COUNCIL

DUTIES AND LIABILITY OF COUNCIL MEMBERS

1. Introduction and general summary

Under the *University of Adelaide Act 1971* (SA) (**University Act**) and by virtue of their office, Council members owe certain duties of good faith, honesty and diligence to the University. Those duties are described and explained in this paper.

The University Act was amended in 2004 and 2005 to include for the first time a statutory statement of some of the duties and liabilities of Council members. Prior to those changes, Council members owed very similar duties to the University under the common law.

From the point of view of Council members themselves, the main impact of the changes to the University Act was the provision of some degree of statutory protection from the risk of personal liability for their acts and omissions as Council members.

2. The University as a corporate entity

The University is a corporate entity under and by virtue of the University Act. It is not incorporated under the general corporations law of the Commonwealth (*Corporations Act 2001*) and, for all practical purposes, is not subject to that legislation.

Except where it is prescribed by regulation to be so [such as under the *Public Finance & Audit Act 1987 (SA) and Freedom of Information Act 1991 (SA) and the Freedom of Information Act 1982 (Cth)]* the University is not an instrumentality or agency of the Crown: University Act, s 4(6).

University Act and University Statutes and Rules

The University is bound by the University Act and must operate in accordance with its provisions. It is also bound by its own statutes and rules, but has the power to alter and repeal these, subject to certain conditions.

3. The functions of the University

The University was originally established under *The Adelaide University Act 1874* (SA) (**1874 Act**). The 1874 Act did not specifically prescribe the functions the University was intended to perform. The preamble to the 1874 Act made the general statement that the intent of establishing, incorporating and endowing the University was to "promote sound learning in the province of South Australia". At common law, a university has been defined as "an institution for the promotion of education in the higher branches of learning."

As a result of the 2005 changes, the University Act now provides, in section 4A:

"The object of the University is the advancement of learning and knowledge, including the provision of university education."

4. The powers of the University

The powers of the University are set out in section 4, sub-sections (3), (4), (5) and (7), and section 6of the University Act, in the following terms:

"**4 – Continuance and powers of the University**

…

(3) Subject to subsection (5), the University is a body corporate invested with full juristic capacity and unfettered discretion, subject to the laws of this State, to conduct its affairs in the manner it thinks fit.

(4) The University may exercise its powers within or outside the State (including outside Australia).

(5) The University must not alienate (except by way of lease for a term not exceeding 21 years), mortgage or charge land vested in or conveyed to the University under –

(a) section 16 of *The Adelaide University Act 1874*;

(b) the *University Site Act 1876*;

(c) the *University Land Act 1929*;

(d) section 6 of *The Statutes Amendment and Repeal (Merger of Tertiary Institutions) Act 1990* to the extent that it applies to land vested in the Roseworthy Agricultural College under the *Roseworthy Agriculture College Act 1973*;

(e) section 26 of the *Statutes Amendment and Repeal (Merger of Tertiary Institutions) Act 1990*;

(f) The Waite Trust,

except with, and in accordance with any terms or conditions of, an approval given by the Governor.

…

(7) to avoid doubt, subsection (5) does not confer any power to alienate land contrary to the terms of a trust relating to the land."

"6 – Power to confer awards

(1) The University has power to confer upon any persons after examination and in accordance with the statutes and rules of the University such degrees, diplomas or other awards as the University may have constituted.

(2) The University has power, in accordance with the statutes and rules of the University, to confer without examination a degree upon a person who has been admitted to a degree at another University or has obtained some other qualification at an institution of higher learning that is, in the opinion of the University, of equivalent or higher status."

5. The general legal obligations of the University

The University is subject to the general laws of South Australia and Australia, both statute and common law, to international treaties and, contractually, to certain foreign laws. If it commits an offence under a State or Commonwealth statute, it may incur fines or other prescribed penalties. If it commits or threatens to commit a civil wrong (eg breach of contract or tort), it is subject to the private law remedies such as damages or injunctive or declaratory relief.

The University may incur vicarious liability for the wrongful acts of its employees, either at common law or under statute. It may also now find itself liable for the wrongful acts of its Council members, whether or not they are also its employees: see University Act, sub-section 29(2), discussed at paragraph 10.

In summary, the University is accountable to the community and in the courts for its performance of its statutory public duties, for its behaviour as a corporate citizen engaged in dealings with other citizens and society at large and, to some extent, for the wrongful acts of persons acting under its authority.

