# CARTELS COST CONSUMERS

***Under the Competition and Consumer Act, people engaging in cartel behaviour face the prospect of spending up to 10 years behind bars.***

Cartels symbolise the worst type of anti-competitive behaviour in business. They often lead to less choice, higher prices, and inferior products and services.

But what exactly is a cartel? It's a term many of us might associate with drug runners or diamond traders. But the reality is cartels can operate anywhere and in almost any industry.

Broadly, a cartel is when competitors conspire to fix or control prices, rig bids, restrict supply or allocate markets.

Their aim is generally to stifle competition or to control a certain market, for their own benefit. Companies involved in cartel behaviour may, in effect, be harming consumers, taxpayers and other businesses.

There is a range of conduct that may be considered to be cartel conduct. It may be systematic, formalised and cause significant loss or damage or, conversely, it may be ad hoc, opportunistic and cause no readily identifiable loss or damage.

The ACCC has a good track record of breaking cartels.

Several years ago the ACCC took action against a group of commercial air-conditioning companies in Western Australia for engaging in activities known as bid-rigging and price fixing.

This is where companies come to an agreement that one will submit the lowest price for a project and therefore be likely to win the tender. Such conduct is at the higher end of the range of cartel behaviour.

The WA companies had covert meetings and phone conversations over many years to rig the outcome of tenders totalling almost $130 million. The companies and their directors were found guilty and penalised more than $9 million.

In late 2011, in Queensland, three building companies were penalised a total of $1.3 million for engaging in a practice known as 'cover pricing' in connection with tenders for three state and one local government construction projects.

The court found the building companies' actions to be illegal 'price controlling', conduct which is at the lower end of the range of cartel behaviour. One of the building companies is appealing the decision.

Price controlling is not an obvious cartel practice, but is a form of collusive tendering and an unlawful civil conspiracy.

Cover pricing is believed to have developed in the building industry over many years. Often builders use the excuse that they don't have the time, resources or inclination to prepare an accurate tender, but still want to be seen as tendering for a project for fear they will be struck off the list for future opportunities if they don't.

Cover pricing involves discussions between two potential suppliers in a tender process. Company A does not want to win the contract for reasons identified above, so it asks company B, which intends to make a genuine tender, to provide them with a 'cover price'.

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Both companies understand that the cover price will be higher than company B's tender price. When company A receives the cover price, it submits its tender at a price which is at or above the cover price.

This gives the client the impression that both companies are tendering competitively, but the exchange of the cover price actually ensures company A's tender price is higher than that of company B. Therefore company A is highly unlikely to be the successful tenderer.

Some people believe cover pricing in these circumstances is acceptable behaviour, but it is not. It is illegal, regardless of whether the damage to competitive processes is intended or not.

Undermining a tender process for government work may defeat the purpose of a competitive tender—to deliver the best value for taxpayers' money.

It creates an illusion as to a range of prices and to the existence of a particular level of competition.

Ultimately it is Australian consumers who may be disadvantaged if they have to pay higher prices or taxes or receive less for their tax dollar than they would otherwise.

It is only by bringing cartels to the attention of the community and describing the harm they cause that the ACCC is going to get more people involved in identifying and stopping cartel behaviour.

Criminal sanctions for engaging in cartel conduct include possible jail terms for up to 10 years; and financial penalties of up to 10 per cent of a business' annual turnover or three times the benefit obtained from the conduct or $10 million, whichever is the highest.

The ACCC has a cartel immunity policy which allows one party in a cartel to dob in the others and walk away without penalties.

*For further information on cartels visit www.accc.gov.au/cartels. If you suspect cartel activity, call the ACCC Infocentre on 1300 302 502.*

# BUILDERS FINED FOR ILLEGAL PRICE CONTROLLING

In October 2011, three Queensland building companies—TF Woollam & Son Pty Ltd, JM Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd—were penalised in the Federal Court for cover pricing, a form of illegal price controlling (see main article).

Their fines totalled $1.3 million.

The companies were found to have engaged in cover pricing in connection with the tenders for four taxpayer-funded building projects.

The court also found that they engaged in misleading or deceptive conduct by certifying they had not discussed prices or collaborated with other tenderers, when they had.

Carmichael Builders has appealed.

The Managing Director of TF Woollam and the Construction Manager of JM Kelly were also found to have been parties to one or more contraventions by their respective companies and were separately penalised.

ACCC Chairman Rod Sims said the decision showed that cover pricing was illegal, and building companies that continued with the practice could expect the ACCC to enforce the law.