



# Unilink

## Legal & Risk Newsletter



### Standard Form Contracts

A number of **Standard Form Contracts** are now available for use by University staff.

A Standard Form Contract is not a generic contract; the fact that it is "standard" does not mean that it will have a broad application. Each Standard Form Contract is drafted for a very specific type of arrangement and will contain the particular terms and conditions which apply to that type of arrangement. In most cases, only the addition of the key commercial information (such as the parties' names, the relevant dates and the payment terms) will be needed. Occasionally, minor amendments may need to be made. In such instances, please contact Legal & Risk on 8313 4539 to speak to one of the legal team.

The following Standard Form Contracts and Guidelines For Use can be downloaded from the Legal & Risk website [www.adelaide.edu.au/legalandrisk/contracts/contracttemplates/](http://www.adelaide.edu.au/legalandrisk/contracts/contracttemplates/).

Type of Contract	Primary purpose
Consultancy Services Agreement (short form)	For use when engaging a consultant to undertake straightforward and low-risk consultancy services for a fee of up to \$30,000.  For additional resources refer to the <a href="#">HR website</a> and Independent Contractor <a href="#">Resources</a> page.
Confidentiality Agreement (one way)	For use when the University will be <u>disclosing</u> confidential information to an external party before entering into a formal relationship, for example during preliminary discussions and negotiations or when developing a joint submission for a grant application.
Confidentiality Agreement (two way)	For use when <u>sharing</u> confidential information with an external party before entering into a formal relationship, for example when developing a joint submission for a grant application.
Guest Lecturer (Letter of Appointment)	For use when engaging a once-off guest lecturer for a fee.
Copyright Consent Form (Guest Lecturer)	For use to obtain a guest lecturer/presenter's consent for their lecture to be recorded.
Copyright Consent Form (Student Material)	For use to obtain a student's consent for the University to use the student's material.
Copyright Consent Form (Photo Release)	For use to obtain a person's consent for a photo of them to be used by the University

### Standard Form Contracts available on request

Legal & Risk also maintains a number of other Standard Form Contracts which are available on request but which will generally require more legal guidance when being used, for example:

- Venue Usage Agreement
- Consultancy Services Agreement (long form)
- Film Shoot Agreement
- International Memorandum of Understanding
- International Student Exchange and Study Abroad agreements

Other parts of the University also maintain Standard Form Contracts relevant to their area of work, such as Campus Services (leases, licences and minor works contracts), Development & Alumni (scholarship and sponsorship agreements) and Adelaide Research and Innovation (research contracts).

For more information, or to have a contract reviewed, contact the legal team: [geraldine.yam@adelaide.edu.au](mailto:geraldine.yam@adelaide.edu.au), [richard.duddy@adelaide.edu.au](mailto:richard.duddy@adelaide.edu.au) or [kim.evans@adelaide.edu.au](mailto:kim.evans@adelaide.edu.au)

### How resourceful!

Past issues of Unilink newsletter provide a useful source of information about legal, risk, compliance, contract, copyright and insurance issues. Articles are easy to read and relevant to the University.

Go to [www.adelaide.edu.au/legalandrisk/newsletter](http://www.adelaide.edu.au/legalandrisk/newsletter) to access articles about the following subjects, and many more:

- Gifts from students and preservation of academic integrity
- Business Names, Domain Names and Trademarks
- Scamming the University: The frauds and potential scams to look out for
- Misinformation on the University website
- Saving and storing legal documents
- Police access to student records
- The legal and risk implications of using social networking sites
- Competitions, raffles and prize-winning draws; running a lottery at the University
- Compliance Matters – what to do when a third party or regulator becomes involved
- Hold Harmless Clauses - Don't sign them!
- The "due diligence" defence: when you need one and how to ensure you have one
- Misrepresentation 101
- Professional indemnity insurance
- Insurance for "high risk" travel
- Whistleblower Protection
- SPAM: Avoid it if you can
- Avoiding online defamation
- Insurance for students on overseas work placements
- Duty of Disclosure and Adverse Event Reporting





**Statute law** is legislation (Acts, Regulations or Codes) that has been passed through Parliament.

**Common law**, also known as case law, is law developed by judges through decisions of courts and similar tribunals. When an issue goes to court and there is no statute that covers it, a judge will hear the case and issue a verdict. A decided case becomes a "precedent" that will serve as a guide but not necessarily binding on the court in deciding later similar cases.