6. The role of the University Council

The role and collective responsibilities of the University Council are now set out in some detail in section 9 of the University Act, in the following terms:

"**9 – Council to be governing body of University**

(1) The Council is the governing body of the University and has the following primary responsibilities:

(a) appointing the Vice-Chancellor and President as the chief executive officer of the University, and monitoring his or her performance;

(b) approving the mission and strategic direction of the University, as well as the annual budget and business plan;

(c) overseeing and reviewing the management of the University and its performance;

(d) establishing policy and procedural principles, consistent with legal requirements and community expectations;

(e) approving and monitoring systems of control and accountability, including general overview of any entities controlled by the University (within the meaning of section 50AA of the *Corporations Act 2001*);

(f) overseeing and monitoring the assessment and management of risk across the University, including commercial undertakings;

(g) overseeing and monitoring the academic activities of the University;

(h) approving significant commercial activities of the University.

(2) The Council must in all matters endeavour to advance the interests of the University."

This is the statutory statement of the corporate governance principles applying to the University.

Section 9 (along with similar provisions in other Australian university legislation), was introduced into the University Act to satisfy a requirement of the National Governance Protocols (**NGPs**) introduced by the Commonwealth Government in 2004.

The NGPs were aimed at addressing Commonwealth Government concerns about the ability of university councils to manage the operational and financial risks of what were now very large enterprises. Government funding for universities under the *Higher Education Support Act 2003* was to be tied to compliance with the NGPs. Compliance was enforced in this way from 2004 to 2007. In 2008, the Commonwealth Government separated the NGPs from funding requirements and announced that they would be replaced by a voluntary code, or set of best practice university

governance principles. In their main substance, the NGPs were in any event by then reflected in university legislation Australia-wide.

The commencement of the *Tertiary Education Quality and Standards Act 2011* (Cth) in 2011 set up the Tertiary Education Quality and Standards Agency (TEQSA) and established a national framework for the regulation of Australian higher education providers. TEQSA operates as an independent body and since 29 January 2012 has assumed the regulatory responsibilities previously undertaken by the various State and Territory regulators and the quality assurance functions previously undertaken by the Australian Universities Quality Agency.

The Commonwealth Government, on 4 January 2012, introduced the Higher Education Standards Framework (Threshold Standards) 2011, consisting of the Provider Standards and the Qualification Standards, as part of the new standards-based framework against which higher education providers are to be evaluated by TEQSA. The Provider Standards effectively replaced the NGPs as they relate to corporate governance requirements.

Delegation of Council power

In addition to the responsibilities and powers outlined in section 9 of the University Act, the Council may delegate any of its powers as follows:

> **"10—Delegation**
>
> (1) The Council may, by instrument in writing, delegate any of its powers or functions under this Act to the holder of a particular office or position in the University.
>
> (2) A power or function delegated to the Vice-Chancellor under this section may, if the instrument of delegation so provides, be further delegated."

7. Council members' duties to the University

7.1 Statutory and common law duties

The University Act now (since 2004) prescribes specific statutory duties to be observed by Council members.

The provisions of sections 15, 16 and 17 of the University Act are, in effect, a restatement in statutory form of the duties that have long been imposed by the rules of equity and the common law upon persons in a similar position. These duties are:

(a) the duty to act in good faith (incorporating the specific duties to act in good faith in the interests of the corporate entity, to exercise powers for their proper purpose, and to avoid conflicts of interest); and

(b) the duty to act with reasonable care and diligence.

The statutory provisions apply only to Council members. Senior management staff, and indeed any officer of the University authorised to act on the University's behalf, while not expressly made subject to the statutory provisions of the University Act, will still owe duties of good faith, care and diligence at common law.

Both the statutory and common law duties are owed to the University as a corporate entity, and to it alone.

The statutory duties now prescribed by the University Act are similar, in effect, to the duties prescribed for company directors by the *Corporations Act 2001* (Commonwealth) and the directors of certain public statutory corporations by the *Public Corporations Act 1993* (SA).

Neither of those Acts applies to members of the University Council. *The Corporations Act 2001 (Cth*) applies to the Controlled Entities of the University and has limited other application where office of Council must be terminated because of disqualification of a member under corporations laws (*See section 13 of the University Act*).

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The University Act imposes the following express duties and obligations on individual Council members.

