

# Competition and Consumer Law Compliance Manual

**Policy Code: CG1510**

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## Introduction

### Background

Significant changes have taken place in relation to laws addressing fair trading and consumer protection. Previously, these matters were addressed in the *Trade Practices Act 1974* (Cth) (**TPA**) and the various fair trading laws applicable in each State and Territory. From 1 January 2011, a single consumer law came into effect replacing the TPA and the State and Territory legislation, to be enforced and administered by the Australian Competition and Consumer Commission (**ACCC**), and the relevant local consumer agency (in Victoria, Consumer Affairs Victoria (**CAV**)).

This national, uniform regime of fair trading and consumer protection has been introduced through the *Competition and Consumer Act 2010* (Cth) (**CCA**), which is the new name of the TPA, and which also includes the Australian

Consumer Law (**ACL**). Although not strictly accurate, *ACL* is often used to refer to the entirety of this new legislative framework and will be adopted for the purposes of this Compliance Manual.

If you have previous experience of the TPA, then many of the principles of the ACL will be familiar to you. However, in a bid to make the legislation more accessible to consumers, attempts have been made to simplify the language used. Therefore, whilst the provisions of the new legislation may well be familiar, some of the terminology used may be different.

This Compliance Manual is designed to assist all staff of the University (**University**) to understand the requirements of the ACL. It contains both a description of the most relevant requirements, and suggested compliance procedures to assist staff and institutions to meet those requirements.

## The University

The University strives to provide all its students with the opportunity to benefit from high quality education and training. Essential to achieving this is a commitment to working responsibly and ethically within the legal and regulatory environment. The University **must** comply fully with the ACL. Whether through consideration of students as *consumers*, or dealings with competitors and suppliers, the ACL is of relevance and the University is determined to ensure that it meets the highest possible standards.

## Overview

In a number of instances, the ACL reflects provisions previously contained in the TPA, as well as introducing a new comprehensive regime for the benefit of consumers. The new law offers protection to consumers and organisations from unfair trade practices by encouraging free and fair competition, as well as more practically, it ensures that the same rights and obligations apply wherever in Australia a consumer or business is located.

In addition to the provisions dealing with anti-competitive conduct, such as prohibitions against price fixing, market sharing, and exclusive dealing, the ACL contains newly-framed consumer protection provisions, including bans on misleading and deceptive conduct and provisions making unfair contract terms in consumer contracts void.

The penalties for failure to comply with the ACL are severe, and not the least of which include criminal and civil fines of up to \$1.1 million for corporations (and as high as \$10 million in some instances), and \$220,000 for individuals (plus the possibility of imprisonment for up to 10 years), together with the payment of compensatory damages to a party that has suffered from a breach of the ACL. The remedies available are not just limited to monetary ones, and the courts essentially have the power to unravel the arrangements which gave rise to the breach of the ACL, making any perceived benefit gained at the time of the initial dealings seem very small.

It is not just the legal remedies which could be taken against the University which are of concern, as a breach of the ACL is likely to cause considerable embarrassment and loss of goodwill towards the University, affecting future funding awards and student enrolments. In a competitive educational environment, the damage to the University as a result of failure to comply with the ACL cannot be underestimated.

The message is simple – if anything you do, or are asked to do, on behalf of the University potentially (1) has an anti-competitive effect, (2) seeks to confer an *unusual* benefit on a party (even if the University is to obtain that benefit), or (3) seeks to mislead or unfairly treat another party, then you should be on notice that the proposed arrangements are likely to fall foul of the ACL.

This Manual seeks to set out the requirements of the ACL in as simple and clear terms as possible. As with any rules which appear black and white, there are areas of *grey*. If, despite the apparent prohibition against the conduct, you still believe that it is justified in the particular circumstances, please contact the Compliance Officers to discuss if the relevant arrangements can proceed, whether through a special clearance from the ACCC or in a slightly modified form.

**Remember: if in doubt, contact the University's Compliance Officer – University General Counsel (Legal Office). Refer to the Compliance Procedures section for further guidance.**

## Responsibility of Staff

All management and staff of the University involved in a commercial activity, such as buying, marketing or course promotion, or management of University fee paying students or other consumers (for example, accommodation, recreation and gymnasium services) must be familiar with the ACL. Ignorance of the law is no excuse. In addition to the University's potential liability, members of staff may also find themselves *personally* liable for a breach of the ACL.

