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



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

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

A proper understanding of the CCA will assist you and the University of Adelaide in confidently pursuing positive and pro-competitive collaborations with a range of institutions, suppliers, retailers and other businesses while minimising the risk of CCA contraventions.

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

In particular, the University of Adelaide is committed to complying with the provisions of the CCA including the ACL and implementing a compliance program that accords with Australian expectations. The compliance program includes this Manual, regular communications and other education and awareness training materials.

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

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

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

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

Direct: +61 8 8313 6103

Email: kim.evans@adelaide.edu.au

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

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

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

faculties and schools making representations and claims about their facilities and teaching staff, courses and subjects, cultural identity, past and future success and affiliates; and

marketing and strategic communications promoting the University of Adelaide in all forms of media and communications – in print and digital media, including social media, television, radio and print media, on posters, banners and letterheads, and locally, nationally and internationally.

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

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

You could go to gaol

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

Heavy fines

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

Other consequences

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

an order preventing you from being involved in the management of any company or other relevant institution for a period of time;

a damages payout to persons who have suffered loss as a result of your contravening conduct; and/or

an order restraining you and the University of Adelaide from acting in certain ways.

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

Seriousness of contraventions

The Courts regard contraventions of the CCA very seriously and have imposed very large penalties on both TJ8yb5 connd l<D.0002 Tc-.0026 Tw[penaltie]5.5(s)-2.8(on)6(bothTJ)6(8y3mm-.c.)6(bothTJ)6

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

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

Contact details:

Direct: +61 8 8313 6080

Email: celine.mcinerney@adelaide.edu.au

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

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

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

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

- laws which say conduct is outright unlawful; and

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

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

- Price fixing;

- Market sharing;

- Restricting output;

- Bid rigging; and

- Exclusionary conduct.

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

- attempt to engage in cartel conduct;

- aid, abet, counsel or procure others into engaging in cartel conduct;

- induce (or attempt to induce) others into engaging in cartel conduct, whether by threats, promises or otherwise; or

- conspire with others to engage in cartel conduct.

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

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

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

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

Set competitive prices for products/courses and determine those prices independently.

Beat your competitors on price, service and quality.

Terminate any discussion on price started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Discuss prices, discounts or rebates with a competitor at any time including at higher education sector meetings, conferences or social functions.

Provide or exchange price lists or price information with a competitor.

Create an expectation in your competitor's mind that you will match prices and not compete with it in the market.

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

your production output, that is, the number of courses you offer or places offered in each course;

your capacity to produce goods or deliver courses; or

your supply of product/courses to certain persons.

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

Limit your output to save costs in times of low demand if the decision is made independently.

Increase offerings of courses and spaces available to win customers/students from competitors.

Terminate any discussion on course output or capacity started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Discuss course output, capacity or proposed plans with a competitor.

Agree with competitors to reduce supply to the market in order to inflate price, even if margins are small.

Discuss student lists or targeting of students, such as international students, with competitors.

ACCC v Tasmanian Salmonid Growers Association Ltd (2003)

The Tasmanian Salmon Growers Association consented to a finding that in order to reduce fish numbers to ensure the financial viability of the salmon farming industry in Tasmania, they

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

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

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

Get the best deal from your suppliers or distributors.

Attract students by competitive pricing of University of Adelaide courses and services.

Terminate any discussion on students or course sharing started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Agree with competitors which students your institutions will supply services/courses

ACCC v Renegade Gas Pty Ltd (2014)

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

ACCC v Vanderfield Pty Ltd (2009)

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

ACCC v FFE Building Services Ltd (2003)

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

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

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

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

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

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

Submit competitive bids to win tenders against other bidders.

Ensure that prices, terms and conditions of bids are set independently.

Talk to Legal and Risk if you want to submit a joint bid with a competitor.

Terminate any discussion on bids started by one of your competitors and report it to Legal and Risk immediately, or as soon as practicable.

Discuss whether you will bid or not with a competitor.

Discuss the contents of any bid with a competitor.

Decide with a competitor who should win a bid.

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

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

ACCC v TF Woollam & Son Pty Ltd (2011)

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

ACCC v Admiral Mechanical Services (2007)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Get the best deal from your suppliers.

Attract students by competitive pricing and service.

Agree with competitors which students or areas to supply.

Discuss with competitors about allocating distributors, suppliers or territories.

Create an expectation in your competitor's mind that you will not compete for its students/clients or in its chosen areas if it does the same for you or in your chosen areas.

ACCC v Cement Australia Pty Ltd (2013)

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

gaining access to unprocessed flyash; and

entering the South East Queensland concrete grade flyash market.

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

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

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

- laws which say conduct is outright unlawful;

- laws which say conduct is unlawful if it substantially lessens competition; and

- laws which say conduct is unlawful if it has an anti-competitive purpose.

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

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

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

- Misuse of market power; and

- Predatory pricing.

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

It is not necessary for the "specified price" to be a particular figure. It can be a range of prices,

ACCC v Mitsubishi Electric Australia Pty Ltd (2013)

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

ACCC v Navman Australia (2007)

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

ACCC v Netti Atom Pty Ltd (2007)

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

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

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

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

An organisation is “related” to another if it:

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

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

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

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

Remember that students, distributors and retailers are free to purchase from whomever they choose (subject to any exclusivity arrangements).

Restructure arrangements to avoid third line forcing by buying the other products from the third party and selling all products to retailers as a package.