7.2 Duty to exercise care and diligence

Section 15 of the University Act provides:

"**15 – Duty of council members to exercise care and diligence etc**

A member of the Council must at all times in the performance of his or her functions-

(a) exercise a reasonable degree of care and diligence; and

(b) act in the best interest of the University."

The duty prescribed by sub-section 15(a) is essentially the same as the duties of care, skill and diligence imposed on the directors of companies by the common law, and by earlier statutory provisions such as sub-section 232(4) of the 1991 *Corporations Law*[1]. The principal difference lies in the Council member's immunity from liability for breach of his or her duty of care and diligence: see section 29 of the University Act, discussed at paragraph 12.

The issue remains: what level of performance is expected of a Council member, in order to comply with his or her duty under sub-section 15(a)? Case law[2] on the broadly analogous position of company directors under the *Corporations Act* supports the following statements:

- A Council member's particular circumstances must be taken into account when considering whether he or she has properly performed his or her duty. The proper performance of the duty of the Council member will be dictated by all surrounding circumstances, including the size and nature of the University's enterprise, the composition of the Council and the distribution of its work between the Council, its various committees and other officers of the University.
- As a minimum, all Council members are required to:
  - ensure they are familiar with the responsibilities of the Council and the public duties and functions of the University;
  - acquire a general understanding of the business and operations of the University and the effect that changing economic circumstances may have on the University;
  - inform themselves regularly about the University's financial and business affairs;

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[1] This latter provision has been replaced by section 180 of the current *Corporations Act 2001*(Commonwealth), which is in slightly different terms.

[2] *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438, 503; *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ACSR 759*; Australian Securities Commission v Gallagher* (1993) 11 WAR 105; see also s 189of the *Corporations Act 2001* (Cth).

- take reasonable steps to place themselves in a position to monitor the University's management; and

- regularly attend Council meetings and take reasonable steps to inform themselves in relation to the business to be transacted at meetings.

Council members are under a continuing obligation to keep themselves informed about the University's business and activities, in order to be able to participate in the overall management of its affairs. This does not require detailed inspection of the University's day to day activities but general monitoring of the University's affairs and policies and regular review of its financial statements. Council members may rely upon information provided by a person in management provided the Council member reasonably believes the person is reliable and competent. If the Council member does not reasonably believe the person is reliable and competent, the Council member will be put on notice and will be under a duty to undertake further independent investigation and assessment of the information.

- A higher standard of care may be required in the case of the Vice Chancellor and President, and of persons appointed to the Council by reason of their particular skills and expertise in financial and commercial matters: see University Act section 8 and sub-section 12(3).

Sub-section 15(b) relates to the Council member's duty to act in good faith, discussed in the next section.

While specific duties of Council members under the University Act are not expressed in the same terms as the *Corporations Act 2001*, it is worth noting that recent case law has raised the bar for the standard of directors' duties in Australia.[3] ASIC has successfully prosecuted breach of directors' statutory duties in a variety of contexts, ranging from approval of misleading financial reports,[4] and misleading ASX announcements.[5]

7.3 Duty to act in good faith

Section 16 of the University Act provides:

"**16 – Duty of Council members to act in good faith etc**

(1) A member of the Council must at all times act in good faith, honestly and for a proper purpose in the performance of the functions of his or her office, whether within or outside the State.

(2) A member of the Council must not improperly use his or her position to gain an advantage for himself or herself or another person, whether within or outside the State.

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[3] Note also, however, the operation of section 29 of the University Act, discussed at paragraph 9.

[4] In *ASIC v Healey* (2011) 196 FCR 291 the Federal Court found that seven directors of Centro and its CFO breached their statutory duties of care by approving annual financial statements provided by Centro's external auditor, failing to identify errors which incorrectly classified substantial liabilities as non-current liabilities and disclose substantial post balance date guarantee liabilities.

[5] In the contemporaneous judgments of *ASIC v Hellicar* (2012) 286 ALR 501 and *Shafron v ASIC* (2012) 286 ALR 612, the High Court found that seven directors of James Hardie Industries Ltd and its general counsel/company secretary breached their duties of care in approving a misleading announcement to the ASX that their compensation foundation would have sufficient funds to meet all legitimate compensation claims.

(3) Subsection (1) does not apply to conduct that is merely of a trivial character and does not result in significant detriment to the interest of the University."

