

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case no: 41/CR/May04

In the matter between:

The Competition Commission

Applicant

and

Toyota South Africa Motors (Pty) Ltd

Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D,
in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the
Competition Commission and the respondent.



D.H. Lewis

02 June 2004
Date

Concurring: N. Manoim, M. Moerane

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In the Competition Tribunal of South Africa

Held at Pretoria

CT Case No:

CC Case No: 2003May463

In the matter between:

The Competition Commission

Applicant

and

Toyota South Africa Motors (Pty) Ltd

Respondent

Consent Order, regarding violation of section 5(2) of the Competition Act,
1998 (Act No. 89 of 1998), as amended

The Applicant and the Respondent in the above matter hereby agree to conclude a consent order in terms of section 49D of the Competition Act No. 89 of 1998, as amended, on the terms set out more fully below.

1. **Definitions**

For the purposes of this *Consent Order* the following definitions shall apply:

- 1.1 The "Act" means the Competition Act, 1998 (Act No 89, of 1998), as amended.
- 1.2 "Commission" means the Competition Commission of South Africa, a statutory body, established in terms of section 19 of the *Act*, with its principal place of business at Building C, Glenfield Office Park, Corner Glenwood Road and Oberon Street, Faerie Glen, Pretoria, Gauteng.

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- 1.3 "*Competition Tribunal*" means the Competition Tribunal of South Africa, a statutory body, established in terms of section 26 of the *Act*, with its principal place of business at Building C, Glenfield Office Park, Corner Glenwood Road and Oberon Street, Faerie Glen, Pretoria, Gauteng.
- 1.4 "*Complainant*" means Graeme R Tucker, an adult male legal advisor who resides at No. 15 Marrakesh Collaeraine Drive Riverclub, Sandton, Johannesburg.
- 1.5 "*Complaint*" means the complaint lodged with the *Commission* by the Complainant in terms of section 49B of the *Act* and filed with the *Commission* under case number 2003May463
- 1.4 "*Consent Order*" means this agreement in its duly signed form by both the *Commission* and the *Respondent*.
- 1.5 "*Days*" means calendar days.
- 1.6 "*Respondent*" means Toyota South Africa Motors (Pty) Ltd (and related companies) ("Toyota"), a company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at No. 1 Wesco Park, East Service Road, Sandton.
- 1.7 "*Related companies*" means any relevant holding company, subsidiary or associated company thereof

2. Background

The *Complainant* lodged a *complaint* with the *Commission* in terms of section 49B of the *Act* on 2 May 2003.

In his *complaint* submission, the *Complainant* made the following allegations:

- 2.1 The *Complainant* discovered, while in the process of negotiating the purchase of a Toyota 160i GLS in the Johannesburg area, that a number of dealerships were offering the same discounts on the new

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Toyota Corolla range, which was a 1% maximum fleet discount for small companies and a 2% maximum discount for large companies.

- 2.2 The *Complainant* further alleged that he was advised by certain of the salespersons that any failure by a dealer to implement the discount structure imposed by Toyota would expose the dealer to a fine
- 2.3 The *Complainant* believed that Toyota might be engaging in a restrictive vertical practice or the practice of minimum resale price maintenance.

3. The Investigation

- 3.1 Following the submission of the *complaint* by the *Complainant*, the *Commission* undertook an investigation into the alleged prohibited practices of Toyota.
- 3.2 The investigative team obtained documentation setting out Toyota's pricing discount structure and the *Commission* issued summons against five Toyota dealer principals to appear before the *Commission* in order to be interviewed, and to submit copies of all documentation relating to the determination of resale prices.
- 3.3 Consequently, the *Commission* engaged in discussions with Toyota. Pursuant to these discussions Toyota submitted a written statement setting out the pertinent facts in relation to Toyota's "you play, you pay" discount policy ("the policy").
- 3.4 As a result of its investigation, the following facts became apparent to the Commission:

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- 3.4.1 On 16 September 2002 Toyota, in conjunction with the launch of the new Corolla, introduced a policy of prescribing maximum discounts on its list prices to dealers. Maximum discounts under the policy varied by model and type of customer. For example, dealers were not permitted to offer any discount on certain top-of-the range models, such as the Toyota Land Cruiser 100 series or the Lexus RX300. For other more popular models, such as the Corolla, dealers were permitted to offer a 2% maximum discount to strategic fleet owners and a 1% discount to other customers. The highest discount permitted under the policy in respect to any model was 12.5%. The effective dates, models, and maximum discounts permitted under the policy are summarized in the table that appears in section 3.4.5 below.
- 3.4.2 Toyota engaged in the above-mentioned conduct during the period between 16 September 2002 and 1 September 2003.
- 3.4.3 Toyota enforced the policy through fines levied on dealers who did not comply with the policy. Altogether 8 fines of R25 000 (twenty five thousand rand) were levied against eight dealers in this period for non-compliance with the policy.
- 3.4.4 Toyota states that no maximum discount policy was applied prior to 16 September 2002.
- 3.4.5 The table below sets out the model ranges that were affected by the policy, together with the dates from which the policy was applied to such model ranges:

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Dates	Models	Maximum Discount
16 September 2002- 1 September 2003 (11.5 months)	New Corolla Private Owners Strategic Fleet Owners	1% 2%
22 November 2002- 1 September 2003 (9.3 months)	Prado Land Cruiser Land Cruiser 100 series	0% 0%
1 February 2003 – 1 September 2003 (7 months)	RunX Private Owners Strategic Fleet Owners	1% 2%
1 April 2003 – 1 September 2003 (5 Months)	Tazz / Carri Camry Hi-Ace RAV4 Land Cruiser Pickup Condor / Stallion (pre-facelift)	2% 2% 1% 6% 6% 12.5%
29 April 2003 – 1 September 2003 (4 months)	Lexus RX300	0%
16 July 2003 – 1 September 2003 (1.5 months)	Hilux (Private Owners) Hi-Ace Panel Van Condor / Stallion (face-lifted models)	12.5% 12.5%
1 September 2003	Cancellation of "You play, you pay" policy in relation to all models	

3.4.6 The policy of prescribing maximum discounts was implemented in a staggered fashion, as indicated in the table above.

