

Division of University Operations

Legal and Risk Branch



THE UNIVERSITY
of **ADELAIDE**

COMPETITION & CONSUMER LAW
(TRADE PRACTICES)
COMPLIANCE MANUAL

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MESSAGE FROM THE GENERAL COUNSEL

This Compliance Manual is designed to assist you in understanding your responsibilities and the University of Adelaide's obligations under the *Competition and Consumer Act 2010 (CCA)*.



The Manual is an important part of the University of Adelaide's competition and consumer law compliance program which also includes regular seminars and other materials.

Every employee and officer of the University of Adelaide is expected to be familiar with the provisions of the CCA, including the Australian Consumer Law (**ACL**) contained in Schedule 2 of the CCA.

A proper understanding of the CCA will assist you and the University of Adelaide in confidently pursuing positive and pro-competitive collaborations with a range of institutions, suppliers, retailers and other businesses while minimising the risk of CCA contraventions. Ignorance or good intentions are no defence to a contravention.

There can be very serious consequences for individuals and for the University of Adelaide if the CCA is breached. For example, if you knowingly engage in cartel conduct and are found guilty, you will have committed a crime that is punishable by a maximum sentence of up to ten years in gaol. Both you and the University of Adelaide may also face significant monetary penalties if you contravene a provision of the CCA.

Given the seriousness of these consequences, all employees and officers must carefully review and understand the contents of this Manual at the commencement of employment with the University of Adelaide and refer to it as necessary during the course of your employment, including in the context of regular seminars and when the Manual is updated. A thorough understanding of your responsibilities under the law will assist in ensuring that you and the University of Adelaide always act in a lawful, efficient and competitive manner.

The University of Adelaide is among Australia's leading universities with world class staff and innovative, high quality offerings to students and the community. A commitment to competition and consumer law compliance will ensure that we continue to achieve our goals in the increasingly competitive markets in which we operate.

A handwritten signature in blue ink that reads "Céline McInerney".

Céline McInerney
General Counsel

July 2015

THE UNIVERSITY'S COMMITMENT TO COMPETITION AND CONSUMER LAW COMPLIANCE

The University of Adelaide is committed to observing all laws, regulations, codes and standards that apply.

In particular, the University of Adelaide is committed to complying with the provisions of the CCA including the ACL and implementing a compliance program that accords with Australian Standard 3806 (Compliance Programs). The compliance program includes this Manual, regular seminars and other education and awareness training materials.

The University of Adelaide's objective is to minimise the risk of contraventions of the legislation. This will reduce the risk of the University of Adelaide or its employees and officers facing penalties, fines, injunctions, orders for damages, personal liability, imprisonment, loss of reputation in the market place and other avoidable consequences and costs.

The University of Adelaide requires all of its employees and officers to be familiar with the provisions of the CCA from the commencement of employment and on a continuing basis through the course of employment. This can be achieved by carefully reviewing this Manual regularly and participating in seminars.

A contravention of the CCA will be considered to be a breach of your terms of employment and may result in disciplinary action including dismissal.

If you believe that your conduct or the conduct of the University of Adelaide may contravene the CCA, you must contact Legal and Risk Branch in the Division of University Operations. Kim Evans, Senior Legal Counsel will assist you. Contact details are provided below.

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CHAPTER 1 INTRODUCTION

The Rules of Doing Business

The CCA sets out the rules for doing business. These rules determine what you can and cannot do in dealing with competitors, suppliers, distributors, wholesalers, retailers and students. A view has been taken by the Australian Competition and Consumer Commission (ACCC) that the services provided and activities undertaken by universities are commercial in nature. This means that universities, along with all other businesses, are subject to the CCA.¹

The purpose of the CCA is to ensure that businesses, including universities, act in a fair and competitive manner. By understanding the provisions contained in the CCA you will know what competitive strategies are legal for you to use to ensure that the University of Adelaide continues to compete vigorously and lawfully.

This Manual explains how the CCA can apply to your business dealings with other universities and with suppliers, distributors, wholesalers, retailers and students.

How the CCA applies to the University of Adelaide

The CCA governs almost every aspect of the University of Adelaide's business. It applies to our actions, behaviour, publications, conversations and communications. Some areas carry a higher degree of risk than others including:

- fee structures;
- marketing materials;
- claims made by staff to existing or potential students;
- claims made by staff when negotiating contracts;
- exclusive agreements and transactions with other businesses and universities; and
- any discussion or agreement with another university relating to the price of any goods or services.

Who may be affected by the CCA?

The CCA will apply to the conduct of employees and officers of the University of Adelaide in a variety of circumstances, including:

- any staff member who is entering into a contract OR interacting with or between competitors, suppliers or wholesalers;
- staff and students who provide information (formally or informally) about, among other things, courses on offer, conditions of entry, costs of courses or the existence of scholarships;
- the University of Adelaide as the supplier or vendor of goods or services including education, research, commercial and other services;

¹ While the CCA is drafted to apply to "corporations", state equivalent Fair Trading legislation and the adoption of the National Competition Policy (i.e. the *Competition Policy Reform (SA) Act 1996*, incorporating the Competition Code) has expanded its scope to encompass a broad range of entities, including individuals and universities.

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- faculties and schools making representations and claims about their facilities and teaching staff, courses and subjects, cultural identity, past and future success and affiliates; and
 - marketing and strategic communications promoting the University of Adelaide in all forms of media and communications – in print and digital media, including social media, television, radio and print media, on posters, banners and letterheads, and locally, nationally and internationally.

As a general rule, you should assume that the CCA will apply unless you are advised otherwise by the University's lawyers.

The Consequences of Breaching the Rules

A contravention of the CCA may have very serious consequences for you as an individual and for the University of Adelaide as an institution.

You could go to gaol

If you knowingly engage in cartel conduct, it will be a criminal offence. You may face a maximum penalty of 10 years in gaol and/or a maximum civil penalty of \$500,000. The University of Adelaide may face significant monetary penalties of up to the greater of \$10 million, three times the illegal benefit derived from the contravening conduct or 10% of its turnover.

Heavy fines

For other types of contraventions, you may face a maximum penalty of up to \$500,000.

Other consequences

In addition to these penalties, the consequences of a contravention of the CCA may include:

- an order preventing you from being involved in the management of any company or other relevant institution for a period of time;
- a damages payout to persons who have suffered loss as a result of your contravening conduct; and/or
- an order restraining you and the University of Adelaide from acting in certain ways.

A contravention of the CCA may also result in lengthy and expensive court processes, disruption to the University of Adelaide, loss of reputation and standing in the market, significant personal stress and, in extreme cases, loss of employment.

Seriousness of contraventions

The Courts regard contraventions of the CCA very seriously and have imposed very large penalties on both organisations and individuals.

The Commonwealth Government also recognises that contraventions are serious by virtue of its decision that certain conduct will constitute a crime that could result in your imprisonment. In other countries such as the United States, executives have been gaoled for contravening laws similar to the CCA.

The ACCC has very wide investigative powers and can compel an organisation and its employees and officers to provide information and documents to it. Any contact from the ACCC should be reported to Legal and Risk Branch immediately. You are not permitted to respond to any query or request from, or contact with, the ACCC.

Any contact or request from the ACCC or any other law enforcement agency or officer must be redirected to the Office of General Counsel, Legal and Risk Branch.

Contact details:

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CHAPTER 2 DEALING WITH YOUR COMPETITORS

Introduction

You must be very careful when dealing with the University's competitors.

Anti-competitive agreements or arrangements with competitors are the most serious of all contraventions and may constitute a crime that results in large fines and individuals being imprisoned.

As a result, you must take care when attending higher education sector events, academic or professional forums, conferences, social functions and other gatherings to ensure that your communications and conversations are appropriate and lawful.

There are two different types of laws under the CCA relevant to your dealings with competitors:

- laws which say conduct is outright unlawful; and
- laws which say conduct is only unlawful if there is an anti-competitive purpose or effect.