Staff should also be aware that the University's insurance policy is unlikely to cover breaches of the ACL.

It is very important that you familiarise yourself with this Manual which provides a guide to the requirements of the ACL and the procedures to be implemented to reduce the risk of contravention. All staff will be presumed to have read this Manual and to be aware of its terms.

## Anti-Competitive Conduct (or Fair Trading)

### Introductory Notes

The ACL prohibits the University from engaging in various forms of anti-competitive conduct. The general rule is that businesses cannot engage in conduct that limits or prevents competition. Simply put, conduct is anti-competitive if it lessens competition or restricts the entry of new businesses into a particular market. The rationale for this legislation is that fair competition provides a level playing field for businesses of all sizes, and in turn, benefits consumers.

These provisions are most relevant to the University when setting course fees or procuring goods and services, and a breach is most likely to occur where the University has been liaising with competitors (such as other educational or research institutes).

One way to consider potential conduct is from the perspective of an outsider. If the University were a third party not involved in the arrangements, would it feel aggrieved by what is being proposed? If the answer is yes, then the arrangements will more than likely breach the ACL and should not be pursued without first consulting the Compliance Officer.

### Agreements with Competitors

The prohibitions against entering into agreements with competitors are broadly categorised into 4 types of *cartel conduct*, which are subject to both civil and criminal penalties, and apply to both organisations and individuals.

This cartel conduct includes:

1. **Price fixing:** agreeing with a competitor to charge the same prices.

*Example:* Competition between institutes for students for a particular course is driving down fees but also making it uneconomical to offer the course. In order to maintain their ability to provide the course, three institutes meet and agree to charge the same fee and not to undercut each other. These three institutes have breached the ACL and such an agreement to fix prices is illegal.

- *Note:* In the example above, these three institutes will not breach the law if they regularly meet and generally discuss issues of educational standards, performance and quality, as a result of which they agree on objective

common standards. Whilst they are competitors entering into an agreement or understanding, they are not agreeing to set prices or share the market, or acting in any way which would substantially lessen competition.

**2. Output restrictions:** agreeing with a competitor to restrict the production or supply of goods or services, or to restrict the supply to particular persons. This may also take the form of boycotts, that is, agreeing that a particular business will only be able to supply or obtain goods or services at a particular set price, or not at all.

*Example:* Three colleges supply training services to an industry association. They are unhappy with the level of fees paid by the industry association and agree that they will all stop providing the training to the association, if the association doesn't agree to pay the same increased fee to all of them.

**3. Market sharing:** agreeing with a competitor to allocate customers, suppliers or territories with which each party will deal.

*Example:* Institutes A and B are each funded to deliver horticultural and hairdressing courses. However, there is limited demand for these courses. The institutes meet to discuss the situation, concerned about the waste of resources. Institute A agrees to do horticulture and not hairdressing and institute B agrees to do hairdressing and not horticulture. This is illegal and a clear breach of the ACL.

- *Note:* If, instead of agreeing that one would offer horticulture courses and not hairdressing (and vice versa):
  - The two institutes agreed that institute A will only seek and enrol students in these courses from north and west Victoria, and institute B will only seek and enrol students from south and east Victoria - this would also be illegal and a breach of the ACL.
  - Institute A independently and unilaterally decides to stop offering horticulture courses based on its own business plan, and in order to enable the enrolled students to complete their horticulture studies, enters an arrangement with institute B for such purposes – this is not illegal as it is not a market sharing arrangement between competitors. Whilst certainly competitors, institute A did not discontinue horticulture courses pursuant to an agreement with institute B, it did so for its own reasons and without reference to institute B.
  - Institute A and B agree to share their resources and offer a brand new course in creative topiary - this is also lawful. The two institutions are jointly creating a new product. Neither is agreeing not to provide something they would otherwise have provided. In other words, they are not agreeing to share the market.

**Outsourcing of courses and teaching provision is lawful providing it is not done pursuant to a market sharing agreement between competitors.**

**4. Bid-rigging:** making an agreement with a competitor that has the effect of *rigging* the outcome of a tender process, such as by agreeing not to enter a bid or to enter a bid with the intention that it is rejected.

