Legal Compliance Education and Awareness

Insurance Contracts Act 1984
(Commonwealth)
The University manages risk in a variety of ways & one of them is to transfer risk by taking out insurance cover with a number of insurers, both onshore & offshore

While an insurance policy does not remove a risk, it does provide the University with some security should the worst happen

The Insurance Contracts Act seeks to protect an insured from financial liability in the event of a loss & seeks to ensure that insurers operate fairly

The Act is administered by the Australian Securities & Investment Commission (ASIC)
Key definitions

- **Insurance Contract**: A contract under which one party (the **insurer**) accepts insurance risk from another party (the **insured**) by agreeing to compensate the insured if he or she is adversely affected by a specified uncertain future event.

- **Insurance Policy**: A legal document which specifies the contents of an insurance contract describing:
  - **Insurance coverage**: the specific insured events for which an insurance company will pay a benefit.
  - **Restrictions** that apply to the coverage: i.e. instances where the insurer will not pay a benefit.
  - **Applicable deductibles**: the amount of money the insured will have to pay in the event of a claim (excess) before the insurer will pay a benefit.
  - **Insurance Premium**: a payment that the insured makes in order to be covered by an insurance policy.
How’s the Act relevant to the University

- The University insures its staff, students, property & assets under a large & complex insurance portfolio.

- The policies insure against risks associated with (among others):
  - staff & student travel
  - accident & injury
  - professional negligence
  - participation in clinical trials & human studies
  - damage to property, buildings & contents
  - business interruption

- The University’s primary obligation under the Act, is a ‘duty of disclosure’ to the insurer (discussed later).
Utmost good faith

- Every insurance contract contains a statutory obligation on both parties to act towards the other with ‘utmost good faith’

- **Utmost good faith** means that that both parties to the contract have a duty to disclose, clearly & accurately, all relevant information *whether they are asked to or not* that will enable the insurers to underwrite* a policy or process a claim correctly

- Any breach of the duty of utmost good faith by the insured (ie. us & the University) may mean the insurer is not obliged to pay debts in the event of a loss

*To underwrite a policy means to assume financial responsibility for something & guarantee it against failure*
Utmost good faith – Responsibilities of the Insurer

The duty of utmost good faith requires the insurer to:

- assess claims promptly
- not refuse to pay claims without proper cause
- not delay paying claims without proper cause
- in some circumstances, explicitly advise the insured of what risks the policy covers or does not cover (eg: exclusion clauses)
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Utmost good faith – Responsibilities of the Insured

The duty of utmost good faith requires the **insured** to:

- not make false or exaggerated claims
- cooperate with the insurer when making claims
- disclose all information relevant to the insurer’s decision whether to accept the risk

  – *This is the insured’s duty of disclosure*
Duty of Disclosure

- In order to maintain adequate insurance coverage the University must fulfil a "duty of disclosure" to its insurer

- This duty of disclosure requires the University to notify the insurer of every known fact, circumstance or event (i.e. "notifiable event") as & when it happens, so that at all times the information relied on by the insurer is correct and complete

- Disclosure must happen when an insurance contract is being negotiated, as well as throughout the period of insurance

- **Failure to disclose a matter to the insurer or to report or update a notifiable event may result in the University being uninsured or under-insured**
  
  - **This could have serious & long-lasting consequences**
Notifiable Events

- A notifiable event can be a number of ‘things’ – a consequence, fact, event, situation, omission, occurrence, activity or failure to do something

- A notifiable event may involve the University, its controlled entities, its students or staff, titleholders, contractors, visitors & volunteers

- A notifiable event may be;
  - words in an email
  - something said to you
  - an accident on campus
  - a misrepresentation in a brochure

- Notifiable events may require a formal or an informal resolution & they may end up in court
Notifiable Events (cont.)

- Examples of a Notifiable Event include:
  - A student is unhappy with her exam results & advises that she will be taking action against the University
  - A member of the public has fallen & hurt himself at the entrance to a University building
  - A student has filed a claim against the University alleging discrimination
  - There has been an accidental release of toxic vapour in a laboratory
  - There is a suspected fraud or embezzlement of University funds
  - A contractor has suffered an injury when working in a University plant room
  - A staff member has been found to be using the University letterhead in promoting his own personal business
Innocent non-disclosure

- Non-disclosure is *innocent* if the person honestly fails to disclose a fact that they thought was irrelevant.

- The insurer *cannot* reject a claim on the basis of innocent non-disclosure if the insurer would have *accepted* the risk & entered into a contract even if full disclosure had been made.
  - However, if the insurer would have charged a higher premium or larger excess if full disclosure had been made, it can reduce the claim against that amount.