Conduct that is outright unlawful

There are several types of conduct that are outright unlawful when dealing with your competitors:

- Price fixing;
- Market sharing;
- Restricting output;
- Bid rigging; and
- Exclusionary conduct.

With the exception of exclusionary conduct, the other forms of conduct are usually referred to as "cartel conduct". Knowingly engaging in cartel conduct constitutes a criminal offence for which you might be imprisoned. It is important to note that under the CCA, you can also be penalised if you:

- attempt to engage in cartel conduct;
- aid, abet, counsel or procure others into engaging in cartel conduct;
- induce (or attempt to induce) others into engaging in cartel conduct, whether by threats, promises or otherwise; or
- conspire with others to engage in cartel conduct.

Conduct that is unlawful only if it is anti-competitive

Other agreements or arrangements with competitors will be unlawful if they have the purpose, effect or likely effect of substantially lessening competition in a market ("the effects test").

PRICE FIXING

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with your competitor on the price, discount or rebate at which you buy or sell competing products or services, which will generally be university courses.

An agreement on a specified price, fee, discount or rebate is not required to engage in price fixing. Price fixing will include suggesting that you and your competitor set prices or fees at 75% of your other competitor's prices or by following a formula that results in the price or fee being fixed, controlled or maintained.

You can go to gaol . . .

You may commit a criminal offence and be imprisoned for price fixing. You and the University of Adelaide may also face substantial monetary penalties.

Do

- Set competitive prices for products/courses and determine those prices independently.
- Beat your competitors on price, service and quality.
- Terminate any discussion on price started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Do Not

- Discuss prices, discounts or rebates with a competitor at any time including at higher education sector meetings, conferences or social functions.
- Provide or exchange price lists or price information with a competitor.
- Create an expectation in your competitor's mind that you will match prices and not compete with it in the market.

Examples

Visy & Amcor Packaging Cartel (2007)

Visy and Amcor held 90% of the corrugated fibreboard packaging market in Australia. Between January 2000 and October 2004, Visy and some of its officers engaged in price fixing and market sharing with Amcor. Visy and Amcor would each permit the other to maintain its market share and would not seek to enter into contracts with the other's principal customers. Visy and Amcor also collaborated to increase their prices. Although Visy had a trade practices compliance manual and program, the Court imposed penalties of \$36m on Visy, \$1.5m on the CEO and \$500,000 on the General Manager.

Following on from the decision, Visy and Amcor faced a class action brought by manufacturers, retailers and transporters who used Visy and Amcor products during the time the cartel existed. The class action was settled in 2011 for \$95m plus costs.

Fine Paper Cartel (2010 – 11)

Between 2000 and 2004 several international companies that competed to supply paper products formed the "AAA club". The club held secret meetings in various south-east Asian countries where they reached agreements regarding the price at which they would supply folio and cut-size paper into various markets including Australia. The Court imposed penalties that totaled more than \$8m on several of the companies.

Global Air Freight Cartel (2008 – 2012)

From 2000 to 2006, a number of airlines colluded on the setting of freight fuel surcharges on certain routes. Interestingly, much of the conduct which constituted a breach of the TPA (now the CCA) occurred in public. Many of these airlines were prosecuted by the ACCC and by overseas regulators.

Most of the airlines admitted to arriving at and giving effect to understandings regarding freight fuel surcharges. The penalties imposed in Australia by the Court ranged from \$3m to \$20m. A number of executives have also been sentenced to gaol in the US and globally over \$1 billion in fines have been imposed on a number of airlines.

RESTRICTING OUTPUT

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with your competitor to restrict or limit:

- your production output, that is, the number of courses you offer or places offered in each course;
- your capacity to produce goods or deliver courses; or
- your supply of product/courses to certain persons.

You can go to gaol . . .

You may commit a criminal offence and be imprisoned for restricting output. You and the University of Adelaide may also face substantial monetary penalties.

Do

- Limit your output to save costs in times of low demand if the decision is made independently.
- Increase offerings of courses and spaces available to win customers/students from competitors.
- Terminate any discussion on course output or capacity started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Do Not

- Discuss course output, capacity or proposed plans with a competitor.
- Agree with competitors to reduce supply to the market in order to inflate price, even if margins are small.
- Discuss student lists or targeting of students, such as international students, with competitors.

Example***ACCC v Tasmanian Salmonid Growers Association Ltd (2003)***

The Tasmanian Salmon Growers Association consented to a finding that in order to reduce fish numbers to ensure the financial viability of the salmon farming industry in Tasmania, they agreed that the five major growers should grade out 20% of salmon from the 2001 year class and that they would later consider a grading out of a further 5%. The agreement was found to be in contravention of the TPA (now the CCA).

Hypothetical

The University of Greatness and The Exceptional Learning University are the two biggest universities in Australia. Both universities see their profits and enrolments getting smaller due to reduced demand from international students as a result of the hangover effects of the global financial crisis. The Vice-Chancellors of each university meet and agree that, in order to maintain current margins and stop losing money, each university will offer fewer courses and fewer places in courses over the coming year.

This conduct would constitute restricting output in contravention of the CCA and may be a criminal offence.

MARKET SHARING

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with your competitor to allocate customers/students, suppliers or territories. This can include 'wink and nod' understandings.

Universities may face some difficulties in relation to market sharing when it comes to forming alliances with other universities or providers to rationalise the range of courses taught. Market sharing situations may also arise in relation to deals with suppliers. In both situations, you should contact Legal and Risk Branch immediately or as soon as practicable.

You can go to gaol . . .

You may commit a criminal offence and be imprisoned for market sharing. You and the University of Adelaide may also face substantial monetary penalties.

Do

- Get the best deal from your suppliers or distributors.
- Attract students by competitive pricing of University of Adelaide courses and services.
- Terminate any discussion on students or course sharing started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Do Not

- Agree with competitors which students your institutions will supply services/courses to.
- Discuss with competitors the allocation of distributors, suppliers or territories.
- Create an expectation in your competitor's mind that you will not compete for its students or in its chosen areas if it does the same for you or in your chosen areas.

Examples

ACCC v Renegade Gas Pty Ltd (2014)

Renegade Gas, Speed-E-Gas and three of their managers admitted to a secret understanding over a long period of time that they would not compete in the supply of certain industrial gases. Penalties totalling \$7.9m were imposed on the companies and \$400,000 on the three managers.

ACCC v Vanderfield Pty Ltd (2009)

Two truck driving companies admitted that their respective employees had entered into an arrangement not to compete for sales to customers in each other's primary areas. Penalties totalling \$1.09 million were imposed by consent.

ACCC v FFE Building Services Ltd (2003)

Four suppliers of fire alarm equipment and a number of their respective executives admitted to market sharing when they made arrangements about who would tender the best price for a number of major building tenders. Penalties totalling \$3.5 million were imposed.

ACCC v ABB Transmission (2001)

Several suppliers of power transformers entered into a market sharing arrangement to maintain their respective market shares. Some of the senior executives were found to have met before or after industry meetings to rig the outcomes of tenders for major contracts. The Court imposed penalties totalling \$25.5m on the companies and \$625,000 on the managing directors of the companies.

BID RIGGING

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with a competitor or competitors in order to ensure that bids for a tender are submitted (or withheld) in a manner agreed by you and the competitor(s). Bid rigging is also referred to as collusive tendering. This situation is probably quite rare in the case of universities, but is not improbable. For example, an independent learning centre may seek tenders from universities for certain course materials or various universities may be submitting bids in a competitive grants process. If you agree with a competitor not to bid, this may constitute bid rigging.

You must not agree with your competitor on the price at which you bid or which party should win the bid.

When bidding for a retail contract or tender, you should never talk to your competitors about their bids or know the terms or conditions of their bid. This may result in bid rigging.

