# Anti-Competitive Behaviour Penalised

*Australian Competition and Consumer Commission v Tyco Australia Pty Ltd and Others*
*Federal Court of Australia, Drummond J*
*13 June 2000*

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THE AUSTRALIAN COMPETITION AND Consumer Commission initiated proceedings against a number of members of the Queensland Fire Protection Industry in relation to alleged price-fixing and market sharing. The proceedings were based on section 45(2)(a)(ii) and (b) of the *Trade Practices Act 1974 (Cth)* which provides that:

*A corporation shall not make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would be likely to have the effect, of substantially lessening competition; or (b) give effect to a contract arrangement or understanding ... if that provision: (ii) has the purpose, or is likely to have the effect, of substantially lessening competition.*

Section 45A declares that price-fixing agreements constitute breaches of section 45, thereby dispensing with the need to show any actual or potential lessening of competition.

## FACTS OF THE CASE

The proceedings were against a total of 57 respondents, including 18 contractors in the industry and 38 executives employed by those contractors. It was alleged that the respondents had participated in an anti-competitive arrangement in markets for both fire sprinkler and fire alarm systems dating back to 1992. The conduct complained of involved attendance at meetings at which price-fixing and collusive tendering arrangements were agreed upon and subsequently implemented.

Justice Drummond of the Federal Court pointed out that the arrangements:

*were highly organised and deliberate. They involved frequent, regular meetings ... over several years. The arrangements had a high degree of complexity in that rules were formulated for allocations of contracts and for what is called cover pricing to mask the collusive tendering arrangements in place. Detailed records were kept.*

'Cover pricing', involves the contractor who has been designated as the one to succeed in the tender transaction indicating its price to its competitors who will then tender at a higher price to ensure the success of the contractor thus designated. According to the *Australian Financial Review* (14 June 2000) the participants referred to the meetings as the 'coffee club'.

It was alleged that the conduct affected 145 projects in the fire sprinkler installation market and 158 projects in the fire alarm installation market. In the proceedings the ACCC was unable to give an estimate of the loss to consumers caused by the practice, however his Honour considered that 'it can readily be accepted that substantial loss had resulted.'

## SIGNIFICANCE OF RULING

The issue of whether or not the conduct referred to amounted to a breach of the *Trade Practices Act* seems not seriously to have been contested by the respondents. Rather, the significance of the proceedings is to be found in the penalties imposed. His Honour made clear the basis on which the penalties were assessed saying:

*I accept that deterrence, that is the need to indicate to like-minded persons and organisations the penalties they face if they give way to temptation and engage in similar conduct, is the major consideration in fixing the penalties.*

Curiously, he then adds, '[it] is unnecessary for me to resolve the question whether punishment is also an appropriate element'. The penalties imposed totalled $8 million. Two of the contractors were penalized $1.4 million and $3.3 million respectively.

Part of the interest of the case lies in the manner in which his Honour adjusted the penalties for the natural persons who were also respondents. Four of the executives of the contractor referred to above as having received a penalty of $1.4 million were also respondents. The most senior of the executives seemed not directly involved but was nevertheless penalized the sum of $100,000 on the basis of the activities of his subordinates because he 'learned at quite an early time of what his subordinates were engaged in, well appreciat[ing] it was wrong but fail [ing] to intervene to put a stop to the conduct, preferring to remain as ignorant as possible.' Two of the subordinates were each penalized $50,000 and the third $100,000 on the basis that when his employer received a notice under section 155 of the *Trade Practices Act* he arranged for the destruction of much of the documentation thereby hindering the ACCC's investigation. Section 155 requires persons upon whom a notice is served to furnish information to the ACCC to aid in its investigation of a possible breach. The obligation is cast in the widest terms.

An executive of another contractor was found to be an active participant in the collusive arrangements, however, on the basis of having provided a high level of co-operation with the ACCC and also of his difficult personal financial circumstances, a penalty of only $20,000 was deemed appropriate. An executive of another contractor was dealt with leniently on the basis that his participation was 'most reluctant' and 'under pressure from his national superiors'.

There would seem to be important lessons to be drawn from the way in which the judge dealt with the penalties. ◙

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