

Trade Practices Act 1974 (Cwlth)

The increasingly competitive nature of today's business environment has meant that business practices involving misleading and deceptive conduct, price fixing, boycotting and market sharing are not only associated with large corporations. In today's highly competitive business environment, more and more small businesses are engaging in business practice, both intentionally and unwittingly, that contravene the *Trade Practices Act 1974 (Cwlth)* (TPA).

The TPA is Commonwealth legislation that is aimed at promoting fair trading conditions for all Australian businesses. The TPA also aims to protect consumers from unfair business practices.

The TPA applies to corporations and some individuals (in certain cases). The provisions of the TPA are largely mirrored in State and Territory fair trading legislation, in Queensland the *Fair Trading Act 1989*, to ensure the same rules apply to small unincorporated associations and individuals.

There are severe penalties for non-compliance with the provisions of the TPA. It is therefore of vital importance that small businesses are aware of their rights and responsibilities under the TPA in order to protect themselves from unfair trading practices and ensure that you yourself do not contravene the TPA.

What does the TPA prohibit?

- 1. Unconscionable conduct:** A stronger party must not deal with a disadvantaged party in a harsh or oppressive manner. For example, you must not exploit your bargaining power to impose unreasonable contractual terms on a weaker customer or client.
- 2. Price fixing:** Competitors must not make arrangements between themselves that fixes, maintains or controls prices, discounts, allowances, rebates or credits. For example, businesses involved in an industry association cannot agree with competitors to follow recommended prices published by an association. Individually using such prices as a guide is fine. However, using them as a foundation for agreeing on prices is illegal.
- 3. Boycotts:** Two or more suppliers must not "get together" to refuse to supply goods or services to another business. There are two types of boycotts, primary and secondary:
- 4. Primary boycotts:** Corporations must not make arrangement that contains an "exclusionary provision". An exclusionary provision is a provision in an arrangement between competitors which has the purpose of preventing, limiting or restricting the supply of goods to, or acquisition of goods from, particular third parties by any of the parties to the arrangement.
- 5. Secondary boycotts:** Two or more persons (who need not be competitors) must not act in concert to hinder or prevent the supply of goods or services, by a third person to another person and the conduct has the purpose and effect or likely effect of either causing substantial loss or damage to the business of the target, or causing a substantial lessening of competition.
- 6. Anti-competitive arrangements:** You must not enter into a contract, arrangement or understanding which has the purpose, or has (or is likely to have) the effect of substantially lessening competition in the market. This is prohibited.



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7. **Third-line forcing:** You must not say that you will only sell a good or service to your customers if they agree to use a third party to provide a service or to purchase a good. A common example of third-line forcing is where a lender who, as a condition of approving loans, requires borrowers to take out loan insurance with a nominated insurance company.
8. **Misuse of market power:** If you have a substantial degree of power in a market, you must not use this power for certain anti-competitive purposes, such as:
 - eliminating or substantially damaging a competitor; in your market or any other market;
 - preventing the entry of a person into your market or any other market; and
 - deterring or preventing a person from engaging in competitive conduct in your market or any other market.
9. **Exclusive dealing:** A corporation must not engage in the practice of exclusive dealing. Exclusive dealing has the following elements:
 - supply of (or refusal to supply) goods or services by one party to another;
 - supply or acquisition being made on the condition that the party receiving the goods or services will not:
 - re-supply or only re-supply to particular customers or in particular areas; and/or
 - deal with other suppliers or only deal with other suppliers in a limited way; and
 - there is an anti-competitive purpose or effect.

Misleading and deceptive conduct provisions of the TPA

A corporation must not engage in conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. This prohibition is particularly relevant to how businesses advertised their goods and services. These provisions are aimed at protecting the public and accordingly, a contravention of these provisions does not require an intent to mislead or deceive or act negligently. A corporation may contravene these sections even though it acts honestly and reasonably.

- **Accuracy:** You should ensure that all statements made in any of your business' advertisements or promotions are factually correct. Furthermore, if you are comparing your business or products to another product and claiming that yours is superior, it is important that you have reputable evidence readily available to support the accuracy of these comparisons.
- **Context:** However, the misleading and deceptive conduct provisions of the TPA are not only concerned with whether or not a statement is accurate or not. A statement may be literally true, but may nevertheless mislead or deceive due to the context in which it appears or other surrounding circumstances. This is relevant in relation to the comparisons drawn between your business or product to another product. The Australian Competition and Consumer Commission ("ACCC") suggest that business follow the "Dos" and "Don'ts" set out below in respect of advertising:



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Do:

- Give current and correct information
- Make sure to provide all the relevant facts
- Ensure that overall impression is correct
- Back-up claims with facts
- Note important limitations or exemptions
- Correct misunderstandings

Don't:

- Guess the facts
- Leave out relevant information
- Use unnecessary jargon
- Make promises you can't keep
- Make predictions without reasonable basis
- Offer services without a reasonable basis for believing you can deliver them

Implied guarantees and warranties

The TPA also gives your customers the following rights by implying warranties into the terms of your sale of goods or services:

- That the goods must correspond with any description given to the purchaser or any sample shown to the purchaser.
- That the goods must be of "merchantable quality" - they must meet the basic level of quality and performance that would be expected of the good or service, bearing in mind price and description.
- That the goods must be fit for the purpose for which they are intended to be used.
- Services must be carried out with due care and skill.

It is important that you are aware of these implied warranties and ensure that the goods you sell comply with them because failing to do so can result in you and your business incurring severe penalties under the TPA.

Further information

The ACCC is the government body whose role it is to ensure that businesses comply with the provisions of the TPA. For further information in relation to the TPA visit the ACCC's website at www.accc.gov.au.

You will also find more information on the TPA at the Commonwealth Government's consumer website at <http://www.consumersonline.gov.au>.

This fact sheet and the above mentioned websites only provide general summaries of the provisions of the TPA. For more detailed information specific to your business you should consult your legal advisor.

The following fact sheet provides further information about these issues:

- Marketing plan