

UNIVERSITY OF SOUTH AUSTRALIA
COMPETITION AND CONSUMER ACT COMPLIANCE MANUAL
PROCEDURAL GUIDELINES

Version: 4.0
Date of Approval: April 2012
Updated: November 2017
Reference Authority: Chief Financial Officer

DOCUMENT CONTROL SHEET

Contact for enquiries and proposed changes

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Revision History

Revision	Section	Change	Date	Who
2.0	1, 3 and 4 All	<ul style="list-style-type: none"> Changing references to Chief Operating Officer (COO) to Chief Financial Officer (CFO) Amendments, text shifting, small deletions - for clarity suggested by Wallmans Lawyers 	30/05/16	Kristian Thoroughgood Carolyn Vigar: Wallmans Lawyers
3	2, 3, 4, 5 and 6	<ul style="list-style-type: none"> Removal of references to third line forcing, updating to exclusive dealing Minor clarifications and terminology updates. 	25/11/17	Kristian Thoroughgood Carolyn Vigar (Tanom Legal)

1.0 JOB SPECIFIC PROCEDURAL GUIDELINES

The *Competition and Consumer Act 2010* (Cth) (**CCA**) prohibits anti-competitive conduct and requires businesses to comply with the Australian Consumer Law (**ACL**). The CCA and ACL apply to the operations of the University.

Some staff members are more likely to encounter trade practice and consumer law issues than others. All staff should be aware, however that the CCA and ACL apply to all activities of the University. Job specific procedural guidelines have been designed to assist you in relation to activities that involve a higher risk of breaching the CCA or ACL.

This document contains guidelines summarising the relevant trade practices and consumer law principles applicable to each of the following activities:

1. providing courses;
2. purchasing goods and services;
3. supplying goods and services;
4. advertising, promotions and marketing; and
5. agreements with competing service providers.

If you are involved in any of these activities, you may find it helpful to have the relevant procedural guidelines handy so that you can use them as a quick reference guide.

If you are involved in other activities for which you would like specific procedural guidelines developed to help you do your job, please suggest it to your supervisor or contact the Commercial Support Taxation Accountant.

Please note that these guidelines should be read in conjunction with the Competition and Consumer Act Compliance Manual <http://w3.unisa.edu.au/policies/cca/>.

2.0 PROCEDURAL GUIDELINES FOR PROVIDING COURSES

2.1 Providing Courses Generally

Information provided by the University must be accurate and complete.

Ensure that all aspects of courses are clearly explained and that students understand the information concerning:

- Up-front fees
- Any other fees or costs
- Admission requirements
- Any external student registration requirements
- Length of course
- Required subjects and other course requirements
- Any work experience placements included in the course and whether the University or the student will be responsible for organising the placement
- Any prerequisites applying to work experience placements that form part of a course (for example a successful police check)
- Required pass levels
- The degree or award that will be accorded
- Pathways to transition between courses
- Location of supervisor(s).

Special care should be taken to ensure that overseas students, or students for whom English is a secondary language, adequately understand the course information provided to them. If necessary, the University should arrange for a translator to explain the information to students.

Students should never be pressured into undertaking any program or any particular elective course.

Do not make enrolment in one course conditional upon enrolment of the student in a course provided by a third party, without seeking advice from your supervisor or the University's legal services (legal.services@unisa.edu.au) before proceeding.

2.2 Answering Questions

Students should be encouraged to ask questions if they are unsure of any details regarding either on-shore or off-shore courses.

All questions should be answered accurately and promptly. If you do not know the answer to a question, you should ask or refer the matter to your supervisor. Never try to guess the answer.

2.3 Complaints

Keep a record of any complaints you receive. All such records must be forwarded to your Pro Vice Chancellor or Senior Manager and responded to in accordance with their directions.

