

**University of South Australia**  
**Trade Practices Act Compliance**  
**Manual**

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## 1. INTRODUCTION

### 1.1 About this Compliance Manual

This manual is designed to assist all UniSA employees in understanding the University's obligations and their personal compliance obligations under four pieces of legislation:

- Trade Practices Act (Cth) 1974 (**TPA**)
- Fair Trading Act (SA) 1987 (**FTA**)
- Competition Policy Reform (SA) Act 1996 (incorporating the Competition Code)
- Misrepresentation Act (SA) 1972.

The legislation is complex and contains many obligations that, if breached, may lead to substantial penalties being imposed not only on UniSA but also on you personally. This manual covers the main obligations relevant to your day-to-day dealings.

The four pieces of legislation create similar obligations and therefore each Act will not be individually dealt with. Generally, the obligations under the Acts will be described collectively as **TPA obligations**. In most cases the TPA will be used as the representative example of the legislation.

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

The aim of this manual is to provide a general explanation of the obligations imposed by these pieces of legislation and guidance on how to conduct yourself, by:

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

However, the manual (including its explanations, examples, guidelines and checklists) will not cover all possible Trade Practices risks.

Important issues that you need to be aware of include:

- "minimum" code-of-conduct requirements when carrying out University business
- topics you can and cannot discuss when going to the negotiating table
- severity of penalties and consequences of non-compliance, including:
  - heavy fines
  - injunctions
  - damages
  - management down-time
  - remedial orders
  - damage to YOUR reputation and to UniSA's reputation
- you and the University are not immune from prosecution
- the University cannot pick up (directly or indirectly) the cost of any penalties awarded against you personally.

The TPA obligations outlined in this manual should be adhered to in relation to all business activities engaged in by the University, including the provision of courses and services in Australia and overseas, and international programs offered by the University.

Potential areas of risk exposure include:

- existing and new contracts
- fee structures
- marketing material
- individual claims and representations to potential customers in relation to courses offered or consultancy or other services provided by the University
- exclusive arrangements with a third party, or any agreement which requires a person to acquire goods or services from a third party, or restricts a person from dealing with a third party
- any agreement with a competitor to fix prices or share markets
- misuse of market power, or any agreement to restrict the supply of goods to, or boycott, particular suppliers or customers.

If you have any concerns or questions in relation to your TPA obligations or the legislation generally you must refer the matter to your supervisor.

UniSA will not support any individual who has consciously or deliberately breached any obligation outlined in this manual.

## **1.2 The Legislation**

### **Trade Practices Act**

The objectives of the Trade Practices Act are to:

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

The TPA does this by preventing businesses from acting unfairly in relation to their competitors, suppliers or buyers, or in a way which reduces competition within the market, to ensure that prices are kept competitively low and that products and services are made available in an efficient manner. The Act also protects consumers from being deceived, misled or bullied by careless or unscrupulous businesses.

The Act includes the following main parts:

- Part IIIA, which deals with access to essential facilities which constitute natural monopolies.
- Part IV, which deals with anti-competitive practices;
- Part IVA, which deals with unconscionable conduct;
- Part V, which deals with unfair trading practices (consumer protection); and
- Part VA, which deals with liability for defective goods.

This manual considers three main parts of the TPA:

- Part IV – Restrictive Trade Practices provisions: these provide a set of rules that govern competitive conduct between businesses
- Part IVA - Unconscionable Conduct provisions: these prohibit conduct which is unconscionable under common law or equitable principles recognised by the courts, and usually relate to the misuse of superior bargaining power, or one party taking advantage of another who is at a special disadvantage
- Part V - Consumer Protection provisions: these prohibit unfair trade practices with the aim of protecting consumers.

### **Fair Trading Act (SA)**

Each State and Territory in Australia has enacted fair trading laws that contain similar consumer protection provisions to those contained in Part V of the TPA. This legislation is necessary since due to constitutional restraints, the application of the TPA is generally limited to corporations, and only applies to individuals in certain circumstances. The fair trading laws ensure that the consumer protection provisions are applicable to all individuals, in addition to corporations.

### **Competition Policy Reform (SA) Act (incorporating the Competition Code)**

Each State and Territory has enacted competition laws which provide for Part IV of the TPA to have force as State or Territory legislation, so as to ensure all segments of Australia's business community, including individuals, are regulated by the same set of rules.

### **Misrepresentation Act (SA)**

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

## **1.3 Why the TPA applies to Universities**

Within the past 10 years, the role of universities has changed – from "providers of education" free of charge, to activities that now incorporate a wide range of commercial dealings. Because of this shift, the TPA now applies to the business activities of universities in a similar manner as to general trading corporations – including the University's dealings with suppliers, competitors, research partners, students, users of University

services and premises, and other relevant people.

The application of Part IV of the TPA - *Restrictive Trade Practices*, to Universities was further cemented in April 1995 through an agreement signed by the Commonwealth and all States and Territories, known as the Conduct Code Agreement.

By virtue of this Agreement, the State and Territory governments agreed to expand the application of Part IV to all persons within their jurisdiction via introduction of the *Competition Code*. The *Competition Code* comprises the Schedule version of Part IV of the TPA, which regulates or prohibits restrictive trade practices. The *Competition Policy Reform (SA) Act* provides for the *Competition Code* to have the force of law in South Australia. Similar competition policy reform legislation has been introduced in all States and Territories.

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

### 1.4 Penalties

University employees can be held individually liable for any breach of the TPA which results from their acts or omissions, and can be sued by competitors, suppliers, customers or consumers. If the University or its staff breach the Act, they can also be prosecuted by the Australian Competition and Consumer Commission (ACCC).

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

<b>COURT-IMPOSED SANCTIONS</b>	
<b>Injunctions</b>	Put in place by a court to restrain the University or an individual employee from taking certain actions that breach the TPA.
<b>Damages</b>	Awarded against the University or an individual employee (or both) for loss or damage suffered by a competitor, supplier, consumer or other person depending on the circumstances.
<b>Fines/ monetary penalties</b>	For each act or omission by the University, a penalty of up to \$10 million may be imposed for a breach of Part IV of the Act relating to restrictive trade practices, and a penalty of up to \$1.1 million may be imposed for a breach of Part V of the Act relating to consumer protection;  For each act or omission by an individual employee, a penalty of up to \$500,000 may be imposed for a breach of Part IV of the Act relating to restrictive trade practices and a penalty of up to \$220,000 may be imposed for a breach of Part V of the Act relating to consumer protection.
<b>Ancillary Orders</b>	A court may make any order it considers appropriate in relation to proceedings, including that a contract be varied, that certain clauses or the entire contract is void, that certain provisions of a contract will not be enforceable, that money must be refunded to a person who suffered loss or damage, or that goods must be repaired or services resupplied to a person who suffered loss or damage.
<b>Corrective Orders</b>	A court may order disclosure of information or corrective advertising in newspapers or other media
<b>CONSEQUENTIAL EFFECTS</b>	
<b>Legal Costs</b>	Significant legal costs may be payable by the University or the individual employee or both.
<b>Staff Down- time</b>	Considerable time may be spent in gathering material, preparing for and participating in legal proceedings

<b>Embarrassment/ Adverse Publicity/Reputation</b>	There is a considerable risk of adverse publicity, damage to reputation and embarrassment for both the University and individual employees. Proceedings may also result in public disclosure of sensitive documents
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It is important to note that the obligations created by the TPA extend beyond those parties “directly” involved in a contravention. They also apply to companies or individuals that are only “involved” to a limited extent in any contravention, including by:

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

### **1.5 Responsibilities of UniSA staff**

At a meeting of the University’s Council on 16 October 2001, the Council resolved to adopt a policy that requires compliance with the Trade Practices and Fair Trading Act be embedded in all University systems. This has been achieved through the University’s Legislative Compliance System and this TPA Compliance Manual and associated guidelines.

