

# The University of Melbourne Trade Practices Compliance Guide

Australia

BAKER & MCKENZIE

## Introduction

The *Trade Practices Act 1974* (“TPA”) and National Competition Policy (“NCP”) constrain the University in a number of respects. The most important issues affected are the following:

- (a) the setting of course fees;
- (b) course development and rationalisation, including:
  - the subjects or courses the University offers;
  - the commercial structure of the subjects; and
  - standards setting;
- (c) procurement, including:
  - group buying;
  - pressuring a common supplier; and
  - refusing to purchase unilaterally;
- (d) promotional activities;
- (e) overseas relations, including:
  - promoting courses overseas to prospective students;
  - licensing courses to overseas institutions; and
  - terminating those licences; and
- (f) regulation.

A number of trade practices issues arise only where the company has market power. This may be unlikely in the case of The University of Melbourne; however, the risk that it may have power exists, particularly on the basis of recent cases where companies with as little market share as 15% have been held to possess market power. For the purposes of compliance, the University should assume it has market power and behave accordingly. This compliance document is therefore predicated on that basis.

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Being an issues-based examination, this document is not an exhaustive analysis of the TPA, NCP or their application to the higher education sector. Moreover, this document does not purport to provide legal advice. It is drafted for the purposes of general guidance to promote legal compliance within the University.

## 1. Fee Setting

### 1.1 Fees must be set unilaterally

- It is unlawful to set course fees by reference to an agreement or understanding with other institutions [**Price Fixing**].
- It is irrelevant whether all institutions charge the same fees for the same subject. It is the agreement or arrangement between institutions to achieve that equality that is unlawful.
- It is permissible to benchmark the University's fees against those set by other leading institutions in the country.
- The University must be able to demonstrate that it has reached its own decision as to the fees it charges [refer to **Recommended Action**].

### 1.2 Discounting fees

- If fees are set unilaterally, discounting those fees may nevertheless involve a risk of breach.
- Any discounting of fees is unlawful where the discount is only available to the student if he or she also buys third-party product [**Third line forcing**]. It is however possible to seek dispensation for this from the ACC in certain circumstances.<sup>1</sup>

#### *EXAMPLES*

*Overseas agents recruit students for the University from throughout South East Asia. Any discounting of course fees provided to these students is unlawful if the agent charges the student fees. That is because the discount is conditional on the student buying recruitment services from the agent. It will not be unlawful if the agent is remunerated by the University [**Third line forcing**].*

*Overseas students are offered discounted course fees, but only if they live at specified accommodation. This was unlawful until the University filed a Notification with the ACCC.*

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<sup>1</sup> The ACCC has the power to legitimise otherwise unlawful conduct if it is socially beneficial. Lodging a Notification is one mechanism to achieve that. An authorisation is the other mechanism. A discussion of this is beyond the scope of this guide.

*Overseas students are offered discounted course fees, but only if they also enrol in the English language course offered by Melbourne University Private. That is unlawful. If the English course was offered by the University (and not a “third party”), the arrangement would be legal. Despite being owned by The University of Melbourne, Melbourne University Private is considered a third party for the purposes of this exercise.*

- Any discounting of course fees exclusively to members of particular organisations may be unlawful [***Third line forcing***, see also ***Discriminating between groups of students***].

#### ***EXAMPLES***

*The Catholic Education Office organises twenty of its employees and parishioners to undertake a course of study. The University offers them a 20% discount on fees as a group booking. This is not third line forcing because employees and parishioners are not “members” of an organisation, in that they do not buy membership services from the CEO. The CEO has acted here as a conduit for the 20 people to enrol as a group.*

*Rotary Victoria negotiates a 20% discount for its members to study at the University. This could be third line forcing because Rotary is an organisation that members must join and from which they acquire membership services.*

- Discounting course fees close to or below cost may be unlawful and also contrary to Government policy [see also ***Competing with Private Providers and other Private-sector Traders and Additional Issues when Competing with the Private Sector (Competitive Neutrality)***].
- Despite the risk, significant discounting is defensible if it can be demonstrated that the University is being reactive to competitive pressures and not “leading the market down”.

