



University of
South Australia

Competition and Consumer Act Compliance Manual

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1. INTRODUCTION

1.1 About this Compliance Manual

This Compliance Manual (**Manual**) is designed to assist all University of South Australia employees in understanding the University of South Australia's (**University**) obligations and their personal compliance obligations under the *Competition and Consumer Act 2010* (Cth) (**CCA**) (formerly the *Trade Practices Act 1974* (Cth) (**TPA**)).

Other legislation contains additional competition law requirements, including the:

- *Fair Trading Act 1987* (SA) (**FTA**);
- *Competition Policy Reform (South Australia) Act 1996* (SA) (incorporating the Competition Code);
- *Misrepresentation Act 1972* (SA).

The legislation is complex and contains many obligations that, if breached, may lead to substantial penalties being imposed not only on the University but also on you personally (including criminal sanctions for some illegal conduct). This Manual covers the main obligations relevant to your day-to-day dealings at the University.

The obligations under the CCA will be described collectively as **CCA obligations**. The broadest range of competition obligations are contained in the CCA. For this reason, the main focus of this Manual is the CCA obligations. Other legislation is referenced where specifically relevant.

It is suggested that you read this Manual thoroughly and then re-read those parts which are of particular relevance to your work and business area. This Manual is intended to be used as a handy reference and training guide and to provide you with the means of obtaining further assistance when required.

The aim of this Manual is to provide a general explanation of the obligations imposed by legislation and provide guidance on how to comply with these obligations by:

- describing the obligations created by the legislation and the conduct that is prohibited or allowable in various circumstances; and
- providing hypothetical examples and recommendations of suitable behaviour in various circumstances.

However, the Manual (including its explanations, examples, guidelines and checklists) **will not cover all** possible legislative obligations.

Important issues that you need to be aware of include:

- conduct requirements when carrying out University business;
- topics you can and cannot discuss when going to the negotiating table;
- severity of penalties and other consequences of non-compliance, including:
 - heavy fines;
 - injunctions;
 - damages;
 - criminal penalties in some circumstances;
 - management down-time;
 - remedial orders;
 - damage to YOUR reputation and to the University's reputation;
- you and the University are not immune from prosecution;

- the University cannot pick up (directly or indirectly) the cost of any penalties awarded against you personally.

The CCA applies to all activities engaged in by the University, including the provision of programs and services in Australia and overseas and international programs offered by the University.

Particular areas of risk exposure include:

- new and existing contracts for the acquisition of goods or services by the University or supply of goods or services by the University;
- unfair terms in 'standard form' contracts;
- fee structures;
- marketing material;
- claims and representations to potential or enrolled students or customers in relation to programs offered or consultancy or other services provided by the University;
- exclusive arrangements with a third party;
- agreements which require a person to acquire goods or services from a third party or restrict a person from dealing with a third party;
- any agreement with a competitor to fix or control prices or share markets;
- arrangements with other universities in relation to programs, fees or service offerings;
- use of the University's market power;
- agreements to restrict the supply of goods or services to third parties or the acquisition of goods or services from third parties (e.g. boycotts).

This Manual is designed to educate you so that you can identify or avoid problematic practices. It is not designed to provide you with a guide on how to 'solve' potential CCA problems.

If you have any concerns or questions in relation to your obligations, you must refer the matter to your supervisor or the University's Legal Services. There are significant penalties for the University and for individuals for non-compliance with the CCA or other legislation.

Currency of Manual

This Manual is current as at November 2017. The CCA has recently been amended with effect from 6 November 2017.¹

Competition and Consumer Act

The objectives of the CCA are to enhance the welfare of Australians by promoting competition and fair trading and protecting consumers. The CCA therefore seeks to:

- prevent anti-competitive conduct, thereby encouraging competition and efficiency in business and resulting in a greater choice for consumers and businesses in price, quality and service; and
- safeguard the position of consumers in their dealings with businesses and businesses in their dealings with other businesses.

¹ *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) and *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*

The CCA:

- prohibits specific anti-competitive practices; and
- implements the Australian Consumer Law (**ACL**) which ensures conformity across all States and Territories by unifying and largely subsuming individual State-based fair trading legislation.

The CCA includes the following main parts:

- Part IIIA, which deals with access to essential facilities that constitute natural monopolies (for example, railways, pipelines or airports);
- Part IV, which deals with restrictive trade practices, including cartel conduct (e.g. price-fixing);
- Part VI, which deals with enforcement and remedies; and
- ACL (Schedule 2 of the CCA) which deals with consumer protection.

This Manual considers:

- Part IV – Restrictive trade practices: provides a set of rules that govern competitive conduct in the market (e.g. cartel conduct, exclusive dealing etc.); and
- ACL: prohibits unfair trade practices, such as misleading and deceptive conduct.

Fair Trading Act

Each State and Territory had their fair trading legislation amended with effect from 1 January 2011 in order to achieve a uniform national application of the ACL to all businesses and individuals.

Competition Policy Reform (South Australian) Act (incorporating the Competition Code)

Each State and Territory has enacted competition laws which provide for Part IV of the CCA to have force as State or Territory legislation. This enables the application of the obligations under the CCA to natural persons and bodies other than constitutional corporations.

Misrepresentation Act

This South Australian law prohibits a person or corporation engaged in trade or business and their employees from making misrepresentations for the purpose of causing or inducing any other person to enter into a contract, or to pay any monetary amount, or to transfer any real or personal property.

1.3 How the CCA applies to Universities

Since the 1980s, the role of Universities has changed – from the provision of education free of charge, to activities that now incorporate a wide range of commercial dealings. Competition from both traditional Universities and specialist education providers has also increased, meaning not only are consumers scrutinising the University's activities, but so are its competitors.

The application of Part IV of the TPA – *Anti-competitive conduct* (now Part IV of the CCA – *Restrictive trade practices*) to Universities was further cemented in April 1995 through an agreement signed by the Commonwealth and all States and Territories, known as the Conduct Code Agreement.

By virtue of this Agreement, the State and Territory governments agreed to expand the application of (then) Part IV to all persons within their jurisdiction via introduction of the *Competition Code*. The *Competition Code* comprises the Schedule version of Part IV of the CCA which regulates or prohibits restrictive trade practices. The Competition Policy Reform (South Australia) Act provides for the

Competition Code to have the force of law in South Australia. Similar competition policy reform legislation has been introduced in all States and Territories.

Effective from 21 July 1996, this competition policy reform legislation enables universal and consistent competition laws and policies to be applicable to all businesses in Australia regardless of their ownership or legal form, including business activities carried on by government.

In a similar manner, the ACL is applied as a law of South Australia through provisions of the FTA and, thereby, has application to the University.

1.4 Penalties

The University and University employees can be held liable for any breach of the CCA which results from their acts or omissions and can be sued by competitors, suppliers, customers or consumers. If the University or its staff breaches the CCA, they can also be investigated and prosecuted by the Australian Competition and Consumer Commission (ACCC). See section 2 of this Manual for a discussion of the ACCC and its enforcement role.

From July 2009 the TPA introduced, for the first time, serious criminal penalties for some types of anti-competitive conduct. The new penalties include up to 10 years imprisonment.

Serious cartel conduct can be generally described as agreements amongst competitors to fix prices, rig tender bids, share markets or reduce the availability of goods or services. To this end, any agreement with a competitor of the University must be closely scrutinised to ensure that it does not result in an illegal (and potentially criminal) cartel.

The University and its staff can be affected in the following ways if they breach the CCA:

COURT-IMPOSED SANCTIONS	
Injunctions	Put in place by a court to prevent the University or an individual employee from taking certain actions that breach the CCA.
Damages	Awarded against the University or an individual employee (or both) for loss or damage suffered by a competitor, supplier, consumer or other person depending on the circumstances.
Fines/ monetary penalties	<p>For a breach by the University of Part IV of the CCA (anti-competitive conduct), the maximum penalty is the greater of:</p> <ul style="list-style-type: none"> ▪ \$10 million dollars; ▪ three times the gain from the offence; or ▪ if the gain cannot be calculated, 10% of the University's annual group turnover. <p>For a breach by the University of some provisions of the ACL, a penalty of up to \$1.1 million applies.</p> <p>Individual officers and employees can, and often are, personally penalised for their involvement in a breach of the CCA. The following individual penalties apply:</p> <ul style="list-style-type: none"> ▪ for a breach of Part IV of the CCA (anti-competitive conduct) up to: <ul style="list-style-type: none"> ○ \$500,000; and/or ○ 10 years in jail (for serious cartel conduct); ▪ for a breach of the ACL up to: <ul style="list-style-type: none"> ○ \$220,000. <p>Both Part IV and the ACL contain 'criminal offences', meaning that a criminal conviction can be recorded against an individual.</p>

<p>Ancillary Orders</p>	<p>A court may make any order it considers appropriate in relation to proceedings, including that a contract be varied, that certain clauses or the entire contract is void, that certain provisions of a contract will not be enforceable, that money must be refunded to a person who suffered loss or damage, or that goods must be repaired or services resupplied to a person who suffered loss or damage.</p>
<p>Corrective Orders</p>	<p>A court may order disclosure of information or corrective advertising in newspapers or other media.</p>
<p>ACCC POWERS TO ISSUE NOTICES</p>	
<p>Background</p>	<p>The CCA confers powers on the ACCC to issue various notices that deal with alleged or suspected breaches of the CCA.</p> <p>The introduction of these powers is likely to result in an increased number of minor offences being acted on by the ACCC. Whereas previously minor offences were often difficult for the ACCC to pursue due to costly court proceedings, the introduction of infringement and substantiation notices (as defined below) provides the ACCC with flexible enforcement powers.</p> <p>The main risk for the University is that an aggrieved student/customer/contractor may make a complaint to the ACCC and result in the ACCC serving a notice on the University. The ACCC is able to follow the matter up itself rather than having to rely on taking action through a court.</p>
<p>Infringement Notice</p>	<p>An infringement notice may be issued where the ACCC has reasonable grounds to believe that nominated provisions of the ACL have been breached. Infringement notices may be issued with respect to:</p> <ul style="list-style-type: none"> ▪ unconscionable conduct; ▪ some types of unfair practices; ▪ failing to respond to a substantiation notice or providing misleading information in a response to a substantiation notice. <p>The maximum penalty applicable under an infringement notice varies depending on the alleged contravention and whether the contravention is by an individual or a body corporate.</p>
<p>Substantiation Notice</p>	<p>A person who makes claims or representations promoting, or intending to promote, the sale of goods or services, the sale or grant of interests in land, or employment offers, may be required by a substantiation notice, to give information and produce documentation to the ACCC that <i>could</i> be capable of 'substantiating or supporting' these claims.</p> <p>For example, a substantiation notice could be issued if the University made representations in its advertising relating to student 'testimonials', asking the University to substantiate who made the testimonial and on what basis. Similarly, if the University uses factual representations in advertising and promotional material, it could be compelled to substantiate the representation with objective evidence.</p> <p>Failure to provide such information or documents within 21 days may give rise to further enforcement action for a potential breach of the CCA including an infringement notice, or alternatively pecuniary penalties may be sought from a court of up to \$16,500 for corporations or \$3,300 for individuals.</p>

	An individual may refuse to provide particular information or documentation sought under a substantiation notice on the ground that the information or document may incriminate the individual or exposes the individual to a penalty.
Public Warning Notice	<p>The ACCC may issue a public warning notice where it:</p> <ul style="list-style-type: none"> ▪ has reasonable grounds to suspect that conduct breaches an obligation under Chapter 2, 3 or 4 of the ACL; ▪ is satisfied one or more persons has suffered or is likely to suffer detriment as a result of the conduct; and ▪ is satisfied it is in the public interest to issue the notice. <p>Failure or refusal to respond to a substantiation notice may also result in a public warning notice.</p>
CONSEQUENTIAL EFFECTS	
Legal Costs	Significant legal costs may be payable by the University or the individual employee or both.
Staff Down-time	Considerable time may be spent in gathering material, preparing for and participating in legal proceedings.
Embarrassment / Adverse Publicity / Reputation	There is a considerable risk of adverse publicity, damage to reputation and embarrassment for both the University and individual employees. Proceedings may also result in public disclosure of sensitive documents.

You don't have to be the ring-leader!

It is important to note that the obligations created by the CCA extend beyond those parties 'directly' involved in a contravention. The obligations also apply to corporations or individuals that are only 'involved' to a limited extent in any contravention, including by:

- aiding, abetting, counselling or procuring another to contravene the CCA;
- inducing or attempting to induce a person (whether by threats or promises or otherwise) to contravene the CCA;
- conspiring with another to contravene the CCA; or
- directly or indirectly, being knowingly concerned in, or a party to, a contravention by another person.

Attempting to engage in conduct which would breach the CCA is also an offence.