While joint bidding may be possible in certain circumstances, if joint bidding situations arise you should contact Legal and Risk Branch before engaging in any discussions or arrangements with any person or organisation.

You can go to gaol . . .

You may commit a criminal offence and be imprisoned for bid rigging. You and the University of Adelaide may also face substantial monetary penalties.

Do

- Submit competitive bids to win tenders against other bidders.
- Ensure that prices, terms and conditions of bids are set independently.
- Talk to Legal and Risk if you want to submit a joint bid with a competitor.
- Terminate any discussion on bids started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Do Not

- Discuss whether you will bid or not with a competitor.
- Discuss the contents of any bid with a competitor.
- Decide with a competitor who should win a bid.
- Make a bid on the basis that you will be unsuccessful against a competitor.

Examples

Norcast SarL v Bradken Ltd (No 2) (2013)

Bradken and Castle Harlan (a private equity firm) were found to have entered a bid rigging arrangement by which Castle Harlan agreed to bid for a Norcast company that was being sold and Bradken did not bid. This conclusion was reached despite there being ambiguity over whether Bradken would have been permitted to bid. Castle Harlan was the successful buyer and it then subsequently on-sold the company to Bradken.

ACCC v TF Woollam & Son Pty Ltd (2011)

TF Woollam & Son Pty Ltd and various other construction companies engaged in the practice of “cover pricing” in tenders for construction contracts. Cover pricing occurs when competitors choose a “winner” in advance and everyone but the winner deliberately bids above an agreed amount to suggest that the winner’s quote is competitive. The Court imposed penalties totalling of \$1.38m on the companies and \$800,000 on two company officers.

ACCC v Admiral Mechanical Services (2007)

Several air conditioning companies agreed which company would submit the lowest tender price for projects for which they were tendering. The Court imposed penalties totalling approximately \$8.7m on eleven companies and \$433,000 on seventeen directors, managers and other employees.

ACCC v DM Faulkner; ACCC v Ferndale Recyclers (2004)

Several scrap metal merchants agreed who would bid at auctions for scrap metal and the others agreed not to bid against the nominated bidder. After the auction, the merchants would divide up the metal purchased by the nominated bidder between them. The Court imposed penalties totalling \$282,500 on five companies and \$202,500 on nine employees (including a penalty of \$100,000 on one employee).

EXCEPTIONS TO CARTEL CONDUCT

What are the exceptions?

So far, we have looked at what behaviour constitutes cartel conduct and what the potential serious consequences are for you and the University of Adelaide. There are however two narrow exceptions to 'cartel conduct':

- a joint venture exception; and
- a related bodies corporate exception.

You may also seek "authorisation" from the ACCC to engage in cartel conduct in limited circumstances. This is discussed below.

Joint venture exception

Conduct will not be regarded as 'cartel conduct' if all of the following are satisfied:

- the cartel provision is contained in a written contract, or in an arrangement or understanding
- the cartel provision is for the purposes of, and reasonably necessary for, undertaking a joint venture; and
- the joint venture is for the production and/or supply, or acquisition, of goods or services.

If a competitor suggests entering a joint venture or you are otherwise involved in a joint venture with a competitor of the University of Adelaide, you should seek approval from the Legal and Risk Branch immediately, or as soon as practicable.

Related bodies corporate exception

Contracts, arrangements, understandings, or concerted practices between related bodies corporate that contain a cartel provision will not constitute 'cartel conduct'. A company is "related" to another if it is a parent, subsidiary or has the same parent as the other company.

Please contact Legal and Risk Branch for further information about the University's related bodies.

Authorisation

In limited circumstances, you can apply for an authorisation from the ACCC to engage in cartel conduct if the public benefits of the conduct outweigh the public detriments. For example, if the cartel conduct involves market sharing but results in lower prices for consumers, the public benefit is likely to outweigh the public detriment.

Before reaching a decision about whether to grant an authorisation, the ACCC engages in a public consultation process. It also issues a draft decision and considers any responses from interested parties before reaching a final decision. If you think authorisation is an option, you should talk to Legal and Risk Branch immediately, or as soon as practicable.

Examples

The Reserve Bank Health Society Ltd (2011)

The Reserve Bank Health Society (**RBHS**) entered a Management Services Contract under which a competitor, Lysaght Peoplecare Limited, would provide it with a wide range of administrative, operational and management services (the **Contract**). Under the Contract, information would be exchanged between the parties and Peoplecare would advise the RBHS Board on matters including setting premiums and benefits. These aspects could potentially be cartel provisions under the CCA and the RBHS applied for authorisation in April 2011.

In August 2011, the ACCC granted authorisation to the Contract for 10 years on the basis that it was likely to result in public benefits. In particular, the ACCC considered that the Contract was likely to generate cost efficiencies for RBHS by streamlining its operations and that economies of scale and transaction cost savings would arise and be passed on to consumers. The ACCC noted that the Contract might also promote competition in the provision of private health insurance to the general public by increasing RBHS and Peoplecare's ability to become more efficient competitors.

The GAMSAT Consortium (2009 & 2014)

On 19 June 2009, Melbourne University on behalf of the Graduate Australian Medical School Admission Test Consortium (**GAMSAT Consortium**) applied for authorisation for an agreement to abide by two policies that govern the selection of applicants for graduate entry medical schools in Australia:

- the "Preference Policy" - whereby applicants submit a single application listing in order of preference the medical schools to which they wish to apply; and
- the "One Interview Policy" - whereby applicants will receive only one offer for an interview. The interview is conducted by the medical school for which the applicant has given the highest preference. An applicant whose ranking is not high enough to be offered an interview at the first preference medical school, or, applicants interviewed but not selected, are passed onto the applicant's next preferred medical school. The interviews are awarded based upon a selection process used by each school.

On 29 October 2009, the ACCC issued a draft determination that proposed to grant authorisation on the basis that, in all the circumstances, the conduct was likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. In particular, the ACCC considered that the two policies would generate efficiencies, resulting from the streamlining of the application and interview processes, as well as cost savings for universities. The ACCC also considered the benefits for applicants in respect of reduced costs of lodging multiple applications and reduced travel and accommodation costs from attending fewer interviews.

On 26 November 2009 the ACCC granted authorisation for five years for the two policies. It subsequently re-authorised the two policies for a further 10 years on 19 November 2014.

EXCLUSIONARY CONDUCT

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with a competitor that has the purpose of preventing, limiting or restricting:

- the supply of goods or services to particular persons; or
- the acquisition of goods or services from particular persons.

This type of conduct is also known as a “collective boycott”.

You can go to gaol . . .

Although conduct that constitutes exclusionary conduct is not a crime, the same conduct may constitute cartel conduct for which you can be imprisoned. You and the University of Adelaide may also face substantial monetary penalties for engaging in exclusionary conduct.

Joint Venture Exception

If the exclusionary conduct is engaged in for the purposes of a joint venture and does not substantially lessen competition in a market, it will not constitute exclusionary conduct.

Whether exclusionary conduct substantially lessens competition in a market will depend on a number of factors relating to whether a company or university/educational institution has, as a result of the conduct, more freedom to raise its prices in the market. As this analysis can be complex, such conduct requires review by Legal and Risk Branch and you should contact the Legal and Risk Branch as soon as practicable.

Do

- Get the best deal from your suppliers and distributors.
- Attract students by competitive pricing of fees and service.

Do Not

- Agree with competitors which students, courses or areas to supply.
- Have discussions with competitors about allocating students, courses or territories.
- Create an expectation in a competitor’s mind that you will not compete for its students/clients or in its chosen areas if it does the same for you or in your chosen areas.

Example

ACCC v Liquorland and Woolworths (2006)

Woolworths and Liquorland engaged in exclusionary conduct by agreeing to withdraw their opposition to liquor licence applications made by smaller competitors on the condition that the competitors agreed to restrictions on the sale of alcohol imposed by Woolworths and Liquorland. The Court imposed penalties of \$4.75m on Liquorland and \$7m on Woolworths.

