

### *Hold Harmless Clauses All for you, none for me*

Most contracts contain indemnity and/or release provisions – often hidden amongst the fine print. These clauses might *look* like stock standard clauses, but the truth is there is no such thing as a “standard” indemnity or release clause. Every clause needs to be checked to make sure the University isn’t unintentionally setting itself up as a scapegoat for the actions of its contractors; or worse, voiding its insurance status.

An indemnity clause allows one party to recover costs from the other party, such as costs associated with bodily injury, property damage or loss of income caused by the other party. By contrast, a release clause acknowledges that a party will not be held liable for such costs even if they would have been held responsible under ordinary principles of law. This could even mean that a party is freed from liability in a situation where they were clearly negligent.

Any indemnity or release provision should be reviewed to ensure that the level of risk the University is accepting is reasonable in the context of that specific contract. Indemnity and release provisions must also be reviewed to ensure that they are not contrary to the University’s obligations to its insurers.

Some indemnity/release provisions waive an insurer’s “right of subrogation”. This means that the clause prevents the insurer from suing the other party. This is most commonly seen in clauses containing the words “hold harmless”.

**The University’s insurance policy does not cover “hold harmless” clauses or any other clause which waives the insurer’s rights of subrogation. Any contract containing such a clause will not have insurance coverage and any damages would have to be paid by the University, and usually from the resources of the School or Branch that accepted or approved the contract.**

*Example: The University appoints a contractor to clean windows. The contract provides that the University will “hold the contractor harmless”. While on scaffolding, the contractor drops a heavy bucket on a pedestrian below resulting in spinal injury. The injured pedestrian sues the University for millions.*

*The “hold harmless” clause means that the University cannot sue the contractor. Further, because the “hold harmless” clause was prohibited under the University’s insurance policy, the University is uninsured. The damages payable to the pedestrian would have to be paid by the University itself out of its own resources.*

These sorts of prohibited clauses can be found in any type of contract, from leases and maintenance contracts, to consultancy agreements, software licences, funding agreements and student exchange agreements.

**Please ensure that all contracts are reviewed well before they are agreed to.**

For more information contact Kim Evans, Senior Legal Counsel by phone 8303 6103 or email [kim.evans@adelaide.edu.au](mailto:kim.evans@adelaide.edu.au).

### *Shifting Positions*

We are pleased to announce that Joe Di Pinto (former Manager Compliance) has accepted the position of Manager Insurance, Legal & Risk

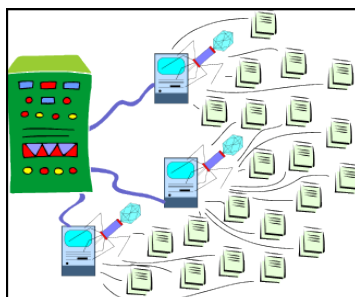
Joe brings a wealth of experience to the position, having worked at Allianz Insurance for more than 12 years. Joe is situated in room G12, Mitchell Building along with Tom Pontt (Insurance Officer) and can be contacted by phone (83034535) or via email ([joseph.dipinto@adelaide.edu.au](mailto:joseph.dipinto@adelaide.edu.au)).

We are also pleased that Richard Boyer is the new Manager Compliance. Richard can be contacted by email ([richard.boyer@adelaide.edu.au](mailto:richard.boyer@adelaide.edu.au)) or phone (83130482)



### *STOP PRESS: New code to improve cybersecurity*

In a coordinated effort by industry, consumers and government, a new voluntary code of practice for Australian Internet Service Providers (ISPs) was launched last month. Known as the **icode**, the code aims to improve cybersecurity and tackle the vast increase in spammers, botnets\* and internet zombies.



Internet Industry Association chief executive, Peter Coroneos, said that the increasing threat of zombied computers (computers which have been essentially hijacked) presents a risk to users, and identity theft, fraud, and increases in spam are all potential consequences of compromised computers. The icode is designed to respond to this challenge, by providing a standard set of ‘best practices’ for ISPs to follow to preserve the integrity of their networks. By following the code, ISPs will contribute to reducing the number of compromised computers in Australia and enhance the overall security of the Australian and international internet.