1.5 Responsibilities of University staff

At a meeting of the University's Council (**Council**) on 16 October 2001, the Council resolved to adopt a policy that requires compliance with the TPA and FTA be embedded in all University systems. This has been achieved through the University's Legislative Compliance System, this Manual and associated guidelines.

As an employee of the University, you are required to be familiar with the CCA. Individuals are fined frequently for breaches of the CCA and ignorance of the law is no excuse for non-compliance.

Under the CCA, you are responsible for your own actions. The University's Professional Indemnity Insurance Policy cannot cover you for any penalties, fines or damages awarded against you for recklessly or knowingly breaching the CCA. The University will not meet these costs.

This Manual is a guide to the requirements of the CCA and to the procedures to be implemented to reduce the risk of contravention and should be read in conjunction with the Legislative Compliance System guidelines. You must be familiar with these requirements and procedures.

If you are in doubt about any conduct, or proposed conduct, relating to the CCA, please contact your supervisor or the University's Legal Services before making a decision. You are also encouraged to report to your supervisor or the University's Legal Services any conduct by a competitor, supplier or customer of the University that you believe might be in breach of the CCA.

All employees are required to:

- verbally report any instance of non-compliance or potential non-compliance with a CCA obligation to Senior Management (either directly or through their Manager, Director or Head of School)
- if requested, prepare and submit to Senior Management (either directly or through their Manager, Director or Head of School) an incident report in respect of any instance of non-compliance or potential non-compliance with CCA obligation.

2. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

2.1 What is the ACCC?

The ACCC administers the CCA and has additional responsibilities under other legislation.

The ACCC was formed in November 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority and comprises a Chairperson, a Deputy Chairperson and a number of full-time Commissioners and part-time Associate Commissioners.

The ACCC is a well-funded and active government body that regularly investigates and prosecutes breaches of the CCA. The ACCC has a website which provides information regarding investigations and enforcement priorities, as well as registers and other information which is required to be maintained under the CCA (www.accc.gov.au).

2.2 Key strategies of the ACCC

The current relevant key strategies of the ACCC are to:

- maintain and promote competition;
- protect the interests and safety and support fair trading in markets affecting consumers and small business; and
- promote the economically efficient operation of, use of and investment in infrastructure and identify market failure.

2.3 Powers of the ACCC

The CCA enables members of the public including competitors, suppliers, customers and consumers, to bring proceedings against a corporation if it breaches the CCA. In addition to this, the ACCC also has the power to take action against a corporation or individual for breach of the CCA, even where no complaint is made.

The ACCC's powers extend well beyond those of a private litigant and include search and seizure powers and the ability to seek the imposition of the substantial fines or penalties (as opposed to damages) outlined above.

The ACCC possesses many powers that enable it to fulfil its role in enforcing the CCA and can for instance:

- bring an action on behalf of an aggrieved consumer;
- compel any person to provide information or furnish documents relating to a possible breach of the CCA;
- require evidence to be provided on oath; and
- enter any premises to inspect or copy documents.

The ACCC also has the power to issue infringement notices, substantiation notices and public warning notices (as described in the table above at section 1.4) for alleged breaches of the ACL as an alternative to commencing legal action. These notices can be ignored by the recipient and/or they can choose to have legal proceedings commenced instead, but if they do comply with the notice, no further legal action will be taken by the ACCC.

2.4 Commissioner for Consumer Affairs

The Commissioner for Consumer Affairs (**Commissioner**) is the State based regulator responsible for enforcing the FTA. The Commissioner is supported by Consumer and Business Services (**CBS**). The compliance and enforcement role of the Commissioner and CBS is described on the CBS website (www.cbs.sa.gov.au). Enquiries from or investigations by CBS should be dealt with in a similar manner to those undertaken by the ACCC.

2.5 What to do if the ACCC contacts you:

DO



- refer all ACCC enquiries immediately and without further comment to the Chief Financial Officer (**CFO**) and the University's Legal Services;
- show a willingness to co-operate with the ACCC's investigations. However, do not provide any information, documents or answer any questions without first consulting the CFO;
- make a detailed note of your discussions with the ACCC.



DO NOT

- enter into discussions with the ACCC or provide any information to it unless directed by the CFO to do so;
- agree or disagree with any comments the ACCC poses;
- allow ACCC investigators to inspect any premises unless you first obtain approval from the CFO who will check that they have a warrant or other relevant authority;
- underestimate ACCC investigators. They are highly skilled at obtaining information and may pose as customers or suppliers.

3. IMPORTANT CONCEPTS

To understand many of the CCA obligations, it is necessary to have a general understanding of a number of key concepts. For example, to understand the prohibitions against anti-competitive conduct, you will need to consider questions such as “what is competition” and “in what markets does the University participate?”

3.1 Definitions of commonly used terms

Competition

Competition is an important concept for the purposes of the CCA. Some, but certainly not all, of the prohibitions contained in the CCA are only triggered where a particular agreement or particular conduct has the ***purpose, effect or likely effect of substantially lessening competition*** in a market.

You should not attempt to make this assessment. Sometimes it will be obvious whether or not an agreement could have any effect on competition; at other times a detailed economic analysis will be required. Your job is to report conduct or agreements to management so it can arrange for a proper assessment to be made.

In determining the level of competition, the following factors are relevant:

- the number, market share and distribution of the sellers in the market;
- the ease with which new competitors may enter the market;
- the degree of product differentiation or substitutability in the market; and
- the degree of vertical integration in the market.

A general principle for determining whether there is effective competition between the University and other participants in a market (or conversely whether the University holds market power in the market) is to ask the question: *“If the University raised its prices without altering anything else (like quality or customer service) would it sell less?”*. If the answer is yes, this is a strong indication that there is effective competition in the market.

Contract, Arrangement or Understanding

Contracts, arrangements and understandings may breach the CCA even if they are not in writing and are not legally enforceable. All there need be is communication with another person from which there has been a “meeting of the minds” or a consensus reached as to what is to be done – a “nod and a wink” is sometimes sufficient to form an understanding.

It is for this reason that you should **never** discuss pricing, market sharing or boycotting a particular supplier with a competitor to the University. You cannot be certain whether or not a third party, such as the ACCC, will assert that an informal understanding has been reached. Nor can you be certain what the competitor might do with the information you provide.

Cartel

A cartel is an anti-competitive agreement amongst competitors. While the CCA has always prohibited conduct that can be generically described as ‘cartel conduct’ (such as price fixing and market sharing), highly publicised amendments to the CCA (then the TPA) in 2009 specifically prohibited the inclusion of a ‘cartel provision’ in any contract, arrangement or understanding.

Specific penalties were enacted for cartel conduct including jail terms and the ACCC’s powers to investigate alleged cartel conduct were increased.

Has the 'purpose'

The purpose (or reason) for doing something is relevant to many sections of the CCA. Accordingly, you should always try and keep a record of why something has been done or not done (for example, why you have chosen to engage a particular supplier).

The purpose need not be a sole purpose but must be a substantial purpose which will be inferred from the nature of the arrangement, the circumstances in which it was made and its likely effect.

Market

To assess the effect on competition, a 'boundary' must be established within which the effect can be measured. For the purposes of the CCA, this is called a 'market'.

A market is the area of close competition between businesses or the field of rivalry between them. In determining the market, one question the courts ask is: If a supplier were to give less and charge more, would there be much of a reaction? If so, from whom? If the response was a shift from one product to another, these products may be in the same market.

In essence, a market is comprised of substitutable products.

There are four dimensions to be taken into account when defining the market:

Product	The range of products that will satisfy customer requirements. Customer response to price changes is an important clue as to whether products are in the same market.
Geography	The geographic area within which a product is traded, e.g. the Adelaide metropolitan newspaper market, etc.
Level of function	The particular market level at which an organisation operates, e.g. manufacturing, wholesale, retail.
Time	The time required for suppliers or customers to switch products in response to a change in price. The effect of time on barriers to entry to the market.

Markets for the acquisition of goods and services (demand side markets) and markets for the supply of goods and services (supply side markets) are both relevant to the CCA.

Market Power

'Market power' is another term used by the CCA. The term is, as it sounds, concerned with how much power a business holds within a market. Generally, a business with greater market power is more likely to be able to engage in anti-competitive conduct than a business with less market power.

Market power is, in essence, the ability of a business to behave in a market in a manner unconstrained by competitors for a sustained period of time. One way to determine market power is to look at the ability of an organisation to raise prices above product cost without rivals taking away customers.

Although a large market share may be evidence of market power, the ease with which competitors are able to enter the market should also be considered. Where it is not rational or possible for new entrants to enter the market, then an organisation with a large market share may be more likely to have market power.

Product

Reference in this part to a 'product' means goods or services or both.

Substantial

The word 'substantial' when used in the CCA has a variety of meanings depending on its context. 'Substantial' has been interpreted as meaning 'large or weighty', 'considerable or big', 'real or of substance' and not 'insubstantial or nominal', depending on the provision of the CCA being considered.

4. KEY ROLES AND RESPONSIBILITIES

The roles and responsibility of each party within the University involved in CCA compliance are set out below.

4.1 Council

The Council of the University is responsible for ensuring as far as possible that the University complies with the requirements imposed under relevant legislation through:

- establishing policy and procedural principles consistent with legal requirements and community expectations;
- approving systems of control and accountability; and
- overseeing and monitoring the assessment and management of risk across the University, including commercial undertakings.

The Council is assisted in its role by the Audit and Risk Management Committee.

4.2 Vice-Chancellor

The Vice-Chancellor is responsible for:

- ensuring compliance with the University's Legislative Compliance System;
- fostering a culture of meeting legal obligations.

4.3 Chief Financial Officer

The CFO is the Responsible Officer under the University's Legislative Compliance System.

4.4 University Legal Services

The University's Legal Services is responsible for:

- collating incident and periodic reports and presenting them to the CFO;
- maintaining all compliance records;
- advising and recommending to the CFO any remedial action to address and/or to avoid the repetition of any reported non-compliance or potential non-compliance.

4.5 Senior Management

Senior Management (Deputy Vice-Chancellors, Pro Vice-Chancellors and CFO) are responsible within their areas for ensuring that the University meets its CCA obligations through:

- assessing the current state of CCA compliance;
- reviewing the adequacy of any current systems;
- identifying risks of non-compliance and areas of shortfall in achieving compliance;
- periodic reviews and audits of business activities;
- ensuring that management plans address risk exposures;
- promoting compliance;
- designing, developing and installing specific CCA compliance programs in their area of responsibility;

- ensuring education and training on each specific program is undertaken by employees as required;
- ensuring that business processes, procedures and products address CCA obligations;
- ensuring all employees have access to an up-to-date version of the CCA Compliance Manual;
- reporting material compliance failures to the University's Legal Services with a copy to Assurance Services. Reports of compliance failures should include details of any remedial action taken or recommended to avoid repetition of the reported actual or potential non-compliance;
- preparing and presenting a report to the CFO on the compliance system on request;
- developing and implementing any remedial action authorised by SMG and/or Audit and Risk Management Committee for compliance failures;
- ensuring that there are effective complaints handling systems in place which incorporate the requirements of the Legislative Compliance System.

4.6 Managers, Directors and Heads of Schools

Managers, Directors and Heads of Schools are responsible for receiving incident reports prepared by their employees and submitting them to the University's Legal Services or Senior Management.

All University employees who supervise the work of others are responsible for ensuring employees have access to senior personnel for advice and mentoring.

4.7 Employees

Employees of the University **must**:

- undertake CCA education and training as directed by their Supervisor;
- comply with CCA obligations insofar as it is relevant to the performance of their duties;
- verbally report any instance of non-compliance or potential non-compliance with CCA obligations to Senior Management (either directly or through their Manager, Director or Head of School);
- prepare and submit to Senior Management (either directly or through their Manager, Director or Head of School) an incident report in respect of any instance of non-compliance or potential non-compliance with CCA obligations where required.

5. PART IV: RESTRICTIVE TRADE PRACTICES

This section is relevant to all University employees who have contact with suppliers, customers and competitors, including but not limited to:

- marketing (including new business development);
- direct sales;
- complaints handling;
- general management and commercial; and
- student services.

5.1 Background

Part IV of the CCA prohibits specific conduct. Prohibited practices which could be relevant to the University include:

- agreeing to share markets, fix prices, restrict the supply of goods or boycott particular suppliers or customers;
- misusing market power by engaging in conduct that has the purpose, or has or is likely to have, the effect of substantially lessening competition in relevant markets;
- imposing conditions on the supply or acquisition of goods or services in manner which substantially lessens competition.

It is easier than you might expect to engage in these sorts of anti-competitive practices. For example, if you discuss and come to some arrangement or understanding about the prices or territory specified in a University tender with a colleague at another University which is also submitting a tender, you could be guilty of price-fixing or market sharing (even if you did not intend to do anything wrong).

