

COUNCIL MEMBERS' DUTIES AND RESPONSIBILITIES

SOURCES OF LEGAL RESPONSIBILITIES OF COUNCIL MEMBERS

[Note: this section is intended only to provide a summary of the legal environment in which members of Council operate. This document does not purport to be comprehensive or to render legal advice.]

The sources of legal responsibility for Council members include:

- the *Deakin University Act 1974* (the Act);
- State and Commonwealth legislation; and
- the common law, particularly regarding the fiduciary nature of the relationship between the members of Council and the University.

Pursuant to section 6 (1), of the Act, the Council is the governing authority of the University. One of Council's obligations is to ensure that the objects of the University as set out under the Act are met. The objects are:

- to maintain the several campuses of the University at such places as are prescribed by the University's Statutes;
- to provide university level education to students and to provide the opportunity for education to qualified persons, either within Victoria or outside Victoria;
- to provide facilities for such study;
- to aid, by research, the advancement of knowledge and its practical application; and
- to confer awards of the University as prescribed by Statutes (section 5, *Deakin University Act*).

Pursuant to section 6 (2) of the Act, the primary responsibilities of Council include:

- appointing and monitoring the performance of the Vice-Chancellor
- approving the University's mission, strategic direction, annual budget and business plan
- overseeing and reviewing the University's management and performance
- establishing policy and procedural principles for the University consistent with legal requirements and community expectations
- approving and monitoring systems of control and accountability for the University, including those systems required to maintain a general overview of University controlled entities
- overseeing and monitoring the assessment and management of risk for the University, including its commercial undertakings
- overseeing and monitoring academic activities of the University
- approving any significant commercial activities.

The primary responsibilities set out above are accurately reflected in the Council functions as established by Council and reviewed from time to time.

The legislative controls affecting the University Council are contained in Division 2 (sections 6 to 25A inclusive) of the Act.

The provisions of the *Corporations Act 2001* (Cth) do not apply directly to members of the University Council when carrying out their roles as council members because the University is not itself incorporated under the Corporations Act, but these provisions have been imported into Deakin University Act generally and are dealt with below under the section headed 'Duties of Council Members'. However, University subsidiary companies are subject to that law, therefore members of Council (and officers of the University) who are appointed to membership of the board of a subsidiary company are responsible for compliance with obligations under that legislation.

A report of University compliance is provided annually to members of Council. Responsibility for compliance management rests with the Vice-Chancellor. The role of Council is rarely to play an executive role, but to oversee operations to ensure that those things which might be done are done.

LIABILITY AND INDEMNITY

The University has a legal obligation to indemnify members of Council for their actions done in good faith. This obligation is set out in section 25A of the Act which provides that:

The University shall indemnify and keep indemnified each member of Council and any member of a committee constituted by resolution of Council or by or under a Statute or regulation against all actions or claims (whether arising during or after the term of office of that member) in respect of any act or thing done or omitted to be done in good faith in the exercise or purported exercise of any power or duty conferred or imposed upon the Council or committee or upon any member or members of the Council by or under this Act.

The University fulfils its obligation through the maintenance of adequate levels of insurance cover, reviewed on an annual basis. This does not indemnify members of Council against liability to the University for a breach of their duties to the University.

DUTIES OF COUNCIL MEMBERS

According to common law and section 19 of the Act, members of the Deakin University Council must:

1 Act always in the interest of the University as a whole

1.1 Members must place the interests of the University before their own personal advantage (financial or otherwise) and the advantage of any other person or organisation. Council members are responsible and accountable to the Council and not to any group which may have elected or appointed them.

1.1.1 This issue was the subject of a NSW case ¹, in which Bennetts was a Fire Union member and also a member of the Commission. The Court held that Bennetts wrongly perceived his duty as a Commission member, in that he believed he was representing a sectional interest. The Court held that as a Commissioner, it was his duty to act in the interests of the Commission, not those of the Union. Members of Council are therefore bound in all instances to serve the interests of the University rather than the interests of the group which may have elected or appointed them.

¹ Bennetts v Board of Fire Commissioners of NSW (1967) 87 WN pt 1 (NSW) 307

- 1.2 Cases now show that members of Council should “attain at least a general understanding of the business” of the organisation and should “bring an informed, independent judgement to bear on various matters that come before the Board [read Council] for decision”.²
- 1.3 In circumstances where a member of Council possesses specialised knowledge or experience, he or she will be expected under the law, in addition to understanding the business of the organisation, to use that special knowledge or experience in the affairs of the organisation. An example of a Council member owing this special duty is a member appointed to meet the requirement in the Act for a person with qualifications and experience in financial matters.