Together with sub-section 15(b) and section 17 of the University Act, these provisions cover more or less the same ground as the common law duties of good faith, that is to say:

(a) the duty to act in good faith in the best interests of the University;

(b) the duty to exercise their powers for the particular purpose for which they were conferred and not for some extraneous purpose;

(c) the duty not to surrender, or to allow any restrictions to be placed on their ability to act in accordance with (a) and (b); and

(d) the duty not to place themselves in a position in which there is an actual or potential conflict between their duties to the University and their personal interests.

7.4 Conflict of interest

Section 17 of the University Act now prescribes in some detail the approach to be taken by Council members in respect of conflicts of interest. The section provides:

"**17 - Duty of Council members with respect to conflict of interest**

(1) A member of the Council who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the Council—

(a) must, as soon as is reasonably practicable, disclose in writing to the Council full and accurate details of the interest; and

(b) must not take part in any discussion by the Council relating to that matter; and

(c) must not vote in relation to that matter; and

(d) must be absent from the meeting room when any such discussion or voting is taking place.

(2) A member of the Council will not be taken to have a direct or indirect interest in a matter for the purposes of this section by reason only of the fact that the member has an interest in the matter that is shared in common with a substantial section of the public, or with staff members or students of the University generally, or with a substantial number of staff members, graduates or students of the University.

(3) If a member of the Council makes a disclosure of interest and complies with the other requirements of subsection (1) in respect of a proposed contract—

(a) the contract is not liable to be avoided by the University; and

(b) the member of the Council is not liable to account to the University for profits derived from the contract.

(4) If a member of the Council fails to make a disclosure of interest or fails to comply with any other requirement of subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the University.

(5) A contract may not be avoided under subsection (4) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(6) If a member of the Council has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a member of the Council, the member must, as soon as is reasonably practicable, disclose in writing to the Council full and accurate details of the interest or office.

(7) A disclosure under this section must be recorded in the minutes of the Council.

(8) Without limiting the effect of this section, a member of the Council will be taken to have an interest in a matter for the purposes of this section if a relative of the member has an interest in the matter.

(9) This section does not apply in relation to a matter in which a member of the Council has an interest while the member remains unaware that he or she has an interest in the matter, but in any proceedings against the member the burden will lie on the member to prove that he or she was not, at the material time, aware of his or her interest.

(10) In this section—

domestic partner means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

relative of a member means the spouse, domestic partner, parent or remoter linear ancestor, son, daughter or remoter issue or brother or sister of the person;

spouse - a person is the spouse of another if they are legally married."

The requirements of sub-section 17(1), in particular, are more prescriptive than the broader common law requirements relating to conflicts. In addition to the requirement of disclosure, Council members must not only refrain from taking part in any discussion or decisions of Council that relate to the relevant subject matter, but must also absent themselves from the meeting room while the discussion is taking place.

The purpose of the disclosure and other requirements of section 17 is to lessen the risk that a Council member may, through a conflict of interest, fail to act in the best interests of the University.

The discussion so far has concerned the obligation of all Council members to avoid actual or potential conflict between their duties to the University and their personal interests. In the case of members of the Council who are appointed or elected by specific constituencies within the University, however, duties to the University may conflict not only with personal interests, but also with the 'corporate' interests of the constituency which either appointed or elected the member. Where these interests do conflict, those members are bound in all cases to serve the interests of the University rather than the interests of the appointing or electing group. As to whether there *is* a conflict in any particular case, see sub-section 17(2) of the University Act, above.

7.5 Summary

A Council member who complies with s 17 of the University Act, and otherwise acts honestly, and in accordance with what he or she genuinely believes to be the best interests of the University, is unlikely to breach either the statutory or common law duties of good faith.

8. Enforcement of Council members' duties

The duties described in the preceding sections are owed to the University, and are able to be enforced only by the University. In other words, only the University itself may take proceedings against a Council member for breach of the Council member's duty to it.

The University's right to take action against a Council member, or former Council member, is limited by the provisions of the University Act.

Section 17B of the University Act provides:

"**17B — Civil liability for contravention of section 16 or 17**

> If a person who is a member of the Council or a former member of the Council is guilty of a contravention of section 16 or 17, the University may recover from the person by action in a court of competent jurisdiction:
>
> (a) if the person or any other person made a profit as a result of the contravention - an amount equal to the profit; and
>
> (b) If the University suffered loss or damage as a result of the contravention - compensation for the loss or damage."

Sub-section 16(2), quoted earlier, makes it clear that sub-section 16(1) is not breached by 'conduct that is merely of a trivial character and does not result in significant detriment to the interests of the University'.