Broadly, prohibitions can be categorised as:

- per se prohibitions which apply regardless of the effect of the conduct in a market;
- substantial lessening of competition prohibitions which include as one of their elements the effect or likely effect on competition.

As per se prohibitions are **strictly prohibited** regardless of their effect on competition and you should **never** engage in these practices (refer sections 5.2 and 5.3 of this Manual).

Other 'substantial lessening of competition' prohibitions are only prohibited if they have the purpose, or effect or likely effect, of substantially lessening competition. You should **never** engage in these practices without first obtaining advice from your supervisor or the University's Legal Services (refer section 5.4 of this Manual). An analysis of the effect or likely effect on competition in the relevant market or markets may be required.

You will need to be particularly careful in relation to any dealings you may have with competitors as many arrangements or understandings between competitors will constitute a breach of the CCA. Remember, as the market for education has changed, and continues to change, the University is likely to have many competitors, and not just other traditional Universities.



DO

- act independently of competitors;
- always ask the University's Legal Services for advice before making arrangements with competitors;

- report any activity (whether engaged in by you or somebody else) that you think may not comply with this Manual. Immunity and exemption policies exist under the CCA, so reporting matters early is essential.

You may meet with competitors. However, if issues relating to pricing, territories, markets, suppliers or boycotts arise you should object, leave the meeting immediately and publicise your leaving so that everyone will remember that you left at that point. You should also make a file note of when you left the meeting and why you left. Inform the University's Legal Services immediately.



DO NOT engage in communication (meeting, correspondence, discussion) with a competitor from which there may be an understanding of how each party will compete in a market (remember, a "nod and wink" is enough!) without first seeking advice from the University's Legal Services. Communications regarding the following issues involve particular risk:

- fees, costs, pricing;
- other competitors;
- terms of dealings with third parties;
- allocation of territory, customers, suppliers or markets;
- decisions regarding the submission of a tender, the terms of the tender, the prices listed in the tender or about dividing the tender up in any way.

5.2 Conduct Prohibited Absolutely

Part IV of the CCA places an absolute prohibition on engaging in certain types of conduct and entering into or giving effect to certain contracts, arrangements or understandings that are considered anti-competitive. Arrangements or understandings do not need to be in writing, nor do they need to be legally enforceable to breach the CCA.



The following types of conduct and arrangements are **strictly prohibited**. You must **never** do any of the following:

- cartel conduct; and
- resale price maintenance.

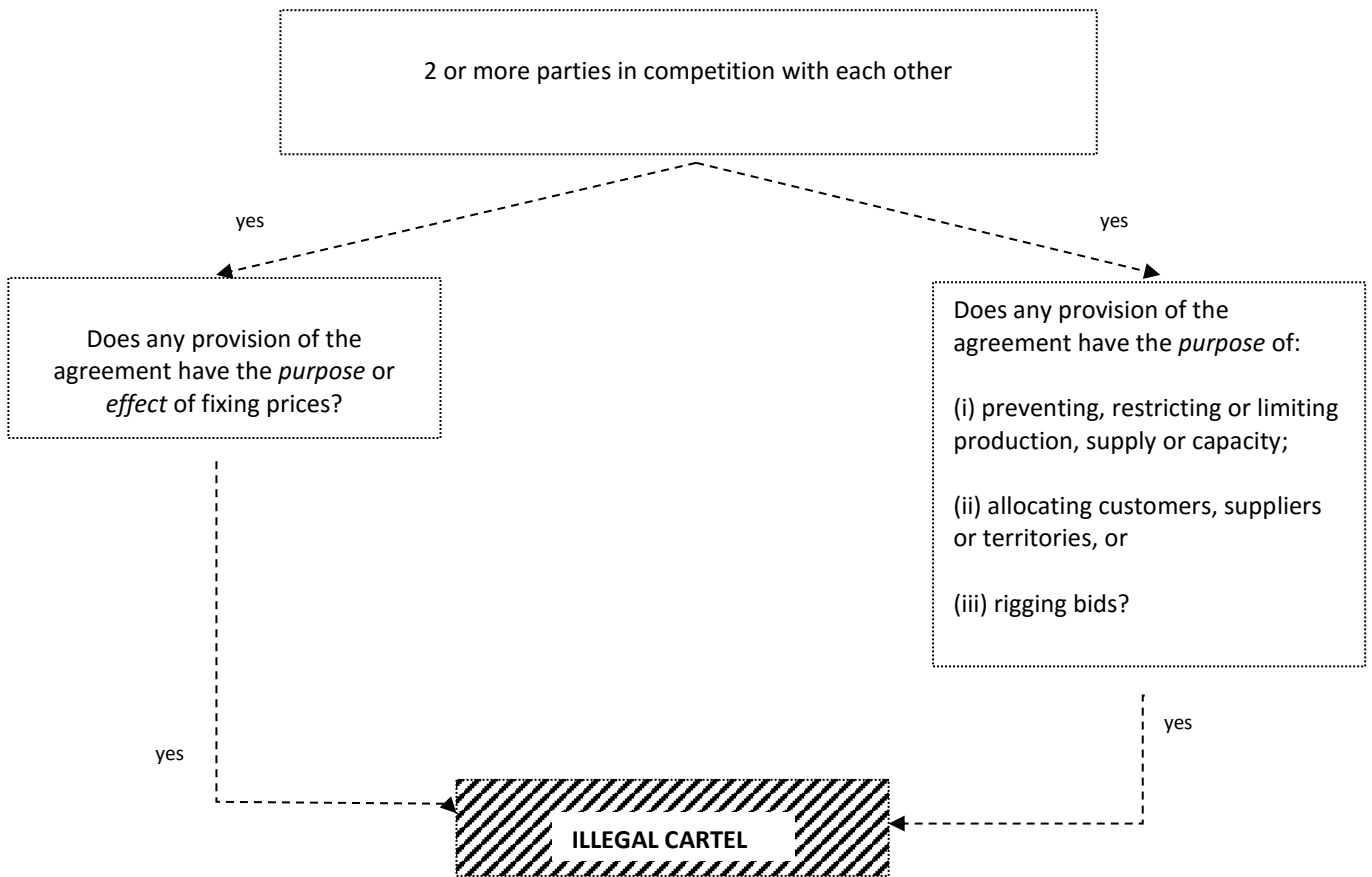
5.3 Cartel Conduct

The CCA prohibits, in every case, the making of, or giving effect to, any contract, arrangement or understanding that contains a cartel provision.

A cartel provision is a term of an agreement between two parties that are competitors (or would be competitors but for the provision) that:

- has the **purpose** or **effect** of directly or indirectly fixing, controlling or maintaining the price for any goods or services,
- or**
- has the **purpose** of:
 - restricting supply, production or capacity;
 - allocating customers, suppliers or geographical areas; or
 - rigging bids.

The elements of a cartel provision are discussed below and the following diagram provides an outline of how the CCA deals with cartel conduct:



Remember, it is only a cartel where the agreement is between 'competitors'. Who the University's competitors are will vary from service to service and from department to department (and are always changing). For example, common competitors could include other Universities and educational institutions; businesses providing a service or product similar to the one being provided by the University (such as research or consultancy services); or government entities and departments.

If you have any indication that a party to an agreement offers the same kinds of goods or services as the University (or acquires the same kinds of goods or services as the University) in any market, you must seek further assistance from the University's Legal Services.

5.3.1 Fixing, Controlling or Maintaining Price (Cartel Provision Part 1)

Any contract, arrangement or understanding with a competitor that has the purpose, effect or likely effect of fixing, controlling or maintaining prices, rebates, discounts, allowances or credit terms provided in relation to goods and services, will create an illegal *cartel provision*.

Remember, no formal agreement is needed. A simple discussion between competitors followed by potentially unrelated, but uniform, changes in pricing can be enough to cause an investigation. If the investigation determines that there is an understanding to fix price, legal liability may follow.

As a rule, costing and pricing must always be done independently, based on the University's specific circumstances and should **never** be discussed with the University's competitors.

Unlike some other aspects of the CCA, both **purpose** and **effect** are relevant to the price fixing prohibition. This means that an agreement that has a perfectly legitimate (and seemingly legal) purpose, could have the direct or indirect effect of fixing prices and will be an illegal cartel. It is for this reason that you must have any agreement with a competitor of the University carefully reviewed.

You should keep detailed records of all meetings with competitors and if price issues are raised for discussion, you must formally state that the University will not participate and leave the meeting. You should then notify your supervisor and the University's Legal Services immediately.

In general, information regarding the University's fees or prices must not be given to a competitor. It is not prohibited to review or obtain **publicly available** copies of competitors' prices to obtain market information. However, you should **never** ask a competitor or person outside of the University to supply this information or indicate to you where it can be found. Acting on sensitive information regarding a competitor's conduct or intended conduct in a market may constitute a prohibited concerted practice under section 45 of the CCA (see section 5.4.3).

Limited exceptions to the strict prohibition on price fixing exist in relation to:

- the supply of goods or services by a genuine joint venture; and
- the buying and selling activities of some limited collective or cooperative buying and selling groups.

However, price fixing arrangements which fall within these exceptions will still constitute a breach of the CCA if they result in a substantial lessening of competition.

You should not assume that any price fixing arrangement will fall within the above exceptions to the CCA without seeking advice from the University's Legal Services.



EXAMPLES

The Real Estate Institute of Western Australia developed some units for real estate training. It used those units itself as part of its teaching of the Certificate III in Property Services (part of the program for getting a real estate licence). The usual price of doing one unit at the REIWA was \$780. A number of TAFE colleges in the area also offered real estate programs. The REIWA offered to licence its units to the TAFE colleges. One of the terms of the contract was that the colleges would not offer the units to their students at a fee less than \$780.

This is an example of real life price fixing – and it is illegal. The colleges had to undertake not to repeat their mistake; and implement a trade practices compliance program at each college. The REIWA had done some other things wrong as well, so its penalty was more severe. Even the solicitor who drafted the contract for the REIWA was ordered to attend a trade practices compliance seminar.

Following the amendments to the CCA (then the TPA) which happened after this case, there is a real chance that this situation could have given rise to a criminal cartel.

Universities and TAFE institutes find themselves in vigorous competition to provide marketing courses. Because one University regularly undercuts other institutions to attract more students, prevailing fees are insufficient to justify conducting these courses.

Instead of discontinuing courses, two TAFE institutes and a university meet and agree to charge fees that will justify the continuance of the courses. They agree to charge no less than \$1,000 a course and not to undercut each other.

These three institutions have breached Part IV of the CCA. It is an arrangement between competitors that fixes or controls prices.

Joe at Sunshine University is preparing a tender for the provision of programs and certain consultancy services to an industry group. He is not sure whether the fee structure he proposes to include in the tender will be competitive with Sky University, which is also preparing a tender for the same work. Mary is preparing the tender for Sky University. Joe is good friends with Mary and meets with her on the weekend to ask her 'off the record' about the pricing structure included in Sky University's tender. Joe and Mary informally discuss the pricing structure of each University's tender. They agree that by keeping their pricing structures similar, there is a good chance that both Sunshine University and Sky University will be engaged by the industry group to provide different parts of the programs and consultancy services. Since this would be in the best interests of both Universities, Joe and Mary agree to include the proposed pricing structure in their respective tenders.

This will constitute price fixing as an understanding has been reached between competitors in relation to price. The arrangement may also constitute bid rigging (also a cartel provision – see discussion below) as competitors have agreed a material component of their tender responses. It does not matter that there is no formality about the agreement nor that the price discussions occurred 'off the record' outside of working hours. The Universities, as well as Joe and Mary, may be penalised for the conduct.

5.3.2 Restricting outputs, allocating markets or bid rigging (Cartel Provision Part 2)

The second type of conduct that can create an illegal cartel relates only to the *purpose* of the University in entering into a contract, arrangement or understanding.

The University **must not**, under any circumstance, enter into an agreement which has the purpose of:

- preventing, restricting or limiting production, capacity or supply;
- allocating customers, suppliers or territories; or
- rigging bids.

The kinds of agreements that could have these illegal purposes include, but are not limited to, an agreement with a competitor that:

- the University and/or the competitor will no longer offer certain programs or courses, or will only offer certain programs or courses at certain times, in certain places or on certain conditions;
- the University and the competitor will both acquire goods or services from the same supplier; and
- the University will focus its marketing initiatives in a particular region or on a particular program or course, whereas the competitor will focus its marketing initiatives in a different region or program or course.

This is not an exhaustive list, but provides some core examples demonstrating the kinds of conduct that can amount to a restriction on outputs or allocating of markets. These terms are very broad, so any agreement with a competitor could give rise to concern.

In addition to the above, issues relating to 'bid rigging' (most commonly in a tender scenario) are now specifically outlawed as cartel conduct. You should **never** discuss any tender process with a competitor of the University.