## Records Management:- Don't bin it, file it!

The University generates and receives hundreds of thousands of physical and electronic records each year, and the State Records Act 1997 (SA) requires us to manage these records in a particular way. Not only do we have a legal obligation to keep good records, but there are many other reasons why it makes good sense to do so.

At the highest level, the University's contributions to research, education and society are simply worth preserving. In addition, evidence of the University's learning and teaching, research and administrative activity and transactions help maintain a reliable 'institutional memory' and ensure the University is accountable to the external bodies and public community it serves.

In a technology-based work environment like the University, it is easy to create, send and receive business records, but harder to save them correctly, securely, and in compliance with the State Records Act.

### Proper records management:

- Leads to business efficiency
- Can free up considerable space in your work area
- Ensures continuity of record custody, with fewer records lost, misplaced or accidentally destroyed
- Allows for quick accessibility and locatability of records
- Ensures you are compliant with the State Records Act

### What is a Record?

A record is an account of something, a collection of information, a compilation of facts – something that is written or otherwise set down in a way that preserves its content.

The record might be an email, letter, map, lab-book, photograph or payment receipt.



### What is an 'official' University record?

A record is considered 'official' if it is created or received by you in the course of transacting University business or carrying out work activities, and retained as evidence of that business or activity. Under the State Records Act, 'official records' must be created and captured correctly, be accessible, accurate, be able to be located and relied upon, and disposed of systematically.

#### Examples:

- minutes of a committee meeting
- any interaction with external groups, regulatory agencies or funding bodies
- contracts and agreements
- submissions and reports
- payment receipts and invoices
- University publications
- student and employee records
- documented changes to policy, procedure or operational methodology

Such records must be kept in accordance with the [Records Management Policy and Manual](#) and disposed of by an authorised person. Compliance with the policy ensures you comply with the Act. Failure to comply with the Act can incur fines of up to \$10,000.

### What is NOT an official record?

Transitory items, such as phone messages, notes and rough working papers are not considered official records and do not have the same records management requirements. Such records may be destroyed in accordance with local procedures (referred to as Normal Administrative Practices, or NAP) as they do not contain information of continuing value to the University.

#### Examples:

- office notices and circulars
- drafts not intended for further use or reference, excluding official version drafts of agreements, submissions and legal documents
- duplicate copies of material retained for reference purposes only
- system printouts used to verify or monitor data, or answer ad hoc queries, that are not part of regular reporting procedures
- brochures, catalogues, price lists or unsolicited promotional material received from external sources

### A record should be created and captured whenever you do any of the following in the University:

- Make a decision, offer advice or exercise a University authority
- Do something that needs to be accountable eg: transaction or contract
- Document a change to policy, procedure or operational methodology
- Take action that you might need to provide evidence of in the future
- Do something that you think might be useful for you or others to refer to in the future
- Capture something for your own academic or research purposes
- Receive a demand from a legal or regulatory body asking something of you
- Receive a record from or send a record to someone outside the University



### How long do records need to be kept for?

All official records have a legal minimum retention period, and the University must retain records for at least the time specified in the State Government's disposal schedules. Some records must be retained permanently, while others may be destroyed after a set period of time, such as 7 years after the expiry of a lease, or 10 years after a file is closed. The University may only dispose of official records in accordance with these schedules.

### Who does a record need to be accessible to?

In order for records to comply with the Act, they need to be locatable and accessible to whoever needs them for business purposes:- this might be a few staff or an entire branch. Records held in individual email inboxes, USB sticks or on computer desk-tops represent the greatest instance of non-compliance in this regard.



If you have a topic that you would like covered in a future edition of Unilink newsletter send your ideas to [phillipa.schliebs@adelaide.edu.au](mailto:phillipa.schliebs@adelaide.edu.au). Alternatively, if you would like to submit an article on behalf of your area, send the content through to the same address.

Thanks to all of the staff who provided feedback to us this year. We look forward to bringing you more legal, risk, compliance and insurance articles in 2013.

## Records Management:- Don't bin it, file it!

### How and where records should be saved

This depends on the type of record. For instance, if you simply want to record the fact that you had a particular conversation on a particular day, then a notation in your work diary may be sufficient; whereas if you are negotiating with another university to undertake a joint research project, then a more formal document trail and legal agreement may be required.

If you are new to records management, start by following these steps:

1. Save working documents on the S-drive (not on your desk-top or email in-box)
2. Name documents correctly and consistently with titles that will enable you and your colleagues to find them if need be
3. Avoid electronic "clean-ups"
4. Send all legal documents (contract, lease, agreement, licence) to the Records Management Office for secure storage
5. Use TRIM for filing of official University records

### What is TRIM?

TRIM is the University's Electronic Document and Recordkeeping Management System (EDRMS), that has been approved by the State Records Council. TRIM enables you to capture and store electronic records, and edit and save revisions. It also allows the location of hardcopy files to be tracked to ensure they can be found quickly and easily.

