NSW)* ('the Act')).

The purpose of these Guidelines is to aid understanding of section 83C of the Act, and to outline factors which the Minister considers relevant and which the Minister is likely to take into account in deciding whether a school operates for profit.

Where these Guidelines list relevant records, the purpose of listing these records is not to impose additional requirements on schools. Rather, the purpose is to provide schools with guidance as to the types of records that may assist them to demonstrate to the Minister that they have not operated for profit, if that is ever called into question.

These Guidelines are not intended to be exhaustive and they do not limit the circumstances in which the Minister may be satisfied a school operates for profit. Rather, they provide general guidance and principles on common transactions and use of assets by schools and their proprietors.

1.1 How to use these Guidelines

These Guidelines form part of a suite of documents available to assist schools, proprietors, Board members and other interested persons.

These Guidelines are divided in four parts to aid users to find information easily:

- Part Two provides a general overview of section 83C;
- Part Three provides guidance on the exercise of regulatory functions as it relates to key concepts and context;
- Part Four provides guidance on common transactions and areas of operation of schools;
- Part Five provides guidance in relation to the payment of members of the governing body.

Further information is also available at the end of the Guidelines.



indicates that there are supporting case studies available on the Regulatory Topic Index at www.education.nsw.gov.au

See also 'Further information' at the end of these Guidelines for ways to contact us if you have questions related to your particular circumstances.

These Guidelines are published by the Minister for Education and Early Learning under section 83L of the Act.

1.2 Glossary

Act means the *Education Act 1990 (NSW)*

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Asset	means an economic resource that may depreciate in value over time (see s.83C(5) of the Act)
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 (see. s.83C(5) of the Act)
Minister	means the NSW Minister for Education and Early Learning
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 (see s.83C(5) of the Act)
Regulation	means the Education Regulation 2017
School	means a non-government school (see s.83A of the Act)

2. Background to Section 83C

To be eligible for financial assistance from the NSW Government, a school must not operate for profit (section 83C(1) of the Act).

Section 83C(2) of the Act identifies (without limitation) a number of specific circumstances in which schools will operate for profit. For instance, a school will operate for profit if any part of its assets or income is used for a purpose other than for the operation of the school. A school will also operate for profit if it makes a payment for property, goods or services, and that payment is at more than reasonable market value or is in any other way unreasonable in the circumstances, given the fact that financial assistance is provided to or for the benefit of the school. Further, a school will operate for profit if it makes any payment to a member of its governing body (unless it is in reimbursement for a payment made by the person in connection with the operation of the school).

Additionally, the Regulation may specify circumstances in which a school will or will not operate for profit (section 83C(3) of the Act). Any such regulation has effect despite anything to the contrary in section 83C(2) of the Act.

3. Key concepts and context

Section 83C of the Act

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).

3.1 ‘The operation of the school’

Under section 83C(2)(a) of the Act, a school will operate for profit if *“any part of the 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”*. Under section 83C(2)(b)(ii) of the Act, a school will operate for profit if it makes payments *“for property, goods or services that are not required for the operation of the school”*.

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The expression ‘operation of the school’ is necessarily broad, recognising that each school is unique in its context and operations.

Whether a use of assets or income is for the purpose of ‘the operation of the school’ or ‘required for the operation of the school’ will be a matter of fact and degree, depending on all the circumstances of a particular case and the evidence before the Minister when considering that question.

The operation of the school will generally encompass:

- the delivery of education at the school; and
- the administration of the school.

In some circumstances, a use may be for the purpose of the operation of the school because it is linked to the education of students or the administration of the school in an indirect manner. This may be the case, for example, if a proprietor permits a school asset to be used by a third party for a fee, for the purpose of generating revenue that the school then uses for the education of students or the administration of the school.

3.2 ‘Reasonable Market Value’

Under section 83C(2)(b)(i) of the Act, a school will operate for profit if the Minister is satisfied that a payment is made by the school “*for property, goods or services at more than reasonable market value*”.

Generally, reasonable market value 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.

