THE UNIVERSITY of ADELAIDE

Legal Compliance Education and Awareness

Insurance Contracts Act 1984

(Commonwealth)

Preamble

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: ie. 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 (ie. “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

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 is 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***

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

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***

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

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)

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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.