Legal Compliance
Education and Awareness

Competition and Consumer Act 2010
(Commonwealth)

Formerly the Trade Practices Act 1974
What does the Competition and Consumer Act do?

- Promotes competition & fair trading
- Protects consumers from being deceived, misled or bullied by careless, unethical or unscrupulous business
- Makes it illegal for business to engage in conduct which is:
  - anti-competitive
  - misleading & deceptive
  - unconscionable (*against conscience*)
- Applies to most University activity
- Enforced by the Australian Competition & Consumer Commission (ACCC)
  - Well funded, active & aggressive independent statutory regulator
How does the Act apply to the University?

• Governs almost every aspect of the University’s business

• Applies to all conduct but some areas carry higher risk;
  • Fee structures
  • Marketing materials
  • Claims made by staff to existing or potential students
  • Claims made by staff when negotiating contracts
  • Exclusive agreements & transactions with other businesses
  • Any discussion or agreement relating to price
Who is affected by the Act?

- **Anyone:**
  - Entering into a contract; or
  - Interacting between competitors, suppliers or wholesalers

- **Staff & students** who provide information (formally & informally) about, among other things;
  - *courses on offer*
  - *conditions of entry*
  - *the existence of scholarships*

- **The University** as the supplier or vendor of services or materials

- **Faculties & Schools** making claims (formally & informally) about their;
  - *Facilities & teaching staff*
  - *Courses & subjects*
  - *Cultural identity*
  - *Past & future success*
  - *Affiliates*

- **Marketing & Strategic Communications** promoting the University;
  - *In TV, radio & print media*
  - *On posters, banners & letterheads*
  - *Locally, nationally & internationally*

- **REMEMBER it is not only staff involved in formal marketing who must be aware of & compliant with the requirements of the Act**
The Act prohibits “Anti-Competitive Conduct”

- Anti-competitive conduct includes arrangements or agreements with competitors that have the purpose, effect or likely effect of substantially lessening competition
  - **BASIC TEST** to give a rough indication if competition is lessened: If you raised prices & changed nothing else would you lose sales?
  - *If the answer is yes, competition is has probably not been lessened* – **but ask Legal & Risk first**

- Anti-competitive conduct is prohibited because competition is thought to lead to efficiency in business & a healthy economy

- An agreement may be:
  - a *formal written document*
  - an *oral agreement to behave in a certain way*
  - an *informal email arrangement*
  - a ‘*nod & a wink’*
Anti-Competitive agreements include...

- **Exclusive Dealing**
  - Making a condition of supply or acquisition that the other party abide by certain conditions
    - Example: The University enters into an agreement with a software supplier agreeing to acquire a particular software application for use at the University, on condition that the supplier does not supply the software to other universities in the area.

- **Price fixing**
  - An agreement between two business competitors to sell the same product or service at the same price

- **Resale price maintenance**
  - Inducing a reseller not to sell below a specified price
Anti-Competitive agreements include...
(cont)

- **Third-Line forcing**
  - Making it a condition of supply that the purchaser also acquire goods or services from a third party
    - Example: The Sports Association makes a deal with a particular sports store that the store will supply University rugby jumpers at a discount price to students. The Sports Association then makes it a condition of membership that students must purchase their rugby jumpers from the particular sports store

- **Predatory Pricing**
  - Sustained below cost pricing for an anti-competitive purpose

- **Misuse of Market Power**
  - Taking advantage of substantial market power for an anti-competitive purpose
Competition and Consumer Act 2010 (Cth)

The Act prohibits “Cartel Conduct”

• Cartel Conduct refers to contracts, arrangements or understandings between competitors where they agree;
  • to fix, control or maintain any component of prices
    • including rebates, delivery fees, discounts
  • prevent or limit the amounts of any product that they will produce, buy or sell
  • who they will buy from or sell to
  • how they will respond to a tender

• Such conduct harms consumers, businesses & the economy by increasing prices & reducing choice, service, innovation & efficiencies

• Cartel Conduct is a criminal offence & may result in up to 10 years imprisonment for an individual & fines of up to $500,000 per breach for an individual or $10 million or more for the University
The Act prohibit “Misleading or Deceptive Conduct”

• Conduct that is false, misleading or deceptive, or is likely to mislead or deceive, whether intentional or not, is prohibited under the Act

• BASIC TEST to give a rough indication of whether a statement is misleading:
  • Would the statement fool an idiot in a hurry?
  • If the answer is yes or maybe, the statement may be construed as misleading or deceptive – but ask Legal & Risk first

• False & misleading representations are also prohibited
Examples of “Misleading or Deceptive Conduct”

• The University advertises for a vacant position stating that the successful applicant will acquire a company vehicle. After accepting the position, the successful applicant finds that he is given the benefit only if part of his salary is sacrificed & not as an additional benefit.