As an employee of UniSA, you are required to be familiar with the TPA. Individuals are fined frequently and ignorance of the law is no excuse.

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

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

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

## 2. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

### 2.1 What is the ACCC?

The ACCC administers the TPA and the *Prices Surveillance Act* (PSA) and has additional responsibilities under other legislation.

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

### 2.2 Objectives of the ACCC

The stated objectives of the ACCC are to:

- improve competition and efficiency in markets
- protect the interests of consumers and foster adherence to fair trading practices in well-informed markets
- promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective
- inform the community at large about the *Trade Practices Act* and the *Prices Surveillance Act* and their specific implications for business and consumers, and
- use resources efficiently and effectively.

### 2.3 Powers of the ACCC

The TPA enables members of the public, including competitors, suppliers, customers and consumers to bring proceedings against a business if it breaches the TPA and causes harm. Most litigation under the TPA is between private parties. However, the ACCC also has the power to take action against a business for breach of the TPA.

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

- compel any person to provide information or furnish documents relating to a possible breach of the TPA
- require evidence to be provided on oath
- enter any premises to inspect or copy documents.

### 2.4 What To Do if the ACCC Contacts You



#### DO

- refer all ACCC enquiries immediately and without further comment to the Executive Director: Finance and Resources (EDFR), or in their absence to the Legal Officer.
- Show a willingness to co-operate with the ACCC's investigations. However, do not provide any information, documents or answer any questions without first consulting the EDFR.



#### DO NOT

- enter into discussions with the ACCC but take careful notes of all information provided by ACCC investigators and immediately refer all enquiries to the EDFR.
- under any circumstances engage in conversation with the ACCC investigators without first seeking advice from the EDFR.
- agree or disagree with any comments the ACCC investigators pose.
- allow ACCC investigators to inspect any premises unless you first obtain approval from the EDFR who will check that they have a warrant or other relevant authority.
- underestimate ACCC investigators. They are highly skilled at obtaining information and may pose as customers or suppliers.

### 3. IMPORTANT CONCEPTS

To understand many of the TPA obligations, it is necessary to have a general understanding of a number of key concepts. For example, if you are not to engage in anti-competitive conduct, you will need to consider questions such as “what is competition” and “in what markets is UniSA a participant?”.

#### 3.1 Definitions of commonly used terms

##### Competition

In determining the level of competition in a market the following factors should be considered:

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

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

##### Agreement, Arrangement or Understanding

Agreements, arrangements and understandings may still breach the TPA even if they are not in writing, and are not legally enforceable. All there need be is communication with another person from which there has been a meeting of the minds or a consensus reached as to what is to be done (as opposed to a mere hope that something will be done) - a “nod and a wink” is sometimes sufficient.

##### Has the purpose ...

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

##### Market

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

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

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

##### Market Power

Market power is, in essence, the power of a business to behave in a market in a manner not constrained by competitors for a sustained period of time. One way to determine market power is to look at the ability of an organisation to raise prices above product cost without rivals taking away customers.

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

##### Product

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

##### Substantial

The word “substantial” is used in a relative sense. It may mean “large or weighty”, “considerable or big”, and must be “real or of substance” and not “insubstantial or nominal”.

## **4. KEY ROLES AND RESPONSIBILITIES**

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

### **4.1 Council**

The Council members of UniSA are responsible for:

- ensuring as far as possible that UniSA complies with the requirements imposed under relevant legislation; and
- through Audit Committee, monitoring and reviewing Senior Management in the establishment, implementation and maintenance of internal systems in order to:
  - foster the highest standards of compliance by UniSA and its employees with that legislation; and
  - minimise the risks of the University and/or its staff being prosecuted and/or penalised for legislative breaches

### **4.2 Vice-Chancellor**

The Vice-Chancellor is responsible for:

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

### **4.3 Executive Director: Finance and Resources**

The Executive Director: Finance and Resources is the Responsible Officer under the University's Legislative Compliance System.

### **4.4 Legal Officer**

The Legal Officer is responsible for:

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

### **4.5 Senior Management**

Senior Management (Pro Vice Chancellors and Executive Directors) are responsible within their areas for ensuring that the University meets its TPA obligations through:

- assessing the current state of TPA compliance
- reviewing the adequacy of any current systems
- identifying risks of non-compliance and areas of shortfall in achieving compliance
- periodic reviews and audits of business activities
- ensuring that management plans address risk exposures
- promoting compliance
- designing, developing and installing specific TPA compliance programs in their area of responsibility
- ensuring education and training on each specific program is undertaken by employees as required
- ensuring that business processes, procedures and products address TPA obligations
- ensuring all employees have access to an up-to-date version of the TPA Compliance Manual

- reporting material compliance failures to the Legal Officer with a copy to Planning and Assurance Services. Reports of compliance failures should include details of any remedial action taken or recommended to avoid repetition of the reported actual or potential non-compliance.
- preparing and presenting a report to the EDFR on the compliance system on request
- developing and implementing any remedial action authorised by SMG and/or Audit Committee for compliance failures
- ensuring that there are effective complaints handling systems in place which incorporate the requirements of the Legislative Compliance System.

#### **4.6 Managers, Directors and Heads of Schools**

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

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

#### **4.7 Employees**

Employees of UniSA must:

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

## 5. PART IV: RESTRICTIVE TRADE PRACTICES

This section is relevant to all UniSA employees who have contact with suppliers, customers and competitors, including:

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

### 5.1 Background

Part IV of the TPA prohibits certain types of horizontal (eg between competitors) and vertical (eg between parties in the same supply chain) arrangements that are deemed to be “anti-competitive”. Prohibited practices which could be relevant to UniSA include:

- agreeing to share markets, fix prices, restrict the supply of goods or boycott particular suppliers or customers
- misusing market power (eg: by eliminating or substantially damaging a competitor, preventing a new competitor from entering the market, or deterring or preventing a person from engaging in competitive conduct)
- exclusive dealing, which involves one party imposing restrictions on the other party's freedom to choose the third parties with whom it deals in relation to the sale or acquisition of goods or services, or requiring the other party to acquire goods or services from a third party.

