



Unilink

Legal & Risk Newsletter



In this issue. . .

1. Compliance Matters—What to do when a third party or regulator becomes involved
2. Trade Marks update—Will Apple be allowed to register “APP STORE” as a trade mark?
3. Email Etiquette—Top 5 dos and don'ts
4. ARI or Legal & Risk? Where you should send your contract



STOP PRESS Consumer Protection Laws

On 1 January 2011, the *Trade Practices Act 1974 (Cth)* was renamed the *Competition and Consumer Act 2010 (CCA)* and also now includes a single, national consumer law, known as the Australian Consumer Law (ACL). While many of the fundamental principles of the TPA have not changed, there are some important amendments and additional requirements that all staff should be aware of.

The ACL contains a number of rules that require organisations, including the University, to deal fairly when doing business. The rules apply to everything we do with others including conversations, emails, negotiations, advertising and tenders. They also apply to all of the products and services the University sells or promotes.



Misleading or deceptive conduct

There are a number of laws that require you to tell the truth, make sure any representation you make is accurate and disclose the total price of any product. Conduct by the University that is misleading or deceptive, or is likely to mislead or deceive, is prohibited under the ACL.

Furthermore, misleading or deceptive conduct in connection with the recruitment of, and provision of courses to, overseas students is specifically prohibited by the Education Services for Overseas Students Act 2000 (Cth), potentially risking the University of Adelaide's licence to teach international students.

Consumer guarantees

The ACL introduces a new set of consumer guarantees for supplies of consumer goods or services. These are largely based on the previous consumer conditions and warranties under the TPA. A range of new remedies are also set out. Generally, the remedies for minor failures include refunds, repairs and replacements, while other legal action is available for major failures.

Unconscionable conduct

The ACL prohibits organisations, including universities, acting in a clearly unfair manner against other parties when doing business. This conduct is called “unconscionable conduct” and usually occurs when one party takes unfair advantage of its significant negotiating power against another party.

Unfair contract terms

The ACL introduces a new regime to prevent organisations, including universities, from using unfair terms ‘tucked away in the fine print’ in standard form contracts. A term in a standard form consumer contract will be void if it causes a significant imbalance in the parties’ rights and obligations and is not reasonably necessary to protect the legitimate interests of the party relying on it. A standard form contract is typically one that is not negotiated and is provided on a ‘take it or leave it’ basis.

What are the consequences?

Contraventions of the ACL can result in monetary penalties or damages, lengthy and expensive court processes, variations to contracts, refunds of money or return of property, and court-enforceable undertakings restraining you or the University from engaging in certain conduct. Furthermore, breaches can lead to disruption to University business, loss of reputation and standing in the market and significant personal stress.

What you need to do

All staff are advised to familiarise themselves with the new ACL. We have an updated Trade Practices Compliance Manual and E-learning 101 on the Legal & Risk website (www.adelaide.edu.au/legalandrisk/resources) that have been designed to assist you to understand your responsibilities and the University's obligations under the CCA.

For more information, contact Kim Evans (Senior Counsel) on 8303 6103 or email kim.evans@adelaide.edu.au.

From the General Counsel



Welcome to the first edition of Unilink for 2011.

We are now into the second year of the rollout of the Legal Compliance Framework. In previous editions of Unilink we've introduced you to some of the tools and resources designed to make compliance easier and to help promote a culture of compliance within the University. In this edition, we focus more on better responding to compliance matters as they arise and specifically, how to respond to a matter once an external authority or regulator becomes involved.

So far this year, we've had a great response from staff wanting to book into one of the training sessions we have on offer. Sessions are filling up fast, so please see page 4 of this issue for more dates and details, and contact us as soon as possible if you wish to be involved. Feedback from previous sessions, is that staff have found it useful when colleagues from the same school or area have attended as a group, as this has allowed presenters to tailor the session to suit the audience. Feel free to contact Legal & Risk to discuss this and anything else about training programs on offer.

A special thanks to Daniel Kiley and Luke Dale from Kelly & Co law firm for contributing to this edition.

I look forward to hearing your feedback.

Celine McNerney, General Counsel



Latin for all occasions: Things to say to your lawyer

"I'm up the creek without a paddle"
In rivo fimi sine remo sum

"Listen, would you repeat everything you just told me, only this time say it in English"
Heu, modo itera omnia quae mihi nunc nuper narravisti, sed nunc Anglice

"You know, I'm your biggest fan"
Edepol, fautor tuus maximus sum

ARI or Legal & Risk?

