

UNIVERSITY MARKETING AND THE LAW

The application of the *Trade Practice Act 1974* to the marketing and promotional activities of Universities

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This paper deals with the application of the Commonwealth *Trade Practices Act 1974* (the TPA) and its state equivalents to the marketing and delivery by universities of the courses they teach. It commences by examining the circumstances in which the Act will apply to universities. It then considers their liability for erroneous, or misleading, promotional material and course information and the situations in which they may contravene the competition law provisions of the Act. It warns that the significance of this area of the law is often not appreciated by those responsible for marketing, or delivering courses, with the consequence that, unwittingly, they risk exposing their university and themselves to significant liability.

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1. Introduction

This paper deals with the application of the Commonwealth *Trade Practices Act 1974* (the TPA) and its state equivalents to the marketing and delivery by universities of the courses they teach. Its genesis is the belief that, whilst the significance of this Act is appreciated by our university solicitors¹, its ramifications and reach are not understood within the wider university community, including, most importantly, by those responsible for marketing and delivering courses. Empirical observation suggests that, primarily, this is because the Act prescribes many forms of conduct that are not instantly recognised as morally reprehensible and which, as a result, are not automatically avoided on the ground that they are inconsistent with acceptable behaviour. This is a matter of concern because the Act creates very significant proscriptions, applicable to universities and to their staff, which can have serious consequences for them both.

2. The applicability of TPA proscriptions to universities

There are two preconditions to liability arising under the *TPA* which, until relatively recently, operated to protect most universities most of the time. They are the requirement that a respondent be a “corporation” and the requirement in certain key provisions that the activity complained of occur “in trade or commerce”. However, the expanded operation of the proscriptions created by the Act, resulting from their incorporation into state fair trading, sale of goods and competition policy reform acts, and the significant changes that have occurred in the nature of university activity and funding arrangements have meant that the protection afforded by these requirements has largely evaporated.

“Corporation”

For constitutional reasons, most of the proscriptions in the TPA are directed at corporations. For the same reasons, “corporation” is defined in s. 4(1) of the Act to include only those that can be characterised as being “foreign”, “trading”, “financial”, “incorporated in a Territory”, or as a holding company of such a corporation. Of these possibilities, in practice, the most important is “trading corporation” and in a number of early TPA cases, a central issue was whether the respondent was a corporation of this nature. This is determined having regard to the current activities of the company, not by reference to its principal activity, or the reason it was established². As a result, a university will be treated as a trading corporation if it has “trading activities [that are] substantial, in the sense of non-trivial [even though they are] not the predominant element of what the university does.”³ Thus, for example, in *Quickenden v O’Connor*,⁴ a case concerning the certification of an agreement under the *Workplace Relations Act 1996*, the University of Western Australia successfully argued that it was a trading corporation because it engaged in trading activities such as buying, selling and renting property, providing parking, selling publications, providing student accommodation and making investments from which it derived a substantial proportion of its total operating revenue.

¹ For example, excellent WWW sites dealing with the *TPA* are maintained by La Trobe, Ballarat and RMIT universities.

² See the discussion in *E v Australian Red Cross Society* (1991) 27 FCR 310.

³ *Quickenden v O’Connor*, Commissioner of Australian Industrial Relations Commission (2001) 184 ALR 260, para 51.

⁴ *Id.*

As discrete issue, the “corporation” requirement is now only relevant to the question of whether the *TPA* or a state equivalent applies to a given situation. This because the consumer protection provisions of the *TPA* have been replicated in state fair trading and sale of goods legislation and the competition provision in state competition codes, all of which are directed at a “person”, a term that certainly embraces a university⁵.

“Trade or commerce”

In respect of the provisions of the *TPA* most relevant to universities, the conduct referred to is only proscribed if it occurs in “trade or commerce”. In the case of provisions such as ss 52 and 53 relating to misleading conduct and false representation, this requirement is imposed directly by the sections themselves specifying that to be proscribed the conduct involved must occur “in trade or commerce”. On the other hand, the competition law provisions of the Act relating to the supply of services impose the requirement indirectly through “services” being defined in s. 4(1) in a manner that restricts them to those supplied “in trade or commerce”. For organizations such as universities for whom “trading” is an enabling activity, rather than the reason for their existence, the scope of this requirement will often be central to liability.