It is easier than you might expect to engage in these sorts of anti-competitive practices. For example, if you discuss and come to some arrangement or understanding about the prices or territory specified in a UniSA tender with a colleague at another university which is also submitting a tender, you could be guilty of price-fixing or market sharing (even if you did not intend to do anything wrong). An example of exclusive dealing would arise if the University told students they had to buy equipment from a particular supplier.

Some restrictive trade practices are **strictly prohibited** regardless of their effect on competition and you should **never** engage in these practices (refer section 5.2).

Other restrictive trade practices are only prohibited if they have the purpose or likely effect of substantially lessening competition. You should never engage in these practices without first obtaining advice from your supervisor or the Legal Officer (refer section 5.3).

You will need to be particularly careful in relation to any dealings you may have with competitors as many arrangements or understandings between competitors will constitute a breach of the TPA.



#### DO

- act independently of competitors
- always ask the Legal Officer for advice before making arrangements with competitors. In particular, be aware of arrangements which:
  - establish particular agreed markets (eg geographical areas, student markets) for each competitor or which otherwise contain non-competitive provisions
  - aim at harming other competitors
  - relate to prices, fees or costs charged by each competitor
  - relate to a boycott of a person or class of person
  - involve any other form of collusion.

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



**DO NOT** engage in communication (meeting, correspondence, discussion) with a competitor from which there may be an understanding of how each party will act (remember, a "nod and wink" is enough!) without first seeking advice from the Legal Officer.

Communications regarding the following issues involve particular risk:

- regarding fees, costs, pricing
- regarding other competitors
- relating to dealings with third parties
- relating to allocation of territory or markets

- about whether or not you will submit a tender, the terms of the tender, the prices listed in the tender or about dividing the tender up in any way.

## 5.2 Conduct Prohibited Absolutely

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



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

- price fixing
- resale price maintenance
- forcing another's products (or "third line forcing")
- exclusionary provisions (or primary boycotts) – including market sharing
- misuse of market power

### 5.2.1 Price Fixing

Any understanding with a competitor that has the purpose or effect of fixing, controlling or maintaining prices, or rebates, discounts, allowances or credit terms provided in relation to goods and services, is illegal.

No formal arrangements need be in place to breach this prohibition

Costing and pricing must always be done independently, based on UniSA's specific circumstances and should never be discussed with the University's competitors. The University's competitors could include other universities and educational institutions; businesses providing a service or product similar to the one being provided by the University; or government entities or departments.

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

In general, information regarding the University's fees or prices must not be given to a competitor. However, it is not prohibited to review or obtain publicly available copies of competitors' prices to obtain market information.

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

- the supply of goods or services by a joint venture, or by the joint venture parties in certain circumstances; and
- the buying and selling activities of collective or cooperative buying and selling groups.

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

You should not assume that any price fixing arrangement will fall within the above exceptions to the TPA without seeking advice from the Legal Officer.



#### EXAMPLE

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

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

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

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

These three institutions have breached the *Competition Code* and Part IV of the TPA. It is an arrangement between competitors that fixes or controls prices.

In the same circumstances, these three institutions will not breach the law if one institution is the "price leader" and the other institutions simply follow the leader's price settings. It is lawful, even though all institutions arrive at the same price, because there is no agreement or understanding between competitors.

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

This will constitute price fixing as an understanding has been reached between competitors in relation to price. It does not matter that there is no formality about the agreement nor that the price discussions occurred 'off the record' outside of working hours.

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### **5.2.2 Resale Price Maintenance**

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

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

**DO**

- allow resellers freedom to set their own price.

**YOU MAY**

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

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

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

**EXAMPLE**

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

The University and the employees who negotiated this arrangement may be accused of resale price maintenance.

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

**5.2.3 Third Line Forcing (Exclusive Dealing)**

Third Line Forcing means:

- The provision of goods or services to a person on the condition that the person buys another product or service from a third person. For example, a car dealer might require you to obtain your finance from a particular company, or it might be a condition of a lease that you use a particular cleaning company.
- Offering a discount or rebate on the condition that the customer or student buys another product or service from a third person. For example, you might be offered a discount on a car if you buy a particular brand of tyre.
- Refusing to sell goods or services to a customer, or refusing to offer a discount or rebate to a customer, because that customer refuses to buy another product from a third party.

Three prerequisites must exist for there to be a third line forcing situation:

**Three Parties**

There must be the following three parties:

- supplier of goods or services
- purchaser
- third party supplier of different goods or services who is nominated by the first supplier

- Two Products** There must be two products:
- one product which the purchaser wants
  - another product which is forced upon it

**A condition** There must be a condition that the product wanted by the purchaser will not be supplied, or that a discount or rebate will not be provided, unless the other product is also acquired from the nominated third party.

You may **recommend** the product of a third person to a customer or student, but you must not sell goods or services on the **condition** that a customer buys the recommended product from the third person.

It is not third line forcing to 'bundle' goods or services. 'Bundling' is where goods or services are packaged to form a new product or service (such as package holidays). Bundling will be lawful provided that it does not substantially lessen competition.

Third line forcing may be immune from legal challenge if it is notified to or authorised by the ACCC (see sections 5.4 and 5.5 of this Manual below).



**DO**

- recognise the high risks associated with third line forcing. This practice is strictly prohibited and customers and competitors can sue for any loss suffered as a result of third line forcing
- allow customers and students to make their own decisions about what products or services they buy

**YOU MAY**

- recommend a third person's products to students and customers where it is commercially advantageous



**DO NOT** supply products or services subject to conditions that:

- restrict the freedom of students/customers to determine what products and services they buy, and from whom
- require students or customers to purchase another product or service from a third person
- provide discounts, incentives or rebates to customers if they acquire products or services from a third party



**EXAMPLE**

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Pi University negotiates a discount on all books purchased from Goodbooks Bookshop Pty Ltd, which is not part of the University. The bookshop agrees to the discount only if all students at Pi University buy their books there. Pi University enrolls students on the condition that they buy their books from that particular bookshop.

The University, the bookshop, the negotiating officer and other employees who assisted in the arrangement may be accused of third line forcing.

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Wallaby University has a large and successful School of Pharmacy. All its students are required to buy lab coats. The School, trying to help its students with the cost of study, negotiates a large discount with Protective Lab Supplies Pty Ltd. The discount is given on the basis that all pharmaceutical students buy their coats from PLS. To ensure that all students get the benefit of the discount, the School of Pharmacy requires all students to buy their coats from PLS before being admitted to the course.

The University, PLS and staff involved in negotiating the arrangement have engaged in third line forcing, which is illegal.

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As part of their recreation management course, all students are required to learn rock climbing. Green University organises for all the students to be taught by one company, "Rocky Mountain High".

Students pay their own fees for the rock-climbing weekend. One student wants to learn abseiling from another company, but is not permitted to do so. This is likely to constitute third line forcing.

