

# *Performance Audit Report*

## **Academics' Paid Outside Work**

- **Administrative Procedures**
- **Protection of Intellectual Property**
- **Minimum Standard Checklists**
- **Better Practice Examples**

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# **Executive Summary**

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## Executive Summary

### The Audit

The objective of the audit was to examine the existence, adequacy and implementation of policy by universities to manage academics undertaking private paid outside work (**POW**) and research, where university facilities or the university's name is, or could be seen to be, involved.

The nature of POW (and the risks faced by universities) varies depending on the relationship between the academic and the external client. Greater risk exists in respect to private POW (where academics act in a private capacity separate from their university employment and sell services directly to an external client) than from POW activities sponsored and controlled by universities.

Therefore, the audit concentrates on the adequacy of universities' policies and procedures in regard to academics' *private* POW. In particular, the audit examined the extent to which universities ensured that the interests of the universities, and ultimately that of the taxpayers, have been adequately been protected in respect of:

- the use of university resources by academics for private work (including time, human and physical resources, and the university's reputation)
- ownership and the use made of intellectual property developed by an academic during his/her employment with a university and
- the extent to which the interests of universities are adequately protected in terms its intellectual property (**IP**).

### Protected Disclosures Act 1994

This audit resulted from the assessment of a protected disclosure referred to The Audit Office under the Protected Disclosure Act, claiming that a university wasted money as a result of an arrangement involving POW it had with one of its academics.

The allegation also raised concerns about whether the academic, without the knowledge and approval of, and compensation to, the university had used the IP of the university.

The overall conclusion was that whilst there was no evidence to prove that serious and substantial waste of public money had occurred in relation to the specific allegations raised, the investigation disclosed systemic failures or deficiencies that can cause such waste. Furthermore, there was an actual or potential conflict of interest in the academic's activities. The university has since addressed the issue.

Nevertheless, The Audit Office was concerned the extent to which the same situation could occur at other universities and carried out a desk audit of all universities in New South Wales. The results of that analysis (without naming the universities) are contained within this report.

In conducting the audit, The Audit Office, among others, relied on guidelines for private POW activities developed by the Office of the Auditor-General in Western Australia and the Discussion Paper on IP issued by the Australian Vice-Chancellors' Committee in 1995.

### **Audit Opinion**

The Audit Office is of the opinion that, whilst all universities have developed policies to manage POW and to protect IP rights, many of those policies are outdated and require urgent review. Many of them do not adequately protect the universities or provide adequate compensation for the use of their resources or their name. There also seems to be a lack of clarity for accountability to monitor and enforce the policy.

Whilst greater attention seems to have been given to protect the intellectual property rights, which mainly arise as a consequence of research projects, there is a need to review and revisit those policies as well.

### **Findings**

The audit opinion is supported by the following findings.

Certain policies are not current and no university has addressed all the minimum standards identified in this report, which are designed to provide protection for universities from the potential risks associated with POW. Several policies are considered to be inadequate, ambiguous and at times contradictory.

Implementation of policies across faculties within universities is not consistent. The audit was not able to confirm that Deans and Heads of faculties monitor compliance with policy requirements. University administrations have a similar, but also unfulfilled responsibility to monitor compliance with policy.



**Other Comments** Certain universities have commenced a review of current arrangements with the intent of improving current arrangements.

To assist in this process The Audit Office has:

- identified a range of minimum standards that all universities are encouraged to address in policy development and implementation
- provided examples of better practices within universities that other universities might consider emulating
- provided each university with a copy of the draft report identifying the results for that university.

It is intended that The Audit Office undertake a follow-up audit in approximately two years time. That audit is likely to concentrate on the level of improvement by universities towards implementation of minimum standards of practice for managing private POW by academics.

#### **Acknowledgment**

The Audit Office gratefully acknowledges the assistance provided by those universities which cooperated with the audit.

## **Recommendations**

It is recommended that universities:

1. review their existing policies in relation to paid outside work and intellectual property policies to ensure that those policies address the minimum standards identified in this report.
2. enhance present accountability procedures to ensure that requirements contained within policies are implemented at all levels of the university.

## **Response from the Department of Education and Training**

*I refer to your letter of 21 December 1999 concerning the performance audit report undertaken by The Audit Office on Academics' Paid Outside Work.*

*I note your advice that the report will be tabled in Parliament, along with any comments from myself as Head of the relevant authority, under the provisions of section 38C of the Public Finance and Audit Act 1983.*

*While the subject matter of the draft report is important, it essentially involves issues of process, monitoring and accountability concerning university academics' paid outside work. These are properly the province of the universities themselves under the powers conferred on universities by their enabling legislation. I note that copies of this report have been forwarded to the Vice-Chancellor of each NSW university for information.*

*It is the view of the Department of Education and Training that the audit report will provide useful guidance to universities in maintaining and reviewing their policies in this area. Initial indications from the university sector would support this view.*

*Professor Gerard Sutton, Convenor of the NSW Vice-Chancellors' Conference (NSWVCC), has indicated that the report will be placed on the agenda for the next meeting of the NSWVCC in March 2000. I will provide you with further feedback, in the tabular form requested, after this meeting.*

*Thank you for the opportunity to comment on this performance audit report.*

*(signed)*

*Ken Boston*

*Managing director of TAFE NSW*

*Director-General of Education and Training*

*Dated: 19 January 2000*

# 1 Introduction

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### 1.1 Independence and Accountability

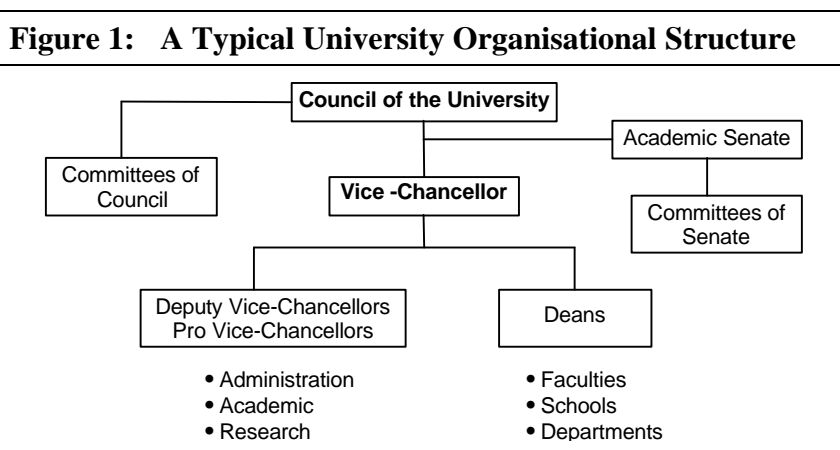
Universities are independent centres of development and dissemination of knowledge.

The structures and governance arrangements of universities reflect their historical development. Persons engaged in research within universities have always been unrestricted in their activities - the concept of "academic freedom" prevails.

This concept of freedom is mirrored by the enabling legislation. There is no single piece of legislation applicable to the "university sector". Rather each university is established under its own Act of Parliament such as:

- Macquarie University Act 1989
- Southern Cross University Act 1993
- University of Sydney Act 1989.

Within this concept, the administration of the university has been one of a collegiate approach with senior academics managing the affairs of the university.



The typical university structure and its management is devolved to Faculties, Schools or Departments.

This approach relies on the Council, Senate or Board and the Vice-Chancellor to develop and disseminate effective policies and procedures, and to have in place arrangements to monitor implementation. Effective devolution also relies on the ability of Deans and Heads of Schools and Departments to implement policies and procedures.

## 1.2 A Changing Environment

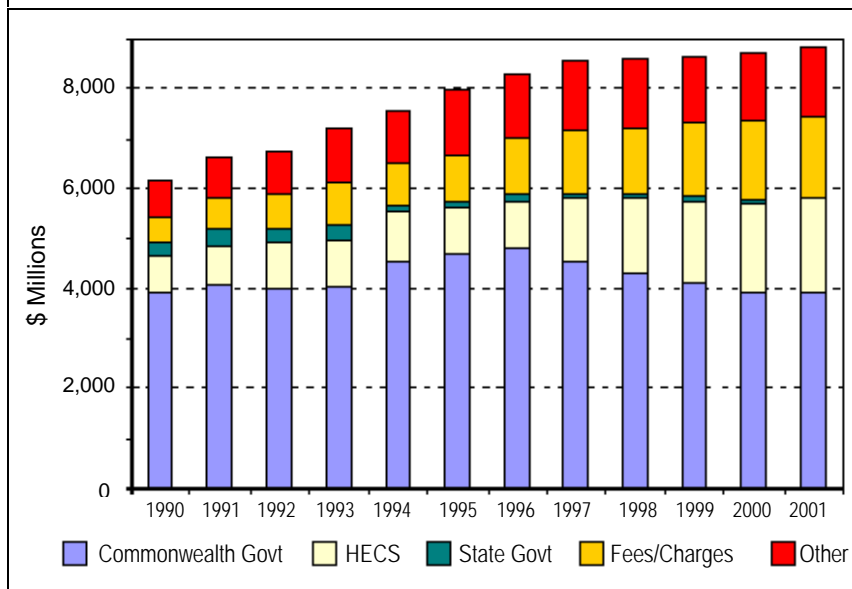
As with many sectors of the Australian economy, universities are under a pressure to change.

### Funding

Traditionally the university sector has relied on funding from government, which has tended to increase until the mid-1990s.

Higher education revenue since 1997 has, however, grown at a smaller rate than previously (Figure 2 refers) and this trend is expected to continue over the next few years.

