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The Australian Competition and Consumer Commission grants first resale price maintenance authorisation to a power tools manufacturer (Tooltechnics)

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On 5 December 2014 the Australian Competition and Consumer Commission (**ACCC**) granted its first authorisation in relation to resale price maintenance (**RPM**). RPM is per se prohibited in Australia. Although an authorisation (exemption) mechanism for RPM, determined on public benefits grounds, has been available in Australia since 1995, this application was the first to be made to the ACCC.

The authorisation application was made by Tooltechnic Systems (Aust) Pty Ltd (**Tooltechnic**), an importer and wholesaler of Festool power tools in Australia. Tooltechnic claimed that the specialised and complex nature of its products necessitated high levels of service and that this service provision was being put at risk by the 'free riding' practices of some of its retailers.

The ACCC accepted that there was market failure caused by the free riding of some existing Festool retailers. It concluded that, while there was public detriment associated with the proposed RPM conduct, this was likely to be limited (in particular due to Tooltechnic's limited market share and the highly differentiated nature of the products) and, on balance, the likely public benefits associated with improved pre-and post-sales services (which would be encouraged by the proposed RPM conduct) would outweigh this detriment. On this basis authorisation was granted for a period of four years, subject to some reporting obligations.

Australia's resale price maintenance law and the authorisation process

Section 48 of the *Competition and Consumer Act 2010* (**the CCA**) prohibits resale price maintenance. RPM is defined in Australia to capture only *minimum* RPM. There is no requirement to demonstrate anti-competitive purpose or effect and no efficiency defence exists; consequently, RPM is *per se* prohibited. [1]

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The CCA does, however, allow parties to seek advance approval for their proposed RPM conduct (s 88(8A)) where they can demonstrate public benefits associated with the conduct such that it 'should be allowed' to take place (s 90(8)). The availability of authorisation recognises that fact that, in appropriate circumstances, RPM can address market failure and produce public benefits. If the ACCC is satisfied such benefits exist they may grant authorisation for the defined conduct. A grant of authorisation operates as an individual exemption for the duration of the authorisation.

The Tooltechnic application

Tooltechnic's application for authorisation in 2014 was the first made to the ACCC, notwithstanding the availability of the authorisation process for RPM since 1995.

Tooltechnic sought authorisation to amend its agreements with dealers to 'include a requirement for resellers to not sell any Festool product below a price(s) nominated by Tooltechnic'. [2]

Tooltechnic argued that its distribution model was dependent on 'high levels of retail services being offered in conjunction with the supply of its goods' [3] This was in part because the products it offered were highly differentiated and sold on the basis of their features and qualities. This, it argued, placed it at high risk of 'free riding' from some dealers who would avoid investing in the necessary level of service in order to undercut those dealers who did make that investment. This propensity for "free riding" created externalities leading retailers to spend less on service than would be optimal. [4]

The resulting reduction in service, it claimed, placed the entire supply chain at risk and, if it continued, would result in fewer dealers for their products and fewer 'Premium' shops. [5] This would impact on the image and status of the product and the 'retail reputation' of dealers who invested at optimal levels.

Tooltechnic identified a number of potential economic benefits associated with the proposed conduct; in particular: [6]

• it would increase the supply of retail services by providing greater incentives to dealers;
• it would result in more efficient pricing;
• it would increase consumer choice through the 'greater availability of a 'high service, high price product', with dealers being incentivised to stock a larger range of products with the necessary supporting services;
• it would increase intra-brand non-price competition;
• it would increase inter-brand competition;
• although it would restrict intra-brand price competition, it would enhance inter-brand competition in all respects, including in relation to price; and
• it would be less restrictive than the alternatives open to Techtonic to address the free riding concern.

ACCC assessment

The ACCC noted that RPM conduct, by limiting or preventing retailers competing on price, is likely to result in some customers paying more and might also facilitate coordinated conduct between manufacturers or retailers in setting prices which may further reduce competition and increase

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prices.