Arrangements that involve competitors of the University need to be carefully considered.

You should:

- avoid all communications with competitors and their employees that may result in an agreement, arrangement or understanding between the parties, other than communications approved by Senior Management;
- **never** enter into a contract, arrangement or understanding with a competitor without first seeking advice from the University's Legal Services;
- conduct all approved meetings with competitors in a formal setting and ensure the meeting is well documented.



DO NOT

- decide who to supply to by arrangement or agreement with a competitor;
- decide who to stop supplying to by arrangement or agreement with a competitor;
- impose on a customer conditions of sale which have been agreed or arranged with a competitor;
- compare poor paying customers with a competitor with a view to reaching an understanding that each party will not supply debtors of the other party until such customers have paid their debts (however, you may decide independently of a competitor not to supply a customer who has a poor credit record);
- agree with a competitor to divide the market;
- enter into any discussions whatsoever with a competitor in relation to the University's marketing or business strategies;
- enter into any discussions whatsoever with a competitor in relation to any tender or bid process in which the University is participating.



EXAMPLES

Software company Prime Disk has supplied all of the computer equipment requirements of a University and a College for several years. As part of its diversification plan, Prime Disk recently established a computer course which it offers to students in direct competition with the computer courses offered by the University and the College. In protest, the University and College agree not to acquire any further computer equipment from Prime Disk.

The arrangement reached between the University and the College will constitute a breach of the CCA.

Waratah University and Wattle College both breed and supply native plants to various landscapers, local Councils, nurseries and other buyers. One landscaping company, one they both deal with, is always late with payment. The University and the College agree that they will both change their payment terms to COD.

There would be no problem if the University and the College reached the same decisions independently as a result of their own experiences with the landscaping company. But their agreement is not legal, even though it seems it was for a good business purpose.

Vice-Chancellors of Alpha, Beta and Delta Universities regularly meet to discuss educational matters. After the Government reduces funding by 15%, they commence discussions about possible efficiency savings. At one meeting, the Vice-Chancellors agree to rationalise operations by:

- allocating the more vocationally oriented engineering students to Alpha University;
- allocating the purely theoretical engineering students to Beta University;
- discontinuing engineering programs at Delta University in exchange for students being allocated to it by the other Universities in the growing market for medicine programs.

This arrangement is unlawful. It is a market sharing agreement between competitors. An agreement has been reached that some Universities will not offer certain programs and others will not cater for certain classes of students – an agreement to share the market.

It may, however, be sensible from an efficiency and effectiveness viewpoint for the Universities to seek to have such an agreement legitimised by approaching the ACCC for authorisation.

5.3.3 Resale Price Maintenance

While resale price maintenance is probably of limited application in relation to Universities, you must **never** engage in practices that seek to prevent a person from reselling at a discounted price any goods or services that they have purchased from the University, including by:

- withholding the supply of goods to a reseller if the reseller does not agree to a minimum resale price;
- making it known that a rebate or other benefit will be withheld if goods are discounted by a reseller;
- offering a special deal to a reseller on the condition that they do not discount goods;
- requiring a reseller to display or advertise goods at the recommended retail price and no other price.

DO

- allow resellers freedom to set their own price.

YOU MAY

- recommend a resale price, provided that resellers can set a different price if they wish without penalty (be cautious);
- specify the selling price of goods that are stocked by a reseller on a consignment basis, or which are otherwise sold by the reseller as a legal agent of the University, as in these circumstances the University will still be the owner of goods. However, you will first need to obtain the advice of the University's Legal Services to ensure that a true consignment or agency relationship exists for legal purposes.



DO NOT (except where a consignment or other agency relationship exists):

- set a minimum selling price;
- offer a benefit or discount to a reseller on the condition that the reseller does not discount the price of goods;
- refuse to supply a reseller, or withhold any rebate or benefit that would otherwise be provided to the reseller, because the reseller has offered goods at a discounted price or has refused to supply the goods at a minimum price.



EXAMPLES

A University publishes a widely read journal. It supplies that journal to various booksellers, at the same time specifying that they must retail the journal for \$9.00 per copy. Representatives of the University make it clear to the booksellers that the University will not provide further supplies unless the booksellers maintain the suggested retail price.

The University and the employees who negotiated this arrangement may be penalised for resale price maintenance.

A University produces clothing and other merchandise with the University's logo on it. The University negotiates with certain clothing stores that it will provide a free marketing course to their staff if the store agrees not to sell the merchandise below a certain price. This is likely to constitute resale price maintenance.

5.4 Conduct that affects Competition

Section 5.3 of this Manual describes certain conduct that is always illegal under the CCA.

The CCA also prohibits other conduct that will be illegal where the conduct has the ***purpose, or effect or likely effect, of substantially lessening competition in a market***. Section 5.4 describes this conduct.

Conduct which falls within this category includes:

- misuse of market power;
- exclusive dealing;
- agreements which have the purpose, effect or likely effect of substantially lessening competition (anti-competitive agreements);
- mergers and acquisitions; and
- secondary boycotts.

5.4.1 Misuse of market power

The misuse of market power prohibition in section 46 of the CCA has been fundamentally altered by recent amendments.² The ACCC has published interim guidelines in respect of the amended provisions.³

A person which has 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 any other market in which the person (or a related corporation) supplies or acquires goods or services (or is likely to supply or acquire goods or services). A person may have a substantial degree of market power either alone or in conjunction with related bodies corporate.

In determining the degree of power that a person has in a market, regard must be had to the extent to which the conduct of the person is constrained by the conduct of competitors, potential competitors,

² *Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Cth)*.

³ ACCC, *Interim Guidelines on misuse of market power* (October 2017).

suppliers and customers. Regard may also be had to any contracts, arrangements or understandings or proposed contracts, arrangements or understandings that the person has with another party.

5.4.2 Exclusive Dealing

Exclusive dealing arrangements are only illegal where they have the purpose, or effect or likely effect, of substantially lessening competition.

Exclusive dealing arrangements include the following practices:

Exclusive Selling Supplying a product or service to a student/customer on condition that the student/customer accepts a restriction (total or partial) from either buying products or services from a competitor or resupplying products or services acquired from a competitor of the University.

'UniSA will only supply you with consultancy services if you agree to deal with it exclusively and not acquire services from any other consultancy firm.'

Exclusive Purchasing Acquiring a product or service from a supplier on condition that the supplier accepts a restriction (total or partial) from selling products or services to competitors of the University, other third parties or in a particular geographic location.

'UniSA will acquire a minimum volume from you provided you do not supply them to anyone else.'

Resale Restrictions Supplying a product or service on condition that the customer accepts some restriction on the right to resupply products or services to particular persons or in particular geographic areas.

'You can resell this publication owned by UniSA, but only in South Australia and not via online sales.'

Third line forcing Supplying goods or services on the condition that the person acquiring the goods or services acquires goods or services from another person.

'You can enrol in this course, but only if you acquire your text books from a nominated bookseller.'

Note: *It would also be **exclusive dealing** if you refuse to supply or acquire a product or service because the student/customer or supplier (as applicable) will not accept a restriction described above, or if you offer a discount or rebate if the student/customer will accept a restriction described above and the conduct has the purpose, effect or likely effect of substantially lessening competition.*

Each of these restrictions could be illegal where they have the purpose, effect or likely effect, of substantially lessening competition in a market. Where an issue might arise, you should have the arrangement reviewed by the University's Legal Services. In most cases, the market will be broad enough or competitive enough that the agreement will have little or no effect on competition. However, there is no general rule of thumb that can be applied in making this assessment.



DO seek advice from the University's Legal Services before agreeing to any exclusive dealing arrangement to determine whether the arrangement may be regarded as having the purpose, or effect or likely effect, of substantially lessening competition.



DO NOT attempt to impose conditions on other people which limit or restrict their freedom to sell to, or buy from, third parties, any products or services without considering the impact on competition.



EXAMPLES

Barrow University sells textbooks to its students in competition with private booksellers. The University offers students a discount of 30% if they agree not to purchase any of their textbooks, or at least any of their core textbooks, from private booksellers. This conduct will be prohibited if it is found to have the purpose, or effect or likely effect, of substantially lessening competition in the relevant market.

A College enters into a contract with computer companies Eenie and Meenie for the supply of computers and software for the College.

The computer companies impose a condition in the contract to the effect that the College will not purchase similar goods from any other suppliers for a period of five years. This condition will be prohibited if it has the purpose, or effect or likely effect, of substantially lessening competition in the market.

A purchasing officer of BigName Limited enters into a contract with a particular supplier to acquire educational software for public Universities on condition the supplier will not supply the educational software to private Universities in the area. This practice is prohibited if it has the purpose, or effect or likely effect, of substantially lessening competition in the relevant market.

New University produces an interactive CD Rom career guide to help school leavers decide what careers they are interested in. The product is a success and soon other Universities are producing similar products. To help protect its market share, New University offers a rebate to bookstores if they agree not to stock similar products produced by other Universities. This arrangement may be prohibited if it has the purpose, or effect or likely effect, of substantially lessening competition.

A University has appointed five distributors to sell a study guide that it has produced. To reduce the extent to which the distributors undercut each other in terms of price, the University limits the territory within which each distributor may sell the study guides. One distributor does not agree to limit its sales to the territory allocated to it and begins selling the study guides outside its territory. The University refuses to fill any further orders for the study guides from that distributor.

Refusing to sell to a person because they do not agree to limit the geographic area within which they resell the products may constitute a breach of the CCA if it has the purpose, or effect or likely effect, of substantially lessening competition.

Wallaby University has a large and successful School of Pharmacy. All its students are required to buy lab coats. The School, trying to help its students with the cost of study, negotiates a large discount with Protective Lab Supplies Pty Ltd (PLS). The discount is given on the basis that all pharmaceutical students buy their coats from PLS. To ensure that all students get the benefit of the discount, the School requires all students to buy their coats from PLS before being admitted to the program. If this arrangement has the effect or likely effect of substantially lessening competition then it will be prohibited exclusive dealing.

5.4.3 Anti-competitive agreements

The prohibition against anti-competitive agreements is a general catch-all provision designed to prevent anti-competitive conduct that does not fit into the more specific prohibitions contained in the CCA.

The University is prohibited from entering into, or giving effect to, any contract, arrangement or understanding, if a provision of that contract, arrangement or understanding has the purpose, or effect or likely effect, of substantially lessening competition. As with other sections of the CCA, there is no need for a formal contract for this provision to be breached – a 'nod and a wink' may be enough.

It will be a breach of this provision if at least one of the substantial purposes of the agreement, arrangement or understanding is to substantially lessen competition, even if there are other legitimate purposes. If there is an intention to substantially lessen competitors, or the effect or likely effect is that competition is or could be substantially lessened, then an anti-competitive agreement will exist.

You will need to be particularly careful about entering into any contract, arrangement or understanding with a person that supplies goods and services to the University or acquires goods and services from the University that will impact on the other business' ability to participate in any market, including how they access University students (as a large body of consumers) for the purposes of providing students with third party goods or services. These types of arrangements are often found to have the purpose, effect or likely effect of substantially lessening competition.

The University is also prohibited from engaging with one or more persons in a 'concerted practice' that has the purpose, or effect or likely effect, of substantially lessening competition. This prohibition was introduced to the CCA in amendments effective from November 2017. The ACCC has published interim guidelines to assist understanding in respect of this new prohibition.⁴ These guidelines describe a 'concerted practice' as any form of cooperation between two or more persons, or conduct which would establish such cooperation. The guidelines indicate the ACCC's view that a concerted practice can result from a single disclosure of information which could be taken to persuade persons to act in concert.

Arrangements that involve the University have the potential to substantially lessen competition.

Therefore you should **never** enter into a contract, arrangement or understanding which imposes conditions on the other party with respect to selling or resupplying goods or services to, or purchasing goods or services from, other persons without first seeking advice from the University's Legal Services.



In particular, agreements that:

- could limit any existing rights, activities or business of a third party (for example, by targeting their customers);
- are exclusive;
- relate to goods or services that are rare, hard to acquire or are in short supply;
- will create a clear advantage in the market; or
- you expect will cause another business to complain or suffer detriment, may in some circumstances substantially lessen competition.

Ask your Supervisor or the University's Legal Services if you are unsure whether specific conduct is prohibited or whether the conduct is likely to substantially lessen competition.

⁴ ACCC, *Interim Guidelines on concerted practices* (October 2017).

You should also not engage in a concerted practice with another person, including by acting on information provided by a person (particularly a competitor) in respect of the competitor's conduct in a market.

**DO NOT**

- enter into any agreement, arrangement or understanding with any other person where one of the purposes of, or the effect or likely effect of, the conduct could be a substantial lessening of competition, without first obtaining advice from the University's Legal Services.
- determine the University's conduct in a market in response to information provided by another business as to its conduct or intended conduct in a market.