The factors and records that the Minister will consider relevant in determining whether a payment was at more than reasonable market value will likely differ depending on the nature of the transaction (and further guidance is provided below). Schools are encouraged to support each proposed transaction with appropriate documentation.

Real property and ‘reasonable market value’

In the context of determining whether a payment for real property is more than “reasonable market value”, the Minister will take into consideration that “reasonable market value” may be influenced by a range of factors including:

- the type, size, and location of the property;
- any structures and/or improvements on the land; and
- heritage status.

In determining “reasonable market value”, the Minister will take into account any independent market valuation that has been provided by an independent qualified valuer engaged by the school.

Additionally, schools may acquire property on the open market, including by bidding at auction. The Minister recognises that the purchase price of a property at auction may be higher than an independent market valuation for that property provided by an independent qualified valuer. This will not necessarily mean that the payment is above

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reasonable market value. The fact that the purchase occurred at auction in an open and transparent setting, as an arm's length transaction, will be taken into account by the Minister in determining whether the payment was at more than "reasonable market value".

Relevant records

- evidence of an independent market valuation being undertaken by an independent qualified valuer at the time of the property transaction, supported by detailed written valuation instructions;
- Documentary evidence that conflicts of interest (if any) have been appropriately managed;
- Records (including decisions and rationale) that clearly explain how the school has determined that the relevant transaction is at no more than reasonable market value.

'Goods or services' and 'reasonable market value'

In the context of determining whether a payment for goods or services is at more than "reasonable market value", the Minister will take into consideration that "reasonable market value" may be influenced by a range of factors including:

- the quality and consistency of provision of the goods or services;
- the location of the school;
- if the goods or services are required at short notice or must be obtained/completed within a specific timeframe (for example, outside of normal business hours);
- if the goods or services are in short supply;
- heritage or related issues (in relation to building and related works);
- the types of warranties provided (if any);
- local government requirements;
- installation costs and any ongoing maintenance and parts.

Generally, the higher the value of the good or service or the more significant the transaction, the more rigour and documentation / procurement the Minister would wish to see on the part of the school.

Relevant records

- A contract between the proprietor/ school and the service provider, clearly setting out the services to be provided;
- tender documentation;
- documented evaluation criteria used to assess reasonable market value;
- documented compliance with procurement thresholds and policies (e.g. multiple quotes or tender process for higher-value items or long-term contracts);
- establishing a list of preferred suppliers through market testing;
- Documentary evidence that conflicts of interest (if any) have been appropriately managed;
- Industrial Awards and/or Enterprise Agreements.

3.3 ‘in any other way unreasonable in the circumstances...’

Under section 83C(2)(b)(iii) of the Act, a school will operate for profit if it makes any payment “*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...*”

Whether a payment is ‘unreasonable in the circumstances’ will be considered based on the facts of the particular payment. It is not possible to conclusively state what will be ‘in any other way unreasonable in the circumstances’, as this is a matter of fact and degree, depending on all of the circumstances of a particular case and the evidence before the Minister when considering that question.

3.4 Ethos, purpose and mission

It is recognised that schools are often established with a constitution reflecting a stated ethos, purpose and/or mission. It is not the intention of s. 83C of the Act to prevent schools from following their particular mission or ethos in order to remain eligible for NSW government financial assistance.

Schools may follow their stated ethos, purpose or mission, while ensuring that all uses of school assets and income are for the purpose of the operation of the school and that all payments are at no more than reasonable market value (see section 3.2 above) and are not unreasonable in light of the fact that the Minister provides financial assistance to the school.

In determining whether a particular use of school assets or income is for the purpose of the operation of the school, the Minister will take into consideration the school’s stated ethos, purpose or mission, as set out in its constitution.

Relevant records

- A copy of the school’s constitution setting out its ethos, purpose and/or mission;
- Records (including decisions and rationale) demonstrating how the relevant use of assets or income is for the purpose of the operation of the school;
- Approved Board minutes and reports to support the relevant use of school assets or income (as required).

