Statement of reasons

Notification lodged by
HP PPS Australia Pty Ltd
in respect of
proposed resale price maintenance conduct on HP products sold through HP Online Marketplace Stores

Notification number: RPN10000456

2 October 2020

Commissioners: Sims
Keogh
Rickard
Court
Ridgeway

Summary

The Australian Competition and Consumer Commission (the **ACCC**) has decided that the resale price maintenance (**RPM**) notification lodged by HP PPS Australia Pty Ltd (**HP**) on 20 July 2020 for the HP eBay Store and any prospective HP stores on other online marketplaces (**HP Online Marketplace Stores**) will be allowed to stand. HP Online Marketplace Stores are HP operated stores hosted on online market places, such as the HP store on eBay.

Based on the information before it, the ACCC considers that some public benefits are likely to arise from the RPM Conduct and that these public benefits will not be outweighed by the likely detriment to the public from the conduct. Therefore, the test to revoke the notification in section 93(3A) of the *Competition and Consumer Act 2010* is not met and the legal protection provided by the notification will continue.

Currently, HP directly manages all aspects of its Online Marketplace Stores. HP's RPM notification proposes a new arrangement whereby the order fulfilment function for orders placed with HP Online Marketplace Stores would be undertaken by a third party distributor. Under this arrangement, the sale agreement will be between the distributor and the customer (rather than between HP and the customer). HP will still maintain control over all other aspects of operating the HP Online Marketplace Stores including product and marketing strategies and, in particular, setting the prices for which the third party distributor will sell the HP products to customers (**the RPM Conduct**). The RPM notification would allow this arrangement to apply to all current and future HP Online Marketplace Stores.

HP states it is seeking to combine the third party distributor's expertise in logistics and delivery management with its experience in implementing product, place, price and promotional strategies for HP Online Marketplace Stores. For example, greater website functionality, improved services including wider delivery options and faster delivery and a wider range of payment options.

The RPM Conduct will only apply to products sold by HP's third party distributor through HP Online Marketplace Stores. The RPM conduct will not apply to any sale of products by the operator of the relevant online market place or by any other third party selling HP products on the online market place. Presently, eBay is the only online market place where HP operates an Online Marketplace Store. However, HP submits that it will seek to establish additional HP stores operating on online marketplaces in the future.

For RPM notifications, the decision for the ACCC is whether to take steps to remove the protection from legal action by revoking the notification. The ACCC can only revoke a notification if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely public detriment from the conduct.

The ACCC notes that the RPM Conduct applies only to sales by its third party distributor through HP Online Marketplace Stores, which represent a very small portion of total sales of HP products. Other suppliers of HP products, and competing products, are likely to constrain any attempt by HP to use the RPM Conduct to raise retail prices.

The ACCC also considers that the RPM Conduct is likely to allow HP to realise public benefits in the form of efficiencies through appointing a third party distributor with expertise in logistics services to fulfil orders placed through its Online Marketplace Stores while maintaining control over the operation of other aspects on the Online Marketplace Stores, including pricing and promotional strategies, which HP is likely to be best placed to manage.

The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notification.

In October 2019 the ACCC allowed to stand a similar notification allowing HP to set the prices for which the third party distributor sells HP products to customers on HP's own online store. The current notification extends this arrangement to HP branded stores that it operates on online market places such as eBay.

The RPM Conduct notified by HP is different to most other RPM conduct the ACCC has considered. It only applies to the third party distributor that will fulfil orders placed through Online Marketplace Stores operated by HP. The likely benefits and detriments resulting from RPM conduct will be assessed on a case by case basis. Accordingly, the ACCC's decision in this matter should not be seen as indicative of its views about RPM conduct more broadly. The ACCC considers that under many circumstances, RPM is likely to result in significant public detriments, particularly where the parties concerned have higher market shares, or in markets where there is not vigorous competition. RPM will often not result in sufficient public benefits to offset the detriment from potentially higher prices. The ACCC will require any party seeking legal immunity for RPM conduct to provide substantial evidence to demonstrate that the extent of public detriment will be limited and there are clear public benefits.