ANTI-COMPETITIVE ARRANGEMENTS

What is prohibited?

You must not make or give effect to an agreement, arrangement, understanding, or concerted practice with a competitor that has the purpose, effect, or likely effect of substantially lessening competition in a market.

What is a “market”?

A “market” is the geographic area in which buyers and sellers of competing products operate. A market is defined by product (i.e. courses offered, professional services, campus services), geography (i.e. regional area, state-wide, national), functional market level (i.e. wholesale, retail) and time (i.e. short term, long term).

Given the diverse activities in which the University of Adelaide is involved, it may operate in many different markets. For example, if it entered into an agreement or arrangement with a number of other universities in different states for the provision of a certain course, it may be that the relevant market would be a national market or potentially even a broader trans-national market (e.g. in the context of postgraduate online courses or Massive Open Online Courses (MOOCs)). Entering into agreements for campus services however, such as food outlets, may only take place in a regional or local market.

What is a “substantial lessening of competition”?

Whether an agreement, arrangement, understanding, or concerted practice substantially lessens competition in a market will depend on a number of factors relating to whether an organisation has, as a result of the arrangement, more freedom to raise its prices in the market. As this analysis can be complex, such arrangements require review by the Legal and Risk Branch. You should contact the Legal and Risk Branch as soon as practicable.

Concerted practices

The concept ‘concerted practice’ was included in the rules in 2017. It means any form of cooperation between two or more persons, or conduct that would be likely to establish such cooperation, where that cooperation prevents, restricts or distorts competition. It involves cooperative behaviour or communications that are less than an agreement, arrangement or undertaking.

A one-way communication with a competitor may be a concerted practice.

A business risks engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition if it replaces/reduces independent decision-making by cooperating with competitors around:

- how the business determines the price of its products
- where it sells its products
- to whom it sell its products
- whether the business bids for a tender
- quantity of the product the business offers or produces

A business can formally apply to the ACCC to authorise a concerted practice where it considers there is a risk the intended activity breaches the rules. A business must apply *before* the activity is undertaken.

You can go to gaol . . .

Although entering and giving effect to anti-competitive arrangements is not a crime, in some cases, the same conduct may constitute cartel conduct for which you can be imprisoned. You and the University of Adelaide may also face substantial monetary penalties for making or giving effect to anti-competitive arrangements.

Do

- Get the best deal from your suppliers.
- Attract students by competitive pricing and service.

Do Not

- Agree with competitors which students or areas to supply.
- Discuss with competitors about allocating distributors, suppliers or territories.
- Create an expectation in your competitor's mind that you will not compete for its students/clients or in its chosen areas if it does the same for you or in your chosen areas.

Examples

ACCC v Cement Australia Pty Ltd (2013)

The Court found that Cement Australia entered into contracts to exclusively acquire flyash (a fine powder used as a partial substitute for cement when making concrete) from four power stations in South East Queensland in order to prevent a rival from:

- gaining access to unprocessed flyash; and
- entering the South East Queensland concrete grade flyash market.

These contracts had the effect or likely effect of “substantially lessening competition”.

ACCC v PRK Corp Pty Ltd & Ors (2009)

The two providers of automotive terminal services at the ports of Brisbane, Sydney and Melbourne (Patrick and P&O) provided each other with access to their services and formed a joint venture for the shared conduct of those facilities. The companies admitted this conduct had the likely effect of “substantially lessening competition” in automotive terminal services markets in Brisbane, Sydney and Melbourne. The Court imposed penalties of \$1.9m each on Patrick and P&O respectively.

CHAPTER 3 DEALING WITH SUPPLIERS, DISTRIBUTORS AND RETAILERS

Introduction

There are some important rules to remember when dealing with suppliers, distributors and retailers.

There are three different types of laws under the CCA relevant to your dealings with suppliers, distributors and retailers:

- laws which say conduct is outright unlawful;
- laws which say conduct is unlawful if it substantially lessens competition; and
- laws which say conduct is unlawful if it has an anti-competitive purpose.

Conduct that is outright unlawful

Minimum resale price maintenance is outright unlawful when dealing with suppliers, distributors and retailers.

Conduct that is unlawful if it substantially lessens competition

Exclusivity arrangements and third line forcing will be unlawful if they have the purpose or effect of substantially lessening competition in a market.

Conduct that is unlawful if it has an anti-competitive purpose

For organisations with substantial market power, there are two types of conduct that are unlawful if they have an anti-competitive purpose:

- Misuse of market power; and
- Predatory pricing.

MINIMUM RESALE PRICE MAINTENANCE

What is prohibited?

You must not prevent distributors or retailers from reselling the University of Adelaide's products or services below a specified price.

It is not necessary for the "specified price" to be a particular figure. It can be a range of prices, an approximate price or it can be calculated by reference to a formula. For example, you must not tell distributors or retailers to have a resale price that is "not less than what is charged by others". You should also be aware of distributors or suppliers attempting to do the same to you.

University of Adelaide staff should keep this provision in mind when entering into arrangements where the University of Adelaide is selling or licensing goods, services or curricula to others, and those goods, services or curricula may be on-sold to third parties.

Recommended retail prices

Stating a recommended retail price to a distributor or retailer is not prohibited. But you should make sure that if you are providing "RRPs", any price is only "recommended". If you are uncertain about recommending prices, you should check with Legal and Risk Branch.

Notification process

Minimum resale price maintenance can be notified to the ACCC to get automatic "immunity" for the conduct after a 60 day period.

Do

- Remember that distributors and retailers can discount your products as they see fit.
- Talk to distributors and retailers about the maximum price at which they can resell products.
- Ensure that distributors and retailers understand the margins they can make on reselling your products depending on price and volume.
- Discuss with Legal and Risk Branch if you want to recommend retail prices to a retailer.

Do Not

- Withhold supply of a product until a retailer agrees not to discount the product or other products.
- Supply products on condition that the retailer must not discount.
- Withhold discounts, rebates or other benefits until a retailer agrees not to discount products.
- Seek to enforce recommended retail prices.
- Discuss the retail price at which products should be advertised.

Examples

ACCC v Mitsubishi Electric Australia Pty Ltd (2013)

Mitsubishi admitted that it attempted to induce a retailer not to sell Mitsubishi air conditioners at below the recommended retail price. This attempt was made through a number of discussions with the retailer and Mitsubishi taking steps to change its terms of supply. The Court imposed a total of \$2.3m in penalties.

ACCC v Navman Australia (2007)

Navman, a supplier of navigational products, discouraged its dealers from discounting their prices below those specified in their price lists. The Court imposed penalties of \$1.25m on Navman and \$110,000 on a former director and the former Australasian sales manager.

ACCC v Netti Atom Pty Ltd (2007)

Netti Atom, a bicycle wholesaler, received complaints from a number of dealers that one particular dealer was selling a popular brand of bicycle, supplied by Netti Atom, over the internet for delivery in an unassembled state at prices below the RRP. Netti Atom sent a letter to each dealer stating that it disapproved of bicycles being sold over the internet and that the relevant bikes be sold 'at no less than the RRP as set out on our dealer price list' or the dealer risked being excluded for the following season. Penalties of \$121,250 were imposed.

THIRD LINE FORCING

What is third line forcing?

Third line forcing is the supply (or supply with discount, allowance, rebate or credit) of goods or services to a customer on condition that the customer will purchase other goods or services from a third party. It is also refusing to supply (or supply with discount, allowance, rebate or credit) for the reason that the buyer will not purchase goods or services from another party. Third line forcing does not necessarily involve the imposition of any condition. It involves supply (or refusal to supply) upon condition.

When can you engage in third line forcing?

Consideration will need to be given to how the conduct impacts competition. The law recognises that in some situations third line forcing is pro-competitive. These situations are discussed below.

