



Draft Notice

Notification lodged by
JWL Marketing Pty Ltd, trading as Weldclass Welding Products
in respect of
proposed resale price maintenance conduct for WeldForce welding
machines and CutForce plasma cutting machines

Notification number: RPN10000454

28 February 2020

Commissioners: Keogh
Rickard
Ridgeway

Summary

The Australian Competition and Consumer Commission (the **ACCC**) proposes to revoke the resale price maintenance (**RPM**) notification lodged by JWL Marketing Pty Ltd, trading as Weldclass Welding Products (**Weldclass**), on 4 October 2019 for certain welding and plasma cutting machines (the **Notified Products**).

Weldclass proposes to amend its distributor (retailer) agreements to require that the Notified Products are not sold below minimum prices nominated by Weldclass (the **Proposed Conduct**).

When businesses lodge a notification for RPM arrangements, they receive legal protection for those arrangements automatically after 14 days. For RPM notifications, the initial decision for the ACCC is whether to take steps to remove that legal protection 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.

Legal protection for the Proposed Conduct commenced on 18 October 2019. However, Weldclass agreed to not commence the Proposed Conduct until after the ACCC's substantive assessment of the notification.

Weldclass submits that the Notified Products are complex, require specialised advice and consumers benefit from purchasing from full service, rather than discount retailers, which provide little pre sales service. Setting minimum prices ensures retailers receive a reliable margin for providing a high level of service to consumers. Weldclass also submits that discount retailers are likely to free ride on the high level of service provided by full service retailers and the Proposed Conduct would eliminate this risk.

The ACCC accepts that welding and plasma cutting machines are complex however based on the available information, the Notified Products do not appear to be more complex than other similar machines. There is no evidence that discount retailers are currently free riding on the service provided by other retailers for the Notified Products.

The ACCC considers the Proposed Conduct is likely to pose a significant risk of public detriments in the form of higher retail prices for the Notified Products, competitors of Weldclass responding by increasing wholesale prices of competing machines and retailers deranging competing machines in favour of the Notified Products.

Accordingly, the ACCC is satisfied the likely benefit to the public will not outweigh the likely detriment to the public from the Proposed Conduct.

The ACCC now invites submissions and further information from Weldclass and other interested parties by **30 March 2020**. In addition, Weldclass or an interested party may request that the ACCC hold a conference to discuss this draft notice. Any such request must be made by **13 March 2020**. The ACCC will then proceed to make a final decision on the notification.

The notification

1. JWL Marketing Pty Ltd, trading as Weldclass Welding Products (**Weldclass**), lodged the Resale Price Maintenance (RPM) Notification on 4 October 2019.
2. Weldclass proposes to amend its distributor (retailer) agreements with selected distributors that wish to sell its current and future WeldForce welding machines and CutForce plasma cutting machines (together, the **Notified Products**) to require that the Notified Products are not sold below minimum prices nominated by Weldclass (the **Proposed Conduct**).¹
3. Legal protection for the Proposed Conduct commenced on 18 October 2019. However, Weldclass agreed to not commence the Proposed Conduct until after the ACCC's substantive assessment of the notification.²
4. Weldclass commenced selling the Notified Products in March 2019.
5. The Proposed Conduct would not apply to Weldclass' general welding products including standard consumables, accessories, spare parts and safety apparel, which do not have a power cord or provide a power source.³
6. The Notified Products include a range of machines that are likely to be purchased by three broad categories of users:
 - Professional fabricators – these users are likely to use much larger and more powerful machines in workshops and at construction sites but may use smaller machines such as the Notified Products for small jobs or for jobs where a smaller, more portable machine is required, such as on a roof accessible only by a ladder.
 - Tradespeople – Plumbers, electricians, panel beaters and home maintenance contractors that need to use a welder or plasma cutter as part of their work.
 - Home handy men/women (DIYers) - manufacturing for hobbies and for maintenance around the home.
7. Further information in relation to the RPM notification is available from the ACCC's [public register](#).

The RPM notification process and public benefit test

8. 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.
9. RPM is a *per se* breach of the *Competition and Consumer Act 2010* (**the Act**), which means it is prohibited outright, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition.⁴

¹ Weldclass, *Notification of Proposed Resale Price Maintenance to the ACCC*, 4 October 2019, p. 8, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/weldclass>

² Weldclass RPM Notification, p.27

³ Weldclass RPM Notification, p. 30

⁴ Section 48 of the Act.

10. The Act allows a business⁵ to obtain protection from legal action for RPM conduct by lodging a notification describing the conduct (under section 93 of the Act) or by obtaining an authorisation for the conduct (under section 90 of the Act).
11. The legal protection provided by an RPM notification commences automatically at the end of a period of 14 days starting on a day the notification is validly lodged, unless the ACCC issues a draft notice objecting to the notification, within that 14 day period.⁶
12. In this case, the ACCC did not issue a draft notice within the 14 day period because Weldclass agreed to not commence engaging in the conduct until after the ACCC's assessment of the notification.