Supply products on condition that the customer or student also purchases other products from another party.

Text books

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

Overseas student healthcare insurance

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

Online payment services

The University enters into an arrangement with a third party provider of online payment services – PAYME Inc – to facilitate online payments for tuition fees, etc. The University requires all foreign students to use the PAYME Inc payment portal to pay University invoices. This conduct would not constitute third line fo

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

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

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

Supplying products or services on condition that the distributor or retailer will not (or will not except to a limited extent) buy or re-supply competing products or services.

Refusing to supply products or services for the reason that the distributor or retailer will (or will to a limited extent) buy or re-supply competing products or services.

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

Refusing to supply products or services for the reason that the distributor or retailer will (or will to a limited extent) re-supply the product or service to certain persons or in certain areas.

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

Buying products/services on condition that the supplier will not (or will not except to a limited extent) supply similar products/services to certain persons or in certain areas. For example, entering into an agreement with a consultancy firm that it will not supply its services or products to any other universities.

Refusing to buy products/services for the reason that the supplier will (or will to a limited extent) supply similar products/services to certain persons or in certain areas. For example, not using the products or services of a consultancy firm because it is also servicing other universities.

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

Offer exclusivity for a discount where it is approved by Legal and Risk Branch.

Bid on tenders on an exclusive basis where exclusive supply is a component of the tender.

Offer competitive prices to students, distributors and retailers.

Provide distributors and retailers with volume discounts as long as the discounts do not drive competing products out of the market.

Talk to Legal and Risk Branch as soon as practicable if you become aware that competitors are complaining about any of the University of Adelaide's exclusive arrangements.

Enter exclusive arrangements to try to drive competitors out of the market.

An organisation with a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely

ACCC v Ticketek Pty Ltd (2011)

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

ACCC v Baxter Healthcare Pty Ltd (2008)

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

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

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

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

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

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

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

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

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

Offer products for “free” for a sustained period of time to drive competitors or their products out of the market.

Supply products at a price that is below cost for sustained periods of time in order to eliminate your competitors.

ACCC v Cabcharge Australia (2010)

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

ACCC v Eurong Beach Resort (2005)

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

Hypothetical

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

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

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

There are a number of laws that require you to tell the truth, make sure any representation you make is accurate and disclose the total price of any product.

Conduct by the University of Adelaide in trade or commerce which is misleading or deceptive, or is likely to mislead or deceive is prohibited under the ACL. Misleading or deceptive conduct in connection with the recruitment of and provision of courses to, overseas students is also specifically prohibited by the

The ACL prevents organisations, including universities, from using standard form contracts to burden consumers with unfair terms that are ‘tucked away in the fine print’.² A term in a consumer contract will be void if it causes a significant imbalance in the parties’ rights and obligations and is not reasonably necessary to protect the legitimate interests of the party relying on it. A standard form contract is typically one that is not negotiated and is provided on

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

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

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

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

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

- undertakings, injunctions, compensatory orders, damages, redress orders for non-parties, non-punitive orders and other orders that a court may make;

- ACCC substantiation notices and public warning notices; or

- corrective advertising notices.

These consequences can also apply to false or misleading representations.

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

Ensure that all claims you make are true and accurate.

Ensure that all representations you make can be substantiated.

Clearly state any qualifications if they apply to products or a deal with a supplier or a student.

Clarify any misleading impression that a student, supplier or other party may be under.

Talk to the Legal and Risk Branch if you want to use a disclaimer.

Use false or misleading representations in advertising the University of Adelaide's offerings.

Compare the quality of the University of Adelaide's courses to competitors' courses if the representation cannot be verified as being true and accurate.

Make predictions or promises unless you have reasonable grounds to make them.

Telstra Corporation Ltd v Singtel Optus Pty Ltd (2014)

Telstra succeeded in establishing that Optus Pty Ltd infringed its copyright in the

Hypothetical 1

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

Hypothetical 2

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

Hypothetical 3

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

Hypothetical 4

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

A consumer is generally someone who has acquired a good or service, where that good or service is ordinarily acquired for personal, domestic or household use or consumption, or the price of the good or service does not exceed \$100,000. For the University of Adelaide, the most obvious consumers will be the students of the University, but other consumers may also include other employees or officers of the University, third party individuals and businesses.

The consumer guarantees under the ACL provide rights for all consumers who purchase

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

in the case of goods, consumers will generally be able to reject the goods and choose between a refund or replacement; and

in the case of services, the consumer may choose to recover the price difference between the value of the services and the price paid.

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

Take care when discussing availability and quality of subjects and courses with students.

Take care even when enter TD0078g 525.5448.3210.484B9a.548.72127 and 1790540085 of 18.40

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

Unconscionable conduct is not defined in the ACL but generally means acting in an unreasonable or excessively unfair manner towards a more vulnerable party. A more vulnerable party may be at a special disadvantage.

Deal fairly with students, suppliers, service providers and other relevant parties.

Be consistent with deals and arrangements struck with others.

Talk to the Legal and Risk Branch if you have any concerns immediately, or as soon as practicable.

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

ACCC v Lux Distributors (2013)

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

Hypothetical

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

Such conduct is likely to be seen as unconscionable conduct.

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

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

In addition to individuals, this consumer protection now applies to small businesses where a contract of less than 12 months is worth up to

If a term of a standard form consumer contract is found to be “unfair” it will be void and cannot

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

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