The “in trade or commerce” requirement has been interpreted broadly so that there are relatively few instances in which liability has been avoided on this ground. However, importantly for universities, it has been construed so as to require the activity complained of in an action based upon s 52 or s. 53, for example, to itself “bear a trading or commercial character”.⁶ This means, that the requirement will not be met merely because the university engages in commercial activity; rather, it must be shown that the conduct in question was itself commercial in character. The following examples may be helpful:

- The Institute of Chartered Accountants in Australia (ICAA) was held to supply, in trade or commerce, the education and training services associated with its chartered account (CA) program because it sold those services for “a very substantial monetary return on a highly organised, systematic and ongoing basis”. This was so even though the ICAA was a professional disciplinary body and the CA program was an educational and training service it provided without profit. See *Monroe Topple v The ICAA* (2001) ATPR (Digest) 46212, esp at 52,340-52,343 and on appeal (2002) ATPR 41-879.
- The provision by UWA of educational services within the framework of the Higher education Funding Act is not “trading”. This is because those services are provided by universities under a statutory obligation and at a fee that is determined by law, for which the student has a statutory liability. See *Quickenden v O’Connor* (2001) 184 ALR 260 especially at 277.
- The ANU’s advertising of a full fee-paying course was assumed to be a conduct in “trade or commerce” in an action brought by one of its students. Although the case failed, the trial judge’s remark that it was “a by-product of a relatively new phenomenon in Australian tertiary education, namely competition amongst Universities for full fee-paying students” sounds a note of warning. See *Fennell v Australian National University* [1999] FCA 989.
- The provision of course advice by academic staff at Griffith University concerning a student’s eligibility to transfer from a postgraduate course to a new combined course

⁵ The various *Acts Interpretation Acts* define “person” to include a body politic or corporate as well as an individual. See, for example, (Cth) *Acts Interpretation Act* 1901, s. 22(1) and (Vic) *Interpretation of Legislation Act* 1984 s. 38.

⁶ See *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, per Mason CJ, Deane, Dawson and Gaudron JJ at 604

advertised by the University appears to have been assumed to have occurred in trade or commerce. See *Dudzinski v Kellow* (1998) 59 ALD 625.

- Statements by a university registrar to a student that an appeals committee would hear a matter “fairly and expeditiously [and] address all of [the student’s] concerns regarding improper actions by the University and its staff” has been held not to be in trade or commerce. See *Mathews v University of Queensland* [2002] FCA 414.
- Statements by a university that it would not countenance plagiarism and that lecturers would provide written a statement of the goals or purposes of their subjects and the nature of assessment have been described as “unlikely” to have been made in trade or commerce. See *Mathews v University of Queensland* [2002] FCA 414 (it is noted that the applicant in this case appears to have been a Commonwealth funded student, rather than one studying on a fee-paying basis.).
- Representations by a private college that its courses were accredited were said to “clearly conduct in trade or commerce”. See *ACCC v Black on White* (2001) ATPR 41-820 at 43,044).

3. Course advertising and advice

Universities spend considerable sums advertising their courses and themselves in order to attract international and domestic students. In some cases these advertisements seek merely to provide information about such matters as the courses on offer, the existence of scholarships and the conditions of entry. In other cases, on the other hand, they make laudatory claims about the institution, the course, or other matters that (presumably) are calculated to attract students. On the basis of the above, it is wise to assume in all such instances that placing the advertisement will be characterised as occurring in trade or commerce, at least when directed at fee-paying students. A similar assumption should also be made in relation to course advice to such students. This is especially the case where the advice has direct financial consequences for the university (for example, advice about advanced standing on the basis of previous study which affects course completion) and so can itself be regarded as commercial in nature. As a result, s. 52 will be contravened if the advertisement, or advice is misleading or deceptive and s. 53 if it contains false representations.