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The University leases its lecture theatres to members of the public for functions on weekends and imposes a condition that the lessee must use a specified cleaning business to clean rooms after the function. This will constitute third line forcing, unless notified to or authorised by the ACCC.

An Overseas Students Unit offers to provide education placements to overseas students on condition that they obtain accommodation services through a nominated private supplier. This will constitute third line forcing.

### 5.2.4 Exclusionary Agreements (Primary Boycotts)

Primary boycotts generally occur in the following three situations, when competitors agree:

- not to supply goods or services, or to restrict or limit the supply of goods or services, **to** a particular person or class of person, or in particular circumstances or on particular conditions (including Collusive Tendering where you agree that you will not submit a tender for a specific contract)
- not to acquire goods or services, or to restrict or limit the goods or services acquired **from** a particular person or class of person, or in particular circumstances or on particular conditions
- that each competitor will keep their own customers and not attempt to take customers from each other. This is also known as market sharing – dividing or allocating the market, whether it be a geographic, product or other market

As with other trade practices provisions, no formal agreement needs to be entered into with competitors for an exclusionary agreement to exist.



#### DO NOT

- decide who to supply to by arrangement or agreement with a competitor
- decide who to stop supplying to by arrangement or agreement with a competitor
- impose on a customer conditions of sale which have been agreed or arranged with a competitor
- compare poor paying customers with a competitor with a view to reaching an understanding that each party will not supply debtors of the other party until such customers have paid their debts (however, you may decide independently not to supply a customer who has a poor credit record)
- agree with a competitor to divide the market



#### EXAMPLE

##### Primary Boycotts

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

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

##### Primary boycotts

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

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

### **Market Sharing**

Vice-Chancellors of Alpha, Beta and Delta universities regularly meet to discuss educational matters.

After the Government reduces funding by 15%, they commence discussions about possible efficiency savings. At one meeting, the Vice-Chancellors agree to rationalise operations by:

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

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

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

### **5.2.6 Misuse of market power**

This prohibition aims to prevent businesses using their market power to compete unfairly. To breach this prohibition, a business must possess substantial market power.

Whether or not an organisation is deemed to have substantial market power depends on how the relevant market is defined. For example, if the market for certain higher education services is considered to be a national market, it is unlikely that any university would have substantial market power. However, if the relevant market is considered to be a state or regional market, then a university may possess substantial market power.

Determining the relevant market involves a complex analysis of issues, which is likely to differ for different courses, products and services provided by the University. You should conduct yourself on the assumption that UniSA possesses a substantial degree of market power in the South Australian education market. It is best to adopt a conservative position unless legal advice is obtained to the contrary.

If the University has a substantial degree of power in a market, it is strictly prohibited from taking advantage of that power for any of the following purposes:

- to substantially damage or eliminate a competitor in any market
- to prevent a person from entering any market
- to prevent or deter a person from engaging in competitive conduct in any market.

### **High Risk Conduct**

- **Predatory Pricing** - aggressively setting fees below market value to beat a competitor or to keep a competitor out of the market, particularly where pricing is at or below cost.
- **Refusal to Supply** - refusing to deal with a customer for any of the three proscribed purposes set out above.
- Any other use of market power for one of the proscribed purposes set out above.



#### **WARNING SIGNALS**

- possession of market power
- pricing below cost
- unjustifiably refusing to supply
- any other use of market power for one of the proscribed purposes



#### **DO**

- seek advice from your supervisor or the Legal Officer before introducing a trading strategy aimed at harming competitors
- properly document the legitimate business reasons upon which important business decisions are made
- realise that the University will only be in breach of these provisions if it has market power in the relevant market, and takes advantage of its market power for one of the proscribed purposes. Conduct that is solely designed to improve efficiency, or service quality, will rarely break the law (although it may still constitute a breach if the circumstances indicate that the conduct was also engaged in for one of the proscribed

purposes).



**DO NOT**

- embark on aggressive price-cutting in market segments, particularly if the fees are set at an unrealistic level close to or below cost, without both seeking advice from the Legal Officer and ensuring that there is a legitimate business reason for reducing prices
- refuse to supply a new customer or stop supplying an existing customer for any of the proscribed purposes, including any attempt to prevent the customer competing with UniSA, or for vindictive or retaliatory reasons
- refuse to supply a customer unless the decision is based on legitimate commercial reasons
- refuse to purchase from a new supplier or stop purchasing from an existing supplier for any of the proscribed purposes
- use market power to prevent a new competitor coming into the market



**EXAMPLE**

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A University which has substantial market power in the short-course market attempts to solidify its market share by offering corporate customers business courses at fees that do not cover the total cost of conducting the courses.

If a substantial purpose of such conduct is to drive other competitors out of business, it is likely to be considered predatory pricing, even though the University maintains that the pricing structure was also intended to "develop its relationship with industry".

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A rural University has the only swimming pool in the district open to the public out of school hours on a user pays basis. A sports club in town establishes another pool in competition, but the University lowers its charges below true operating costs for twelve months and drives the competitor out of business.

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An Environmental Education Centre (EEC) provides transport to and from, and runs education programs on, a historically unique site for the public. It has a sole license to control access to the site through its tour services or through private tour competitors and handles around 20% of transport clients and 60% of on-site tour clients from the public.

It offers below-cost rates when setting prices for the public with a view to eliminating its competitors. This practice will be prohibited if the EEC is found to have substantial market power and the purpose or likely effect of the price undercutting is to substantially damage or deter competitors.

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**5.3 Conduct that affects Competition**

Certain TPA provisions are only breached by conduct that has the purpose, effect or likely effect of substantially lessening competition in a relevant market. That is, unlike the conduct discussed in section 5.2 of this manual, the conduct described in this section will not automatically breach the TPA, and will only be prohibited if it substantially lessens competition.

Conduct which falls within this category includes:

- exclusive dealing
- anti-competitive agreements
- mergers
- secondary boycotts

### 5.3.1 Exclusive Dealings

Exclusive dealing arrangements (other than third line forcing) are only illegal where they have the purpose or likely effect of substantially lessening competition. They include the following practices:

- |                             |  |
|-----------------------------|--|
| <b>Exclusive Selling</b>    | Supplying a product or service to a student/customer on condition that the student/customer accepts a restriction (total or partial) from either buying products or services from a competitor, or resupplying products or services acquired from a competitor of UniSA. |
| <b>Exclusive Purchasing</b> | Acquiring a product or service from a supplier on condition that the supplier accepts a restriction (total or partial) from selling products or services to competitors of UniSA, other third parties, or in a particular geographic locations                           |
| <b>Resale Restrictions</b>  | Supplying a product or service on condition that the customer accepts some restriction on the right to re-supply products or services to particular persons or in particular geographic areas.   |

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

It is not illegal to refuse to supply a customer provided there are legitimate commercial reasons for doing so.



**DO** seek advice from the Legal Officer before agreeing to any exclusive dealing arrangement to determine whether the arrangement may be regarded as having the purpose or effect of substantially lessening competition.