Legal test

13. The ACCC is required to 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 Proposed Conduct will not outweigh the likely detriment to the public from the Proposed Conduct.

Steps in the RPM notification process

14. Before the ACCC issues a notice under section 93(3A) revoking a notification, it must:
 - (a) issue a draft notice (such as this one) providing a summary of its reasons for considering that the likely public benefits from the Proposed Conduct will not outweigh the likely public detriments from the Proposed Conduct.⁷ This draft notice will be sent to the notifying business and interested parties and will be placed on the ACCC's public register;
 - (b) seek submissions from the notifying business and interested parties in response to the draft notice; and
 - (c) invite the notifying business and interested parties to request that the ACCC hold a conference in relation to the draft notice. Any conference request must be made in writing within 14 days from the date nominated by the ACCC.⁸ In this case, a conference must be requested no later than **13 March 2020**.
15. If a conference is requested, it must be held no later than 30 days after the expiration of the 14 day period nominated by the ACCC.⁹ In this case, if a conference is called the ACCC will hold it by **9 April 2020**. The purpose of a conference is to allow the notifying party or an interested party to put their views to an ACCC Commissioner and potentially respond to other parties views. If a conference is held, the ACCC will invite the notifying business and all interested parties to attend, and will prepare a record of the main points raised during the conference. Copies of this record, and all written submissions, will be placed on the public register.
16. The ACCC will then decide whether to issue a final notice revoking the notification. If the ACCC decides to issue a final notice to revoke the notification, the legal protection

⁵ Under the Act, a corporation or other person may lodge an RPM notification: s 93(1)(b) of the Act.

⁶ Section 93(7A) of the Act; regulations 9(a) and 9(b) *Competition and Consumer Regulations 2010*.

⁷ Sections 93A(1) and (3) of the Act.

⁸ Section 93A(2) of the Act.

⁹ Section 93A(5) of the Act.

provided by the notification ends on the 31st day after the ACCC issues the final notice or on a later day specified in writing by the ACCC.¹⁰

17. Alternatively, the ACCC may decide not to revoke the notification. If the ACCC decides not to revoke the notification, the legal protection provided by the notification, which commenced 14 days after valid lodgement continues.¹¹

Imposing conditions

18. If the ACCC reasonably believes it has grounds to revoke an RPM notification and 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 on a notification which must be complied with.¹²

ACCC consideration of RPM conduct

19. 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. It can also result in retailers deranging competing machines in favour of products with an artificially high price (and hence higher retail margin). In some circumstances, RPM may also increase the risk of co-ordination or collusion between upstream competitors (manufacturers) or signal an opportunity for manufacturers to raise prices.
20. 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.
21. 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.
22. In certain circumstances, RPM can result in public benefits, including by promoting competition in non-price dimensions, particularly service quality. For example, producers of particularly 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 that highlight key and unique features and training staff to be able to provide advice about the products, which is valued by consumers. Faced with the same prices across all resellers, consumers are more likely to make their purchase from the reseller that offers the best service and support.
23. Without RPM, other resellers who do not invest in the same high level of 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

¹⁰ Section 93 (7C) of the Act

¹¹ Section 93(7A)(a) of the Act.

¹² Section 93AAA(1) of the Act.

competitors. RPM can also create an incentive for retailers to be innovative in providing valuable services to consumers and an incentive for manufacturers to develop more advanced products.

24. Free riding can occur when customers visit one retail outlet and receive high levels of service such as product demonstrations and an opportunity to try the product and then buy from another retail outlet. One retailer free rides on the services of another retailer. This free riding problem may make providing costly retail services commercially unviable. This is more likely to be the case where a higher proportion of consumers use high levels of retail services in deciding what to buy, but purchase from low-service online discounters. Consumers 'shopping around' to understand products and check prices before purchasing does not necessarily result in a free rider problem.