- The insurer *can* reject a claim on the basis of innocent non-disclosure if the insurer would have *rejected* the proposal had full disclosure been made.
  - However, it must prove that it would have rejected the proposal.
Insurance Contracts Act 1984 (Cth)

**Fraudulent non-disclosure**

- Non-disclosure is *fraudulent* if the person knew a fact was relevant to the insurer’s decision of whether to accept the risk & still failed to disclose it

  - For example: Mrs X is travelling to the US for a conference. She suffers from epilepsy & is prone to unprovoked seizures, but fails to inform the insurers of her medical condition for fear that they will choose to withdraw her travel insurance

  - For example: Mr Y is moving some expensive University-owned medical equipment interstate. Despite the fact that the equipment is worth $500,000, he informs the insurers that it is only worth $200,000 so that the cost of the premium is less

- If non-disclosure is *fraudulent* the insurance company can cancel the policy for that event, for that year or indefinitely
Insurance Fraud

- **Insurance Fraud**: The deliberate falsification of information by a person claiming against the policy, in order to obtain a financial advantage or gain.
  - For example: overstating the value of damaged or lost items
  - For example: not declaring information that is known & relevant to a claim

- **Insurance Fraud can be:**
  - **Opportunistic**: such as the exaggeration of an otherwise legitimate claim
  - **Premeditated**: such as arson, theft or staged incidents involving the fabrication of a claim
  - **Based on non-disclosure**: such as misrepresenting or hiding facts relevant to a claim

- **Insurance fraud is a cost on the provision of insurance that ultimately contributes to higher insurance premiums**
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Changes to an insurance policy

The University is entitled to a written reason, if the insurer:

- does not accept an offer to enter into a contract of insurance
- indicates that it does not wish to renew the insurance cover
- offers insurance cover on terms that are less beneficial than the terms it would usually offer
- cancels the policy of insurance
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What can happen if I don’t comply with the Act?

*University Consequences:*

- The insurer is entitled to cancel an insurance policy if the University has:
  - failed to comply with the duty of utmost good faith
  - failed to disclose all adverse events
  - broken a condition of the insurance contract
  - made a fraudulent claim
  - failed to pay premiums

- **Cancellation of an insurance policy would mean that any loss would be the responsibility of the University to pay**
  - *WE DO NOT HAVE THE CAPACITY TO DO THIS*
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What can happen if I don’t comply with the Act? (cont.)

*Individual Consequences:*

- Where a claim by an individual is made fraudulently;
  - the insurer will avoid payment of the claim
  - the insurance company may hand over its evidence to the police & request criminal prosecution

- A breach of the Act may be misconduct actionable under the University’s Enterprise Agreement
Reporting Notifiable Events

*It is everyone's responsibility to ensure that notifiable events are reported*

- Staff, students, titleholders, volunteers, visitors, contractors & Controlled Entities

- Notifiable events must be reported to Legal & Risk as soon as they become evident

- Any change in the circumstances of a previously reported notifiable event must also be reported

- Reports can be made in person, by phone or by email

Legal & Risk Branch  
Email: helpdesklegal@adelaide.edu.au  
Phone: 08 8313 4539
Insurance Contracts Act 1984 (Cth)

University obligations under the Act: All Staff

• **REMEMBER:** *An insurer cannot insure something they don’t know about*

• **Our insurer must know about what we do, who we do it with, when, where & how we do it, in order to provide us with a sufficient level of insurance cover***

• Always seek advice from Legal & Risk;
  – if you are unsure about whether a particular matter should be disclosed to the University’s insurers;
  – if you are unsure as to whether a notifiable event has occurred or is likely to occur; or
  – if you are unsure about the level of insurance you are covered for while undertaking specific University activities

• Do not make fraudulent claims

• Always act in utmost good faith when making a claim or a report
University obligations under the Act: Insurance Officers

- Ensure that the University has sufficient insurance coverage at all times
- Keep abreast of the terms & expiry dates of insurance policies
- Ensure that the University’s insurance procedures & practices are consistent with the Act
- Ensure that University staff & students are properly informed of the different types & levels of insurance available to them
- On receipt of the report of a notifiable event, inform the University’s brokers immediately
Additional Resources

- University of Adelaide Insurance website
- University of Adelaide Notifiable Event Reporting Guide
- Australian Securities and Investment Commission (ASIC) website
- Insurance Contracts Act 1984 (Cth)
Disclaimer

The content of this material is intended only to provide a summary & general overview of the Insurance Contracts Act as it applies to the University of Adelaide.

It is not intended to be comprehensive nor does it constitute legal advice.

Please contact Legal & Risk Branch if you are unsure of your compliance obligations under the Act.