**Figure 2: Total Higher Education Revenue - 1990-1997 (Actual) and 1998-2001 (Estimated)**



Source: *Higher Education - Report for the 1999 to 2001 Triennium*, Department of Education, Training and Youth Affairs, Canberra, March 1999.

At the same time, patterns of government funding are also changing. The Commonwealth Government is seeking greater diversification in universities' funding with the institutions being encouraged to be more innovative in securing resources from other than government sources.

The Final Report of the Review of Higher Education Financing and Review to the Commonwealth Minister for Education, Training and Youth Affairs recommended considerable change in the way that universities are funded, with the emphasis on a more responsive performance-based approach to funding.<sup>1</sup>

<sup>1</sup> *Learning for Life Final Report* Review of Higher Education Financing and Policy, Canberra, April 1998.

Recommendations from the review are designed to develop a globally competitive higher education industry. This includes:

- good management practices
- changes to the traditional governance arrangements
- increased competition in the higher education sector and
- transformation of existing financial arrangements to emphasise accountability to individual students.

The report states:

Financing arrangements should also embody fair levels of private and public contribution that reflect both the benefits to society and the significant private benefits that are generated by participation in post secondary education.<sup>2</sup>

In relation to work practices the report notes that

In line with broader industrial relations changes, institutions now have greater freedom in wage bargaining. However, this has not been accompanied by the flexibility or incentive to make use of that freedom in ways beneficial to both staff and students. Because greater industrial relations freedom has been granted without a commensurate increase in the capacity of institutions to earn additional revenue, institutions can fund wage increases only through cost cutting, which for many has taken the form of staff reductions.<sup>3</sup>

## **POW**

One means by which universities might attract additional revenue is to attract contract research or encourage university expertise to be used through academics engaging in POW. Contract research and university-sponsored and managed POW generate revenue flow direct to the university.

Private POW (that is, where academics undertake POW in a private capacity separate from their university employment) can reduce wage pressures through staff accessing alternative revenue sources and might create other direct and indirect benefits for university (identified in Chapter 2). Private POW also exposes universities to several risks including unauthorised use of university resources, potential legal liability and damage to the university's reputation.

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<sup>2</sup> Ibid, p17.

<sup>3</sup> Ibid, p19.

**IP** Academics undertaking POW are attractive to external clients because they can accept the knowledge and expertise within the university. Often POW requires the use of IP owned by the university and unavailable from any other source.

Universities face the risk that such IP might be used in the course of POW without permission or adequate recompense to the university. This can affect the revenue-earning capacity of universities' IP and cause diminution in its value.

*Audit Observation* A more commercial environment within universities is a significant departure from past practice and brings risks that must be identified and managed.

### **1.3 Review by Western Australia**

In November 1994 the Office of the Auditor-General of Western Australia (OAGWA) reported on the findings of a performance examination into university consulting services within that State.<sup>4</sup>

The OAGWA findings indicated that there were several areas of concern in regard to the practices of universities allowing their staff to engage in paid external consultancy activities. The report concluded that:

. . . substantial scope (exists) for improvement in the monitoring and management of such services by universities if maximum benefit is to be derived in terms of revenue, knowledge and reputation.

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<sup>4</sup> *University Consultancy Services*, Office of the Auditor General Western Australia Performance Examination Report No. 5C, November 1994.





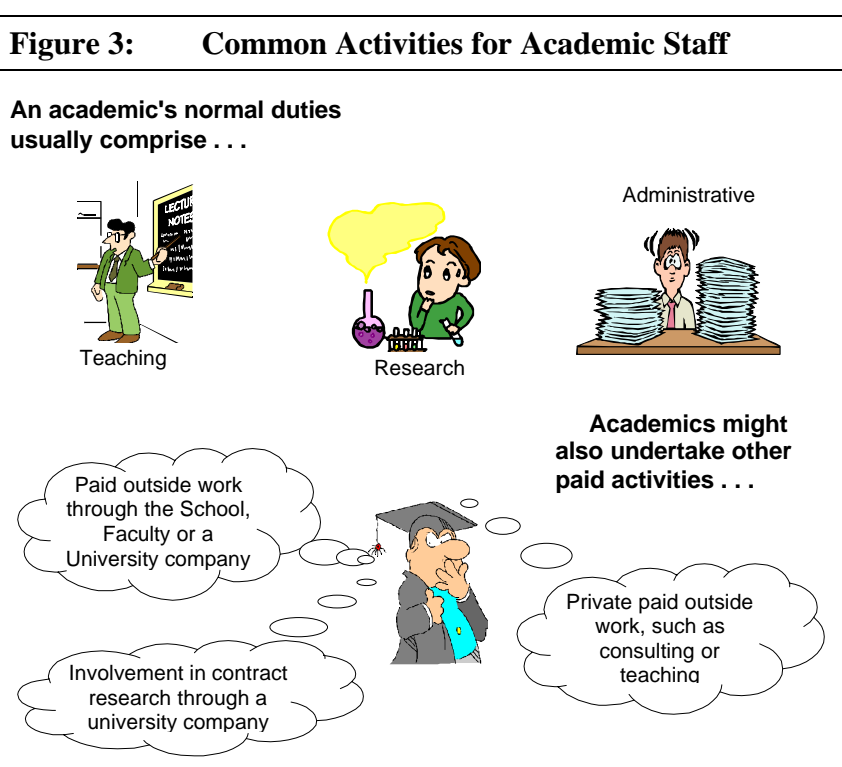
## **2 Managing the Risks**

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## 2.1 Introduction

Academics are entitled to engage in POW other than, and in addition to, their employment with a university.

This entitlement is a characteristic of the academic profession and arose from the need for universities to attract quality staff while managing the total salary bill in an environment of declining revenue from government.



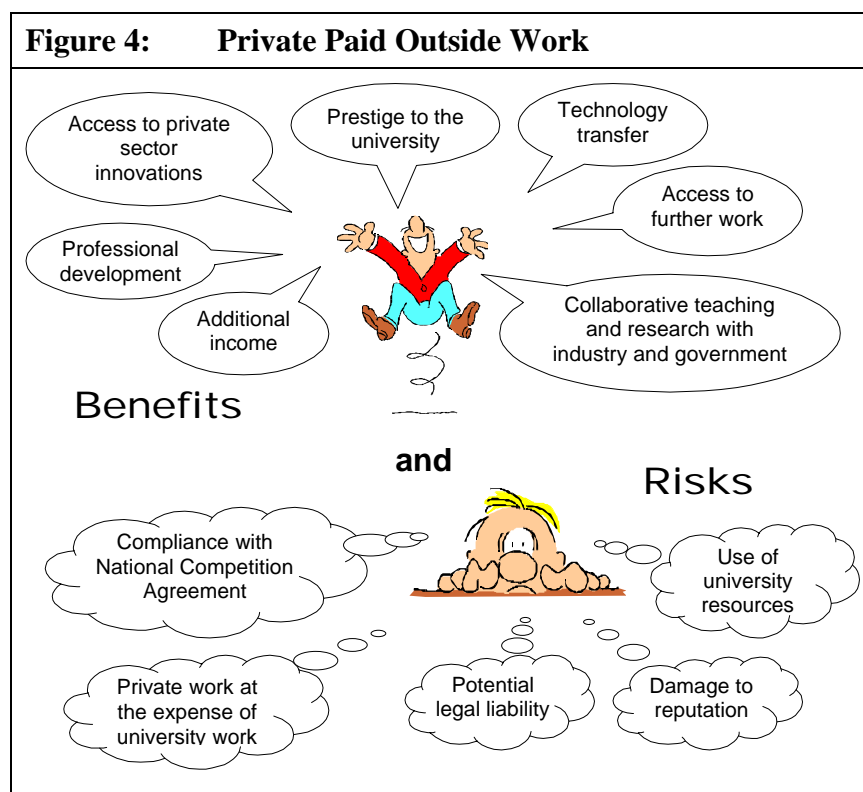
**The Nature of POW** The nature of POW that academics might undertake varies depending on the relationship between the academic and the external client.

On the one hand and in the case of contract research through a university company, work is undertaken through a School, Faculty or University company. In these situations the university enters a contract with a client. Academics undertaking work on such activities do so as employees of the university and have no separate contractual relationship with the client.

**Private POW**

Alternatively, the academic might engage in *private* paid outside work, such as consulting or teaching. The academic acts in a private capacity that is separate from his/her university employment and sells his/her services at professional rates directly to an external client. In this circumstance the client's contractual relationship is with the academic not the university.

Greater risks exist in respect to private POW than from activities sponsored and controlled by universities. Therefore, the audit concentrates on the adequacy of universities' policies and procedures in regard to academics' *private* POW.

**2.2 Minimum Standards**

Private POW can represent both benefits and risks for the academic and the university. For universities to benefit, it is essential that risks are managed.

Each university is obliged therefore, to assess the risks for paid outside work and to implement relevant policies to manage risks so identified.

For example, POW may involve the use of resources of the university by academics. A mechanism is required to determine both a reasonable cost for the use of those resources and to charge the academic for their use. If academics are prohibited from using those resources then procedures are required to monitor compliance with that policy.



**NOTE:**

**Minimum risk management standards suggested in this report are highlighted with the symbol identified within the left margin and are collated at the end of the chapter.**

Universities' policies for POW were reviewed to determine compliance with the minimum standards. The following sections:

- discuss the issues arising from the application of minimum standards,
- present the findings of the analysis of universities' policies and
- highlight examples of better practice that other universities might adopt.