2 Avoid actual or potential conflicts of interest

- 2.1 Council members must take reasonable steps to avoid all conflicts of interest, and must disclose, in accordance with Council procedure, material personal interests³ where those interests could potentially lead to a conflict of interest. Where a potential conflict of interest may arise, a council member must declare the nature and extent of their interest and such interest must be noted in the minutes of the meeting. The declared interest must be dealt with in accordance with the Council Conflicts of Interest Procedure. Potential conflicts of interest might involve (but are not limited to):
- employment by, shareholding in or directorship of a company dealing with the University
 - membership of a body that is in competition or conflict with Deakin University
 - out-sourcing or restructuring of functions directly related to the area of employment of a member of staff elected to membership of the Council
 - any matter under discussion that would result in personal financial advantage
 - government officials who are responsible for an aspect of policy or operations which affects a matter under consideration by the University.
- 2.2 A matter which arises from membership of the group qualifying an individual for election or appointment to membership of the Council, and which is not otherwise special or personal to that member of Council, is not a conflict of interest. (Examples could include students voting on assessment policy, or staff voting on a salary increase for all staff.)
- 2.3 Council members must not accept gifts or benefits either for themselves or for another person which might in any way, directly or indirectly, compromise or influence them in their capacity as a member of Council or its committees.

3 Not improperly use their position to gain an advantage for themselves or someone else

- 3.1 Council members must not take advantage of membership of Council or information gained in that position for their own or someone else’s advantage. For example, a Council member must not take advantage of a business opportunity at the expense of the University.
- 3.2 Council members must scrupulously avoid any circumstance which may give rise to a perception that the member or someone else has received a benefit by virtue of the member’s position on Council. For this reason, Council members and persons or entities with whom they have a close association, may not provide professional services to the University for the duration of their term

² AWA Limited v Daniels (1992) &ACSR759 at 864

³ A material personal interest arises where there is a realistic expectation that, directly or indirectly, a member of council or an associated/related person stands to gain a benefit or suffer a loss depending on the outcome of the matter. The benefit or loss need not be financial.

as a member of Council. This prohibition does not extend to prevent a Council member or person with whom they have a close association from continuing employment with the University or from making application for and taking up employment with the University.

A person has a close association with a Council member if the person is a close relation (including a de facto spouse or a close relation of a de facto spouse), an employer or employee, a business partner, a person from whom the Council member receives fees for professional other services, a corporation of which the Council member is a director, a proprietary company of which the Council member is a shareholder, or the beneficiary of a trust of which the Council member is a trustee.

4 Exercise powers for their proper purposes and retain discretionary powers.

- 4.1 A member of Council must always carry out his or her duties as a Council member in good faith, honestly and for proper purposes consistent with the interests of the university.
- 4.2 For example, it would be unacceptable for members of Council to enter an agreement to vote in a certain way.

5 Act honestly, ethically and with integrity.

- 5.1 Council members should raise with the Chancellor any ethical issues that may arise through their role as a member of Council or a standing committee of Council.

6 Exercise due care, skill and diligence in their duties.

- 6.1 Council members must exercise appropriate care and skill in carrying out their duties as Council members.
- 6.2 What amounts to ‘appropriate skill and care’ seems to equate most closely with the “business judgement rule” set out in the Corporations Act which provides a ‘safe harbour’ for directors who in reaching a judgement:
- make that judgement in good faith and for a proper purpose
 - have no material personal interest in the subject matter of the judgement
 - have informed themselves to the extent reasonably necessary to make the judgement, and
 - rationally believe the judgement to be in the best interests of the corporation.

The University agrees that section 6.2 sets out correctly the limits of Council members’ liability.

- 6.3 In a 1991 case⁴, the Chairman of the National Safety Council was held to be personally liable for losses sustained (in the NSW court’s view), as a result of his failure to exercise sufficient diligence and care in his oversight of the operations of the Commission. More recently, the courts have found that delegation of responsibility is not a shield by which liability can be avoided: delegation is no more than a resource to assist the directors [read Council members] in discharging their responsibility to guide and monitor diligently the management of the entity.⁵

⁴ Commonwealth Bank of Australia v Friedrich & Ors, an unreported 1991 decision

⁵ Daniels v AWA Limited (1995) 37 NSWLR 438

A precise of these cases is attached.

RESPONSIBILITIES OF COUNCIL MEMBERS

7 Members of Council are required to:

- 7.1 Attend Council meetings. Under section 9 (2) (b) of the Act, the office of any member who is absent from three consecutive ordinary meetings of Council without special leave of absence previously granted by the Council, shall be deemed vacant.
- 7.2 Participate, as far as they reasonably find themselves able to do so, in functions of the Council which are held from time-to-time and also in functions of the University where the attendance of members of Council is appropriate.
- 7.3 Be prepared to contribute to the functioning of Council through membership of standing and ad-hoc committees of Council and other committees of the University, and through membership of such selection committees as may be required from time to time
- 7.4 Be prepared to contribute to the advancement of University as requested from time-to-time.
- 7.5 Maintain the confidentiality of information obtained in the course of one's duties as a Council member. All agenda papers for Council and its committees are regarded as 'confidential' until after the relevant meeting and documents marked 'confidential' must be treated in the strictest confidence at all times.
- 7.6 Contribute so far as reasonably possible to the fulfilment by Council of such operating provisions as may be established by Council from time to time.
- 7.7 Recognise that only the Vice-Chancellor may speak publicly on behalf of the University as its official spokesperson with respect to University policy or management decisions.

