

In this issue . . .

1. *Competitions, raffles and prize-winning draws;* what you need to know about running a lottery at the University
2. *The "due diligence" defence:* when you need one and how to ensure you have one
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5. *2011 insurance renewal process:* our duty of disclosure and your part to play

New Insurance Policy Guides

Our Insurance Policy Guides have recently been reviewed, reformatted and revamped. The guides are comprehensive and will be useful to staff and students alike. We have guides for work experience and community placement, clinical trials, personal accident cover, travel insurance and more.

The work experience guides also contain necessary placement agreements which must be completed and signed by the student, the Head of School and the host organisation prior to placement commencement.

Link to the guides through the Legal & Risk website.
www.adelaide.edu.au/legalandrisk/insurance

For more information contact Joe Di Pinto, Manager Insurance via email (joseph.dipinto@adelaide.edu.au) or phone 8303 4635.

From the General Counsel



Welcome again to Unilink newsletter; linking you with Legal and Risk issues.

It's around this time each year that I travel to London, along with a number of insurance brokers, to negotiate the University's insurance premiums and level of cover. This process requires substantial preparation and planning, beginning mid-year when submissions are prepared, through to September/October when the program is negotiated with underwriters from Lloyds.

In this issue of Unilink, we give you an insight into the insurance renewal program, explain how you contribute to the process and inform you of what you need to do to ensure that next year, we obtain the best possible cover.

Keeping with an insurance theme, we focus on Professional Indemnity insurance and how it helps protect clients, businesses and practising professionals employed by and for the University.

Also in this issue, we discuss "due diligence" as a legal defence for a person charged under certain legislation. We explore the defence of due diligence and offer some suggestions as to how it may be demonstrated.

Given that this is our last issue before Christmas, I would like to thank those who have contributed articles and ideas to our newsletter this year, and encourage more of both during 2011.

Celine McInerney, General Counsel

Want to be a winner?

Think you can entice more students to participate in your survey by offering a chance to go into a draw for an iPad? Want to host a Christmas charitable fundraising raffle for your Faculty's social club? Surely that's fine – everyone else seems to run this sort of thing! Yes, but any lottery is declared a 'common nuisance' and illegal unless authorised under the South Australian *Lottery and Gaming Act*.

A lottery is defined as *any competition involving the award of a prize to be determined by a draw where:*

- *entitlement to participate in the competition depends on the purchase of a ticket or giving of some other valuable consideration by a participant; and*
- *the selection of the prizewinner involves an element of chance, even if some knowledge or skill was required at some stage (e.g. only correct answers go into the draw).*

To be an "authorised lottery", the lottery must either be **licensed** or **exempted**. Fortunately, most lotteries organised for minor fundraising or profile-raising purposes are actually exempted, however even exempted lotteries must be conducted in accordance with Regulations.

Exemption 1: Minor Trade Promotion Lottery

A Minor Trade Lottery is a lottery that is conducted by an organisation to promote the sale of their goods or services with the value of the prize not exceeding \$500. Examples within the University include offering participants a chance to go into a draw for a prize if they:

- complete a survey on student services provided by the University;
- provide their contact details at the Open Day booth consenting to receive follow-up information; or
- enrol within a PCE course by a certain date.

Importantly, when running a Minor Trade Lottery you must ensure that:

- advertisements of the lottery state:
 - the name and address of the University
 - the nature and value of the prizes to be won
 - the date, place and time for the draw; and
- a list of the prize winners is displayed in a prominent place at the premises of the draw for at least 7 days after the lottery is drawn (this could include the University website).

Exemption 2: Minor Lottery

A Minor Lottery is a lottery or raffle where the total retail value of all prizes in the lottery is \$5000 or less, and the proceeds of the lottery are to be applied to an approved purpose (eg. a charitable, educational or religious purpose). Unless you have an astounding prize list, any typical Social Club fundraising lottery will qualify as a Minor Lottery.

Importantly, when running this kind of lottery you must ensure that:

- the total value of prizes in the lottery is not less than 20% of the total face value of all tickets in the lottery; and
- if tickets are being sold before the day on which the lottery is drawn, each ticket contains certain details about the lottery.

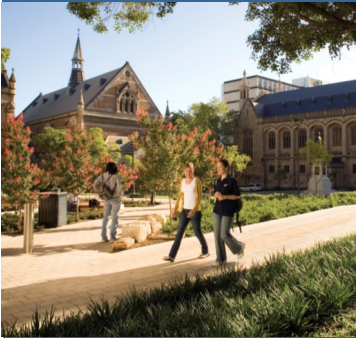
If your lottery does not fit within one of these exemptions, you may require a licence. And in all cases, you must obtain *prior Ministerial approval* if you wish to use an electronic system to draw your lottery. In other words, it's easiest to stick with drawing tickets out of a hat.