Exceptions

You can engage in third line forcing if the two organisations offering separate products are “related”. In these circumstances, the conduct will only be unlawful if it substantially lessens competition.

An organisation is “related” to another if it:

- is the parent company of the other organisation;
- is a subsidiary company of the other organisation; or
- shares a parent company with the other organisation.

Whether third line forcing substantially lessens competition in a market will depend on a number of factors relating to whether an organisation has, as a result of the conduct, more freedom to raise its prices in the market. As this analysis can be complex, such conduct requires review by the University’s lawyers. You should contact Legal and Risk Branch as soon as practicable if you think you or the University of Adelaide may be engaging in this conduct.

Notification

If you have an innovative idea to compete vigorously by engaging in third line forcing, you can get “immunity” for the conduct by lodging a notification with the ACCC. You should talk to Legal and Risk Branch if you think notification is an option.

Bundled services

Conduct does not qualify as third line forcing unless “another person” from whom goods or services are to be acquired is involved. When services are bundled, with one supplier taking responsibility for the whole bundle, no third line forcing will occur. The analysis of whether package arrangements do or do not amount to third line forcing can be complex. Contact Legal and Risk Branch if you have any concerns about whether package arrangements being supplied by the University of Adelaide may constitute third line forcing.

Do

- Remember that students, distributors and retailers are free to purchase from whomever they choose (subject to any exclusivity arrangements).
- Restructure arrangements to avoid third line forcing by buying the other products from the third party and selling all products to retailers as a package.

Do Not

- Supply products on condition that the customer or student also purchases other products from another party.
- Refuse to supply products because a customer or student will not also purchase other products from another party.

Examples

Griffith University (2011)

Griffith University lodged a notification, which the ACCC accepted, regarding its requirement that aviation students in the Bachelor of Aviation Pilot Stream and Graduate Diploma of Flight Management acquire additional flying lessons (if needed) from the Airline Academy of Australia, rather than use another flying school.

Australian National University (2010)

The Australian National University lodged a notification, which the ACCC accepted, regarding a proposal to offer accommodation scholarships, bursaries or grants to students to partially fund the cost of student accommodation, where the offer would be conditional on the students acquiring student accommodation services from BRU Project Pty Ltd (owner of Davey Lodge) or SA2 Project Pty Ltd (owner of Kinloch Lodge).

James Cook University (2002 and 2003)

The ACCC initially opposed a notification lodged by James Cook University which required as a condition of enrolment for students to gain and maintain membership of the James Cook University Student Association. Following a public consultation process the ACCC allowed the notification to stand.

Hypotheticals

Compliant sports clothing

The Sports Association makes a deal with sports store BEFIT that the store will supply all University sports team clothes at a discount price to students. The Sports Association then makes it a condition of membership that students must purchase their sports clothes from BEFIT. This conduct would constitute third line forcing.

However, if the Sports Association makes it a condition of membership that students must wear sports clothes in the University colours (even if the only sports store that currently supplies such clothing is BEFIT) this would not constitute TLF. Other suppliers of sports clothes would be free to enter/expand and supply sports clothes in the University colours.

Text books

The University offers places to students on condition that they purchase all their text books from a particular bookshop that is not associated with the University. This conduct would constitute third line forcing.

Overseas student healthcare insurance

The University makes a deal with insurance company ENSURE to supply international students with health insurance at a discounted price. The University then requires all international students to purchase health insurance from ENSURE. This conduct would constitute third line forcing.

Online payment services

The University enters into an arrangement with a third party provider of online payment services – PAYME Inc – to facilitate online payments for tuition fees, etc. The University requires all foreign students to use the PAYME Inc payment portal to pay University invoices. This conduct would not constitute third line forcing because the Uni is supplying a combined single integrated (bundled) service of education services with payment arrangements and there is no requirement for students to acquire separate services from PAYME Inc.

Articulation agreements

The University enters into an articulation arrangement with an overseas college and includes a clause that students of the college must lodge their applications for articulation through the college. This conduct would not constitute third line forcing as the supply of education services to the student by the University is not conditional on the student acquiring separate goods or services from a third party. The student could apply to the University through other means.

Tuition discounts

The University enters into an arrangement with a pathway program provider – READY 4 SCHOOL – to provide a fee discount to students who enter the University via a pathway program run by READY 4 SCHOOL. This conduct would generally constitute third line forcing where supply of the fee discount is conditional on the student acquiring the READY 4 SCHOOL services.

EXCLUSIVITY ARRANGEMENTS

What is prohibited?

Exclusivity arrangements require one party to the arrangement to abide by certain conditions imposed by the other. They are only prohibited if they have the purpose, effect or likely effect of substantially lessening competition in a market.

Types of exclusivity arrangements

The University of Adelaide may, from time to time, enter into exclusive arrangements with retailers or distributors where, for example, we may provide a discount to a retailer on the condition that the retailer does not buy or re-sell competing products. Such an arrangement however, will be unlawful if it has the purpose, effect or likely effect of substantially lessening competition in a market. You must seek advice from Legal and Risk Branch **before** agreeing to any exclusive arrangement.

The following types of exclusive arrangements between the University of Adelaide and **distributors or retailers** are prohibited if they substantially lessen competition in a market:

- Supplying products or services on condition that the distributor or retailer will not (or will not except to a limited extent) buy or re-supply competing products or services.
- Refusing to supply products or services for the reason that the distributor or retailer will (or will to a limited extent) buy or re-supply competing products or services.
- Supplying products or services on condition that the distributor or retailer will not (or will not except to a limited extent) re-supply the product or service to certain persons or in certain areas.
- Refusing to supply products or services for the reason that the distributor or retailer will (or will to a limited extent) re-supply the product or service to certain persons or in certain areas.

The following types of exclusive arrangements between the University of Adelaide and **suppliers** are prohibited if they substantially lessen competition in a market:

- Buying products/services on condition that the supplier will not (or will not except to a limited extent) supply similar products/services to certain persons or in certain areas. For example, entering into an agreement with a consultancy firm that it will not supply its services or products to any other universities.
- Refusing to buy products/services for the reason that the supplier will (or will to a limited extent) supply similar products/services to certain persons or in certain areas. For example, not using the products or services of a consultancy firm because it is also servicing other universities.

Substantially lessening competition in a market

Whether an exclusivity arrangement substantially lessens competition in a market will depend on a number of factors relating to whether an organisation has, as a result of the arrangement, more freedom to raise its prices in the market. As this analysis is complex and may involve the impact of a number of arrangements taken together, such arrangements must be reviewed by Legal and Risk Branch.

Do

- Offer exclusivity for a discount where it is approved by Legal and Risk Branch.
- Bid on tenders on an exclusive basis where exclusive supply is a component of the tender.
- Offer competitive prices to students, distributors and retailers.
- Provide distributors and retailers with volume discounts as long as the discounts do not drive competing products out of the market.
- Talk to Legal and Risk Branch as soon as practicable if you become aware that competitors are complaining about any of the University of Adelaide's exclusive arrangements.

Do Not

- Enter exclusive arrangements to try to drive competitors out of the market.
- Enter exclusive arrangements unless you have prior approval from Legal and Risk Branch.

Examples

Parmalat Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (2013)

Parmalat succeeded in establishing that there was a prima facie case that VIP Plastic had refused to supply plastic products to Parmalat (who required it for its milk business), because Parmalat had acquired other plastic products from a third party.

ACCC v Fila Sport Oceania (2004)

Fila engaged in exclusive dealing by adopting a policy of not supplying Australian Rules apparel to retailers who stocked rival products. The Court imposed penalties of \$3m on Fila.

Universal Music Australia v ACCC (2003)

Universal Music engaged in exclusive dealing when it threatened to stop supplying its retailers with popular CDs because the retailers were stocking cheap imported CDs. The Court imposed a penalty of \$1m as well as a total of \$180,000 on four senior executives.

