

Gyles Royal Commission Revisited

Australian Competition & Consumer Commission v CC (NSW) Pty Ltd (No 9)
Federal Court of Australia, Lindgren J

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It has been a decade since Commissioner Roger Gyles QC was appointed to report to the NSW Government on Productivity in the NSW Building Industry. It is trite to point out that the findings of the Commissioner, published on 26 May 1992, wrought some far-reaching changes to the practices of the industry.

One such change related to discontinuance of the payment of unsuccessful tenderers' fees (UTFs) and trade association fees in excess of the fee prescribed by the rules of the particular association. The practice had prevailed in the industry since anyone could remember and was certainly almost universal. Discussing the practice, the second Commissioner, K.J. Holland QC made the following statement on 19 July 1991:

It should perhaps be made clear that the companies from whose representatives evidence was called comprise only a small proportion of the large number of contractors shown to have been involved in such projects since 1 January 1986. Evidence available to the Commission indicates that more than 70 contractors have tendered on projects in respect of which arrangements for payment of either special fees or unsuccessful tenderers' fees have been made since that time.

IMPACT OF ROYAL COMMISSION FINDINGS

Both Government and non-Government clients of the industry reacted strongly to the disclosures and sought reimbursement of money paid as special fees to trade associations or as unsuccessful tenderers' fees. By and large the moneys in question were recovered without recourse to final judicial determination of the legal rights of the parties. In some instances the settlement was brought about as part of an overall settlement of proceedings initiated by the then Trade Practices Commission (now the Australian Competition & Consumer Commission, hereafter referred to as the ACCC) for

alleged breaches of the *Trade Practices Act 1974 (Commonwealth)*. In other instances the settlement resulted from the desire of a contractor to continue doing business for a particular instrumentality.

LEGAL RIPPLE EFFECT

What is surprising is the fact that it was not until July 1999 that there was a judicial pronouncement on the legality or otherwise of the practices in question. In *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 165 ALR 468 the issues came before Lindgren J in the Federal Court. There the ACCC prosecuted the defendant for breaches of section 45(2) of the *Trade Practices Act* (*mak[ing] . . . an arrangement or . . . understanding . . . likely to have the effect of substantially lessening competition*), section 45A (the deeming provision making conduct that had the effect of *fixing, controlling or maintaining . . . the price* a breach of section 45(2)) and section 52 (on the basis that failure to disclose the arrangements for payment of an unsuccessful tenderer's fee to the principal amounted to *misleading and deceptive* conduct).

COURT'S FINDINGS

On the question of the payment of higher than prescribed fees to a trade association, Lindgren J found in favour of the defendant saying that the 'Special Fee was unilaterally imposed by the [trade association] on the Tenderers as a means of raising revenue from its members'. His Honour found in favour of the ACCC in that the undertaking by the defendant to pay UTFs to the unsuccessful tenderers breached section 45(2)(a) of the *Trade Practices Act*. He pointed out:

I infer that the UTF understanding was likely to have the effect of controlling, by way of increasing, by \$2,250,000 or by a substantial part of that sum, the price that [the principal] would be charged for the Project. The Tenderers knew many of the

matters referred to above, including their mutual understandings of secrecy and the fact that none of them would readily pay UTFs totaling \$2,250,000 out of the profit on the Project and would prefer to pass it on to [the principal].

As to the third issue, his Honour found that the non-disclosure of the obligation of the liability to pay UTFs was not misleading or deceptive as the parties had negotiated at arms length and no special circumstances could be pointed to from which a duty to disclose arose.

The question of penalty was dealt with by Lindgren J on 21 January 2000. His Honour imposed a monetary penalty of \$200,000 on the defendant. This sum was slightly less than that imposed on the other tenderers in the same transaction who effectively 'pleaded guilty' in terms of admissions of fact. These admissions related to a matter of which his Honour specifically exonerated the defendant (the issue relating to the payment of Special Fees to trade associations). In addition, the defendant was ordered to pay a proportion of the ACCC's costs for the proceedings. ■

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