*Example:* Request for Tenders 1 and 2 have been issued within institute A and institute B's area of expertise. Institute A and institute B reach an understanding that institute A will only submit a tender for 1 (and not 2), and institute B will only submit a tender for 2 (and not 1). This arrangement is illegal as it seeks to rig the outcome of an open and free tender process. The same would be true, if agreement is reached for institute A to also submit a tender for 2 but on terms which are much less favourable than those proposed by institute B (and vice versa), which would produce the same result of compromising the open tender process.

- *Note:* If one Request for Tender is issued which institute A and institute B do not separately have the expertise to be able to tender for but could do so using their combined skills, and agreement is reached to submit a joint tender, this would not breach the ACL. Although agreement has been reached to submit only one tender, it has been done so openly and with no collusion between the institutes to rig the outcome of the tender process (even if the joint tender is the only one submitted).

Any contract or arrangement – or understanding (a “nod and a wink” is enough!) – with a competitor which has the purpose or is likely to give effect to a cartel provision, and which you know or believe will have that effect, is strictly

prohibited and attracts criminal penalties of up to \$10 million for organisations and up to 10 years in prison and/or a fine of up to \$220,000 for individuals, *in addition* to any civil penalties.

These arrangements or understandings do not need to be in writing - any communication with another person which is or may be a competitor and from which each party has an expectation of how the other will act is sufficient.

## Other Anti-Competitive Conduct

In addition to the specific instances of cartel conduct detailed above, any contract, arrangement or understanding which has the purpose, or has or is likely to have the effect, of *substantially lessening competition* is prohibited. Such unlawful conduct here includes:

**1. Third line forcing:** supplying goods or services, or offering a discount, to a customer (including a student) on condition that the customer buys goods or services from a third person. It is acceptable to recommend the product of a third person to a customer but not to *force* those other products on your customer as a condition of dealing with you (on preferential terms or otherwise).

*Example:* An institute negotiates a discount on all books purchased from a particular local bookseller. For that institute's students to get the discount, the institute had to agree to ensure that its students buy books from no other supplier. The institute therefore enrolls students on the condition that they buy their books from that bookseller. This is third line forcing. The institute 'forces' the bookseller's books on its students as part of enrolment.

*Note:* If, in the example above:

- the institute simply recommends that students buy their books from that bookseller, this would not breach the ACL as the institute is not 'forcing' the third party's (bookseller's) goods on its students (although in this case, the terms of the agreement between the institute and the bookseller would not be satisfied, and all such arrangements should be avoided); or
- the institute simply agrees to place advertisements for the local bookseller in the institute course book, and recommends that its students buy books from the seller, and as a result, most students buy books from the bookseller, this is not third line forcing. The books are available from numerous suppliers, and students are free to buy their books from any of those suppliers. There is no 'forcing' of a third party's products.

**2. Misuse of market power:** using a substantial degree of power in a market (geographical or in a particular course area) to eliminate or damage a competitor, prevent a competitor from entering the market, or deter or prevent competitive conduct in that market. Particularly relevant here, would be to provide goods or services at below cost for a sustained period in order to prevent or deter a potential competitor.

*Example:* Institute A is a leading provider of health and safety training courses to corporate customers, and becomes aware that another service provider is planning to enter the market. In response, institute A sets course fees below its costs of providing the course to deter the other service provider from competing with it. The other service provider stops its plans and decides not to offer those courses as it is unable to compete. On the basis that the institute has substantial market power (as determined under the provisions of the ACL), this conduct would be unlawful as it is improperly taking advantage of that power to eliminate a possible competitor.

*Note:* If, in the example above, the institute responded by making its courses more competitive through trimming its profit margin, this would be lawful. The rationale for these provisions is to promote competition, and if the entry into the market of a new service provider prompts fees to drop, this outcome is encouraged. It is the act of discounting fees to such a level as to be unsustainable in the long term, to deter competition, which is the unlawful conduct.

**3. Exclusive dealing:** involves either (a) supplying goods or services on the condition that a person does not acquire goods or services from another supplier, or (b) purchasing goods or services on the condition that the supplier does not supply goods or services to a competitor.