The University of Adelaide will be working to mature its processes in line with a number of general recommendations set out in the Code, including those about user education, network monitoring for compromised machines and action plans for when a compromised machine is identified. Download the icode from: <http://iaa.net.au/images/resources/pdf/icode-v1.pdf>

\* A **botnet** is a term for a computer connected to the Internet that has been set up to forward transmissions (including spam or viruses) to other computers on the Internet, without the knowledge of the computer owner.



*From the  
General  
Counsel*

Welcome to the July edition of Unilink newsletter.

The *Trade Practices Act (TPA)* has been given an overhaul during the past 18 months and more amendments are flagged for the future (see pg.4). The most obvious change is the change of name. Although it’s still some months before we see all of the amendments come into effect, staff should look out for references made to the *Competition and Consumer Act 2010* and be aware that this new Act and the TPA are one and the same.

Significant amendments are also about to be made to Australia’s Health Practitioner legislation. The health industry has moved from more than 85 health profession boards governed by 66 Acts, to one national scheme governed by one National Law. We briefly outline the new legislation and explain how registered health practitioners at the University will be affected.

The complexity, diversity and size of the University’s operations makes management of risk both difficult and resource intensive without co-ordinated and centrally supported software. To counteract this, Legal & Risk has developed the *University Risk Register (URR)* to help support risk management practices across all sections of the University. Anne Hill (Manager Risk Services) introduces you to this new resource.

Also in this issue of Unilink, why we should avoid signing contracts containing certain clauses, tips to help prevent misrepresentation at the University and what travelling to a high risk travel destination can do to limit your insurance cover.

Celine McInerney, General Counsel

## Legal and Risk

Mitchell Building  
The University of Adelaide  
North Terrace  
SA 5005 Australia



### MISREPRESENTATION 101

“Misrepresentation” is a false statement of fact made during negotiations which plays a part in persuading someone to enter into a contract. Understatements, exaggerations or unrealistic predictions about future price or performance may constitute misrepresentation. False statements or promises about the quality or nature of a product may also be considered misrepresentation, for example;

- “One tutor for every 10 students”; or
- “Our graduates are guaranteed a job”.

An innocent, incorrect statement of fact, such as a typographical error or misprint will be a misrepresentation if not corrected when new information arises. And an omission of information (saying nothing or staying silent) can be a misrepresentation if it would lead a person to believe something other than the truth. Subject to limited exceptions, it is a defence to a claim of misrepresentation that the representor had reasonable grounds to believe that the representation was true.

Generally, a statement of opinion is *not* a misrepresentation because it is merely an expression of personal belief.

### Types of Misrepresentation

There are three main types of misrepresentation:

**Fraudulent** misrepresentation involves an intention to deceive. For example;

- *Exaggerating qualifications and experience of professional staff; or*
- *Overstating the University’s resources and capabilities in the delivery of courses.*



Misrepresentation will be **Negligent** if the person making the representation has not taken care in investigating the accuracy of the claim or has no logical basis to believe it to be true, for example;

### New Health Legislation

Australia’s new health practitioner registration and accreditation scheme began on 1 July this year with almost all States (Western Australia is still to follow) adopting the *Health Practitioner Regulation National Law Act 2009*. The former individual pieces of State health practice legislation (e.g. *Medical Practice Act 2004*; *Dental Practice Act 2001*) have been repealed.

Under the new law, ten health professions, including Dentistry, Medicine, Psychology and Physiotherapy are regulated by nationally consistent legislation. One national Board sets standards and policies, registration and accreditation requirements for each profession and each Board is supported by the Australian Health Practitioner Regulation Agency (AHPRA).

The scheme has many benefits, including enabling health care practitioners to move around the country or provide telemedicine services across State and Territory borders within Australia. The scheme will also maintain a public national register to ensure that a practitioner who is banned from one State or Territory does not practise elsewhere in Australia.



- *Speculating on the availability of academic assistance or supervision.*

**Innocent** misrepresentation *only* occurs when there are reasonable grounds for believing that the false statement is true at the time, for example;

- *Innocent publishing of an incorrect timetable.*

### Legislation

The Misrepresentation Act 1972 (SA) seeks to protect consumers from being deceived or misled by careless or unethical businesses by providing criminal penalties against misrepresentation in certain commercial transactions. Misrepresentation can also allow the other party to terminate a contract.