The notification

1. HP PPS Australia Pty Ltd (**HP**) lodged the RPM notification on 20 July 2020. HP's parent company, HP Inc., is a manufacturer of HP-branded technology products including desktop computers, notebooks, printers and related accessories and supplies. HP imports, distributes and supplies HP products in Australia through its network of authorised distributors, retail channel partners and resellers for resupply to consumer and business customers. HP also sells directly to consumers through its own '**HP Online Store**' and an HP Online Marketplace Store on eBay. Outside of the HP eBay Store and HP Online Store, most sales direct from HP to end-users are to large corporate and government customers with large volume requirements.

2. HP proposes that its model for the HP Online Store, which was the subject of RPM Notification RPN10000453, whereby HP would supply HP products to a third party distributor, which will on-sell direct to customers and receive payments from customers through the HP Online Store, be extended to all present and future HP Online Marketplace Stores.[1] The third party distributor will be responsible for the physical supply of HP products to customers purchasing from the HP Online Store and all other HP Online Marketplace Stores. Currently the HP eBay store is the only Online Marketplace Store HP operates. HP submits that it proposes to launch other HP Online Marketplace stores in the future and that the third party distributor would perform the order fulfilment function for those stores.

3. The RPM conduct HP proposes to engage in involves HP controlling product and marketing strategies and, in particular, specifying the prices for which the relevant third party distributor will sell the HP products to customers (**the RPM Conduct**). The RPM Conduct will only apply to products sold by that third party distributor through HP Online Marketplace Stores. The RPM conduct will not apply to any sale of products by the operator of the relevant online market place or by any other third party selling HP products on the online market place.

[1] The HP Online Store was the subject of an RPM Notification lodged by HP on 16 July 2019. HP's RPM Notification regarding the HP Online Store and the ACCC's Statement of Reasons regarding the conduct (RPN10000453) are available on the Public Register.

HP's proposed changes to the operation of its Online Marketplace Stores

4. Currently, HP directly or partially manages all aspects of the HP eBay Store, except for the physical fulfilment of orders. However, HP advises that it does not have large inventory holdings in Australia and when it does not hold the relevant stock, HP purchases it from one of its distributors. When this occurs, that distributor then undertakes the physical fulfilment of orders. HP notes that contractually, the supply is still direct from HP to the customer. HP submits that the complexity of this system, with some orders being fulfilled by HP, and some by the distributor, has resulted in variable delivery timeframes and delays in customers receiving products and returns processing.

5. HP now proposes to adopt the same model for the operation of its eBay Store, and any other HP Online Marketplace Stores launched in the future, as it adopted last year for its HP Online Store the subject of RPM Notification RPN10000453. In this respect, HP submits that during the implementation of this model for its HP Online Store it identified a business imperative to also alter its model for online sales being undertaken through the HP eBay Store and any prospective HP Online Marketplace Stores.

6. With the RPM Conduct, HP proposes to outsource the order fulfilments function for all HP Online Marketplace Stores to a third party distributor.[2] The distributor will order products from HP based on forecasts supplied by HP and store the products in its warehouses.

7. Under this arrangement, the distributor will be the merchant and seller of record – when a customer makes a purchase, the payment will go to the distributor's bank account, the distributor will invoice the customer and the title of the product will flow from the distributor to the customer. The distributor will also manage all product returns and refund payments, under indemnification from HP.

8. HP submits that, apart from the above changes, HP will continue to be the operator of the HP Online Marketplace Stores, maintaining control over all other aspects of its operation including product and marketing strategies and, in particular, specifying the prices for which the third party will sell the HP products to customers.

9. HP states that from the customer's perspective the process will remain unchanged since the customer will deal exclusively with HP's customer support team on all aspects of their orders with the HP support team to coordinate with the distributor on returns and refunds.

10. HP will also integrate HP Online Marketplace Stores with a third party eCommerce platform. HP will supply HP products to the third party distributor and that distributor will receive payments direct from customers (through the third-party eCommerce platform) and be responsible for the physical supply of HP products to customers.

11. In the case of the HP eBay Store, eBay currently processes all payments made on the HP eBay Store through its own payment gateway. eBay is also responsible for the management of the eCommerce platform and development of content for the general platform, including the maintenance and integration of the platform into payment gateways. HP is responsible for the development of content on the HP eBay Store and the manual extraction of orders received from eBay's order management system and the input of such orders into HP's order management system.