Tooltechnic 2014 RPM authorisation

25. On 5 December 2014 the ACCC granted conditional authorisation A91433 to Tooltechnic Systems (Aust) Pty Ltd (**Tooltechnic**) to set minimum retail prices on Festool products for a period of five years. This was the first application for authorisation of RPM conduct since 1995, when the Act was amended to allow the ACCC to authorise such conduct.
26. Tooltechnic submitted that a variety of pre-sales services are needed in order to communicate the unique features of the Festool range, in particular its specialised functionalities, high durability and complex integrated systems. Tooltechnic claimed that these features are not obvious to customers.
27. Many market participants suggested that Festool products benefit from services at the point of sale due to their complexity and the lack of customer awareness regarding the potential uses and benefits of Festool's products.
28. The ACCC stated that Festool is not unique in attempting to set itself apart from other power tool manufacturers through the use of specialised features and benefits. However, the ACCC accepted that retail services are particularly important in order to help inform Festool customers of the features of Festool products that differentiate them from other brands' offerings.
29. The ACCC concluded that Tooltechnic setting minimum retail prices would eliminate price competition between Festool resellers resulting in a clear detriment as some customers would face a higher retail price for the products. The extent of the detriment was likely to be limited by the wide range of alternative trade quality power tools available to customers 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.
30. The ACCC also concluded that:
 - Festool products are complex products, which are highly differentiated in terms of their attributes and quality and the provision of services to customers including pre-sale explanations, demonstrations and 'try-before-you-buy' of Festool products and post sales services such as repairs, loan tools and training in use of a product and these services are important in the sale of Festool products.
 - Customers can access retail services from one retailer but then purchase the product from another retailer (which may not provide retail services) at a discount. That is, some retailers can free ride on the services offered by other retailers.

31. The ACCC determined that the public benefit resulting from the increase in retail services would likely outweigh the clear, but limited, detriment resulting from the fact that some customers will face a higher retail price for Festool products.
32. The ACCC noted that it was difficult to weigh the public benefits and detriments before the conduct commenced and decided to require Techtronic to provide the ACCC with certain information on an annual basis.

Tooltechnic 2018 RPM notification

33. On 12 February 2018, Tooltechnic lodged a RPM notification for its Festool and Fein branded power tools. The ACCC conducted an assessment of the benefits and detriments of the conduct having regard to the information Tooltechnic reported under the conditions of its 2014 authorisation. The ACCC's assessment of the notified Festool and Fein conduct 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 during the period of authorisation. This allowed the ACCC to conduct an intensive and practical assessment of the likely effect of the notified conduct.
34. The ACCC accepted that the Festool and Fein range of tools are 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.
35. The loss of discounting entailed by RPM was a clear detriment to some consumers. However, in the unique circumstances of the Tooltechnic notification, the ACCC considered that the information it had obtained did 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.
36. Accordingly, the ACCC decided at the time, not to take further action in respect of the RPM notification, that is, it allowed the notification to stand and did not commence action to revoke the notification. The ACCC stated that it would monitor the effects of the Proposed Conduct closely, both in deciding whether it became necessary to revoke the Tooltechnic notification in the future and in determining any changes to its approach to any future notifications. The ACCC also stated that it should not be assumed that because it allowed the Tooltechnic notification to stand, the ACCC will not object to future notifications for RPM.

The Notified Products

37. The Notified Products include nine welding machines and one plasma cutter. The welding machines cover a range of welding processes including manual metal arc (**MMA** or 'stick') welding, metal inert gas (**MIG**) welding and tungsten inert gas (**TIG**) welding.
38. Welders range from compact, portable and inexpensive stick welders suitable for small jobs on thin material, to welders capable of multiple welding processes (i.e. stick, MIG and TIG) with multiple manual and automatic features to improve the likelihood the user will create high quality professional welds.
39. A plasma cutter is an electrically powered machine used to make precise cuts in metals including steel, copper, brass and aluminium. Many plasma cutters are large

and expensive and are typically found in specialised engineering workshops. Following technology improvements and with the onset of low cost manufacturing, small compact and relatively inexpensive plasma cutters can be purchased by small workshops, trades people and DIYers such as car enthusiasts.

40. Weldclass submits that there are over 22 brands of welding and plasma cutting machines supplied in Australia and over 465 machine models; the market is extremely competitive and no one brand dominates the market.¹³
41. Weldclass submits that the Notified Products are cheaper when compared to other competitive products however they have higher specifications and features than comparable competitor products.¹⁴
42. Welding and plasma cutting machines are sold by large discount tool retailers such as Sydney Tools, Total Tools, Bunnings, smaller specialist tool shops and specialist welding suppliers. With the increase in low cost manufacturing, machines have reduced in price and there are now many brands and models to suit inexperienced tradespeople and DIY users that weld infrequently.
43. Based on ACCC market inquiries, retail margins on machines have fallen to the extent that some small tool shops have decided to stop selling any welders or to reduce their range. Retailers such as Sydney Tools and Total Tools carry a range of different brands and models of welders and some plasma cutters.