3.0 PROCEDURAL GUIDELINES FOR PURCHASING GOODS AND SERVICES

3.1 Requests For Tender And Getting Quotes

- Statements in a request for tender or other procurement documentation must be correct.
- Representations you make must not be misleading. Half-truths or keeping quiet can be misleading in some circumstances.
- Particular care must be taken regarding predictions (e.g. as to demand for a particular good or service in the future). A statement about a future matter must be made on the basis of reasonable grounds.
- Opinions, predictions and claims must be reasonably held. Document the basis for opinions, predictions and claims.
- If goods or services are being bundled either with other products or services offered by the University or by a third party, consult your supervisor or Legal Services (legal.services@unisa.edu.au) before proceeding.
- Remember that the key to a harmonious relationship between the University and a supplier is well thought out specifications, clearly and unambiguously expressed.
- The tender process outlined in a request for tender should be followed.
- Quote enquiries should be genuine and statements made should be accurate.

3.2 Negotiating The Contract

- Statements and representations made **during** contract negotiations must not be misleading.
- Remaining silent or only giving half the picture can be misleading in some circumstances. Do not impose any unreasonable contract terms on individuals or small businesses with whom you deal.
- If the products and/or services are being supplied on a condition that the recipient deal exclusively with the University, this may constitute unlawful **exclusive dealing**. Consult with your supervisor or the University's Legal Services as above.
- If you are considering supplying a product or service to a customer (including a student) on a condition that they accept a restriction from purchasing products or services from another person, this may be unlawful **exclusive dealing**. Consult with your supervisor or the University's Legal Services.
- If the value of the sale is less than \$40,000, there may be non-excludable statutory terms and conditions regarding the goods or services provided by the University which will apply and which the University must not purport to exclude.

3.3 Conduct After The Contract Is Signed

Statements and representations made **during** the term of a contract must not be misleading.

3.4 What If Things Go Wrong?

Consult the University's Legal Services or the Chief Financial Officer for advice if anything goes wrong. The University may be entitled to claim compensation if the statements or representations made by a supplier were, at any stage of the business deal, misleading.

4.0 PROCEDURAL GUIDELINES FOR SUPPLYING GOODS AND SERVICES

4.1 Submitting Tenders And Sales Presentations

- Statements in tender documents, other procurement documentation and sales presentations must be accurate.
- Representations must not be misleading. Half-truths or keeping quiet could be misleading in some circumstances.
- Opinions, predictions and claims must be reasonably held. Document the basis for an opinion, prediction or claim.
- Do not promise anything you cannot deliver or make unrealistic or exaggerated claims about the goods or services that the University is supplying.
- Avoid using product comparisons unless you are certain the comparison is accurate, complete, objectively verifiable and current.
- Make sure that any product comparisons are absolutely correct, are fair by comparing like with like, and that there is evidence to support the comparisons. Be aware that changes in competing products after you have made a comparison, may make the comparison misleading.
- Do not put pressure on an individual or small business to contract with the University.
- Do not discuss tender pricing or terms with competitors or come to any arrangement or understanding about market sharing or price, as this could constitute unlawful **price fixing** or an **anti-competitive agreement**.
- Make sure that you have disclosed all relevant information about a contract to the other party. Check whether there is any fact or any other project that will affect how this contract is to be performed. If there is, this should be disclosed.
- Seek legal advice from Legal Services before discussing any joint venture or cooperative tendering arrangement with a competitor.

4.2 Negotiating The Contract

- Statements and representations made during contract negotiations must not be misleading.
- Remaining silent or only giving half the picture can be misleading in some circumstances.
- Opinions, predictions and claims must be reasonably held. Document the basis for an opinion, prediction or claim.
- Do not impose unreasonable contract terms on individuals or small businesses with whom you deal.