**NOTE:**

**The results of the analysis against each criterion for each university (identified by a number only) are provided in table format within this report.**

### 2.3 Procedures within Universities



**Each university should identify the risks arising from academics' POW, develop, and implement a policy and supporting procedures to manage those risks. The policy and procedures should include a process of periodic review and amendment to ensure that policies remain relevant, respond to implementation comments and address emerging issues.**

Summary of Analysis – Existence of Procedures										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the university have a POW policy?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Has the university's POW Policy been issued recently?	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗
Does the policy contain evidence of recent review or includes review mechanism / timeframes?	✗	✓	✗	✗	✗	✗	✗	✗	?	✗

Key: The analysis of university policies uses the following symbols:

- ✓ Criterion met – Policy or procedure exists *or* issue is addresses adequately and gives clear guidance to users.
- ? Criterion partially met – Unclear whether policy or procedure exists or issue is mentioned but contains ambiguities
- ✗ Criterion not met – Policy or procedure does not exist or issue is not addressed or is dealt with too ambiguous or contradictory to assist users.

All universities have issued instructions to cover POW activities by their staff. These instructions can be:

- a specific policy (for example, *University Paid Outside Work by Academic Staff Policy*) and/or
- a section of a personnel management handbook (for example, *Section – Outside Employment of Academic Staff*) and/or
- another form, such as an enterprise or industrial agreement.<sup>5</sup>

#### Audit Observations

Only one policy stated specifically a review mechanism and a review date. Of the policies reviewed by The Audit Office, the majority were not current (that is, showing evidence of being issued or reviewed during the previous 18 months).

It is better practice to date the document and include mechanisms for reviewing and amending the policy after its implementation.



The policy issued by Curtin University of Technology<sup>6</sup> (WA) includes an operative date and a statement on the review process:

The policy will be reviewed 12 months from the operative date and, should any unintended consequences be identified, amended accordingly.

<sup>5</sup> For simplicity, this report uses the term "POW policy" for whichever form the instructions are issued by individual universities.

<sup>6</sup> Curtin University of Technology policies on POW are available from the University's internet site at [www.vc.curtin.edu.au/oua/las/policies](http://www.vc.curtin.edu.au/oua/las/policies)

2.4 Restrictions on POW



**Policies should include discussion of any restrictions that universities place on academics engaging in POW activities. The most common restrictions are the type of work that academics may undertake and the amount of "normal duties" time that can be used for non-university related activities.**

**Summary of Analysis – Restrictions on POW**

Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the policy state the types of POW allowed to academics?	?	?	?	x	?	?	✓	?	?	?
Does the policy set a time limit for academics engaging in POW?	x	?	✓	✓	✓	✓	✓	x	✓	✓
Does the policy specify other methods for monitoring POW activities?	?	x	x	x	x	x	?	✓	✓	x

**Types of POW**

Although academics are entitled to undertake POW in addition to university employment, there are nonetheless some restrictions.

The restrictions usually state that activities should be of a professional nature within a field relevant to the academic's discipline and be of a type to enhance the prestige of the academic and the university. Many policies state specifically those activities such as "routine testing" and professional work, which could easily be carried out by other persons in the community, should be avoided.

*Audit Observation*

Academics should avoid POW that could lead to perceived or actual conflict of interest. More specific guidance by universities in this area might assist.

This might take the form of avoiding engagements that place an academic in competition with university-sponsored activities, for example, directorships, and lobbying activities.



Two universities highlight that paid coaching of the university's students (by an academic) is not acceptable. One university policy contains a specific test to ascertain conflict of interest situations:

Ask whether or not the nature of the outside activity might place the academic's own interest above that of the university.

### **Time Limits**

Most universities allow academic staff to engage in POW during the academic's usual working time up to a specific time limit. The amount of time allowed for POW is usually one day per week, or 13 days per quarter. Most policies also allow staff to exceed this limit over short periods so long as the average for the year does not exceed one day per week.

### *Audit Observation*

There are inherent difficulties in monitoring compliance with time-based activities.



Much of an academic's university activities can take place away from the university's premises, for example preparation of course material, marking of papers, assignments and theses, and the preparation of articles for academic journals. In such an environment it is difficult for supervisors to monitor continuously all staff activities.

Nevertheless, if university policy applies the one-day a week rule then there is a requirement for management to monitor adherence to the time limit.



Within the context of a specific time limit on POW some policies mention that:

If a significant amount of an academic's time is to be taken up with paid outside work, then their supervisor should suggest the academic apply for leave without pay or negotiate a fractional appointment.

### **Performance Assessment**

The OAGWA 1994 audit report highlighted the difficulties in applying a specific time limit to POW activities. It suggested that universities:

may be better served by a shift in focus (from time monitoring) to output based measures whereby appropriate levels of service to the university are established as a standard measure against which output can be compared.<sup>7</sup>

Such a focus attempts to overcome the difficulties inherent in time-based policies by ensuring that an academic is meeting his/her obligations to the university as contained in performance agreements. Once an academic fulfils the requirements of the employment contract (and maintains a satisfactory level of performance of duties) then he/she is free to engage in unrestricted POW.

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<sup>7</sup> Op cit, p47.



A performance-based model to be effective requires an adequate system of performance contracts and appraisals. Adherence by academics to university policies (including those relating to POW activities) would be an important aspect included within a performance based contract and performance assessment.

*Audit Observations*

Certain universities are currently implementing a more performance-based approach to managing POW activities.

It might be appropriate for universities that currently monitor POW activities based on a fixed time-period to consider managing these activities as part of the performance appraisal systems.

**2.5 Notification Procedures**



**To enable monitoring of performance and compliance with university policies, notification to the university is required that an academic proposes to engage in POW.**

**Policies should identify exemptions allowed under the university's procedures. This simplifies compliance requirements by academics and avoids unnecessary work for university and faculty administration staff.**

Summary of Analysis – Notification Procedures										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Is there a requirement that academic advise the University before starting POW activities?	✓	✓	✓	✓	✓	✓	?	?	✓	✓
Does the policy contain approval procedures for POW activities?	✓	✓	✓	x	✓	?	?	?	✓	x
Does the policy state the circumstance where activities are exempt from approval procedures?	✓	✓	✓	x	✓	✓	?	✓	✓	✓

*Audit Observations*

All but two of universities' policies state specifically that academics must advise the university before commencing POW. The other two policies contain ambiguous statements on notification requirements.



Most universities require notification before an academic engages in POW. However, several universities do not specify approval procedures. Requirements should be contained in policy documents, for example:

- notification arrangements on specific forms
- immediate supervisors certifying satisfactory performance of duties by the academic
- approval from Deans or Vice-Chancellors for the academic to undertake POW.

One university is taking the approach not to approve private POW because this might signal to third parties that the university condones, or is a party to, the private employment of academics.

Such an approach would require other compensatory controls instead of the approval process, to protect adequately the university from the risks associated with POW activities. Suitable controls could include performance monitoring of staff and evidence that the client was aware that the academic acts in a private capacity.

Examples of good approval procedures include:



Prior approval for paid outside work must be obtained from the Dean on the recommendation of the academic's Head of Department.

Procedures require prior approval which shall be given when:

a completed disclaimer form (that the academic acts in a private capacity not as an employee) has been lodged

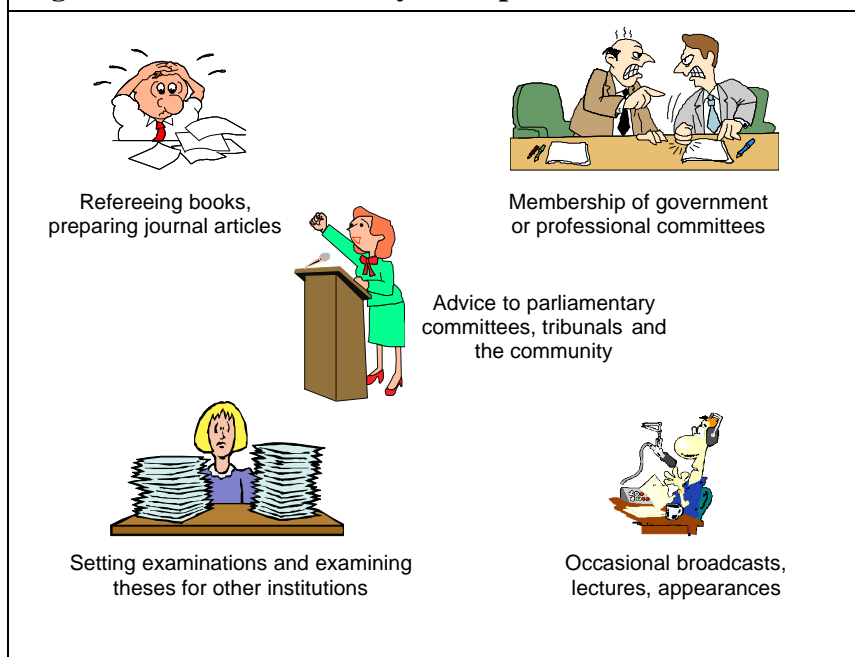
it can be demonstrated that the proposed activity will not interfere with the efficient conduct of the staff member's University responsibilities

benefits to the University, including staff development opportunities and the need for engagement in professional practice, have been fairly and equitably considered.

### **Activities Allowed without Notification**

Not all non-university activities require formal notification and approval; Figure 5 below highlights some common exemptions. Any exemption (to the requirement to notify) should be contained within policies.

