



Australian
Competition &
Consumer
Commission



Cartels

What you need to know

A guide for business



Are you aware of the ACCC's immunity policy?

For further information visit www.accc.gov.au/cartels

Australian Competition and Consumer Commission
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Foreword

Where competitors choose to collude rather than compete, a cartel is formed. Raising prices through price fixing, bid rigging, restricting output and market allocation is a silent extortion that undermines the efficient functioning of Australian markets. Cartels steal billions of dollars both here and abroad from business, from taxpayers and ultimately from consumers.

The damage caused by cartels can extend far beyond higher prices. By controlling markets and restricting goods and services, cartels can put honest and well-run companies out of business while stifling innovation and protecting their own inefficient members.

It is worth reflecting on the words of one of our Federal Court judges, Justice Heerey, in November 2007, when he issued his judgment on the well-known Visy cartel case.

The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.

Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect.

The whole point of price fixing and market sharing is to obtain the benefit of prices greater than those which would be obtained in a competitive market.

The cartel here went on for almost five years. Had it not been accidentally exposed, it would probably still be flourishing. It was run from the highest level in Visy, a very substantial company. It was carefully and deliberately concealed. It was operated by men who were fully aware of its seriously unlawful nature.

In an earlier case, Justice Finkelstein of the Federal Court stated “It is not unusual for antitrust (cartel) violations to involve far greater sums than those that may be taken by thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society...”

The ACCC regards fighting this damaging behaviour—regardless of scale—as a major priority of our enforcement program, both within Australia and as part of a global network of competition agencies detecting and breaking up international cartels.

While cartel activity has been illegal for more than 30 years in Australia there is now, for the first time, the additional sanction of criminal conviction for cartel conduct. The *Competition and Consumer Act 2010* (the Act) provides major additions to cartel detection capacity, including search warrants and telephone interception. The criminal provisions provide a powerful deterrent to those who might be tempted to collude with competitors.

The overwhelming message of this publication is to warn about the consequences of engaging in cartel conduct; however, it also contains useful information for the vast majority of law-abiding businesses that simply want to trade fairly:

- Guidance on compliance tools will help businesses assess and mitigate their risks.
- Detection tips for monitoring collusion among suppliers will enable purchasers to protect their budgets.
- Hypothetical scenarios illustrate circumstances that might tempt businesses into colluding.

The simple advice for the business community is not to participate in any cartel. Don't fix prices, don't restrict output, don't rig bids and don't allocate customers, suppliers or territories.

It is recommended that all businesses in Australia consult this publication for clear advice and guidance on this very important topic.

Introduction

Combating cartels is a high priority for the ACCC, because of the potential damage to the economy caused by anti-competitive arrangements. These arrangements can adversely affect consumers through higher prices and reduced choices of products and services. They can also affect the large majority of businesses who are committed to lawful competition and fair trading.

Whether the economy is growing strongly or is in decline, cartels are unlawful and can cause considerable damage.

The Act therefore seeks to protect both consumers and businesses from anti-competitive, restrictive and unfair business practices.

This publication is designed to give businesses an overview of the law in relation to cartel conduct as outlined in the Act and the consequences of engaging in cartel conduct. It is not exhaustive—there will be many instances where businesses should seek their own independent advice.

There are three main messages:

- Businesses should be aware of the law and the penalties for contravening the Act.
- Businesses should adopt suitable risk management and compliance strategies.
- Businesses should be aware of the risks of being targeted by a cartel, and should be alert to possible collusion by suppliers.

What is a cartel?

A cartel exists when businesses agree to act together instead of competing with each other.

Cartels have been discovered operating in a wide range of industries. Cartel participants range from large, well known corporations to small local businesses. Products involved have included air cargo services, photocopy paper, petrol, concrete, air conditioning, cardboard boxes, freight and fire protection systems.

How do cartels damage law-abiding businesses?

Cartel activities are an imposition on the entire community—consumers, taxpayers and businesses.

The extra profits cartels generate are at the expense of everyone in the supply chain.

The particular damage caused to other businesses can be direct or indirect.

- Higher prices—cartels artificially inflate costs along the entire supply chain, causing businesses and their customers to pay more than they should.
- Inflated capital costs—when cartels are part of the supply chain, the costs of capital items such as buildings and plant become inflated, leading to higher operating costs (including rent, interest, and opportunity costs) over the life of the asset.
- Lack of innovation—cartel conduct protects inefficient suppliers from the operation of market forces and stifles innovation and investment in research and development.
- Lack of investment—cartels typically attempt to block the entry of new players into their industry in order to defend market position. In the long term this can reduce investment opportunities, economic growth and jobs.
- Locking up resources—cartels interfere with normal supply and demand forces, and can effectively lock out other operators from access to resources and distribution channels.
- Negative customer sentiment—cartel activity can damage consumer confidence in an entire industry sector, and this mistrust may extend to law-abiding businesses that are not involved in cartel conduct.
- Higher taxes and reduced services—cartels that target the public sector extract extra costs that are paid by all consumers through rates and taxes.
- Less infrastructure—bid rigging in public infrastructure projects can inflate costs, which ultimately reduces the capacity of the public sector to invest in projects that benefit our community.

Strongly enforcing competition laws and breaking up cartels benefits well-run businesses that compete fairly.

1 Cartels and the law

Certain forms of anti-competitive conduct—including that known as cartel conduct—are against the law and have been for many years. The Act specifically defines and prohibits different types of cartel agreements for which civil and criminal penalties apply.

A cartel provision is one that has the purpose or effect of:

- fixing, controlling or maintaining prices

and/or the purpose of:

- allocating customers, suppliers or territories
- preventing, restricting or limiting output
- bid rigging, such as collusive tendering.

It is a breach of the law for competitors to make an agreement containing a cartel provision, and a further breach to put it into effect.

Businesses are considered to be competitors if they or any related companies are, or are likely to be, in competition in any relevant market for the supply or acquisition of goods or services.

Types of cartel conduct

The four types of prohibited cartel conduct are explained on the following pages. It is common for cartels to employ more than one of these strategies at a time.

Alice Springs Car Rental Cartel

The Managing Director of a major car rental company rang his regional manager in Alice Springs and directed him to contact local competitors and propose that they all cease to discount car rentals during the off-peak tourist season. Covert meetings were held at a restaurant, the golf course and at other social functions and the local competitors all agreed to the scheme.

It has been estimated that consumers paid an average of \$300 extra per rental while the agreement was in place. In 1998 the companies and some of the individuals involved were penalised a total of \$1.54 million.

Price fixing

Price fixing occurs when competitors agree on pricing rather than competing against each other. The Act refers to the 'fixing, controlling or maintaining' of prices. This may be in the form of:

- agreed selling or buying prices (this does not necessarily mean that prices are set at the same level by all parties to the agreement)
- agreed minimum prices
- an agreed formula for pricing or discounting goods and services
- agreed rebates, allowances or credit terms.

Such agreements may be in writing but are often informal and verbal.

Visy and Amcor packaging cartel

Between them, Visy and Amcor controlled around 90 per cent of the corrugated fibre packaging market (the humble cardboard carton), which was worth some \$1.8 billion to \$2 billion per year. From 2000 to 2004, the two companies conspired to raise the prices of their products while maintaining their respective market shares.