- If the person the University is dealing with is at a special disadvantage (eg due to age, infirmity, language barriers, financial hardship), then do not take advantage of the University's stronger position else you may be acting **unconscionably**.
- Do not agree to supply goods or services on the basis that the person acquiring the goods or services will not acquire goods or services of a particular kind from a person. This may be unlawful **exclusive dealing**.
- If the value of the sale is less than \$40,000, there may be non-excludable statutory terms and conditions regarding the goods or services provided by the University which will apply and which the University must not purport to exclude.

4.3 What Should I Consider When I Set Prices?

- Remember that price is a charge of any description and discounts, allowances, rebates and credits are all elements of price.
- Set prices independently. Do not ever discuss or agree to prices, discounts, allowances, rebates or credits with your competitors. This may constitute **price fixing**.
- Find out about competitor's prices only from publicly available information.
- Avoid any suggestion that the University will act in concert with any other entity to fix prices or restrict business activities in any way. This may be considered to be **price fixing, market sharing, a boycott** or acting for a **concerted purpose**.
- Do not impose harsh or unusually high prices on a buyer or seller who is in a considerably weaker position than the University. This may constitute **unconscionable conduct**.
- If the products or services supplied by the University will be on-sold by the purchaser, do not attempt to set the prices at which they on-sell. This may be considered **resale price maintenance**.
- Do not use sustained pricing that is below cost to drive others out of the market in which the University operates. This may be considered **misuse of market power by predatory pricing**.
- If you make predictions about what prices may be in the future, make sure you have good grounds for your predictions and that you have documented them. Failure to do so may be considered **misleading conduct about future matters**.
- Be careful when using the word 'free' in advertising. It is not acceptable to claim that a product or service is free, but then impose a range of terms and conditions that mean the product is not really free. This may be considered **misleading or deceptive conduct** or a **misrepresentation about price**.
- Do not make an offer concerning the price of a product or service (including a discount, allowance, credit or rebate) that the buyer can only take advantage of if he or she also obtains a product or service from someone else. This may constitute **exclusive dealing**.

4.4 Conduct After The Contract Is Signed

Statements and representations made **during** the term of the contract must not be misleading.

4.5 What If Things Go Wrong?

Consult Legal Services or the Chief Financial Officer for advice if anything goes wrong.

The University may be entitled to claim compensation if the statements or representations made by a purchaser were, at any stage of the business deal, misleading. Conversely, the purchaser may be able to claim compensation from the University if the University has made any misleading or deceptive statements.

Do not think that a purchaser is not entitled to compensation just because there is a clause in the contract saying that the University does not take responsibility.

5.0 PROCEDURAL GUIDELINES FOR ADVERTISING, PROMOTIONS AND MARKETING.

Promotional materials include (but are not limited to) advertisements and brochures, in both print and electronic forms.

5.1 What Should I Check For When I Produce Promotional Material?

- Promotional materials must be accurate. Be truthful and tell the whole story.
- Check all prices and terms and conditions with relevant personnel to ensure that they are correct.
- There must be no discrepancy between the product and the description of the product in the promotional material.
- Think about who your audience is. Consider the impact of the entire message on the audience. Could the advertisement be understood differently by different members of that audience? If so, it may mislead some people.
- Wherever possible, eliminate technical wording and use plain English.
- Give a clear and unambiguous explanation of unusual aspects of the offer or the deal.
- Any special terms and conditions of the offer must be stated.
- Qualifications that may be important to consumer choice must be disclosed in advertising.
- Do not rely on the 'fine print' to outline key terms and conditions of the offer. If the main text leaves a misleading impression, it cannot be cured with footnotes or asterisks.
- Be very careful when using the word **FREE**. It is not acceptable to claim that a product or service is 'free', but then impose terms and conditions that mean the product is not really free. It is not permissible to inflate the price of these other products to cover the cost of the 'free' product.
- Promotional material must not perpetrate hatred or unlawfully discriminate against a person on grounds of age, ethnicity, race, nationality, gender, marital or parental status, physical or mental impairment, religion or sexual preference.
- When making statements about the future (e.g. 'Buy our software now, because prices will rise within 12 months'), make sure that there is reasonable basis for the claim and keep a copy of material supporting the claim.
- Opinions, predictions and claims must be reasonably held and (if applicable) the basis revealed (e.g. 'Market research conducted by Recruitment Research Pty. Ltd. has shown that a higher percentage of science graduates from the University of South Australia obtain employment in the first 6 months of graduation than graduates from other Universities'). Document the basis for opinions, predictions and claims.
- Make sure that product comparisons are fair by comparing like with like, and are absolutely correct.

