



AUSTRALIAN
COMPETITION
& CONSUMER
COMMISSION

Statement of Reasons

in respect of a notification lodged by
Tooltechnic Systems (Australia) Pty Ltd
for

resale price maintenance conduct on
Festool and Fein power tools

Date: 25 July 2018

Notification number: RPM20181

Summary

The Australian Competition and Consumer Commission (the **ACCC**) has decided not to take further action at this time in respect of the resale price maintenance (**RPM**) notification lodged by Tooltechnic Systems (Aust) Pty Ltd (**Tooltechnic**) on 12 February 2018 for its Festool and Fein power tools.

The notification gives Tooltechnic legal protection to impose a minimum price for the retail sale of these tools, which prevents discounting by retailers. The loss of discounting entailed by RPM is a clear detriment to some consumers. However, in the unique circumstances of this matter, the ACCC considers that the information it has obtained to date does not enable it to be satisfied that this clear detriment to buyers of Fein and Festool products would not be outweighed by benefits arising from the conduct.

In particular, feedback from dealers suggests that setting a guaranteed minimum price for these products has given a large network of Festool/Fein dealers the certainty they need to invest in facilities and staff to provide better levels of pre- and post-sales retail services. This results in consumers being able to make more informed decisions about the purchase and maintenance of these relatively complex products. The ACCC considers that this may also be likely to result in increased service-based competition between Festool/Fein power tool dealers (particularly enabling smaller dealers to better compete with larger dealers) and promote inter-brand competition.

Further, while there is clear detriment in this case, it is likely to be reduced by the fact that Festool and Fein have relatively low market shares and face numerous competitors.

The protection from legal action provided by the notification automatically commenced on 12 March 2018 and will continue unless or until the notification is revoked or withdrawn.

Tooltechnic has already been engaging in RPM conduct for Festool power tools since it was granted ACCC authorisation to do so in 2014. In considering this notification, the ACCC has considered evidence as to the effects of Tooltechnic's Festool RPM conduct since 2014.

For resale price maintenance 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.

Based on the information before it, on balance, the ACCC is not satisfied that the legal test to revoke the notification is met at this time. The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notification.

This is the first RPM notification received by the ACCC since amendments to the *Competition and Consumer Act 2010* to introduce this new process. Accordingly, the ACCC will monitor the effects of this conduct closely both in deciding whether it is necessary to revoke this notification and in determining any changes to its approach to any future notifications. It should not be assumed that because it has allowed this notification to stand the ACCC will not object to future notifications for RPM.

Although there is now a notification process available, RPM remains prohibited outright – that is, it is still not subject to a substantial lessening of competition test. 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 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 Tooltechnic notification

1. Tooltechnic lodged the notification on 12 February 2018. Under the notification, it is proposing to:
 - require dealers to not sell any Fein product below a price(s) nominated by Tooltechnic (this is a new arrangement)
 - require its dealers to not sell any Festool product below a price(s) nominated by Tooltechnic (this continues an existing arrangement authorised by the ACCC in 2014).
2. Tooltechnic is an importer and wholesaler of premium power tools, mainly sourced from European suppliers, including Festool and Fein power tools, accessories and consumables. At the time of lodging the notification, Tooltechnic distributes these power tools through 366 specialist power tool dealers across Australia.

The RPM notification process and public benefit test

3. 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.
4. 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.
5. 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.
6. The legal protection provided by an RPM notification commences automatically 28 days after the notification was validly lodged, unless the ACCC issues a draft notice objecting to the notification within that period.¹
7. 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.
8. 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 information for the relevant goods – then the ACCC can impose conditions which must be complied with.

¹ Reg. 9(a) Competition and Consumer Regulations 2010. In accordance with reg 9(b), after 6 November 2018, the relevant period will reduce from 28 days to 14 days.

Existing Tooltechnic RPM authorisation

9. On 5 December 2014 the ACCC granted conditional authorisation² to enable Tooltechnic to set minimum retail prices on Festool products until 31 December 2018. Subject to the conditions of authorisation, the ACCC was satisfied that the RPM conduct would likely result in a net public benefit. In particular, the ACCC concluded that as a result of the RPM conduct dealers would likely invest in pre- and post-sales services, as the risk of 'free riding' by other retailers who do not provide those services would be addressed. The ACCC considered that the risk of harm from RPM conduct would be minimised where the product was subject to strong competition from other goods – and Tooltechnic had a very small market share.
10. The conditions required Tooltechnic to provide the ACCC with reports annually regarding the Festool product range, dealers, dealer contracts and pricing.
11. A key aspect of the ACCC's consideration of the notified Festool and Fein RPM conduct has been to closely review the impact of the 2014 authorisation, particularly whether the expected public benefits have eventuated, and the extent of the detriments arising from higher prices.