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[2] HP provided the ACCC with details about the proposed third party distributor on a confidential basis.

HP's rationale for the changes

12. HP submits that the model for the HP eBay Store has significant limitations which constrain HP's ability to improve the customer experience and the HP eBay Store and any future HP Online Marketplace Stores cannot operate in the same way as the HP eBay Store has operated to date.

13. HP submits that the primary reason for implementing the proposed model is to improve the experience of, and service offerings to, customers that source HP products from HP Online Marketplace Stores in the most efficient and cost-effective way. HP submits that to achieve this it is proposing to partner with a third party (that it has already partnered with for order fulfilment on the HP Online Store) that can contribute skills, capabilities and infrastructure.

14. In this respect, HP submits that as its core business is not the provision of logistics services, it lacks the expertise and experience of a specialist in this area to facilitate innovative logistics and delivery methods that may improve delivery times and offer more convenient delivery options for customers. Therefore, HP states, the proposed changes will allow an experienced third party to take on this function while HP focuses on HP products, including developing and implementing product, place, price and promotional strategies.

The RPM notification process and public benefit test

15. In broad terms, RPM occurs when a supplier of goods or services (for example, a manufacturer or wholesaler) specifies a minimum price below which a reseller must not on-sell, or advertise for sale, those goods or services.

16. RPM is a per se breach of the *Competition and Consumer Act 2010* (**Act**), which means it is prohibited outright, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition.

17. Changes to the Act from 6 November 2017 mean that it is now possible to obtain protection from legal action for RPM conduct by lodging a notification (under Section 93 of the Act). Prior to this date, ACCC authorisation was the only way to obtain legal protection for RPM conduct.

18. The legal protection provided by an RPM notification commences automatically 14 days after the notification was validly lodged, unless the ACCC issues a draft notice objecting to the notification within that period.[3] In this case, HP has submitted that it will commence engaging in the RPM Conduct if and when the ACCC makes a decision to allow the notification to stand.

19. The ACCC will assess an RPM notification by applying the public benefit test in section 93(3A) of the Act. The test requires that in order to revoke a notification the ACCC must be satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the notified conduct.

20. If the ACCC considers it has grounds to revoke an RPM notification, but these grounds would not exist if particular conditions relating to the RPM conduct were complied with by a notifying party – for example, requiring annual reporting on sales and pricing

[3] Reg. 9(a) Competition and Consumer Regulations 2010. In accordance with reg 9(b), after 6 November 2018, the relevant period reduced from 28 days to 14 days.

information for the relevant goods – then the ACCC can impose conditions which must be complied with.

Consultation

HP's submission

21. HP submits that if the RPM Conduct does not proceed it will not proceed with any aspect of the proposed new model for the HP Online Marketplace Stores. Rather HP will cease operating the HP Online Marketplace Stores, meaning consumers would lose the benefit of the HP eBay store and other prospective HP Online Marketplace Stores.

22. HP states that other alternatives to its proposed approach to the new model for the HP Online Marketplace Stores, and the reasons it considers that these alternatives are not viable are:

    - Proceeding with the new model while allowing the third party distributor to set prices – the third party distributor's primary business is warehousing and logistics, it does not have the necessary expertise to set prices in a manner that balances the interests of customer and participants in the broader HP distribution network. In contrast, HP has highly experienced and dedicated teams that specialise in setting product distribution, pricing and promotional strategies.

    - Appointing the third party distributor under an agency model – this would involve the third party distributor holding significant amounts of stock on consignment as well as holding stock in its own right as distributor. Logistical and operational efficiencies from pooling stock would not be realised. This would also be more complex from a financial and accounting perspective as both HP and the distributor's inventory would remain on HP's books without being in its effective control while the distributor bears responsibility for managing two sets of inventory.

23. HP submits that the new model for the HP Online Marketplace Stores will result in public benefits for customers from improved services including wider delivery options, faster delivery and a wider range of HP products, and improved marketing, content and product information.