For more information contact Geraldine Yam, University Legal Counsel via email (geraldine.yam@adelaide.edu.au) or phone 8303 5244 or visit <http://www.olqc.sa.gov.au>.



Legal & Risk

Mitchell Building
The University of Adelaide
North Terrace
SA 5005 Australia



Insurance Renewal—the what, where, why and how

Lloyd's : A brief history



Image c/o <http://bigeastmeadow.wordpress.com/>

Lloyd's of London was founded in 1688 in a coffee house run by Edward Lloyd, who provided shipping news to merchants, sailors and ship owners and encouraged them to insure part of the risk of a voyage in return for a premium. In the early days and well into the 1990's rich individuals backed policies written at Lloyd's with their own personal wealth. Today, individuals provide only 10% of capital, with corporations accounting for the rest.

Lloyd's is an insurance market of 'members' who join together as 'syndicates' to insure and reinsure risk. Currently, there are around 75 syndicates operating within the market covering a variety of speciality areas, including property, marine, personal liability, and motor accident. Syndicates are staffed by 'underwriters', who assess the eligibility of a customer (such as the University) to receive their products: equity, capital, insurance, mortgage or credit.

The University's relationship with Lloyd's

The University's diverse and complex operating environment requires equally diverse and complex insurance cover. As our activities and business or collaborating partners change, the scope of our insurance cover must change too.

Lloyds offers a level of cover appropriate for the University's needs, so each year, the General Counsel travels to London to negotiate the University's insurance cover. The University does not do business directly with Lloyd's syndicates, but hires brokers ('intermediaries'), to shop the University's policies among the syndicates, trying to obtain the best prices, conditions and terms.



Image c/o: http://www.fredroberts.com/_privaciforeq.htm

What is an insurance declaration?

Every year the University is required to provide "declarations" to our brokers, whereby we "declare" what we do, who we do it with, when, where and how we do it. Numerous staff in every area of the University are involved in this process.

In order to determine how much "risk" is attached to the activities we undertake, our insurers must know about (among other things) the research projects we've agreed to, any new collaborating partners, how many cars we have in our fleet, details of clinical trials we're embarking on, buildings we have constructed, art collections we have on campus and students we have admitted.

These declarations help us fulfil our "duty of disclosure" to the insurer under the *Insurance Contracts Act 1984 (Cth)* and ultimately ensure that we have the adequate level of insurance to cover our staff, our assets and the activities we undertake. Incorrect declarations can result in the University, or part of it, being uninsured, or under-insured. This could have serious and long lasting consequences.

University obligations under its insurance policies

An important part of the contract between the Insurer and the Insured (the University) is disclosing all the relevant facts - **before** the insurer "accepts the risk" of insurance, and **during** the period of insurance.

To be sure we can get the benefit of the insurance cover we purchase, the University must notify the insurer of every known fact, circumstance or event (ie. "notifiable event") as and when it happens, so that at all times the information relied on by the Insurer is correct and complete. Failure to report a notifiable event, such as an accident or personal injury on campus, a formal complaint or dispute, or a suspected fraud, could lead to the Insurers denying a claim and leaving the University and/or individuals potentially without cover.

All staff have a vital role to play in helping with insurance; firstly in the process of disclosure, when you are asked to participate in the preparation of declarations, and secondly, throughout the year as notifiable events need to be brought to our attention or need to be updated. If we each recognise our contribution, we all help in the process and the outcome.

Keep an eye out for the **Disclosure and Notifiable Events Reporting Guide** that will be distributed to all Schools and areas in the coming weeks.

The guide includes more detail about what constitutes a notifiable event, as well as numerous examples.

Further Reading

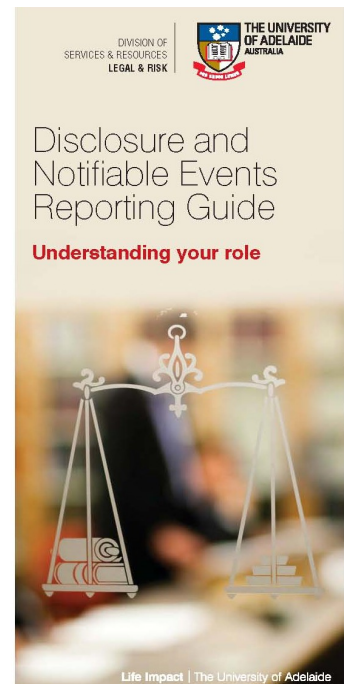
For more information about your duty of disclosure, contact Joe Di Pinto (Manager Insurance) on 8303 4635, or see the Notifiable Event Reporting Guide, accessible via the Legal & Risk website:

www.adelaide.edu.au/legalandrisk/insurance/notifiableevents/

For more information about your obligations under the Insurance Contracts Act 1984 (Cth) see the **Insurance Contracts Act 101**, accessible via the Resources page on the Legal & Risk website:

www.adelaide.edu.au/legalandrisk/resources/

Many thanks to Chris Gamber (Executive Director, FINEX International, Willis London) for his assistance with this article.