**Figure 5: Activities Usually Exempt from Notification**



## 2.6 Using University Resources



**It is the responsibility of each university, after considering the risks and the specific circumstances of the institution, to decide whether to allow academics to use university resources (for private POW) and if so under what terms and conditions.**

**If the policy requires that academics *are to be precluded* from using university resources for private POW then:**

- **measures are necessary to monitor university resources for appropriate usage especially items such as consumable supplies, photocopying, facsimile machines and telephones, and computer equipment.**

**If resources *are allowed* to be used for private POW university policies should *as a minimum*, contain:**

- **guidelines on the use of resources, for example under what circumstances is the use of resources approved**
- **administrative procedures to record and account for resources used in private POW**
- **procedures for identifying and recovering the university's overhead costs in relation to private POW.**

Summary of Analysis – Using University Resources										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the policy state unambiguously whether the use of university resources is allowed for POW?	?	✓	✓	✓	?	✓	?	✓	✓	✓
Does the policy provide guidelines on allowable usage of university resources?	?	?	?	?	?	?	?	✓	✓	✓
Are there procedures for charging staff (or other means of recovery) for using university resources?	?	?	?	?	?	x	x	✓	?	✓
Are charge rates for university resources specified or available?	✓	x	?	x	x	x	x	✓	x	✓

**Policy**

A minority of universities maintain a policy that resources are not to be used by staff for private POW activities. As the use and control of most resources in universities is devolved to the School, Department or Faculty level, this policy places emphasis on establishing strong accountability mechanisms at, and to, this level.

*Audit Observations*

The analysis of universities' policies in regard to the use of resources disclosed ambiguity and some gaps.



Anecdotal evidence suggests that adequate accountability mechanisms are not established within faculties and schools of universities. Most universities avoid blanket prohibition (of use of resources) by stating that academics may use resources for POW but with an adequate recompense to the university.

However, in doing so most policies are silent in terms of providing guidance on what is permissible usage of university resources and on procedures for recovering the cost of usage.

For example, it is common to state that reimbursement to the university shall be on "full cost recovery" basis without providing guidance on how this is determined or implemented.

One university which precludes academics from using its resources for POW states:



... the (private) consultant: . . shall not use the University's resources such as accommodation, technical or secretarial staff, facilities, equipment, telephone, computing or network links in connection with the private consultancy . .

Alternatively, a university that allows its resources to be used for private POW is developing a schedule of charges for resource:



A schedule of charges will be developed and be approved by the Vice-Chancellor annually. As part of the budget process, the Executive Director, Division of Financial Services shall seek from each commercial enterprise and service area a recommended charge for each service performed. The Executive Director in advising the Vice-Chancellor shall ensure that charges are set at commercially acceptable rates to satisfy the requirements of competitive neutrality, and ensure consistency in charging across the University.

Another NSW university provides the following definitions to assist academics to prepare quotations for private POW:

"Full cost" is the total cost to [the university] (including salary on-costs and all other overheads), to undertake the work.

"Price" refers to the actual amount charged to the outside organisation. The "price" may be more or less than the full cost. The extent to which the price exceeds the full cost represents profit.

The "commercial rate" is the normal rate which applies outside the University and includes full cost plus a profit.

All outside professional activities to be undertaken as a commercial activity must be priced to be commercially competitive.

One method of ensuring that the university does recover the full cost of resources used is for academics to undertake POW through university-owned companies. This aspect is discussed further in the next section on *Implementation of Policies*.

## 2.7 Liability and Indemnity



**In certain circumstances, universities might be legally liable for damages arising from private POW. Universities should require academics as part of the notification and approval process to certify that an academic has informed the potential client that he/she is acting in a private capacity.**

Summary of Analysis – Liability and Indemnity										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the policy require a statement to the private client that the university is not involved in private POW?	✓	✓	✓	✓	✗	✓	✗	✓	✗	✓
Is evidence of the above statement required to be submitted by the academic?	✓	✓	✗	✗	✗	✓	✗	?	✗	✗
Is the academic required to have adequate insurance coverage for private POW?	?	✓	✓	?	?	✓	✗	?	✗	?
Is evidence of adequate insurance required?	?	✓	✓	✗	✗	✗	?	✗	✗	✗
Do academics have the option of engaging in University-sponsored POW activities?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Legal advice obtained by Curtin University in Western Australia, and more recently confirmed by some universities in New South Wales, highlights the potential for a legal liability to arise from POW.

Concerns have been raised about the need for academics to clearly state that they are acting in a private capacity and that in no manner is the university involved in the particular activity.

Most policies include a requirement that an academic inform his/her client that the activity is undertaken in a private capacity. This might take the form of:

- oral advice to the client
- written notification or
- through inclusion of a specific clause in the contract between the academic and the client.

*Audit Observations*

Whichever of these methods of notifying external clients is specified in policy, few universities request specific evidence or certification (of notification) that this has actually occurred.



Legal action taken by a private client against an academic of the university has the potential to damage the reputation of the university.

Some policies suggest that academics engaging in POW effect professional indemnity insurance. Two universities require academics to provide evidence of insurance. Although universities might not be able to enforce such a requirement, it is desirable that academics are made aware of the risks associated with private POW.

The following examples represent better practice being applied by certain universities:



It is the academic's responsibility to make clear to the person or body requesting work that the academic, and not the university, will undertake the work and that the university has no responsibility or liability for work undertaken. A declaration to this effect by an academic is required when seeking permission to undertake POW.

the proposed client has been informed in writing that the staff member is acting as an individual totally independent of the University; that the University has no control or direction of the work and that the University accepts no liability whatsoever; . .



Other requirements mentioned in POW policies include:

- not using the University's repute such as University notepaper and letterheads
- not referring to the consultant's academic rank
- use of notepaper bearing a legend (eg the consultant's private address) which will make it clear that the academic is acting in a private capacity
- instructing clients to direct postal and telephone communications to a place other than the University.

## 2.8 Reporting and Monitoring



**Policy should specify mechanisms to monitor compliance with policy. This might be through the performance appraisal system or through periodic reporting requirements for POW.**

Summary of Analysis – Reporting and Monitoring										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
POW policy contains requirements for reporting the POW Activities occurring within the University?	x	✓	✓	x	✓	✓	✓	✓	✓	✓

### Audit Observations

Most universities include some form of reporting on the level of POW undertaken by academics during the year. Reporting is usually on an annual basis to the Vice-Chancellor from Deans and Heads of School.



Discussions held with various universities indicate that reporting requirements where these exist are not applied consistently and rigorously across all Schools, Faculties or Departments. Little, if any, follow-up action on compliance with reporting arrangements appears to occur. Consequently, management of a university will not have a complete picture of the level of POW undertaken by academics.

## 2.9 Disciplinary Measures



**Instances of non-compliance with university policies need to be identified and follow-up action implemented. This might require the university to take disciplinary action against academics. All university policies should state clearly that such action can and will occur.**

Summary of Analysis – Disciplinary Measures										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the POW policy contain disciplinary measures for instances of non-compliance?	✓	✓	x	x	?	x	x	x	x	?



*Audit Observation*

The policies of two universities only contain specific reference to disciplinary measures (for breach of policy).

The policies of two other universities mention disciplinary action for breaches of specific segments of the policy, for example failure to comply with the annual reporting provisions.

A clear commitment by a university to enforce its policies is desirable. The following statement provides guidance:



This policy shall form part of the Conditions of Employment of academic and general staff of the university. Any breach of this policy which is deemed to be a breach of discipline of the University will be dealt with pursuant to the relevant industrial award or enterprise agreement.

The policy of Curtin University provides a good example:

In the event of their non-compliance with the directives of this policy, staff members will be subject to the misconduct rules set out in the Agreement On Enterprise Bargaining (Academic Staff) 1997 between Curtin University of Technology and The National Tertiary Education Industry Union and the Curtin University of Technology General Staff Agreement of 1997, or the specific contract of employment for Casual Staff Members.

## **2.10 Implementation of Policies**

University policies form part of the conditions of employment.

As such, policies should form part of the performance appraisal mechanism with a failure to comply with policies attracting possible disciplinary action.

Staff within faculties are primarily responsible for the implementation of policy while Deans and Heads are responsible for monitoring compliance with policy.

*Audit Observations*

Implementation of policies across faculties within universities, and across universities, varies.

Inconsistent implementation has led certain academics to complain, particularly those academics the subject of a stricter application of policies.

Monitoring (by administrative units of universities) of compliance with policy by faculties seems not to be adequate. There is, for example, an inconsistent application of compliance with reporting requirements.

### **University Sponsored POW**

All universities have created research companies to undertake commercial activities separate from universities' core functions. Research companies usually:

- manage universities' contract research (that is, research undertaken in the university but paid for by a third party)
- undertake assessment and exploitation of university-developed IP (this aspect discussed in Chapter 3)
- facilitate and manage consultancy services provided by the university.

In regards to the last service, university research companies provide an avenue for academics to undertake POW activities but with the university (in this case the company) being the contracting party with the client rather than the academic. There are certain advantages to this approach:

- the university accepts responsibility (and any liabilities arising) under the contract
- staff working on university-sponsored POW are covered by the university's workers' compensation and professional indemnity insurance
- university facilities and resources may be used as their use will be monitored and billed through the university's accounting systems
- the university provides all administrative, legal and professional support needed during the contract.<sup>8</sup>

University research companies recoup the costs associated with providing such services by including a "management fee" component (usually a certain percentage of the estimated bill) in the quotation to the external client.

