

# WELCOME TO MEMBERS OF THE JAMES COOK UNIVERSITY COUNCIL

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**6 May 2020**

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# OVERVIEW

- ▶ Legal status of the James Cook University (**University**) and the Council
- ▶ Applicable corporate governance standards
- ▶ Duties of Council members
- ▶ Understanding Conflicts of Interest
- ▶ Managing Conflicts of Interest
- ▶ Relevance of Code of Conduct issues

# JAMES COOK UNIVERSITY

- ▶ The University is established under the James Cook University Act 1997 (**Act**) and is:
  - » A body corporate, but is not a Corporations Act company or corporation
  - » A statutory body for the purposes of:
    - › The Financial Accountability Act 2009 and
    - › The Statutory Bodies Financial Arrangements Act 1982 and
  - » A unit of public administration for the purposes of the Crime and Corruption Act 2001

# JAMES COOK UNIVERSITY

- ▶ The University is ultimately controlled by the Council as it is the University's governing body
- ▶ The Council consists of a range of members who are either official members, appointed members, elected members or an additional member
- ▶ A quorum of the Council exists at a meeting if at least half of its members are present
- ▶ The Act expressly deals with the appointment of the Chancellor, Deputy Chancellor, Vice-Chancellor and Chairperson of the Academic Board

# DELEGATION OF POWERS

- ▶ The Council may under section 11 of the Act delegate certain of the Council's powers under the Act to:
  - » an appropriately qualified member of the Council;
  - » a committee of appropriately qualified persons but which must include 1 or more members of the Council; or
  - » an appropriately qualified member of the University's staff

# APPLICABLE CORPORATE GOVERNANCE STANDARDS

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# WHAT ARE THE CORPORATE GOVERNANCE STANDARDS

- ▶ In the broader Government context the term "corporate governance" is regarded as having a wide meaning
- ▶ There are, and have been numerous reports and standards at the State and Commonwealth levels that have set very clear standards for members of Boards of statutory bodies and authorities
- ▶ This is important as if an issue arises it is likely that there will be a clear answer on what should have been done or adopted

# A DEFINITION OF CORPORATE GOVERNANCE

- ▶ "The processes by which organisations are directed, controlled and held to account. This encompasses organisational authority, accountability, stewardship, leadership, direction, control and performance."





# KEY GOVERNANCE GUIDELINES

- ▶ The Queensland Auditor-General has previously undertaken a number of key governance reviews including:
  - » Auditor-General of Queensland Report No. 7 1998-1999;
  - » Auditor-General's Report No. 1 2001-2002; and
  - » Auditor-General's Report No. 2 2002-2003.
- ▶ The Queensland Auditor-General has also prepared a range of governance and risk checklists and self assessment checklists

# KEY GOVERNANCE GUIDELINES

- ▶ Other relevant benchmarks are:
  - » ASX Corporate Governance Council Principles (which was applied by Queensland Treasury when they developed the Corporate Governance Guidelines for Government Owned Corporations). These guidelines are a precedent as they are a Queensland Government modification (for the GOCs) of the ASX Corporate Governance principles
  - » Various Australian Standards on Corporate Governance issues which cover both private sector and government entities
  - » Voluntary Code of Best Practice for the Governance of Australian Universities

# ROLE OF COUNCIL MEMBERS

- ▶ At a high level the focus of the Council members should be to:
  - » Adopt a strategic viewpoint
  - » Address the "big picture" issues
  - » Be pro-active and responsive
  - » Not get caught up in minor operational/day to day/managerial issues and
  - » Deal with the oversight of any significant operational/crisis issues

# DUTIES OF THE COUNCIL MEMBERS

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# DUTIES OF THE COUNCIL MEMBERS

- ▶ The relevant legal duties for a member of the Council come from:
  - » The common law duties developed by the Courts that are imposed on all Board members whether they are publicly or privately appointed
  - » These common law duties reflect the fiduciary positions of trust that are personally held by Council members
  - » A subset of these duties that are imposed under legislation and specifically in the Act

# DUTIES OF THE COUNCIL MEMBERS

- ▶ One key and quite detailed document which members of the Council should note is the Queensland Government Manual titled "*Welcome Aboard: A guide for members of Queensland Government Boards, committees and statutory authorities*"
- ▶ If there is ever an alleged failure to discharge your duties as a member of the Council this manual will be consulted as the leading official State Government guide. It specifically refers in Section 2.3 to University Councils as relevant statutory authorities which "govern" the operation of an agency.