### 1.3 Additional issues when competing with the private sector

#### (a) Background and scope of the Policy

- The University’s fees and prices must be costed and priced in compliance with Competitive Neutrality Policy where the University competes against private sector providers to sell product, deliver courses or supply services to anyone outside the university community.
- This is most likely to include the following:
  - non-Government funded courses; and

- any goods and other services it sells (such as the Department of Dentistry offering dentistry services to the general public).
  - Failing to price in a competitively neutral fashion is not unlawful; it is a breach of Government policy.
  - Non-compliance is adjudicated by the relevant Competitive Neutrality Complaints Unit, resulting (if successful) in a direction for the University to price in a policy-compliant fashion in future – generally with guidance on how that is to be done.
- (b) Policy-compliant price setting
- The guiding principle is that the University must set its prices “as if the University was a privately owned and operated entity”.
  - First, calculate the competitively neutral cost of the product, record it and file it.
    - That involves imputing those costs that the private sector must pay and that the University does not pay.
    - Business Units within the University may have calculated a competitive neutrality surcharge that approximates the additional (notional) costs. Where there is such a surcharge, you will need to add it to direct costs to derive total competitively neutral costs.
  - Second, set price/fees according to market, having total competitively neutral costs in mind.
- (c) Setting price to market
- The University can set price/fees at rates competitive with private sector competitors, even where that is below – even substantially below - the competitively neutral cost.

#### *EXAMPLES*

*The University submits a bid to undertake research in response to a Government tender at the competitively neutral cost plus a 5% margin. Other bidders include universities and private researchers. The Government Department running the tender tells the University that the bids from other bidders were 25% less than the University's. The University rebids at a price 27½% lower than its first bid and wins the tender. This is likely to comply with the Policy.*

*The University has developed an advanced computer course. There are a number of other courses on the market, including courses offered by private institutions and computer companies. The majority of them charge around \$1000 for the course. The competitively neutral cost of the course is \$3000. The University decides to set a fee of \$1000 (noting that the direct cost is \$750). This complies with the Policy.*

- The University can accede to pressure from a client to reduce the fee, even if the price is driven below the competitively neutral cost.

#### *EXAMPLES*

*The University is approached by BHP to conduct research. BHP tells the University that it will not pay any more than \$10,000 for the research. The competitively neutral cost of the research is \$25,000. The University agrees to charge the price demanded as the University's direct cost is only \$5,000. This will comply with the Policy.*

*The University is approached by BHP to conduct research in a difficult area. BHP makes no mention of price limits, openly recognising that it could be involved. The researcher is interested by the problem and decides to undertake the research irrespective of what the job is worth commercially. She offers to do the research for \$10,000. The competitively neutral cost is \$25,000. This may very well be non-compliant if it is the type of research private researchers could undertake.*

- The costing and pricing considerations should be recorded in a document and filed.

#### 1.4 Discriminating between groups of students

- If course fees are set unilaterally, discriminating between groups of students raises issues.
- The University is unlikely to breach the TPA if the difference in fees can be justified by that difference furthering or reflecting the University's broader commercial, social or pedagogical objectives.

#### *EXAMPLES*

*The University discriminates between full fee paying domestic students and students taking HECS places. This is unlikely to raise issues under the TPA. It appears that the course fees in each case are set by quite different market dynamics. There is only an issue if the University discriminates within the one market.*

*The University offers bursaries to targeted groups of postgraduate students (such as under-privileged students and Aboriginal and Torres Strait Islander students). This is unlikely to be unlawful, even if the net cost to these students is zero, as it aids the University's broader access agenda.*

*The University charges overseas students and domestic students different fees. This is unlikely to raise issues because they are discrete cohorts for which Australian institutes compete separately. In effect, fees are set in distinct markets.*

## 1.5 Misrepresenting fees

- Misleading and deceptive conduct is discussed in detail under *Promotional Activities*.
- Misleading students as to the course fees or any other fees or charges payable is criminal, with a maximum penalty of \$1.1 million for the University and \$220,000 for any person involved.

