

Competition guidelines relating to negotiations with publishers

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CAUL provides content procurement services to its members (**Procurement Negotiations**). As part of these services, it negotiates on behalf of its members with publishers of scholarly content the terms and conditions for access to such content, and following a successful negotiation, makes available those terms and conditions to members. Members are entitled to benefit from these negotiated terms and conditions should they elect to enter into an agreement with publishers containing the agreed terms.

As part of conducting these services, CAUL receives assistance from its members from time to time, including through the provision of feedback, product preferences, and priorities. It may receive this individually or as part of working groups constituted by CAUL and representatives of members.

As member universities may be considered competitors with one another, it is important that members are mindful of their obligations under the *Competition and Consumer Act 2010 (Act)*. CAUL takes its obligations under the Act seriously, and accordingly has developed these guidelines to assist members understand their obligations when participating in the Procurement Negotiations.

CAUL and participating members in the Procurement Negotiations agree to abide by these guidelines. Should you have any queries, please do not hesitate to contact consortium@caul.edu.au.

GENERAL COMPETITION LAW OBLIGATIONS

For ease of reference, there are three main categories of obligations relevant for members to be aware of.

1. Cartel conduct

The Act prohibits what is referred to as 'cartel conduct'. Cartel conduct is any 'contract, arrangement, or understanding'¹ between actual or potential competitors that relates to:

- Price fixing: fixing, controlling or maintaining prices for goods or services which the parties are in competition (or potential competition) with each other;
- Market allocation: allocating customers between competitors, or agreeing to supply or not supply certain markets;
- Supply restriction: agreeing to restrict or control the amount of goods and services each party will supply to customers; and
- Bid rigging: agreeing amongst competing bidders to bid, not bid, or limit bids.

Cartel conduct attracts both civil and criminal liability. It is a *per se* offence, that is, an agreement made between competitors that contains a cartel provision is sufficient for a contravention – it does not require proof of a substantial lessening of competition.

¹ A meeting of minds – whether informal or formal, written or not written. This can include a 'nod and wink'.

There are some defences to cartel conduct available to parties,² however those defences are technical in nature and need to be properly constituted to be available to members. Please seek legal advice before seeking to rely on these defences.

As a rule of thumb, members should operate on the following basis:

- **Do not** agree with other members on matters relating to price, allocation, supply or bids:
 - All decisions on such matters must be made independently by members.
 - To the extent any such matters arise as relevant in the Procurement Negotiations, they must be raised with CAUL bilaterally.
- Be clear that all decisions relating to any potential negotiations are the sole responsibility and discretion of CAUL, and each member will determine on its own whether to acquire content from publishers on terms negotiated by CAUL.

2. Concerted practices

The Act prohibits parties engaging in 'concerted practices' that have the purpose, effect or likely effect of substantially lessening competition. Concerted practices involve conduct that falls short of an agreement, but which substitutes competition for coordination. The Australian Competition and Consumer Commission's (ACCC) *Guidelines on Concerted Practices* (August 2018) state that the ACCC will be likely to conclude that a concerted practice has the purpose of harming competition where **competitively sensitive information**, such as a corporation's planned future pricing or output or capacity, is exchanged between competitors in circumstances where:

- the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and
- the recipient acts or intends to act on the sensitive information.³

As a rule of thumb, members and CAUL should operate on the following basis:

- **Only** share competitively sensitive information with CAUL on a bilateral basis.
- **Do not** share competitively sensitive information between members.
- CAUL must keep member information confidential and not disclose it to other members, unless sufficiently de-identified (e.g., in the form of aggregated and anonymised data).

3. General anti-competitive agreements

The Act prohibits general agreements which have the purpose, effect, or likely effect of substantially lessening competition.

² For example, in some circumstances, activities of a joint venture that amount to cartel conduct may be reasonably necessary and exempt.

³ Australian Competition and Consumer Commission's "Guidelines on concerted practices" (August 2018), available from: <https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Concerted%20Practices.pdf>.

INTERACTIONS BETWEEN MEMBERS

Members should be mindful of the following guidelines when interacting with other members:

- **Always** make your own independent decisions regarding the acquisition of scholarly content and operate independently of other members when making decisions about:
 - (a) the prices you will pay for subscription services;
 - (b) whether you will or will not deal with the publishers; and
 - (c) the terms and conditions on which you will engage with publishers.
- **Only** discuss matters relating to the Procurement Negotiations in forums properly constituted and hosted by CAUL. Avoid bilateral discussions between members that do not involve CAUL. Such discussions are not within the scope of the performance of CAUL's services to members.
- **Do not** disclose competitively sensitive information to other members. This is commercially confidential information that relates to matters of competitive sensitivity between the parties, such as price and volume information.
- **Do not** agree with other members to not engage or acquire services from publishers. This includes attempts to ensure that there is a boycott of publishers who do not engage in the Procurement Negotiations with CAUL.

INTERACTIONS WITH CAUL AND OTHER MEMBERS

From time to time, CAUL and other representative members may meet to discuss and receive input to properly inform a successful Procurement Negotiation. Members and CAUL should be mindful of the following guidelines when participating in these forums:

- **Do** – meetings should be properly requested through CAUL as reasonably required for the purposes of facilitating the Procurement Negotiation.
- **Do** – where reasonably practical, prepare and follow an agenda, and keep clear records of the communication.
- **Do** – be mindful that you attend these forums in your capacity to assist CAUL as part of the Procurement Negotiations.
- **Do not** share competitively sensitive information in a forum where other members are present.
- **Do** – engage with and share competitively sensitive information with the representatives of CAUL / CONZUL that sit on the Content Procurement Committee for the purposes of their role on the Committee (i.e., to represent the interests of the body of members which they represent as a collective, **not** the interests of their own institutions). CAUL must keep such information confidential from other members.

INTERACTIONS BETWEEN MEMBERS AND PUBLISHERS

Members may have interactions with publishers on a unilateral and bilateral basis, independently of CAUL. Such interactions are not a part of the Procurement Services and are at each member's sole discretion.

To the extent that members have interactions with publishers that involve CAUL (which may also include other members), members should be mindful of the following guidelines:

- **Do** – allow CAUL to have carriage of such interactions and provide input where appropriate to do so (i.e., when asked).
- **Do** – continue to make independent decisions as to whether you will or will not utilise the terms and conditions made available to you through CAUL.
- **Do** – continue to deal with publishers directly for any matters related to customer and technical service, and account administration.
- **Do** – retain your ability to negotiate and deal with publishers separately.
- **Do not** agree with other members to not deal with, or refuse supply from, the publisher.