Non-compliance with the Act can incur fines of \$100,000 and a case of misrepresentation may also give rise to a claim of “misleading conduct” under the *Trade Practices Act 1974 (Cth)* or *ESOS Act 1997 (Cth)* – both of which carry far harsher penalties.

### University obligations under the Act

As a general rule, when undertaking University activities;

- Be careful not to mislead, understate or overstate. Do not rely on ‘fine print’, disclaimers or exclusion clauses to qualify an exaggerated statement or clarify an ambiguity.
- Always be open and honest with staff, students and customers, and ensure **all** facts are disclosed during negotiations.
- Take care when setting and communicating course fees—formally and informally.
- Keep in mind that within the University context, *deliberately* fraudulent misrepresentation is less likely than innocent misrepresentation **BUT** in all cases, carelessness is not a defence. If you misrepresent facts that you should have reasonably known to be otherwise, the misrepresentation will be considered negligent and penalties will be incurred accordingly.

For more information contact Kim Evans, Senior Legal Counsel by phone 8303 6103 or email [kim.evans@adelaide.edu.au](mailto:kim.evans@adelaide.edu.au).

The National Law does not introduce any additional compliance obligations on the University in relation to students. If anything, it provides some clarification on the University’s responsibilities regarding student registration and introduces simplified mandatory reporting requirements. The National Board is provided with authority to request the University to provide particulars of students enrolled within the approved program. As this authority is established by statute, the University will not be in breach of privacy restrictions if it releases students’ details to a National Board upon request.

If the University offers health services (e.g. through a University-operated clinic), the University must ensure that the staff providing those health services are appropriately registered and have sufficient professional indemnity insurance.

If you are a health practitioner, you should have received information from your professional Board on the effect of this new legislation on you as an individual. It is your own responsibility to comply with any such legislative obligations.

For more information on the scheme, contact Geraldine Haese (Legal Counsel) on 830 35244 or visit the AHPRA website [www.ahpra.gov.au](http://www.ahpra.gov.au). If you are a registered health practitioner, your health professional Board can also be accessed via this site.

### Absurd Law

In Louisiana, biting someone with your natural teeth is considered “simple assault,” but biting someone with your dentures is “aggravated assault”

## Introducing the new Risk Register

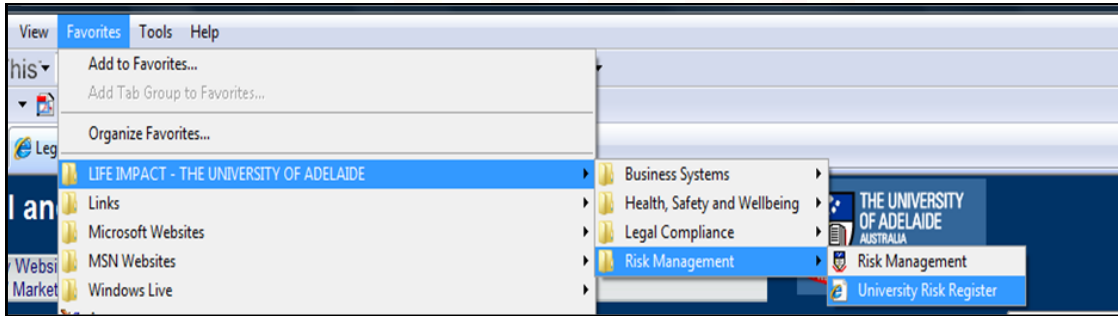
The University has a new resource to help support risk management practices across all sections of the University – the **University Risk Register (URR)**. The URR is a simple, web based tool that facilitates the identification and assessment of risk, monitoring and review of risks, and standardised reporting of risks. It will enable individual areas to build a risk profile over time and will also allow the University, as an organisation, to report to those internal committees, auditors and external stakeholders seeking assurance that risks are being managed.