*Example:* College A has specialist expertise in providing web design and hosting courses to industry to enable employees to manage in-house websites. In return for providing this course to Company B, College A requires that

Company B only obtains training services for its employees from College A, and no other education provider (or alternatively, that Company B does not enrol any of its employees in courses with College C (its main competitor)). This is unlawful as it has an anti-competitive purpose or effect.

*Note:* It would similarly be unlawful, if instead of supplying services to Company B, College A obtained the services of Company B (a specialist web design and hosting company) for a relaunch of College A's website, and as part of its agreement with Company B, required that Company B did not provide web design and hosting services to College C.

**4. Resale price maintenance (preventing discounting):** supplying goods or services on condition that the purchaser will not re-sell them below a price specified by the supplier (or refusing to supply the goods or services if the purchaser refuses to accept such a condition). This would include offering an incentive to a purchaser (such as a discount) if the purchaser agrees not to re-sell below the specified price. A recommended price is acceptable but there must be no obligation to comply with the recommendation.

*Example:* University A publishes a regular law journal. It supplies that journal to booksellers, and specifies that they must retail the journal for not less than \$10 each. The University makes it clear that the booksellers will not receive further supplies of the journal if they sell it for less than \$10 (or alternatively, if the booksellers agree not to sell the journal for less than \$10, the University will offer them a discount of 5% on the cost price to the booksellers). This is unlawful resale price maintenance. University A supplies goods, which are re-supplied, and the University seeks to determine the resale price.

*Note:* If University A had simply recommended that booksellers sell the journal for not less than \$10, as the University considers it to be a fair price and one which it believes customers will be willing to pay, then there would be no breach of the ACL, as there is no requirement for the booksellers to sell at that price. If there is concern to ensure that a product is not demeaned by being sold at a low price, then the University should set the price which it charges to all resellers accordingly, although this would still not prevent a reseller from selling the product at a low price or at a loss (but presumably, it would not be able to sustain such sales for long and will either increase the price or determine not to stock the product in future).

**5. Anti-competitive share acquisitions (including mergers):** acquiring (directly or indirectly) shares or assets of a company if it is likely to substantially lessen competition in a market.

*Example:* University A and Company B are the main providers of engineering research services in Victoria. University A acquires a major shareholding in Company B, as a result of which it is able to exert control over the operations of Company B (such as the types of engineering research services it will provide or the price of such services). The acquisition of the shares in Company B is potentially unlawful as it is likely to reduce competition in the provision of engineering research services (depending upon the level of University A's shareholding). This would be one example where, should University A have good reasons for the acquisition, it should seek a clearance or authorisation to proceed from the ACCC (see Section D below).

## Clearances

In some instances, the ACCC may grant clearances or authorisations for conduct that would otherwise breach the cartel provisions or would have the effect of substantially lessening competition. Assessment of an application for a clearance will involve consideration of whether the conduct is in the public interest.

Seeking a clearance is a complicated process and the University anticipates that this will only occur in exceptional circumstances, where there is a compelling reason for the otherwise offending conduct to be permitted.

If you consider that the arrangements which you are proposing fall into this category of an exceptional case, then you should contact the Compliance Officer to discuss whether the seeking of a clearance is warranted.

## Additional Restrictions

Although not a part of the ACL, staff should also be aware of the potential restrictions imposed on the University under the National Competition Policy, and in particular, the principle of *competitive neutrality*. Simply put, a government body must not be advantaged over private sector competitors as a result of its public status. This may be relevant in the context of 'spin-off' companies, to the offer of non-Government funded courses, or the provision of goods and services to the general public, where fees should be set in a competitively neutral manner. A failure to comply is not unlawful but would amount to a breach of the National Competition Policy, and would be subject to investigation by the relevant office if a complaint was made.

## Action Checklist

### DO:

- Seek advice if you are unsure whether specific trading conduct is prohibited.
- Seek advice from the Compliance Officer if you are unsure whether a proposed agreement, arrangement or understanding with a competitor will have the purpose or effect of substantially lessening competition.
- Seek advice from the Compliance Officer before making arrangements with competitors:
  - which establish particular student markets (e.g. geographical areas) for each competitor;
  - aimed at harming other competitors; or
  - which in any way involve collusion for the purpose of reducing competition.
- Realise that the prohibition against boycotts applies irrespective of the reason or motive for the boycott. It is no excuse to say that the boycotted student or supplier 'deserved it'.
- Do keep accurate records, including about how you have reached a decision (the factors you have taken into account). Watch your language – anything you say or write may be used as evidence in Court against you and the University.
- Exercise caution in setting the price of University courses or services to ensure that the prices are competitive, and in particular are not so low that they substantially lessen competition.
- Exercise caution if suppliers attempt to restrict the University from acquiring similar goods or services from other persons.
- Recommend products of third persons to students and other customers, where it is commercially advantageous. It is only prohibited if customers are supplied on the condition that they buy another product from a third person.
- Recommend a resale price to customers.
- Refer to the University Legal Office for advice on any acquisition of another educational institution (of whatever character) or, indeed, any other business.