24. HP submits that there are no public detriments associated with the RPM Conduct as:

    - without the conduct it would remain the case that HP would continue to set prices for products sold through its online store HP Online Marketplace Stores because the third party distributor would not be reselling the products

    - no other retailers in the HP distribution network will be impacted by the conduct

    - the HP Online Marketplace Stores represent only a very small part of the HP supply chain with customers remaining free to purchase HP products from a large number of online and bricks and mortar retailers, and

    - HP faces strong competition from numerous competing brands in each relevant product category.

Interested party submissions

25. The ACCC sought submissions from a range of potentially interested parties, including suppliers of HP products, competitors and consumer groups.

26. The ACCC received one submission, from eBay Australia and New Zealand advising that it had no issue with HP's notified conduct.

27. Further information in relation to the RPM notification and eBay's submission are available from the ACCC's website.

ACCC assessment

The ACCC's general approach to RPM notifications

28. Removing price competition between resellers of a particular brand of products has the potential to result in significant consumer harm. It can result in resellers selling goods or services at prices higher than they would otherwise and consumers paying more for those goods or services without receiving any additional value. In some circumstances, RPM may also increase the risk of collusion between competitors.

29. Given these potentially significant detriments, including preventing retailers offering discounts, the ACCC will normally have significant concerns and may move to revoke an RPM notification unless this detriment is limited by competition and there are clear offsetting benefits.

30. The size of the public detriment from RPM will be smaller where the relevant good or service is subject to strong rivalry from competing goods or services. In these circumstances, the supplier would be less likely to be able to set retail prices above the competitive level.

31. In certain circumstances, RPM can result in public benefits, including by promoting competition. For example, producers of complex goods or services may seek to engage in RPM to create incentives for a reseller to invest in pre-and post-sales services such as in-store product demonstrations and training staff to be able to provide advice about the products, which is valued by consumers.

32. Without RPM, other resellers who do not invest in the same level of high service could 'free ride' on these investments by setting lower prices. Eventually, high-service resellers may not gain sufficient returns on product sales to continue to provide these services. In some cases RPM can help to align the incentives of the retailer with those of the wholesaler, allowing them to compete more strongly with vertically integrated competitors.

HP's RPM notification

33. The ACCC notes that HP's RPM Conduct differs from other matters the ACCC has considered in the past through the authorisation and notification processes in two respects:

    - HP's RPM Conduct applies only to one reseller – the third party distributor that will fulfil orders placed through the HP Online Marketplace Stores, and

    - HP's RPM Conduct is not aimed at addressing concerns that resellers who do not invest in high service could free ride on the investments of resellers that do

by setting lower prices. Rather, HP is seeking to preserve the ability to set prices for products sold through its Online Marketplace Stores while outsourcing the order fulfilment function.

34. This means that the ACCC's general approach to assessing RPM notifications as outlined above is not directly applicable in this instance.

35. The ACCC's assessment of the public detriments and public benefits of HP's proposed RPM Conduct follows.

Public detriments

36. RPM conduct eliminates the scope for dealers to offer discounts on the recommended retail price. This will result in a clear public detriment if it leads to customers paying more for relevant products. However, in this instance, the ACCC is of the view that the RPM Conduct will not likely result in customers paying more for HP products.

37. HP is not seeking to impose retail price controls on an existing competitor or a business that would, absent the notified conduct, be a likely future competitor. The RPM Conduct applies only to the third party distributor that is reselling through the HP Online Marketplace Stores.

38. Customers remain free to source HP products from a range of other online and bricks and mortar retailers, including from other parties selling HP products on the online market places where HP Online Marketplace Stores operate. These resellers will remain free to compete on price, and other terms and conditions, in selling HP products.

39. The ACCC considers that these alternative retail channels are likely to constrain any attempt by HP to use the RPM Conduct to raise retail prices. In this respect, HP has substantiated with confidential information, that sales through its Online Store and Online Marketplace Stores represent a very small portion of total sales of HP products.

40. Further, HP currently sets the prices for products sold through the HP Online Marketplace Store it currently operates – the HP eBay Store. The RPM Conduct preserves its ability to continue to do so, but via a third party.