In relation to the first concern, price competition, the ACCC considered that Tooltechnic's proposed RPM conduct would eliminate price competition between Festool dealers for Festool products. This would result in 'clear public detriment' because some customers would pay more for those products. However, the ACCC acknowledged that such public detriment would be limited by the 'wide range of alternative trade quality power tools available' and the fact that Tooltechnic 'has little incentive to set minimum retail prices above competitive levels because doing so would likely reduce sales of Festool products overall'. [7]

In relation to the concern that RPM might facilitate coordinated conduct, the ACCC considered that the market characteristics, including Festool's relatively small market share, the significant number of larger suppliers, the history of entry and expansion in the market, the highly differentiated of the products and the importance of innovation in the industry, meant it was unlikely the proposed conduct would have this effect. [8]

When considering public benefits, the ACCC accepted that RPM can, in appropriate circumstances, address market failures, thereby generating public benefits. In this case, the complex and highly differentiated nature of Festool products meant that customer service was particularly important in relation to their products. Absent RPM, those retailers providing full service could purchase their product from a discount retailer not offering the service. This free riding constituted a market failure [9] and there was a significant risk that without the conduct a number of retailers would either cease to provide the services altogether or would not provide them to sufficient levels. The improved pre- and post-sales services, which would be encouraged by the proposed conduct, would result in public benefits which included:

• some customers making more informed decisions in relation to their trade quality power tools and
• 'power tool customers continuing to be offered the choice of a premium trade quality power tool product which is accompanied by a high level of post-sales service'. [10]

After evaluating these potential public benefits and detriments, the ACCC addressed the 'key issue' of incentives facing Tooltechnic. [11] In this respect, Tooltechnic's small share of the market meant that it would need to judge whether higher services outweighed lower prices in attracting customers. If it *did not* then the proposed RPM was unlikely to be profitable and was not likely to continue. If it *did* then it was likely that inter-brand competition would be promoted by the RPM conduct.

The ACCC therefore concluded that the public benefits would outweigh the 'clear, but limited' detrimental result that some customers would fact through higher retail prices. [12]

The ACCC placed a condition on Tooltechnic's authorisation requiring it to provide the ACCC with certain information annually (including price and sales information) to allow it to monitor the impact of the RPM conduct over the relevant period. This, in turn, will inform any future application for re-authorisation by Tooltechnic. No doubt it will also inform any other authorisation decisions it may consider in future.

The future of RPM in Australia

It is too early to tell whether Tooltechnic's success in this case will encourage more suppliers to seek

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authorisation for RPM conduct. However, the specific facts in this case that influenced the ACCC - in particular, the nature of the products as highly differentiated and complex, the competitive nature of the market and Tooltechnic's relatively small market share – suggest it is unlikely to result in any immediate opening of floodgates. Nevertheless, the result has demonstrated that, in appropriate cases, the ACCC will accept that RPM may result in public benefits sufficient to warrant an exemption from the existing per se ban.

The authorisation decision also comes in the midst of a major Competition Policy Review ('**Harper Review**') [13] in Australia. Notwithstanding international developments in relation to RPM, there has been no significant push to amend the existing provision, although some submissions did call for the removal of the per se ban. In its Draft Report, released in September 2014, the Review Panel recommended retaining the existing per se prohibition, but also introducing a quicker and simpler process for parties seeking exemption. [14] The Panel is scheduled to hand down its final report in March 2015.

[1] Very limited exemptions exist; for example, where a product has been used as a 'loss leader' in the preceding year a supplier may 'withhold supply' from that dealer without contravening the provision: s 98 CCA.

[2] Authorisation application – Tooltechnic Systems (Aust) Pty Ltd, 20 June 2014 (http://registers.accc.gov.au/conten...), Form EA application, section 2. (**Authorisation application**)

[3] Authorisation application, page 5

[4] Authorisation application, page 13, para 2.5

[5] Authorisation application, page 12, para 2.5

[6] Authorisation application, from page 18

[7] Application for Authorisation of A91433 lodged by Tooltechnic Systems (Aust) Pty Ltd in respect of resale price maintenance (ACCC Determination, 5 December 2014) (**ACCC Determination**) page 16

[8] ACCC Determination, pages 16-17

[9] ACCC Determination, page 24, para 145.

[10] ACCC Determination, page 24, para 145.

[11] ACCC Determination, page 24, para 147.

[12] ACCC Determination, page 24, para 148.

[13] See Competition Policy Review website: http://competitionpolicyreview.gov.au/

[14] Competition Policy Review Draft Report (September 2014) , Draft Recommendation 29, para 3.11 (http://competitionpolicyreview.gov...., accessed 26 February 2015)

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