### *EXAMPLES*

*The fee for enrolling in Advanced Marketing is \$1,500. However, students must also subscribe to the publisher's website, on which there are various materials that will be used in class. The subscription fee is \$1,000 for the year. Promoting the course to Sales and Marketing Executives without mentioning the additional \$1,000 fee is likely to be misleading and deceptive [see also **Third Line Forcing**].*

*The fee for enrolling in Advanced Marketing is \$1,500. Students are required to buy the prescribed text and course notes, available at the University Bookshop [see also **Third Line Forcing**], but the promotional material is silent on the matter. This is unlikely to be misleading as student would expect to pay extra for such things.*

*The fee for enrolling in Advanced Marketing is \$1,500. That is the total charge for tuition. However, all students are required by statute to pay the A&S fee to the University. The promotional material is silent on that requirement. The dominant impression is nevertheless correct. Students would normally expect to pay this or some similar fee as the "entry charge" to University. Compare Dell Computers failing to tell customers that a delivery charge of \$99 was payable on all computers. This was misleading and deceptive because it was a mandatory charge and customers would not have expected to pay it unless they were told.*

- Where course fees are promoted, the TPA requires the total fee for the course to be noted.

### *EXAMPLES*

*Advanced Econometric Methods is taught over 4 modules. Students must complete all 4 modules to receive credit for the subject. The fee for each module is \$500. The student prospectus 2005 includes Advanced Econometric Methods, stating only that "the fee for Module 1 is \$500". This breaches the TPA, even though it may not be misleading.*

*An advertisement issued by the University Bookshop to students in OWeek states that "the 2004 Riverside Shakespeare is on sale at the bookshop for \$150 + GST". This is a breach of the TPA. The total cash price should be stated as either \$165 or "\$150 plus \$15 or 10% GST".*

*The fee for enrolling in Advanced Marketing is \$1,500. However, students must also pay \$1000 to the University to subscribe to the publisher's website, on which there are various materials that will be used in class. Promoting the course to Sales and Marketing Executives by stating "Fees \$1,500 plus additional fees for publisher subscription" is unlikely to be unlawful because the subscription fees is not part of the price of the course, but a fee for a separate (albeit complementary) service.*

## 1.6 Recommended Action

- **The topic of fees or fee setting should be avoided at collegiate gatherings as meetings of Deans.**
- **Suggested Document Creation: Create a pricing document for each discipline [NB: refer to the University Fees Policy], setting out all the considerations taken into account in setting fees, including:**

- **the direct cost;**
- **the total competitively neutral cost;**
- **the fees charged by other institutions for similar courses (if they are a consideration),**
- **the desired market placement,**
- **any other competitive pressures to which the University may be responding;**
- **the competitive context generally; and**
- **the ramifications of not reacting to competitive pressures (if any).**

- **University Policy requires that there can be no discounting unless the Administrative Committee approves. This will involve making a case for the proposed discount, identifying the reasoning, the competitive context compelling that move, and the actual and imputed costs in offering that course or subject.**
- **If the University wishes to encourage students to buy a third party's goods or services by discounting its own course fees, the University should consider restructuring the course arrangements or file a Notification with the ACCC. Either way, seek advice from General Counsel.**

- **Before setting discriminatory fees, confirm that the discrimination is justifiable by reference to broader commercial, social or pedagogical objectives. Seek guidance from General Counsel.**
- **Focus on the dominant impression created by all promotional material. Without considering any disclaimers or subsidiary text, determine whether that impression is correct. In this context, the question is whether the impression created concerning the fees payable for the subject, the course or the qualification is correct.**
- **Identify all additional fees and charges students must pay for each subject. Determine whether they should be added to the course fee for promotional purposes.**

## 2. Course development

### 2.1 Course selection, joint venturing and rationalisation

#### (a) Guidance

- The University must make its own decision as to which courses and subjects it offers. This applies to the development of new subjects and courses and to the rationalisation of existing subjects and courses.
- Determining which courses are offered in consultation with other institutions raises serious issues under the TPA. Legality will depend on the objective the University is seeking to achieve and, therefore, must be approached with caution.