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- 3.5 Toyota states that following the Commission's investigation, on 1 September 2003 at a meeting with its dealers, Toyota announced the withdrawal of the policy. The cancellation of the policy was embodied in a revised Dealer Bulletin issued on 12 September and also reaffirmed in a news release to Toyota dealers and Toyota's employees, dated 6 October 2003.
- 3.6 Subsequent to the cancellation of the policy, Toyota refunded the fines to the dealers concerned.

4. Relevant provisions of the Act

- 4.1 Section 5(2) prohibits the practice of minimum resale price maintenance. Section 5 of the Act states:

"5. Restrictive Vertical Practices Prohibited:

- 1) *An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*
- 2) *The practice of resale price maintenance is prohibited.*
- 3) *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
 - (a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding;**and*

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(b) *if the product has its price stated on it, the words "recommended price" appear next to the stated price."*

4.2 In order to sustain a charge of minimum resale price maintenance against the Respondent the following elements must be proved:

4.2.1 an understanding within the industry regarding the prices at which dealers would on-sell the vehicles concerned;

4.2.2 the manufacturer enforces this understanding by imposing a sanction against dealers who do not comply with the manufacturer's determined prices.

5. Commission's findings

5.1 The Commission is of the view that the conduct referred to in paragraphs 3.4.1 – 3.4.6 falls within the ambit of section 5(2) of the Act in that it amounts to the maintenance of minimum resale prices.

5.2 The Commission is of the view that Toyota failed to comply with the provisions of section 5(2), which prohibits the practice of minimum resale price maintenance.

5.3 The Commission is of the view that Toyota's implementation of the maximum discount policy and enforcement thereof through penalties to dealers who failed to comply with the policy was unlawful and in contravention of section 5(2) of the Act

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6 Agreement concerning conduct

The *Commission* and Toyota agree that Toyota shall:

- 6.1 cease and desist from engaging in the alleged anti-competitive conduct of resale price maintenance by imposing a maximum discount structure in respect of all their motor vehicles;
- 6.2 take prompt and effective action in ensuring that the dealers terminate their part in implementing the alleged anti-competitive conduct.
- 6.3 Toyota will not itself or through any officer or employee of Toyota or any person authorized to act on behalf of Toyota notify to dealers, or otherwise publish, in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of any Toyota S.A. products, other than as expressly provided for in section 5(3) of the Act;
- 6.4 refrain in the future from engaging in any alleged unlawful conduct in its dealings with its dealers;
- 6.5 circulate to all its dealers within one month from the date of this consent order a statement conveying the substance of the consent order and advising them:
 - 6.5.1 that they are free to sell, advertise and display for sale of goods supplied by Toyota at whatever price they may choose;
 - 6.5.2 that Toyota does not in any way condone and positively discourages agreements between dealers as to the prices to



be charged or quoted by the dealers for goods supplied by Toyota;

6.5.3 that Toyota will not be party to or in any way support agreements between dealers as to the prices to be charged or quoted by the dealers for goods supplied by Toyota; and

6.6 provide copies of this consent order to each of its present directors and provide a copy to any future director on his or her appointment and in each case will draw the attention of the director to the contents of this consent order;

6.7 institute, within six months from the date of this order, a compliance programme designed to ensure that employees and dealers are informed about Toyota's obligations under competition law and the existence and substance of this consent order;

6.8 require its employees to comply with the substance of this consent order and will take appropriate disciplinary action against any employee who fails to do so; and

6.9 submit a compliance programme to the *Commission*. Such compliance programme will include, but not limited to, establishing a mechanism for consumers to report any contraventions of the *Act*

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7. Administrative penalty

7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the *Act*, Toyota agrees to pay an administrative penalty in settlement of any contravention of section 5(2) of the *Act* in relation to the period 16 September 2002 to 1 September 2003.

7.2 Toyota agrees to pay an administrative penalty in the amount of R12 000 000 (twelve million rand) to be paid not later than thirty (30) days after the confirmation of this *Consent Order* by the *Tribunal*. The said amount is payable to the *Commission*, whose banking details are as follows:

Bank: ABSA
Name of Account: The Competition Commission Fees
Branch Name: Pretoria
Branch Code: 323345
Account Number: 4050778576

8. Waiver of damages

The complainant has indicated to the Commission in writing that he has waived his right to seek any damages, which may have arisen pursuant to his complaint.

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9. **Effect**

Nothing in this consent order amounts to an admission of liability and no statements shall have any prima facie effect in any subsequent private lawsuit that may be brought against Toyota.

10 **Variation**

No contract varying, adding to, deleting from or canceling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

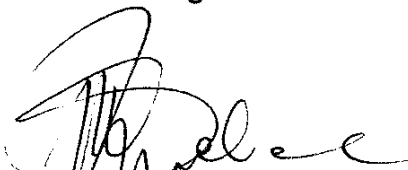
Dated and signed at Johannesburg on this the 29th day of March 2004.



Dr Johan van Zyl
President and Chief Executive Officer
Toyota South Africa Motors (Pty) Ltd

29th March 2004.
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Date

Dated and signed at Pretoria on this the 2nd day of April 2004. *MS*



Adv. Menzi Simelane
The Commissioner
Competition Commission

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Date