The scope of liability

The scope of s. 52, especially, is very broad.⁷ It is not restricted to statements that are actually false in the sense of containing factual error, or to those that actually mislead the persons to whom they are directed. Rather, it extends to all forms of conduct that leads a person into error, whether literally false or not, or that has the potential to do so. Further, an action for contravention can be brought by any person, regardless of whether they themselves were misled. The reach of the section is shown by the following examples.

- *Factual error*: The clearest cases of contravention will occur when advertisements, or advice, contain factual errors. For example, statements, such as those considered in *ACCC v Black on White Pty Ltd*⁸, that a course was accredited by a government agency, when it is not.

⁷ Because of its breadth, s. 52 is generally relied upon by the victims of false advertising, or representations, when they seeking redress. For this reason, it is the focus of the text. Although covering similar ground, s. 53 is most commonly used to re-enforce s. 52, or when the ACCC is seeking to have a penalty imposed on the respondent.

⁸ (2001) ATPR 41-820.

- *Literal (but misleading) truth*: Statements that are literally true will, nevertheless, contravene s. 52 if they would mislead a reasonable member of the audience to whom they are address. For example, it is suggested that it could be misleading for a university to announce the appointment of a new staff member who shared the same name as a Nobel laureate, without making clear that the appointee was not that person.⁹
- *Ambiguous advertising*: *Fennell v Australian National University*¹⁰ arose out of advertisement for an MBA program that read in part–

“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.”

The ANU’s intention was that students would arrange their own work placements and this was made clear its *Handbook*. However, the applicant, who enrolled in the course after reading the advertisement, argued that it amounted to a representation that the ANU would arrange a work placement for him, which it had not done. Although dismissing the application on other grounds, the court found that this was a “clearly plausible” interpretation of the advertisement.

Similarly, it is suggested that a statement that a university has (say) “70,000 students” would be misleading if that figure included TAFE and non-award students in addition to those studying for a degree.

- *Inaccurate predictions*: Inaccurate predictions will be misleading unless it can be shown that when made, there were reasonable grounds for making them.¹¹ Examples might include a statement that a course will be accredited by a professional body by the time it commences in circumstances in which no application for accreditation had been made, or a statement that certain resources would be available to students commencing a new course when no processes were yet in place to secure those resources.
- *Non-disclosure of important information*: Failure to disclose important information may contravene s. 52 where, combined with other conduct on the respondent’s part, it misleads the person with whom the respondent was dealing.¹² For example, it may be misleading for a university whose LLB is not recognised for admission purposes in (say) Malaysia, to advertise the degree in that country without making clear that it was not recognised there. Similarly, it may be misleading not to disclose to current students that the course in which they were enrolled had lost its accreditation with a relevant professional body, or governmental authority.
- *Groundless opinions*: Expressing an opinion that is honestly held is not misleading conduct.¹³ However, if is expressed in circumstances that imply that, for example, there were reasonable grounds for holding the opinion, or that it was based upon considered research, or familiarity with relevant information, then it will misleading if this was not the case.¹⁴ Thus, for example, a claim that staff or facilities are “world class”, even if regarded as an expression of opinion, may be taken to imply that it was based upon

⁹ See the example given by Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216. at 227

¹⁰ [1999] FCA 989

¹¹ See s. 51A(2).

¹² See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

¹³ See *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82.

¹⁴ See, for example, *Thompson v Ice Creameries of Australia Pty Ltd* (1998) ATPR 41-611.

some form of rigorous comparison of institutions so that if this is not the case, liability could arise.