Section 29 of the University Act importantly provides:

"**29 — Immunity from civil liability**

> (1) Subject to this Act, no civil liability attaches to a member of the Council for an act or omission in the exercise or purported exercise of official powers or function.
>
> (2) An action that would, but for subsection (1), lie against a member of the Council lies instead against the University.
>
> (3) This section does not prejudice the rights of action of the University in respect of an act or omission not in good faith."

Sub-section 29(3) effectively protects Council members from being sued by the University for a breach of sub-section 15(a) or, for that matter, a breach of their common law duty of care and diligence[6]. They are able to be sued for a breach of either section 16 or 17 if they profited, or if the University suffered loss or damage as a result.

Section 17A of the Act provides, however, that a contravention of section 15, 16 or 17 constitutes serious misconduct, and a ground for removal of the Council member from office.

9. Liability of a Council member to third parties and other obligations

Council members owe no duty at common law, by virtue of their office, to anyone other than the University; nor can they be made personally liable to third parties for the debts or other

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[6] Note, however, that section 29 applies only to Council members, and does not protect University senior management who are not Council members, but who share the same common law duties as Council members.

contractual engagements of the University. In this respect, their position is different from that of company directors. The *Corporations Act* makes directors personally liable (in limited circumstances related to insolvent trading by the company) for the debts of the company. These provisions do not apply to University Council members.

Council members cannot be sued by third parties in respect of wrongful (in the sense of tortious) acts or omissions of the University, unless they themselves acted wrongfully by procuring or directing the University to commit the act in question. If that has happened, they may be liable, concurrently with the University, to the person injured. In the normal course of events, this would seem to be no higher risk than a remote possibility.

Sub-section 29(1) of the University Act provides specific immunity for Council members against civil liability at the suit of third parties, where the matter relates to an act or omission of the Council member in the exercise or purported exercise of his or her official powers or functions. Note, however, the provisions of sub-section 29(2) which provides that an action that would, but for sub-section 29(1), lie against the member of the Council lies instead against the University. In other words, the University itself may be liable to a third party in respect of the acts or omissions of Council members. It is in the area of offences under legislation other than the University Act that Council members may be at real personal risk of liability for the unlawful acts of the University. There is an increasing tendency for legislation to impose heavy penalties on corporations for offences under the legislation, and to make the directors and other officers and managers personally liable as well. Examples of this can be found in legislation relating to workplace health and safety, competition and unfair trade practices, environment protection, equal opportunity, customs and excise and consumer protection[7]. Much of this legislation is capable of applying to the University, and of rendering Council members and others personally liable for an offence committed by the University.

While the scope for personal liability arising from corporate conduct in this context is not completely clear, Council members should also be aware of the obligations potentially placed on the University and its officers by proposed reforms to Australian export controls under the *Defence Trade Controls Bill 2011* (Cth), reforms in May 2011 to sanctions under the *Autonomous Sanctions Act 2011* (Cth) and amendments to the *Criminal Code Act 1995* (Cth) in relation to anti-bribery and corruption laws in Australia.

Work Health and Safety Act 2012 (SA) (**WHS Act**)

The WHS Act is part of proposed uniform health and safety legislation across all State and Federal jurisdictions.

The WHS Act imposes a positive duty on Council members to exercise ‘due diligence’ to ensure compliance by the University with all of its duties and obligations under the WHS Act including ensuring the health and safety of workers, as far as is reasonably practicable. This duty imposes a personal obligation on officers to exercise "due diligence".

The WHS Act contains a broad definition of ‘officer’ in relation to the compliance with the WHS Act by the University. An 'officer' is defined, in accordance with the definition contained in the *Corporations Act 2001* (Cth) as a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or a person who has the

[7] The *Australian Consumer Law*, contained at Schedule 2 of the *Competition and Consumer Act 2010* (Commonwealth), has introduced a nationally regulated and consistent set of consumer protection and unfair business practices laws. The *Australian Consumer Law* aims to protect consumers and businesses by (amongst other things) prohibiting misleading or deceptive conduct, prohibiting unconscionable conduct and unfair contract terms and providing consumer guarantees to consumers.

capacity to affect significantly the corporation's financial standing. Council members fall within the definition of 'officers' and must comply with the duty of due diligence.[8]

'Due diligence' is defined under the WHS Act to require a Council member to take reasonable steps to:

- know and understand the nature of the University's operations, hazards and risks and acquire and keep up to date knowledge about work health and safety matters; and
- ensure the University has in place appropriate resources and process to eliminate or control hazards or risks to health and safety and consider and act on safety information.