Consultation

Interested party submissions

12. The ACCC sought submissions from over 100 interested parties potentially affected by this RPM conduct, including current Festool and Fein dealers and competing power tool wholesalers. A summary of the public submissions received from Tooltechnic and interested parties follows.
13. Submissions commented on the experience of the past three years under the existing Festool authorisation, as well as the proposed future Festool and Fein RPM conduct.
14. Further information in relation to the RPM notification, including any public submissions received by the ACCC, is available from the [ACCC's website](#).

Interested party submissions in support

15. The ACCC has received nine submissions in support of the RPM conduct from current Festool dealers. These dealers submit that Festool and Fein products are unique and warrant a premium level of service. The dealers submit that the RPM conduct enables them to focus on offering their customers a better service, rather than also competing on price.

Interested party submissions in opposition

16. The ACCC received submissions from two dealers who do not currently stock Fein or Festool products but they oppose the RPM conduct. These dealers are concerned that the RPM conduct provides Tooltechnic with a competitive advantage as the guaranteed margin offered by RPM makes dealers more likely to stock Festool and Fein products and less likely to stock other brands.

² ACCC Determination in relation to application for authorisation A91433 from Tooltechnic Systems (Aust) Pty Ltd, 5 December 2014.

17. The ACCC also received one submission from a group of Festool end-users and three submissions from individual end-users. These end-users submit that since introducing RPM, prices for Festool products have increased substantially while service levels have not improved. Some of these parties consider that Festool products are not unique and that the RPM conduct may set a precedent in the market for power tools.

Tooltechnic

18. Tooltechnic submits that Festool and Fein tools are premium products. It considers that its distribution model relies on dealers offering a high level of retail services. However, in the absence of RPM, dealers who provide limited retail services are able to undercut the prices of dealers who provide a high level of retail services ('free-riding'). This 'free-riding' risks discouraging dealers from investing in the staff training and equipment necessary to effectively demonstrate Festool and Fein tools to prospective customers.

19. Tooltechnic submits that the authorised RPM conduct has proved to be effective in relation to its Festool products and has resulted in:

- increased supply of retail services
- more efficient pricing
- increased customer choice (e.g. more dealers)
- increased intra-brand³ non-price competition (e.g. Festool dealers have introduced new services)
- increased inter-brand⁴ competition (e.g. increased sales by dealers and increased turnover for Festool)
- a less restrictive outcome than other alternatives to overcome the current market inefficiencies and allowing dealers to also stock competing brands and
- innovation in product and retail services. The RPM conduct has encouraged Festool dealers to invest in new types of inventory, in-store training events, larger displays with tool testing facilities and loan tools.

20. Tooltechnic submits that Festool and Fein have a combined market share of less than 5 per cent of the national wholesale branded power tool market. It also submits that there are numerous power tool wholesale suppliers, with recent new entrants and low barriers to entry.

21. Tooltechnic submits that any public detriment from loss of intra-brand price-competition between dealers will be minimal as its pricing is constrained by other brands of tools.

Tooltechnic data

22. Tooltechnic has provided three reports under the conditions of its existing Festool authorisation (for the 2015/16, 2016/17 and 2017/18 reporting periods). Tooltechnic also provided further data when lodging its RPM notification.

³ Competition between retailers in selling the manufacturer's product to consumers.

⁴ Competition among manufacturers of competing products.

23. In addition, the ACCC obtained further data and clarification from Tooltechnic. This included confidential internal business records, pricing and other data, as well as information from Tooltechnic executives. Tooltechnic also provided a public written submission, which is available on the ACCC's public register.
24. While much of this data and information is confidential, in general terms, it supports Tooltechnic's submissions that since the authorised Festool RPM conduct was introduced:
 - there has been an increase in Festool dealer numbers, floor space for displaying tools and Festool sales
 - Tooltechnic has not used RPM conduct to significantly raise its wholesale margins on sales of Festool power tools
 - increases in Festool retail prices have not been significant, although dealers are no longer able to offer discounts and
 - some Festool dealers have introduced new or better services. Tooltechnic has also implemented or improved policies and systems to support and monitor dealers to meet their service obligations.
25. The ACCC also reviewed Tooltechnic's complaints data provided in accordance with the conditions of the 2014 authorisation to identify consumer concerns with the Festool RPM conduct.