41. In addition to competition provided by other resellers of HP Products, the ACCC also considers that, with respect to most product categories, competition provided by suppliers of competing brands will also serve to constrain prices set by HP through its online store.

42. The ACCC has considered whether the RPM Conduct would give rise to coordination between other retail suppliers of HP products. However, given HP currently sets the prices for all products sold through the HP Online Marketplace Stores, the RPM Conduct does not represent a change to HP's current ability to set prices charged through its online store(s) and is therefore unlikely to increase the prospect of any coordinated conduct between suppliers of HP products. The ACCC considers that to the extent the prices set for the HP Online Marketplace Stores influence the prices charged by other retailers, this would remain the same, with or without the Notified Conduct.

Public benefits

43. The ACCC considers that assigning the order fulfilment function to a third party with expertise in logistics and delivery methods is likely to improve the customer experience when using the HP Online Marketplace Stores. In particular, HP will be able to rely on

the expertise of the third party distributor in fulfilling orders while maintaining control over the operation of other aspects of the online store, including pricing and promotional strategies. As the proposed RPM conduct is confined only to the HP Online Marketplace Stores, the ACCC considers that HP is likely to be better placed to decide on these aspects of the operation of the store.

44. The ACCC considers that it is not necessarily the case that HP could not, or would not, be able to adopt a distribution model that draws on the logistics expertise of a dedicated distributor without the RPM Conduct. However, the ACCC considers that the proposed RPM conduct is likely to realise efficiencies as described by HP. For example, having regard to HP's existing structures, appointing a third party distributor under an alternative model, such as an agency agreement, is likely to introduce additional complexities to the distribution process.

45. The ACCC considers that an improved experience for customers, including greater functionality, better delivery options and times constitutes a public benefit. This is also likely to promote competition with other suppliers of HP products, and suppliers of other competing brands, at least to some degree, which is a further likely public benefit of the RPM Conduct.

Balance of public benefits and detriments

46. The ACCC considers that the likely benefit from HP's RPM Conduct will outweigh the likely public detriment from the conduct. While the likely public benefits from the RPM conduct are likely to be modest, any public detriment is likely to be even more limited. In particular, the RPM Conduct:

    - applies only to the HP Online Marketplace Stores which represent a very small portion of total sales of HP products. Other suppliers of HP products, and competing products, are likely to constrain any attempt by HP to use the RPM Conduct to raise retail prices. Further, HP currently sets prices for the HP Online Marketplace Stores and would be likely to continue to do so without the RPM conduct because it would be selling directly to customers and contracting out the fulfilment function, and
    - is likely to allow HP to realise efficiencies through appointing a third party with expertise in logistics services to fulfil orders placed through its online store while maintaining control over the operation of other aspects on the online store, including pricing and promotional strategies which HP is likely to best placed to manage.

Decision

47. For the reasons set out in this paper, the ACCC is satisfied that, on the evidence it has obtained to date, the test to revoke the notification in section 93(3A) of the Act is not met and therefore the legal protection provided by the notification should continue at this time.

48. The notification relates only to HP specifying the prices to be charged by the third party which will resell and distribute HP products sold though HP Online Marketplace Stores, for HP products sold through the store(s).

49. The notification does not extend to HP specifying the price at which any other third party sells its products.

50. The notification also does not extend to HP specifying the price at which the third party distributor sells HP products that are not sold through the HP Online Marketplace Stores.

Review of the notification

51. While no further action is proposed at this time, the ACCC may revisit this assessment at any time. Should the ACCC come to the view that the likely detriments to the public from the RPM conduct are not outweighed by the likely benefits, the ACCC may take steps to remove the protection provided by the notification.

Future RPM notifications or applications

52. The ACCC's assessment of efficiency-promoting RPM conduct will depend heavily on the circumstances of each case. The ACCC considers that under many circumstances, RPM is likely to result in significant public detriments without producing offsetting public benefits.

53. The ACCC has had regard to the facts of HP's specific conduct, including that the RPM conduct applies only to the HP Online Marketplace Stores, and that the HP Online Marketplace Stores represent a small portion of total sales of relevant HP products. In this respect, HP's proposed RPM Conduct differs from other matters that the ACCC has considered in the past.