Weldclass rationale for the Proposed Conduct

44. This section summarises Weldclass' stated rationale for the Proposed Conduct.
45. Weldclass has invested significant time and resources into developing a premium range of welding and plasma cutting machines, which require a premium level of distributor pre and post-sales service. Weldclass wishes to protect its investment in the new range of machines.
46. The Proposed Conduct will provide sufficient consistent return for distributors of the Notified Products to invest in infrastructure, floor space, additional training and pre and post-sales service.
47. Welding and plasma cutting machines are complex and include a variety of settings and features that are set depending on the type and size of the material and the accessories being used with the machines. Sale of these machines requires specialised advice and the public are likely to be best served purchasing from full service retailers rather than discount retailers, including online retailers.
48. Many consumers are sold welding and cutting machines that are unfit for their intended purpose and/or are over/under specified for the intended use, and therefore unsuitable for the consumer. This situation arises as a result of:
 - The price discounting culture in the welder/cutter market.
 - The selling of welders by tool shops, hardware stores, other general industrial supply outlets and online retailers that do not have appropriate product knowledge and/or the ability to match a product to a customer. As a result consumers are

¹³ Weldclass RPM Notification, pp. 41-42.

¹⁴ Weldclass RPM Notification, p.42.

being sold specialised welding and cutting machines by retail staff that have little to no welding experience, knowledge or training.

- The growth in the non-professional welding market, which has been driven by the increase in welder and cutter machine affordability. This non-professional end of the market is comprised of tradespeople and home do-it-yourself users, who are untrained, inexperienced and generally have little knowledge of welding. The notified products are predominantly used by this end of the market.
49. Price discounting has become the primary focus for some retailers, at the expense of non-price service-based competition created by focussing on appropriate well-informed product advice, product demonstration, reliable after-sales support/troubleshooting and product warranty.
50. The focus on discounting creates an environment conducive to free riding, whereby some consumers visit full service retailers for product advice, including where possible to 'try before they buy' but then purchase the product from a discount store or online retailer. As a result full service retailers that provide high levels of product advice, make insufficient sales and are at risk of closing or deciding to become low service retailers to the detriment of consumers purchasing welders.
51. As a result of price pressure and competition, there has been a lack of investment by major suppliers on both product development and the provision of retail services. Price competition and discounting rewards suppliers of some products to the detriment of bricks and mortar distributors and consumers.
52. Weldclass submits that the Proposed Conduct will:
- encourage product innovation, research and development
 - incentivise retailers to display a larger range of notified products
 - enable the provision of point of sale material (**POS**) setting out product specifications and features.
53. The RPM conduct will guarantee a consistent return for distributors and enable them to have the confidence to invest in infrastructure, floor space, additional training and pre- and post-customer service and then compete on these aspects with discount and online retailers.
54. Since the introduction of its new range of machines, Weldclass has restricted the number of distributors that can sell them. Weldclass considers that in the absence of the Proposed Conduct, restricting the number and location of distributors is an appropriate approach. However, in the long term the current level of service it provides to the restricted number of distributors of the new machines is unsustainable.
55. The restricted distributor policy results in several downsides including:¹⁵
- A significant reduction in availability of the Notified Products Australia wide and a reduction in consumer choice.
 - Less service based competition because there are fewer distributors selling the Notified Products, and therefore fewer distributors competing on service, rather than price.

¹⁵ Weldclass RPM Notification, p. 54.

- It restricts Weldclass's opportunity to grow and expand and adds a complication to the Weldclass business model and distributor network.
56. Similarly, the current WeldForce Distributor Agreement states that distributors must not *'...advertise any WeldForce Products via any website or Internet sale site including the Distributor's website without the express written permission of Weldclass.'*¹⁶ Weldclass submits that restricting advertising has many downsides including:¹⁷
- Preventing customers from being informed that the Notified Products are sold by a particular distributor, which restricts consumers' ability to make an informed decision about product availability and suitability.
 - Restricts customer choice, which is likely to be a public detriment.
 - Distributors are restricted in their ability to market the Weldclass range and advise customers of product features.
57. If Weldclass engages in the Proposed Conduct, it has advised the ACCC that it will lift its current restricted distributor policy and provide all its distributors that are willing to meet the relevant Weldclass RPM requirements, with access to the Notified Products.¹⁸
58. Weldclass has also stated that it would lift its restricted online advertising policy and allow distributors to advertise the Notified Products.¹⁹

ACCC assessment

Future with or without the proposed RPM conduct

Future with:

59. Weldclass distributors will be unable to sell the Notified Products below a minimum retail price, set by Weldclass. Consumers will be unable to negotiate cheaper prices for the Notified Products.
60. All Weldclass' current distributors will be offered the opportunity to sell the Notified Products. It is unclear how many of Weldclass' distributors, currently over 800, will decide to sell the Notified Products, however it is reasonable to assume the number of distributors selling the Notified Products will increase, possibly by a significant number.
61. Weldclass will lift its current restricted online advertising policy and allow distributors to advertise the Notified Products online at the minimum retail price set by Weldclass. The ACCC understands that if the online advertising restrictions are lifted, distributors will also be able to sell the Notified Products provided they meet requirements set out in the Distributor Agreement.