### DO NOT:

- Refuse to supply a person or corporation without the approval of senior management.
- Forget that price fixing arrangements with competitors are strictly prohibited, irrespective of their purpose or effect.
- Become involved in a meeting with competitors where fees, rebates, discounts, allowances or credits are discussed. If the subject of prices is raised, you should leave the meeting immediately and publicise your leaving so that everyone will remember that you left at that point (and keep your own record).
- Exchange information on fees with competitors.
- Agree with a competitor to share a market (whether course subject area or a geographical area).
- Make an arrangement with competitors not to sell or buy products from particular suppliers or students.
- Attempt to impose conditions on other people that limit or restrict their freedom to sell to, or buy from, third parties any products.

- Supply products to a customer on the condition that the customer must purchase another product from a third person.
- Threaten to withhold supply if a customer does not accept a minimum selling price of a product.
- Offer a special benefit or discount to a customer to induce the customer not to discount a product.
- Embark on aggressive price cutting in market segments, particularly if the fees are not set at realistic levels or are set at close to or below cost, without advice.
- Enter into an acquisition agreement, or make a public announcement about a proposed acquisition, before obtaining advice from the University Legal Office.

## Consumer Protection

### Introductory Notes

The recent changes in the legislation are most pronounced in the way that provisions dealing with consumer protection have been reformulated and set out in a single, national regime.

For the purposes of the new law, a **consumer** is: (1) a person that acquires goods or services that are priced less than \$40,000; or (2) a person that acquires goods or services priced at more than \$40,000 if they are of a kind *ordinarily acquired for personal, domestic or household use or consumption*. A consumer can be an individual or a company.

In the University context, a consumer would include students (or potential students) and any other purchasers of goods or services provided by the University.

The Consumer Protection provisions are divided into **General Protections** and **Specific Protections**:

**General Protections** include:

- **misleading and deceptive conduct**: a general ban on misleading and deceptive conduct in trade or commerce;
- **unconscionable conduct**: a general ban on unconscionable conduct in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions; and
- **unfair contract terms**: provisions that make unfair contract terms in consumer contracts void.

**Specific Protections** (many of which have counterparts in the TPA) include:

- **unfair practices**: banning specific unfair practices in trade or commerce;
- **consumer transactions**: provisions dealing with consumer transactions;
- **safety of consumer goods and product-related services**: a new consumer product safety law and regulatory framework;
- **information standards**: the making and enforcement of information standards (in relation to consumer products); and
- **liability of manufacturers for goods with safety defects**: national rules governing the liability of manufacturers for safety defects.

For the purposes of this Manual, only the most relevant consumer protection provisions will be addressed (as highlighted in bold underline above). If any of the protections set out above have not been specifically detailed here and you consider that they may apply to acts proposed by the University, please contact the Compliance Officer for further information.

*Note:* If a commercial product is to be developed with assistance from the University (such as through the contribution of intellectual property), please contact the Compliance Officer to discuss the terms of the University's

assistance. It is important to ensure that the University has sufficient insurance cover in place and that any risks are allocated appropriately with the commercial partners.

## General Protections

### Misleading or Deceptive Conduct

These provisions of the ACL largely mirror the terms previously contained in Section 52 of the TPA, and provide that the University must not make statements or engage in conduct that is misleading or deceptive, or that is *likely* to mislead or deceive. Note that even if there is no intent to mislead or deceive, or that no consumer has actually been misled or deceived, it is still possible to be in breach.

*Conduct* includes advertisements, promotions, quotations, statements, or a representation by any person. In the University context, this would cover marketing material, website information, handbooks, prospectus and related documents, as well as statements made in sales discussions (including pre-sales communications via email or mobile phone), or negotiations and presentations.