Melway Publishing v Robert Hicks (2001)

Melway held about 80 to 90 per cent of the retail market for Melbourne street directories. Melway appointed an exclusive wholesale distributor for each market segment. For the petrol station segment, Melway terminated one exclusive distributor in preference for another and refused to supply the former. The Court held that this conduct was legitimate because the exclusive distributorship agreements with each segment promoted competition between street directory brands even though it restricted competition between Melways' directories.

MISUSE OF MARKET POWER

What is prohibited?

An organisation with a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition in that market or in any other market in which the organisation or a related organisation supplies, acquires or is likely to supply or acquire goods or services directly or indirectly.

The rules are such that it is not necessary to demonstrate the organisation has taken advantage of its market power for a prohibited purpose.

Substantial market power

Given the diverse activities in which the University of Adelaide is involved it may operate in many different markets, including trans-national, national, state-based and regional or local markets. For example, if the market for higher education services is considered to be national, it is unlikely that any university would be seen to have substantial market power. However, where a university supplied products or services in markets that were state or regional, there may well be cases where that university could come to possess substantial market power.

In these circumstances, whether the University of Adelaide has substantial market power in a particular case is an issue that must be referred to the Legal and Risk Branch.

Purpose

If you have a proposed strategy, you should check that the language you use to describe the strategy is not negative or anti-competitive.

You should ensure that your language accurately reflects the strategy. If you can describe your strategy by using words like “increasing the University of Adelaide’s competitiveness”, “increasing efficiency” and “ensuring growth”, the strategy is *likely* to be lawful.

Do

- Get approval from the Legal and Risk Branch to enter exclusive or tying arrangements.
- Attract business from your competitors on price, service and quality.
- Remember that distributors and retailers are free to purchase from and supply to whomever they choose (subject to any exclusivity arrangements).

Do Not

- Supply goods/services at prices aimed at driving the University of Adelaide’s competitors out of the market.
- Implement a strategy if it is negative and anti-competitive. Seek advice from the Legal and Risk Branch.

Examples

ACCC v Ticketek Pty Ltd (2011)

Ticketek refused to distribute tickets for Lastix, whose business involved selling discount tickets, where the Lastix price was lower than the Ticketek price for the event being promoted. Ticketek admitted that, in so doing, it took advantage of its substantial degree of market power in relation to live entertainment events for the substantial purpose of deterring or preventing competition from a competing ticketing supplier. The Court imposed penalties totalling of \$2.5m.

ACCC v Baxter Healthcare Pty Ltd (2008)

Baxter was the only Australian manufacturer of sterile fluids – an essential hospital product – and the dominant supplier of those fluids. Baxter was found to have misused its market power when it tendered to State and Territory health departments for the supply of sterile fluids and other fluids at very high prices on an item-by-item basis, while also providing a bundled offer at a significantly lower price. The 'bundled' price was only available on condition Baxter was the sole supplier of both sterile and other fluids. The anti-competitive purpose of this strategy was to make competing bids for the other fluids unacceptable, due to the high cost alternative of Baxter's item-by-item offer.

NT Power Generation Pty Ltd v Power & Water Authority (2004)

The High Court found that the refusal by a Northern Territory electricity authority to give access to its infrastructure, required by the applicant in order to supply electricity, constituted a taking advantage of a substantial degree of market power.

PREDATORY PRICING

What is prohibited?

Generally, you must not supply any product for a sustained period of time at a price that is less than the cost of supplying the product for any one of the following purposes:

- eliminating or substantially damaging a competitor;
- preventing a person entering into a market; or
- deterring or preventing a person from competing in a market.

There are currently two separate prohibitions against predatory pricing in the CCA. Predatory pricing is prohibited in markets where the University of Adelaide has:

- (a) a substantial share of a market; or
- (b) a substantial degree of power in a market. This provision is contained in the general prohibition of misuse of market power outlined in the above section.

Substantial share of a market

While it may be unlikely that the University of Adelaide has a substantial share in any of the markets in which we operate, the University of Adelaide must be careful if it engages in any conduct that could be characterised as predatory pricing. The test is whether the conduct has the purpose, effect or likely effect of substantially lessening competition in a market. Such issues should be referred to the Legal and Risk Branch as soon as practicable.

Sustained period

There is no guidance on what is a “sustained period” of time. It may be construed to mean anything from a few days to a few weeks to a few months.

Do

- Set competitive prices for the University of Adelaide’s offerings to attract students from your competitors.

Do Not

- Offer products for “free” for a sustained period of time to drive competitors or their products out of the market.
- Supply products at a price that is below cost for sustained periods of time in order to eliminate your competitors.

Examples

ACCC v Cabcharge Australia (2010)

Cabcharge Australia was held to have engaged in predatory pricing when it supplied taxi metre units at substantially below Cabcharge's direct cost of acquisition and supplied schedule updates for taxi fare rate changes free of charge. A penalty of \$3 million was imposed for this predatory pricing conduct (other penalties were also imposed for other breaches of the CCA)

ACCC v Eurong Beach Resort (2005)

Eurong Beach Resort misused its market power in the ferry market by dropping its prices to levels below operating costs in order to drive out a competitor. The Court imposed a penalty of \$700,000 on Eurong Beach Resort and \$200,000 on the company's controller and another employee.

Hypothetical

As part of a promotion to outdo its competitors, the University of Greatness decides to give students free tuition for one semester if the students agree to enrol with the University of Greatness for their entire degree. The promotion works and is profitable but the University of Greatness may be engaging in predatory pricing in contravention of the CCA.

CHAPTER 4 CONSUMER PROTECTION LAWS

Introduction

Since January 2011, a single national consumer law, known as the Australian Consumer Law (**ACL**) has been in operation under the CCA for all of Australia. The ACL replaced the different Commonwealth, State and Territory consumer laws and schemes that previously applied to the conduct of businesses, organisations and universities. However, the fundamental principles of the consumer laws have not changed.

The ACL contains a number of rules that require organisations to deal fairly when doing business. The rules apply to everything you do with others including conversations, emails, negotiations, advertising and responding to or issuing tenders. They also apply to all of the products and services the University of Adelaide offers, 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 of Adelaide in trade or commerce which is misleading or deceptive, or is likely to mislead or deceive is prohibited under the ACL. Misleading or deceptive conduct in connection with the recruitment of and provision of courses to, overseas students is also specifically prohibited by the *Education Services for Overseas Students Act 2000* (Cth), potentially risking the University of Adelaide's licence to teach international students.

False or misleading representations

False or misleading representations made by The University of Adelaide when offering, supplying or promoting goods or services are also prohibited and may be an offence.

Consumer guarantees

The ACL provides a set of consumer guarantees that apply to the supply of consumer goods or services. A range of remedies for breaches of these guarantees are also set out. Generally, the remedies for minor failures include refunds, repairs and replacements while damages are also available against suppliers and manufacturers 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 prevents organisations, including universities, from using standard form contracts to burden consumers with unfair terms that are ‘tucked away in the fine print’.² A term in a 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?

There may be a number of significant consequences for you and the University of Adelaide if you engage in conduct that contravenes the provisions of the ACL. These include:

- monetary penalties up to a maximum of \$500,000 for you as an individual and \$10 million for the University of Adelaide for certain contraventions;
- damages payouts to parties who have suffered loss or damage as a result of the contravening conduct even where those parties do not commence legal proceedings themselves;
- injunctions or court-enforceable undertakings restraining you or the University of Adelaide from engaging in certain conduct;
- an order that you are disqualified for a period of time from managing any company;
- a court declaration that you and/or the University of Adelaide have contravened the ACL;
- a variety of other consequences including variations to contracts, refunds of money or return of property; and
- a variety of other court orders including community service orders, corrective advertising orders and adverse publicity orders.