Future without:

62. Currently Weldclass restricts the number of distributors that can sell the Notified Products. Weldclass submits that the level of service that it provides to its distributors, which in turn enables distributors to provide high levels of service to customers, is

¹⁶ Weldclass RPM Notification, p. 55.

¹⁷ Weldclass RPM Notification, p. 55.

¹⁸ Weldclass RPM Notification, p. 54.

¹⁹ Weldclass RPM Notification, p. 55.

unsustainable due to the small number of distributors currently selling the Notified Products.

63. The ACCC considers that, without the Proposed Conduct, Weldclass is likely to offer the Notified Products to more distributors to sell. Distributors would engage in price competition and possibly some service based competition and individually determine the retail price for the Notified Products. This is likely to result in consumers being able to negotiate a cheaper retail price with distributors and receive information about the products from salespeople and via marketing material such as POS display materials and product information on Weldclass' website. The ACCC understands that some welding machine distributors currently successfully compete with discount retailers for the sale of other machine brands by bundling and selling machine consumables with the sale of a machine.
64. Without the Proposed Conduct, Weldclass may decide to reduce the level and extent of service to distributors. The ACCC notes that Weldclass has already developed brochures, videos, POS materials and other marketing material is available on its website. Weldclass may decide to continue to make these materials available to distributors so that distributors can continue to provide service to their customers. However, Weldclass may reduce spending on innovating these materials and on training reseller staff.

Area of competition

65. Weldclass did not define the relevant area of competition.
66. The ACCC considers that it is not critical to accurately define the market for its assessment, however the relevant areas of competition are likely to be the regional retail and wholesale supply of electric welding and plasma cutting machines. While some machines are quite small and lightweight, others are bulky and heavy and therefore likely to be costly to ship directly to customers. Accordingly some customers may prefer to visit bricks and mortar stores to purchase and take delivery of machines immediately rather than shop online.

Consultation

67. The ACCC sought submissions from a wide range of interested parties including specialist welding machine and welding consumables suppliers, large retailers (such as Bunnings, Sydney Tools and Total Tools) and other suppliers of welding and plasma cutting machines.
68. The ACCC received five public submissions from specialist welding retailers:
 - Addler – Recently stopped selling all welders because the profit margin is too low to justify the investment in stock. Addler found that after providing pre-sales service and advice, and offering a competitive price, customers bought welders elsewhere at a price very close to cost price.
 - Barlows of Ballina submits that setting a minimum resale price would enable it to spend time with customers and then sell them the appropriate machine.
 - Hampdon Industrial does not sell the Notified Products, however it supports the Proposed Conduct noting that another welding machine wholesaler has implemented similar conduct and as a result Hampdon is now able to spend more time and money with customers helping them purchase the correct machine.

- Gold Coast Welding Supplies supports the Proposed Conduct submitting that if the price is the same for all retailers, then the customer can choose the distributor with the best service and support. Tool shops sell welders based on price and high store traffic whereas welding specialists like Gold Coast Welding Supplies offer product demonstrations and advice. Fixed minimum pricing will help Gold Coast Welding Supplies remain competitive and continue trading.
 - Roma Tools, a welding specialist retailer that provides a high level of customer service and advice, supports the Proposed Conduct submitting that it struggles to compete with retailers that discount welders, including online retailers, which do not offer a similar level of pre and post-sales service.
69. Welding Guns of Australia Pty Ltd, trading as Uni-Mig Welding (**Unimig**) made a public submission opposing the Proposed Conduct. In summary, Unimig submits that:²⁰
- The Proposed Conduct will have anti-competitive consequences as retailers will derange competing machines.
 - Weldclass products are not innovative or high end, are not designed by Weldclass and therefore do not justify RPM conduct.
 - Weldclass products are not designed by Weldclass and are essentially off the shelf machines sourced directly from Chinese manufacturers with minor non-innovative changes to the machines.
 - Weldclass' service delivery is not innovative nor unique compared to what is offered by competitors.
 - The Proposed Conduct will not change consumer product research habits and buying behaviour.
 - There is no guarantee that a distributor will use the additional profit margin from RPM conduct to invest in pre and post-sales support.
70. Several additional interested parties contacted the ACCC about the Proposed Conduct and decided not to lodge a submission.
71. The ACCC also visited a number of retail outlets that sell the Notified Products as well as several outlets that do not currently sell the Notified Products.
72. Interested party submissions and comments have been considered in the ACCC's assessment of the public benefits and detriments.

Public detriments

73. The ACCC considers that, in general, consumers are best served by retailers independently setting their prices based on their own assessment of prevailing market conditions and their own business strategies. Any restriction on their ability to do so impedes their ability to compete, including through a differentiated price offering, to attract customers.