Anything which gives a misleading overall impression about the price, value or quality of goods or services is likely to breach the ACL.

**Example:** A Higher Education Institution attempts to attract students to its course with the promotion: 'You will get a job after this course!' No student obtained employment, certainly not within six months of completing the course. The claim about the course is likely to be misleading conduct.

**Note:** Further examples include: suggesting a connection with another institution which is untrue (or overstated); using a photograph of research equipment or facilities in connection with a course, if that equipment or those facilities are not available to students of that course; or, making a claim about the standing of the University or one of its courses, if that claim cannot be proven.

Other conduct of relevance includes:

*Silence:* silence can also be misleading or deceptive, for example, if: you know a relevant fact and fail to disclose it; important details that a person should know are not provided; or, a change in circumstances means that information previously provided is no longer correct.

*Disclaimers & Small Print:* it is not possible to rely on disclaimers in small print to excuse misleading or deceptive claims. A disclaimer which is prominently set out may be sufficient, as long as it clearly specifies the conditions of the offer.

*Predictions & Opinions:* if a statement relates to a future matter or prediction and does not turn out to be true, it may not necessarily be misleading or deceptive unless you knew it was untrue, you did not care if it was true or not, or it was unreasonable for you to make such a claim.

### Unconscionable Conduct

These provisions are very similar to the previous position under the TPA, and prohibit unconscionable conduct when selling, supplying or acquiring goods or services in dealings with consumers and other businesses.

*Unconscionable conduct* refers to a type of behaviour which is unfair or unjust, and is defined in general terms. It is the nature of the conduct as a whole which will be examined, instead of identifying whether a person has done or not done something which is specifically prohibited.

As a result, it is not always easy to determine what amounts to unconscionable conduct, although the ACL does provide guidance:

- not properly explaining a contract to someone that you know does not understand its terms (e.g., English is their second language or they have a learning disability);
- pressuring a person into signing a contract without providing an opportunity for them to read it properly, ask questions or seek advice;
- using someone to exert undue influence on a person to sign the contract;
- using high-pressure sales tactics, such as refusing to take *no* for an answer; or
- including terms in a contract which go above and beyond what is necessary to protect your interests.

As the term implies, acting in bad faith or *without good conscience*, is what undermines the notion of unconscionable conduct. As suggested earlier, perhaps the best indicator of whether something is unconscionable is to put yourself in the place of the other person – if you were dealt with in this way, would you consider that you had been unfairly treated? If the answer is *yes*, then a court will more than likely agree that the conduct is unconscionable.

## Unfair Contract Terms

Provisions have been introduced under which an *unfair* term in a *standard form consumer contract* is void and unenforceable. If it is possible for the contract to operate without the unfair term, then the contract will remain in force (and the unfair term will be removed). These provisions apply to standard form contracts (and the presumption will be that the contract will be a standard form contract unless proved otherwise), and consideration will be given to whether one party prepared the contract which the other party was required to accept or reject. A number of the University's contracts with its students are likely to be covered (business to business transactions are not covered).

A term is unfair if it:

- (a) would cause a significant imbalance in the parties' rights and obligations;
- (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) would cause detriment (whether financial or otherwise).

A term which sets out the price to be paid (as long as it is not conditional upon a later event) cannot be subsequently challenged as being unfair.

The ACL sets out a number of examples of terms which may be unfair, and generally speaking, these are terms which allow one party to do something (such as change the price or the nature of the goods or services, or vary or terminate the contract) without the agreement of the other party or without giving the other party the same rights.

## Specific Protections

Unlike the General Protections set out in Section B above, the Specific Protections are targeted at certain kinds of activities and have been based on the provisions set out in the TPA, with additions. As noted in the introduction to this Part, for the purposes of this Manual, only the provisions most relevant to the activities of the University will be considered.

## Unfair Practices

A range of different types of conduct is considered to amount to an unfair practice:

- (a) false or misleading representations or conduct in trade or commerce, in relation to goods or services, land transactions or employment;
- (b) failing to supply gifts and prizes or not supplying them as offered;
- (c) requiring payment for unsolicited goods and services;
- (d) wrongly accepting payment for goods and services not supplied;
- (e) pyramid selling schemes;
- (f) bait advertising (offering goods or services at a particular price with only a limited supply at that price);
- (g) certain pricing practices (such as displaying multiple prices or only a component of the total price); and
- (h) harassment and coercion.