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



#### EXAMPLE

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

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

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

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

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

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

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

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### **5.3.2 Anti-competitive agreements**

UniISA is prohibited from entering into, or giving effect to, agreements, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition. As with other sections of the TPA, there is no need for a formal contract for this provision to be breached – a 'nod and a wink' may be enough.

It will still be a breach of this provision if at least one of the substantial purposes of the agreement, arrangement or understanding is to substantially lessen competition, even if there are other legitimate purposes.

This is a general catch-all provision designed to prevent anti-competitive conduct that does not fit into the more specific prohibitions contained in the TPA.

You will need to be particularly careful about entering into any contract, arrangement or understanding with a competitor of UniISA as these types of arrangements are often deemed to have the purpose, effect or likely effect of substantially lessening competition.

**All arrangements with competitors have the potential to substantially lessen competition.**

**Therefore you should:**

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



**Ask your Supervisor or the Legal Officer if you are unsure whether specific conduct is prohibited, or whether the conduct is likely to substantially lessen competition.**



#### **DO NOT**

- enter into any agreement, arrangement or understanding with a competitor or any other person, where one of the purposes of, or the likely effect of, the conduct could be a substantial lessening of competition, without first obtaining advice from the Legal Officer.

### **5.3.3 Mergers**

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



#### **DO**

- seek advice from the Legal Officer if consideration is being given to acquiring shares in a company or the assets of any person.



#### **DO NOT**

- enter into an acquisition agreement for share capital or assets, or make a public announcement about a proposed acquisition before obtaining advice from the Legal Officer



#### **EXAMPLE**

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

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

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

### 5.3.4 Secondary Boycotts

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

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

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

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

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

### 5.4 Authorisation

Upon application by a University or a body representing a group of Universities (such as the AVCC), the ACCC has the power to authorise some restrictive trade practices which are otherwise prohibited. Authorisation gives an entity protection against legal proceedings in relation to conduct that would otherwise be in contravention of the TPA.

Authorisation may be sought for:

- provisions in contracts, arrangements, understandings or covenants that have the purpose or likely effect of substantially lessening competition;
- price fixing arrangements;
- exclusive dealing, including third line forcing;
- mergers and acquisitions;
- exclusionary provisions (primary boycotts);
- boycotts (secondary);
- resale price maintenance.

However, the ACCC will not grant an authorisation unless it is satisfied that the contract or conduct would result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any anti-competitive effects of the contract or conduct.

Authorisation is not available for misuse of market power.

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

### 5.5 Notification

A corporation may file a notice with the ACCC and obtain statutory protection in relation to trade practices which amount to Exclusive Dealing (including third line forcing), which would otherwise be in breach of the TPA. Notification is an alternative to applying for an authorisation, and is much less expensive and easier to obtain than an authorisation.

Upon lodging a notification for exclusive dealing, a corporation gains immediate and automatic immunity from legal proceedings under the TPA. Third line forcing becomes immune at the end of the prescribed period (usually 14 days) from the time the ACCC receives the notice. The immunity remains effective until it is revoked by the ACCC. The ACCC can revoke immunity if it decides that the conduct is likely to have the effect of substantially lessening competition and either:

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

## 6. UNCONSCIONABLE CONDUCT

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

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

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

The TPA prohibits the following three types of unconscionable conduct:

- unconscionable conduct in **commercial dealings** – this prohibition applies generally in relation to all commercial dealings other than consumer transactions
- unconscionable conduct in relation to **consumer transactions** – this prohibition applies in relation to the supply of goods or services which are ordinarily acquired for personal, domestic or household use or consumption
- unconscionable conduct in relation to **business transactions** – this prohibition applies in relation to the supply of goods or services which are under \$3 million in value to a person or corporation (other than a publicly listed company). This prohibition is aimed at protecting small businesses from attempts by larger business to exploit their stronger bargaining position.

### 6.1 General Unconscionable Conduct – Commercial Dealings

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

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

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

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

### 6.2 Unconscionable Conduct – Consumer Transactions

This is a particular category of unconscionable conduct aimed at protecting **consumers**.

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

- the relative bargaining strengths of the parties
- the consumer's ability to understand the documentation presented
- whether undue influence or pressure or unfair tactics were used
- whether the conditions imposed went beyond what was necessary to protect the supplier's legitimate interests
- the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services elsewhere.

This prohibition only applies to unconscionable conduct in connection with the supply to consumers of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption (ie not for the purpose of resupply or to manufacture something else).

### 6.3 Unconscionable Conduct – Business Transactions

The TPA provides small businesses with similar protection to that available for consumers outlined above. This obligation is limited to business transactions for the supply or acquisition of goods or services of a value under \$3 million.

In determining whether a party has acted unconscionably, the TPA provides a further six matters, in addition to the five matters listed above, that a court may consider:

- the extent to which the supplier's conduct toward the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers
- the requirements of any applicable industry code
- the requirements of any other industry code if the business consumer acted on the reasonable belief that the supplier would comply with that code
- the extent to which the supplier unreasonably failed to disclose to the business consumer:
  - any intended conduct of the supplier that might affect the interests of the business consumer
  - any risks to the business consumer arising from the supplier's intended conduct, which the supplier should have foreseen and would not be apparent to the business consumer
- the extent to which the supplier was willing to negotiate the terms and conditions of any supply contract
- the extent to which the supplier and the business consumer acted in good faith.



#### WARNING SIGNALS

- dealing with persons or businesses:
  - who are disadvantaged in some way;
  - where the University is in a stronger bargaining position;
  - in relation to goods or services of a personal, domestic or household nature, or in relation to business transactions worth less than \$3 million
- complex transactions where the other party seems confused about the terms of the arrangement



#### DO

- encourage the other party to obtain independent legal advice in relation to complex transactions;
- explain the nature of the transaction carefully
- deal honestly and fairly with customers
- ensure that your customers understand all important terms, and any adverse aspects, of any contract or sale
- follow all relevant industry codes of practice
- allow the customer time to consider documents and consult their advisers
- give careful consideration to any request to change the terms of any standard form contract used by the University for the purchase or supply of goods or services.



#### DO NOT

- engage in any conduct that a court may consider unconscionable having regard to the matters set out above, including:
  - the relative strengths of the bargaining positions of the parties;
  - whether the consumer was able to understand the documentation;
  - whether undue influence or pressure was exerted or unfair tactics used;
  - whether the consumer was required to comply with conditions which were not reasonably necessary for protection of the supplier's legitimate interests;
  - the amount for which and the circumstances under which the consumer could have acquired equivalent goods or services from a different supplier.
- use pressure tactics to secure a sale
- attempt to coerce a customer into signing before they have read and understood any documents
- impose any unreasonable terms or conditions on a customer that is in a weaker position, particularly if the customer is effectively locked into dealing with the University due to particular circumstances
- fail to disclose the total cost of the product or service being offered or any other important terms, including any intended conduct of the University that may affect the interests of a business consumer, or any risks to the business consumer arising from

the University's proposed conduct

- discriminate between different customers and treat one customer or a group more favourably than another unless you have legitimate business reasons for making those distinctions
- withhold information that would influence the customer's decision about whether or not to purchase goods or services, or enter into an agreement with the University

## **7. CONSUMER PROTECTION**

Part V of the Trade Practices Act aims to protect consumers. This can affect the University in two ways:

- it can protect the University if the University deals with a business that fails to do business honestly
- it can also apply in situations where the University is the “wrongdoer” – for example, if students are given incorrect information about a course.