Volunteer Council members, who are not remunerated for their contribution to Council, still owe obligations to exercise due diligence however they cannot be prosecuted for failing to exercise due diligence. They can still be prosecuted for a failure to take reasonable care.

From time to time, Council members – and members of Standing Committees - will be offered education and training sessions that are intended to assist in the discharge of due diligence obligations in WHS and other areas. It will be clearly be in the interests of both the University and of Council members and the standing committees to attend these sessions.

A summary of the application of the WHS Act to the University and a summary of the capacities and duties of officers of the University under the WHS Act are attached.

10. Duties of Council members who also act as directors of University related companies

Council members may from time to time be asked to act as directors on the boards of companies incorporated by the University for its own purposes, or other companies in which the University owns shares. In such cases, situations are bound to arise from time to time in which there is a conflict between the University's interests and those of the company in question (although that will not be very likely where the company is a wholly-owned University subsidiary).

While a Council member acting as a director on a company board as a nominee of the University is able to pursue the University's interests, in the event of conflict, the Council member must however always give priority to the interests of the company, over those of the University.[9] Thus, a Council member engaged as a nominee board member must not allow himself to be compromised by looking to the interests of the University who appointed him where it conflicts with those of the company.[10] The Council member must respect the confidential nature of board affairs and such duty of confidentiality, owed to the company, is greater than that owed to the University.[11]

Needless to say, Council members (and other University personnel) who act as directors of companies are subject, in that role, to the provisions of the *Corporations Act 2001* (Commonwealth).

11. Insurance Cover

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[8] The definition of 'officer' is capable of broad application including to members of Council Committees and Management Committees sitting below the Council, merely by virtue of their participation in a committee that makes decisions that affect a substantial part of the business of the University.

[9] *Dairy Containers Ltd v NZI Bank Ltd & Ors* (1995) 13 ACLC 3211, 3243.

[10] *Bennetts v Board of Fire Commissioners* (1967) 87 WN (Pt 1))NSW) 307, 310.

[11] Ibid.

As part of its annual insurance program, the University has in place an appropriate D & O policy for directors' and officers' insurance under which Council members and other officers of the University are insured in certain circumstances against claims from third parties. It will usually be the case that section 29 of the University Act will apply first in respect of liability arising under State laws. That statutory immunity may not take priority over Commonwealth legislation and so the University's Insurance program provides directors' and officers' liability cover and separately provides D & O legal defence costs for liability not otherwise recoverable under the D & O policy.

As a matter of public policy it is not permitted to provide cover by way of insurance or indemnity where a Council member has acted in bad faith or dishonestly.

The University's insurance does not, in any event, cover Council members against liability to the University for breach of their own duties to the University: see sections 17B and 29(3) of the University Act (discussed at paragraph 9). The University is not permitted at common law to pay for insurance for that purpose. Any such insurance would have to be arranged and paid for by Council members personally.

Application of the *Work Health and Safety Act 2012* (SA) to The University *of* Adelaide