4. Common Transactions and Areas of Operation

4.1 Property

Reasonable market value in the context of payments related to a land transaction may be influenced by a range of factors (see section 3.2 of these Guidelines).

An independent land valuation is an evidentiary way to demonstrate to the Minister that a payment was not made at more than reasonable market value. However, it is not the only evidence that can be provided to establish this, as there may be other factors influencing value, such as if a property is acquired at auction (see section 3.2 of these Guidelines).

Relevant records

- Documents evidencing land valuations;
- Business records that demonstrate the need to purchase property for the operation of the school such as Board minutes, strategic /masterplans and concept plans;
- Business records evidencing the intended use of the land such as development applications, local council advice regarding the zoning/rezoning of land and professional advice obtained, and
- Documentary evidence that conflicts of interest (if any) have been appropriately managed.

4.2 Acquisition of land for a future purpose

Schools may require land for the purpose of expanding the school such as, for example, to accommodate increased enrolments. A school may wish to acquire land (e.g. adjacent to or near the school, or for another campus) as it becomes available, however the school may not be in a position to use the land (e.g. by constructing new facilities) until some later date. For example, the school may need to acquire further adjacent land before there is sufficient space to construct the new facilities.

Generally speaking, a school will not operate for profit merely because the land is not intended to (or cannot) be used for its intended purpose immediately. However, in order for a school to remain eligible for NSW financial assistance, the acquisition of land must still be in accordance with the requirements of section 83C of the Act. This includes that the land is acquired at no more than reasonable market value (see section 3.2 of these Guidelines) and that the purchase is for the purpose of the operation of the school.

Once land has been acquired, the land may be used or disposed of, and the balance of these Guidelines will apply to that use or disposal (as appropriate).

Relevant records

In addition to documents which evidence the acquisition and establish that it is at no more than reasonable market value (see section 3.2), documents which record:

- the purpose of the acquisition;
- any initial masterplans or concept plans;
- expected timeframes and plans for any subsequent developments or acquisitions which may be required; and
- details of any rental agreements over the acquired land.

4.3 Mortgages & Loans (Land)

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

Generally, a proprietor or school 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.

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Section 3.2 of these Guidelines ('reasonable market value') applies to the terms of any loans or finance facilities that a proprietor/school may undertake. For example, the payment of an interest rate that is above the reasonable market value of interest rates on comparable loans indicates that a school operates for profit within the meaning of section 83C(2)(b)(i) of the Act.

Relevant records

- evidence that the school has tested the market with respect to obtaining finance;
- written loan agreements which include relevant terms and conditions (e.g. loan repayment schedules);
- documents evidencing registration of land title and land valuations;
- 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;
- business records that document prior approval to enter the agreement by the Board; and,
- business records demonstrating the need to purchase property or otherwise obtain finance for the purpose of the operation of the school.

4.4 Leasing/Rent by a School (Land)

Proprietors/schools may lease property for the purpose of operating a school. Most commercial leases will 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 purpose of operating a school.

Section 3.2 of these Guidelines ('reasonable market value') applies to the terms of any leases that a proprietor/school enters into as lessee. For example, the payment of rent that is above reasonable market value for comparable properties indicates that a school operates for profit within the meaning of section 83C(2)(b)(i) of the Act.

In assessing whether the value of the lease is above reasonable market value, it may be necessary for the Minister to consider other terms and conditions of the lease, including (but not limited to):

- the term of the lease and any options to renew the lease;
- 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');
- provisions clearly setting out who is responsible for maintaining/repairing the property and fixtures and fittings during the term of the lease; and
- 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.

4.5 Leasing of School-Owned Property and Assets

Proprietors/schools may lease school-owned property and assets to third parties and remain eligible for NSW financial assistance, however the lease must be for the purpose of the operation of the school. This may include leasing the school canteen or uniform shop to a private operator.

In determining whether the lease of school property or assets is for the purpose of the operation of the school, the Minister will have regard to, among other things, the terms of the lease.