Lloyd's fact:
Lloyd's has insured
Tina Turner's legs,
Keith Richards'
fingers and Michael
Flatley's legs

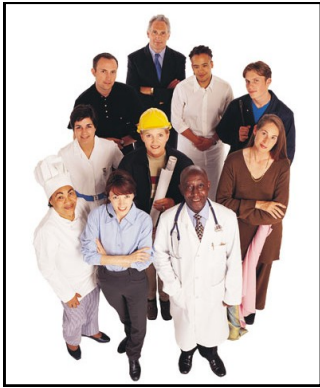
PROFESSIONAL INDEMNITY INSURANCE – for when the experts get it wrong . . .

A “professional” is a person who gives expert advice and/or services to his/her client, such as an architect, engineer, designer, medical practitioner, lawyer or accountant.

Professionals are expected to exercise skill and are legally held to a higher degree of care than an ordinary person. But professionals are only human and mistakes do happen. If a professional is negligent or otherwise fails to meet the standards expected of him/her and a client suffers a loss as a result, the professional can be sued.

What is Professional Indemnity Insurance?

Professional Indemnity (PI) insurance insures a professional against the legal liability arising from professional negligence which results in a loss or damage (predominantly financial or economic) to a client or customer.



In the health care industry, PI is known as Medical Malpractice insurance (Med Mal).

Med Mal covers hospitals, paramedic services, GP clinics and telephone counselling services, and provides cover for legal liability for a breach of professional duty, specifically in the conduct of healthcare practice.

Why is Professional Indemnity Insurance important?

From the Professionals perspective: A claim of negligence can result in enormous costs and expenses to a professional and/or their business. Some claims take years to settle, leaving a large bill for court costs and legal expenses. Professional indemnity insurance covers practicing professionals for any of these legal costs and for any potential compensation they may have to pay in the event of losing a claim.

As claims are often made long after the event to which they refer, professionals generally keep their PI insurance current for several years after they retire or leave a particular job.

From the Client's perspective: If you hire a professional and they make an error, it could have serious consequences for you—

for example, if your doctor misdiagnoses you, or your accountant makes an error on your tax, or if your architect designs your building badly. Of course you can sue them, but do they have enough money/assets to compensate you for your loss? If they have adequate PI, you know that they will be able to meet the full costs of any damage they might cause you.

What level of P.I. insurance is required by the University?

When the University uses external professional consultants, such as analysts, designers, auditors, lawyers and accountants, the University requires those professionals to have PI insurance to protect the University from any loss it may suffer as a result of the negligent acts of those professionals. Each contract is individually evaluated to gauge the level of risk to the University, and this forms the basis of the decision on the amount of PI the University will insist on. As an example, this amount is often between \$2m and \$5m, but can be much more or much less.

What PI insurance is the University required to have?

Professionals are not only external consultants. The University also has many professionals who are employees of the University, such as its finance officers and lawyers. Where those professionals are only advising the University itself, PI is not required. The University cannot get insurance for the losses its own staff might cause it. After all, it can't sue its own staff for negligence.

However, where University professional staff give advice to people external to the University, the University needs to have PI to insure against liability for losses that these professionals might cause to others. For example, medical practitioners employed by the University and its Controlled Entities are required to have PI and Med Mal insurance, most commonly, taken out through membership of a Medical Defence Organisation (MDO).

Even highly trained and competent professionals will sometimes 'get it wrong' and when they do, it can be very serious for their client. An engineer might be a well paid consultant, but does he have a spare \$5m to compensate his client for a collapsed building? With PI, the client can be compensated and the engineer does not risk losing his home!

For more information about Professional Indemnity insurance or Medical Malpractice insurance contact Joe Di Pinto (Manager Insurance) via email (joseph.dipinto@adelaide.edu.au) or phone 830 34635 or Tom Pontt (Insurance Officer) via email (thomas.pontt@adelaide.edu.au) or phone 830 33878.