5.4.4 Mergers and Acquisitions

The University is prohibited from acquiring shares in or assets from another company if the acquisition would have, or is likely to have, the effect of substantially lessening competition in any market for goods or services in Australia or in a State, Territory or region within Australia.

Many of the same considerations that apply to exclusive dealing or general anti-competitive agreements apply to mergers or acquisitions (e.g. an agreement to acquire an asset or shares is an 'agreement' for the purposes of section 5.3.2 of this Manual). However, specific processes apply under the CCA for obtaining informal or formal merger clearance from the ACCC.

**DO**

- seek advice from the University's Legal Services if consideration is being given to acquiring shares in a company or the assets of any person, in particular where any assets are acquired from another University, education institution or competitor of the University.

**DO NOT**

- enter into an acquisition agreement for share capital or assets or make a public announcement about a proposed acquisition before obtaining advice from the University's Legal Services.

**EXAMPLE**

A University and two IT computer teaching companies compete for students. They decide that they can increase profits through rationalisation.

The companies merge with the University and operate out of the University's IT Centre, thereby closing the only other computer teaching locations in the area. The merged operation uses a single IT teaching strategy and discontinues the special corporate service previously provided by one of the companies.

In these circumstances, there will be a serious question as to whether the merger will substantially lessen competition for computer centres and IT courses in the region. Whether the arrangement breaches the CCA will depend on the definition of the relevant market (and in particular whether it is a local, metropolitan or state-wide geographic market) other characteristics of the market (e.g. the barriers to entry for new participants) and the likely effect of the merger (e.g. the ability of the merged entity to raise prices above supply costs without rivals taking away customers).

5.4.5 Secondary Boycotts

The CCA prohibits a person acting in concert with another person so as to hinder or prevent a third person from:

- supplying goods or services to, or acquiring goods or services from, a fourth person with the purpose, effect or likely effect of causing substantial loss or damage to the fourth person;
- supplying goods or services to, or acquiring goods or services from, a fourth person with the purpose, effect or likely effect of substantially lessening competition in any market in which the fourth person supplies or acquires goods or services;
- importing or exporting goods between Australia and places outside Australia.

One of the reasons these prohibitions were created was as a means of controlling union boycott activities.

A person will not contravene the secondary boycott prohibitions in certain circumstances where the dominant purpose of the conduct relates to:

- remuneration, conditions of employment or working conditions of employees engaged in the conduct; or
- environmental protection or consumer protection and the conduct is not industrial action.

5.5 Authorisation

Upon application by a University or a body representing a group of Universities (such as the Australian Vice-Chancellor Committee), the ACCC has the power to authorise some restrictive trade practices which are otherwise prohibited. Authorisation gives an entity protection against legal proceedings in relation to conduct that would otherwise be in contravention of the CCA. For example, some Universities have been granted an authorisation for the way in which they deal with preference applications for medical students, which would otherwise be in breach of the CCA.

Authorisation may be sought in respect of conduct which would breach any of the prohibitions in Part IV of the CCA.

The ACCC must only grant an authorisation if the ACCC is satisfied that in all the circumstances:

- (a) the conduct (other than cartel conduct, secondary boycotts or resale price maintenance) would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) that:
 - (i) the conduct would result, or be likely to result, in a benefit to the public; and
 - (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

Authorisations will be time limited and must be reapplied for prior to their expiry. The ACCC may also reopen an authorisation in circumstances provided for in the CCA.

Any request for authorisation must be made by the Vice-Chancellor. As authorisations are very expensive, time-consuming and may be difficult to obtain, such a request should be seen as an exceptional, rather than a routine step.

5.6 Notification

A corporation may file a notice with the ACCC and obtain statutory protection in relation to trade practices which amount to exclusive dealing, which would otherwise be in breach of the CCA.

Notification is an alternative to applying for an authorisation and is much less expensive and easier to obtain than an authorisation.

Upon lodging a notification for exclusive dealing, a corporation gains immediate and automatic immunity from legal proceedings under the CCA (other than in respect of third line forcing). Third line forcing becomes immune at the end of the prescribed period (14 days from the time the ACCC receives the notice unless the ACCC is undertaking an assessment of the public benefits and anti-competitive effects of the notified conduct). The immunity remains effective until it is revoked by the ACCC. The ACCC can revoke immunity if it decides that the conduct is likely to have the effect of substantially lessening competition and either:

- no public benefit flows from the conduct; or
- any resulting public benefit would not outweigh the public detriment constituted by the lessening of competition.

Notifications should only be prepared and lodged by the University's Legal Services.

6. UNCONSCIONABLE CONDUCT

The CCA requires businesses to conduct their dealings with customers and third parties who are in a weaker position or who are otherwise disadvantaged in an ethical and fair manner. It is illegal for a person to act unconscionably when dealing with these types of customers and businesses.

Unconscionability involves exploitation by a stronger party of a weaker party, which goes beyond normal hard commercial dealings and affronts the concept of good conscience. In essence, it is an abuse of an organisation's stronger bargaining position in its dealings with disadvantaged businesses or individuals.

The consequences of breaching the unconscionability provisions may include: pecuniary penalties, compensation for damage or loss suffered; injunctions, declarations; variation of contract and refund of monies paid.

The CCA prohibits engaging in unconscionable conduct in trade or commerce:

- within the meaning of the unwritten law;
- in connection with the supply or possible supply of goods or services to, or the acquisition or possible acquisition of goods or services from a person (other than a publicly listed company).

The biggest risk for the University is likely to arise in dealings with students (or consumers) who may not properly understand that the terms of any agreements they are being asked to sign or conditions they are required to comply with.

6.1 Unconscionable conduct within the meaning of the unwritten law

Conduct may be deemed to be unconscionable where the University knows or ought to know that a person or company with whom it has dealings in trade or commerce (including as customer or supplier) has a special disadvantage or weakness and the University takes unfair or unjust advantage of any superior bargaining position or superior knowledge to the disadvantage of the other person or company.

A party may have a special disadvantage or be in a weaker position due to:

- important facts known only to one party;
- physical limitations of one party such as infirmity, drunkenness or age;
- lack of business knowledge or acumen;
- illiteracy, lack of education or English not being a first language;
- poverty or being in a vulnerable financial situation;
- being unable to access independent advice or assistance where these are necessary.

Unconscionable conduct can also arise where a party uses economic pressure or other types of pressure that go beyond normal commercial negotiations. In particular, if the pressure you are asserting has the practical effect of compelling the weaker party to submit to something which is to their disadvantage due to the realisation that they have no other practical choice, this may well be unconscionable conduct.

6.2 Unconscionable conduct in connection with supply or acquisition of goods or services

This provision protects individuals and business in their business transactions. There will be overlap between this protection and the protection afforded against unconscionable conduct under the unwritten law (see 6.1).

The CCA sets out the following considerations which a court may have regard to in considering whether a business has engaged in unconscionable conduct towards consumers. These are:

- the relative bargaining strengths of the parties;
- the consumer's ability to understand the documentation presented;
- whether undue influence or pressure or unfair tactics were used;
- whether the conditions imposed went beyond what was reasonably necessary to protect the supplier's legitimate interests;
- the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services elsewhere;
- the extent to which the supplier's conduct toward the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- the requirements of any applicable industry code;
- the requirements of any other industry code if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- the extent to which the supplier unreasonably failed to disclose to the business consumer:
 - any intended conduct of the supplier that might affect the interests of the business consumer;
 - any risks to the business consumer arising from the supplier's intended conduct which the supplier should have foreseen and would not be apparent to the business consumer;
- the extent to which the supplier was willing to negotiate the terms and conditions of any supply contract;
- the terms and conditions of any supply contract;
- the conduct of the parties in complying with the terms and conditions of any supply contract;
- the conduct of the parties, in connection with their commercial relationship, *after* they have entered into a supply contract;
- whether there is a contractual right to unilaterally vary a term or condition of any supply contract;
- the extent to which the supplier and the business consumer acted in good faith.



WARNING SIGNALS

- dealing with persons or businesses:
 - who are disadvantaged in some way; or
 - where the University is in a stronger bargaining position;
- complex transactions where the other party seems confused about the terms of the arrangement.



DO

- encourage the other party to obtain independent legal advice in relation to complex transactions;
- explain the nature of the transaction carefully;
- deal honestly and fairly with customers;
- ensure that your customers understand all important terms and any adverse aspects of any contract or sale;
- follow all relevant industry codes of practice;

- allow the customer time to consider documents and consult their independent advisers;
- give careful consideration to any request to change the terms of any standard form contract used by the University for the purchase or supply of goods or services.

**DO NOT**

- engage in any conduct that a court may consider unconscionable having regard to the matters set out above, including:
 - the relative strengths of the bargaining positions of the parties;
 - whether the consumer was able to understand the documentation;
 - whether undue influence or pressure was exerted or unfair tactics used;
 - whether the consumer was required to comply with conditions which were not reasonably necessary for protection of the supplier's legitimate interests;
 - the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services from a different supplier;
- enter into an agreement with a person who is intoxicated;
- enter into an agreement with a person who you think does not understand the terms of the agreement, either because they are confused or have language difficulties;
- use pressure tactics to secure a sale;
- attempt to coerce a customer into signing before they have read and understood any documents;
- impose any unreasonable terms or conditions on a customer that is in a weaker position, particularly if the customer is effectively locked into dealing with the University due to particular circumstances;
- fail to disclose the total cost of the product or service being offered or any other important terms, including any intended conduct of the University that may affect the interests of a business consumer or any risks to the business consumer arising from the University's proposed conduct;
- discriminate between different customers and treat one customer or a group more favourably than another unless you have legitimate business reasons for making those distinctions;
- withhold information that would influence the customer's decision about whether or not to purchase goods or services or enter into an agreement with the University.

7. CONSUMER PROTECTION

Note: The ACL replaced Part V of the TPA and is implemented in Schedule 2 of the CCA. The application of the law and the legal principles behind the misleading or deceptive conduct prohibitions has remained largely the same for the purposes of the University. However, there have been additional laws introduced regarding consumer guarantees, sales practices and a national product safety system.

The ACL aims to protect consumers. This can affect the University in two ways:

- it can protect the University if the University deals with a business that fails to do business properly and in accordance with the standards imposed by the CCA;
- it can also apply in situations where the University is the 'wrongdoer' – for example, if students are given incorrect information about a program or a supplier is given incorrect information about the University's requirements for a particular product or service.

Section 18 of the ACL prohibits businesses engaging in misleading or deceptive conduct. This includes conduct that is 'likely' to mislead or deceive, even if no-one has actually yet been misled or deceived. Generally, the University and other businesses are required to be truthful and refrain from giving impressions which are incorrect. Remaining silent and failing to disclose relevant information can also be a breach of the CCA.

You do not have to be 'dishonest' to breach section 18 of the ACL. The provision can be breached even where you have no intention of misleading or deceiving a person, including where you have not taken sufficient care with your communications. **Remember – it is no excuse that the conduct is unintentional or accidental.**

The other provisions of the ACL prohibit specific types of misleading and deceptive conduct and certain other unfair practices. The ACL prescribes consumer guarantees into sales transactions with consumers; this replaces the previous system of implied warranties. These guarantees will be described in further detail later in this Manual.

Staff working in areas that involve substantial interaction with customers, suppliers, competitors and the public generally must pay special attention to these CCA obligations. This is particularly so for individuals involved in advertising, marketing and general sales, customer service, complaint handling and corporate services.

7.1 Misleading or Deceptive Conduct

Section 18 of the ACL which prohibits misleading or deceptive conduct is one of the most litigated provisions of the CCA.

Conduct (including oral representations) in trade or commerce that is misleading or deceptive or is likely to mislead or deceive is prohibited.

Misleading or deceptive statements often arise:

- in promotional or marketing material (which for the University might include advertisements for various programs);
- during sales discussions or negotiations (eg when trying to 'sell' programs to prospective students or promote the University).

The University creates and distributes a vast amount of information in the form of advertising, brochures, handbooks, prospectuses and other related documents. Some of this material is in hard copy form while other information appears on the University's website.

It goes without saying that this information should be accurate and factually correct; but it is not enough for information to be technically or narrowly correct – a representation as a whole must give an accurate overall impression to the likely audience.

Special care must be taken when you refer to:

- characteristics of the service, program or product that are likely to be very important to students or customers (e.g. the identity of a particular lecturer giving a special seminar);
- any characteristics of the service, program or product that are subject to variation;
- future events that might or might not occur.

If a representation relates to a future matter or prediction, it is likely to be regarded as misleading if there are no reasonable grounds for making the representation at the time the representation is made or if the representation is not appropriately qualified.

It is no excuse that an error was unintentional or accidental. **Even silence can be misleading** if it is clear that your students or customers have the wrong idea and are relying on your information (or lack of it). If you believe a student or customer has a misunderstanding, it may be misleading if you do not correct that misunderstanding.