Although staff should be aware of all the prohibited conduct detailed above, the conduct of most relevance to the University is the making of false or misleading representations.

### **False or Misleading Representations**

It is unlawful for a business to make false or misleading representations in relation to:

- the standard, quality or value of goods or services (e.g. saying that a course has an accreditation when it does not);
- a particular person agreeing to acquire goods or services (e.g. saying that a person has enrolled in a course when they have not);
- testimonials by any person relating to goods or services (e.g. making up false testimonials or portraying an actor as a real person saying how great the course is);
- the sponsorship, approval, performance characteristics, benefits and uses of goods or services (e.g. saying that a course will lead to registration with a professional body when it does not);
- the price of goods or services (e.g. saying the course will cost less than it does); or
- a buyer's need for the goods or services (e.g. you need to do this course or you won't be able to do x).

Whether a representation is considered false or misleading will depend on the circumstances of each case, and reference is likely to be made to whether a reasonable person in a particular group of consumers would have been misled.

Note that a representation can be misleading even if it is true or partly true, if it fails to tell the whole story or give a complete picture. For example, stating that a course has a 100% success rate when 20% of the students dropped out before the final examinations because they found the course too difficult.

The provisions dealing with false and misleading representations overlap with the general prohibition against misleading and deceptive conduct (Section B), although making a false or misleading representation is an offence (attracting criminal and civil penalties), whereas given its wider scope, only civil remedies apply to misleading and deceptive conduct (but the same conduct may breach more than one of the prohibitions).

## **Consumer Transactions**

Of those provisions dealing with consumer transactions, the most relevant here is the introduction by the ACL of a new national law providing statutory consumer guarantees when consumers acquire goods or services. Under previous law, consumers were required to enforce their rights as breaches of contract whereas now a failure by a supplier to comply with a consumer guarantee will be enforceable as a breach of the ACL.

Different consumer guarantees apply to goods and services, and for the purposes of this Manual, those relating to services have been set out (although many of the principles also apply to goods).

A consumer that receives services is entitled to the following guarantees (which cannot be excluded in the terms of the contract):

- a guarantee that the services will be rendered with due care and skill;
- a guarantee that the services, and any product resulting from the services, will be reasonably fit for the purpose that the consumer, expressly or by implication, makes known to the supplier; and
- a guarantee that the services will be supplied within a reasonable time (if a time is not otherwise agreed or set out in the contract).

A breach of a consumer guarantee entitles a consumer to have the services re-supplied (by the initial supplier or in some cases, by a new supplier), or to terminate the contract and obtain a refund (and possibly damages) from the supplier.

## Additional Provisions

In addition to the requirements imposed under the ACL, brief mention should also be made of the University's obligations under the *Education Services for Overseas Students Act 2000* (Cth) (**ESOS**) which provides that the University must not engage in misleading or deceptive conduct in connection with:

- (a) the recruitment of overseas students or intending overseas students; or
- (b) the provision of courses to overseas students.

Further obligations are imposed pursuant to Part D of the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (**Code**), issued under ESOS, including that the University must:

- ensure that marketing of its education and training services is professional, accurate and maintains the integrity and reputation of the industry; **and**
- recruit students in an ethical and responsible manner and provide information that enables students to make informed decisions about studying with it in Australia.

Whilst the sanctions for a breach of ESOS or the Code are more limited than those provided under the ACL, they are still potentially serious and may lead to the imposition of limits on the University's ability to recruit and enrol overseas students for certain courses or from certain countries.

## Action Checklist

### DO:

- Ensure that course materials are up to date and accurate (and perhaps include a 'use by' date to ensure that they are updated regularly).
- Ensure that all advertisements and other promotional materials are checked carefully before they are used.
- Remember that even to remain silent can be misleading conduct.
- Realise that no intention to mislead or deceive is required to breach the ACL.
- Use prominent disclaimers if there is any qualification to a statement (such as the course is subject to sufficient numbers or the availability of teaching staff).
- Realise that although this part of the ACL is designed to protect consumers, it is often used by competitors.
- Seek advice if you are unsure whether a proposed statement is likely to be false or misleading.