Additionally, as in the case of “Disposal of School Assets” in the section below, the lease of school-owned property or assets at a value below reasonable market value is a factor that may indicate that a school operates for profit. There are some circumstances 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) which cannot easily be given a “reasonable market value”. In these circumstances, the Minister will consider whether the terms of the lease arrangement are reasonable in the particular circumstances.

Relevant records

- a written lease agreement supporting all leasing of school assets;
- records evidencing the reasonable market value of the lease (see section 3.2 above);
- where appropriate, evidence that the terms of the lease are reasonable in the circumstances;
- evidence that the lease is for the purpose of the operation of the school (for example, while it will depend on all the facts of the particular case, a lease may be for the purpose of the operation of the school where its purpose is to generate revenue to be used for the operation of the school).

4.6 Disposal of School Assets

Proprietors/schools may sell school assets and remain eligible for NSW financial assistance, however the sale must be for the purpose of the operation of the school.

The disposal of school assets at a value below reasonable market value is a factor that may indicate that a sale was not for the operation of the school or that the school otherwise operates for profit. In some cases, the reasonable market value of an asset may be less than the asset’s book value, for example, where there is limited demand for the school asset being disposed of. Therefore, the identification of the reasonable market value of a particular asset will depend on the circumstances.

In considering whether the disposal of a school asset at less than reasonable market value constitutes operating for profit, the Minister will take into consideration whether the relevant asset is a valuable asset. For example, school computers approaching the end of their useful operational life will generally not be considered valuable assets. In contrast, real property or a mini-bus purchased for transporting students are both likely to be considered valuable assets.

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There may be circumstances where a proprietor is not the owner of land, but nevertheless makes improvements to the land for the purpose of operating the school, such as by paying for the construction or upgrade of buildings on the land. If the owner disposes of the land and the school does not receive a proportionate return on its investment at the time of sale, this may constitute a use of the proprietor's assets that is not for the purpose of the operation of the school or may otherwise cause the school to operate for profit. The Minister will have regard to all the facts of the particular case, including the terms of any lease or licence setting out the agreement between the proprietor and the landowner (and whether there is provision for the proprietor to recoup an amount of money that reflects its contribution to the value of the property at the time of sale), when determining whether the sale of the land and its improvements has caused the school to operate for profit.

Note that any money received through the sale of school assets is characterised as "income" for the purposes of section 83C(2)(a).

Relevant records

- if relevant, records evidencing that the asset was sold at 'at least reasonable market value' (see section 3.2 above);
- evidence that the disposal of the asset was for the purpose of the operation of the school (for example, while it will depend on all the facts of the particular case, the sale of an asset may be for the purpose of the operation of the school where the purpose of the sale is to generate revenue to be used for the operation of the school);
- documentary evidence that conflicts of interest (if any) have been appropriately managed;
- If relevant, any written lease or licence governing the relationship between the landowner and the proprietor;
- a school asset register listing the details of all school assets above a nominated value appropriate within the context of the school;
- 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;
- policies and procedures for disposing or writing-off (depreciation/amortization) school assets; and,
- 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.

It is suggested that asset registers should include:

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

4.7 Transfer of Assets or Income

A school will operate for profit if the Minister is satisfied that 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 (section 83C(2)(a)).

Transferring assets or income, or making payments, to related or unrelated third parties for the purpose of placing them beyond scrutiny by the Minister under sections 83H and 83I, and which could prevent recovery of any financial assistance under section 83J (where applicable), may amount to operating for profit. In the context of payments made by the school for property, goods or services, the Minister will consider the purpose of a payment when determining whether it would amount to a payment that is unreasonable under section 83C(2)(b)(iii).

The Minister will consider all of the circumstances of a particular transaction when determining whether a school operates for profit. For example, it may be relevant that income or assets are transferred to a third party to be held on trust for the school, or to be used to purchase assets that will be held on trust for the school. Proprietors/schools should retain evidence documenting any trust arrangements, which would include (among other things) a trust deed, and should ensure (where relevant) that there is a legal instrument providing that the proprietor may continue to use the asset to operate the school.