Both companies nominated executives to consult on and coordinate price rises and collude when negotiating quotes for customers. These executives met regularly and secretly in public places such as hotels and parks, and also communicated using public phones and special prepaid mobiles. When larger customers wished to renegotiate contracts, the two companies swapped information to ensure that the competitor's quote was higher than the existing price structure (this practice is known as cover pricing).

The scheme was discovered only when Amcor management reported to the ACCC and Amcor was granted immunity from prosecution. Visy eventually admitted its role in the cartel. It was fined \$36 million by the Federal Court, and fines to individuals totalled \$2 million. The Federal Court subsequently ordered Visy and Amcor to pay \$95 million in damages to a customer class action involving more than 4500 businesses.

Animal vitamins cartel

Three Australian suppliers of animal vitamins held meetings and telephone conversations during which they agreed on the prices they would charge for certain vitamins. They were the Australian subsidiaries of large foreign companies that had also entered into price fixing and market allocation agreements overseas. The Federal Court imposed penalties of \$26 million against the Australian suppliers.

Fine paper cartel

Between 2000 and 2004, several international companies that supplied paper products formed a cartel known as the AAA club. The secret meetings of this 'club' were held in south-east Asian countries, particularly those that had no anti-trust (cartel) laws at the time. The participants made price fixing agreements for the supply of copy and other papers into various markets including Australia.

In 2010 and 2011, several of those companies were penalised more than \$8 million by the Federal Court of Australia. The Court also made injunctions restraining the companies from repeating their conduct, and ordered them to pay \$550 000 towards the ACCC's legal costs. Despite the agreements being made outside of the country, Australian laws were breached because the illegal deal was put into effect in the Australian market and harmed local consumers.

Queensland construction cover pricing

Between 2004 and 2007, three construction companies (TF Woollam & Son, JM Kelly and Carmichael Builders) engaged in cover pricing when bidding on four government projects. The companies also misled their clients by signing statements that they had not colluded with their competitors during the bidding process.

Cover-pricing is a practice which has developed within the building industry, both in Australia and abroad. It is used in situations where a construction company may not have the time, resources or inclination to prepare an accurate tender, but still wants to be seen as tendering for that project.

In this instance, cover-pricing involved discussions between two potential suppliers (builders) in a tender process. Company A does not want to win the contract for reasons identified above and so asks company B (who intends to make a genuine tender) to provide them with a 'cover price'. Both companies understand that this 'cover price' will be higher than company B's tender price. Once the cover price has been received from company B, company A (should it choose to tender) then submits its tender to the client 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 that company A's tender price is higher than that of company B and therefore makes it unlikely that company A will be the successful tenderer.

In 2011 the Federal Court described this cover pricing as 'illegal price controlling conduct' and the making of the false statements as 'a betrayal of trust'. The three companies were penalised a total of \$1.3 million and two key individuals received penalties totalling \$80 000.

Hypothetical scenario—Price fixing

You attend a regularly scheduled trade association meeting. Afterwards, during refreshments, you find yourself chatting with a local competitor. The conversation eventually moves to the tightening of margins and profits in recent years. You agree with your competitor that business conditions are much tighter than they have been for quite some time and that things were better in the good old days.

No problems here—you are simply exchanging views.

Your competitor goes on to say that part of the problem is that the industry participants are 'cutting each other's throats' and that the focus should be on lifting prices and margins. They state that the industry association should concentrate on improving the bottom line for members by putting out a guide on prices.

Warning! Where there is an understanding between competitors to use a recommended price list as an industry-wide price floor, then a price fixing arrangement has been made.

You are non-committal and leave shortly afterwards. Several weeks later, you receive from your competitor an email containing a draft minimum price schedule and saying that most of the suppliers in the state like the idea and intend to use it.

Act now! The agreement is clearly to fix, control and/or maintain prices, and would be illegal. You may be implicated if you do nothing, because it could be inferred that you tacitly agreed. You should seek legal advice and report the matter to the ACCC.

Allocating customers, suppliers or territories

When competitors agree to divide or allocate customers, suppliers or territories among themselves they are sheltering from competition, denying consumers the benefit of choice, and engaging in cartel conduct.

Such actions include:

- allocating customers by geographic area
- dividing contracts within an area
- agreeing not to compete for established customers
- agreeing not to produce each other's products or services
- agreeing not to expand into a competitor's market.

The key is that competitors agree among themselves how the market will operate, rather than allow competitive market forces to work.

Freight cartel

This case involved TNT Australia, Ansett Industries and Mayne Nickless. In five significant meetings between 1987 and 1990, attended by representatives of each of the three companies, a series of agreements were reached to allocate customers and share the market.

The conduct included agreements between the companies not to poach each other's customers. When customers moved from one provider to another, the companies balanced their accounts of customers lost and gained, and paid or received compensation. The companies also deliberately provided poor service in order to compel customers to return to a supplier with which they might have been dissatisfied.

Each of the companies acted on these agreements on many occasions. The practices were believed to have been in place for 20 years. In 1995, fines of \$11 million were imposed.

Power transformers cartel

The major Australian suppliers and manufacturers of both power and distribution transformers were involved in price fixing, bid rigging and market allocation within domestic markets with a combined value of around \$160 million per year. The customers affected by the cartel included some of the largest electricity transmission and distribution utilities across Australia, many of them publically owned, resulting in Australian consumers paying higher electricity bills. A whistleblower alerted the ACCC to the cartel conduct.

The cartel included the principal manufacturers and suppliers of transformers in Australia and covered virtually 100 per cent of the industry, including the ABB companies, Schneider Electric (Aust), Wilson Transformers, Alstom Australia and AW Tyree. The collusion involved executives at the highest level, and featured secret meetings in hotel rooms, airport lounges and private residences in various locations across Australia. These meetings rigged the outcomes of multimillion dollar contracts, with at least 27 tenders being rigged between 1993 and 1999. Some aspects of the cartel ran from 1989 to 1999. A 2004 study by the Australian National University concluded that the cartel extracted an extra \$70 million to \$80 million from its customers between 1994 and 1999.

The Federal Court imposed penalties of more than \$35 million on the participating companies and some of their executives. The Court was particularly scathing about the fact that the arrangement was coordinated by senior executives, including managing directors. Total penalties imposed on individual executives exceeded \$1 million, with the highest being \$200 000.

Hypothetical scenario—Market allocation

Your firm is a wholesaler that supplies retailers over most of the metropolitan area of a capital city. In recent years you have expanded into the rapidly growing northern suburbs, with limited success. You find you have to be very competitive in pricing to win business from a well-established local firm. You have, however, just secured two good accounts with retailers. You receive a phone call from the angry competitor, who says they are willing and able to take you on in a price war and will target your existing retailers.

Business can sometimes be rough and tumble, and a threat to compete vigorously could be perfectly legal so long as a threatened price war is not an attempt to reach an agreement to stop discounting.