Section 52 prohibits businesses engaging in misleading or deceptive conduct. This includes conduct that is “likely” to mislead or deceive, even if no one has actually yet been misled or deceived. Generally, the University and other businesses are required to be truthful and refrain from giving impressions which are incorrect. Keeping quiet and failing to disclose relevant information can also be a breach of the Act.

You do not have to be “dishonest” to breach section 52 of the TPA. The provision can be breached even where you have no intention of misleading or deceiving a person, including where you have not taken sufficient care with your communications. Remember – it is no excuse that the conduct is unintentional or accidental.

The other provisions of Part V prohibit specific types of misleading and deceptive conduct and certain other unfair practices. The Part V provisions also imply certain minimum warranties into sales transactions with consumers.

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

### **7.1 Misleading or Deceptive Conduct**

Section 52, which prohibits misleading or deceptive conduct, is one of the most litigated provisions of the TPA.

Conduct (including making statements) in trade or commerce that is misleading or deceptive or is likely to mislead or deceive is prohibited. Misleading or deceptive statements often arise in promotional or marketing material, which for the University might include advertisements for various courses. Misleading or deceptive statements may also arise in discussions or negotiations when trying to “sell” courses to prospective students or promote the University.

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

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

Special care must be taken when you refer to:

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

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

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

There are no fines or penalties imposed for a breach of section 52 of the TPA. However, injunctions to restrain breaches may be sought, and a court may order rectification of the breach or damages to be paid to a person who suffers loss or damage as a result of the breach.

Fines of up to \$1.1 million for corporations and \$220,000 for individuals may be imposed for breaching other provisions of Part V of the TPA.



**WARNING SIGNALS**

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

**Note**

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



**DO**

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



**DO NOT**

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



**EXAMPLE**

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

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

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

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

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

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

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

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

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

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

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

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A well-known tennis player has done a degree in your faculty, and your information brochure for 2003 has a picture of him on the University grounds on the front cover. You did not obtain his permission before using the photograph.

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

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## **7.2 False or Misleading Representations**

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

- the standard, quality, value, grade, composition, style, model, history or previous use of goods or services
- that goods are new
- sponsorship or approval of goods or services
- performance characteristics, accessories, uses or benefits of goods or services
- price

- availability of spare parts or facilities for repair of goods
- place of origin of goods
- the need for any goods or services
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

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

### **7.3 Advertising Practices**

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

#### **Advertising Partial Prices**

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

#### **Fine Print Qualifiers**

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

#### **Two-price Advertising**

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

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

#### **Comparative Advertising**

When comparing a competitor's products or services with the University's products or services, it is important that the advertisement gives a truthful impression of the differences between the products or services, and does not exaggerate any disadvantages associated with the competitor's products or services, or any advantages of the University's products or services. Comparisons should only be made with 'like' or equivalent products or services of a competitor.

#### **Imaginary Gifts or Prizes and Bait Advertising**

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

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

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



#### **DO NOT**

- make assumptions that your advertising material will only reach a particular target audience
- make any statements concerning gifts or prizes offered when there is either no intention of providing the gifts or prizes or they will be made available in unduly limited quantities or for an unreasonably limited period of time
- refer to prices in promotions unless they represent the full price and there will be no price increases while the advertising is current
- compare prices or other characteristics of the University's goods or services with competitors' goods or services unless the compared products or services are equivalent, and any compared prices or other characteristics are current. An advertising campaign must be quickly withdrawn or changed if the competitor alters

- its price or the characteristics of its goods or services
- advertise “discounted” prices unless your product or service has actually been sold for a higher price within a recent period
- use fine print to qualify an advertisement where the fine print contradicts statements made in the body of the advertisement
- use bait advertising or offer goods or services at a particular price if you do not intend to or are not able to supply the goods or services at that price for a reasonable period of time
- accept payment without intending or being able to supply goods or services as ordered

#### 7.4 Misleading Conduct in Relation to Employment

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



#### EXAMPLE

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

#### 7.5 Referral Selling

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

#### 7.6 Harassment or coercion

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

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

#### 7.7 Other consumer protection matters

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

An organisation must not:

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

#### 7.8 Defences

- There are several defences that may be available to an organisation or individual prosecuted for contravention of Part V of the TPA, including where the contravention was due to:
  - a reasonable mistake
  - reasonable reliance on information supplied by another person

- the act or default of another person, or an accident or some other cause beyond the organisation's or person's control, and the organisation or person took reasonable precautions and exercised due diligence to avoid the contravention.



**DO**

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



**DO NOT**

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

## 7.8 Consumer Contracts

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

- the price of the goods does not exceed \$40,000 OR
- the price of the goods exceeds \$40,000 but the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, or, if the goods consist of a commercial road vehicle (a vehicle acquired principally to transport goods on public roads)

AND the goods are not purchased for either:

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

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

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

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

In consumer contracts, a trading corporation, when supplying goods or services to a consumer, must comply with certain warranties and conditions that are implied by the TPA, as set out below. These conditions and warranties cannot be modified or excluded by agreement between the parties (although liability may be limited in certain ways by mutual agreement)

### **Statutory warranties and conditions relating to supply of Goods to a consumer:**

- condition as to clear title to goods
- warranty that goods are free from encumbrances, that the corporation has the right to sell the goods, and that the consumer will enjoy quiet possession of the goods
- condition that the goods:
  - correspond with sale by description
  - are of merchantable quality
  - are fit for any purpose made known by the consumer to the corporation either expressly or by implication
  - correspond with sale by sample.

### **Statutory warranties and conditions relating to supply of Services to a consumer:**

- warranty that services will be rendered with due care and skill and that materials supplied with those services will be reasonably fit for the purpose for which they are supplied
- warranty that, where the purpose is made known either expressly or by implication to the supplier, the services and any materials supplied in connection therewith will be reasonable fit for that purpose.

If a breach of any of these warranties or conditions occurs in relation to a contract for the sale of goods or services to a consumer, the consumer may bring an action for breach of contract. There are no statutory fines or penalties for breach of these provisions under the TPA.

