

# Getting it right – Guide to Trade Practices Laws and the University

## Why read this?

A range of trade practices laws apply to the University and associated organisations. Failure to comply with these laws can result in significant penalties and reputational damage. Breaches of some obligations can give rise to personal liability. The purpose of this guide is to provide an overview of the applicable laws and where can you find more information. The guide covers the:

- [Commerce Act 1986](#);
- [Fair Trading Act 1986](#) and the Advertising Codes of Practice; and
- [Consumer Guarantees Act 1993](#).

## The Commerce Act 1986

### Overview

The Commerce Act 1986 (Act) aims to promote competition in markets for the long term benefit of consumers in New Zealand. The Act is administered by the Commerce Commission, which has substantial powers to investigate and enforce breaches of the Act. The penalties are significant (fines of up to the greater of \$10,000,000 or three times the commercial gain from the unlawful activity). There is also provision for penalties of up to \$500,000 for individuals who breach the Act. The University cannot insure against this liability, or pay the fines of employees.

In summary, the key obligations for you to be aware of are:

- **no price fixing** – the Act prohibits contracts, arrangements or understandings between competitors that have the effect of fixing or maintaining prices;
- **no other anti-competitive arrangements** – the Act also prohibits other contracts, arrangements or understandings that are likely to substantially lessen competition in any market; and
- **no misuse of market power** – the Act prohibits a company with a substantial degree of market power from taking advantage of that market power for the purpose of damaging competition.

## How are these obligations relevant to the University?

### As a supplier

The University and its associated organisations/companies supply goods and services in competition with others in a multitude of markets locally, nationally and globally. The University competes in a number of markets for the provision of tertiary education services. Of course there is healthy and extensive collaboration between New Zealand Universities in many areas, in particular, through Universities New Zealand (and this is recognised by the Education Act 1989<sup>1</sup>). The joint setting of standards and discussions relating to issues of common interest affecting Universities is not of concern. However, a degree of care needs to be taken to ensure that discussions in this forum do not stray into areas which could give rise to issues under the Act, for example, the level of a particular institution's tuition fees.

In terms of the misuse of market power, the University is a significant business, particularly in the lower South Island. There are areas where the University might be considered to have a substantial degree of market power, for example, Uniprint in the local market for certain printing services. Aggressive pricing in these markets should be undertaken with care. If in doubt you should seek advice from University's Chief Operating Officer.

### As a purchaser

The University is a substantial buyer of goods or services. Joint purchasing arrangements with others will ordinarily not give rise to Act issues but you should seek appropriate advice, particularly if the arrangement will have a material impact on the relevant market. If the University is a major purchaser in a market you should also consider competition issues where long term exclusive arrangements with a single customer are proposed.

### Accommodation Services

For Act purposes the affiliated colleges compete with the University colleges and with each other. There is no issue with affiliated colleges collaborating on standards, policies and joint initiatives, for example, to improve quality and safety. However, any contract, arrangement or understanding relating to the level of accommodation charges would most likely be a breach of the Act.

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<sup>1</sup> Any conduct which is expressly authorised by legislation or regulation is not a breach of the Commerce Act.

## Some key questions

### What is a contract, arrangement or understanding?

It is important to understand that no formal written document or verbal agreement is required. Any consensus involving a mutual expectation about future conduct will qualify as an arrangement or understanding e.g. a nod and a wink is sufficient.

### What is price fixing?

Price fixing consists of any contract, arrangement or understanding that has the purpose or effect, or likely effect, of fixing, controlling or maintaining the price of goods or services supplied or acquired by parties that are in competition with each other. Any kind of price manipulation is caught, from an agreement on price to be charged or paid, to arrangements concerning discounts, allowances, rebates and credits. There is no need for the parties to agree an actual price. Any kind of arrangement which limits the ability of the parties to set their own price is likely to be unlawful.

Price fixing is unlawful *whether or not it has any effect on competition*. Note that there are exceptions for certain joint venture arrangements and, as noted, for joint buying. However, you should seek appropriate advice before relying on these exceptions.

### What is a substantial lessening of competition?

Provisions of any contract, arrangement or understanding which have the purpose, effect or likely effect of substantially lessening competition in a market are prohibited. Such agreements can take many forms, for example, agreements to split a market between competitors, either geographically or by customer or product or agreements requiring exclusivity or restraining trade.

Absent price fixing, determining whether an agreement substantially lessens competition is almost always complicated. Complex legal and economic analysis may be required. If you have any concerns, you should seek advice from the Chief Operating Officer before you embark on the conduct.

### What is a substantial degree of market power?

A firm or business with a substantial degree of market power must not take advantage of that power for any of the following anti-competitive purposes:

- eliminating a person from the market;
- restricting a person from entering a market; or
- deterring or preventing a person from competing in a market.

Assessing whether or not a firm or business has a substantial degree of market power is often difficult. The question is whether the constraints on the firm or business by competitors are relatively ineffective. High market shares and barriers to entry by new participants in the market will be important considerations.

## The Fair Trading Act 1986 and Advertising Standards Codes

### When does the Fair Trading Act (FTA) apply?

All conduct by the University 'in trade' will be subject to the FTA. 'In trade' is broadly defined and, among other things, will capture all the University's dealings with suppliers, information regarding courses (and associated promotional material) and material on the University's website. The FTA will also apply to all statements and information provided as part of the commercialisation of any research. You should be familiar with the University's [brand policy](#) and [brand guide](#).