#### *EXAMPLES*

*All universities in Melbourne meet to discuss how all important modern and ancient languages can be taught. The analysis has established that no one university can provide a comprehensive offering of languages under the government funding model. Each university agrees to teach at least one European and Asian language and one ancient language and to grant credit to each other institution's students in the Language Diploma course. This raises the issue, but is unlikely to constitute a collective boycott, given its policy objective of ensuring a comprehensive language offering.*

*The University of Melbourne and Monash University agree to joint venture a new course, exploiting each institution's expertise. This is not a collective boycott as neither institution could have offered this course in competition with each other.*

- Even where course rationalisation is undertaken unilaterally, the University must protect itself against claims from affected students. The two questions are:
  - were students misled by university promotional material; and
  - is the University treating affected students unconscionably?
- The law does not prevent the University pursuing or protecting its own best interests. Accordingly, it will not be unconscionable for the University to cease offering a course that is not viable.
- Affected students must nevertheless be treated equitably. Likely measures to protect student interests during course rationalisation will include the granting of credit, reallocation and refunds policy.

(b) Recommended Action

- **Do not meet with representatives of other institutions to discuss course rationalisation without involving General Counsel.**
- **Suggested Document Creation: Create an issues paper that sets out the problem (in the above example, the fact that teaching all languages is not viable), demonstrating the proof for that proposition, and outline the options available to the University to address that problem. The document should also include a statement as to the University's objective. In the example, this was the pedagogical objective of ensuring that all modern and ancient languages are taught somewhere in Victoria and are available to all students in Victoria.**
- **Ensure that all complaints from students concerning course rationalisation are collected and reported to those in charge of the rationalisation.**
- **The University must consider each complaint seriously, assessing whether it is reasonable or not. The University should then determine the reasonable response (if any). It is not necessary that the University respond to every complaint.**
- **In response to any claim that students have been misled by course materials/promotion, the University should undertake a due diligence of the material published in relation to the course to determine whether there is any basis for students claiming they were misled.**

## 2.2 Commercial structure

### (a) Guidance

- The TPA has little to say about the commercial structure of university courses.
- The exception is where students are expected (even though it is not compulsory) to purchase goods or services from a third party provider [**third line forcing**].
- The issue also arises if students are compelled to purchase these materials. However, note the limitations imposed by the *Higher Education Support Act 2003* for Commonwealth supported students.

#### *EXAMPLE*

*Students enrolling in Industrial Economics are informed that one unit of the course will involve materials available on the Prentice Hall website (the publisher of the prescribed text). This entails students paying a subscription fee of US\$50 to the publisher. The course can be completed successfully without access to the site, but most students are expected to subscribe given the benefits the site offers and the fact that the lecturer strongly recommends subscription. This breaches the TPA, even though Prentice Hall is based in the United States.*

*All students enrolling in CreativeWriting 101 are expected to buy the prescribed text, "Materials in CreativeWriting". This text has been imported especially and is only available at the University Bookshop. This is not third line forcing because (amongst other reasons) the bookshop is part of the University and, therefore, not a "third party".*

- Requiring students to purchase or subscribe to excessive quantities of additional material raises issues of unconscionability. The risk is small if there is a pedagogical rationale for the materials.

#### *EXAMPLE*

*The University requires all students enrolling in Advanced Computer Systems 301 to purchase a new, upgraded computer from the University's IT supplier. This is an important subject for all IT professionals to undertake. From a purely functional perspective, a slower, older computer may be adequate. Insisting on strictly unnecessary (onerous) requirements risks being unconscionable [see also **Third line forcing**].*

- Two institutions joint venturing a course of study is lawful, even though the student is expected to buy services from each institution [**Third line forcing**]. A residual risk remains, depending on the details of how the course is structured. Seek guidance from General Counsel.