ACCC discussions with dealers

26. It was important for the ACCC to verify Tooltechnic's claims about improvements in the service level offered by its Festool dealers after identical Festool RPM conduct was introduced three years ago. This evidence of outcomes to date provides some indication as to the likely effect of the notified Festool and Fein RPM conduct. To this end, the ACCC has conducted store visits and discussions with different categories of Festool and Fein dealers.
27. Those discussions and submissions from dealers indicate that:
 - it takes additional sales effort to explain and demonstrate the full functionality of Festool products. Dealers consider Fein metal working tools are similarly complex
 - service (in terms of displays, range, staff training and pre- and post-sale service) is the same or better since the introduction of the Festool RPM
 - smaller dealers are better able to compete on service with larger Festool dealers, which previously offered significant discounts on Festool products
 - Tooltechnic appears to effectively monitor dealers' compliance with service obligations
 - dealers have not observed significant increases in wholesale prices for Festool power tools
 - the Festool RPM conduct has not significantly influenced dealers' decision making when deciding what other competing tools to stock and in what quantities and

- Festool products are premium quality tools and some tools within the product range are highly differentiated. Brands that compete with certain tools within the Festool range include Makita, Milwaukee, Bosch, Hitachi, Hilti, De Walt and Metabo.

ACCC assessment

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.
33. The ACCC has had regard to the information Tooltechnic reported under the conditions of its authorisation, submissions from interested parties and Tooltechnic, and has conducted additional inquiries with dealers and data analysis. The ACCC's assessment of the notified Festool and Fein conduct has also had the benefit of being informed by observing the practical effect of the introduction of identical RPM conduct by Tooltechnic on Festool products in Australia over the past three years. This has allowed for an intensive and practical assessment of the likely effect of the notified conduct in this case.

Public detriments

34. RPM conduct eliminates the scope for dealers to offer discounts on the recommended retail price. This will result in a clear public detriment. Some customers will pay more for Festool or Fein products.
35. While this is the case, the ACCC is of the view that the notified RPM conduct will not likely result in Tooltechnic raising the recommended (or minimum) retail price.
36. The ACCC accepts that the Festool and Fein range of tools are currently niche, low volume brands. In particular, Festool are positioned as high quality tools, with some products designed to integrate into complementary Festool systems. They are priced at a premium price point. The ACCC notes that Tooltechnic can continue to supply its products at a premium price point (at the wholesale level) regardless of RPM conduct. Other, lower quality, brands of power tools may not be close substitutes for more differentiated tools within the Festool range.
37. Nonetheless, there is a wide range of alternative trade quality power tools available to customers. Because of the availability of substitutes, Tooltechnic has little incentive to set minimum retail prices above competitive levels because doing so risks reducing sales of Festool and Fein products overall.
38. It is not apparent that the existing Festool RPM conduct has resulted in crowding out of other power tool brands in retail stores. Milwaukee, Bosch and Makita in particular continue to have prominent product displays in specialist tool shops.
39. The ACCC considers that the notified Festool and Fein RPM conduct is unlikely to facilitate coordinated conduct between suppliers of trade quality power tools, noting the combined Fein and Festool market share only represents around 5 per cent of the market. The ACCC may be additionally concerned if RPM was already prevalent in the relevant market as it may result in a loss of inter-brand price competition across the market. Relevantly, there appears to be inter-brand price competition in the supply of power tools and RPM conduct is not currently widespread.
40. There does not currently appear to be a strong brand-recognition of Festool and Fein products in the Australian power tools market, and Festool and Fein have a small combined market share. This is in contrast to the several ubiquitous brands with a large share of the Australian power tool market.

Public benefits

41. The ACCC accepts that Festool and Fein products are complex and are highly differentiated in terms of their attributes and quality, and the provision of pre- and post-sales services to customers is important in the sale of these products. In particular, customers benefit from the support of knowledgeable sales staff in-store, including: prior to purchase, being shown the system of tools, how to use them and trialling the product; and after purchase, access to ongoing advice about the tools and any innovations, trouble-shooting and timely repairs.
42. In this case, the ACCC accepts that 'free-riding' by some Festool and Fein retailers risks full-service retailers being unable to achieve a sufficient return on the sales of Festool and Fein products to continue to provide these pre- and post-sales services, or to provide a sufficient level of these services.