You ignore the call, but notice over the next few months that you lose some retailers to your competitor. You respond by cutting your margins and instructing your sales staff to 'sharpen their pencils'. You are, however, worried about the situation. Your competitor then calls you to discuss the matter. They suggest that the issue could be resolved if you back out of the northern suburbs; in return they will relinquish your previous clients. Then, they suggest, both of you could raise prices to what they were before the conflict and concentrate on 'our own patches'.

Warning! What is being proposed is a market allocation scheme, and is illegal. At this stage you are not a party to the agreement, but if you ignore the incident it could be inferred that you tacitly agreed. You should seek legal advice and report the matter to the ACCC.

You reluctantly agree to back off, and then tell your sales team to leave the north alone. Over the next few months you raise your prices back to the original levels.

Danger!! By agreeing, you have made a market allocation arrangement and breached the law. By pulling your sales staff off, you have put that agreement into effect and made a second breach. It might also be inferred that you have fixed prices. You should contact your lawyer and the ACCC immediately. If you are the first to inform the ACCC and you continue to cooperate, you may receive immunity from prosecution.

Bid rigging

Bid rigging refers to agreements between competitors in order to ensure that bids for a tender are submitted (or withheld) in a manner agreed by the participants. Bid rigging is also referred to as collusive tendering.

Types of bid rigging

Collusive tendering is an insidious form of anti-competitive behaviour, so it is useful to understand some of the more common bid rigging tactics:

- **cover bidding**—competing businesses choose a winner while the others deliberately bid over an agreed amount, which ensures the selected bidder has the lowest tender and also helps to establish the illusion that the lowest bid is indeed competitive
- **bid suppression**—a business agrees not to tender, thus ensuring that the pre-agreed participant will win the contract
- **bid withdrawal**—a business withdraws its winning bid so that a competitor will be successful instead
- **bid rotation**—competitors agree to take turns at winning business, while monitoring their market shares to ensure they all have a predetermined slice of the pie
- **non-conforming bids**—businesses deliberately include terms and conditions that they know will not be acceptable to the purchaser, ensuring that they will not win the bid and that the pre-agreed business will be successful.

Brisbane fire protection cartel

For about 10 years until 1997 most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings at which they agreed to allow certain tenders to be won by particular competitors. To ensure that the tenders were won by the agreed participants, the companies agreed on the prices at which they would tender for particular projects. It has been estimated that this conduct affected contracts worth more than \$500 million. The Federal Court imposed more than \$14 million in penalties on the companies and some of their executives.

Marine hose cartel

This case involved price fixing, bid rigging and market sharing by four foreign companies that supplied rubber hosing to transfer oil and gas from production and storage facilities to offshore tankers. The four companies involved (Dunlop Oil & Marine, Bridgestone Corp., Trelleborg Industrie SAS and Parker ITR) each appointed members to a committee that allocated jobs and coordinated bidding and quoting for these jobs. The designated winner of the contract was referred to as the 'champion' and the cartel used such codes and other covert tactics to conceal their activities.

The cartel was international and the key meetings were held overseas, but the successful court action was based on the cartel giving effect to their agreement in the Australian market, following global enforcement action taken by competition authorities in the USA, UK, Europe and Japan. In 2010 the Federal Court of Australia made orders restraining the parties from repeating such conduct and imposed penalties exceeding \$8 million.

Hypothetical scenario—Bid rigging

Your firm provides demolition services on a wide range of private and government contracts. A large government contract is out for tender and you are well positioned to undertake the work, although competition in the sector is quite fierce, with three rivals likely to also bid. You spend many months preparing the tender. Close to the submission date your main rival (a much bigger company) rings you and says that they will be bidding and want to know whether you would be prepared to undertake subcontract work on the job should they win the contract.

It is not unusual for firms to subcontract work to each other, especially to harness specialised skills.

You inform your rival that you are also bidding on the project and would like to be considered as a subcontractor should they win the contract.

The next day your competitor rings you again. They are prepared to provide you with guaranteed subcontracting work for 60 per cent of the job at a price above the going rate, provided they win the contract. To cut the deal, they want you to withdraw your bid. When you ask whether your two other rivals intend to bid, they reply that everything is sorted.

Warning! If you agree to withdraw your bid you will be a party to a bid rigging arrangement, which is illegal.

You tell your rival that you are a bit uneasy at what is being proposed, and that you would rather let the market decide who wins. Your competitor then becomes very terse and says that if you are not a friend, you are an enemy and should not expect any further work from them or from any of the others. A large part of your income is sourced from subcontracting.

Act now. Although you are clearly not the ringleader, giving in to the pressure would make you part of a cartel. You should contact your lawyer and the ACCC immediately.

Output restrictions

Output restrictions occur when the participants in an industry agree to prevent, restrict or limit supply. The purpose is to create scarcity in order to increase prices (or counter falling prices) while also protecting inefficient suppliers.

Any business may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output. Generally, the action needs the support of key market participants to achieve the cartel's desired result.

Tasmanian Atlantic salmon growers

In 2002 the Tasmanian Atlantic salmon industry was in financial difficulty and decided that supply was outstripping demand. The industry association, the Tasmanian Atlantic Salmon Growers Association (TSGA), decided that if all members culled stocks by around 10 per cent, this would meet demand and avoid further price falls. It sought legal advice but did not correctly brief its lawyers. The advice that the cull would not breach competition laws was consequently flawed. After a meeting of growers approved the plan, agreements were circulated. One member, Tassal, subsequently culled its stocks. The ACCC investigated and the cull was stopped.

Due to the parlous state of the industry and the fact that legal advice had been sought and cooperation shown, the ACCC chose not to pursue penalties. It instead obtained court orders that the industry establish a compliance training program and stop any future culls.

Hypothetical scenario—Output restrictions

You work for a company that supplies concrete additives to the pool and spa industry. Although demand for the product is fairly stable, a new competitor has recently entered the industry and has aggressively marketed its product, leading to a concerted price war in the industry. Your bottom line has been further eroded by an increase in input costs for the chemicals used in manufacture, as these are linked to crude oil prices.

It is not unusual in certain industry sectors that a new entrant to a market will reduce their profit margins in order to secure a viable market share. In these circumstances incumbents may be forced to respond by dropping their prices to match.

At the national aquatic congress all the manufacturers of concrete pool additives get together for dinner one evening, and the discussion turns to the profitability of the sector. Despite some antagonism directed at the new entrant, there is a consensus that the price war is only damaging everyone's business.

Warning! The implication of the discussion is that industry participants should act collectively to control the price of their products.

Someone suggests that increasing the volume of product will only drive prices lower, so perhaps the manufacturers should be thinking about driving prices up by reducing output to the market. The increase in chemical costs is the perfect pretext to reduce supply, and it is suggested that everyone should reduce the availability of stock by 20 per cent for the coming three months leading to summer.

Warning! Discussion among competitors about restricting supply is illegal.

The new entrant leaves saying that they want no part of a crooked deal.

The remaining manufacturers realise that the arrangement won't work unless everyone in the industry plays along. They are now worried that someone will reveal to the ACCC what has been proposed.

Penalties

Changes to the law in 2009 introduced criminal penalties for cartel conduct.

Criminal penalties

The ACCC takes the view that serious cartel conduct should be prosecuted criminally whenever possible.