(b) Recommended Action

- **Consider whether the additional material you wish students to purchase or subscribe to is necessary for the course. Consider whether there are other acceptable sources of the equipment, material or information, available at more reasonable prices. This is required in any case by the *Higher Education Support Act 2003* for Commonwealth supported students.**
- **If it is necessary for the course – or even desirable for the course – you may strongly recommend that students purchase or subscribe to that material, but a Notification must be lodged with the ACCC. General Counsel should be involved in drafting the Notification.**
- **Seek guidance from General Counsel when joint venturing courses with other institutions to get the structuring right.**

## 2.3 Standards setting

(a) Guidance

- Standards setting will have implications under the TPA only where they are set co-operatively with other institutions, particularly where the leading institutions are involved. Legality depends largely on the nature of the standard concerned.
- Issues arise where the standard materially affects how the universities compete for students. This is likely if the standard affects those matters on which the universities compete, such as ENTER scores, marking standards, mobility of (and attracting) academics, the courses offered (including “cappuccino courses”) and the contents of those courses.
- The University may set standards for itself, but must manage the impact on students. It could amount to unconscionable conduct if students are adversely affected and there is no commercial or pedagogical rationale for the standard.

(b) Recommended Action

- **General Counsel should be involved in or at least fully informed of the setting of standards, where that is done in consultation with other institutions either directly or by way of co-operative submissions to Government [see also *Regulation*].**

- Standards that are absolutely required from a pedagogical perspective may be acceptable, but could require ACCC clearance. It will be important to demonstrate why co-operative action in setting such standards is necessary.
- Monitor all complaints from students as to the effect of standards. Respond to those complaints if reasonable.
- Try to set any standards unilaterally. In this context, question why unilateral action will not be effective.
- Suggested Document Creation: Any co-operative standards setting should be supported by an appropriate issues paper that sets out the problem the standards seek to address, the options available to the universities, why unilateral action is unacceptable and how the proposed solution (Standard) addresses the difficulty identified.

### 3. Procurement

#### 3.1 Co-operation with other purchasers

##### (a) Guidance

- The TPA prohibits purchasers collectively negotiating buy-prices [*price fixing*].
- There is an exception for buying groups. This must involve either one of the group purchasing all product from the supplier and then distributing to the others, or the group establishing a separate company to conduct the transactions.
- The members of the buying group must be free to purchase independently from the group [*collective boycott*]. If the attractiveness of the price secured by the group is not sufficient to ensure that members do not purchase independently, the group cannot otherwise lawfully enforce compliance.
- If a number of higher education institutions have issues with a common supplier, The University of Melbourne must not band together with any of those institutions to pressure the supplier [*collective boycott*].

##### *EXAMPLE*

*All universities in Victoria buy a highly developed marking software package from EXCELL Computers Systems. As it is the only organisation offering such a package on the market, the price is exorbitant. Its new policy is to restrict access to updates to one copy per licence. That would cost the University a considerable amount. As all institutions are affected*

*in the same way, they decide to approach EXCELL together. The threat – whether implied or express – that the group will not deal with EXCELL unless it changes its policy, is unlawful.*

(b) Recommended Action

- **Establish an appropriate purchasing structure for all group buying arrangements. This applies to buying arrangements that are to last for a number of years, in addition to any ad hoc arrangements. Seek guidance from General Counsel.**
- **Members of the buying group must be allowed to purchase independently from the buying group.**
- **If it is necessary to impose pressure on a supplier, The University of Melbourne must not participate in any arrangement with other institutions to impose that pressure.**
- **The University of Melbourne should not have any discussions with other institutions regarding whether each institution will or will not purchase goods or services from a common supplier.**

### 3.2 Unilateral refusal to buy from suppliers

(a) Guidance

- Ensure that the University has the contractual right to cease purchasing. Terminating a contract may first be necessary. Consult General Counsel.
- Particularly where the University has substantial bargaining power over a supplier, it should treat that supplier equitably in the decision to cease buying its goods and services and in the manner in which that decision is implemented [**Unconscionable conduct**].
- There is of course no general obligation on companies with market power to purchase all goods and services offered to it. The University can refuse to buy goods and services where it has a legitimate business justification for doing so. That is the broader commercial objective.