- Be careful about making comparisons with competitors' products or services. This is high risk advertising. Competitors may change their product without telling the University. Indeed they could deliberately do so to make an advertising campaign misleading and therefore unusable.
- Make contract documents readily available to consumers and businesses during negotiations with them.
- Exaggeration or 'puffery' must be self-evident. It must be readily apparent to the target audience that it is only market hype and not literally true.

5.2 Winning New Business And Customers

Winning new customers is encouraged, provided you do not:

- Mislead or misrepresent the University's products or services through advertising or sales pitches. This may be considered to be ***misleading or deceptive conduct***.
- Extract unreasonable, unfair or unusual terms from a customer or supplier who has a special disadvantage. This may constitute ***unconscionable conduct***.
- Collude with the University's competitors on price or agree to a market sharing arrangement. This may be considered ***cartel conduct***, entering an ***anti-competitive agreement or market sharing***.
- Engage with a competitor to boycott anyone to force them into doing or not doing what you want. This may be considered a ***collective boycotts***.
- Make supply conditional on dealing with a third party as well as with the University. This may be ***exclusive dealing***.
- Substantially lessen competition in any market by misusing the University's market power.

6.0 PROCEDURAL GUIDELINES FOR AGREEMENTS WITH COMPETING SERVICE PROVIDERS

6.1 Illegal Arrangements With Competitors

The CCA prohibits any contract, arrangement or understanding that has the purpose, or effect or likely effect, of substantially lessening competition in a market. The CCA also prohibits acting in concert with another person for the purpose, or with the effect or likely effect, of substantially lessening competition.

In addition to this, the CCA strictly prohibits the following between competitors, irrespective of their purpose or effect. Any of the following arrangements will be illegal and subject to penalties imposed on both the companies involved and also on individuals.

- **Price Fixing** – this means agreeing with a competitor to fix, maintain or control price.
- **Production or supply restrictions** – this means agreeing with a competitor or limit the production or supply of goods or services.
- **Market Sharing** – this means agreeing with a competitor to divide or allocate customers or geographical markets between them.
- **Bid Rigging** – this means competitors colluding or cooperating in respect of a tender or steps preceding a tender.

A contract, arrangement or understanding does not have to be in writing to be illegal. If through communicating with a competitor you each have an understanding of how the other will act, that is sufficient. A ‘nod and a wink’ is enough to constitute a breach of the law. Similarly, discussions in a social context with an anti-competitive intention or effect (even outside working hours) can constitute a breach of the law. Acting on sensitive information provided by a competitor regarding the competitor competitive conduct or intended conduct, may be sufficient to constitute acting in concert with that competitor.

6.2 Guidelines

- Consult with Legal Services before entering into any agreement, arrangement or understanding with a competitor. While some agreements, arrangements and understandings with competitors are legal, others are likely to breach the provisions of the CCA.
- You must make decisions about the pricing of consultancy services and other services offered by the University independently of competitors.
- Make it clear that you will not exchange price information or discuss price or market sharing with any competitor that approaches you to do so.
- Do not agree with a competitor not to do business with someone or that only one of you will do business with someone.
- Do not agree with a competitor not to poach their customers and *vice versa*.

- Do not make an arrangement with a competitor not to sell or buy products from a particular supplier or customer.
- Do not agree with a competitor that you or they will not enter a particular market.