Consumers will pay higher prices for the Notified Products

The impact on prices for the Notified Products

²⁰ Unimig submission, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/weldclass>

74. Weldclass acknowledges that the Proposed Conduct will prevent price competition for the Notified Products, which may result in retail prices being slightly higher than without the Proposed Conduct. However it submits that this higher retail price is offset by the many advantages of the conduct, particularly higher levels of distributor training, the provision of expert advice to consumers, user training and service, user guidance and warranty benefits, all of which results in consumers making an informed choice and purchasing a machine that is fit for purpose.²¹
75. The ACCC considers that, to the extent it is binding, RPM will result in detriment by restricting the ability of retailers to compete against one another on the price of the Notified Products; RPM will eliminate intra-brand price competition. Consumers will also be unable to negotiate discounts for the Notified Products, even if the distributor would be willing to supply at a lower price. As a result of both factors, consumers will pay higher prices than they would pay without the Proposed Conduct.

Constraint on Notified Product prices

76. Weldclass submits that any detriment from increased prices for the Notified Products is likely to be limited. It will not seek to inflate prices above competitive levels because of the prevalence of inter-brand competition (that is, competition between brands) at the distributor level. Distributors may stop selling the Notified Products if prices are uncompetitive and sales are consequentially weak. Further, Weldclass wants to increase sales volume and increasing prices above a competitive level may reduce volume.²²
77. There are several upstream competitors operating in the wholesale market for the supply of welding and plasma cutting machines to distributors. The ACCC accepts that currently there is inter-brand competition operating at the distributor level and ordinarily this would be likely to limit the loss of intra-brand competition as a source of detriment from the Proposed Conduct. However, as discussed below, the Proposed Conduct is likely to have a detrimental impact on inter-brand competition.

Consumers will pay higher prices for competing products

78. The ACCC considers that higher retail prices for the Notified Products can also provide latitude for upstream suppliers (manufacturers) and/or distributors of competing products to increase their prices. The degree to which this is likely depends on the strength of other constraints that affect the prices of competing products.
79. During consultation, the ACCC was provided with an example of a welding machine supplier that increased retail prices in response to another supplier changing its distributor pricing policy, which increased the recommended retail price of its welding machines. The outcome was that consumers paid more for both brands of machine.
80. While it may be the case that Weldclass will be unable to raise prices beyond a competitive level because consumers will switch to competitor brands of machines, it is also possible that competitors would respond to the Proposed Conduct and any attempt to increase prices above a competitive level, by also raising their prices. This lessening of competition and upward pressure on prices would be a public detriment.

²¹ Weldclass RPM Notification, pp 77-78.

²² Weldclass RPM Notification, p. 81.

Loss of retail product range and choice

81. Unimig submits that all suppliers of welding and plasma cutting machines compete for limited retail floor space. Under the Proposed Conduct, Weldclass distributors will receive a higher return on the Notified Products, which provides an incentive for retailers to stock the Notified Products. In these circumstances retailers, particularly small retailers, will discontinue selling, or substantially reduce their stock/display, of competing products.
82. Unimig also submits that the influence of Weldclass in the market is not insignificant; while its current market share of welding and plasma cutting machines may be small it may use its goodwill, reputation and relationships within the welding consumables market to influence the welding and plasma cutting market.
83. Unimig submits that the Proposed Conduct restricts the ability of distributors to conduct sales to clear their existing stock of the Notified Products in order to stock other competing brands' products.
84. The ACCC considers that RPM can have a detrimental impact on inter-brand competition via reduced product range where retail floor space is limited, as is the case in many tool and specialist welding supply outlets. Welding machine distributors are likely to favour brands that provide a higher profit margin to the distributor. In circumstances where floor space is limited, brands that provide a lower distributor profit margin are likely to be de-ranked to make way for more profitable brands, reducing inter-brand competition. ACCC consultation with interested parties confirms this scenario is likely.
85. While Weldclass' current market share is small compared to some of its competitors, if Weldclass engages in the Proposed Conduct and lifts its restricted distributor policy, as it says it will, more distributors will sell the Notified Products and any detrimental impact on inter-brand competition is likely to increase.
86. Lifting the restricted distributor policy can have other effects also. The ACCC notes Weldclass' submission that its distributors can stop selling the Notified Products and sell competing brands if prices are, or become, uncompetitive. However in these circumstances, distributors may be unable to discount existing stock to clear floor space for competitor brands. This is likely to reduce consumer choice for welding and plasma cutting machines and have a detrimental impact on inter-brand competition.
87. Unimig submits that allowing Weldclass to engage in RPM conduct may result in other welding machine suppliers applying their own RPM model. This may further impact inter-brand competition. The ACCC notes, as outlined in paragraph 9, that RPM is prohibited under the Act and legal protection for RPM conduct can only be obtained by lodging a notification or by applying for authorisation. Each notification or application will be assessed on a case by case basis.