The URR has been developed to facilitate the management of **operational risks**. These are the risks that arise from the day-to-day work of the University, or the business or project related risks associated with individual faculties, schools or centralised areas. For example:

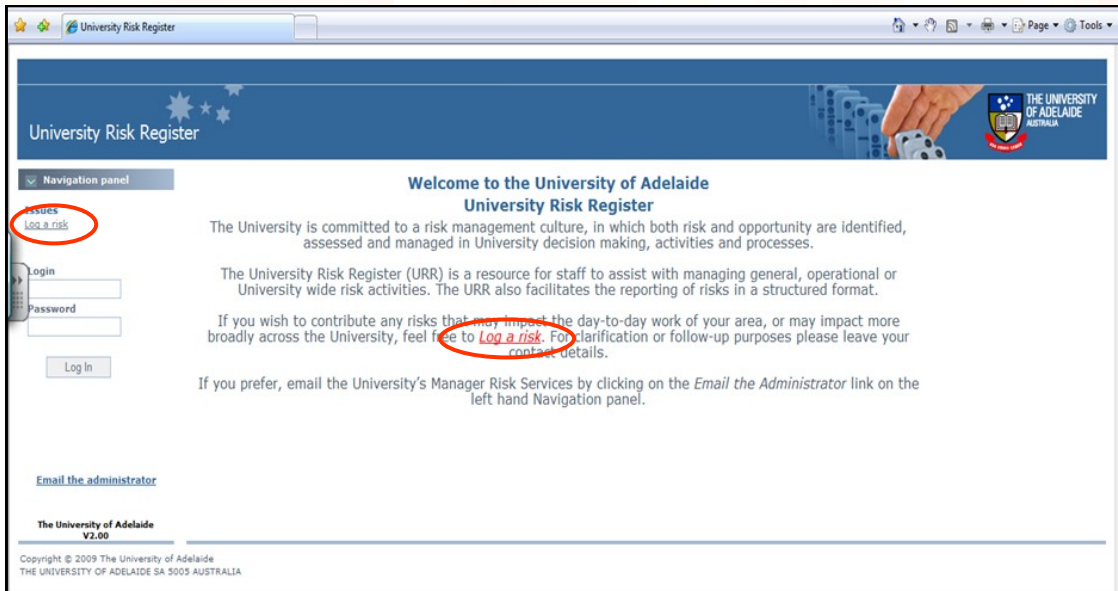
- Feasibility of a project or field activity
- Risks relating to the application for funding
- The impact of a growth in student demand
- Security risks
- Potential risks for expanding current programs
- Risks relating to the storage of research material
- The risk of water penetration due to ageing infrastructure
- Relationship with new collaborating partners

**Please note:** The URR does not replace other registers such as RMSS (used for Health & Safety, and Legal Compliance); instead it acts as an adjunct to these systems to support operational risks. The reporting and managing of risks associated with health and safety remains the responsibility of the HR branch, Health, Safety & Wellbeing team and University Health & Safety Committee, while any risks of a specific academic nature rest with the University's Academic Board.

The URR is available from the University's Intranet. To find the register, click [HERE](#), or go to "Favourites" and follow LIFE IMPACT – THE UNIVERSITY OF ADELAIDE, Risk Management and University Risk Register, as depicted below.



The main welcome screen of the URR looks like this:



The URR allows any staff member to **Log a Risk**. In logging a risk, staff are asked to describe the risk or concern they have and identify where the risk exists. Determining who needs access to use the URR will be up to the local area (whether the Faculty, School or Branch) to decide. All users will require some basic training which will initially be provided by the Manager Risk Services.

If you are interested in learning more about the URR, or discussing your operational risk management issues please contact Anne Hill (Manager Risk Services) in Legal & Risk on 830 34603 or by email([anne.hill@adelaide.edu.au](mailto:anne.hill@adelaide.edu.au)).



## Absurd Law

In Kentucky, it's illegal to carry a concealed weapon more than six-feet long

## Insurance for "high risk" travel destinations

The University purchases travel insurance through *Accident and Health International (AHI Assist)* for all staff and students travelling interstate or overseas on approved University travel. Travel insurance covers the policyholder for insurable events that may occur before or during travel, such as trip cancellation, medical expenses and baggage theft. The cost of travel insurance is based on the type of cover requested, the age of the insured, length of stay and any pre-existing medical conditions. **It is also affected by the countries a policyholder intends to visit.**

### DFAT Warnings

The Department of Foreign Affairs and Trade (DFAT) routinely assess the dangers of Australians travelling abroad and may issue travellers a warning against visiting certain countries. DFAT travel advice provides accurate, up-to-date information about the risks Australians might face overseas, assisting people to make well-informed decisions about whether, when and where to travel.