To prove that a criminal cartel offence has occurred, the prosecutor must establish certain fault elements under the Criminal Code.

- An offence is committed if it can be proved that a corporation intended to enter into a contract, arrangement or understanding that it knew or believed contained a cartel provision.
- A further offence is committed if it can be proved that a corporation intended to give effect to a contract, arrangement or understanding that it knew or believed contained a cartel provision.

The Commonwealth Director of Public Prosecutions (CDPP) is required to prove these offences beyond reasonable doubt.

Penalties may include gaol sentences of up to 10 years and/or fines of up to \$220 000 for the individuals involved, and other court orders. A criminal conviction may also invoke *Commonwealth Proceeds of Crime Act 2002* provisions.

Civil penalties

It is a breach of the civil provisions of the Act if competitors make a contract or arrangement or arrive at an understanding that contains a cartel provision. It is a further and separate breach if competitors give effect to that cartel provision. If the ACCC proves this on the balance of probabilities, the Federal Court can impose significant penalties and make various orders, including restraining the parties from continuing their conduct.

For a breach by a corporation of the civil cartel provisions, the court can impose a maximum penalty the greater of:

- \$10 million
- when the value of the illegal benefit to one or more parties can be ascertained, three times the total value
- when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the corporate entity (including related corporate bodies) in the preceding 12 months.

In addition, a penalty of up to \$500 000 can be imposed on individual company officers where they are knowingly concerned in the conduct. Where proceedings are taken against an individual company officer, the company is prevented from indemnifying the individual for legal costs and any financial penalty.

The court may also disqualify directors and officers from managing a company.

Accessories to a breach

Attempts to form or give effect to a cartel can have serious consequences for the individuals involved, their reputations and future career and business plans, even if the attempt is unsuccessful.

Under the Act the Court can penalise those who:

- attempt to engage in cartel conduct
- aid, abet, counsel or procure others into engaging in cartel conduct
- induce (or attempt to induce) others into engaging in cartel conduct, whether by threats, promises or otherwise
- are party to or are knowingly concerned in cartel conduct
- conspire with others to engage in cartel conduct.

Attempted price fixing

In one case brought by the ACCC, the Federal Court found that a food manufacturer had contacted a competitor and attempted to fix the wholesale price of flour. The competitor did not respond. The court imposed a \$1.5 million penalty for attempting to fix prices.

Attempted collusive quotation

In a remote region of South Australia, a truck and tractor mechanic quoted on the repair to a front end loader. The customer stated that they would seek a competitive quote. As there was only one other operator in the region, the mechanic wrote a note on the quote inviting the other mechanic to 'cover' him on this job (quote higher) and that he would return the favour in the future. He asked his secretary to fax the quote to his competitor. The secretary made an error and faxed the note to the customer, who promptly informed the ACCC. The matter was settled by the mechanic giving court enforceable undertakings not to repeat the conduct, among other things.

Civil or criminal?

The ACCC takes the view that serious cartel conduct should be prosecuted criminally whenever possible. For this reason, ACCC investigations will distinguish serious cartel conduct from less serious conduct as early as is practicable.

The ACCC and the CDPP have established a memorandum of understanding which is intended to ensure that serious cartel conduct is pursued criminally. A copy of the MOU is on the ACCC website. The ACCC will refer all matters it considers to involve serious cartel conduct to the CDPP for assessment of possible criminal prosecution.

Referral of possible serious cartel conduct will concentrate on types of conduct that can cause large-scale or serious economic harm. The ACCC will consider factors including whether:

- the conduct was longstanding or had, or could have had, a significant impact on the market in which it occurred
- the conduct caused, or could have caused, significant detriment to the public or a class of the public, or significant loss or damage to one or more customers of the alleged participants

- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, civil or criminal cartel conduct
- the value of the affected commerce exceeded or would have exceeded \$1 million within a 12-month period (that is, the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12-month period)
- in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12-month period.

The CDPP will advise the ACCC whether a prosecution should be commenced according to the Commonwealth prosecution policy. It will consider the same factors as the ACCC (see above).

For further information about the ACCC's approach to cartel investigations, please consult the guidelines relating to cartel investigations on the ACCC's website.

Investigation powers of the ACCC

The ACCC has extensive powers to investigate cartels. Under s. 155 of the Act, it may compel any person or company to provide information about a suspected breach of the Act, including documents or oral evidence, so long as there is reason to believe they are capable of doing so.

The ACCC may also seek (from a magistrate) and execute search warrants on company offices and the premises of company officers.

If the ACCC becomes aware of ongoing cartel conduct that could warrant a criminal prosecution, it may notify the Australian Federal Police, which may in certain circumstances collect evidence using phone taps and other surveillance devices.

Immunity for cartel participants

The ACCC has established an immunity policy for both corporations and individuals who have been involved in a cartel but then report their involvement to the ACCC.

The policy provides immunity from litigation and penalty for those who assist with cartel investigations. The ACCC can grant civil immunity. Immunity from criminal prosecution can only be granted by the CDPP (on the recommendation of the ACCC, as outlined in the MOU, and in accordance with the prosecution policy of the Commonwealth). The immunity is strictly conditional and is subject to a number of conditions, including the following.

- Only the first person or corporation to bring the matter to the attention of the ACCC may qualify for immunity (those who subsequently cooperate may be offered leniency).
- The immunity applicant must not have been the clear leader of the cartel or have coerced others to join.
- They must cooperate fully with the ACCC and continue to cooperate, or the immunity may be withdrawn.
- They must cease their involvement in the cartel, or agree to cease such conduct.
- An application for immunity will not be accepted if the ACCC already has written advice that there is sufficient evidence to commence court proceedings.

A person or corporation may request a 'marker' for a limited period of time. This will, in effect, preserve first place in the queue while the applicant collects information or seeks legal advice.

Corporate immunity is offered only if the admissions are a truly corporate act, as opposed to isolated confessions of individual representatives. The immunity may cover past and current directors, officers and employees who admit their conduct and cooperate with the investigation. The corporation must list all those seeking this derived immunity at the time of applying.

Individuals may also seek immunity on the same conditions. This might apply where an individual officer wishes to report the conduct to the ACCC.

Further details can be found in the ACCC's Immunity policy for cartel conduct and *Immunity policy interpretation guidelines*, which are available from the ACCC website—www.accc.gov.au/immunity.

Immunity in operation

The immunity policy has been extremely successful in both detecting cartels and providing a powerful deterrent to engaging in such arrangements. It provides a strong incentive to be the first to break ranks. Clearly, the policy can inject distrust and suspicion into a cartel and destabilise relationships between participants. The message is simple: don't be beaten in the 'rush to the confessional'.

It is important to note that immunity does not protect a company from civil damages claimed by its customers.

Confidentiality

Whistleblowers can report to the ACCC on a confidential basis. Investigators will, as far as possible, keep the identity of whistleblowers confidential.

The Act has special provisions for protected cartel information. This enhances the protection given to confidential information about a possible breach of the civil or criminal provisions relating to cartel conduct.