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<sup>8</sup> The Goods and Services Tax (GST) will be another issue that academics will need to consider when undertaking private POW. In addition to applying the tax to clients, academic will be obliged to register for GST and fulfil the necessary administrative and reporting procedures. This is likely to be another area where university research companies will be able to provide a service to academics.

No university restricts its academics to using university research companies if the academic undertakes POW although some are considering introducing such restrictions.

*Audit Observations* Anecdotal evidence suggests that at least some of the present reluctance to use research companies on the part of some academics lies in the fees charged by those companies.

This is an area that universities need to address if they are to encourage more POW activities through university sponsored avenues.

### 2.11 Checklist for Paid Outside Work Policies

Minimum Standards	Result
1. The university's POW Policy has been recently issued.	
2. The policy contains evidence of recent review or includes review mechanism and timeframes.	
3. The policy states the types of POW allowed to academics.	
4. The policy sets a time limit for academics engaging in POW <b>AND/OR</b> specifies other methods for monitoring POW activities.	
5. There is a specific requirement that academic advise the University before starting POW activities.	
6. The policy contains procedures for approving POW.	
7. The policy states the circumstance where activities are exempt from approval procedures.	
8. The policy unambiguously states whether the use of university resources is allowed for private POW activities.	
9. The policy provides guidelines on allowable usage of university resources in private POW activities.	
10. Procedures exist for charging staff (or other means of recovery) for using university resources for private POW activities.	
11. Charge rates for university resources are specified or available.	
12. The policy requires a statement from the academic that University is not involved in private POW activities.	
13. Academics must submit evidence that the above statement has been provided to clients for each private POW activity.	
14. Procedures require academic to have adequate insurance coverage before engaging in private POW activities.	
15. Evidence is required that academics have adequate insurance coverage if engaging in private POW activities.	
16. Academics have the option of engaging in University-sponsored POW.	
17. The policy contains requirements for academics to report their private POW activities to the University on a periodic basis.	
18. The policy contains a statement that disciplinary measures will be taken in instances of non-compliance	



## **3 Intellectual Property**

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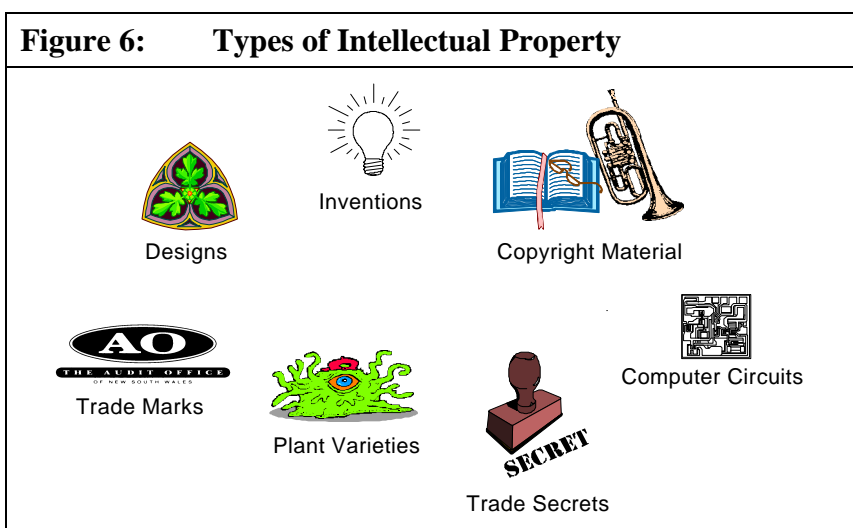
### 3.1 Introduction

#### Definition

“Intellectual property” (IP) represents those rights, which the law provides for the protection of creative effort and economic investment in creative effort.<sup>9</sup>

Commonwealth legislation, such as the *Patents Act 1990*, the *Copyright Act 1968* and the *Designs Act 1906*, exist to protect most types of IP. As IP often represents the culmination of many years of effort on the part of the originator, legislation seeks to give the originator a period of exclusivity as to its use and exploitation.

The most common forms of IP are shown in Figure 6.



#### Universities

Universities through their involvement in teaching and research can be a source of new, and potentially exploitable, IP. Like private originators, universities must actively seek and enforce their rights to ownership of, and rewards from, IP.

#### IP and POW

Clients who engage academics do so seeking to benefit from the academic's “know-how” and experience gained during the course of his/her academic employment.

Academics are free to exploit their “know-how”. Universities cannot control an academic's use of his/her “know-how” even though it results from the academic's contract of employment with a university.

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<sup>9</sup> *Ownership of Intellectual Property in Higher Educational Institutions - a discussion paper*, Australian Vice-Chancellors' Committee, 1995, p2.

Attempts to control “know-how” might give rise to a claim of restraint of trade and subsequent legal action.

Difficulties can arise however in distinguishing between what constitutes an academic's “know-how” and IP over which a university has a legitimate claim.

The allegation received by The Audit Office raised such a concern, that is whether the IP of the university had been used by the academic without the knowledge, approval of, and compensation to, the university.

**Figure 7: Intellectual Property or Know How?**

<p>✓</p> <p>It is <b>Intellectual Property</b> if an academic, as part of his/her employment contract:</p> <ul style="list-style-type: none"> <li>• undertakes research connected with his/her discipline</li> <li>• as a result of that research creates inventions or new processes related to that discipline that have potential commercial value.</li> </ul>		<p>✗</p> <p>It is <b>Know How</b> if an academic:</p> <ul style="list-style-type: none"> <li>• develops or enhances skills as a result of his/her employment</li> <li>• uses those skills in activities not included in his/her employment contract with the university</li> <li>• <i>provided</i> such know-how did not result from information given in confidence by the University.</li> </ul>
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### 3.2 Minimum Standards

**IP Discussion Paper** In 1995, the Australian Vice-Chancellors' Committee (AVCC) issued a discussion paper in response to requests from universities for advice on how best to deal with the vexed issue of IP.<sup>10</sup>

The AVCC paper explored the risks faced by universities and made suggestions as to how universities might address those risks.

*Audit Observation* The paper provides guidance rather than mandatory standards. Nevertheless, the discussion paper provides a helpful summary of issues which universities should seek to address in protecting IP rights.

The Audit Office took the material contained in the AVCC Discussion Paper into account when developing the minimum standards for IP used during the audit. The audit approach compared practice in universities with the minimum standards so developed. In so doing, practice by universities was

<sup>10</sup> Ibid.



compared with the “standards” suggested within the AVCC Discussion Paper.



Minimum standards are highlighted by the symbol in the left margin. The results of the analysis follows.

### 3.3 Policy, Procedures and Review



**Each university should develop and implement policy and procedures to identify and protect its rights to IP. The policy and procedures should include a process of periodic review and amendment to ensure that policy and procedures remain relevant, respond to implementation feedback and address emerging issues.**

Summary of Analysis – Policy, Procedures and Review										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Has the university developed and implemented a policy on IP?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Has the university's IP Policy been issued recently?	✓	✓	✗	✗	✓	✗	✓	✓	✗	✓
Does the policy contain evidence of recent review or include review mechanisms and timeframes?	✓	✓	✗	✗	✓	✗	✓	✓	✗	✓

#### Audit Observations

In most cases, universities have included in their policies those issues in regard to IP identified in the AVCC Discussion Paper.

This is in contrast with the findings of the analysis of POW policies (Chapter 2), which generally did not reach the same degree of thoroughness of, or compliance with, IP policies.

Universities' IP policies generally are also current and include mechanisms for reviewing and revising the policies. Reviews of most IP policies have occurred since 1995. Nevertheless, not all policies set timeframes for future review or review mechanisms.



The IP policy of Curtin University (WA) provides an example of good practice in defining review timeframes and processes:

The University Research and Development Committee shall review the policy on Ownership of Intellectual Property every two years.

### 3.4 Definition and Ownership of, IP

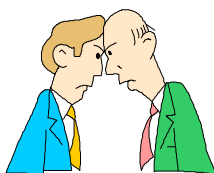


**Because of the variety of forms that IP may take, policies should provide a definition of IP. The circumstances under which the university asserts ownership of IP should be stated.**

**IP for which the university intends not to assert ownership (for example, artistic works) also should be stated.**

Summary of Analysis – Definition and Ownership										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the policy contain a definition of IP?	✓	✓	?	✓	✓	?	✓	✓	?	✓
Does the policy contain a clear statement on the ownership of IP developed by university staff?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Is courseware (lecture notes, AV material) included in IP, if commissioned by university?	✓	✓	✓	✓	✓	x	✓	✓	✓	✓
Are there procedures for using such courseware by the academic, if academic leaves the university?	✓	✓	✓	x	✓	x	✓	✓	✓	✓
Are there exemptions from policy for scholarly books, articles, AV, and lectures not commissioned specifically by the university?	✓	?	?	✓	x	x	✓	x	✓	✓
Are there exemptions for creative works not specifically commissioned by the university?	✓	?	✓	✓	✓	x	✓	✓	x	✓
Does the policy include IP developed by students?	✓	✓	✓	✓	✓	✓	✓	✓	?	✓
Are the rights of students mentioned in the policy?	✓	✓	✓	✓	✓	✓	✓	✓	?	✓

#### Ownership



All policies reviewed contained statements that the respective university asserts ownership rights over IP developed by academics during the course of employment. The AVCC discussion paper suggests that a claim of ownership of IP will be more likely to succeed if a contract of employment is clearly defined.