The ACCC also has the power to:

- issue substantiation notices, a preliminary investigative tool that requires organisations to verify or substantiate claims or representations it has made by providing the ACCC with supporting documents or information. If an organisation fails to comply, it can be fined.
- issue infringement notices, which (like “car parking tickets”) are fines for minor breaches of certain provisions of the ACL. Payment of an infringement notice is not an admission of liability but prevents the ACCC from taking action in the courts. The fines payable under infringement notices are substantially less than the fines the ACCC may seek in a court action if the infringement notice is not paid.
- issue a public warning notice, which allows the ACCC to inform the public about persons engaged in business practices that are suspected breaches of the ACL. This ‘name and shame’ provision puts the reputation of businesses on the line.

Contraventions of the ACL can also result in lengthy and expensive court processes, disruption to the University of Adelaide, loss of reputation and standing in the market, significant personal stress and, in serious cases, loss of employment.

² Media Release by Dr Craig Emerson, 17 March 2010.

MISLEADING OR DECEPTIVE CONDUCT and FALSE OR MISLEADING REPRESENTATIONS

What is prohibited?

You must not engage in conduct that is misleading or deceptive or that is likely to mislead or deceive. Conduct is misleading or deceptive if it induces an error or is capable of inducing an error. A wide range of surrounding facts and circumstances are taken into account in assessing whether conduct is misleading or deceptive.

You must also not make false representations about certain characteristics of goods or services including the price, standard, cost, composition or quality of products/courses offered by the University of Adelaide.

If you are advertising or supplying a course or other University of Adelaide offering, you must provide a total single figure price of the product - inclusive of GST where it applies - and all other charges that can be calculated. The single price figure must be at least as prominent as the display of part prices.

You must take care to be truthful and accurate at all times.

Misleading or deceptive conduct does not give rise to a criminal offence but the same conduct may also constitute a false representation which can be a criminal offence. If you or the University of Adelaide engage in misleading or deceptive conduct you may be subject to:

- undertakings, injunctions, compensatory orders, damages, redress orders for non-parties, non-punitive orders and other orders that a court may make;
- ACCC substantiation notices and public warning notices; or
- corrective advertising notices.

These consequences can also apply to false or misleading representations.

If you make false or misleading representations in contravention of the ACL, you may commit a criminal offence. You may also face fines up to \$500,000 and the University of Adelaide may face fines up to \$10 million.

Some guidelines

The following guidelines are important to remember:

- even if you did not intend to say or write something misleading, you can still contravene the ACL. Innocent mistakes, exaggerations or typographical errors or misprints may all be misleading or deceptive;
- disclaimers and exception clauses may not overcome misleading impressions created;
- silence can, in certain circumstances, constitute misleading conduct;
- statements of opinion may constitute misleading or deceptive conduct; and
- oral statements or representations as well as written documents can be misleading or deceptive, as can impressions given by previous conduct or a pattern of behaviour.

Do

- Ensure that all claims you make are true and accurate.
- Ensure that all representations you make can be substantiated.
- Clearly state any qualifications if they apply to products or a deal with a supplier or a student.
- Clarify any misleading impression that a student, supplier or other party may be under.
- Talk to the Legal and Risk Branch if you want to use a disclaimer.

Do Not

- Use false or misleading representations in advertising the University of Adelaide's offerings.
- Compare the quality of the University of Adelaide's courses to competitors' courses if the representation cannot be verified as being true and accurate.
- Make predictions or promises unless you have reasonable grounds to make them.

Examples

Telstra Corporation Ltd v Singtel Optus Pty Ltd (2014)

Telstra succeeded in establishing that Optus had engaged in misleading and deceptive conduct in relation to an advertisement comparing the coverage of its mobile network against that of Telstra.

Shahid v Australasian College of Dermatologists (2008)

The College, which provided training and accreditation for medical practitioners, was found to have engaged in misleading representations in relation to the appeal process contained in its handbook to trainees.

ACCC v Cadbury Schweppes Pty Ltd (2004)

Cadbury Schweppes engaged in misleading conduct by labelling its cordial with images of fruit and the words "banana mango flavoured cordial" where there was no fruit extract in the cordial. This was despite the fact the label clearly stated the contents were "flavoured cordial". The Court ordered that Cadbury Schweppes pay 70% of the ACCC's costs.

ACCC v Black on White Pty Ltd (2001)

Black on White operated a private college for childhood education. It advertised that its courses were accredited with various government vocational training accreditation systems when they were not. It was found to have engaged in misleading and deceptive conduct.

Hypothetical 1

The University of Greatness claims that 80% of all graduates from its courses are offered employment. The university however does not clarify that the offers of employment relate to any type of employment, rather than employment relevant to each course. A number of students enrol with the university on the basis that 80% of graduates will be offered jobs relating to the courses undertaken only to discover that the claim is not entirely accurate. Such conduct may be found to be misleading or deceptive.

Hypothetical 2

Marie, an employee at the University of Greatness is asked by a prospective student for a quote as to the course fees for a Bachelor of Arts degree. Marie is fairly new at the University of Greatness and is not yet familiar with the fee structure. Marie provides the standard quote but does tell the student about additional enrolment and administrative taxes and charges. Such conduct may be found to be misleading or deceptive and contravene the single figure pricing provisions of the ACL.

Hypothetical 3

Peter, an employee at the University of Greatness is preparing a brochure to attract international students to the university. The brochure contains a section on living on campus and in order to attract as many students as possible Peter states that the campus is within minutes to the beach even though it is about a 20 minute drive. A number of sun-loving students decide to enrol at the university and pay additional charges to live on campus given the proximity to the beach. Such conduct may be found to be misleading or deceptive and a false representation.

Hypothetical 4

In seeking to promote research opportunities at the University of Greatness, Pauline, an employee of the university tells Dr Gray that the faculty and facilities at the university are "second to none". Dr Gray knows this is the case and says he will accept a research position if the equipment he is to use is secure, kept in a cool place and kept clean – these matters are very important to ensure the research experiments are accurate. The university does not say anything and soon Dr Gray finds that the security, air-conditioning and cleaning services for the labs are very poor. This conduct may be at risk of being misleading or deceptive or a false representation.

CONSUMER GUARANTEES

Who are the University's "consumers"?

A consumer is generally someone who has acquired a good or service, where that good or service is ordinarily acquired for personal, domestic or household use or consumption, or the price of the good or service does not exceed \$40,000. For the University of Adelaide, the most obvious consumers will be the students of the University, but other consumers may also include other employees or officers of the University, third party individuals and businesses.

What rights do consumers have?

The consumer guarantees under the ACL provide rights for all consumers who purchase goods, including a guarantee as to:

- title;
- undisturbed possession;
- being free of undisclosed securities;
- acceptable quality (this means the goods are fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable);
- fitness for a disclosed purpose;
- goods match their description; sample or demonstration model;
- availability of repairs and spare parts; and
- any express warranty is complied with.

All consumers acquiring services also have the following guarantees:

- services will be provided with due care and skill;
- services will be fit for the purpose that a person makes known to the supplier; and
- services will be provided within a reasonable time.

These consumer guarantees will generally be implied into contracts for the supplies of goods or services below \$40,000 or where the goods or services are of a kind ordinarily acquired for personal, domestic or household use.

What is prohibited?

For guarantees, the University of Adelaide must:

- ensure all goods and services supplied comply with the consumer guarantees; and
- not attempt to contract away from those guarantees to its sales of consumer goods or services.

What are the consequences?

In the event that a supplier of goods/services fails to comply with a consumer guarantee and the problem is a 'major failure' (for example, the consumer would not have acquired the goods/services had they known there is a significant departure from the description/sample,

goods are unsafe, goods cannot be made fit for their purpose or services are not supplied within a reasonable time) then:

- in the case of goods, consumers will generally be able to reject the goods and choose between a refund or replacement; and
- in the case of services, the consumer may choose to recover the price difference between the value of the services and the price paid.