There are no fines or penalties imposed for a breach of section 18 of the ACL. However, injunctions to restrain breaches may be sought and a court may order rectification of the breach or damages to be paid to a person who suffers loss or damage as a result of the breach.

Fines of up to \$1.1 million for corporations and \$220,000 for individuals may be imposed for breaching other provisions of the ACL (including section 29, which specifically prohibits many of the same kinds of conduct as section 18). Additionally, the powers of the ACCC to issue various notices (infringement, substantiation and public warning notices) apply to many other parts of the ACL.



WARNING SIGNALS

- statements made in discussions or contractual negotiations that are not absolutely correct, or if they relate to future matters, cannot be substantiated;
- providing information without ensuring its accuracy;
- claiming to have authority you do not or may not have;
- providing reports from third parties without appropriate qualification or disclaimers or without specifying the source of the report;
- failing to provide information where it is apparent that the other party is basing its decisions on an incorrect assumption.

Note

- if a comparison is made with a competitor's program or product, the comparison **must** be fair and absolutely accurate in all the circumstances. It is better to invite the customer to make the comparison themselves;
- advertising often involves a degree of 'puffery' but **care must be taken** to ensure that the average person would not be misled.

**DO**

- consider whether by your statements, conduct or silence you may (intentionally or unintentionally) be likely to mislead or deceive;
- remember intention is irrelevant;
- remember that a breach can occur where no person is actually misled or deceived or there was no intention to mislead or deceive – the mere likelihood that a person may be misled or deceived is sufficient;
- ensure all advertisements, marketing or promotional materials are checked for accuracy before they are used;
- correct any misunderstanding if you believe the other party has misunderstood;
- ensure you have the expertise or skills you claim;
- state clearly any qualifications or assumptions relating to information you provide;
- remember competitors may use the information you provide to bring an action against you or the University;
- remember always to include the relevant GST amount in any quotes for products or services to which GST does apply. Although the educational services provided by the University are mostly GST free, there are still some University products, services and agreements which will need to include a GST component.

**DO NOT**

- rely on 'fine print' to qualify an exaggerated statement or to clarify an ambiguity. The overall impression created by the statement or advertisement is important;
- use superlatives unless it is self-evident exaggeration;
- provide reports or materials from third parties without an appropriate qualification or disclaimer;
- guess or speculate about future matters unless you have a reasonable basis for making predictions about such matters;
- make any statement or become involved in communications which are inaccurate, misleading, deceptive or unsubstantiated.

**EXAMPLES**

A University developed a program in commercial law and attempted to attract students by assuring them that after completing the program, they would be able to obtain employment in a growth industry.

The program brochures stated: 'We have designed this program to equip you with the practical skills you need to practise commercial law. You are sure to get a job after this program!' Not one student who completed the program obtained employment within six months of completion. Industry employers later said the program was poorly designed for its purpose.

In this case, unemployed graduates might complain that the University's conduct in preparing the brochures and promoting the program was misleading or deceptive.

A postgraduate program was advertised to include a period of work experience. When the program started, it became apparent that students were required to find their own work experience placements. A student complained that she thought the University would be organising the placement.

The relevant paragraph of the newspaper advertisement for the program read:

"This intensive 11-month program provides comprehensive management training in the changing Asian business context. A further three months are spent in an overseas placement with a leading company honing management skills and building the international networks essential for doing business in the region".

This was an issue in a real case. The judge decided that the advertisement:

"was ambiguous. It did not make clear who was to be responsible for organising the 'overseas placement with a leading company.' It is, in my opinion, clearly plausible that a potential applicant for admission to the Program might have gained the impression from the advertisement that the [University] would be responsible for organising a placement in a leading company for every applicant admitted to the Program".

A University has a brochure that contains information for prospective overseas students. The brochure states that the University is located "in close proximity to the centre of the city".

An overseas student enrolls at the University. She has organised part-time work at her aunt's business in the city centre. Upon arriving, she discovers that the University is located a long way from the city and that it will take her over an hour to reach the city by public transport. It will therefore be impractical for her to keep her part-time job. If she had known about the distance, she would have enrolled at a different University which is much closer to the city.

In these circumstances, the University's brochure is likely to constitute misleading or deceptive conduct and may be actionable since the student has suffered loss or damage in not being able to take up employment with her aunt.

A well-known tennis player has done a degree in your Division and your current information brochure has a picture of him on the University grounds on the front cover. You did not obtain his permission before using the photograph.

This could constitute misleading conduct because readers might think the sportsman is endorsing your Division. The tennis player himself would certainly have grounds to complain about the unauthorised use of his image.

7.2 False or Misleading Representations

Section 29 of the ACL prohibits an organisation, in trade or commerce, from making false or misleading representations in connection with the supply of goods or services, including falsely or misleadingly representing:

- the standard, quality, value, grade, composition, style, model, history or previous use of goods or services;
- that goods are new;
- testimonials by any person relating to the goods or services;
- sponsorship, approval or affiliation of goods or services;
- performance characteristics, accessories, uses or benefits of goods or services;
- price;

- availability of spare parts or facilities for repair of goods;
- place of origin of goods;
- the need for any goods or services;
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;
- a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person already has under a Commonwealth, State or Territory law.

The last prohibition will particularly affect businesses offering extended warranties. A business cannot charge for something 'extra' that is already afforded under law. An extended warranty **must** provide an actual added benefit for the consumer if they are made to pay extra for the benefit.

The CCA also prohibits the making of false or misleading representations in connection with the sale of land.

7.2.1 Testimonials

The introduction of a subsection relating to misrepresentations in regard to testimonials is an important change that will be relevant to the University. Testimonials are a common form of advertising, both within the education sector and generally. Generally, a testimonial is a statement by 'past students' about the University used in advertisements and for other marketing purposes.

The University must not make a false or misleading representation that *purports* to be a testimonial by any person relating to goods and services or make false or misleading representations concerning a testimonial or a representation purporting to be a testimonial.

The University **must** ensure that if it does use testimonials, that these representations can be substantiated.



EXAMPLE

A University runs a series of radio advertisements that utilise voiceovers from 'past students' describing the University as the 'best place in Australia to get an education' as well as various other positive comments regarding the University.

The ACCC issues a substantiation notice to the University referring to the advertisements and asking them to substantiate that the testimonials were actually provided by past students.

If, in response to the substantiation notice the University is unable to provide proof that the comments purporting to be testimonials were actually made by past students, it may be subject to further ACCC investigation and/or penalties.

7.3 Advertising Practices

The ACCC has been particularly concerned with misleading advertising practices. The following advertising practices in particular may constitute a breach of the CCA:

Advertising Partial Prices

A business must not promote the sale of its products or services by reference to a portion only of the full or total purchase price (i.e. that a particular program will only cost students a certain amount per month, without disclosing the total cost of the program).

Section 48 of the ACL specifically prohibits partial pricing practices. The 'component pricing' requirements of the CCA prohibit the University from using partial pricing representations unless it also 'prominently' specifies the total amount payable or the 'single figure' price.

The 'single figure' price must include all fees and charges that are quantifiable at the time the pricing representation is made, including such things as taxes, delivery charges or application fees. For example, it is no longer permissible to say '\$10 per month for 12 months' without also stating the single price of \$120.

Section 48 of the ACL only applies to consumer transactions, most commonly being pricing representations the University makes to consumers and/or students.

While component pricing is not illegal, you **must be careful** when using any partial pricing representation to ensure it complies with section 48 of the ACL.

Fine Print Qualifiers

Fine print disclaimers such as 'conditions apply' or the use of an asterick together with a set of exclusions, are often used to qualify statements made in advertisements. Qualifying statements must be clear, prominently set out and must not directly contradict the rest of the advertisement. It must be clear to the consumer what the real offer is.

Two-price Advertising

This is the advertising practice where a business advertises that its products or services are being offered at a 'discounted' price, where in reality the goods or services have never been charged at a higher price and the 'discounted price' is in fact the normal price for the goods or services.

'Discounts' should only be advertised if they provide a genuine reduction in price for the goods or services.

Comparative Advertising

When comparing a competitor's products or services with the University's products or services, it is important that the advertisement gives a truthful impression of the differences between the products or services and does not exaggerate any disadvantages associated with the competitor's products or services or any advantages of the University's products or services. Comparisons should only be made with 'like' or equivalent products or services of a competitor. Be aware that a competitor may alter its goods or services in response to comparative advertising with a consequence that a comparison becomes misleading.

Imaginary Gifts or Prizes and Bait Advertising

The advertising practice of offering gifts, prizes or particular free items in association with the promotion or supply of products or services is only allowable where there is the intention of honouring the offer.

The University must ensure that any such promotional gifts or prizes are capable of being provided and are not available in unduly restrictive quantities or time periods.

Similarly, the University must ensure that it does not offer goods or services at a specified price if it has grounds to believe it will not be able to offer the goods or services at that price in reasonable quantities for a reasonable period of time. Where possible, if goods or services are advertised at a particular price and stock runs out, additional stock should be obtained within a reasonable time and sold at the advertised price or equivalent goods should be offered at the same price.

**DO NOT**

- make assumptions that your advertising material will only reach a particular target audience;
- make any statements concerning gifts or prizes offered when there is either no intention of providing the gifts or prizes or they will be made available in unduly limited quantities or for an unreasonably limited period of time;
- refer to prices in promotions unless they represent the full price and there will be no price increases while the advertising is current;
- compare prices or other characteristics of the University's goods or services with competitors' goods or services unless the compared products or services are equivalent and any compared prices or other characteristics are current. An advertising campaign must be quickly withdrawn or changed if the competitor alters its price or the characteristics of its goods or services;
- advertise 'discounted' prices unless your product or service has actually been sold for a higher price within a recent period;
- use fine print to qualify an advertisement where the fine print contradicts statements made in the body of the advertisement;
- use bait advertising or offer goods or services at a particular price if you do not intend to or are not able to supply the goods or services at that price for a reasonable period of time;
- accept payment without intending or being able to supply goods or services as ordered.

7.4 Misleading Conduct in Relation to Employment

The University is prohibited from engaging in misleading conduct in relation to the availability, nature, terms or conditions of employment of staff.

**EXAMPLE**

A University inserts an advertisement for a vacant position stating that a particular benefit, such as a car, will be provided to the successful applicant. After accepting the position, the successful applicant finds that they will only be given the benefit if part of their salary is sacrificed and not as an additional benefit.

7.5 Referral selling

The CCA prohibits inducing customers to buy goods or services by promising them that they will receive a discount or rebate if they provide the names of additional future customers, if in fact there is no assurance that the discount or benefit will be received because it depends on some other future contingency (i.e. the potential customers actually making a purchase).

7.6 Harassment or coercion

The CCA prohibits the use of physical force or undue harassment in relation to either the supply of goods or services or the payment for goods or services by a customer.

Care therefore needs to be taken when attempting to recover overdue debts from customers. The threat of court proceedings where there is no basis for any such proceedings can also amount to harassment or coercion.

7.7 Other consumer protection matters

There are a number of other prohibitions in the ACL that are set out below. Most are not relevant to the University, but are included for the sake of completeness.

An organisation **must not**:

- make false or misleading representations about the profitability, risks or other material aspects of a business activity that an organisation has represented can be carried on at or from a person's place of residence;
- engage in pyramid selling;
- assert rights to payment for unsolicited goods or services; this includes:
 - sending out unsolicited credit or debit cards;
 - claiming payment for unsolicited goods or services or for making a directory entry;
- make false or misleading representations in relation to land.

7.8 Consumer Contracts

The definition of 'consumer' for the purposes of the CCA is set out below.

A person (including a corporation) will be a consumer in relation to contracts to acquire goods if:

- the price of the goods does not exceed \$40,000; or
- the price of the goods exceeds \$40,000 but the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption or if the goods consisted of a vehicle acquired principally to transport goods on public roads.

AND the goods are not purchased for either:

- resale; or
- using them up or transforming them in the process of production or manufacture or in the course of repairing or treating goods or fixtures on land.

A person (including a corporation) will be a consumer in relation to contracts to acquire services if:

- the price of the services does not exceed \$40,000; or
- the price of the services exceeds \$40,000 but the services are of a kind ordinarily acquired for personal, domestic or household use or consumption.

In some circumstances, the consumer will be the person acquiring goods or services from the University and in other circumstances, the University will be the consumer who is acquiring goods or services from another person. In many cases, a consumer will be a student of the University.

In the past, consumer contracts have contained warranties and conditions that were only *implied* by the CCA (then the TPA). However, the ACL has brought in statutory consumer guarantees that now apply to every acquisition of consumer goods or services.

7.9 Consumer Guarantees

The new statutory consumer guarantees apply to the supply of goods and services to consumers.