**EXAMPLE**

*EXCELL has been supplying its electronic marking system to the University for the last 12 months; indeed, the University is EXCELL's major customer. On the strength of the relationship, and on the expectation of further business, it has made a number of important investments. The University takes the decision to abandon the system because of security concerns, opting for a paper-based system. The change was prompted by a number of hacking incidents. This is sufficient justification for the refusal to purchase, although the University must ensure that it has not engaged in any misleading and deceptive conduct*

*by previously having made representations on which the company has relied and, thereby, invested.*

- The University risks breaching the law if it refuses to buy goods and services because the supplier will not agree to exclusivity, or will not agree not to supply to the University's major competitors (such as Monash University). Legality of this refusal to buy depends on the factual matrix, particularly on what the University is seeking to achieve by refusing to purchase.

(b) Recommended Action

- **Suggested Document Creation: Unless it is clear that the University does not have any market power in respect of the goods and services in question, set out in a document the University's reason for refusing to buy and the objective it is seeking to achieve by refusing to purchase, identifying the issue and the options available to the University.**
- **If a supplier complains after the University threatens to cease buying its goods and services, take the complaint seriously and assess the University's justification for refusing to buy. In this context, consider whether the University has treated the supplier equitably.**
- **Where such a supplier complains, conduct a due diligence of everything that was said or written to that supplier to determine the University's exposure to claims of misleading and deceptive conduct. This will involve talking with those members of staff who have been involved in the relationship. Seek guidance from General Counsel.**

## 4. Promotional activities

### 4.1 Guidance

- It is unlawful to engage in any conduct that will mislead or deceive or be likely to mislead or deceive.
  - This applies to oral representations and written or published material.
  - It also applies to any other conduct, potentially including silence (for an explanation on misleading silence, see example in section 5.1(a)).
- The key is whether the "dominant impression" created is correct.

- In an advertisement, determine the dominant impression by focussing on the headline statements and the key images. For this purpose, ignore disclaimers and all other subsidiary text. What is suggested or implied?

*EXAMPLE*

*Heinz recently advertised its Baked Beans product with the statement “Melbourne Uni Maintenance” and a photograph of Heinz cans collecting water leaking into an old house. There is an argument that the dominant impression is that Melbourne University is in some way sub-standard or possibly under-funded. Such an advertisement also raises issues of defamation.*

- Disclaimers will generally not correct an incorrect dominant impression. Disclaimers should only be used where the headline statement is generally correct, but requires some clarification.

*EXAMPLE*

*The University published an advertisement stating that “Melbourne is now more accessible . . . with new scholarships, more flexible admissions . . .”. This would be misleading if the total number of merit-based scholarships declined, despite the introduction of new scholarships. A disclaimer to that effect would not make the advertisement legal.*

- Comparative advertising is assessed at a higher standard.
  - Unless otherwise clearly indicated, the comparison is “apples with apples”.
  - The comparison must be comprehensive and fair.
- Puffery (excessive exaggeration) is not misleading and deceptive. A statement will not be puffery if it is capable of verification. This is not recommended because of the risk of making a statement that is not puffery.

## 4.2 Recommended Action

- **Identify the dominant impression of all advertisements created for the University. Advertisements include course brochures and student prospectuses. Ensure that impression is correct.**
- **Confirm that all factual statements are correct.**
- **Seek the assistance of General Counsel if in doubt.**
- **Manage staff involved in promotional activities. They must be properly briefed as to what they can say.**

- Any complaints of inaccuracy or misleading and deceptive conduct must be addressed.
- Exercise caution if attempting to use puffery as it is not always clear that a statement is puffery despite being an exaggeration. Seek guidance from General Counsel.

## 5. Overseas relations

### 5.1 Promoting courses overseas

#### (a) Guidance

- The University will breach Australian law if its promotional statements and activities conducted overseas to attract students to Australia are misleading and deceptive, particularly in relation to those students that ultimately enrol in the University [see discussion under ***Promotional Activities***].
- The University should correct inaccurate statements made overseas. It could otherwise itself engage in misleading and deceptive conduct.

