

TRADE PRACTICES – CONSUMER PROTECTION (CONSUMER GUARANTEES, UNFAIR CONTRACT TERMS & MISLEADING INFORMATION)

Part V of the Trade Practices Act has been amended and is now referred to as the Competition and Consumer Act (the “CCA Act”) which aims to protect consumers and businesses (particularly small businesses) from dishonest and unfair business practices. The CCA Act applies to the University in its dealings with students, research partners, commercial research or consultancy clients and suppliers. The consumer protection and unfair business practices provisions of the CCA Act are contained in a part of the Act known as the **Australian Consumer Law (“ACL”)**.

The new changes in the ACL can affect the University in two key ways – it is protected if it deals with a business which fails to tell the truth about its product or services. It can also be relevant if the University is the “wrongdoer” – for example, if students are given incorrect information about a course.

Broadly, the ACL has increased consumer protection by:

- the introduction of *new penalties* for contravention of certain consumer protection provisions;
- it will *prohibit unfair contract terms* in standard form consumer contracts; and
- it has *introduced new enforcement powers* for the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC)

1. Introduction of Consumer Guarantees

For consumers (including for the University), the changes to the ACL will increase the protection available to them when they acquire goods, services, financial products and financial services by way of specific ‘consumer guarantees’. This will affect the University in two ways:

- (i) Goods supplied or received by the University will need to be of ‘acceptable’, as opposed to ‘merchantable’ quality; and
- (ii) Consumers including the University can rely on statutory remedies for any breach of consumer guarantees.

Consumer Guarantees - Goods must be of an acceptable quality

The most relevant consumer guarantees as they apply to the University, will include the following:

- goods are of an acceptable quality;
- goods are reasonably fit for a disclosed purpose;
- supplied goods correspond with their description;
- services will be rendered with due care and skill;
- services and related products will be reasonably fit for their identified purpose; and
- services will be supplied with a reasonable time

The previous implied condition of ‘merchantable quality’ has now been replaced with a guarantee of ‘acceptable quality’, which is defined as being: (i) fit for purpose; (ii) acceptable in appearance and finish; (iii) free from defects; (iv) safe and (v) durable.

Available remedies

Consumers will be able to seek certain relief for a breach of a ‘consumer guarantee’ depending on whether the breach can be remedied for example the goods can be fixed or replaced or whether the breach constitutes a ‘major failure’.

If the breach can be remedied and is not a major failure, the consumer is entitled to the goods being repaired, replaced or a refund.

However, if the breach can't be remedied, or is a major failure, the consumer is entitled to:

- reject the goods, or choose between a refund and a replacement (for goods); or
- terminate the contract for the supply of services, or recover compensation for any reduction in value of the services.

(ii) Unfair Contract Terms

A key provision of the ACL has made unfair contract terms in 'consumer law' contracts void. The price of goods or services will no longer be relevant as it was under the previous Trade Practices Act. If goods or services are supplied for personal, domestic or household use or consumption, then the supply will be made under a consumer contract.

Unfair contract terms are those which cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer, where the term is not reasonably necessary to protect the supplier's legitimate interests which have come into effect from 1 July 2010.

(iii) Misleading and Unconscionable Conduct (previously s52 under the Trade Practice Act)

Section 18 prohibits businesses engaging in misleading or deceptive conduct. This includes conduct which is "likely" to mislead or deceive, even if no-one has yet become a victim. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

Generally, the University or other businesses are required to tell the truth or refrain from giving an unlawful impression. Keeping quiet and failing to disclose information can also be a breach of the ACL.

Remember – it is no excuse that the conduct is unintentional or accidental.

For more information on this topic you should read the University's *Trade Practices Compliance Guide* which is available at <http://www.latrobe.edu.au/legalservices>

Please contact Legal Services on Extn: 2495 for further advice.

*Approved: George Sdraulig, General Counsel, Legal & Governance
Updated by Gina Sachdev 8 December, 2011*