## **7.9 Obtaining Refunds**

Under the TPA, you are entitled to a refund if something you bought for yourself or the University:

- is faulty or defective and you were not aware of the fault or defect, and it was not brought to your attention, before purchasing the product
- does not do the job you were led to believe it would do
- does not match a sample you were shown or
- is not as described on the box or in an advertisement

You may be able to negotiate for defective goods to be exchanged or repaired by the supplier instead of refunded

Businesses do not have to give you a refund if you:

- can't prove that you bought the product from that business (eg. you don't have a receipt).
- have just changed your mind
- have damaged the product or
- knew or should have known about a fault when you bought the product (eg. the product was purchased in circumstances where you would expect defects ie factory seconds, or the defect was specifically drawn to your attention before you purchased the product, or you were given the opportunity to examine the product before the sale and the examination ought to have revealed all defects)

It pays to find out the refund policies of a business before you buy. Some businesses offer refunds even when they don't legally have to because they are keen to maintain a good relationship with their customers.

## 8. COMPLIANCE PROCEDURES

### 8.1 Background

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

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

### 8.2 Executive Director: Finance & Resources

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

If you have any questions about the *Trade Practices Act*, or these compliance procedures please seek advice from the EDFR or the Legal Officer.

### 8.3 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 at their induction and will be asked to read it.

You may also be asked to take part in a training program that has been specially designed to help you avoid breaching the *Trade Practices Act*. You will be told what training you need to participate in and how often you need to do it. Where necessary, new employees will also be required to participate in the training program as part of their initial training and induction. It is up to you to make sure that you participate satisfactorily in all the required training.

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

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

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

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

### 8.5 Conduct of Competitors

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

### 8.6 Reporting

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

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

- a brief description of the non-compliance
- a proposal for rectification
- a time-frame for rectification

The Legal Officer will maintain a register of reports.

### **8.7 Document Sign-Off**

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

Please refer to the authorisation guidelines contained on the University intranet site for details regarding the University personnel who have authority to sign different types of documents.

## 9. GOOD PRACTICES

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

1. Staff may compete vigorously in each market in which UniSA operates using:
  - pricing;
  - standard of service;
  - product benefits; and
  - other ethical means that do not involve anti-competitive practices, such as those outlined below.
2. UniSA staff must not enter into any of the following types of, arrangement if the arrangement would have the purpose or likely effect of substantially lessening competition:
  - prohibiting or restricting customers from handling the products of a competitor;
  - prohibiting or restricting suppliers from supplying goods or services to a competitor or any other third party;
  - requiring the customer to buy all its requirements of a particular product from UniSA or to deal exclusively with UniSA;
  - restricting the territory or markets in which the customer may resell products or services purchased from UniSA;
  - restricting the customers or classes of customers to whom the customer may resell; or
  - any other contract, arrangement or understanding which has the purpose or likely effect of substantially lessening competition.
3. UniSA staff must not (regardless of the effect on competition):
  - require a customer to purchase products or services from a third party as a condition of selling the customer another product or service;
  - restrict the minimum price at which the customer may resell any goods or services it purchases from UniSA;
  - misuse any market power for the purpose of eliminating or substantially damaging a competitor, or preventing entry by a competitor into a market, or deterring or preventing competitive conduct in a market;
  - enter into any agreement with a competitor to prevent, restrict or limit the supply of goods or services to or from particular persons or classes of persons, or in particular circumstances or on particular conditions;
  - enter into any arrangement with a competitor that has the purpose or likely effect of fixing, controlling or maintaining prices, discounts, allowances, rebates or credit in relation to goods or services.
4. If UniSA staff wish to combine two or more business products for sale exclusively as a package, they must:
  - consider carefully the market for each of the products to determine whether the arrangement may result in a substantial lessening of competition; and
  - not proceed without legal advice if there is a possibility that sale of the products together will result in a substantial lessening of competition.
5. If UniSA staff wish to enter into an agreement or understanding with a customer that the customer will buy all its requirements of a particular product from UniSA, or that the customer will deal exclusively with UniSA and not purchase products from any competitor of UniSA, they must:
  - consider carefully the market for the products to determine whether the arrangement may result in a substantial lessening of competition; and
  - not proceed without legal advice.
6. UniSA staff must not participate in discussions with competitors regarding confidential matters that are the subject of competition between UniSA and a competitor. In particular, UniSA must not enter into any contract, arrangement or understanding with a competitor regarding:
  - prices or discounts;
  - terms or conditions of sale, including credit terms;
  - profits, profit margins or costs;
  - bids or an attempt to bid;
  - sales territories or markets;
  - entering or leaving geographic markets;
  - entering or leaving product markets;
  - selection, classification, rejection or termination of customers or classes of customers;
  - the exchange of competitive information; or

- any other matter which may restrict or impact upon UniISA's freedom of action or independence in the competitive conduct of its business.
7. UniISA staff must not allow express or tacit anti-competitive agreements or understandings between UniISA and one or more competitors to:
- come into existence; or
  - limit the market behaviour of UniISA in any way.
8. To help protect UniISA from any claims that it has collaborated with its competitors, UniISA staff must record the source of any information received:
- regarding competitors; or
  - which influences its market strategy, particularly in relation to price.
9. In general, UniISA staff should exercise caution when making decisions which may affect competition. In particular, care should be taken in markets in which UniISA as a supplier has or might have a relatively large market share, or where UniISA might have substantial market power as a buyer.

APPENDIX 1: READY-REFERENCE SUMMARY

TPA RISK AREA	EXAMPLES
<b>AUTOMATIC BREACHES OF THE TPA</b>	
<p><b>Price Fixing</b> Occurs if two or more competitors agree to fix, control or maintain prices, mark-ups, discounts, allowances, rebates or credit in relation to goods or services</p>	<p>A contract, arrangement or understanding between competitors about:</p> <ul style="list-style-type: none"> <li>▪ selling prices or arrangements</li> <li>▪ discounts or rebates</li> <li>▪ tenders or quotations</li> <li>▪ price lists or other price information</li> <li>▪ standard terms of sale, credit arrangements or profit margins</li> </ul>
<p><b>Resale Price Maintenance</b> Occurs if a supplier insists on or attempts to persuade a reseller not to resell below a certain price.</p>	<ul style="list-style-type: none"> <li>▪ imposing minimum prices for resale</li> <li>▪ refusing to supply resellers selling below recommended prices</li> <li>▪ pressuring or threatening distributors to raise prices</li> </ul>
<p><b>Third line forcing</b> Occurs if a supplier sells or offers to sell a product to a purchaser on the condition that the purchaser obtains another product from a nominated third party</p>	<ul style="list-style-type: none"> <li>▪ refusing to supply products or services unless a customer agrees to acquire another product or service from a supplier nominated by UniSA</li> <li>▪ refusing to supply a customer if they wish to select products or services which differ from any products or services of a third party nominated by UniSA</li> <li>▪ providing discounts, incentives or rebates to customers only if they acquire products or services from a third party</li> </ul>
<p><b>Primary Boycott / Exclusionary agreements</b> Occurs where two or more competitors enter into an arrangement under which they agree to prevent, restrict or limit the supply or acquisition of goods or services to or from, particular persons or classes of persons, or in particular circumstances or on particular conditions</p>	<ul style="list-style-type: none"> <li>▪ deciding who to supply to by arrangement with a competitor</li> <li>▪ discussing formal tenders with a competitor and agreeing that one or more parties will not tender for the supply of certain goods or services, or will not submit a tender at all imposing conditions of sale which have been agreed with a competitor</li> <li>▪ comparing poor paying customers with a competitor and agreeing not to supply each others' poor paying customers until they have paid their debts</li> <li>▪ agreeing with a competitor how to divide or "share" customers or markets</li> </ul>
<b>MISUSE OF MARKET POWER</b>	
<p><b>Abuse/misuse of market power</b> Occurs if a business has a substantial degree of power in a market and takes advantage of that power for the express or implied purpose of eliminating or substantially damaging a competitor, or preventing entry by a competitor into a market, or deterring or preventing competitive conduct in a market.</p>	<p>Where UniSA has market power in a relevant market and takes advantage of its market power by:</p> <ul style="list-style-type: none"> <li>▪ refusing to supply a customer for vindictive reasons with the aim of preventing them from engaging in competitive conduct</li> <li>▪ refusing to purchase from a supplier unless that decision is based on legitimate business reasons</li> <li>▪ using market power to prevent a new competitor entering the market</li> <li>▪ attempting to damage a competitor by offering unreasonably low prices or refusing to supply</li> </ul>