• This is misleading conduct in relation to Employment

• During a phone conversation, a member of student services mistakenly informs a prospective student from Japan that a course fee is $7,000, despite the course actually costing $19,000 for an International Student

• The mistake is informal & unintentional, but is still considered a breach
What does Misleading or Deceptive Conduct apply to?

- Written documents or advertisements
  - Oral statements or representations
  - telephone conversations
  - formal & informal
- Impressions given by previous conduct
  - claiming to have authority or qualifications you do not have
- A pattern of behaviour
- Silence (in some cases)
  - omitting information
  - not correcting someone’s assumptions or impression that you know is incorrect
- Inadvertent breaches
  - innocent mistakes
  - exaggerations
  - typographical errors & misprints
The Act prohibits “Unconscionable Conduct”

- Conduct which exploits a weaker partner which is clearly unreasonable or unfair is prohibited under the Act.

Examples:
  - Using your superior bargaining power to take advantage of a person with a disadvantage:
    - Sickness or disability
    - Illiteracy
    - Lack of assistance or explanation
  - A painter with poor English language skills is contracted by the University to do some work. Despite his obvious lack of understanding, he is forced to sign a contract with particularly harsh terms.

- A high risk area within the University is exploitation of consumers (often international students) who lack the capacity to make an informed decision as to the implications of entering into a contract.
What can happen if I don’t comply?

**Individual Consequences:**

- Up to 10 years imprisonment (for Cartel Conduct)

- Fines of up to $500,000 per breach
  - University insurance will not cover an employee’s penalties

- Court orders;
  - damages to compensate another party
  - corrective advertising
  - cancellation of a contract or agreement
  - Disqualification from managing any company (for certain breaches)

- A breach of the Act may be misconduct actionable under the University’s Enterprise Agreement
What can happen if I don’t comply? (cont.)

**University Consequences:**

- Fines of up to $1.1 million per offence or 10% of the University’s annual turnover per breach (which ever is greater)
- Legal & administrative costs
- Court orders:
  - Damages to compensate another party
  - Injunctions preventing the University from doing things
  - Variation to existing contracts
  - Corrective advertising
  - Refunds
- Misrepresentation to a consumer (eg: a student or potential student) can also be a criminal offence under the Misrepresentation Act or the Education Services for Overseas Students (ESOS) Act
  - A person only needs to prove that they have been misled & that it has cost them something (financially, socially etc.)
- Damage to the University’s reputation
- ACCC, competitors, suppliers, customers & other businesses can all sue under the Act
What must I do to be compliant with the Act?

• Always tell the truth & be accurate
• Be careful not to mislead or overstate
• Do not rely on "fine print", disclaimers or exclusion clauses to qualify an exaggerated statement or clarify an ambiguity
• Explain the nature of transactions carefully, especially to students
• Ensure that agreements are not seen as “anti-competitive”
• Act independently of competitors at all times
• Recommend the product of a third person to a customer/student **BUT DO NOT** compel them to buy the product as a condition of your sale
• Regularly review your commercial interactions with competitors, including contracts and verbal arrangements;
What must I do to be compliance with the Act? (cont.)

**TAKE CARE WHEN:**

- Setting & communicating course fees
- Selling training materials or “consultancy services”
  - research consultancies
  - IT software arrangements
  - Contracting services
- Entering into an agreement with another institution or University
What must I do to be compliance with the Act? (cont.)

REMEMBER

- The Competition & Consumer Act works on the basis that competition:
  - is a healthy thing
  - drives efficiency & fairness; &
  - offers the best results to consumers

- Although the University’s collaborative nature goes against many of the principals of the Act, we are nonetheless governed & impacted by the Act

- Be aware of the areas which carry higher risk of breach, such as dealings with competitors, or sales/promotions to international students
What must I do to be compliance with the Act? (cont.)

REMEMBER

• Anything that we do in our University capacity that has a trade or commerce element is potentially subject to the Act

• It is not only staff involved in formal marketing & promotions who must be aware of the requirements of the Act

• Under the Act, you are responsible for your own actions

• Consult Legal & Risk for advice;
  • Before making arrangements with competitors
  • If you are unsure whether specific conduct is prohibited, or
  • If you are hesitant whether the conduct may substantially lessen competition
ACCC Investigations

- If the ACCC contacts you;
  - Co-operate with their investigations

BUT

- Immediately refer them to Legal & Risk
- Do not agree or disagree with any comments an ACCC investigator poses without first consulting Legal & Risk
Additional Resources

- **Kim Evans**, Senior Legal Counsel
  - 8313 6103

- **ACCC website**
  - Overview of the Competition & Consumer Act

- **Competition & Consumer Act 2010 (Cth)**

- **Competition & Consumer Law Compliance Manual**
Disclaimer

The content of this material is intended only to provide a summary & general overview of the *Competition & Consumer Act* as it applies to the University of Adelaide.

It is not intended to be comprehensive nor does it constitute legal advice.

Please contact Kim Evans, Senior Legal Counsel or Legal & Risk if you are unsure of your compliance obligations under the Act.