# RELEVANCE OF INTERNAL POLICIES AND GUIDELINES

- ▶ Secondly, members of the Council should be very familiar with the relevant internally adopted policies and guidelines of the University.
- ▶ Again, the terms of these internal policies can become relevant if an issue arises
- ▶ For example the University Council Code of Conduct (**Code of Conduct**)

# SUMMARY OF KEY LEGAL DUTIES

- ▶ Section 26A(1) of the Act states that a Council member has the function of ensuring that the Council performs its functions and exercises its powers appropriately, effectively and efficiently
- ▶ But this is a generic statement. So it is necessary to examine the full range of common law and statutory duties that are imposed on Council members



# SUMMARY OF KEY LEGAL DUTIES

- ▶ The members of the Council carry a range of common law and statutory duties including:
  - » Owing a fiduciary duty to the University as a separate legal entity
  - » The duty to act honestly and exercise relevant powers for their proper purpose
  - » Duty to act in good faith
  - » Duty to exercise diligence, care and skill

# SUMMARY OF KEY DUTIES

- » Duty of confidentiality
- » Duty to avoid conflicts of interest and
- » Duty to avoid conflicts of duty and duty

# DUTY - ACT HONESTLY IN THE BEST INTERESTS OF JCU

- ▶ Council members owe a common law and statutory duty to act honestly and in the best interests of the University (section 26A(2)(a) of the Act)
- ▶ Because Council Members are in a position of trust and oversee the expenditure of large sums of public monies, their actions and standards of behaviour will be required to be exemplary

# DUTY - EXERCISE REASONABLE SKILL, CARE AND DILIGENCE

- ▶ This duty arises under the common law and under the Act (section 26A(2)(b))

# DUTY - EXERCISE REASONABLE SKILL, CARE AND DILIGENCE

- ▶ Council Members should:
  - » take reasonable steps to inform themselves about the affairs of the University and the circumstances and environment within which it operates
  - » obtain sufficient information and advice and then exercise an active discretion at all times to then make conscientious and informed decisions

# DUTY TO DISCLOSE CONFLICTS OF INTEREST

- ▶ Again this is both a common law and statutory duty under the Act (section 26A(2)(c))
- ▶ The key principle is that Council members must disclose any conflict that arises between a Council member's personal interests and the interests of the University
- ▶ However, as we will see the clear expectation in Queensland is higher than the obligation in the Act - requiring the disclosure of all "perceived" conflicts of interest

# DUTY - NOT MAKE IMPROPER USE OF YOUR POSITION

- ▶ Again this is both a common law and statutory duty that arises for Council members (section 26A(2)(d))
- ▶ Section 26A states that a Council member must not make improper use of their position, or of any information acquired as a member, to gain directly or indirectly an advantage for the member or another person

# DUTY OF CONFIDENTIALITY

- ▶ Duty of Confidentiality
  - » A Council member has a common law duty to not disclose or misuse any confidential information
  - » A Council member must not:
    - › use or divulge information which is not yet public information and which has been communicated to them in their capacity as a Council member, in circumstances where there is an obligation of confidentiality or
    - › make improper use of information acquired because of their role as a Council member to benefit any person or cause detriment to the University or



# DUTY OF CONFIDENTIALITY

- » compile records or information of the University for the Council member's own private use
- ▶ This duty can be particularly relevant and contentious for Council members who are members of more than one Board. These Council members may have to clearly define what "hat" they are wearing when information is received and then dealt with
- ▶ There is also a useful discussion in Section 3.3 of the Welcome Aboard guide that suggests that Government Board members are responsible collectively for, and should support and adhere to final Board Decisions. But individual Board members do have a right to dissent when voting on a particular issue

# DUTY TO AVOID A CONFLICT OF DUTY AND DUTY

- ▶ Where a person is a member of more than one Board they will owe a fiduciary duty to each legal entity
- ▶ If a conflict arises between the interests owed to one entity and the interests owed to a second entity, a conflict of duty and duty will arise
- ▶ This conflict of duty and duty must be managed to avoid the improper pursuit or preference of the interests of one entity at the expense of the other

# DUTY TO AVOID A CONFLICT OF DUTY AND DUTY

- ▶ As a member of one Board, a Board member must not exercise his or her powers for the benefit or gain of a second entity, without clearly disclosing the second entity's interest and without obtaining the informed consent from the Board of the first entity

# POTENTIAL DEFENCES

- ▶ These defences are primarily for civil liability
- ▶ **Business Judgement Rule**
  - » A Council member will make a legitimate business judgement where:
    - › They act in good faith and
    - › They do not act for irrelevant purposes

