



THE UNIVERSITY
of ADELAIDE

Legal Compliance Education and Awareness

CRICOS PROVIDER 00123M

Competition and Consumer Act 2010

(Commonwealth)

Formerly the Trade Practices Act 1974

adelaide.edu.au

seek LIGHT

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 and 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 and 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, agreements, understandings or ‘concerted practice’ which 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***
- ‘Concerted practice’ is any form of cooperation between two or more organisations or individuals (or conduct that would be likely to establish such cooperation) but which falls short of a contract, arrangement or understanding.
- 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 which has the purpose, effect or likely effect of substantially lessening competition
 - 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 which has the purpose, effect or likely effect of lessening competition in the market.
- Misuse of Market Power
 - Taking advantage of substantial market power in a way that has the purpose, or has or is likely to have the effect of substantially lessening competition in the market.

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 consult the Legal and Risk Branch 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 to 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 \$10 million per offence (for Cartel Conduct) 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 compliant 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 compliant 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 compliant 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 the [Legal and Risk Branch](#).

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](#)



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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.