For a claim of ownership by a university to succeed, there has to be an evident relationship between the IP so developed and the particular discipline of the academic. Conversely a university

might not succeed in asserting ownership of IP not related to the academic's normal duties and chosen discipline.

Other ownership tests suggested by the AVCC include whether:

- substantial use was made of institutional resources and/or services
- use of pre-existing IP owned by the institution
- management by the institution of IP generated by a number of staff and/or students
- use of institutional funding or funding obtained by the institution occurred.<sup>11</sup>

### Trade Secrets



An area of IP often overlooked is that of confidential information or "trade secrets". Trade secrets cover such information as trade methods, formulae, production techniques etc. This type of knowledge – how to apply technology to real world situations – is sought after in the market place by competitors.

Although trade secrets can not be protected in the same manner as an invention (patent) or a literary work (copyright) – that is, through registration – court action to restrain unauthorised disclosure of trade secrets may be taken by an employer.

### Policy Exemptions

Exemptions normally allowed under university policy include scholarly works (where the university has not been involved in producing the work), articles, audio-visual material and lecture notes. Creative works (art, music, drama, literature, and so forth) not specifically commissioned by the university usually are not claimed by the universities. Exemptions should be specifically identified in university policy.

### Audit Observations

Most, but not all, policies adequately address the issues of what constitutes IP and the ownership of IP developed within the universities' environment.

The majority of policies define IP by reference to the legislation under which originators of IP might seek protection. However, the approach is impaired when policy is not updated to reflect changes in legislation. For example, two policies mention that the *Plant Variety Rights Act 1987* protects new plant varieties. The *Plant Breeder's Rights Act 1994* replaced this Act.

Exemptions from policy and trade secrets are not addressed adequately by several universities.

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<sup>11</sup> Ibid, p9.



Although mention of the specific legislation that covers IP is desirable and commendable, it is probably of itself not sufficient to explain adequately the concept of IP.

One university has for example, developed a discussion paper that provides further guidance on what constitutes IP and elaborates on the reasons why proprietary rights to IP arise.

It is worth universities considering a policy to the effect that, unless affected by other factors, IP developed by an academic is owned by the originator where its development is not related to his/her normal duties and academic discipline.

### 3.5 Notification



**The onus for reporting IP capable of being protected and exploited rests with the originator. Therefore, it is necessary for policies to contain specific arrangements for notifying the university when IP is developed.**

**Arrangements should include time limits and confidentiality requirements whilst the university decides whether to protect and exploit IP. Policies should address the role and rights of originators if the university is involved in the exploitation of IP, and procedures for determining ownership rights to IP if the university declines such involvement.**

Summary of Analysis – Notification										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Do procedures exist for notifying the university of the development of IP?	?	✓	✓	✓	✓	✓	✓	?	✓	✓
Are time limits placed on university in deciding whether to exploit the IP?	✓	x	x	✓	✓	✓	✓	✓	x	✓
Are confidentiality provisions included in notification/management procedures?	x	✓	✓	✓	✓	✓	✓	x	?	x
Are there procedures for assigning or sharing ownership of IP with the university if it decides to exploit the IP?	x	?	?	✓	?	?	✓	✓	x	✓
Are there procedures for determining ownership rights if university decides <b>NOT</b> to exploit the IP?	✓	✓	✓	✓	✓	?	✓	✓	✓	✓
Are students included in these arrangements?	✓	✓	✓	✓	✓	?	✓	✓	✓	✓

**Time Limits on Decision-Making**

A university often needs to deal with reports of IP expeditiously because IP may be made redundant by later developments.

A university may however, not wish to be involved in the exploitation of IP, but the same cannot always be said of the originator. Therefore, a time limit on the university deciding whether to exploit the IP seems to be both fair and advantageous.<sup>12</sup>

**Confidentiality Provisions**

Confidentiality is another important issue, that is until an assessment and decision is made on future exploitation.

Most protection mechanisms (for example, patent applications) require proof that IP is new and not a modification of existing IP. This requires confidentiality until the necessary protection processes are completed. As the Curtin University's (WA) policy succinctly asserts:

Much benefit of industrial (*sic*) property has been lost by premature commercial agreements and premature publication in journals and conferences.

The policy of Curtin University raises the issue of the natural eagerness of academics to publish research results and the potential for tension with the requirements for confidentiality.

*Audit Observations*

A timely decision making process would assist in balancing competing priorities but policies should include a requirement that confidentiality should be maintained until the university makes its decision on whether to protect and exploit the IP.

The majority of policies do contain specific requirements for academics to notify universities of the development of IP. Two policies are ambiguous in this respect and do not provide sufficient guidance in regard to the notification arrangements.

Time limits on university decision-making and confidentiality requirements are two areas of improvement needed by several policies.

About half of universities' policies do not address adequately the issue of assigning or sharing IP ownership between originators and the university.

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<sup>12</sup> Time limits set by NSW universities for such decision-making vary from eight weeks to twelve months.

Although universities assert ownership rights in their IP policies it is good practice to stipulate that the originator will share in the rewards generated from the exploitation of IP. The strategy behind this approach is to encourage academics to excel in their particular disciplines.



Universities need to make informed decisions about their involvement in exploiting IP. This aspect is addressed well (whilst treating fairly the IP originator) in the following policy extract:

#### *Time Limits*

The University shall decide within eight weeks of the initial contact by the researcher whether it wishes to be associated with the exploitation of the University IP. If the University has not given notice within that period that it wishes to be involved in the exploitation of the relevant University IP then it will be deemed to have decided not to be.

If the University requires further information during or at the end of this period (ie, of eight weeks), it shall advise the researcher and an extension of the period shall be negotiated.

#### *Confidentiality*

A specific reference on the need for confidentiality while acknowledging the academic's right to publish is contained in one university's policy:

The IP Office *may request delay* of the publication of research results for up to 12 months to protect the commercial viability of the innovation. (*The Audit Office emphasis*)

#### *Exploitation and the Originator*

Two examples of policies provide guidance on the role of originators in the exploitation of IP:

If (a university company) decides to exploit commercially the IP then the innovator will be so advised and be requested to complete an assignment of IP to (a university company) for a consideration in the form of a contract that specifies the rights that will accrue to the staff member or student.

When asserting a proprietary interest . . . the university will enter into a written agreement with the originator and such other people as may be appropriate. The agreement will define the ownership shares and rights of the parties to the agreement.

### 3.6 Exploiting IP



**Ownership of IP of itself does not generate a return to the originator. A return or benefit is derived by the exploitation of the IP. The manner in which exploitation is pursued is an important policy issue which should address:**

- **management and administrative arrangements**
- **liaison among stakeholders**
- **decision-making processes**
- **income-sharing arrangements.**

#### Summary of Analysis – Exploiting IP

Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Do the procedures for exploiting the IP include a role for the originator?	✓	✓	?	✓	x	✓	✓	✓	✓	✓
Does the university have the right to exploit the IP as it sees fit?	✓	✓	x	✓	x	x	✓	✓	✓	?
Are there procedures for sharing income from IP exploitation?	✓	✓	?	✓	✓	✓	✓	✓	✓	✓
Are moral rights included in exploitation procedures (for example, attribution)?	✓	x	✓	?	x	✓	✓	✓	x	✓

#### Moral Rights

A distinguishing feature of the university environment is for academics to publish the results of research. This creates certain moral rights to the originator including:

- the right of attribution (that is, to be identified as the originator of the IP)
- the right to object to derogatory treatment (for example, using the material out of context such that the academic integrity of the originator might be questioned)
- the right to review and update material to maintain the academic integrity of the IP.

Although not enshrined currently in legislation, the Commonwealth has indicated its intentions to review the situation in respect to moral rights.

#### Audit Observations

Most, but not all, policies state clearly that the university acknowledges and affirms such rights. A statement to this effect should be included in all IP policies.

However, some policies do not emphasise that the university, whilst committed to a consultative process, has the right to exploit IP as it sees fit.

This is a corollary to universities asserting ownership rights over IP generated within the institution. Nevertheless, it is worth while stating explicitly in IP policies.

The following extracts from universities policies provide good examples of appropriate statements:



Where the University seeks to commercially exploit any University IP, the University will invite the originator to be involved in University decisions about commercial exploitation and management of the University IP which the originator has developed.

The Research Office will consult with the relevant researchers in connection with any negotiations in which it is involved before determining, as it thinks best, the appropriate means and terms for commercialising any University work.

Where (the university) is the owner of any intellectual property in an invention and wishes to commercialise or otherwise exploit the invention under the terms of this policy (the university) is free to commercialise or otherwise exploit or use such intellectual property and to execute such documents as (the university) deems necessary for the purposes of the commercial exploitation of that invention consistent with the objectives of this policy.

### 3.7 Dispute Resolution



**Disputes can and do arise when ownership of property is involved. University policies need to have mechanisms to consider and determine impartially and fairly disputes that arise as to ownership and exploitation of IP.**

Summary of Analysis – Exploiting IP										
Criteria	Universities									
	1	2	3	4	5	6	7	8	9	10
Does the policy contain dispute resolution mechanisms?	✓	✓	✓	✓	✓	✓	✓	✓	x	?

#### *Audit Observations*

Most policies do address the issue to some extent.

Some universities make a distinction between disputes arising from the application of the university's policy and those arising



over the ownership of IP. The two types of disputes often result in two separate dispute-resolution mechanisms.