# POTENTIAL DEFENCES

- ▶ When deciding whether an irrelevant purpose has been involved the Courts have applied the following test being whether "*an intelligent and honest man in the position of the director of the company concerned, could, in the whole of existing circumstances, have reasonably believed that the transactions were for the benefit of the company belief that the judgement is in the best interests of the entity will generally be regarded as a rational one unless the belief is one that no reasonable person in their position would hold*"

# POTENTIAL DEFENCES

- ▶ **Reliance defence**
- ▶ Council member who relies on information from the University's management or from a professional or an expert will be entitled to rely on such advice
- ▶ This is unless they knew, or by the exercise of ordinary care, they should have known of facts that would have denied such reliance e.g. where professional advice is given on the basis that certain facts exist which the Council member knew, or ought to have known did not exist

# POTENTIAL DEFENCES

## ▶ **Delegation defence**

- ▶ Generally, if the Council members delegate a power under the Act they will not be liable for the exercise of the power by the delegate if the Council members believed, on reasonable grounds, that the delegate would exercise the power in conformity with the duties imposed on the Council members and that the delegate was reliable and competent in relation to the exercise of the delegated power

# STATUTORY REQUIREMENTS

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# JCU ACT

- ▶ **26A Member's function, and obligations about function ...**
- ▶ (2) In performing the function, a member—
  - » (a) must act **honestly** and in the **best interests of the university**; and
  - » (b) must exercise reasonable skill, care and diligence; and
  - » (c) **must disclose** to the council any conflict that may arise between the member's personal interests and the interests of the university; and
  - » (d) must not make improper use of his or her position as a member, or of information acquired because of his or her position as a member, to gain, directly or indirectly, an advantage for the member or another person.
- ▶ **26B Council may remove member from office**

# CONFLICT OF INTEREST ISSUES

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# OVERVIEW

- ▶ Concept of a 'conflict of interest'
- ▶ How conflicts of interest may arise
- ▶ Identifying and managing potential conflicts
- ▶ The Golden Rules

# CONFLICT OF INTEREST - COMMON LAW DUTY

- ▶ As noted above one of a Council member's key legal duties is to avoid any conflicts of interest
- ▶ A Council member must avoid actual or potential conflicts of interest arising between their duties as a member of the Council and their personal interests or any other legal duty owed to another third party

# WHAT IS A CONFLICT OF INTEREST?

- ▶ It is clear that every person who hold a statutory office on a Board of any statutory body in Queensland should avoid taking any action which would appear to a reasonable person with knowledge of the relevant facts, to involve a conflict of interest
- ▶ Generally speaking, if such an office holder stands to gain some **financial benefit** or **personal advantage** from a decision, recommendation or advice, they should clearly not be involved in the relevant decision making process

# WHAT IS A CONFLICT OF INTEREST?

- ▶ The concept has been described by the Crime and Corruption Commission (**CCC**) as:
  - » a conflict between a **public official's duties** and responsibilities in serving the **public interest**, and the public official's **private interests**
  - » can arise from avoiding personal losses as well as gaining personal advantage – whether financial or otherwise

# WHAT IS A CONFLICT OF INTEREST?

- ▶ The Integrity Commissioner in discussing conflicts of interest for statutory office holders has highlighted that:
  - » fundamentally, a conflict of interest involves a conflict between a person's personal interests and official duties
  - » personal interests vary with the responsibilities that are held by the office holder
  - » **the appearance of a conflict of interest may be as serious as an actual conflict**
  - » consequently, office holders should avoid any actions which, would appear to a reasonable person with knowledge of the relevant facts, to involve a conflict of interest

# EXAMPLES OF CONFLICTS OF INTEREST

- ▶ Examples of a conflict of interest would include:
  - » where a person's interest in any property or other assets in terms of the value may be altered by a relevant decision or recommendation to which they are a party
  - » where a person's commercial or business interests could be advanced or harmed by the relevant decision, recommendation or advice



# EXAMPLES

- » where a person seeks or accepts gifts and/or hospitality which may influence or appear to influence their decision making
- » where a person's relationships with third parties influence or appear to influence the decision, recommendation or advice that they are involved with
- » as a general rule, when a decision is to be made involving a relative or friend, the affected decision-maker should not stay involved in the making of that decision

# CONFLICTS OF INTEREST

- » a Council Member who is on the Board of another entity where there could be a conflict of duty and duty (e.g. if the two entities companies are dealing with each other)
- » a Council member approving the award of a contract when a close family member or associate has been clearly involved in the successful bid to the University
- » where existing relationships are in place between a Council Member and a third party who is dealing with the University e.g. where the Council member is or has acted as a solicitor, accountant or consultant