Many of you would be aware of Adelaide Research & Innovation (ARI), the University's commercialisation company. ARI's role is to help develop and manage the University's commercial research and consultancy partnerships, and matters related to Intellectual Property and its commercialisation. Like Legal & Risk, ARI has its own legal team that is available to provide advice on research and commercial contracts and intellectual property issues. Now and then there is confusion amongst University staff as to what legal matters should be referred to ARI for advice and what should be referred to Legal & Risk, so let's clarify. . .

Matters to be referred to ARI

- Research contracts (including Contract and Collaborative Research)
- Consultancies to be undertaken for external parties (as per Research Grants, Contracts and Consultancies Policy www.adelaide.edu.au/policies/122/)
- Any subcontracts of the above consultancies
- Disclosure of any IP you have developed
- Proposals for commercialisation of IP (as per Intellectual Property Policy www.adelaide.edu.au/policies/1263/)
- Queries regarding ownership or use of IP
- Student involvement in research projects (IP ownership and use)
- Material Transfer Agreements
- Confidentiality Agreements where it relates to a project or commercialisation of IP
- Clinical Trial Agreements

ARI also assists the Research Branch and DVCR Office in finalising competitive research grant agreements and agreements for strategic research alliances or collaborations.



Matters to be referred to Legal & Risk

- Any other type of contract, for example:
 - Engaging consultants
 - International agreements
 - Licences to premises / facilities / software / other parties' IP (not related to a project or commercial research)
 - Contracts for procuring goods or services
 - Student placement agreements
 - Non-research funding or collaboration
 - Corporate transactions
- Copyright inquiries
- Any legal, compliance, risk or insurance question

Who to contact

Don't worry if you are unsure about which of the two to approach. Where necessary, Legal & Risk will refer matters to ARI and vice versa.

To contact ARI, please refer to the [ARI website](http://www.adelaide.edu.au/ari) for more information.

To seek advice from Legal & Risk, you may contact any of our lawyers directly or email helpdesklegal@adelaide.edu.au.

Please refer to the [Contracts](#) section of the Legal & Risk website for more information. The website will show you the specialist areas that should be consulted and processes that apply when negotiating certain University agreements.

Email Etiquette Top 5 Dos & Don'ts

Have you become too comfortable with email communication? Do your emails contain spelling mistakes, poor formatting or excessive abbreviations? Do you commit multiple sins on a daily basis? If so, your emails could be giving a bad impression.

When writing business emails, consider the following:

1. Don't WRITE IN CAPITALS



Writing in capitals is like screaming at the reader and can trigger unwarranted concern or an unintended response. Consider other ways to get your message across while conveying its importance. For emphasis, underline or bold the occasional word, but only if absolutely necessary. If an email is significant enough to merit being labelled IMPORTANT or URGENT, phone the person instead.

2. BCC recipients



When sending a group email to a large number of people, use the BCC: field. By listing all recipients in the TO: or CC: field, your readers have to scroll through the whole list to read the message. This can be extra irritating if reading email on an i-phone. Using BCC prevents recipients being able to view everyone else's email address.

3. Don't Waffle on



Be concise. For most people, reading an email on screen is harder than reading printed communications and a long email can be discouraging to get through. Excess words can also mean that crucial information is glossed over by the recipient. Remember the "50c a word" rule; if it's not completely necessary, delete it or you could be paying the price.

4. Spelling check



Your reader shouldn't have to muddle through typos, punctuation errors or obvious grammatical errors. Email is no longer considered a more casual form of communication and should be written with the same care as a printed letter. Silly mistakes can give the impression that you have little attention to detail. Ensure you read the email before you send it and set up your email account so it automatically spell-checks every message before it's sent.

5. Do not use abbreviations and emoticons unless appropriate



Save emoticons :-) and abbreviations like OMG (Oh My God) or IDK (I don't know) for text messages among friends. This type of abbreviation can be deemed lazy and your reader may not know what it means. LOL. . . "Lots Of Love" or "Laugh Out Loud"? In almost all cases, emoticons are simply un-professional and can be inappropriate if used in the wrong context. It's better to spell out a word or phrase in full.

Email and Records Management

Remember that emails are "in writing" communications the same way that contracts, letters and official memos are.

When emails relate to university business they are university records that should be captured just as a hard copy document would be. That means, devising a filing and/or archiving system (e.g. TRIM) that allows you or someone else (such as an Executive Assistant) to find old emails if necessary.