Documents are titled according to the content, business owner and year, and these titles are attached to a records disposal schedule, which has been authorised by the State Records Council.

The use of TRIM is encouraged because it helps the University fulfill its compliance obligations. From a practical point of view, TRIM enables you to increase your productivity by saving time searching for documents, and be assured that your work and records will be safely stored for colleagues to access.

If records are saved on TRIM (whether electronically or in hard-copy) disposal will happen automatically, at the appropriate time, and the RMO will consult with business owners of records before any disposal occurs.

Even if you aren't using TRIM to electronically store your records, doesn't mean you can't still use it for hard-copy filing, particularly as most areas still tend to print the bulk of work that they do. Request a hard-copy TRIM file, using the online file-request function [www.adelaide.edu.au/records/rmo/forms/rmo\\_request.html](http://www.adelaide.edu.au/records/rmo/forms/rmo_request.html) - the RMO will help you work out what to call your files. Store all official records (such as letters, memos and reports) on the hardcopy TRIM file as an alternative to a regular folder.



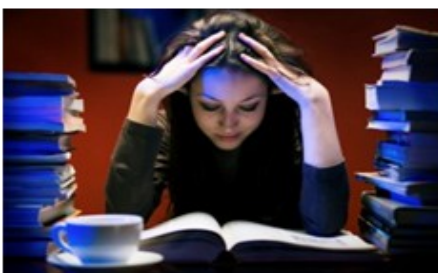
For more information on the University's compliance obligations under the State Records Act, refer to the State Records Act 101 available on the Legal & Risk website ([www.adelaide.edu.au/legalandrisk/resources](http://www.adelaide.edu.au/legalandrisk/resources)). Contact Sue Coppin (Collection Archivist) at [sue.coppin@adelaide.edu.au](mailto:sue.coppin@adelaide.edu.au) or 8313 5184 if you are unsure about your record keeping requirements.

## Risk taking and decision-making under stress

New research from the University of Southern California shows that stress affects the way the brain considers the pros and cons, causing it to focus on pleasure and ignore the possible negative consequences of a decision.

Two recent studies looked at how people learned to connect images with either rewards or punishments. In one experiment, some of the participants were first stressed by having to give a speech and do difficult math problems in front of an audience; in the other, some were stressed by having to keep their hands in ice water. In both cases, the stressed participants remembered the rewarded material more accurately and the punished material less accurately than those whose testing was not preceded by stress.

Excerpt from an article by Maia Szalavitz "Decision-Making Under Stress: The Brain Remembers Rewards, Forgets Punishments" ([Time Magazine Online](#))



## STOP PRESS A new Privacy Act for South Australia



The [Federal Privacy Act](#) does not apply to most universities, as they are state-based entities and don't otherwise qualify or get caught by the Federal Act except contractually. Most other states have introduced state Privacy legislation, however South Australia and Western Australia have lagged behind. Nonetheless, the University chose to establish a Privacy Policy in 2006, which largely adopted the National Privacy Principles under the Federal legislation, so that we would:

- Only collect personal information that is necessary for our functions
- Obtain consent if collecting sensitive information
- Not use or disclose information other than for the purpose for which it was collected

Recently, the SA Government advised that new South Australian privacy legislation is being drafted and that it will apply to universities. A consultation draft is expected to be released by the end of the year, with the Bill tabled in Parliament in early 2013.

Legal and Risk will be reviewing and revising the University's [Privacy Policy and Privacy Management Plan](#) in light of the new legislation. Although we expect that the fundamental principles will remain the same, there will need to be an extension to the scope of the Policy (which currently only deals with staff and student personal information) to recognise the breadth of personal information collected by the University, and additional procedural detail to ensure compliance with the new legislation.

For more information about Privacy, contact [geraldine.yam@adelaide.edu.au](mailto:geraldine.yam@adelaide.edu.au) (Legal Counsel) or refer to the Privacy 101—available on the Legal & Risk Resources page [www.adelaide.edu.au/resources](http://www.adelaide.edu.au/resources).



**Hacktivism** is defined as “the act of hacking, or breaking into a computer system, for a politically or socially motivated purpose.” A hacktivist uses the same tools and techniques as a hacker, but does so in order to disrupt services and bring attention to a political or social cause. A **Haction** usually has the following elements: political motivation, humour (debatable), non-violence, capacity for solo activity and anonymity.