If however, the problem is not a 'major failure' then the consumer can require the supplier to fix the problem. The supplier may choose between a refund, replacement or repair. If the supplier fails to remedy the problem within a reasonable time, then the consumer may have the goods repaired or services rendered by another party and have the supplier pay for the expense. Further, a consumer may seek to recover losses as a result of failure to comply with the guarantee.

Do

- Take care when discussing availability and quality of subjects and courses with students.
- Take care even when entering into sales of items such as vehicles, computers and hardware as the guarantees as to title, undisturbed possession and undisclosed securities will apply.
- Contact the Legal and Risk Branch if you have any concerns immediately, or as soon as practicable.

Do Not

- Include contractual terms excluding, modifying or restricting consumer guarantees.
- Exclude consumer guarantees on online auction sites.

Examples

Hypothetical 1

The University of Greatness sells second-hand computers to students on campus. Some computers are old models but Richard, the manager of the store, says all computers work perfectly and are synchronised to the university network. Some students buy computers but find that they do not work properly or do not always synchronise with the university network. Such conduct may be a breach of consumer guarantees as to acceptable quality as well as other provisions of the ACL.

Hypothetical 2

Richard, the manager of the University of Greatness computer store also tells students that if a computer does not work properly, spare parts and repairs will be available. When some students seek repairs for a faulty computer, Richard says that repairs must be done off-campus as he does not have the required spare parts. This conduct may be a breach of consumer guarantees as to availability of spare parts and repairs as well as other provisions of the ACL.

UNCONSCIONABLE CONDUCT

What is prohibited?

The University of Adelaide must not engage in “unconscionable conduct” in dealings with students/customers, suppliers, or service providers.

Unconscionable conduct is not defined in the ACL but generally means acting in an unreasonable or excessively unfair manner towards a more vulnerable party. A more vulnerable party may be at a special disadvantage given sickness, disability, illiteracy, or a lack of assistance or explanation. For example, parties with an intellectual disability or those from a non-English speaking background may not understand what you say, or they may have difficulty understanding documents or contracts, especially if they are lengthy or complex. Young people may also not understand complex contractual arrangements and may be more susceptible to promotions concerning popularity. Such characteristics can put that party in a position of disadvantage, and the University of Adelaide should be careful not to take advantage of its stronger position.

Whether conduct is unconscionable

A number of considerations will determine whether the University of Adelaide’s conduct is unconscionable, including the following:

- the relative bargaining strengths of the parties;
- whether a party is required to comply with conditions not necessary to protect the legitimate business interests of the University of Adelaide;
- whether the student, supplier or service provider or other relevant party could understand any relevant documents;
- whether the University of Adelaide exerted undue pressure or influence or engaged in unfair tactics;
- whether the University of Adelaide was willing to negotiate terms or conditions or unilaterally varied terms; and
- whether the parties acted in good faith.

If you are concerned that you or the University of Adelaide may have engaged in unconscionable conduct, you should contact the Legal and Risk Branch immediately, or as soon as practicable. High risk conduct for the University of Adelaide is the exploitation of students, especially international students, who may lack the capacity, for whatever reason, to make an informed decision as to the implications of entering into a contract.

If you engage in unconscionable conduct, the University of Adelaide may be liable to pay a maximum fine up to \$10 million and you may be liable for a maximum fine of up to \$500,000.

The University of Adelaide and/or you may also be required to:

- pay damages to persons who have suffered loss;
- be subject to undertakings, injunctions, compensatory orders, damages, redress orders for non-parties, non-punitive orders and other orders that a court may make;
- refrain from acting in certain ways; and
- pay an infringement notice fine.

Do

- Deal fairly with students, suppliers, service providers and other relevant parties.
- Be consistent with deals and arrangements struck with others.
- Talk to the Legal and Risk Branch if you have any concerns immediately, or as soon as practicable.

Do Not

- Unfairly take advantage of a student, supplier or service provider if they are at an obvious disadvantage or have no bargaining power.

Example

ACCC v Lux Distributors (2013)

On appeal, the Full Federal Court confirmed employees of Lux engaged in unconscionable conduct by attending the premises of elderly women ostensibly to offer a free vacuum cleaner maintenance check, which was then followed by selling techniques to convince the customers to buy a new vacuum cleaner. The Court concluded an opportunity to sell a product through extended demonstration in the home had been obtained by deception.

Hypothetical

The University of Greatness is keen to attract full fee paying international students from India. One of the clauses in the students' enrolment acceptance documents says in English that if fees are not paid in full within 7 days of the start of the term, penalties will apply. Many students are coming to the university to learn English and believe that they only need to pay at the end of each term. The university tells them that they don't need to get legal advice on the documents as the university will help them. Many students are hit with a penalty as they did not understand when payment was required.

Such conduct is likely to be seen as unconscionable conduct.

UNFAIR CONTRACT TERMS

What is prohibited?

The University of Adelaide must not include an “unfair term” in a standard form consumer contract.

An “unfair contract term” is one which causes a significant imbalance to the rights of students/customers and is not reasonably necessary to protect the legitimate interests of the University of Adelaide. Any unfair term included in a standard form contract benefiting the University of Adelaide will be presumed to be not reasonably necessary to protect its legitimate interests, unless proven otherwise.

In addition to individuals, this consumer protection now applies to small businesses where a contract of less than 12 months is worth up to \$300,000 or where the contract for any longer period is valued at less than \$1m. The University should avoid unfair terms in standard contracts entered into with small businesses. A small business is one with less than 20 employees.

Most terms in standard form consumer contracts are covered by the unfair contract terms law. However, the following terms are exempt:

- terms that set out the price;
- terms that define the product or service being supplied; and
- terms that are required or permitted by another law.

Whether a term is ‘unfair’?

In determining whether a term is unfair, a Court may take into account any matters it considers relevant. However, the Court must consider the following:

- the extent to which the term would cause a significant imbalance in the parties’ rights and obligations;
- whether the term was reasonably necessary to protect the legitimate interests of the party advantaged by the term;
- the extent to which the term may cause detriment (including non-financial detriment) if the term was relied on;
- the extent to which the term is transparent (expressed in plain language, legible, presented clearly and readily available to the party affected by the term); and
- the contract as a whole.

Whether a term is in a ‘standard form contract’?

The prohibition on ‘unfair’ contract terms applies to business to consumer contracts that were not negotiated between the parties (i.e. “take it or leave it” contracts). However, a contract will be presumed to be a standard form contract unless proven to be otherwise.

If you are concerned that the University of Adelaide has “unfair terms” in any of its standard form consumer contracts, you should contact the Legal and Risk Branch immediately, or as soon as practicable.

What are the consequences?

If a term of a standard form consumer contract is found to be “unfair” it will be void and cannot be enforced. If the court has found that a particular term is “unfair” but it is nevertheless relied on by a party, this is a contravention of the ACL for which damages, injunctions and compensation orders are available.

Do

- Set out clearly terms dealing with the subject matter of the contract and be upfront about the price.
- Review consumer contracts entered into, renewed or varied for any unfair terms.
- Talk to the Legal and Risk Branch if you have any concerns immediately, or as soon as practicable.

Do Not

- Use contractual terms that are not reasonably necessary to protect the University of Adelaide’s interests.
- Use contractual terms that are difficult for consumers/students to understand.

Example

Hypothetical

The University of Greatness uses standard terms and conditions on student enrolment that permits it to unilaterally:

- (c) vary the terms of the contract, but does not provide reciprocal rights for the students;
- (d) limit its vicarious liability for its agents; and
- (e) suspend the student’s enrolment without the student having any recourse or right of response.

All of the above terms may be found to be ‘unfair’ terms.

REMEMBER

If you have any questions or concerns relating to this Manual, your obligations under the CCA, including under the ACL, or any competition or compliance issue that arises in the course of your employment, you should contact the Legal and Risk Branch.

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