Latin for all occasions: B.S. is more convincing in Latin

"I'm glad you asked me that"
Gaudeo te illud de me rogavisse

"Believe me, this hurts me more than it hurts you"
Mihi crede, hoc mihi magis quam tibi nocet

"I'm only thinking of what's best for you"
Mogo cognito quid prosit rebus tuis

Compliance Matters

As the rollout of the Legal Compliance Framework across the University has progressed, we've talked a lot about 'compliance matters' and the importance of reporting them internally in a timely fashion and with sufficient gravity. But what happens when an external authority or regulator becomes involved? And what sort of response is expected by an individual and by the University?

What is a compliance matter?

In the University context, a compliance matter is a *non-compliance or potential non-compliance with State or Federal legislation applicable to the University*. We are all human and compliance matters do occur. Since the rollout of the Legal Compliance Framework began 18 months ago, 23 matters have been recorded. Many were able to be rectified quickly and easily, while others continue to be managed. All matters required a different response.

Compliance matters are rarely black and white and many relate to a combination of other 'things', aside from legislation; University policy, staff and/or student behaviour, contract management or risk. Often matters take some discussion for their status as a 'compliance matter' to be determined and subsequently reported. Other matters are more obviously 'compliance matters' and should trigger an immediate response from staff.

Third parties

When a regulator or external authority becomes involved in a compliance matter, you can assume the matter is serious. Any response from the University must be formal and properly managed by qualified personnel, usually a combination of a Head of School/Branch and one of the solicitors in Legal & Risk. Generally, the Vice Chancellor, General Counsel or member of staff will be served an official letter (notice) which states the need for the University to address the compliance matter. At this stage, the matter will likely have been officially identified as a "breach" of legislation.

A notice may originate from:

- ATO (Australian Taxation Office)
- Medical Board of Australia
- Equal Opportunity Commission
- ASIC (Australian Securities and Investment Commission)
- EPA Environment Protection Authority
- State Ombudsman
- ACCC (Australian Competition and Consumer Commission)
- Safework SA
- AEC (Australian Electoral Commission)
- AQIS (Australian Quarantine and Inspection Service)

For example:

- The AEC informs a researcher that she has inadvertently misused Electoral Roll Data obtained for a project.
- The ACCC informs the Vice Chancellor that a case of misrepresentation is being brought against the University stemming from the misquoting of course fees and living expenses to an international student.
- The Environment Protection Authority is notified by a member of the public that a contractor has been observed pouring paint stripper down a drain on University premises. The General Counsel is served a notice which requests a response to the allegation.

In most cases, the University will be informed that it is required to take action to rectify the compliance breach and to help prevent it from reoccurring, such as formally apologise, pay a fine, modify an advertisement, enter mediation with an aggrieved party or implement new policies and procedures.

The time-frame set by an external body to remedy a non-compliance will vary accordingly to the severity of the breach and the particular Act. Breaches that result in a threat to safety may require immediate action, while breaches of a more administrative nature can be rectified over time.

In all cases, if you are the recipient of such a notice from an external body or regulator, inform Legal & Risk as soon as possible. Do not respond unless under the direction of one of our solicitors.

What to do if you come across a compliance matter



Report all compliance matters to a supervisor, Local Compliance Officer, Head of School/ Branch or Legal & Risk in a timely manner—whether it involves your actions or the actions of someone else. The Legal Compliance Policy requires you to do this.



Don't wait until you have been contacted by a third party before you report a matter internally. Early reporting will ensure actions are put into place immediately, before a breach or potential breach becomes more serious.



If you are unsure about whether a matter is a 'compliance matter' - ASK. Conferring with Legal & Risk or asking for assistance does not always mean that a mountain will be made out of a mole-hill, but it may mean that a legal, insurance or risk management perspective can be given if appropriate and support offered where necessary.



Document the matter. Some matters can take years to resolve and it is important that the corporate knowledge surrounding these matters be captured for future staff from the minute that they start becoming a problem.



If as a member of staff you are threatened with legal action, tell someone. Do not wait to see if it is an empty threat. If a student, colleague or third party says they intend to report a matter to an external body, regulator or solicitor, inform Legal & Risk. This will ensure that the University is at least partially prepared for future action (should it eventuate), and that our insurers can be informed as well—a requirements for future insurance cover to be provided.

It is always in your and the University's best interest to report compliance matters early. It is better that matters are identified and managed when they are a minor issue, rather than a major problem.

If you have any questions please contact Richard Boyer (Manager Compliance) on 8313 0482 or email richard.boyer@adelaide.edu.au.