4.8 Ground Rent/Leases for Unimproved Land

A 'ground lease' is a lease of vacant land only, without any buildings/improvements on the land. Under such a lease, the tenant is responsible for improving the land through the construction of buildings or similar. Proprietors may enter such a lease for the purpose of operating a school.

Section 3.2 of the Guidelines ('reasonable market value') applies to the terms of any leases that a proprietor/school enters into as lessee. For example, the payment of ground rent based on the improved value of the land is likely to indicate that a school operates for profit within the meaning of section 83C(2)(b)(i) of the Act.

Additionally, as with leases generally (see section 4.4 of the Guidelines), it may be necessary for the Minister to consider other terms and conditions of the ground lease when assessing whether the value of the lease is above reasonable market value.

Relevant records

- a written lease agreement;
- documents evidencing registration of the lease (where applicable);
- business records that document prior approval to enter the lease by the Board;
- business records demonstrating that the lease is for the purposes of the operation of the school; and
- Records (including decisions and rationale) that clearly explain how the school has determined that the relevant lease is at no more than reasonable market value.

4.9 Buildings and Related Works

Proprietors/schools may enter into agreements for the provision of building and related works that are required for the operation of the school.

Section 3.2 of these Guidelines ('reasonable market value') applies to payments for the provision of 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.

Relevant records

- 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 procurement policies;
- appropriate approval to proceed from authorised staff member after reviewing all quotes;
- a contract between the proprietor and the service provider, clearly setting out the services to be provided;
- appropriate records supporting all payments for building and related works made by the school (including all supplier invoices);
- 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); and,
- a policy that gives authority to enter building contracts to appropriately senior staff only and which requires the Board to sign off on higher levels of expenditure.

In relation to new buildings or other substantial works:

- grant applications;
- copies of development consent and stamped plans;
- copies of construction or occupation certificates;
- comparative analysis to ensure that the school is getting good value for the services the contractor will provide; and,
- business records as evidence of prior Board approval.

4.10 Shared or Joint Use of Assets

It is a requirement of section 83C(2)(a) of the Act that school assets only be used for the purpose of 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, such as sporting facilities, school halls, classrooms, playgrounds and performance venues, by other schools or sectors of the community.

In determining whether the shared or joint use of assets constitutes a use for the purposes of the school, the Minister may have regard to the following matters (in addition to any other matters relevant to a particular case):

- whether the shared or joint use of assets detrimentally affects or obstructs the usual activities of the school (for example, where an asset is made available to a third party at a time when it would usually be required by the school);

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- whether the shared or joint use of assets causes the proprietor or school to incur a financial liability (for example, where the school is liable under the arrangement for shared or joint use for damage caused to the asset by the other user);
- whether the value of the arrangement for the shared or joint use of assets is at least reasonable market value (note: there are some circumstances where a school receives a non-financial benefit from the use of school-owned property or assets by a third party (such as a local not-for-profit entity) which cannot be given a “reasonable market value”. In these circumstances, the Minister will consider whether the terms of the arrangement are reasonable in the particular circumstances.); and
- whether the shared or joint use of assets otherwise contributes to the operation of the school (for example, where an asset is used to present an exhibition or show, by providing students with free access to that exhibition or show).

Note: that any money received by a school for the use of a school asset is characterised as “income” for the purposes of section 83C(2)(a).

Relevant records

- copies of written agreements or contracts documenting arrangements for the shared or joint use of proprietor/school assets with third-parties;
- Where relevant, records that clearly explain how the school has determined the reasonable market value of the arrangement for the shared or joint use of assets;
- cash book records of daily receipts and payments;
- asset booking/management records;
- policies and procedures that facilitate appropriate use (shared or joint use) of proprietor’s/school’s assets by third-parties or communities; and,
- business records demonstrating Board approval for shared or joint use of school facilities.

4.11 Preschool, Early Learning and Out of School Hours Care

TO BE INSERTED.

