

WELCOME



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



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

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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



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





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



DUTIES OF THE COUNCIL MEMBERS



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





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.



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.

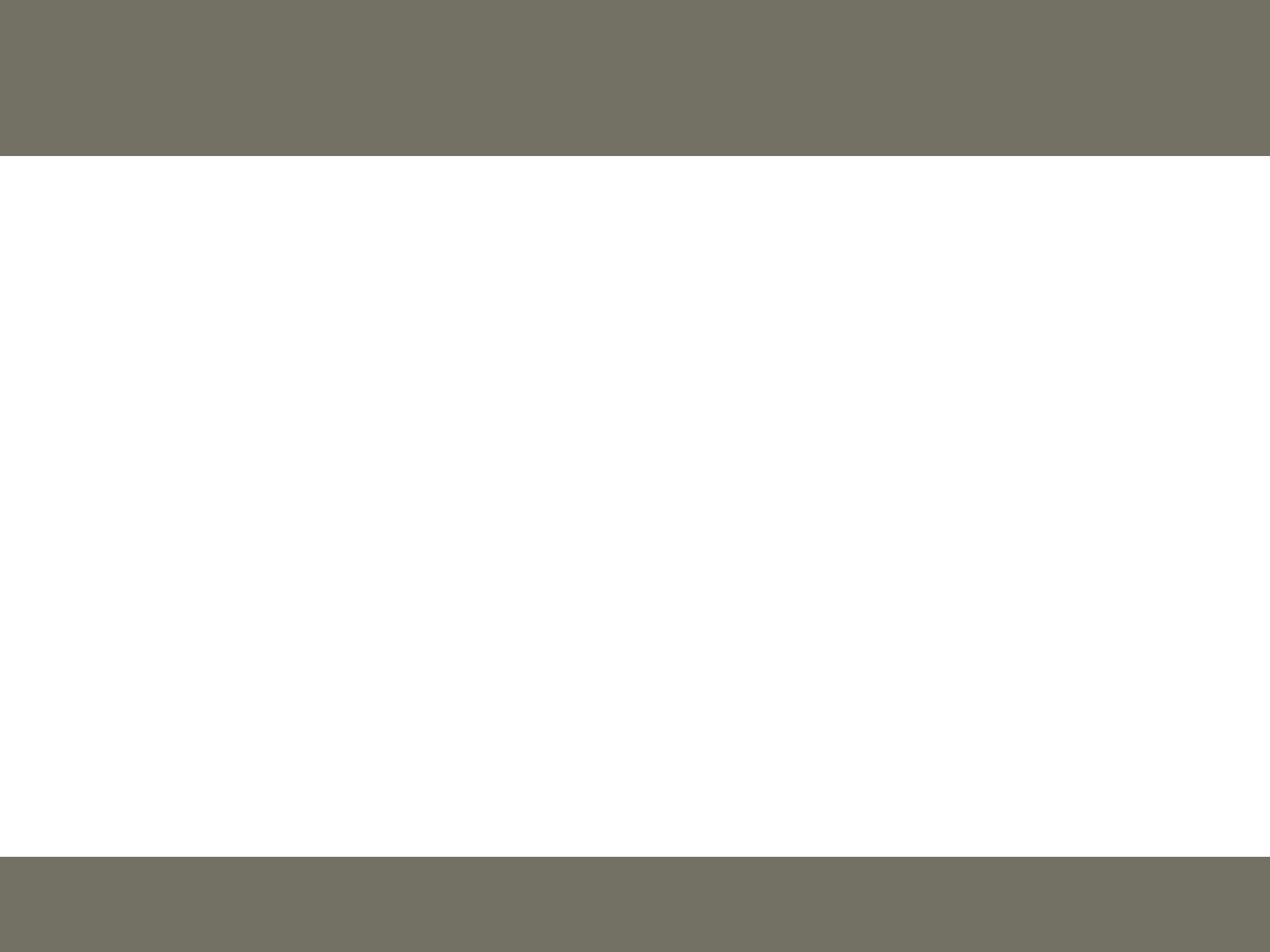


SUMMARY OF KEY LEGAL DUTIES

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





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

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

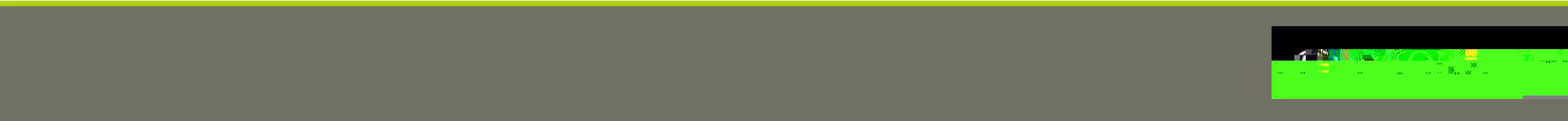


DUTY OF CONFIDENTIALITY

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 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



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:





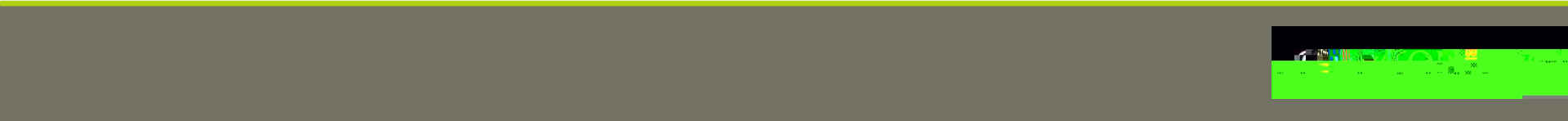
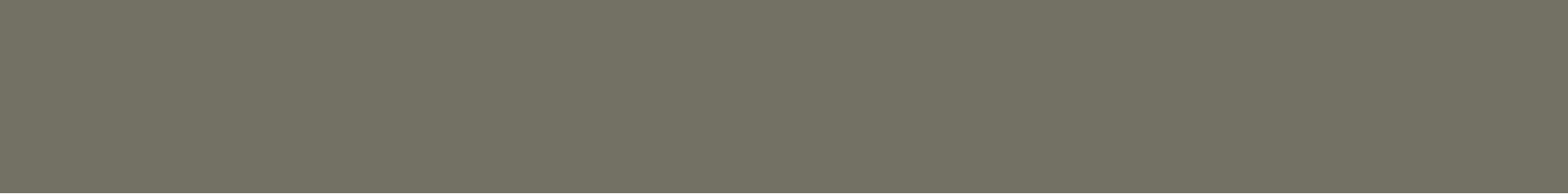
POTENTIAL DEFENCES

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





STATUTORY REQUIREMENTS

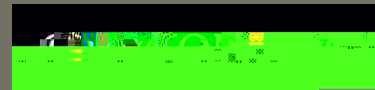


26A Member's function, and obligations about

(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



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 and responsibilities in serving the public interest , and private interests
- » can arise from avoiding personal losses as well as





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



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



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

Conflict Type	Characteristics
Actual	Direct conflict between public official's 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







UNIVERSITY COUNCIL CODE OF CONDUCT



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

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



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