Internal processes generally handle disputes arising from the application of the policy. A Pro Vice-Chancellor (Research) or the Vice-Chancellor might deal with a dispute. One university has implemented a mechanism to review the decision of the Vice-Chancellor taken under its policy:



An Originator who believes that the decision of the Vice-Chancellor, as it relates to the Originator, is contrary to the policy may request a review of the decision by the Intellectual Property and Outside Professional Activities Appeals Committee (“the Appeals Committee”). The purpose of the review is to decide whether the policy has been breached . . .

The Appeals Committee shall, by a majority of members present and voting, confirm or vary the decision of the Vice-Chancellor and notify the appellant and the Vice-Chancellor, along with reasons for the decision, within two (2) weeks.

Disputes arising from the ownership of IP benefit from having mechanisms involving external mediation and arbitration:

(The university) will attempt to agree with the other party to settle first the dispute by mediation. If mediation within a reasonable time is not successful, then arbitration will be used in accordance with the rules of the Australian Commercial Disputes Centre (ACDC). If no agreement on an arbitrator is reached then the ACDC will be given power to appoint a person as arbitrator.

Although fairness and natural justice require a mechanism to settle disputes, a stage must be reached where a final decision is made on the dispute. One policy specifically states that:

The decision of an independent arbiter will be binding on the University and the innovator.

Similarly:

If the Originator or the Vice-Chancellor wishes to appeal against the decision of the Appeals Committee, the Appeals Committee shall refer the matter to the Australian Commercial Disputes Centre for resolution. The decision of that Centre shall be final and binding.

### 3.8 Implementation of Policy

#### *Audit Observations*

Most aspects of policies provide adequate guidelines for staff and policies have been disseminated through the institutions. However, comments from university staff responsible for administering IP-related activities suggest that confusion and uncertainty exists among academics in relation to IP.

At least two universities are attempting to overcome such difficulties by seeking to increase awareness of the issues by implementing ongoing education programs on IP.

Policies of both universities include an education requirement:



(The university) shall conduct an ongoing intellectual property education programme with the following objectives:

- (a) to inform staff and students of their rights, responsibilities and opportunities in relation to intellectual property;
- (b) to inform staff and students of any changes to policy; and
- (c) to generate a better understanding of intellectual property issues in general.

One of these universities recently invited all academic staff to attend an IP Seminar at which guest speakers from the university, lawyers, and IP Australia spoke on related topics including:

- the university's IP policy
- patents, trademarks and designs
- confidentiality
- licensing IP.

Both examples represent better practice, which other universities should consider implementing.

### 3.9 The Costs of Protecting IP

The main difficulty relating to IP is a lack of resources within universities to protect and exploit IP.

Many administrators within universities acknowledge a lack of commercial expertise in evaluating and exploiting IP. Therefore research companies (of universities) are often given the task of assessing the commercial potential of IP and arranging exploitation agreements usually with the private sector.

However, commercialisation of IP is a relatively small part of most university research companies' activities (their main income streams being from contract research and consultancy activities). Consequently, commercialisation of IP tends not to produce significant income for research companies.

A significant cause of this outcome is the cost of instigating protection (such as a patent) which is often prohibitive unless protection is restricted to certain countries or markets.

Consequently, most university research companies will only instigate provisional protection which:

- lasts for a short period (for example, twelve months) whereas commercialisation of IP can take several years to return an income stream
- allows some time to seek commercial backers for the IP.

University research companies usually do not have the capital to continue the protection past the provisional stage and will return the IP back to the university or originator at the end of this period.

### **Overseas Models**

Overseas the originator is encouraged to exploit IP and take whatever measures are necessary to pursue commercialisation possibilities. The university might provide some initial "seed capital" to the originator to commence the process.

Another commercialisation example used overseas is for universities to establish "spin-off" companies specifically to exploit IP. Cambridge University (UK) and the University of British Columbia (Canada) are two universities that have used successfully "spin-off" companies to exploit IP.<sup>13</sup>

### *Audit Observations*

Anecdotal evidence suggests that some research companies of universities are failing to recover costs but continue to provide commercialisation as a service to the parent university.

With increasing constraints on university resources, universities may not in the future be able to justify asserting ownership over IP because of a lack of success in its exploitation. Allowing ownership to remain with the originator (with the university receiving a percentage of net revenues) as occurs in some overseas universities, might provide a solution.

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<sup>13</sup> Further information on the University of British Columbia's experience with spin-off companies is available in its *Report on UBC Spin-off Company Formation and Growth 1997* and the *1998 Supplement*, available from the University's Internet site – <<http://www.uilo.ubc.ca>>.

### 3.10 Checklist for Intellectual Property Policies

Minimum Standards	Result
1. University's IP Policy is current (that is, recently issued or reviewed).	
2. The policy contains review timeframes and review mechanisms.	
3. The policy contains an adequate definition of what constitutes IP.	
4. There is a clear statement on the ownership of IP developed by staff.	
5. Courseware (lecture notes, AV material) when commissioned by the university is included in IP.	
6. The policy contains procedures for academics to use such courseware if the academic leaves the university.	
7. The policy identifies specific exemptions allowed for scholarly books, articles, audio-visuals and lecture notes <b>not</b> commissioned specifically by the university.	
8. The policy includes exemptions for creative works <b>not</b> specifically commissioned by the university.	
9. The policy addresses the ownership of IP developed by students.	
10. The rights of students are stated (if included in the IP policy).	
11. The policy contains specific procedures and requirements for notifying the university of the development of IP.	
12. Time limits are set for the university to decide whether to involve itself in the exploitation of the IP.	
13. The policy includes confidentiality requirements while the university assesses the IP.	
14. The policy contains procedures for assigning or sharing ownership of IP with originators when the university decides to exploit the IP.	
15. There procedures to determine ownership if the university decides <b>not</b> to exploit the IP.	
16. Students are included in revenue-sharing arrangements.	
17. The policy includes a role for originators in the exploitation of the IP.	
18. The university asserts the right to exploit the IP as it sees fit.	
19. There are procedures for sharing income from IP exploitation.	
20. The university acknowledges specifically the moral rights of originators (for example, to attribution).	
21. The policy contains adequate dispute resolution mechanisms.	



## Appendices

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## **Appendix 1: About the Audit**

<b>Audit Objectives</b>	<p>The objectives of the audit were:</p> <ul style="list-style-type: none"><li>• to determine the adequacy of policies and procedures for control of paid outside work in NSW universities</li><li>• to examine the effectiveness of, and compliance (and ease of compliance) with, these policies and procedures</li><li>• to ensure that universities interests are adequately protected in terms of ownership and use of intellectual property developed as a result of university sponsored or facilitated research</li><li>• to determine whether universities are aware of the extent of paid outside work and the accuracy/completeness of these records.</li></ul>
<b>Audit Scope</b>	<p>The audit scope was:</p> <ul style="list-style-type: none"><li>• to review the existence and adequacy of policies and procedures covering academics' paid outside work.</li><li>• to ascertain the level of awareness of, and compliance with, universities' policies and procedures</li><li>• to determine the adequacy of the systems designed to record and monitor outside work by academics and the adequacy of controls established by the universities</li><li>• to determine whether universities are receiving their fair share of the benefits arising from non-academic work resulting from university sponsored or facilitated research</li><li>• to examine the adequacy of arrangements where consultancy services are undertaken through university commercial centres.</li></ul>
<b>Audit Focus</b>	<p>The focus of the audit for the review of policies and procedures included all NSW universities. NSW universities' policies and procedures were compared to practices in Australia and overseas.</p>
<b>Audit Criteria</b>	<p>The following criteria were applied to allow an opinion to be determined:</p> <ul style="list-style-type: none"><li>• Universities' policies will cover all significant aspects of relevance to their institution. Such policies will cover aspects such as the use of non-academic university staff and university students by academics engaged in paid outside work.</li></ul>

- Universities will ensure that appropriate charges are determined for the use of university resources by academics engaged in non-university related activities.
- Universities will take all reasonable steps to make academic staff aware of and understand such policies and guidelines.
- Functional responsibility for ensuring compliance with policies and procedures will be implemented.

**The Approach**

During the audit, *minimum standards* sufficient to address the issues and were developed from reviewing practices in interstate and overseas universities and review of relevant literature.

**Cost of the Audit**

The cost of the audit was \$67,953 and comprised:

	\$
Direct salaries cost	39,882
Overhead charges	17,677
Value of unpaid staff time (at standard rates only)	3,393
Printing (estimate)	7,000
<b>Total Cost</b>	<b>67,953</b>





**Performance Audits by  
The Audit Office of New South Wales**

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## **Performance Auditing**

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Performance audits seek to serve the interests of the Parliament, the people of New South Wales and public sector managers.

The legislative basis for performance audits is contained within the *Public Finance and Audit Act 1983, Division 2A*, which differentiates such work from the Office's financial statements audit function. Performance audits examine whether an authority is carrying out its activities effectively and doing so economically and efficiently and in compliance with all relevant laws. These audits also evaluate whether members of Parliament and the public are provided with appropriate accountability information in respect of those activities.

Performance audits are not entitled to question the merits of policy objectives of the Government.

When undertaking performance audits, auditors can look either at results, to determine whether value for money is actually achieved, or at management processes, to determine whether those processes should ensure that value is

received and that required standards of probity and accountability have been met. A mixture of such approaches is common.

Where appropriate, performance audits provide recommendations for improvements in public administration.