- *Celebrity advertising:* Most universities have celebrities, in one field or another, within their student bodies and it may be appropriate to draw attention to this in promotional material. However, such conduct will contravene s. 52 if it creates the false impression that the person involved endorses their course or university, when they have not done so.¹⁵

The nature and extent of liability

From the perspective of potential respondents, the scope of s. 52 is compounded by the nature and extent of the liability it imposes when read in conjunction with the remedy provisions in Part VI of the Act. In this connection, three matters are particularly important. First, liability is strict in the sense that fault is not required on the part of the respondent for liability to arise. Consequently, for example, it is no defence to an action based upon a false statement for the speaker to show that all reasonable care had been taken to ensure that it was correct. Likewise, it is no defence that the speaker had innocently relayed false information provided by a third person¹⁶, unless at the time of doing so it was made clear that the speaker was not adopting that information but was merely passing it on to the recipient.¹⁷

The second is that action can be taken against a party guilty of misleading conduct by its rivals and the ACCC, as well as by those actually misled by that conduct. Furthermore, action can be maintained by a rival, or the ACCC, regardless of whether it has suffered loss as a result of the conduct complained of. Importantly for universities, this means that promotional claims, for example, are actionable at the suit of other universities even though they have not been misled by them. In the case of a rival university, if it can establish that it suffered loss attributable to the respondent's conduct, damages will be recoverable under s. 82; this could include, for example, the income, or profit, that the rival would have been earned from fee-paying students who enrolled with the respondent, rather than with it, because of the former's conduct. If loss cannot be established, the rival university may still be able to obtain a remedy in the form of an injunction under s. 80, restraining the respondent from persisting with the conduct in question.

Finally, the remedy and penalty provisions of the *TPA* extend liability beyond the business that is regarded as having engaged in misleading conduct, to all those individuals who were accessories to that conduct. In this connection, section 82 is particularly relevant because it enables damages to be recovered from "any person involved in the contravention".¹⁸ The potential of this provision is shown by *ACCC v Black on White Pty Ltd*¹⁹. In this case a "part-time accreditation officer" was held liable because he had been actively involved in making what he knew to be misleading statements about the accreditation of courses offered by his employer. Indeed, a notable aspect of *Mathews*, *Fennell* and *Dudinski* (all noted above) is that in each case, a personal action was brought against the university employees involved in the subject matter of the complaint, as well as against the university itself.

Some limits on liability

When evaluating advertisements, the law has long drawn a distinction between those advertisements that members of the target audience are entitled to take seriously and which, therefore, are actionable if misleading in some way, and those that are mere "puffery", that is, exaggerated, evocative or opinionated sales talk that should not be taken literally, and which,

¹⁵ *Wickham v Associated Pool Builders Pty Ltd* (1988) ATPR 40-910 is an example of this kind of conduct on the part of a commercial firm.

¹⁶ *John G Glass Real Estate Pty Ltd v Karawi Construction Pty Ltd* (1993) ATPR 41-249.

¹⁷ *Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525.

¹⁸ See s. 82(1); see also s. 75A(1) that defines the concept of being a person involved in a contravention.

¹⁹ (2001) ATPR 41-820 at 43,045.

therefore, are not actionable even if though they are false, or incapable of proof. As a result, it may not be actionable under the *TPA* for a university to advertise itself as “Australia’s most innovative university”, or to describe its lecturers as “world-class researchers”, or to say that its postgraduate program is “the icing on the cake.” However, where an advertisement makes claims of a serious nature, the conclusion that it is mere puffery will not be drawn lightly. Thus, whilst the context and audience will always be important controlling factors when determining whether a reasonable person could have been misled by the respondent’s conduct, universities should note when framing advertisements that claims such as that health insurance was the “best value”²⁰, or that residential units were “bigger and better” than others²¹, have been held to contravene s. 52. Indeed, it has been said that even advertisements “devoid of meaning” can, none the less, be misleading.²²

A second limitation on liability arises from the requirement that damages can be recovered under s. 82 only if the applicant has suffered “loss or damage” as a result of the respondent’s conduct. Thus, even where misleading conduct in contravention of s. 52 has occurred, damages may be irrecoverable if the applicant did not act on the misapprehension it created, or if the correct position was made clear before action was taken. The importance of this point is illustrated by *Fennell v Australian National University*. Here, although the applicant was able to establish that the ANU’s MBA advertisement was ambiguous and capable of misleading him, liability was avoided because, before he enrolled in that course, the University’s representative had disabused him of the false impression the advertisement may have given. In these circumstances, it could not be said that the ANU’s conduct had caused him loss or damage as s. 82 requires.