Applying the definition of consumer in the ACL, they therefore apply where goods or services acquired do not exceed \$40,000 or where they are of a kind ordinarily acquired for personal, domestic or household use.

The guarantees apply regardless of whether or not they are explicitly stated in a contract and cannot be waived or excluded. In fact, it is an offence to claim that the consumer guarantees are excluded or do not apply.

The consumer guarantees are, as provided in Division 1 of Part 3-2 of the ACL, as follows:

- the supplier has the right to sell goods;
- the consumer will have a right to undisturbed possession of goods and that they will be free of undisclosed charges, securities and encumbrances;
- that goods will be of an acceptable quality, i.e. fit for purpose, acceptable in appearance and finish, free from defects, safe and durable;
- that goods will be fit for any purpose which is disclosed to the supplier or for which the supplier represents they are reasonably fit;
- that goods will correspond with their description;
- that goods will correspond with any sample or demonstration model;
- the supplier will take reasonable action to ensure the reasonable availability of repair facilities and spare parts for a reasonable period after supply of goods;
- that the supplier will comply with any manufacturer's express warranties;
- that services will be rendered with due care and skill;
- that services and any product resulting from the services will be fit for purpose;
- that services and any product resulting from the services will be of such a nature, quality, state or condition as to reasonably achieve any desired result which a consumer makes known to the supplier that he or she wishes to achieve; and
- that services will be provided within a reasonable time.

The University should always ensure that any goods or services it provides to *consumers* (as that term is currently defined in the CCA) are of a high quality and comply with the minimum essential requirements set out above. Further, the University must exercise caution and care when advising students of what rights they do and do not have in regard to its goods and services.

You should also be aware that simply meeting the statutory guarantees will not always be sufficient from a business point of view. The minimum standards imposed by the CCA may not meet actual customer or student expectations; something the University wishes to avoid. Moreover, section 5(2) of the *University of South Australia Act 1990* (the legislation under which the University was created) requires that:

"The University must strive for excellence in teaching and research and for attainment of the highest standards in education".

7.10 Remedies

The ACL also changes the remedies available to consumers for a failure of goods or services to comply with a consumer guarantee. These remedies are set out at Part 5-4 of the ACL.

The ACL defines failures into two categories; 'major' or 'minor'. A major failure occurs where goods or services:

- would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or
- significantly depart from the description by which they were supplied; or

- are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot easily, within a reasonable amount of time, be remedied to be fit for the purpose; or
- are unfit for a disclosed purpose and they cannot easily, within a reasonable amount of time, be remedied to be fit for the purpose; or
- are unsafe or create an unsafe situation.

If a major failure occurs, the consumer may:

- demand a full refund or replacement; or
- opt to keep the goods and seek compensation for the drop in value of the goods.

If a minor failure occurs, the consumer can demand the supplier rectify the failure by refund or replacement or by sending off for repair if this is reasonable.

A consumer may also seek an action for damages against the supplier for the loss or damage suffered by the failure.

These remedies seek to create uniform refund policies across businesses in order to protect consumers from faulty products. From the University's perspective, these remedies need to be considered from both a supplier's perspective and a consumer's perspective, as the University will be a 'consumer' where goods or services worth less than \$40,000 are acquired.



EXAMPLE

A University offers a range of branded clothing for sale to its students. Displayed on every receipt of purchase is a clear disclaimer reading "no representations made about quality and NO REFUNDS".

A large number of shirts purchased by students shrink significantly on being washed for the first time. Consequently, there are complaints made to the University and refunds are requested.

The University attempts to rely on the disclaimer on the receipt and claims that it was clearly displayed.

On investigating the matter, the ACCC identifies that the shirts did not live up to the standards required by the CCA because they were not of an acceptable quality. Because of this, the ACCC finds that the University has breached a consumer guarantee in selling shirts and failing to rectify the breach. Moreover, the ACCC identifies a further breach by reason of the 'NO REFUNDS' statement displayed on the receipts, which misrepresents the students' legal rights.

7.11 Unfair Contracts

Part 2-3 of the ACL protects consumers and small businesses from 'unfair' terms in standard form contracts. The new laws could apply to any standard form contract or agreement used by the University, including some contracts with students.

Any term(s) of a contract that are found by a court to be unfair will be void, meaning that the supplier under the contract might not obtain the benefit of important rights or benefits. This could lead to loss or damage being suffered by the University if standard form contracts are not prepared correctly. Contracts are assumed under the CCA to be standard form contracts, however, this assumption is rebuttable by evidence to the contrary.

7.11.1 Relevant contracts

A 'consumer contract' for the purposes of the unfair contract terms prohibition is an agreement for the supply of goods or services, or a sale or grant of an interest in land, where the goods, services or interest is predominantly acquired for personal, household or domestic use or consumption (**Consumer Use**). In general, whether or not goods or services are acquired for Consumer Use will be determined by reference to the customer's intention in acquiring those goods or services.

Goods or services (including educational services) made available by the University will generally be acquired for Consumer Use. Some examples likely to be relevant in the present context might include the sale of text books, the supply of fitness/recreational facilities, accommodation services or counselling.

Where Consumer Use goods or services are provided under a 'standard form' contract (whether in writing or not), the terms of the contract could be challenged under the unfair contract laws.

A 'small business contract' for the purposes of the unfair contract terms prohibition is a contract for the supply of goods or services, or a sale or grant of an interest in land, where at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons and either:

- the upfront price payable under the contract does not exceed \$300,000; or
- the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1 million.

7.11.2 What is a standard form contract?

For the purposes of the CCA, it is presumed that all contracts are 'standard form'. This presumption can be rebutted. Relevant considerations include whether the contract was subject to negotiation (as opposed to a 'take it or leave it' scenario) or prepared before discussions took place with the other party.

Many common contracts are standard form and are presented as a 'take it or leave' proposition. For example: telecommunications contracts, gym membership agreements; library membership agreements, online shopping terms; car rental, equipment hire forms and consumer software licenses are almost always 'standard form' contracts.

7.11.3 What is an unfair term?

A term of a standard form consumer contract will be unfair if it:

- causes a significant imbalance in the rights and obligations of the parties to the contract;
- is not reasonably necessary to protect the legitimate interests of a party; and
- causes detriment to a party if it were applied or relied on.

There are a number of considerations that must be taken into account when assessing the overall fairness of a term. Terms which can be exercised unilaterally for the benefit of a party or to the detriment of another party may be unfair.

Some terms are exempted from the unfair contract terms prohibition. For example, terms that define the main subject matter of a contract (such as the promise to supply) and terms that are required or permitted by legislation are exempt.

The University operates in a highly regulated market, meaning that assessing which contract terms are 'fair' or 'unfair' for the purposes of the CCA is not easy. Your role is not to assess terms, but to identify

standard form consumer contracts and to ensure that they are reviewed by the University's Legal Services.

7.11.4 Common unfair terms

Depending on the circumstances surrounding the contract, any term of a contract can be unfair. However, terms that are more likely to be seen as unfair include:

- terms that enable the University to unilaterally alter a contract without the consent of the other party;
- a right for the University to terminate a contract for convenience;
- an ability for the University to impose unreasonable fees and charges (such as late fees); and
- certain limitations of the University's liability.



DO

- identify where standard form contracts are being used and ensure they have been reviewed by the University's Legal Services; and
- immediately refer any student or customer complaints about the fairness of the terms of a contract (whether written or unwritten) to the University's Legal Services.



DO NOT

- seek to enforce the terms of a contract if the student or customer asserts it is unfair without review by the University's Legal Services; or
- amend standard form contracts without approval from the University's Legal Services.



EXAMPLES

The Central University rents out rooms for private functions, including social events. The Central University requires that the hirer complete a 'room hire' form, which includes the usual terms relating to payment, damage and hire conditions. One of the conditions is that the renter is required to pay a cleaning fee of \$1,500 if the room is not left in satisfactory condition (as determined by the Central University).

Following one event, some rubbish is left in the room and the Central University cleaner is required to clean it up. The Central University's cleaning contractor charges \$400 overtime. The Central University then asserts that the customer is required to pay \$1,500.

The customer challenges the term of the room hire form as being unfair. The court agrees that the contract was a standard form consumer contract and states that the arbitrary cleaning fee was not required to protect the legitimate interests of the Central University and was excessive. The Central University is prevented by the court from charging any amount to the customer for the cleaning fees.

CampusFitness+ is a personal training and fitness service provided by the Green University Student Union. Students are required to purchase sessions for \$30 each, in 12 session blocks. Students are

asked to sign a personal injury waiver, but otherwise no contract is signed for the supply of the sessions.

After a few months, the Student Union decides that it is not possible to run the sessions on-campus as too many sessions have been purchased and students cannot be accommodated by the limited on-campus resources. The Student Union has no alternative but to move the sessions to a city gym located about 10 minutes away from the University and does not wish to provide any refunds as the customer funds have already been paid to the trainers.

Most of the students who have purchased blocks do not want to have the sessions held off-campus. Many argue that the reason for them acquiring the blocks was the convenience of the on-campus service.

The students apply to the court for a determination that the move to the city gym is a material variation to the contract by the Student Union and is unfair. The court declares that the change is unfair and orders that the Student Union either provide for the sessions on-campus or refund the full value of all sessions purchased by the aggrieved students.

7.12 Product Safety

A new national product safety regime has been introduced by the ACL. This will allow the Commonwealth to set and regulate product safety standards rather than have separate State and Territory laws.

Mandatory reporting requirements have also been introduced where the use of a consumer good or related service has caused a death or major injury or illness. A *supplier* must inform the ACCC within two days when they become aware that a product or service they have supplied has caused, or may have caused, a death or serious injury or illness to any person.

7.13 Defences

There are several defences that may be available to an organisation or individual prosecuted for contravention of the ACL, including where the contravention was due to:

- a reasonable mistake of fact;
- reasonable reliance on information supplied by another person;
- the act or default of another person, or an accident or some other cause beyond the organisation's or person's control, and the organisation or person took reasonable precautions and exercised due diligence to avoid the contravention.



DO

- ask your supervisor for advice if you are unsure whether a proposed statement is likely to be false or misleading;
- be aware that this is a high risk area of the law and strict compliance is essential.



DO NOT

- make statements about programs or other products or services offered by the University, including in advertisements or marketing that cannot be fully substantiated;
- make statements that you think are *probably* true – **you must be certain**.

8. COMPLIANCE PROCEDURES

8.1 Background

The University has established the following procedures to assist you in complying with the CCA. You must ensure that you comply with these procedures at all times. If you are uncertain whether a particular procedure applies, please consult your supervisor.

These procedures will be reviewed from time to time and will be updated to include any changes in trade practices legislation or to improve the procedures in practice. You will be advised of any changes.

8.2 Chief Financial Officer

The University has nominated the CFO to manage the University's compliance program as the Responsible Officer under the University's Legislative Compliance System.

If you have any questions about the CCA or these compliance procedures, please seek advice from the CFO or the University's Legal Services.

8.3 Education and Training

The University's CCA Compliance Manual, CCA Compliance Guidelines and CCA Incident Report template are available from the University's intranet site: <http://www.unisa.edu.au/policies/cca/default.asp>

The CCA Compliance Manual is a required training tool for all new and existing staff of the University. New employees should read this Manual as part of their Induction Program.

You may also be asked to take part in a training program that has been specially designed to help you avoid breaching the CCA. You will be advised by your supervisor what training you need to participate in and how often you need to do it. Where necessary, new employees may also be required to participate in a specialised training program as part of their initial training and induction.

The CFO will be responsible for continually monitoring the effectiveness of the training program. If you have any comments or suggestions about the compliance program or about how the training or this Manual could be improved or updated, please contact the Project Officer to the CFO.

8.4 Complaints by ACCC, Department of Consumer Affairs or Office of Fair Trading

The following procedures exist to deal with complaints or investigations by the above bodies:

- all complaints will be made to or must be referred immediately to the CFO who will seek the advice of the University's Legal Services;
- the University's Legal Services will review all complaints. A decision will then be made on any further action the University should take. This action will be implemented on a priority basis;
- ongoing discussions or correspondence relating to complaints and investigations must be conducted by or under the supervision of the CFO or the University's Legal Services;
- employees must promptly provide all information and supporting documents requested by the CFO or the University's Legal Services;
- the CFO, assisted by the University's Legal Services, will keep the Vice-Chancellor and Audit and Risk Management Committee informed as to the progress of all complaints and investigations as required.

8.5 Conduct of Competitors

All staff are encouraged to report to their supervisor any conduct by a competitor of, or supplier to, the University which they believe might be in breach of the CCA.

8.6 Reporting

It is important that non-compliance with any of the matters set out in this Manual be reported immediately to the University's Legal Services. Early reporting may avoid or significantly reduce any adverse consequences of non-compliance.