Exemptions

Exceptions apply to the cartel regime. These can include circumstances where the ACCC has authorised the conduct because the public benefit outweighs any public detriment which would result from the conduct, or where businesses have formed certain joint ventures. Such exemptions are very specific, and businesses should seek independent advice before relying on them.

Collective bargaining

Businesses will be exempt from the cartel offences and civil prohibitions if they have a collective bargaining notice in place, as far as the conduct relates to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories.

Such an exemption does NOT apply to bid rigging.

More information about the collective bargaining notices and the formal notification regime is available on the ACCC website.

Authorisation

In circumstances where the public benefit from the conduct would outweigh any public detriment the ACCC, upon a formal application, can authorise cartel conduct that relates to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- bid rigging.

Before reaching a decision about whether to grant authorisation, the ACCC engages in a public consultation process. It also issues a draft decision and considers any responses from interested parties before reaching a final decision.

Fixed-price funerals

Some funeral directors in Western Australia sought authorisation to agree to offer fixed-price discounted prepaid funerals to pensioners. The ACCC recognised that this scheme would allow pensioners to obtain substantially discounted funeral services, and authorised it for five years.

Levy on bricks

Several brick manufacturers, through their industry associations, proposed to impose a small levy on bricks. Although the levy would be passed on to consumers, it would fund schemes designed to alleviate the current shortage of skilled bricklayers in Australia. The brick manufacturers lodged an application for authorisation with the ACCC. The ACCC considered that the public benefits flowing from the proposal outweighed any anti-competitive detriment, and authorised the scheme.

Generally speaking, conduct that has already occurred cannot be authorised. You should seek authorisation well in advance of embarking on any conduct that may breach the Act. If you are considering lodging an application for authorisation, the ACCC encourages you to discuss the matter with its Adjudication Branch. To arrange a meeting, email adjudication@acc.gov.au.

The fees payable for authorisations and notifications are detailed on the ACCC website. These fees may be reduced or waived at the ACCC's discretion if they would cause unnecessary hardship to the applicant.

You can find more information about the authorisation process in the ACCC's *Guide to Authorisations and Authorisations and notifications—a summary*, both available from the ACCC website.

Joint ventures

An exception to the cartel offences and civil prohibitions has been created for joint ventures. Those claiming the joint venture exception will need to ensure that the portion of their agreement that contains a cartel provision is in a contract. They will also need to ensure that the joint venture is for joint production or supply.

The joint venture defence to the cartel provisions is a complex legal area. If you are contemplating a joint venture which may otherwise contravene the cartel provisions you should seek legal advice.

Agreements between related corporate bodies

Agreements solely between related corporate bodies will not fall within the cartel offences or civil prohibitions.

Buying groups

There is an exception to the cartel offences and civil prohibitions (in relation to price fixing) where the cartel provision being considered relates to the price for goods or services to be collectively acquired, or to joint advertising of the price for the resupply of those goods or services. Businesses wishing to form a buying group should seek legal advice to ensure that their arrangement is covered by the buying group exemption.

'Anti-overlap' provisions

Provisions governing cartel conduct may not apply to conduct that is subject to other provisions of the Act, including covenants affecting competition, resale price maintenance, exclusive dealing, dual listed companies and the acquisition of shares or assets. Such exemptions are technical, and businesses likely to be affected should seek legal advice.

Commonwealth, state and territory legislation

Some Commonwealth, state and territory legislation permits conduct that would normally contravene certain parts of the Act, including those relating to cartel conduct. Section 51 of the Act provides that such conduct may be permitted if it is specifically authorised under certain Commonwealth, state or territory legislation.

Again, this is a complex area and businesses should seek legal advice before relying on such exemptions.

2 Complying with the law

What to do if you are invited to join a cartel

If you are invited into an arrangement you think may be a cartel, you may wish to seek independent legal advice and notify the ACCC.

If you believe the arrangement to be a cartel, you should consider the penalties that can be imposed by a court for breaching the Act, and the real possibility of a criminal conviction, as well as financial penalties that will outweigh any unlawful gains. Also at stake are your reputation and your future career and business plans.

What to do if you are involved in a cartel but wish to get out

You should contact your legal adviser as a matter of urgency and provide information to the ACCC under its immunity policy. Remember, only the first through the door may receive full immunity.

What to do if you think you have been targeted by a cartel

Businesses that believe they have been the target of collusive behaviour should contact the ACCC. You are not expected to undertake a complex investigation of your own or to provide irrefutable proof that suppliers are colluding. However, it is helpful if you assemble the facts that demonstrate your concerns.

It is useful to keep in mind that ACCC investigators generally seek three kinds of information concerning suspicious behaviour.

- Details of any incidents that have aroused your suspicion. If possible, this should be backed up by relevant documents such as copies of bids, quotes or invoices.
- Any other evidence, such as notes of phone calls and conversations with suppliers. It is best that you write down any such anecdotal information at the earliest convenient time.
- Whatever background information is available, such as past tenders, the history of relevant products and dealings with the industry sector. This might include retained records or more general perspectives on past practices.

There are various strategies that can make your business harder for cartels to target. Part 3 of this publication provides useful tips on how to detect possible cartel behaviour among your suppliers or competitors.

Those affected by the activities of a cartel may seek redress for any loss or damage incurred as a result of the cartel conduct. This could include, but not be limited to, the amount a cartelist has overcharged you as a customer. Those affected can pursue redress individually or through a class action.

Compliance programs

A company is liable for the conduct of its employees and agents even if they act beyond their authority or inadvertently break the law. The purpose of a compliance program is to ensure that all directors and staff understand their legal obligations. Compliance programs that are embedded within a firm's corporate culture can greatly reduce the risk of a breach of the Act. Company managers should view a robust compliance program as a prudent risk management tool.

The ACCC actively encourages the adoption of compliance programs so that businesses are engaged in monitoring their legal obligations. Prevention is better than cure.

Avoiding risks

Breaches of the Act can cause harm to consumers—your customers. Unlawful conduct can have serious, direct consequences for your company:

- significant penalties for a breach
- the legal costs of defending litigation
- the risk of extensive claims for civil damages arising from a breach
- additional expenses such as corrective advertising that may be required
- valuable staff time and other resources spent on investigating, defending or correcting a breach.

It can also have indirect consequences:

- damage to a firm's reputation, brand and goodwill
- loss of staff morale and consequent loss of key employees
- loss of market share while the firm's attention is elsewhere
- potential for reduction of share prices and resultant shareholder discontent
- additional marketing efforts required to offset damage.

Benefits of a compliance program

Establishing a compliance program can bring considerable benefits and improvements to business performance.

- Promotion of good corporate citizenship can have a positive impact on a firm's market position.
- An open commitment to comply with the law can enhance a firm's reputation, both with customers and with staff.
- A commitment to compliance can encourage innovation.
- Complaint-handling procedures can encourage feedback and build customer loyalty.
- In the event of a breach, the existence of an effective compliance program may convince the court to reduce penalties or fines.

What sort of compliance program?

The nature of an appropriate compliance program will depend on the profile of the company. In the case of smaller operators, it may simply be the establishment of an effective complaints-handling process and targeted staff training. Larger companies will generally require a more comprehensive regime, and may require a specialist consultant and a dedicated team. Each program should be tailored to a company's business activities and the particular risks it may face.