- Contact the University Legal Office for assistance in evaluating standard form contracts that may be in use in your area.
- Consider whether or not the contract is a 'consumer' contract in discussion with the University Legal Office.
- If you use consumer contracts, consider whether or not any terms are unfair and if the contract is in plain language, transparent and readily available to the parties.
- Ensure that the other party understands the contract and correct any misunderstandings.
- Take particular care when preparing material intended for overseas students (including when making statements about life in Australia).
- Be aware that this is a high risk area of the law and strict compliance is essential.

**DO NOT:**

- Say or write anything that you are not positive is true.
- 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.
- Make statements about courses or other services that cannot be fully substantiated.
- Make statements which you think are probably true - you must be sure.

## Australian Competition and Consumer Commission & Consumer Affairs Victoria

The Australian Competition and Consumer Commission (**ACCC**) and Consumer Affairs Victoria (**CAV**) administer and enforce the ACL. They are well resourced and their officers diligently perform their functions. The new legislation brings with it a concerted and determined approach to ensuring compliance with its terms, and to taking action wherever appropriate.

If you suspect a breach or possible breach of the ACL, report it to the Compliance Officer immediately in writing.

The ACCC has power to force the University to assist with any investigations into breaches of the ACL. Voluntary cooperation by the University may lead to a reduction in the penalty or sanction imposed. **Whilst you should show a willingness to co-operate with the ACCC or CAV investigators, you should refrain from providing any response without first consulting the Compliance Officer** (refer to Part 5 for further guidance).

### Action Checklist

**DO:**

- Take careful notes of all conversations with investigators.
- Immediately refer all enquiries from the ACCC or CAV to the Compliance Officer.
- Be careful of what you say and write so the ACCC or CAV cannot misinterpret your language.

**DO NOT:**

- Under any circumstances engage in conversation with investigators without first seeking advice from the Compliance Officer.
- Agree or disagree with any comments the ACCC investigator poses.
- Allow investigators to inspect any premises unless you first obtain approval from the Compliance Officer.

## Compliance Procedures

### Introduction

The compliance procedures set out in this Manual should help you comply with the ACL and assist you in implementing a risk management plan. You will need to undertake periodic audits of conduct and procedures in your department to ensure compliance with this Manual.

You must ensure that you comply with these procedures at all times. If you are unsure whether a particular procedure applies, ask the Compliance Officer.

The University will review these procedures from time to time and will update them to include any legislative changes or to improve their use in practice. Staff will be advised of any changes.

### Compliance Officer

The University General Counsel is the Compliance Officer for the purposes of this compliance procedure.

The Compliance Officer must:

- ensure that a copy of this Compliance Manual is provided to all relevant members of staff;
- arrange training sessions (or, at least, ensure training is arranged) for all relevant employees and 'refresher' training sessions for these employees;
- respond to questions in relation to fair trading and consumer protection;
- establish procedures as required to review trading activities and relationships;
- monitor the procedure for dealing with complaints made by the ACCC to the University; and
- respond to any enquiries or investigations made by the ACCC, CAV or similar agency.

### Education and Training

A copy of this Manual will be made available to all full and part time staff.

All new employees will be given a copy of this Manual (in hard copy or electronic form) at their induction and will be required to read it.

### Document Approvals

The following documents must be submitted to the University Legal Office for review and approval:

- all contracts, including letters of understanding; and
- other documents identified by the University Legal Office from time to time.

### Complaints by the ACCC, CAV or Third Parties

The following procedures exist to deal with complaints or investigations:

1. All complaints should be referred immediately by staff to the Compliance Officer.
2. All complaints should be urgently reviewed by the University Legal Office. A decision will then be made on further action which the University should take. This action will be implemented on a high priority basis.

3. On-going discussions or correspondence should be conducted by or under the supervision of the Compliance Officer.
4. Staff must promptly provide all information and supporting documents requested by the Compliance Officer or the University Legal Office.
5. The Compliance Officer will keep the Vice-Chancellor regularly informed of the progress of all complaints and investigations.

If you receive a call directly from the ACCC or an investigator you should state:

**“I am happy to assist you but I should first let the University’s Compliance Officer know you’re here [or you’ve called] then I would be happy to assist you if I can.”**

You should then refer the call immediately to the Compliance Officer.