

## Cover Pricing Uncovered

Ever wondered or suspected that your tender bid was unsuccessful because of collusion between a group of competitors?

The Australian Competition and Consumer Commission (ACCC) have successfully prosecuted an action in the building and construction industry involving the practice of "cover pricing". In the recent case against *T.F. Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd, and Carmichael Builder Pty Ltd*, the ACCC secured a finding by the Federal Court that the parties engaged in cartel behaviour and therefore illegal conduct.

The Court found that the conduct engaged in by the Respondents of "cover pricing" (where one construction company seeks the price of a bid from another competing construction company during a tender process) was a form of "bid rigging" and "amounts to controlling of the price at which services are to be supplied". The case has been adjourned for the hearing of submissions on penalties.

These penalties are likely to be substantial. As a precedent, the Court is sure to consider the record fine of \$36 million imposed upon The Visy Board Pty Ltd for price fixing. Also worth remembering is the potential for directors and other individuals to be personally fined.

Any party submitting or receiving tenders, that involve substantial amounts of money and contracts, needs to be aware of this decision. Most importantly it highlights the need for establishing a clear and independent process, and transparency during the tender process. From an evidentiary point of view, clear and unambiguous corporate policy, followed by actual practice and support for the implementation of the policy at the highest levels is important. From a defence of a prosecution perspective, having these processes and measures documented as well as their actual practice may prove critical.

On the other side, a buyer of goods or services under a tender process, might want to conduct an investigation and probity audits where there are questionable issues such as late bids, withdrawn bids and when price differentials arise.

The steps that should be taken to protect against such potentially damaging and unlawful conduct includes;

- driving a culture of intolerance to fraudulent and corrupt behaviour from top to bottom;
- have a clear and unambiguous written policy on the issue;
- regularly review the tendering process to ensure that there is compliance and risk management; and
- a whistleblower process for identifying and preventing misconduct on both sides of the tender process.

If you own or operate a building and construction business, and you suspect your competitors or the bidders for your tender of collusion, have a dispute over unpaid works, a problem with workplace policies or contracts, or you need assistance performing a due diligence for your business, contact our professional team at our Gold Coast or Brisbane office. Alternatively, visit our website

[www.msllawyers.com.au](http://www.msllawyers.com.au).



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