Who within the University?	Who has the duty?	The governed activity	Duty	Relevant standard to be exercised	Penalties
Council Committees Senior Management	Officers	Organisational decision making and governance	Officers must ensure that the PCBU complies with its duties and obligations under the WHS Act	**Due Diligence** Officers must exercise **due diligence** to ensure that the PCBU complies with its duties and obligations under the WHS Act Failure to meet standard → BREACH	Category 1: $600k / 5 years jail Category 2: $300k Category 3: $100k
University	PCBU	Operation of the business	**Primary Duty** A PCBU must ensure: - health and safety of workers and others - safe work environment - safe plant, structures, systems of work - safe design, use, handling and storage of plant, structures and substances - adequate welfare facilities, information, training, instruction and supervision - health monitoring **Other Duties** A PCBU must also: - notify serious incidents, illnesses and injuries - permit lawful union right of entry - consult, co-operate and co-ordinate activities with other duty holders - consult with workers, allowing worker representation and participation - comply with lawful exercise of inspector's powers; and - not discriminate against, coerce or mislead on safety matters.	**Reasonable Practicability** A PCBU must ensure safety, so far as is reasonably practicable, weighing up: - the likelihood of risk - consequence of risk - knowledge about, and means of mitigating risk - availability of means of mitigating risk - cost A PCBU must comply with its Other Duties Failure to meet standard → BREACH	Category 1: $3m Category 2: $1.5m Category 3: $500k
Staff HDR Students Contractors Volunteers	Workers	Work activities (including supervision)	Workers must take **reasonable care** - for their own health and safety - that their acts or omissions do not adversely affect others - to comply and cooperate with instructions, policies and procedures of the University	**Reasonable Care** Workers must take reasonable care to - consider the tasks to be completed and understand the risks of that task - recognise the manner in which risks are to be controlled - question assumptions made about the task - ensure procedures to manage the task are proven effective - follow procedures - ensure that workers are supervised and follow procedures -intervene when procedure is not followed - comply and cooperate with instructions, policies and procedures of the University Failure to meet standard → BREACH	Category 1: $300k / 5 years jail Category 2: $100k Category 3: $50k
Students HDR Students Visitors	Others	Circumstantial attendance at the workplace	A person must take **reasonable care** - for their own health and safety - that their acts or omissions do not adversely affect others - to comply with reasonable instructions of the University	**Reasonable Care** A person must exercise reasonable care to protect their own safety and that of others and to comply with instructions	

Categories of breach

Category 1	Category 2	Category 3
Reckless conduct involving risk of death, serious injury or illness	Breach of duty involving risk of death, serious injury or illness	Breach of duty (not necessarily involving any risk of harm)

Capacities and duties of the Officers of the University *of* Adelaide under the *Work Health and Safety Act 2012* (SA)

	Officers	Volunteer Officers	Workers
Definition	***"officer"*** of the University means (a) a University Council Member; (b) a person who: (i) makes, or participates in making decisions that affect the whole or a substantial part, of the business of the University; or (ii) who has the capacity to affect significantly the University's financial standing; (iii) in accordance with whose instructions or wishes the University Council Members are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the persons' professional capacity or their business relationship with the University) NB: This may include Members of Council Committees, the VC, DVC's and Heads of Faculties, Schools and Business Units	A ***volunteer*** means a person who is working on a voluntary basis (irrespective of whether the person receives out of pocket expenses) A ***volunteer officer*** is a person fulfilling the definition of an officer of the University who performs their function without expecation of fee or reward.	A person is a ***worker*** if the person carries out work in any capacity for a PCBU including as: An employee, a contractor, a subcontractor, an employee of contractor, an employee of subcontractor, labour hire, outworker, apprentice, trainee, HDR Student, student on work experience, volunteer NB: Where an officer (including a volunteer officer) carries out work for a PCBU they will have concurrent capacity as a worker
Duty	**Due Diligence** Officers must exercise **due diligence** to ensure that the PCBU complies with its duties under the Act Due diligence includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of work health and safety matters; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and (c) to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business; and (d) to ensure that the PCBU has appropriate processes for receiving and considering information about incidents, hazards and risks and responding in a timely way to that information; and (e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act (f) to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e). Officers may also bear a duty of Reasonable Care in their concurrent capacity as a Worker	**Due Diligence** Officers must exercise **due diligence** to ensure that the PCBU complies with its duties under the Act Due diligence is the same as that required of officers as set out in the adjacent box Officers may also bear a duty of Reasonable Care in their concurrent capacity as a Worker	**Reasonable Care** Workers must take **reasonable care** - for their own health and safety - that their acts or omissions don't adversely affect others - to comply and cooperate with instructions, policies and procedures of the University Workers must take reasonable care to - consider the tasks to be completed and understand the risks of that task - recognise the manner in which risks are to be controlled - question assumptions made about the task - ensure procedures to manage the task are proven effective - follow procedures - ensure that workers are supervised and follow procedures - intervene when procedure is not followed
Penalty	**Category 1: $600k / 5 years jail** **Category 2: $300k** **Category 3: $100k**	**Volunteer Officers may not be prosecuted for a failure to exercise Due Diligence but may face other consequences including;** **- an adverse legal finding of a failure to adhere to the required standard** **- reputational damage**	**Category 1: $300k / 5 years jail** **Category 2: $100k** **Category 3: $50k**

Categories of breach

Category 1	Category 2	Category 3
Reckless conduct involving risk of death, serious injury or illness	Breach of duty involving risk of death, serious injury or illness	Breach of duty (not necessarily involving any risk of harm)