43. The ACCC considers that the RPM conduct is likely to limit 'free riding' by eliminating discounting and so encouraging retailers to offer better services (rather than lower prices) to attract customers. This can increase service-based competition between dealers. The ACCC notes the submissions of current Festool dealers that the authorised Festool RPM conduct has helped address the 'free-rider' problem and has enabled dealers to focus on offering quality service, including smaller dealers. For example, in addition to the increase in the number of Festool dealers, floor space and staff training, there is evidence of new Festool services such as better displays, test centres, a wider product range, larger stock levels, in-store training and demonstrations and 'try before you buy' schemes. Importantly, the ACCC also considers that Tooltechnic appears to have effective systems in place to ensure dealers are supported and monitored to ensure quality service.
44. The ACCC is of the view that improved pre- and post-sales services are likely to result in public benefits, including:
- 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 and
 - some customers making more informed decisions in purchasing and using trade quality power tools.
45. The RPM conduct may also assist Festool and Fein compete with other brands of power tools, resulting in increased inter-brand competition in the power tool industry. It is also likely to result in increased service-based competition between Festool/Fein dealers, including enabling smaller dealers to better compete with larger dealers.

Balance of public benefits and detriments

46. The ACCC considers that the data and submissions indicate that the existing Festool RPM conduct has:
- had the effect of increasing the provision of retail services
 - had the effect of increasing sales of Festool power tools
 - not had the effect of significantly increasing Tooltechnic's wholesale margin on sales of Festool power tools and
 - not had the effect of causing retailers to cease stocking other brands of power tools, or substantially reducing the retail space they devote to other brands.
47. The ACCC has also had regard to the following factors:
- Festool and Fein products have a very small market share (less than 5 per cent) in a market with a large number of competitors, including other high end brands
 - RPM conduct is not prevalent among other power tool suppliers in Australia
 - trade quality power tools are highly differentiated products and Festool and Fein products are particularly complex, with their features and full functionality not readily observed without being shown or explained

- in selling Festool and Fein products, therefore, customers obtain significant benefit from investment by retailers in both pre- and post-sales services (including in-store demonstrations and advice) and
 - trade quality power tools are readily sold online or by discount retailers who have not made this significant investment.
48. On balance, the ACCC considers that in the circumstances the proposed Festool and Fein RPM conduct is likely to result in public benefits from improved retail services. In particular, it will allow some customers to be able to make more informed decisions and the conduct is likely to assist retailers to maintain high service levels for trade quality power tools. The Festool/Fein RPM conduct is also likely to promote inter-brand competition and increase service-based competition between Festool and Fein dealers. The ACCC considers that these public benefits will outweigh the clear, but limited, likely detriment resulting from the fact that some customers may face a higher retail price for Festool and Fein products through lost discounting.

Decision

49. 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.

Review of the notification

50. While no further action is proposed at this time, the ACCC may revisit this assessment at any time and will watch with interest for any issues arising from Tooltechnic's Festool and Fein RPM conduct. In particular, the ACCC would be concerned if the implementation of the RPM conduct results in a significant increase in price for end consumers and/or does not result in continued improvements in services offered by dealers.
51. 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 Tooltechnic's specific conduct, including the complex nature of Festool and Fein tools which are not readily observed upon entering a dealer's store, customer reliance on knowledgeable sales staff to explain and demonstrate the products, the apparent under-provision of service by some dealers, competitive dynamics of the power tool industry including the absence of widespread RPM conduct, and Festool and Fein's current minor market share.
54. In this case, the ACCC has had the unusual benefit of being able to review three years of experience of Tooltechnic engaging in RPM conduct for its Festool range due to the existing authorisation for the conduct.

55. As this is the first RPM notification the ACCC has assessed, the ACCC will continue to monitor RPM conduct in Australia in coming years. The ACCC's approach to assessing whether RPM conduct should be allowed will evolve over time.
56. The ACCC will look closely at any future notification of RPM conduct. The characteristics of the product/service and the industry will be relevant to this assessment. The ACCC will require any party seeking legal immunity for RPM conduct to provide substantial evidence to demonstrate that there will be clear public benefits and limited detriments from the conduct. This will likely include data, such as information about the size of existing discounts below recommended retail prices typically offered by retailers, market shares and details about systems that underpin the provision of better pre-and-post sales services.
57. The ACCC will closely monitor the impact of any RPM conduct that is allowed to stand to assess whether it has resulted in public benefits or public detriments. The ACCC may request information from the notifying party to assist its consideration.