The current Guidelines (June 2019) provide guidance to non-government schools and proprietors in relation to ‘ancillary services’. It is recognised that this area of the Guidelines would benefit from further regulatory clarity regarding the use of income and assets for preschools, early learning and out of school hours care. For this reason, the Minister for Education and Early Learning has agreed to the development of a Regulation to provide this clarity. The corresponding section of the revised Guidelines is still to be inserted, subject to the finalisation of the new Regulation.

4.12 Credit/Monetary Loans

A school may lend money to other schools or entities however any such loan must be for the purpose of the operation of the lending school.

In determining whether lending money constitutes a use of assets or income for the purpose of the operation of the school or is otherwise operating for profit, the Minister may have regard to the following matters:

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- the rate of interest charged on the loan. One factor which could indicate that a loan is not for the purpose of the operation of the lending school is an interest rate at lower than reasonable market value;
- any evidence demonstrating that the loan (or the income to be generated by the loan) is for the purpose of the operation of the lending school; and,
- any other matters which indicate that the loan would be unreasonable in the context that the lending school is receiving financial assistance from the NSW government. For example, the Minister may be satisfied that a school is operating for profit if it is engaged in the business of lending money with limited (or no) evidence that the loans are for the operation of the school.

Relevant records

- where the loan is purely a financial investment (in contrast to a loan relating to, for example, joint use of facilities), documented market research on options available to the school in respect of investing any excess funds;
- documentary evidence that conflicts of interest (if any) have been appropriately managed;
- a written loan agreement that contains provisions including: (a) the loan term; (b) the payment of interest and/or repayment schedules; (c) adequate security over the loan, taking into account the risks of non-payment; and (d) debt recovery;
- business records demonstrating Board approval for the provision of the credit/loan; and
- 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).

4.13 Investment of School Income

A school's proprietor may invest income that arises from the operation of the school, provided that the investment is for the purpose of the operation of the school (section 83C(2)(a)) or, where the income is used to acquire property, goods or services (such as shares), it meets the requirements of section 83C(2)(b).

Matters that the Minister may take into account when determining whether an investment constitutes operating for profit are similar to the matters set out in the Credit/Monetary Loans section of these Guidelines.

The Minister will consider all the circumstances of a particular transaction. For example, it may be relevant that the investment is being made to generate income for a specific purpose connected to the operation of the school (such as acquiring an asset); or that the investment is part of a broader financial strategy to ensure the security and financial stability of the school (such as securities or other financial instruments to protect the school's financial position). The level of risk associated with the investment is also likely to be a matter the Minister will take into consideration in determining whether a particular investment is for the purpose of the operation of the school, or otherwise constitutes operating for profit.

Relevant records

- documented market research on options available to the school in respect of investing any excess funds;

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- documents recording the transaction and its key terms (such as a contract or product disclosure statement), including: (a) the cost to the school; and (b) the expected returns;
- documentary evidence that conflicts of interest (if any) have been appropriately managed;
- business records demonstrating Board approval for the investment; and,
- any documents recording the purpose of the investment or the use of investment income.

4.14 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, 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.

Relevant records

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

School fee concessions and remissions are dealt with separately in section 4.22 below.

4.15 School fundraising activities for external causes

Schools often fundraise for a particular external cause, holding these funds in trust for the relevant entity or cause, before making a donation to that cause. The Minister will consider all of the circumstances of particular fundraising when determining whether a school operates for profit.

Relevant records

- communications and correspondence to parents and the community in respect of the fundraising activity and the cause;
- financial records that record the receipt and payment of donations/fundraising.

4.16 Equipment

Proprietors/schools purchase equipment required for the operation of the school. Common examples include machinery or classroom equipment (such as computers or audio-visual equipment).

Section 3.2 of these Guidelines ('reasonable market value') applies to payments for equipment.

Relevant records

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- a) copies of quotes, tax invoices, and/or written contracts relating to the supply of goods;
- b) procurement and/or tender documentation;
- c) business records that document prior approval to purchase the equipment (where it requires Board consideration), and other financial records and reports.