Public benefits

88. In the past the ACCC has accepted that in some circumstances, RPM can result in public benefits. Public benefits have been tied to addressing market distortions, such as free riding that would otherwise result in under-provision of pre-and post-sales retail services. The existence and extent of public benefits depends on the circumstances of each notification.

89. Weldclass submits the Proposed Conduct is likely to result in a wide range of public benefits.²³ These claimed public benefits have been arranged into groups of similar issues and, to the extent they are relevant to the assessment, have been considered below.

Eliminating free riding and increasing service based competition

90. Weldclass submits that the Proposed Conduct should assist in eliminating intra-brand free riding by Weldclass distributors.²⁴

91. Weldclass submits that free riding is rife in the welding machine market and in the absence of the Proposed Conduct it too will be negatively affected.²⁵ Weldclass submits that there is a real likelihood that many existing full-service specialist welding retailers will be pushed out of the market by free riding and discount retailers.²⁶

92. Weldclass submits:

- The Proposed Conduct will remove the current focus on price competition and promote competition based on the quality of distributor service and expertise.
- The Proposed Conduct will result in distributors earning a guaranteed profit margin on the Notified Products so that they can invest in infrastructure, floor space, training, customer demonstrations, user training and pre and post sales service.
- Due to the complexity of the Notified Products, the provision of pre and post sales service by its distributors is important and necessary so that consumers purchase a machine that is fit for purpose.
- It markets its welders and cutters to a niche market who require quality products with innovative features and premium service. Weldclass submits that the Notified Products are not unique in terms of their main function, however the combination of innovative functions and features designed specifically for Australian users and designed to accommodate non-professional welders as well as professionals, sets them apart from their competitors.²⁷

93. Unimig submits that free riding is not a phenomenon new to any industry or exclusive to the welding industry, nor exclusive to Weldclass products. The problem is faced by all suppliers of branded products. The retail industry generally faces this challenge because of the use of the internet to compare prices.

94. Specialist welding retailers submit that profit margins on welding machines are low and the Proposed Conduct will remove discounting and, by overcoming free-riding risks, encourage sales staff to spend more time with customers, increasing the likelihood that customers buy the best machine for the intended use.

95. The ACCC notes that prior to lodging its 2014 application for authorisation to engage in RPM conduct, Tooltechnic had utilised contractual arrangements in an effort to induce retailers to provide the necessary high level of customer service it considered necessary for its products. Ultimately, Tooltechnic found that the onset of aggressive discounting, internet sales and smart phone technology meant that its contractual

²³ Weldclass RPM Notification, pp. 58-63.

²⁴ Weldclass RPM Notification, p. 17.

²⁵ Weldclass RPM Notification, p. 19

²⁶ Weldclass RPM Notification, p. 15

²⁷ Weldclass RPM Notification, p. 32

arrangements became ineffective in preventing free riding and as a result retailers did not provide sufficient service to customers.²⁸

96. The ACCC notes that Weldclass has taken a different approach in delivering its new machines to market. Weldclass commenced distributing the Notified Products to a small number of distributors in March 2019 insisting that distributors provide high levels of customer service by investing in infrastructure, floor space, training, customer demonstrations and pre and post sales service. Weldclass states that it supports its distributors by providing sales and marketing resources, sending a Weldclass representative to distributors to assist with merchandising and training and also providing back office support for technical inquiries and management of the product warranty scheme.
97. Submissions by Weldclass, (including confidential end user comments) and the ACCC's market inquiries, suggest that the information and service currently provided by Weldclass to its distributors (such as POS material, brochures, videos, online and phone support and visits from Weldclass representatives) coupled with distributor in-store activities, is resulting in a high level of customer service now.
98. Based on the information available the ACCC is unaware of any current discounting of the Notified Products which results in problematic free riding.
99. The ACCC notes the submissions by Weldclass that there is free riding in the welding machine market. Several interested parties that spoke to the ACCC raised these concerns also.
100. Free-riding does not appear to be a substantial problem more generally because none of the welding products sold in the relevant price range appear to require much higher levels of service than are currently provided. To the extent that free riding does exist in the welding machine market, there may be a risk of future free riding for the Notified Products if Weldclass distributes its new machines more widely, as it says it intends to do and it relaxes its current restricted online advertising policy. However, the presence and extent of any future free riding is unclear at the present time.
101. Removing price competition and eliminating free riding can result in distributors competing on service.
102. The ACCC notes Weldclass rationale for the Proposed Conduct; that Weldclass has invested in developing its new machines, Welding and cutting machines are complex and if consumers do not receive appropriate levels of pre-sales service, they may purchase an unsuitable machine.
103. The ACCC accepts that generally, welders and plasma cutting machines include features that may be complex to understand and use, particularly for new or inexperienced users. Matching a machine to the task and considering the environmental and safety factors adds an additional layer of complexity. As a result some consumers are likely to need and value retail services prior to purchase.
104. Market inquiries conducted by the ACCC and end user comments provided by Weldclass suggest that the Notified Products include good features, some of which are better than those of similarly priced machines. However the inclusion of these features does not mean that consumers interested in buying the Notified Products require more explanation or training than other similarly positioned and priced machines. Further,