A non-compliance report should include the following minimum information:

- a brief description of the non-compliance;
- a proposal for rectification; and
- a timeframe for rectification.

The University's Legal Services will maintain a register of reports.

8.7 Document Sign-Off

It is important that contracts and other documents prepared by University employees are signed off by a staff member who has been delegated authority to sign documents of that type.

Refer to the Vice-Chancellor's Authorisations for details regarding University personnel who have authority to sign different types of documents located at:

<http://www.unisa.edu.au/policies/policies/corporate/C32.asp>.

9. GOOD PRACTICES

Set out below are practices recommended for ensuring that the University's trading activities in relation to goods and services comply with Part IV of the CCA.

1. University staff may compete vigorously in each market in which the University operates using:
 - pricing;
 - standard of service;
 - product benefits; and
 - other ethical means that do not involve anti-competitive practices, such as those outlined below.
2. University staff must not enter into any of the following types of arrangement, if the arrangement would have the purpose, or effect or likely effect, of substantially lessening competition:
 - prohibiting or restricting customers from handling the products of a competitor;
 - prohibiting or restricting suppliers from supplying goods or services to a competitor or any other third party;
 - requiring the customer to buy all its requirements of a particular product from the University or to deal exclusively with the University;
 - requiring the customer to acquire goods or services from a third party as a condition of the University supplying goods or services to the customer;
 - misuse market power for the purpose, or with the effect or likely effect, of substantially lessening competition in any market in which the University participates;
 - restricting the territory or markets in which the customer may resell products or services purchased from the University;
 - restricting the customers or classes of customers to whom the customer may resell; or
 - any other contract, arrangement or understanding which has the purpose, or effect or likely effect, of substantially lessening competition.
3. University staff must not (regardless of the effect on competition):
 - restrict the minimum price at which the customer may resell any goods or services it purchases from the University;
 - enter into any agreement with a competitor to prevent, restrict or limit the supply of goods or services, allocate markets or rig bids; or
 - enter into any arrangement with a competitor that has the purpose, or effect or likely effect, of fixing, controlling or maintaining prices, discounts, allowances, rebates or credit in relation to goods or services.
4. If University staff wish to combine two or more business products for sale exclusively as a package, they must:
 - consider carefully the market for each of the products to determine whether the arrangement may result in a substantial lessening of competition; and
 - not proceed without seeking legal advice from the University's Legal Services if there is a possibility that sale of the products together will result in a substantial lessening of competition.

5. If University staff wish to enter into an agreement or understanding with a customer that the customer will buy all its requirements of a particular product from the University or that the customer will deal exclusively with the University and not purchase products from any competitor of the University, they must:
 - consider carefully the market for the products to determine whether the arrangement may result in a substantial lessening of competition; and
 - **not proceed without seeking legal advice from the University's Legal Services.**
6. University staff must not participate in discussions with competitors regarding confidential matters that are the subject of competition between the University and a competitor. In particular, the University must not enter into any contract, arrangement or understanding with a competitor regarding:
 - prices or discounts;
 - terms or conditions of sale, including credit terms;
 - profits, profit margins or costs;
 - bids or an attempt to bid;
 - sales, territories or markets;
 - entering or leaving geographic markets;
 - entering or leaving product markets;
 - selection, classification, rejection or termination of customers or classes of customers;
 - the exchange of competitive information; or
 - any other matter which may restrict or impact upon the University's freedom of action or independence in the competitive conduct of its business.
7. University staff must not allow express or tacit anti-competitive agreements or understandings between the University and one or more competitors to:
 - come into existence; or
 - limit the market behaviour of the University in any way.
8. To help protect the University from any claims that it has collaborated with its competitors, University staff must record the source of any information received:
 - regarding competitors; or
 - which influences its market strategy, particularly in relation to price.
9. In general, University staff should exercise caution when making decisions which may affect competition. In particular, care should be taken in markets in which the University, as a supplier, has or might have a relatively large market share or where the University might have substantial market power as a buyer. If there is any concern or doubt around these issues, you should seek advice from both the University's Legal Services and your supervisor.
10. University staff must ensure the accuracy of information published by the University or verbal representations made on behalf of the University.
11. Documentation supporting the substance of representations made by the University should be maintained.

APPENDIX 1: READY-REFERENCE SUMMARY

CCA RISK AREA	EXAMPLES
AUTOMATIC BREACHES OF THE CCA	
<p>Cartel Conduct: Price Fixing</p> <p>Occurs if two or more competitors enter an agreement with the purpose, or effect or likely effect, of directly or indirectly fixing, controlling or maintaining prices, mark-ups, discounts, allowances, rebates or credit in relation to goods or services.</p>	<ul style="list-style-type: none"> ▪ agreeing prices, discounts, allowances, rebates or credits for goods or services; ▪ agreeing to maintain prices, discounts, allowances, rebates or credits for goods or services; ▪ agreeing to a process to control prices, discounts, allowances, rebates or credits for goods or services; ▪ agreeing circumstances in which prices, discounts, allowances, rebates or credits for goods or services will be fixed, controlled or maintained; ▪ exchange of pricing information with an understanding that price matching will occur.
<p>Cartel Conduct: Restricting outputs, allocating markets or bid rigging</p> <p>Occurs where two or more competitors enter into an arrangement for the purpose of:</p> <ul style="list-style-type: none"> ▪ preventing, restricting or limiting the supply or acquisition of goods or services ▪ market sharing ▪ rigging bids 	<ul style="list-style-type: none"> ▪ deciding who to supply to by arrangement with a competitor; ▪ discussing tenders with a competitor and agreeing that one or more parties will not tender for the supply of certain goods or services, agreeing the content of tenders, agreeing how tenders will be submitted or agreeing that one party will not submit a tender at all; ▪ imposing conditions of sale which have been agreed with a competitor; ▪ comparing poor paying customers with a competitor and agreeing not to supply each other's poor paying customers until they have paid their debts; ▪ agreeing with a competitor how to divide or 'share' customers or markets.
<p>Resale Price Maintenance</p> <p>Occurs if a supplier insists on or attempts to persuade a reseller not to resell below a certain price.</p>	<ul style="list-style-type: none"> ▪ imposing minimum prices for resale; ▪ refusing to supply resellers selling below recommended prices; ▪ pressuring or threatening distributors to raise prices.

COMPETITION BREACHES OF THE CCA	
<p>Agreements which substantially lessen competition</p> <p>Entering or giving effect to contracts, arrangements or understandings that have the purpose, or effect or likely effect, of 'substantially lessening competition' in a market.</p>	<p>Any contract, arrangement or understanding which has the purpose, or effect or likely effect, of substantially lessening competition, which may include arrangements for:</p> <ul style="list-style-type: none"> ▪ joint ventures in regard to facilities; ▪ entering into joint purchasing or joint supply agreements with competitors; ▪ entering into any understanding with a competitor to share customers or divide up markets; ▪ attempting to limit customer contact with competitors.
<p>Concerted practices which substantially lessen competition</p> <p>Engaging with another person in a concerted practice that has the purpose, or the effect or likely effect, of substantially lessening competition.</p>	<p>Any form of cooperation between two or more persons, or conduct which would establish such cooperation, which has the purpose, or the effect or likely effect, of substantially lessening competition.</p>
<p>Misuse of market power</p> <p>Misusing a substantial degree of market power with the purpose, or the effect or likely effect, of substantially lessening competition in any market in which the person participates</p>	<p>Misusing market power may involve:</p> <ul style="list-style-type: none"> ▪ refusing to deal with other persons ▪ restricting access to essential inputs for another person's business ▪ pricing goods or services below costs for a sustained period ▪ tying or bundling of goods and services.
<p>Exclusive dealing</p> <p>Exclusive dealing practices include:</p> <ul style="list-style-type: none"> ▪ supplying goods or services on the condition that the purchaser does not acquire goods or services from a competitor of the supplier or the purchaser accepts some restriction on its right to resupply goods or services ▪ acquiring goods or services on the condition that the supplier accepts some restriction on its right to supply third parties ▪ supplying goods or services on the condition that the purchaser acquires goods or services from third party. 	<p>The following conduct will constitute exclusive dealing where it has the purpose, or effect or likely effect, of substantially lessening competition:</p> <ul style="list-style-type: none"> ▪ refusing to supply a new customer or stopping supplying an existing customer because: <ul style="list-style-type: none"> ○ they have dealt with a competitor of the University; ○ they will not agree to stop buying goods or services from a competitor; or ○ they have not acquired goods or services from a third party. ▪ prescribing a condition that the customer not re-supply products or services acquired from the University or not resupply to particular persons or in particular places; ▪ refusing to purchase from a new or existing supplier because that supplier deals: <ul style="list-style-type: none"> ○ with a competitor;

	<ul style="list-style-type: none"> ○ with any other particular person; ○ in a particular place or territory; ▪ offering incentives or discounts to customers on the condition that they agree not to purchase other goods or services from competitors of the University or they accept some limitation on their right to resell goods or services.
<p>Secondary boycotts</p> <p>Where two persons act in concert to hinder or prevent a third person from supplying goods or services to, or acquiring goods or services from, a fourth person with the purpose, or effect or likely effect, of causing substantial loss or damage to the fourth person or to substantially lessen competition in any market in which the fourth person operates.</p>	<ul style="list-style-type: none"> ▪ acting in concert with another party for the purpose of hindering or preventing a third party acquiring goods or services from a fourth party; ▪ acting in concert with another party for the purpose of hindering or preventing a third person from supplying goods or services to a fourth party.
OTHER BREACHES OF CCA	
<p>False or misleading representations and misleading or deceptive conduct</p>	<ul style="list-style-type: none"> ▪ making untrue statements in negotiations; ▪ trying to sell products that are deceptively similar to a competitor's products; ▪ attempting to trade under a deceptively similar name to an existing business; ▪ making predictions as to price, quality or performance that are unrealistic; ▪ becoming involved in communications which are inaccurate, misleading or unsubstantiated; ▪ guessing or speculating about future matters unless there is a reasonable basis for doing so; ▪ leaving out material you consider a third party would consider important; ▪ allowing a third party to continue under a false impression when you know they are mistaken; ▪ making representations which you are unsure of or have not checked.
<p>Advertising and promotional claims</p> <p>Advertising is a high risk area for misleading or deceptive conduct.</p>	<ul style="list-style-type: none"> ▪ making untrue advertising claims; ▪ relying on fine print or general statements of qualification or limitation such as “exclusions apply” or “limited offer”; ▪ creating campaigns based upon unusual or dangerous or comical use of the University's products or services using words such as “free”, or ambiguous words such as “scientific” or “breakthrough”; ▪ making any statements concerning gifts or prizes offered when there is either no intention of providing the gifts or prizes or they exist in unduly

	<p>limited quantities or for an unreasonably limited time.</p>
<p>Price Claims Price claims are also a high risk area for misleading or deceptive conduct.</p>	<ul style="list-style-type: none"> ▪ referring to prices in promotions unless they are the full price and there will be no price increases while the advertising is current; ▪ comparing prices with competitors unless your products and services are equivalent, the compared prices are current and the advertising campaign can quickly be withdrawn or changed if the competitor alters its prices; ▪ advertising “discounted” prices unless your product or service has actually been sold for a higher price within a recent period.
<p>Consumer Guarantees</p>	<ul style="list-style-type: none"> ▪ supplying goods or services that fail to meet the prescribed statutory guarantees; ▪ charging a consumer for a benefit that would already be provided for under a statutory guarantee; ▪ attempting to exclude statutory guarantees from contracts or misrepresenting how they apply.
<p>Dishonest selling practices</p>	<ul style="list-style-type: none"> ▪ unduly harassing customers in relation to supply of products or payment; ▪ offering inducements to customers to supply names of prospective customers if in reality receipt of the inducement is contingent on some other future event (i.e. that the prospective customer actually makes a purchase).
<p>Unconscionable conduct</p>	<p>Unjust use by the University of its stronger bargaining position in relation to persons or businesses that have a special disadvantage:</p> <ul style="list-style-type: none"> ▪ withholding information that would influence customers’ decisions; ▪ imposing onerous terms or conditions on a person in a weaker bargaining position that are not reasonably necessary to protect the legitimate interests of the University;

	<ul style="list-style-type: none"> ▪ using undue influence or unfair tactics to pressure a person to sign any document before they have had an opportunity to consider its terms and seek independent advice; ▪ preparing contracts that are not in plain English and are not otherwise easy to understand, especially where it is clear that the customer has limited business or legal know-how and does not understand the terms of the contract.
<p>Unfair contracts</p>	<p>Use by the University of standard form consumer or small business contract that contain terms that are unfair. A term can be unfair if it:</p> <ul style="list-style-type: none"> ▪ causes a significant imbalance in the rights and obligations of the parties to the contract; ▪ is not reasonably necessary to protect the legitimate interests of the University; and ▪ it causes detriment.