4.17 Salaries

Schools set salaries following an assessment of the labour market context and often in accordance with relevant industrial and/or enterprise agreements. Schools may also pay a remuneration package for executive remuneration. In order for a school not to operate for profit, the payment of each and every salary or remuneration package must be required for the operation of the school, be at no more than reasonable market value, and not be 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.

Reasonable market value in the context of salaries/remuneration packages may be influenced by a range of factors (see '3.2 'reasonable market value'). Each circumstance should be assessed on its facts and supported by appropriate documentation.

Relevant records

- Clearly defined and documented contracts of employment;
- Documentation in the employment contract of any specific payments associated with the achievement of key performance indicators or targets, including clear criteria for ascertaining whether the key performance indicators or targets have been achieved;
- Records (including decisions, rationale and evaluation of costs) that clearly explain how the school has determined that the relevant salary is no more than reasonable market value, required for the operation of the school, and not unreasonable in the circumstances. If relevant, schools may also wish to make records evidencing a clear rationale for any performance-based component of the salary and, in particular, how it meets the requirements of s. 83C of the Act;
- Industrial Awards and/or Enterprise Agreements; and
- School Human Resources (HR) policies and procedures.

4.18 Consultancy and Professional Services

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 no more than reasonable market value, and not be unreasonable having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister.

Section 3.2 of these Guidelines ('reasonable market value') applies to payments for consultancy and professional services.

Schools should exercise particular care in circumstances where payment for consultancy or professional services is proposed to be made to a related entity.

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Relevant records

- a copy of the services agreement or contract detailing the nature of professional services provided by consultants or experts to the school;
- appropriate evidence that any professional services paid for were received, such as copies of any reports or documents produced by the relevant consultant or expert;
- records (including procurement records) that demonstrate the need to engage consultants/professional services;
- a 'Conflict of Interest' policy and records demonstrating that the policy has been followed in the particular circumstances (for example, records demonstrating that a conflict of interest has been declared and outlining the steps taken to manage it); and
- records that demonstrate decision making, such as Board minutes and reports.

4.19 Shared services

A shared services agreement is an agreement under which multiple schools (or one or more schools and other non-school related entities) receive services from a single service provider.

Schools may enter into shared services agreements provided that all payments made by individual schools under the agreement are for services that are required for the operation of that individual school, are at no more than reasonable market value and are not 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.

Section 3.2 of these Guidelines ('reasonable market value') applies to payments for shared services.

In considering whether a shared services agreement is in accordance with s83C, the Minister may have regard to:

- whether terms are flexible, so that each individual school only pays for the services it requires for its operation;
- whether there are options for each school to opt in or out of the receipt of services (without penalty) according to changing needs and whether schools are provided with options to review and negotiate future services;
- whether the agreement is well documented and clearly identifies the services to be delivered and costs;
- whether the agreement includes a provision for itemised billing for each school participating in the shared services agreement;
- whether the school or schools are subsidising services provided to any other organisation; and
- whether payments for services made by each school are at no more than reasonable market value.

Relevant records

- shared service agreements with clearly documented terms;
- records (including procurement records) that demonstrate the need for the services; and

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- records that demonstrate decision making, such as Board minutes and reports.

4.21 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, volunteers, teachers or other employees as a result of their attendance at excursions, sports events, training and similar events relevant to their position and responsibilities. Personal travel must not be paid for using school funds.

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

All travel expenditure must not be 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.

Relevant records

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

4.22 Compensation, settlements and other one off payments

Compensation and Settlements

From time to time proprietors make payments to individuals in the context of pending or actual litigation alleging breaches of their obligations under contract, statute or common law. Examples include payments to settle a public liability claim or an employment related dispute.

Generally, these payments will be considered for the operation of the school where the litigation arises out of the proprietor's operation of the school and the payments are consistent with any professional legal advice or orders given by a relevant tribunal (e.g. Fair Work Commission) or Court (where applicable).

Relevant records

- Appropriate legal documentation supporting any compensation or settlement payments made by the proprietor or school (such as a copy of a deed of settlement)
- Appropriate records detailing the reasons for any compensation or other payments made by the school or proprietor; and
- 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.