Although *Fennell* shows the value giving correct pre-enrolment course advice, it should not be read as suggesting that liability for misleading advertisements can always be avoided by the simple expedient of correcting the claims made before a student enrolls. This is because the student may have incurred considerable cost in reliance upon the advertisement before receiving correct enrolment advice; for example, by travelling to Australia, or resigning from employment, prior to commencing study. Costs of this kind, attributable to an advertisement, could be compensable even though correct advice was eventually given which saw, for example, the student enrol in another course or university, or not at all. Also, rival universities may suffer compensable loss as a result of a misleading advertisement, even though *they* did not rely upon it; for example, by losing students to the author of the advertisement.

4. Marketing arrangements and Part IV of the TPA

The core behaviour at which ss 52 and 53 are directed is dishonesty and because this is anathema to our moral and religious codes, most people would regard as obviously wrongful most, if not all, of the forms of conduct considered so far. As a result, within the university sector where there are relatively few incentives for dishonesty, compliance with the *TPA* will, for the most part at least, occur automatically through staff members acting in good conscience; in short, most contraventions of the Act will happen accidentally, rather than through design. This is not the case, however, with the proscriptions in part IV of the *TPA*. Here, although some forms of the conduct prohibited are clearly morally repugnant, for the most part they are simply amoral. As a result, far more often than not, no “ethical warning bells” will operate to protect universities from contravention. On the contrary, the actors may well consider their actions to be laudatory, or at the very least, “good business” as the following examples are designed to show. In these circumstances, comprehensive and regular compliance program is essential

²⁰ . *Hospitals Contribution Fund of Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 483.

²¹ . *Byers v Dorotea Pty Ltd* (1987) ATPR 40-760.

²² . See *Eveready Australia Pty Ltd v Gillette Australia Pty Ltd* (2000) ATPR 41-751 at 40,694.

Price fixing

It is an offence, punishable by the imposition of a “pecuniary penalty” of up to \$10m, for competitors to engage in price fixing.²³ For the purposes of this offence, price fixing is defined very broadly. In the first place, it is not restricted to contractual agreements, but applies also to arrangements or understandings. Second, it extends beyond the “price” of goods or services to also include discounts, allowances, rebates and credit. Third, it includes “controlling or maintaining” prices (and so on) as well as actually “fixing” them. And finally, it applies not only to agreements that have the purpose, or effect of fixing prices, but also to those that are likely to have that effect.²⁴ Examples of the kinds of arrangements that could constitute price fixing include the following:

- An agreement between two or more universities about the fees they will charge international students. This could arise out of an altruistic desire to protect students from price exploitation (by setting a maximum fee), or to ensure that the fees charged are sufficient to enable universities to provide students with a ‘proper’ education, or to enable universities to generate sufficient income to be able to avoid staff redundancies.²⁵
- A licence agreement between a university and a private college authorising the college to use the university’s current teaching materials and setting the price that the college is to charge its students for the course, or subjects, in which they are used.²⁶
- An agreement between some elite universities to charge domestic students the maximum “top-up” fee allowed by the government.²⁷
- An agreement between two or more universities about the scholarships schemes they offer to outstanding or needy students.²⁸
- An agreement between a consortium of MBA business schools designed to return profitability to MBA education in Australia.

Boycotts

The *TPA* prohibits two or more competitors from agreeing not to deal with a third party.²⁹ This prohibition is also expressed in very broad terms and is capable of extending to boycotts designed to advance popular public policy objectives, such as ending apartheid,³⁰ as well as to traditional boycotts involving commercial bullying. As a result, it would, for example, be unlawful

²³ . See ss45, 45A and 76(1A).

²⁴ . See s. 45A.