## Poison Posts:-

Uncertainty regarding liability for user-generated Facebook content places businesses at serious risk



Facebook, twitter and other internet sites provide a useful and inexpensive forum for businesses to establish a branded profile through which they can communicate information, including advertising messages, to customers. In many cases these pages permit users to post their own content in the form of text, video, audio and photos.

If this content infringes the law, is the business who owns the page liable? A recent decision of the Advertising Standards Bureau (ASB) suggests that where user content on a business Facebook page breaches an industry code, the business that operates the page may be liable for that breach. So if the answer to the above question is “possibly”, how far does the obligation on the business extend?

### The Diageo Case

Complaints were received by the ASB that the official Smirnoff Facebook page contained content that breached the Australian Association of National Advertisers Code of Ethics and the Alcoholic Beverages Advertising Code. In particular, the complaints were that the content featured:

- Sexism, racism and other forms of discrimination and vilification;
- Irresponsible drinking and excessive consumption of alcohol;
- Obscene language and the depiction of under-25 year olds consuming alcohol; and
- Material that connects alcohol consumption with sexual or social prowess.



On review of the materials contained on the Smirnoff page, the ASB determined that the content did not offend the applicable advertising codes. However, it did take the opportunity to comment on whether the codes apply to content posted by users:

*“... the Code applies to the content generated by the advertisers as well as material or comments posted by users or friends”*

Since it was decided that the content was non-infringing, this case provided limited guidance on what is expected of businesses who operate Facebook pages with respect to user-generated content.

### When will the owner of the page be liable?

The Diageo Case referred to an earlier case of the Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2). In earlier proceedings against Allergy Pathway, it had been ordered not to publish false, misleading or deceptive information regarding its allergy prevention and treatment business. Subsequently, false and/or misleading and deceptive information was posted on Allergy Pathway’s business Facebook page, including user-generated testimonials.

In determining whether Allergy Pathway had breached the earlier orders, the court looked at whether Allergy Pathway could be held responsible for posts by others. The court relied largely on the case law relating to the liability of publishers for defamatory content created by others.

The court identified that a threshold question to ask is whether the publisher has the power to remove the content. This power is necessary for the business to be liable for the publication. As a business that operates a Facebook profile will have the power to remove user-generated content this requirement will be satisfied.

The more difficult question is the degree of knowledge the business has of the content. A business will not be liable where it has played a merely passive role in the publication. However, if it knows certain user-generated content is on its page, and it chooses not to remove it, it will likely be liable if the content infringes the law. Clearly, if someone has complained about certain content, the business will have knowledge and will be liable if it fails to remove it where it is later found to be infringing. It will also likely be unacceptable for the business to act recklessly or turn a blind eye to the publication of infringing content through its page.

It is unclear what the outcome would be where significant volumes of user-generated content are posted on a page that is infrequently checked by the business. Arguably, the courts have not gone as far as saying that there is a positive obligation to monitor and review all content. However, the Diageo case tends to lean in this direction.

Allergy Pathway was found to have breached the earlier orders, as the court determined that it knew persons had posted the relevant testimonials, and it inferred that Allergy Pathway had not removed them as it wanted to take the benefit of them and thought that they added legitimacy to its business. In this way Allergy Pathway had accepted responsibility for the posts.

## What should a business page owner do?

The following steps may assist businesses that operate an online profile which is open to posting of user-generated content:

- If the business does monitor this content, it should ensure that no such content breaches the law (including any laws relating to defamation, misleading and deceptive conduct and intellectual property) or any applicable code of practice.
- If the business receives a complaint or other notice of possibly infringing content, it should review that content closely and remove it if it does infringe any law or applicable code of practice. The business may be liable if it chooses not to remove content that is later found to be infringing.
- The lowest risk approach is to actively vet all user posting. However, it is arguable that courts have not required businesses to go to these lengths yet.

Many thanks to [Iain Irvine](#), Senior Associate (Commercial IP) from [fox tucker lawyers](#) who contributed this article.



## Win a double movie pass

Acronyms underpin the provision of higher education in Australia today. The first 2 people who can accurately state what each of these acronyms stands for will win a **double-pass to the Palace Nova**.

- HESA
- ESOS
- CRICOS
- DEEWR
- TEQSA
- ASQA

Email your answers to [phillipa.schliebs@adelaide.edu.au](mailto:phillipa.schliebs@adelaide.edu.au)