Hypothetical scenario—Compliance risks

You run a medium-size company that sells building supplies. Growth has been excellent over the last three years, largely due to the efforts of your ‘hot shot’ sales manager. They are on a bonus that rewards them for margins achieved as well as volume of sales. When reviewing the sales figures, you note that several regional centres that used to generate small sales no longer record any business. When you inquire, your sales manager replies that it wasn’t worthwhile working those areas and it was best to leave the business to a competitor that had served the regions for years. You are sceptical but think ‘If it ain’t broke, don’t fix it’.

Warning! If the decision to withdraw from a market was made independently, you need not have any concerns.

However, if the move was made in concert with competitors, it may be a market allocation and/or price fixing arrangement.

You make further inquiries and are sure that there is opportunity in the regions. When you inform the sales manager, they are adamant that such a move will break ‘industry agreements’, start a price war and be counterproductive. They reveal that they meet with the competitors’ sales managers monthly and it’s best to leave the matter alone.

Warning! You are now aware of a market share deal. You should seek legal advice and contact the ACCC.

You challenge the sales manager. They admit to market-sharing deals and also assert that the price list is healthy due to agreements with competitors not to compete under agreed prices. They point out that this has delivered good profits, and threaten to resign if you keep butting in.

Act now! Despite the fact that you and other senior managers were unaware of the arrangements, your company is liable for breaches of the Act by its employees. You should seek legal advice and report to the ACCC. Don’t be beaten to it by a competitor!

A company is responsible for the actions of its employees, even if senior management is ignorant of illegal conduct. The best policy is to establish a compliance program to reduce and manage the risks.

Compliance programs and the law

The Federal Court has given great weight to the compliance culture of companies. One of the factors to be considered when setting penalties is:

Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programmes and disciplinary or other corrective measures to an acknowledged contravention [Justice French, *Trade Practices Commission v CSR Ltd* (1991)].

The court does not consider the cost of such a program to be an excuse for not having an effective, compliance program. In fact:

The cost of failing to comply should be set at a level which is significantly greater than the cost of ensuring compliance (via a compliance program) [Justice Emmett, *ACCC v MNB Variety Imports Pty Ltd* (1998)].

The court does not consider the mere existence of a program as a cause to reduce penalties:

A well drafted set of policies and procedures will mean little if there is no follow-up in terms of training company officers (including directors) and, where appropriate, refresher training [Justice French, *ASIC v Chemeq Ltd* (2006)].

The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it [Justice Heerey, *ACCC v Visy Ltd* (2007)].

If a company that breaches the Act has no compliance program, the court will in most cases order that an effective program be established. The ACCC has developed four compliance program templates that can be adapted for companies of any size or risk profile.

Compliance resources

Compliance programs cover all relevant areas of the Act besides cartel conduct, such as product safety and misleading and deceptive conduct. The relevant Australian Standard for compliance programs is AS 3806-2006, and the standard for handling customer complaints is AS ISO 10002-2006. For further information and examples, including compliance program templates, please go to the ACCC website and follow the links.

Industry associations

Industry associations face unique compliance issues. The goal of such bodies is to progress the interests of members. Generally such bodies promote high ethical standards and compliance with relevant laws. However, because they bring competitors together, there is a risk that their meetings could be used, directly or indirectly, to promote anti-competitive behaviour.

Two areas require particular vigilance:

- Whenever an association deals with subjects like pricing, territories, market shares or industry outputs, there is a risk that the organisation may end up facilitating arrangements that may be in breach of the Act, irrespective of the aims or motives of the organisation.
- Whenever an association is involved in some form of regulation that restricts membership (for example, monitoring experience or education qualifications) there is a risk that the organisation may unreasonably create barriers to entry and restrict competition in a market.

Industry associations should approach the following areas with great caution and ensure that any policies are consistent with the Act.

Price recommendations

Any association that deals with pricing issues may be at risk if a communication relating to price has the purpose, directly or indirectly, of fixing, controlling and/or maintaining prices between competitors. If an association reports or comments on industry prices, they should clearly state that it is for information only and that members may set their prices as they see fit. The association should make it clear that it will not seek to discipline members for their pricing policies.

Meetings

Whenever competitors meet, whether these meetings are scheduled or informal, there is a risk that the issues discussed may approach sensitive areas. Any meetings that are facilitated by the association should be fully minuted in case questions are asked at a later date. It would also be wise to make clear to members that discussions held before and after meetings may pose a risk to both the members and the association.

Discipline

Any association is entitled to make rules regarding members' behaviour and provide for sanctions if these standards are not upheld. Such rules are common—dealing, for instance, with relations with clients that might reflect on the industry as a whole. However, the rules must be transparent and not relate to enforcing pricing policies within the industry sector. Associations also need to ensure that their discipline policies are not exclusionary in a way that restricts and reduces competition in the industry.

Hypothetical scenario—Industry associations

You work for a trade association and are chairing its bi-monthly meeting. Your legal adviser has been present and commented on some parts of the agenda that required expert advice. However, they had to leave before the end of the meeting. There are no problems until the meeting is almost over and the final agenda item, 'Other business', is reached. Some members are angry that other members have been undercutting them, and believe that some of the prices quoted were uneconomic. Other members strongly agree. The debate moves towards some form of pricing formula, and someone suggests that all members should submit their pricing guidelines so that some measure of price variations can be assessed.

Warning! The meeting is approaching some risky ground.

A member proposes that a survey of prices be held and that the association then put some recommended pricing guidelines to the next meeting. There is strong agreement but some members state that their prices are their business. Another member then suggests that it would be better to simply agree on minimum prices, making a survey unnecessary.

Warning! This would be price fixing and illegal. You should use your position as chair to terminate the discussion and refer the issue to the legal adviser. Also consider obtaining guidance from the ACCC.

Some members say the matter is too urgent for such a delay. They move that the association issue a questionnaire to members with a view to coming up with an acceptable minimum price schedule, and that acceptance of minimum prices be a condition of membership. The motion is passed by at least 80 per cent of those present.

The motion would oblige the association to facilitate price fixing. You should state that you need legal advice before accepting the motion, and put compliance on the agenda for the next meeting. Contact your legal adviser immediately! If members do not accept legal advice, you should contact the ACCC.

Industry association case studies

A number of instances in recent years clearly demonstrate the pitfalls that can face industry associations. In some cases, the organisations were at the time unaware they had been involved in illegal arrangements. There have also been instances where an industry association has facilitated collusion.

ACCC v CC Constructions and others (1999)

The tender for the Commonwealth Office at Haymarket, Sydney, in 1988 led to the exposure of long-term collusive practices by large construction firms. Before the close of tender, the industry association, the Australian Federation of Construction Contractors, called a meeting of the four firms bidding for the contract. It was agreed that the winning firm should pay the three losers \$750 000 each, and the AFCC \$1 million. The project was worth around \$200 million. The transactions were to be concealed by invoices for consultancy services.

The arrangement was exposed by a New South Wales Royal Commission into the construction industry. The Federal Court issued penalties of \$1.75 million on the companies and individuals involved. It came out in the case that 'loser's fees' were a common arrangement in the industry.