²⁵ . A common explanation for price fixing is a desire to protect the parties from “ruinous competition” by guaranteeing them a fair return on their investment. It is argued that this will enable them to continue in business (thereby preventing undue economic concentration) and serve their constituencies: see, for example, *AG v The Adelaide Steamship Co Ltd* (1913) 18 CLR 30 at 47-48 and *Re The Yarn Spinners’ Agreement* [1959] 1 All ER 299 at 314-317.

²⁶ See *ACCC v Real Estate Institute of Western Australia Inc* (1999) ATPR 41-673.

²⁷ Lord Dearing, the author of a report proposing student fees in the UK has warned that universities might be tempted to form price fixing cartels: see BBC news 19/2/2003.

²⁸ This example is derived from a 1990 Justice Department action taken against nine Ivy League universities in the United States. In Australia, this situation is complicated by the inclusion in the definition of services in s. 4(1) of the *TPA* of a requirement that the services be provided in “trade or commerce”. This could restrict the example to instances in which there is a commercial dimension to the scholarship scheme, perhaps catching a scheme for outstanding students but not one for the needy.

²⁹ The actual prohibition in the *TPA* is of “exclusionary provisions”: see s. 45(2) and 4D. The vernacular “boycott” is, however, more commonly used.

³⁰ See *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

for universities to agree not to purchase library books from a publisher that they considered guilty of price exploitation, or not to enrol fee-paying students guilty of civil rights abuses or of academic offences such as plagiarism.

Market sharing

Section 45(2) of the *TPA* prohibits agreements that have the purpose, or effect, of substantially lessen competition in a market, or that are likely to do so. It is the Act's principal weapon against the creation and operation of commercial cartels that eliminate, or reduce, competition between members for their private benefit, at the expense of consumers and society as a whole. However, such a selfish intent is not required by the section with the result that any agreement designed, for example, merely to enable the parties to specialise in their areas of expertise, or to concentrate their promotional efforts on certain locations, will still be unlawful should it have the purpose or effect of substantially lessening competition. From the perspective of universities the following arrangements between two or more universities would be at risk:

- An agreement to "rationalise" fee-paying courses by each party concentrating on those areas it is best able to teach, whilst vacating others.
- An agreement to avoid "wasting" resources by each party concentrating their international recruitment activity on certain countries only.
- An agreement to improve the quality of research by each party concentrating its resources on those areas in which it has already established leadership.

In instances such as these, the central issue is likely to be whether the agreement had the purpose or effect of lessening competition. However, if the parties intended to reduce competition between themselves, even though for beneficent reasons, this obstacle may easily be overcome. In this connection it should be noted that the concept of lessening competition means lessening competition in a market for "goods or services" and that "market" means a market "in Australia".³¹ This could be especially relevant when considering off-shore marketing arrangements.

Exclusive dealing

Firms often seek to deal with customers (or suppliers) on terms that restrict the ability of the latter to deal with whom, or where ever, they wish. Such restrictions may be imposed for a variety of reasons including to foreclose the patronage of the customer from rival firms, to encourage the customer to promote the product or service involved, to "force" the customer to acquire another product or service from the supplier, or to facilitate franchise arrangements by restricting the areas within which the customer can operate. Arrangements such as these are prohibited by s. 47 of the *TPA*. However, because it is recognised that they can be pro-competitive and well as anti-competitive they are unlawful only if they substantially lessen competition.³² Examples of university related arrangements that may contravene s. 47 if this requirement is met include the following:

- A twinning agreement between a university and an international college that prevents the latter from entering into a similar agreement with another university.
- A franchise agreement between a university and an international college whereby the latter offers courses devised by the university on condition that the college also purchases teaching materials from the university.

³¹ . "Market" is defined in s. 4E to be a "market in Australia".

³² . See S, 47(10).

- A twinning agreement between a university and an international college, containing a provision limiting the territory from which the college can recruit students.