Performance audits are conducted by specialist performance auditors who are drawn from a wide range of professional disciplines.

The procedures followed in the conduct of performance audits comply with The Audit Office's Performance Audit Manual which incorporates the requirements of Australian Audit Standards *AUS 806 and 808*.

Our performance audit services are certified under international quality standard *ISO 9001*, and accordingly our quality management system is subject to regular independent verification. The Audit Office of NSW was the first public audit office in the world to achieve formal certification to this standard

## **Performance Audit Reports**

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<b>No.</b>	<b>Agency or Issue Examined</b>	<b>Title of Performance Audit Report or Publication</b>	<b>Date Tabled in Parliament or Published</b>
1	Department of Housing	<i>Public Housing Construction: Selected Management Matters</i>	5 December 1991
2	Police Service, Department of Corrective Services, Ambulance Service, Fire Brigades and Others	<i>Training and Development for the State's Disciplined Services: Stream 1 - Training Facilities</i>	24 September 1992
3	Public Servant Housing	<i>Rental and Management Aspects of Public Servant Housing</i>	28 September 1992
4	Police Service	<i>Air Travel Arrangements</i>	8 December 1992
5	Fraud Control	<i>Fraud Control Strategies</i>	15 June 1993
6	HomeFund Program	<i>The Special Audit of the HomeFund Program</i>	17 September 1993
7	State Rail Authority	<i>Countrylink: A Review of Costs, Fare Levels, Concession Fares and CSO Arrangements</i>	10 December 1993
8	Ambulance Service, Fire Brigades	<i>Training and Development for the State's Disciplined Services: Stream 2 - Skills Maintenance Training</i>	13 December 1993
9	Fraud Control	<i>Fraud Control: Developing an Effective Strategy</i> (Better Practice Guide jointly published with the Office of Public Management, Premier's Department)	30 March 1994
10	Aboriginal Land Council	<i>Statutory Investments and Business Enterprises</i>	31 August 1994
11	Aboriginal Land Claims	<i>Aboriginal Land Claims</i>	31 August 1994
12	Children's Services	<i>Preschool and Long Day Care</i>	10 October 1994
13	Roads and Traffic Authority	<i>Private Participation in the Provision of Public Infrastructure</i> (Accounting Treatments; Sydney Harbour Tunnel; M4 Tollway; M5 Tollway)	17 October 1994
14	Sydney Olympics 2000	<i>Review of Estimates</i>	18 November 1994
15	State Bank	<i>Special Audit Report: Proposed Sale of the State Bank of New South Wales</i>	13 January 1995
16	Roads and Traffic Authority	<i>The M2 Motorway</i>	31 January 1995
17	Department of Courts Administration	<i>Management of the Courts: A Preliminary Report</i>	5 April 1995

*Performance Audit Reports and Related Publications*

No.	Agency or Issue Examined	Title of Performance Audit Report or Publication	Date Tabled in Parliament or Published
18	Joint Operations in the Education Sector	<i>A Review of Establishment, Management and Effectiveness Issues (including a Guide to Better Practice)</i>	13 September 1995
19	Department of School Education	<i>Effective Utilisation of School Facilities</i>	29 September 1995
20	Luna Park	<i>Luna Park</i>	12 October 1995
21	Government Advertising	<i>Government Advertising</i>	23 November 1995
22	Performance Auditing In NSW	<i>Implementation of Recommendations; and Improving Follow-Up Mechanisms</i>	6 December 1995
23	Ethnic Affairs Commission	<i>Administration of Grants (including a Guide To Better Practice)</i>	7 December 1995
24	Department of Health	<i>Same Day Admissions</i>	12 December 1995
25	Environment Protection Authority	<i>Management and Regulation of Contaminated Sites: A Preliminary Report</i>	18 December 1995
26	State Rail Authority of NSW	<i>Internal Control</i>	14 May 1996
27	Building Services Corporation	<i>Inquiry into Outstanding Grievances</i>	9 August 1996
28	Newcastle Port Corporation	<i>Protected Disclosure</i>	19 September 1996
29	Ambulance Service of New South Wales	<i>Charging and Revenue Collection (including a Guide to Better Practice in Debtors Administration)</i>	26 September 1996
30	Department of Public Works and Services	<i>Sale of the State Office Block</i>	17 October 1996
31	State Rail Authority	<i>Tangara Contract Finalisation</i>	19 November 1996
32	NSW Fire Brigades	<i>Fire Prevention</i>	5 December 1996
33	State Rail	<i>Accountability and Internal Review Arrangements at State Rail</i>	19 December 1996
34	Corporate Credit Cards	<i>The Corporate Credit Card (including Guidelines for the Internal Control of the Corporate Credit Card)</i>	23 January 1997
35	NSW Health Department	<i>Medical Specialists: Rights of Private Practice Arrangements</i>	12 March 1997
36	NSW Agriculture	<i>Review of NSW Agriculture</i>	27 March 1997
37	Redundancy Arrangements	<i>Redundancy Arrangements</i>	17 April 1997
38	NSW Health Department	<i>Immunisation in New South Wales</i>	12 June 1997
39	Corporate Governance	<i>Corporate Governance Volume 1 : In Principle Volume 2 : In Practice</i>	17 June 1997

*Performance Audit Reports and Related Publications*

<b>No.</b>	<b>Agency or Issue Examined</b>	<b>Title of Performance Audit Report or Publication</b>	<b>Date Tabled in Parliament or Published</b>
40	Department of Community Services and Ageing and Disability Department	<i>Large Residential Centres for People with a Disability in New South Wales</i>	26 June 1997
41	The Law Society Council of NSW, the Bar Council, the Legal Services Commissioner	<i>A Review of Activities Funded by the Statutory Interest Account</i>	30 June 1997
42	Roads and Traffic Authority	<i>Review of Eastern Distributor</i>	31 July 1997
43	Department of Public Works and Services	<i>1999-2000 Millennium Date Rollover: Preparedness of the NSW Public Sector</i>	8 December 1997
44	Sydney Showground, Moore Park Trust	<i>Lease to Fox Studios Australia</i>	8 December 1997
45	Department of Public Works and Services	<i>Government Office Accommodation</i>	11 December 1997
46	Department of Housing	<i>Redevelopment Proposal for East Fairfield (Villawood) Estate</i>	29 January 1998
47	NSW Police Service	<i>Police Response to Calls for Assistance</i>	10 March 1998
48	Fraud Control	<i>Status Report on the Implementation of Fraud Control Strategies</i>	25 March 1998
49	Corporate Governance	<i>On Board: guide to better practice for public sector governing and advisory boards (jointly published with Premier's Department)</i>	7 April 1998
50	Casino Surveillance	<i>Casino Surveillance as undertaken by the Director of Casino Surveillance and the Casino Control Authority</i>	10 June 1998
51	Office of State Revenue	<i>The Levying and Collection of Land Tax</i>	5 August 1998
52	NSW Public Sector	<i>Management of Sickness Absence NSW Public Sector Volume 1: Executive Briefing Volume 2: The Survey - Detailed Findings</i>	27 August 1998
53	NSW Police Service	<i>Police Response to Fraud</i>	14 October 1998
54	Hospital Emergency Departments	<i>Planning Statewide Services</i>	21 October 1998
55	NSW Public Sector	<i>Follow-up of Performance Audits: 1995 - 1997</i>	17 November 1998
56	NSW Health	<i>Management of Research: Infrastructure Grants Program - A Case Study</i>	25 November 1998
57	Rural Fire Service	<i>The Coordination of Bushfire Fighting Activities</i>	2 December 1998

*Performance Audit Reports and Related Publications*

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No.	Agency or Issue Examined	Title of Performance Audit Report or Publication	Date Tabled in Parliament or Published
58	Walsh Bay	<i>Review of Walsh Bay</i>	17 December 1998
59	NSW Senior Executive Service	<i>Professionalism and Integrity</i> <i>Volume One: Summary and Research Report</i> <i>Volume Two: Literature Review and Survey Findings</i>	17 December 1998
60	Department of State and Regional Development	<i>Provision of Industry Assistance</i>	21 December 1998
61	The Treasury	<i>Sale of the TAB</i>	23 December 1998
62	The Sydney 2000 Olympic and Paralympic Games	<i>Review of Estimates</i>	14 January 1999
63	Department of Education and Training	<i>The School Accountability and Improvement Model</i>	12 May 1999
64	Key Performance Indicators	<ul style="list-style-type: none"><li>• <i>Government-wide Framework</i></li><li>• <i>Defining and Measuring Performance (Better practice Principles)</i></li><li>• <i>Legal Aid Commission Case Study</i></li></ul>	31 August 1999
65	Attorney General's Department	<i>Management of Court Waiting Times</i>	3 September 1999
66	Office of the Protective Commissioner Office of the Public Guardian	<i>Complaints and Review Processes</i>	28 September 1999
67	University of Western Sydney	<i>Administrative Arrangements</i>	17 November 1999
68	NSW Police Service	<i>Enforcement of Street Parking</i>	24 November 1999
69	Roads and traffic Authority of NSW	<i>Planning for Road Maintenance</i>	1 December 1999
70	NSW Police Service	<i>Staff Rostering, Tasking and Allocation</i>	31 January 2000
71	Academics' Paid Outside Work	<ul style="list-style-type: none"><li>• <i>Administrative Procedures</i></li><li>• <i>Protection of Intellectual Property</i></li><li>• <i>Minimum Standard Checklists</i></li><li>• <i>Better Practice Examples</i></li></ul>	February 2000

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