RESPONSIBILITIES OF THE UNIVERSITY IN RESPECT OF COUNCIL MEMBERS

8 The University is responsible for:

- 8.1 providing Council members with complete and accurate information in respect of all matters to be considered by Council and in respect of all of Council's identified functions, in sufficient time to allow proper consideration;
- 8.2 providing such legal and financial advice as may be necessary to enable members to discharge their fiduciary duties;
- 8.3 providing Council members with access to records of Council proceedings and material placed before Council in meetings of Council;
- 8.4 providing such other administrative assistance as may be required from time to time including reimbursement of expenses incurred by members and car parking arrangements etc;
- 8.5 ensuring that all requirements in respect of Council as set out in the Act, University legislation, legislation applicable to the University and processes approved by Council, are met;

8.6 maintaining adequate levels of insurance cover to indemnify and keep indemnified each member of Council in accordance with the requirements of Section 25A of the Act.

The University acknowledges that the “business judgement rule” set out in section 6.2 above correctly states the limits of the obligations of a member of Council.

Approved by Council on 11 August 2005 with effect from 31 August 2005

COMMONWEALTH BANK OF AUSTRALIA V FRIEDRICH and OTHERS (UNREPORTED) 1991.

This was an action brought by the Commonwealth Bank to recover moneys advanced to the National Safety Council of Australia.

Friedrich, the Chief Executive Officer of the NSCA built an empire upon lies and deceit.

In the course of the action, the role of the Chairman of the NSCA came under scrutiny. The Chairman, who was not a young man, was found by the Court to have failed to have exercised acceptable standards of care and diligence with respect to the Council's interests. It appeared that he had been a mere 'rubber stamp' for Friedrich's activities and had taken no steps to seek verification of equipment purchases and no, or insufficient interest in proposals Friedrich brought to the Council.

It was held that the Chairman was personally liable for a part of the moneys owed to the bank.

BENNETTS V BOARD OF FIRE COMMISSIONERS OF NEW SOUTH WALES (1967) 87WN307

The Board, constituted under the Fire Brigades Act (NSW), comprises a number of members elected by municipalities, insurance companies, volunteer firemen and permanent fireman who are members of the NSW Fire Brigade Employees Union.

During 1966 the Union made an application to the Industrial Commission for a new award. Bennetts had been elected to the Board by the permanent firemen.

At a meeting of the Board's Finance Committee, Bennetts sought access to a copy of Counsel's advice in relation to the award application. The President said it would only be made available on an undertaking that its terms would not be disclosed to the Union. This Bennetts declined to give.

Bennetts sought a declaration that the Board was not entitled to refuse to produce the legal advice to him.

It was held:

- 1 that in the case of a Statutory Board, once a group has elected a member he assumes office as a member of the Board and becomes subject to the overriding and predominant duty to serve the interests of the Board in preference, on every occasion upon which conflict may arise, to serving the interests of the group which elected him;
- 2 that a member of such a Board must respect the confidential nature of Board affairs where the interests of the Board so require;
- 3 that a Board member has no absolute right to see a document of importance, and has no such right where, as here, he wishes to see a document in order to carry out a misconceived duty to further the interests of the group which elected him to the Board.

DANIELS V AWA LIMITED (1995) 37 NSWLR 438

An employee became involved in substantial foreign currency transactions, undertaken with no effective internal controls or record-keeping standards. When the extent of the company's losses resulting from the foreign currency transactions was identified, the company sued the auditor, who in turn counterclaimed in negligence against a variety of parties, including those directors who were not members of the executive. At trial and again on appeal, the non-executive directors were found not to have been negligent in the performance of their duties, however in coming to this conclusion, the New South Wales Court of Appeal established the stringent test to be applied to non-executive directors:

1 Directors are subject to a Minimum 'Objective' Standard of Competence

The test of negligence in the duty of care owed by the directors to the company was established to be an objective test in which [a] minimum standard of competence on the part of all directors was required by the law. All directors would have to ensure that their decisions were informed, independent and involved the active exercise of their discretions. The notion that liability of directors was limited to cases of gross negligence was rejected.

2 Directors must take an active role in the supervision of the Corporation

It was made clear that the obligations of the director could not be avoided by relying on delegation: delegation provides assistance to the director, but does not afford a shield against liability, nor does it reduce the obligation on the director to take an active role in supervision:

...a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience. That duty involves becoming familiar with the business of the company and how it is run and ensuring that the board has available means to audit the management of the company so that it can satisfy itself that the company is being properly run. The board may be assisted by subcommittees consisting of its members, including non-executive directors...

In our opinion, the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company.⁶

⁶ Daniels v AWA Limited (1995) 37 NSWLR 438