Forcing the services or product of third parties

Under the rubric of exclusive dealing, s. 47(6) the TPA prohibits a firm from making it a condition of supplying a customer that the latter acquires goods or services from a third party. "Third line forcing", as this practice is known, is an offence regardless of whether it has an adverse effect on competition.³³ Thus, for example, it would be unlawful for a university to do any of the following:

- Offering a place in a degree course to an international student on condition that the student completes an English language course at an independent language college. This would be so, even though the university had nominated the college because of its excellent reputation and in order to protect the student from unscrupulous operators.
- Requiring fee-paying students undertaking a course, or study tour, to purchase the equipment or accommodation they need from a nominated third party.
- Offering a fee discount to participants in a professional development program conducted using a third party's conference centre if, during the program, they reside at the centre.
- Prescribing certain text-books, written by staff members of the university, as a condition of enrolment in a unit offered to students on a fee-paying basis.

Re-sale Price Maintenance

Section 48 of the TPA, read in conjunction with Part VIII of the Act, prohibits firms from engaging in re-sale price maintenance (RPM); that is, fixing a minimum price below which their customers cannot re-supply the goods or services they have acquired from the firm. As with other competition law provisions, s. 48 applies to conduct stretching across the moral spectrum, from conduct designed merely to enhance the appeal of the firm's products to that designed to eliminate price competition. Although, perhaps, of limited relevance to universities, it could apply in situations such as the following:

- A licensing agreement between a university and a private college that sets the fees at which the latter can sub-license other colleges.
- A sales agreement between a university and a college relating to course material, setting the price at which this material is re-sold to students at the college.

Importantly, however, s. 48 is unlikely to apply to an agreement between a university and private college, authorising the college to teach one of the University's courses at a fee set by the latter. This is because the service supplied by the university to the college (some form of licence, or franchise) is not the same as that supplied by the college to the student (tuition). Such an arrangement, may, on the other hand, constitute price-fixing, exposing the university to liability under s. 45.³⁴

Misusing Market Power

³³ . The Federal Government has announced that in a raft of changes to be made to the TPA in response to the Dawson Committee of Inquiry, it will make third line forcing subject to a competition test.

³⁴ . See *ACCC v Real Estate Institute of Western Australia Inc* (1999) ATPR 41-673.

All the forms of conduct considered so far in this section have in common the requirement that there must be an agreement, of some kind, between two or more organisations. The *TPA*, however, also prohibits unilateral anti-competitive conduct. In particular, s. 46 proscribes firms with substantial market power (the power to act independently of market forces) from using that power for the purpose of damaging other firms, or competition generally. Although much less relevant to universities, this provision should be kept in mind in situations such as the following:

- A “sandstone” university (which by virtue of its position may have market power, generally, or in relation to particular courses) seeking to expand a course at the expense of a similar course at another university, in order to better take advantage of new government funding arrangements.
- Representatives from an existing university, as members of an external accreditation authority, refusing accreditation to a new course proposed by another university.
- A regional university refusing to allow its facilities to be used by a firm that wishes to offer tertiary level courses, using those facilities, during the University’s summer teaching break.
- A university refusing to allow members of its teaching staff to teach in a fee-paying course offered by another university.

Although the elements of s. 46 are more difficult to establish than those of the *TPA*’s other competition provisions, growing rivalry and commercial pressure could well see universities engage in the forms of conduct at which this section is directed.

5. Authorisation

As is apparent from several of the examples given above, the competition law provisions of the *TPA* are capable of applying to conduct that is in the public interest and which, therefore, should not be illegal. This is recognised in Part VII of the Act that enables firms to obtain permission to engage in conduct that would otherwise be prohibited by ss 45, 47 or 48. “Authorisation”, as it is known, can be granted by the ACCC where a firm can show that the conduct involved will result in, or is likely to result in, a “benefit to the public” that outweighs the detriment suffered by any reduction it may cause in the level of competition. Similar immunity can be granted in respect of exclusive dealing by a firm giving the ACCC “notification” of the conduct it wishes to pursue, an immunity that will remain unless the Commission believes that the conduct is detrimental to the public. These provisions may be especially valuable to universities wishing, in the public interest, to engage in the forms of conduct described above. In view of the serious penalties that can be imposed upon them and their employees, this is a very attractive option.