²⁸ Tooltechnic, Final Determination, p. 11; available: [Tooltechnic Authorisation A91433](#)

based on market inquiries, the opportunity for consumers to try before they buy is limited. Some current distributors have access to a welding bay enabling customers to try a machine before purchase; other distributors are yet to install a bay and cannot provide product demonstrations and an opportunity to try machines. Product demonstrations may be more valuable for high priced products with novel features and where the customer wants to confirm that a product is suitable for a particular purpose as is likely to be the case for many Festool products.

105. Professional fabricators and some experienced tradespeople are unlikely to require significant pre-sale service because of their technical expertise and experience with similar machines. Other users such as tradespeople and DIY users with little to no experience and expertise may require significantly more service from distributors.
106. Interested parties stated that the Notified Products are quite different to Festool and Fein products in terms of features, quality, modularity, market position, complexity and price point. Accordingly, interested parties considered that setting minimum prices for Festool and Fein products was justified, but that is not the case for the Notified Products.
107. The ACCC notes that in making its 2014 Final Determination on the Tooltechnic application for authorisation, market inquiries supported Tooltechnic's assertions that the Festool products are complex, positioned as niche, high quality and at a high price point.
108. Based on the information provided by Weldclass and interested parties, the ACCC considers that the Notified Products are not more complex and highly differentiated in terms of their attributes and quality compared to other brands of welding and plasma cutting machines and therefore are unlikely to require more pre and post sales retail service than other brands of machines.

Increasing the number and viability of full service retailers

109. Weldclass submits that the Proposed Conduct is likely to encourage more distributors to become full-service retailers. It would also promote and enhance the viability of bricks and mortar welding retailers who provide full service offerings to customers.
110. Unimig submits that all machine suppliers are trying to distribute to bricks and mortar distributors and dealers, not just Weldclass. The demise of bricks and mortar dealers is largely due to the rise of online retailing and purchasing habits and is no different to what is happening for grocery stores and other large department stores. Umimig also submits that Weldclass distributes its other products online.
111. The ACCC accepts that some consumers, particularly those that are less well informed and less experienced with these types of machines, are likely to prefer visiting a traditional retail outlet, rather than an online retailer. In this context, the Proposed Conduct is likely to result in some public benefit.

Balance of public benefits and detriments

112. The ACCC considers that the Proposed Conduct is likely to result in public detriments in the form of:
 - Higher retail prices for the Notified Products because the Proposed Conduct will prevent consumers from negotiating a lower price.

- Higher retail prices for competitors' products as they respond to the Proposed Conduct and the lack of discounting for the Notified Products.
 - A reduction in inter-brand competition as more distributors decide to sell the Notified Products because of the higher retail margin and, due to limited floor space, stop selling competitors' products.
113. The ACCC considers that the Proposed Conduct is likely to result in some public benefits in the form of:
- Eliminating the risk of future free riding (noting there is currently no evidence that free riding is occurring now), which would in turn encourage and incentivise distributors to increase service levels for the Notified Products.
 - An increase in the number and viability of full service retail outlets selling the Notified Products, which provide consumer access to retail services and consumer choice.
114. The ACCC considers that consumers are price sensitive and the likely impact on prices from the Proposed Conduct, combined with the broader reduction in competition is likely to be more significant than the likely benefits. Accordingly, the ACCC considers that the likely public benefits of the Proposed Conduct do not outweigh the likely public detriments of the Proposed Conduct.

Draft Notice

115. For the reasons set out in this draft notice, the ACCC, based on the information available and in accordance with s93(3A), is satisfied the likely benefit to the public will not outweigh the likely detriment to the public from the Proposed Conduct and therefore gives this notice under s93A proposing to revoke notification RPN10000454 lodged by Weldclass on 4 October 2019.

Next steps

116. The ACCC now invites submissions and further information from Weldclass and interested parties. In addition, consistent with section 93A of the Act, the notifying party or an interested party may request that the ACCC hold a conference to discuss the draft notice.
117. While there is no statutory timeframe for the next stage of the ACCC's assessment process, the ACCC intends to conclude its assessment in a timely manner and requests any further submissions be provided by **30 March 2020**.
118. Requests for the ACCC to hold a conference to discuss the draft notice must be provided in writing by **13 March 2020**. The ACCC will then proceed to make a final decision on the notification.