#### *EXAMPLE*

*The University knows that prospective students have been told by independent agents operating in KL that they can stay in Australia once they complete their degrees, and they will obtain employment through a program that the University operates. The University is not responsible for the actions of an independent agent in this instance; however, it cannot remain silent once it realises that the agent has made this statement. To do so – to remain silent – could very well be misleading and deceptive conduct.*

#### (b) Recommended Action

- Promotional statements and activities (including published advertisements) directed to the overseas market with a view to attracting students to Australia must be assessed in the same manner as local advertising.
- Management of overseas agents (including providing them with an appropriate incentive structure) is particularly important. They must realise that they are bound by the TPA in what they say and do and that there are also potential implications for the University when it is aware of their statements and conduct.

- **The University should correct any misleading statements made by agents as soon as the University learns of it. The agent in question must also be dealt with appropriately to avoid the same issue arising. Failing to do so could result in a greater penalty for the University than would otherwise have been the case.**

## 5.2 Licensing overseas institutions to teach Melbourne courses

### (a) Guidance

- Exclusive arrangements with overseas institutions to teach Melbourne courses will generally be lawful.
- The only possible exception is where the arrangement “forecloses” critical institutions in strategically important regions, locking out other Australian universities. Legality will depend on the factual matrix.
- It is unlawful to compel licensees to buy goods and services from nominated suppliers (other than the University itself) [***Third line forcing***]. This could include teaching materials from identified publishers. Where this is pedagogically unavoidable, the University must lodge a Notification with the ACCC.
- The University must not set a minimum course fee for the licensed institution [***resale price maintenance***].
- It is, however, lawful to set a maximum course fee. This may be necessary to place the Melbourne brand in the market place appropriately.

### (b) Recommended Action

- **Choose the overseas institutions with which you wish to associate carefully. They should be institutions that understand the Melbourne ethos. This minimises the need for close management, particularly of their pricing.**
- **Consider whether the University needs to lodge a Notification with the ACCC so as to allow it to compel the licensed institution to buy specified materials from third parties (such as publishers).**

### 5.3 Terminating licences

#### (a) Guidance

- The University can only terminate a licence with an overseas institution where it has the contractual right to do so and only pursuant to the requirements of that contract. Failing to adhere to the contract could result in damages for breach of contract.
- Particularly where termination is for no cause (i.e. not based on breach), the University must act in good faith. That requires the University to consider the interests of the other party and treat those interests equitably [see also *Unconscionable conduct*]. This does not require the University to place those interests ahead of the University's own interests.
- The University could be liable to the licensed institution for damages if it terminates the licence where certain representations have previously been made to the institution. The risk here is where the licensed institution has relied on the representations and made investments.
- The University should not terminate a licence because the licensed institution discounts its course fees [*Resale price maintenance*].
- The University should not terminate the licence because the licensed institution has failed to obey a direction to buy materials from a third party [*Third line forcing*].

#### (b) Recommended Action

- **Before terminating, consult the contract to determine the University's rights. General Counsel should be involved in this assessment.**
- **Identify the licensed institution's concerns if terminated and determine how to deal with those concerns equitably, whilst not negating the University's own interests in the matter. This could mean an extended notice period (ie. beyond what is provided for in the contract).**
- **Before terminating, conduct a due diligence of what has been said and written to the institution to determine whether terminating could amount to misleading and deceptive conduct.**
- **Most important will be whether the University has made representations on the basis of which the institution has relied and invested resources. Where such representations are discovered, seek guidance from General Counsel. It may be that the University will need to grant further indulgences to overcome this issue.**

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## 6. Regulation

### 6.1 Guidance

- Co-operative submissions and deputations to Government are generally lawful.
- The only exceptions to this under the TPA are those submissions and deputations concerning:
  - the course fees that should be charged; and
  - the subjects and courses the universities should be offering.
- The legality of co-operative submissions and deputations to Government on course rationalisation will depend on the ultimate objective the universities are trying to achieve [refer to *Course Development*].

### 6.2 Recommended Action

- **Exercise caution at such occasions such as AVCC and VVCC meetings, particularly where there are discussions about Government policy on course fees and subject development.**
- **Seek guidance from General Counsel for any submissions or deputations to Government made in consultation with other institutions, particularly those that involve course fees or course rationalisation.**

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