The FTA will apply to information posted by the University on-line. You should be familiar with the University's [web policy](#) and [web guidelines](#).

### No misleading and deceptive conduct

There are a number of different obligations under the FTA (giving rise to both civil and criminal liability). In general terms conduct which is, or may be, misleading or deceptive or likely to mislead or deceive is unlawful. Misleading and deceptive conduct can occur by:

- direct or express statements or representations;
- conduct – acting in a certain manner;
- implied representations; or
- silence, where there is a requirement to disclose a matter.

### Some key things to remember

- Intention is irrelevant. You can be found to have been misleading and deceptive even if you did not intend to be so.
- Similarly, mistake is generally no excuse. Whether mistaken or not, you can be found to have engaged in misleading or deceptive conduct even if you thought you were telling the truth, sought advice from a third person, or accidentally omitted an important piece of information.
- Reliance on a statement by a third party can sometimes be a defence to a criminal prosecution under the FTA where the reliance is reasonable and reasonable enquiries were made.
- Merely passing on information may not be misleading or deceptive where it is apparent that the University is not the source of the information and does not accept responsibility for its accuracy.

- Where impugned conduct clearly involves expressions of opinion, to avoid liability the opinion must be:
  - honestly held;
  - reasonably based; and
  - not demonstrably wrongat the time that it was expressed or relied upon.

### Who must be misled or deceived or likely to be misled or deceived?

Courts will consider the overall impression of the communication in the mind of a member of the target audience. This includes the 'astute and the gullible' and those who may have less education within that audience. It is important to have regard to your target audience and what they will and won't understand. For example, conduct that may arguably not be misleading to a highly qualified specialist in a particular field could well be misleading to students or the public generally.

The Commerce Commission can take action for misleading and deceptive conduct without having to prove that anyone was actually misled. All it needs to demonstrate is that the communication was likely to mislead and deceive.

### What about the fine print?

It is possible to qualify or explain a claim made, for example, in advertising. However, care needs to be taken that any qualification is not buried in fine print. The qualification needs to be clearly visible to the consumer when he or she reads the claim. Any qualification can qualify, but should not contradict, the claim.

### The Advertising Standards Codes

If you are involved in the production or review of advertising materials you will also need to be conscious of the Advertising Standards Codes published by the Advertising Standards Authority (ASA). The prime function of the ASA is to self-regulate advertising in New Zealand. Advertising Codes of Practice provide the rules with which all advertisements in all media should comply. There is a general Advertising Code of Ethics and a range of other codes dealing with specific topics, such as comparative advertising. Generally the codes impose more stringent requirements on advertisers than the FTA. For more information see the [ASA website](#).

## The Consumer Guarantees Act 1993

### When does the Consumer Guarantees Act 1993 (CGA) apply?

The CGA applies to all consumer goods and services, i.e. goods and services normally bought for personal or household use. For example, the CGA applies to education services provided to students by the University.

Goods or services normally acquired for business use are not covered. Among other things, neither are consumer goods that will be on-sold (for example the sale of goods to a retailer).

When the University or a related organisation supplies a consumer good to a business customer it can, and should, contract out of the CGA. Contracting out of the CGA when dealing with a consumer is not possible and attempting to do so is a breach of the FTA.

### How does the CGA work?

#### Goods

The CGA implies certain guarantees into every contract for the sale of consumer goods, including that the goods:

- will be of acceptable quality;
- will be fit for any particular purpose;
- will be the same as any description given to the customer;
- can be legally sold; and
- will cost the consumer a reasonable price (if no price has been agreed).

#### Services

The CGA implies similar guarantees into every contract for the sale of consumer services, including that:

- the services will be carried out with reasonable care and skill;
- the services will be fit for any particular purpose made known to the supplier by the customer;
- if the time for completing the services has not been agreed, the services will be carried out within a reasonable time; and
- if the price for the services has not been agreed, the price charged will be reasonable.

## Customers' remedies

Unlike the other Acts discussed in this guide, breaching the guarantees in the CGA does not give rise to fines or penalties. Rather, the consumer has a number of rights and remedies set out in CGA. These depend on the seriousness of the failure to comply with the guarantee.

Where the failure of the goods or services can be fixed and is not substantial, the customer may require the failure to be remedied but is not entitled to a refund. If the failure is not remedied within a reasonable time, the customer can get the failure remedied elsewhere and recover the costs or reject the goods/cancel the service contract and get a refund.

Where the failure of the goods or services cannot be fixed or is substantial, the customer may reject the goods or cancel the contract for services and get a refund or seek compensation. Compensation for losses suffered as a consequence of the failure may also be payable.

Any allegation by a student that a course provided by the student has failed to comply with the CGA will be dealt with in accordance with the [Student Academic Grievance Procedures](#).

## Other useful sources of information

Within the University

[External communications framework](#)

[Internal communications framework](#)

Outside the University

[The Commerce Commission](#)

[The Ministry of Consumer Affairs](#)

This guide is intended solely for use by the University of Otago and its related entities. The guide is general in nature and, if you have a particular query or problem, specific legal advice may be required. Please contact the University's risk manager, Alex Sweetman at [Alexandra.Sweetman@otago.ac.nz](mailto:Alexandra.Sweetman@otago.ac.nz) or (03) 479 5005 if you have any feedback on the guide or any general compliance or risk related queries.