The court found that there was an expectation (thus an agreement) that these fees were levied in addition to the contract price. As such, they were an imposition on the developer, in this case the Commonwealth government, and therefore on the taxpayer.

Another case clearly demonstrates that trade associations should be cautious when seeking legal advice and must ensure that legal advisers are completely and properly briefed.

ACCC v Tasmanian Salmon Growers Association and others (2003)

When the TSGA proposed that its members cull stocks to reduce supply, it sought legal advice as to whether the scheme would breach the Act. However, it did not correctly or completely brief its lawyers. The advice it received was based on an understanding that the cull was merely a recommendation to members, whereas the TSGA intended to seek written undertakings from its members to ensure that all complied with the cull. Consequently the advice was flawed.

The ACCC and the Federal Court took this into account, along with the cooperation shown by the parties. No penalties were sought but the court ordered that no future culls be attempted, and that trade practices training be undertaken and compliance programs established. The TSGA and Tassal, the one company that had begun the cull, were ordered to contribute to the ACCC's costs.

3 Protecting your purchasing

How to detect cartels

It is a matter of informed self-interest for a company to protect itself from the operation of cartels among its suppliers. If cartels successfully target your purchasing budgets, they will raise the prices of your inputs and may even compromise your competitive position in the marketplace. Protecting yourself is a prudent risk management strategy.

If you become aware of suspicious activity you should contact the ACCC. If cartel conduct is proved, there is scope to seek compensation.

Role of purchasing officers

If you do procurement work for your company, you will almost certainly be in the best position to notice the first warning signs of collusion.

By comparing bids with what your experience tells you should be the norm, an astute purchaser can develop a

hunch about suspicious bidding patterns. While talking with suppliers' representatives, you may also pick up valuable information or tips that indicate something may be amiss. In these circumstances, we encourage you to report your concerns.

Market risks

While collusive behaviour may occur in any industry, there are some specific market conditions that make the formation and continuation of cartels an easier and more tempting option for suppliers. Understanding the market allows you to assess the risks and your level of exposure.

See the table on page 26, which outlines particular market conditions that can facilitate the formation of cartels.

Market risk factors

This table outlines the particular market conditions that can facilitate the formation of cartels.

Conditions that may make it easier for cartels to operate	Why?
Suppliers	
<p>A small group of suppliers might control most of a market for many reasons:</p> <ul style="list-style-type: none"> • long-established firms have come to dominate the market • the industry is specialised or capital-intensive; therefore, it is costly and difficult for new firms to set up (e.g. airlines) • many competitors are unable or unwilling to supply because of geographic isolation (e.g. regional Australia). 	<p>The more suppliers available, the more choices a purchaser has. If there are many potential suppliers, it is more difficult and risky for them to communicate with each other and attempt to establish a cartel. If new suppliers regularly enter an industry, they are not likely to be cartel members. They will need to be enlisted, bought out or scared off for a cartel to maintain its control.</p>
Products	
<p>A product or service may lend itself to control by suppliers.</p> <ul style="list-style-type: none"> • It may be essential and have few or no alternatives (e.g. fire protection). • Demand is stable and predictable (e.g. construction, steel or bricks). • It is a standard off-the-shelf product and the same for all providers and buyers (e.g. premixed concrete). • It is highly technical or specialised (e.g. medical supplies). 	<p>The more product choices a purchaser has, the harder it is for suppliers to conspire to control a market. If a product is relatively generic, and demand is stable and predictable, it is easier for suppliers to attempt to share markets and fix prices. A volatile market is far harder for a cartel to control. Clearly, if buyers lack expertise in an area of purchasing, it is easier for suppliers to fix higher prices.</p>
Purchasers	
<p>The way purchasers operate may create opportunities for cartels:</p> <ul style="list-style-type: none"> • purchasing activities are regular and predictable (e.g. construction works) • purchasing activities are open and transparent (e.g. open tenders). 	<p>A cartel needs to be able to monitor purchasers and understand their requirements to be able to effectively allocate contracts and fix prices. A cartel also needs to be able to monitor its own members to ensure that they keep to their agreements.</p>

Warning signs

There is rarely a simple indicator of cartel activity, but some warning signs suggest a closer look is in order. There may be reasonable explanations for some of the following signs; if not, you may need to inquire further.

Cartels often go to great lengths to remain secret and are usually very hard to detect. Many warning signs can be ambiguous. For example:

- similar pricing may indicate collusion, or it may simply reflect similar input costs and even highly competitive tendering
- an active trade association with regular meetings of competitors may make collusion easier, or it may promote high standards within an industry
- simultaneous price rises may be suspicious, or they may be explained by industry-wide cost increases.

If you are concerned about overpricing, make inquiries to ensure that your expectations are reasonable. High prices are not illegal. A supplier can set their prices wherever they like and compete on whatever terms they choose, such as quality or service level. It is when competitors agree not to compete that the conduct is unlawful.

The ACCC recognises that effective cartel detection may require several suspect or unusual incidents or a developing pattern of behaviour before your suspicions are aroused.

But a simple error in competing tenders, such as an identical misspelling or miscalculation, may expose collusion by apparent competitors. And statements by businesses that use phrases like 'industry agreements' may indicate market-sharing arrangements. It is the procurement professional who is most likely to notice such telltale signs and detect a potential cartel.

If and when you suspect cartel conduct you should inform your management, your organisation's legal adviser and the ACCC.

A checklist of warning signs follows.

Signs of possible bid rigging

- Suppliers appear to be taking turns at winning tenders or appear to be sharing the contracts by value.
- Regular suppliers decline to tender for no obvious reason.
- Bidders appear to deliberately include unacceptable terms in their tenders.
- Bidders sometimes bid low and sometimes high on what appears to be the same type of supply.

- You become aware that bidders meet before the close of tender, without you being present.
- The winning firm regularly subcontracts to competitors that submitted higher tenders.
- One firm or professional advisers represents several tenderers.

Signs of possible price fixing

- Tenders or quotes are much higher than expected. This may indicate collusive pricing, or it may just be overpricing (not illegal in itself). It may simply reveal that your estimates are inaccurate. It is in your commercial interest to make inquiries and determine whether your price expectations are reasonable.
- All suppliers raise prices simultaneously and beyond what seems to be justified by changes in input costs. You can ask suppliers why this is so. You might also consider surveying suppliers of inputs so you are better equipped to recognise suspicious pricing movements.
- Prices submitted are much higher than in previous tenders or published price lists.
- A new supplier's price is lower than the usual tenderers'. This may indicate collusion among the incumbent tenderers.
- Prices drop markedly after a new supplier tenders. This may indicate that the existing suppliers have been colluding and the new supplier has forced them to compete.

Signs of possible customer, supplier or territory allocation

- Firms charge significantly different prices in different locations, and the differences can't be explained by transport costs.
- A supplier declines to tender in certain locations, stating that to supply would be an intrusion on someone else's patch.
- A supplier states that they can't supply certain products or services because of agreements with other businesses.
- A firm's representative states that another firm should not have supplied you, because of industry agreements.
- Bidders wait until the last minute to submit their bids and express interest in whether a non-local or occasional bidder is present.