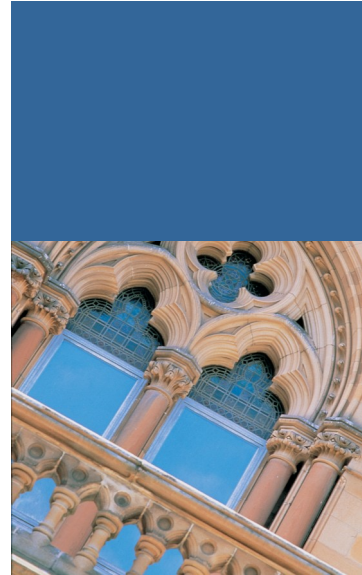
Collisions, calamities & injuries

The statements below are taken from actual insurance accident claim forms:

- “Coming home I drove into the wrong house and collided with a tree I don't have.”
- “I told the police that I was not injured, but on removing my hat found that I had a fractured skull.”
- “I pulled away from the side of the road, glanced at my mother-in-law and headed over the embankment.”
- “I thought my window was down, but I found it was up when I put my head through it.”
- The claimant had collided with a cow. The questions and answers on the claim form were:
Q: What warning was given by you?
A: “Horn.”
Q: What warning was given by the other party?
A: “Moo.”



(SOURCE: <http://www.swapmeetdave.com/Humor/Insurance/Insurance.htm>)



Absurd Law:

If you have been maintaining an illegal radio station in Israel for five or more years, the station becomes legal

Due Diligence - exercising it, demonstrating it, proving it

"Due diligence" is a term used to describe the degree of care and caution which someone should exercise when making a decision.

The term "due diligence" has been around since the 1930s and was initially used to describe the audit process undertaken when considering whether to make a major investment. Increasingly, the term is used more generally to describe the degree of effort required by law and/or by good business practice. In this context, "exercising due diligence" might mean:

- undertaking a financial or technical investigation to determine whether an investment is sound
- performing a risk assessment
- directing OHS training and implementing policies to protect the health, safety and welfare of workers
- having a contract or agreement reviewed by an external party
- implementing a compliance program to prevent and respond to breaches of legislation and promote a culture of compliance within an organisation.

Exercising Due Diligence

Importantly, a person will not be found guilty of certain offences if they can show they exercised "due diligence". The defence exists under **some** provisions of (among others) the *Fair Work Act (SA)*, *Environment Protection Act (SA)* and *Development Act (SA)*, the *Federal Broadcasting Services Act*, *Copyright Act*, *Disability Discrimination Act* and *Gene Technology Act*.

For example, under the *Disability Discrimination Act (Cth)*, it is illegal for the University to allow a member of its staff to harass a disabled employee, in relation to the person's disability. However, it is a defence if the University can show that it "took reasonable precautions and exercised due diligence to avoid the conduct from occurring".

Demonstrating Due Diligence

For a due diligence defence to apply, you must demonstrate that you took **all reasonable steps** and **every reasonable precaution** to prevent the incident or offence from happening. This generally means looking at the way in which your system operates, putting a series of checks in place to prevent problems from occurring and making sure those checks are being carried out.

In the example of the *Disability Discrimination Act* (above), the checks and systems the University employs as part of its due diligence defence include:

- Promoting mutual respect and consideration between all members of the University Community
- Openly supporting and promoting the University's Fair Treatment Policy
- Providing Equity and Diversity training for staff as part of a harassment prevention method
- Not tolerating any form of discrimination, harassment or bullying at the University
- Implementing sufficient penalties to deter acts of harassment
- Encouraging staff to come forward with complaints involving either themselves or another employee
- Providing processes to deal with such issues.

Proving Due Diligence

How you can prove due diligence depends on the particular legislation. However, the following guidelines will go a long way, and may assist in lessening the severity of the penalty handed down:

- ✓ Positive action is necessary. Failing to do something or doing nothing is unlikely to protect you.
- ✓ Set up a system which specifically aims to prevent breaches of legislation, taking into account the breadth of the activity and the level of risk.
- ✓ Ensure that the system works and that it is being used. Having a system in place that nobody follows is as bad as having no system at all.
- ✓ Have written procedures for all operations carried out in your area, in particular those operations that could lead to breaches of legislation.
- ✓ Ensure all staff are fully trained, aware of legal issues and are adequately supervised.
- ✓ Evaluate the system periodically to identify and rectify any failures. Regularly review associated procedures, and make any necessary changes or improvements. Proper documentation of the reviews or audits are useful for demonstrating due diligence.
- ✓ Keep in mind that factors like ignorance of the law, poor command of a language or a lack of common sense will not work in your favour.

For more information contact Kim Evans, Senior Legal Counsel by phone 8303 6103 or email kim.evans@adelaide.edu.au.

New Legal & Risk Resources

The following new resources can be accessed through the Legal & Risk website:

www.adelaide.edu.au/legalandrisk/resources

- *Natural Resources Management Act 101*
- *Volunteers Protection Act 101*
- *Defamation Act 101*
- *Insurance Contracts Act 101*
- *Misrepresentation Act 101*
- *Children's Protection Act 101*

Coming soon. . .

- *Aboriginal Heritage Act 101*
- *Trustee Act 101*
- *Child Sex Offenders Registration Act 101*



Absurd Law 3

In Blythe, California, a person must own at least two cows before he can be permitted to wear cowboy boots in public