"My dog ate it"

Canis meus id comedit

"I did call. Maybe your answering machine is broken"

Sane ego te vocavi. Forsitan capeditum tuum desit

"I was kidnapped by aliens. What year is it?"

Hostes alienigeni me abduxerunt. Qui annus est?

"APP STORE" Trade Mark Update

Key Points

- Apple has sought to trade mark the term "APP STORE".
- Microsoft is opposing this application on the grounds that it is too generic.
- What may initially appear to be common terms can be trade marked in certain situations.
- Businesses should not assume that these common terms are free to be used.

Apple has recently sought to register "APP STORE" as a trade mark in a number of countries, including Australia and the United States. Microsoft has filed a formal objection to Apple's Australian application, claiming that the phrase "APP STORE" is too generic to be registered as a trade mark.

Under the Australian Trade Marks Act 1995 (Cth), a trade mark must be capable of distinguishing an applicant's goods and services from those of other traders. An invented phrase or word will generally be inherently adapted to distinguish goods or services of one trader from another, but the same cannot be said of descriptive words.

Microsoft claims that the words "APP STORE" are descriptive of the services that Apple wishes its trade mark to cover, with "APP" being a generic descriptor for pieces of software, and "STORE" being a generic term used in retailing. As such, Microsoft contends that "APP STORE" is a generic phrase describing somewhere consumers can buy software, and that other traders should be free to use the phrase. Apple is yet to respond to Microsoft's objections.

Even if "APP STORE" is deemed to be descriptive, Apple may be able to seek registration based on its reputation in the name. Should Apple be able to demonstrate that "APP STORE" has become a household name and that the substantial majority of consumers associate the name with Apple's services, it may be possible for the mark to be registered.

Apple has a vast portfolio of **Australian** trade marks. Apple already holds an Australian trade mark for "APPSTORE", a mark it acquired from previous owners Salesforce.com, Inc. Apple also has trade marks and pending applications covering a wide range of its brands. These marks include obvious marks, such as logos like the iconic Apple silhouette and product names like "IPOD TOUCH", but extend further to elements some brand owners may fail to consider.

Apple holds or has applied for Australia trade marks covering, among other things, the shape of an iPod shuffle, the design of individual App icons from an iPhone, the design of the iPhone's home button, the "Made for iPod" logo, the phrase "There's An App For That", and even the physical layout of an Apple store.

Apple has a number of other pending trade marks which may also be seen as attempts to claim exclusive use of relatively descriptive terms, including a pending Australian trade mark application covering the words "MULTI-TOUCH MULTITOUCH".

The actions of Apple and other companies may mean that competitors must take care to ensure that seemingly descriptive terms have not been trade marked by another trader. This is especially true in fast-moving industries like the information technology sector, where new product categories are still being forged, Apple's vast trade mark portfolio also serves to illustrate the wide range of brand elements that can be protected by a proactive trader.

This article was prepared by Daniel Kiley (Solicitor) and Luke Dale (Partner) and reproduced with the kind permission of Kelly & Co, an external legal service provider to the University of Adelaide.

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Did you know...

The Apple App Store has just reached 10 billion downloads

All photos accredited to Marketing and Strategic Communications Office, University Of Adelaide, unless otherwise specified

Training

Education & Awareness

Thank you to all staff who have registered for the Legal & Risk Education sessions to be held in the first half of this year. All sessions are hosted in the Legal & Risk basement meeting room in the Mitchell Building and run for approximately 1 hour, unless otherwise specified.

To book into a session email: helpdesklegal@adelaide.edu.au.

Risk Management (1.5hr)

15 Apr @ 11am
3 Jun @ 11am
20 Jun @ 11am

Presented by Anne Hill, Manager, Risk Services

University Risk Register (URR)

8 Apr @ 11am
8 Apr @ 3am

Presented by Anne Hill, Manager, Risk Services

Legal Compliance Framework

28 Mar @ 2pm

Presented by Richard Boyer, Manager Compliance

Insurance and your role at the University

11 Apr @ 10am
13 June @ 10am

Presented by Tom Pontt, Insurance Officer and Joe Di Pinto, Manager Insurance

"Connecting the Dots" - Legal, Risk and Contract Management (3hr)

6 Jun @ 9am

Presented by Celine McInerney, General Counsel

For the session overview and learning outcomes, refer to the Legal & Risk website www.adelaide.edu.au/legalandrisk/education.

Got something to say?

Would you like to contribute to future editions of Unilink? Email any comments or suggestions to phillipa.schliebs@adelaide.edu.au. Please also contact us if you would like to be added to our mailing list.