Unusual mistakes

Despite the fact that cartels are usually secret arrangements, there is a long history of cartels coming undone due to plain old carelessness. Everyone makes mistakes, but if a mistake indicates collusion it may be crucial evidence of illegal behaviour. It pays to be on the lookout for the following telltale signs:

- There are identical spelling or calculation errors in competitors' bids.
- There is an uncanny similarity in the layout or language in competing tenders.
- A tender document is in electronic form and has been prepared on a competitor's computer. (This can sometimes be revealed by checking the document's metadata, usually under 'properties' in the file menu.)
- A firm's representative says something that indicates they are aware of the details of a competitor's tender.
- All bids are delivered by one agent—or even delivered in the same envelope.

Whistleblowers

Illegal cartel activity is often exposed by insiders who have knowledge of, or have been involved in, the arrangement. If they are willing to provide information, you should encourage them to reveal what they know and provide that information directly to ACCC investigators.

- Let informants know that information can be provided confidentially to you or the ACCC.
- The ACCC immunity policy for cartel conduct can be used by cartel members who break rank and report their involvement.
- If a supplier's employee or agent suggests that they are aware of collusion, do not ignore it. Note the details and report the incident to the ACCC.

Tender analysis

It is often useful to study the bidding history of a product. This may provide evidence that supports a suspicion of collusion. For example, the receipt of identical bids is generally suspicious. A pattern of close bids may also suggest collusion, but can just as easily be the result of price convergence in a highly competitive market. Tender rotation is usually only detectable by studying the bidding patterns of successive winning and losing tenders over time.

Ask yourself:

- Do your records suggest that bidders seem to be taking turns at winning tenders? This may indicate tender rotation.
- Do tenderers seem to win around the same percentage of the contracts from year to year?

This may indicate market allocation.

- Do suppliers seem to win contracts in certain areas but not in adjoining areas? This may also indicate market allocation.

If you are suspicious

DO

- question bidders about their pricing
- note their replies and carefully record them for future reference
- check your records against the checklist on page 27 for any other suspicious signs
- continue with the tender process, including awarding the contract
- act normally, so as not to alert the bidders
- report your suspicions to the ACCC

DO NOT

- accuse the bidders of illegal behaviour—if you are right, this may give them time to cover their tracks; if you are wrong, you might open yourself to accusations of slander
- launch your own internal investigation without contacting the ACCC—this might alert a cartel that they may be exposed and give them time to destroy evidence
- attempt to apply your own penalty, rather than reporting to the ACCC

How to deter cartels

Confidentiality

Where possible, keep the identity of bidders and the value of their bids confidential, at least until after a contract has been awarded. Cartels need to be able to monitor bids to ensure that members are sticking to their agreements.

Competitive tender design

Try to get as many bidders as possible and compare their bids rigorously. Approaching a wide range of suppliers may not always prevent collusion, but it can disrupt the operation of a cartel when you broaden the field.

Predictability and transparency can aid the operation of a cartel, especially where they attempt to manipulate tenders. By periodically changing the way you engage with the market, you can improve competition and your outcomes.

- Do your processes tend to exclude some possible suppliers, such as smaller operators? You may reduce the size of certain supply contracts to attract alternative suppliers. Alternatively, you can actively encourage joint ventures by smaller suppliers so that they may better compete with market heavyweights for your tenders.
- You may wish to extend the term of a supply contract so the arrangement will not lend itself to tender rotation.
- Do you require suppliers to always tender to maintain registration? This may lead to some suppliers submitting 'cover prices' if the contract is beyond their capacity, simply to remain registered for future jobs.
- Do your procurement systems tend to favour incumbents?
 - A prolonged cycle of 'select tenders' may lead to bidder complacency. It is always a good idea to periodically test the broader market through an open tender.
 - It is not unusual for companies to prefer to deal with local operators, to stimulate local employment and economic activity. As with select tenders, be mindful to test the broader market occasionally.

Effective tender design can improve your outcomes as well as being a good tool to deter and disrupt cartels.

Monitor your outcomes

Keep track of past tenders and pricing movements so they can be analysed over time. This will help you to understand your market and assist you with estimating and budgeting, as well as making it harder for cartels to target you. It may also help you detect irregularities such as tender rotation.

In summary, there is no substitute for being alert to possible collusion when conducting a tender.

The table on page 30 offers a range of deterrence tips.

A Purchaser's Checklist of warning signs and recommended contract terms is available for download at www.accc.gov.au/cartels.

Deterrence tips

Assists Cartels	Deters Cartels	Why?
Predictability of tender timing	Deliberate strategic choice to occasionally alter your tender schedule	Regularity makes it easier for cartels to share contracts by rotating tenders or other bid rigging tactics
Regular size of supply contracts	Varied size and scope of purchases	Regularity makes market allocation easier. Smaller supplies may attract smaller operators that are not members of an existing cartel. A larger supply (say for a longer period) might achieve a better price and also deter tactics such as tender rotation.
Small group of regular suppliers	Larger group of suppliers that often changes	It is harder to maintain collusion when new operators continually need to be enlisted to ensure the coverage of a cartel
Splitting contracts between identical tenders	Choosing another method of solving tied bids, including random choice	Splitting makes market allocation extremely easy and partially removes the incentive to compete
Disclosing identity of all bidders before the close of tender	Limited disclosure of identity of bidders	Full disclosure makes it easier for cartel members to contact all bidders and attempt to collude
Disclosing all bidders' prices	Limited or no disclosure of prices bid in unsuccessful bids	Full disclosure allows a cartel to monitor all bids to ensure members stick to their arrangements and don't cheat
Purchasers are not experts on the value of what they purchase and the dynamics of their market	Purchasers understand their market and the approximate value of what they purchase	It is much harder to fix prices if buyers are alert to industry trends or overpricing
Purchasers rely solely on suppliers and the competitive process to calculate value of supply	Purchasers obtain independent estimates of value before seeking quotes or tenders	The estimate will give purchasers a warning if quotes or tenders are excessive
Staff are not trained to reduce risks and detect cartels	Staff are trained in reducing risk and detecting warning signs	Without training, staff may not notice warning signs or not know what to do about them
Purchasers do not keep detailed records or analyse tenders over time	Purchasers analyse tenders for trends and irregularities	Tender analysis may reveal trends over time that might not be apparent in the short term
Closed shortlists require suppliers to submit tenders regularly to remain on a shortlist of preferred tenderers	Regular open tendering	Shortlists should only be used for as long as they are needed

Reporting and inquiries

If you would like to know more, or wish to report suspicious behaviour, please feel free to contact the

ACCC Infocentre

1300 302 502

You will find a large collection of resources on the ACCC website

www.accc.gov.au

Immunity applicants

The only valid way to make an immunity application or request a marker is by facsimile (02) 6243 1156 (dedicated line) or by contacting:

Mr Marcus Bezzi
Executive General Manager
Enforcement and Compliance Division
Telephone: (02) 9230 3894 (business hours)

It will not be adequate to leave a voicemail or other message or send an email.

References and further information

We wish to thank the following sources for information used in this publication.

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