<b>COMPETITION BREACHES OF THE TPA</b>	
<p><b>Agreements which substantially lessen competition</b> Occurs through anti-competitive contracts, arrangements or understandings that have the purpose or likely effect of a "substantial lessening of competition" in a relevant market.</p>	<p>Any contract, arrangement or understanding which has the purpose or likely effect of substantially lessening competition, which may include arrangements for:</p> <ul style="list-style-type: none"> <li>▪ exchanging commercially sensitive information with a competitor</li> <li>▪ entering into joint purchasing or joint supply agreements with competitors</li> <li>▪ entering into any understanding with a competitor to share customers or divide up markets</li> <li>▪ attempting to limit customer contact with competitors</li> </ul>
<p><b>Exclusive Dealing (other than third line forcing)</b> Exclusive dealing practices include supplying goods or services on the condition that the purchaser does not acquire goods or services from a competitor of the supplier, or the purchaser accepts some restriction on its right to resupply goods or services, or acquiring goods or services on the condition that the supplier accepts some restriction on its right to supply third parties.</p>	<p>The following conduct will constitute exclusive dealing where it has the purpose or likely effect of substantially lessening competition.</p> <ul style="list-style-type: none"> <li>▪ refusing to supply a new customer or stopping supplying an existing customer because: <ul style="list-style-type: none"> <li>▪ they have dealt with a competitor of UniSA; or</li> <li>▪ they will not agree to stop buying goods or services from a competitor</li> </ul> </li> <li>▪ prescribing a condition that the customer not re-supply products or services acquired from UniSA, or not resupply to particular persons or in particular places</li> <li>▪ refusing to purchase from a new or existing supplier because that supplier deals: <ul style="list-style-type: none"> <li>▪ with a competitor</li> <li>▪ with any other particular person</li> <li>▪ in a particular place or territory</li> </ul> </li> <li>▪ offering incentives or discounts to customers on the condition that they agree not to purchase other goods or services from competitors of UniSA, or they accept some limitation on their right to resell goods or services.</li> </ul>
<p><b>Secondary Boycotts</b> Where two persons acts in concert to hinder or prevent a third person from supplying goods or services to, or acquiring goods or services from, a fourth person, with the purpose or likely effect of causing substantial loss or damage to the fourth person, or to substantially lessen competition in any market in which the fourth person operates.</p>	<ul style="list-style-type: none"> <li>▪ acting in concert with another party for the purpose of hindering or preventing a third party acquiring goods or services from a fourth party</li> <li>▪ acting in concert with another party for the purpose of hindering or preventing a third person from supplying goods or services to a fourth party</li> </ul>
<b>OTHER BREACHES OF TPA</b>	
<p><b>Misleading or Deceptive Conduct</b></p>	<ul style="list-style-type: none"> <li>▪ making untrue statements in negotiations</li> <li>▪ trying to sell products that are deceptively similar to a competitor's products</li> <li>▪ attempting to trade under a deceptively similar name to an existing business</li> <li>▪ making predictions as to price, quality or performance that are unrealistic</li> <li>▪ becoming involved in communications which are inaccurate, misleading or unsubstantiated</li> <li>▪ guessing or speculating about future matters, unless there is a reasonable basis for doing so</li> <li>▪ leaving out material you consider a third party would consider important</li> <li>▪ allowing a third party to continue under a false impression when you know they are mistaken</li> <li>▪ making representations which you are unsure of or have not checked</li> </ul>

<p><b>Advertising and promotional claims</b> Advertising can often constitute misleading or deceptive conduct</p>	<ul style="list-style-type: none"> <li>▪ making untrue advertising claims</li> <li>▪ relying on fine print or general statements of qualification or limitation such as “exclusions apply” or “limited offer” without seeking prior approval from the Legal Officer</li> <li>▪ creating campaigns based upon unusual or dangerous or comical use of UniSA’s products or services without approval from the Legal Officer</li> <li>▪ using words such as “free”, or ambiguous words such as “scientific” or “breakthrough” without approval from the Legal Officer</li> <li>▪ making any statements concerning gifts or prizes offered when there is either no intention of providing the gifts or prizes, or they exist in unduly limited quantities or for a unreasonably limited time</li> </ul>
<p><b>Price Claims</b> Price claims also often constitute misleading or deceptive conduct</p>	<ul style="list-style-type: none"> <li>▪ referring to prices in promotions, unless they are the full price and there will be no price increases while the advertising is current</li> <li>▪ comparing prices with competitors unless your products and services are equivalent, the compared prices are current and the advertising campaign can quickly be withdrawn or changed if the competitor alters its prices</li> <li>▪ advertising “discounted” prices unless your product or service has actually been sold for a higher price within a recent period</li> </ul>
<p><b>Dishonest selling practices</b></p>	<ul style="list-style-type: none"> <li>▪ unduly harassing customers in relation to supply of products or payment</li> <li>▪ offering inducements to customers to supply names of prospective customers if in reality receipt of the inducement is contingent on some other future event (ie that the prospective customer actually makes a purchase).</li> </ul>
<p><b>Unconscionable conduct</b></p>	<p>Unjust use by the University of its stronger bargaining position in relation to persons or businesses that are in a disadvantaged or weaker position, including by:</p> <ul style="list-style-type: none"> <li>▪ withholding information that would influence customers’ decisions</li> <li>▪ imposing onerous terms or conditions on a person in a weaker bargaining position that are not reasonably necessary to protect the legitimate interests of UniSA</li> <li>▪ using undue influence or unfair tactics to pressure a person to sign any document before they have had an opportunity to consider its terms and seek advice</li> <li>▪ preparing contracts that are not in plain English and are not otherwise easy to understand, especially where it is clear that the customer has limited business or legal know-how, and does not understand the terms of the contract</li> </ul>