

Comparison of the exposure draft NFP Guidelines to the current regulatory landscape

These guidelines are extremely useful to schools in Victoria as a further reference in relation to considering potentially prohibited arrangements.

	NSW		VIC
	NFP Guidelines 2023 exposure draft	NFP Guidelines (current)	Minimum Standards Guidelines
Source of not-for-profit obligation	Section 83C(1) of the Education Act 1990 (NSW) ('the NSW Act'). ¹		Schedule 4, cl. 17 of the ETR Regulations (i.e. the Minimum Standards).
When a school operates for profit	83C(2) of the NSW Act		Regulation 7 of the ETR Regulations Regulation 7A for PAA requirements
Explanation of 'operation of the school'	<p>Explains at a high level that the operation of the school will generally encompass:</p> <ul style="list-style-type: none"> • The delivery of education at the school; and, • the administration of the school. <p>Added emphasis that a school's ethos/mission/purpose as set out in its governing document (e.g., constitution) can support determinations of relevant use of school assets or income for the operation of a school.</p>	Defers to s83C(2) language and explains operation of school through examples only	<p>PAA requirements applies language of 'for the conduct of the school' or 'for the benefit of the school'.</p> <p>Explanatory guidance of the meaning of conduct – of a school, includes:</p> <ul style="list-style-type: none"> • fundraising activities conducted solely for the school; and • the provision of goods and services and other matters or things to students attending the school; and • the provision of other educational services that are within the scope of the school's registration. <p><i>Arguably, "conduct" provides a broader coverage of arrangements that are not simply transactional or administrative that can be caught by the PAA requirements. The language of "operation" under NSW regulations requires the element of performance in relation to assets, income or payments.</i></p>

<p>Explanation of 'reasonable market value'</p>	<p>Expands on the relevant factors and types of records the Minister will consider when determining reasonable market value under the first limb of s83C(2). Introduces guidance for real property and expands on existing guidance in relation to goods and services.</p> <p>Explains the level of rigour and documentation or procurement process increases as the value of the goods or service or significance of the transaction increases.</p>	<p>Focuses mostly on good and services under s83(2) (b) and defers to what is reasonable market value in the context of example transactions.</p>	<p>The PAA requirements expect the application of "reasonable market value ... currently prevailing in the community."</p> <p><i>The language mirrors NSW regulations but there is argument for a requirement to benchmark with like-institutions receiving similar goods or services.</i></p>
<p>'in any other way unreasonable in the circumstances...'</p>	<p>Strengthened emphasis on the third limb to s83C(2) which will deem transactions that might be reasonable market value, or might defensibly be for the operation of the school to be unreasonable in light of the fact that the Minister provides financial assistance to the benefit of the school and therefore are prohibited having regard to the facts and circumstances of the transaction.</p>	<p>Unreasonableness is highlighted through examples only.</p>	<p>A similar limb whereby a PAA would arise where it "...is not reasonably required for the conduct of the school".</p> <p><i>Similar to the application of the NSW regulation, the circumstances and context of the arrangement or agreement would determine whether it is reasonably required and is a question of fact.</i></p>
<p>Relevant records</p>	<p>The draft moves away from inclusive language on the types of relevant records schools are required to keep. The broader, but now exhaustive list requires:</p> <ul style="list-style-type: none"> • 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; 	<p>Currently provides guidance on examples of the types of policies and procedures schools may include in their standard operating procedures and types of records to assist to demonstrate compliance as an inclusive list.</p>	<p>The Minimum Standards Guidelines provide limited guidance on records for specific types of transactions and schools should have regard to broader governing documentation and probity requirements including in relation to contracts, financial management and procurement, conflicts of interest, mission statement, and fit and proper person requirements.</p>

<p>Transactions covered by the Guidelines</p>	<ul style="list-style-type: none"> • Property • Acquisition of land for a future purpose • Mortgages & Loans (Land) • Leasing/Rent by a School (Land) • Leasing of School-Owned Property and Assets • Disposal of School Assets • Transfer of Assets or Income • Ground Rent/Leases for Unimproved Land • Buildings and Related Works • Shared or Joint Use of Assets • Preschool, Early Learning and Out of School Hours Care • Credit/Monetary Loans • Investment of School Income • Outstanding Debts • School fundraising activities for external causes • Equipment • Salaries • Consultancy and Professional Services • Shared services • School Related Travel • Compensation, settlements and other one off payments • Insurance • National Redress Scheme for Institutional Child Sexual Abuse 	<ul style="list-style-type: none"> • Land (Mortgages & Loans) • Land (Leasing/Rent) • Ground Rent/Leases for Unimproved Land • Plant and Equipment • Buildings and Related Works • Intellectual Property • Payment for Goods • Consultancy and Professional Services • Payments to Members of Governing Body • School-Related Travel • Other Common Payments and Financial Transactions • School Fundraising and Donations • Credit/Monetary Loans • Outstanding Debts 	<p>The Minimum Standards Guidelines do not provide specific examples for schools other than in relation to exceptions for ELC and boarding premises, and remuneration for governing body members.</p> <p><i>The NFP Guidelines provide a useful reference point for how schools can approach compliance with not-for-profit and PAA requirements.</i></p>
--	--	--	---

¹S83C

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.