DFAT offers advice depending on the level of risk that has been assessed, ranging from a reminder to be aware of personal safety, to a recommendation not to travel at all for countries with the highest level of risk. A number of factors to determine what makes a country 'dangerous' are considered, including political stability, crime, airline safety, health issues and natural disasters.

DFAT travel advice is just that, *advice*. It is not mandatory and travel decisions remain the responsibility of the University and the traveller. However, it's important to remember that official, government warnings can affect your travel insurance cover.

### For Example

Consider you are a staff member and have been approved to travel to a destination that has just been given a Level 4 DFAT warning advising people to "reconsider the need to travel".

This level warning does not necessarily mean that you *cannot* or *should not* travel, but final approval *must* be given by your Executive Dean, the Deputy Vice Chancellor or Vice President. (Refer to the [HSW Handbook](#) for the process for travel approval.)

It is important to note that escalating DFAT warnings may limit the level of cover under the University's Travel Insurance Policy and in some instances, disallow you to claim against an entire section of the policy.

### Things to remember if considering travelling to a "high-risk" destination

- Travel insurance is a purely contractual matter and will be subject to the terms and conditions agreed by the University and its broker at the time of purchase.
- Depending on where you are travelling, be aware of policy exclusions that may apply. Ensure you read and understand your travel insurance policy and check the circumstances and activities that are *not* covered under the terms of the agreement.
- Escalating DFAT warnings may reduce the level of cover under the University's Travel Insurance Policy.
- If you do decide to travel to a high-risk country, it is advisable to **register with DFAT prior to departure** and to check with the Embassy of the visiting country if there is anything else you should be concerned about.

For more information about the University's travel insurance policy contact Tom Pontt (Insurance Officer) by phone 830 33878 or email [thomas.pontt@adelaide.edu.au](mailto:thomas.pontt@adelaide.edu.au). For the most up-to-date DFAT warnings and overseas travel advice, visit [www.smarttraveller.gov.au](http://www.smarttraveller.gov.au).



"It was a terrible holiday, everything was so perfect we couldn't claim anything off our insurance."

### Goodbye Trade Practices Act... Hello Competition & Consumer Act

On 14 April 2010, Federal Parliament passed the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010*. This legislation introduces important changes dealing with unfair contracts and institutes new penalties and consumer redress options for breaches of the Act. These provisions will become more significant with the introduction of civil penalties of up to \$1.1 million for corporations and \$220,000 for individuals who engage in unconscionable conduct.

The Act is a component of the overhaul of competition and consumer protection laws which proposes to create a single national consumer law. The Australian Consumer Law (ACL) is intended to commence on 1 January 2011.

A second piece of legislation—*Trade Practices Amendment (Australian Consumer Law) Bill No 2 2010*—is yet to pass, having been introduced on 17 March 2010. The ACL will comprise the bulk of the content of this bill. In addition, the Trade Practices Act 1974 will be renamed the **Competition and Consumer Act 2010**.

Linked to the changes, the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) will have expanded enforcement and investigative powers that will allow them to (among others):

- issue infringement notices containing financial penalties for *suspected* contraventions of various provisions, including the unconscionable conduct provisions under the TPA; and
- issue public warning notices for *suspected* breaches of certain provisions of the TPA or ASIC Act, effectively naming and shaming companies publicly.

The national perspective of the new Consumer Law will provide consistency throughout the country and many people see it as the most important piece of consumer protection legislation since the introduction of the TPA in 1974.

To learn more about unconscionable conduct, see the *Trade Practices Act 101* on the [Legal & Risk website](#); [www.adelaide.edu.au/legalandrisk/resources](http://www.adelaide.edu.au/legalandrisk/resources). For more information about the new *Competition and Consumer Law*, contact Kim Evans, Senior Legal Counsel by phone 8303 6103 or email [kim.evans@adelaide.edu.au](mailto:kim.evans@adelaide.edu.au).

### Absurd Law

The law in Denmark says, "before starting the car, the driver is required to check lights, brakes, steering and honk the horn. He also needs to make a visual check to make sure there are no children underneath the car."