One-off payments to individuals

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Schools should exercise caution when considering providing other kinds of one-off payments without legal liability or obligation, or on the basis of a purely moral or social obligation. The school should assess each proposed payment on its facts to make sure the payment is required for the operation of the school and is not a payment for property, goods or services that is unreasonable having regard to the fact that financial assistance is provided to the school by the Minister. Appropriate supporting documentation should be kept.

Relevant records

- Clearly defined and documented contracts of employment;
- Documentation in the employment contract of any specific payments associated with the achievement of key performance indicators or targets, including clear criteria for ascertaining whether the key performance indicators or targets have been achieved;
- Records (including decisions and rationale) that clearly explain how the school has determined that the relevant payment is required for the operation of the school and is not unreasonable in the circumstances. If relevant, schools may also wish to make records evidencing a clear rationale for any performance-based component of the salary and, in particular, how it meets the requirements of s. 83C of the Act.

Student Scholarships, Prizes and Other Activities

Making a reasonable payment to a student in connection with a prize, scholarship or other activity as a student of the school does not constitute operating for profit.

Relevant records

- Policies and procedures supporting any student scholarship or prize (including cash prizes) routinely awarded by the school;
- 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;
- Appropriate documentation supporting that the payment is reasonable; and
- Documentary evidence that conflicts of interest (if any) have been appropriately managed.

Student Fee Concessions

Proprietors and schools may offer fee concessions or remissions to existing or prospective students of the school, on the basis of clear and documented criteria, including in circumstances of financial hardship.

Each circumstance should be assessed on its facts and supported by appropriate documentation to demonstrate that the use of income is for the purpose of the operation of the school.

Relevant records

- Policies and procedures supporting any student fee concessions, remissions or other adjustment to fees and charges offered by the school;
- Complete records and approvals, in line with policies and procedures, on all student fee concessions and remissions; and

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- Documentary evidence that any conflicts of interest (if any) have been appropriately managed.

4.23 Insurance

Schools may wish to obtain insurance related to the operation of the school, for instance, public liability insurance or directors & officers insurance.

Such insurance must be required for the operation of the school, be at no more than reasonable market value, and not be unreasonable having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister.

Relevant records

- Copies of insurance policies and payment records;
- Periodic review by an independent broker of appropriate insurance cover and up-to-date copies of insurance policies and statement of coverage;
- adequate recording of Board minutes, including rationale and approvals.

4.24 National Redress Scheme for Institutional Child Sexual Abuse

A school will not operate for profit because of a funding contribution made by or on behalf of the school to the National Redress Scheme for Institutional Child Sexual Abuse, if the school demonstrates to the Minister's satisfaction that the funding contribution does not comprise any money provided by the Minister as financial assistance in respect of the school.

Funding contribution means a funding contribution for a participating non-government institution under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

Relevant records

- Audited financial statements and/or financial audit information; and
- Records related to the administration of the National Redress Scheme

5. Payments to members of the governing body

A school will operate for profit if it makes a payment to a person in connection with the person's activities as a member of the governing body of the school, unless the payment is in reimbursement for a payment made by the person in connection with the operation of the school.

Members of school governing bodies who are also paid employees 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.

Relevant records

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- Records of all payments made to members of the school's governing body, along with supporting receipts; and
- an employment contract and/or statement of duties for any other paid role in the school held by school governing body member.

6. Further information

Schools or proprietors may contact the Department about these Guidelines by email to ngsenquiries@det.nsw.edu.au.

Further information is available on the Department's website at: www.education.nsw.gov.au.

This further information includes:

- The Regulatory Framework (LINK) for the Oversight of Financial Assistance to NSW non-government schools – outlining our risk based and outcomes focussed regulatory approach
- A Regulatory Topic Index (LINK) – including easy to find topics and case studies on a number of topics covered by these Guidelines
- Contact details for schools wishing to seek clarification regarding the Guidelines or their particular circumstances in light of the Guidelines.