# CONFLICTS OF INTEREST

- ▶ In some cases, as a Council member, there may be no real issue if the key University decisions are being made at the management or executive level within the University - assuming that the Council member has not sought to intervene or influence the making of that decision

# RESPONSIBILITY OF COUNCIL MEMBERS

- ▶ Must seek to avoid conflicts arising between their personal interests and the duties owed to the University
- ▶ Where the conflicts cannot be reasonably avoided, the conflict must be identified, reported and then effectively managed
- ▶ That can result in a Council member having to step aside in relation to some specific Council issues

# TYPES OF CONFLICTS OF INTEREST

<b>Conflict Type</b>	<b>Characteristics</b>
Actual	Direct conflict between public official's current duties and existing private interests. The conflict is present.
Perceived	Could be perceived by others that a public official's private interests could improperly influence the performance of their public duties. The conflict is only believed to exist.
Potential	A public official has private interests that could interfere with official duties in the future. Conflict is a future possibility.

# IMPORTANCE OF IDENTIFYING CONFLICTS OF INTEREST

- ▶ An undisclosed or unmanaged conflict can:
  - » Lead to investigation by the Crime and Corruption Commission
  - » Lead to disciplinary action and loss of employment/office
  - » Damage one's reputation or status
  - » Undermine public confidence in the organisation or the individual
  - » Lead to an inefficient or irresponsible use of resources, including a misdirection of funds, inappropriate allocations of resources, goods or services

# HOW TO MANAGE CONFLICTS

- ▶ **Register or Declare:** In writing all possible conflicts to the appropriate internal party
  - » Disclose actual or perceived conflict immediately - **always** err on the side of caution if in doubt
  - » Record the relevant disclosure that is made
  - » Have an appropriate strategy internally approved to manage the conflict
  - » Implement and record the management arrangements that have been put in place

# HOW TO MANAGE CONFLICTS

- ▶ **Restrict Involvement or Remove:** where the conflict (actual or perceived) exists
- ▶ **Recruit:** engage third parties who do not have an interest to advise (such as probity advisers)
- ▶ **Relinquish:** relinquish any private interest creating the conflict



# THE CONFLICT GOLDEN RULES

## Rule 1

The fact that a conflict of interest may arise, in practice, is not in itself a problem. Conflicts of interest regularly arise in practice. However, the key issue is to ensure that the conflict of interest is properly managed

# THE CONFLICT GOLDEN RULES

## Rule 2

A conflict of interest will be regarded as having arisen even if there is no actual or direct conflict or bias or influence. The perception of a conflict of interest can, in terms of the public interest, be as damaging as there being an actual or direct conflict of interest

# THE CONFLICT GOLDEN RULES

## **Rule 3**

At the end of the day, the protection of the public interest must always be given greater weight and priority when dealing with conflict of interest issues

# THE CONFLICT GOLDEN RULES

## **Rule 4**

Therefore, always take a conservative view when assessing whether there is a conflict of interest. If in doubt, always declare the conflict of interest and then take appropriate action

# THE CONFLICT GOLDEN RULES

## Rule 5

When assessing your position, consider whether you would be totally comfortable if:

- » Your colleagues became aware of the relevant facts/potential conflict of interest; or
- » If the relevant facts/conflict of interest appeared in the media

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# UNIVERSITY COUNCIL CODE OF CONDUCT

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# THE UNIVERSITY COUNCIL - CODE OF CONDUCT

The University Council Code of Conduct (**Code of Conduct**) sets out further standards that have to be followed by members of the Council

The Code analyses the four fundamental ethical principles that are set out in the Public Sector Ethics Act being:

- ▶ Principle 1 - Integrity and impartiality
- ▶ Principle 2 - Promoting the public good
- ▶ Principle 3 - Commitment to the system of government
- ▶ Principle 4 - Accountability and transparency

# CODE OF CONDUCT

- ▶ Based around those four principles in the Act, the University has in the Code of Conduct constructed the Code around the following four principles:
- ▶ Principle 1 - Seek excellence as part of a learning community
- ▶ Principle 2 - Act with integrity
- ▶ Principle 3 - Behave with respect for others
- ▶ Principle 4 - Embrace sustainability and social responsibility



# CODE OF CONDUCT

- ▶ The Code of Conduct is also supported by an Explanatory Statement which provides relevant background, explanation and context for the above principles

# CODE OF CONDUCT

- ▶ Each Council member should be fully aware of the Code of Conduct and the Explanatory Memorandum as they are very relevant internal documents
- ▶ In the event of a complaint or issue arising about the conduct of a Council member or members, it is inevitable that the Code of Conduct and the Explanatory Memorandum will be consulted by any third party reviewer as being a relevant, fundamental internal policy

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