



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Resale Price Maintenance notification guidelines

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Australian Competition and Consumer Commission

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[www.accc.gov](http://www.accc.gov)

## 1. Introduction

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

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.<sup>1</sup>

The Act allows a business<sup>2</sup> to obtain legal protection to engage in RPM conduct without breaching the RPM prohibition in the Act where the ACCC is satisfied that the likely public benefits from the RPM conduct outweigh the likely public detriments. Legal protection can be obtained by:

- lodging an RPM **notification**, or
- obtaining **authorisation** for the conduct.

This guide provides information about the RPM notification process. The ACCC's [Guidelines for Authorisation of Conduct \(non-merger\)](#) contains details about the authorisation process.

## 2. Resale Price Maintenance

RPM may arise in several ways, including if the supplier makes it a condition of supply that the reseller must (or threatens to withdraw supply if the reseller does not):

- sell the goods or services at a certain price
- not sell below a certain price
- only discount to an extent that is 'agreed' or not discount at all
- comply with a recommended retail price (RRP) or not price a certain percentage below it.<sup>3</sup>

## 3. RPM notifications

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. Prior to this date, ACCC authorisation was the only way to obtain legal protection for RPM conduct. Authorisation will continue to be available, so now businesses proposing to engage in RPM now have a choice of lodging a notification or seeking authorisation.

### Lodgement

#### When to lodge a notification

A business may decide to lodge a notification if it proposes to engage in conduct that may constitute RPM, but it considers that the public benefits resulting from the proposed conduct are likely to outweigh the public detriments.

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<sup>1</sup> Section 48.

<sup>2</sup> Under the Act, a corporation or other person may lodge an RPM notification (s 93(1)(b)).

<sup>3</sup> Section 96.

The assessment of risk and whether it is necessary to lodge a notification ultimately lies with the business proposing to engage in the relevant conduct.

## How to lodge a notification

The ACCC encourages businesses to contact it before they lodge a notification for proposed RPM conduct. These discussions enable businesses to outline their proposal to the ACCC to ensure they provide all relevant information and documents as part of the notification.

A notification can only be lodged by the business that is proposing to engage in the RPM conduct.

To lodge a notification, the business must:

- provide the information required by the notification [form](#), which is available on the [ACCC website](#), and
- pay the notification fee, which is \$1000 per notification unless a concessional fee applies.
  - A concessional fee of \$0 may apply where additional notifications are lodged within 14 days of the first notification and relate to conduct in the same, or closely related, markets as the first notification.
  - See the [ACCC's website](#) for details on how to pay the lodgement fee.

The ACCC requests that notifications be lodged electronically via the [Authorisations and Notifications Web Form](#), but they can also be lodged by mail or in person at an [ACCC office](#).

Once the notification is assessed as validly lodged, it will be placed on the ACCC public register, on the ACCC website.

## Information required

The information the ACCC requires to assess a notification will vary depending on the nature and complexity of the proposed conduct and the market(s) involved. The ACCC can assess your notification more efficiently and effectively if you provide comprehensive information and evidence.

As part of the notification it is important that you:

- describe the proposed conduct in a sufficiently precise manner such that the ACCC can consult with interested parties and assess the notification
- outline the areas of competition (relevant markets) likely to be affected by the proposed conduct
- describe the likely public benefits from the proposed conduct
- describe the likely public detriments, including any likely detrimental effect on competition
- provide any other information that is relevant to the ACCC's assessment.

The ACCC will give more weight to claims that are supported by relevant evidence.

The ACCC may seek further information from the notifying business or consult with interested parties. The ACCC generally prefers to obtain its information cooperatively but may exercise its compulsory information gathering powers under s 155 of the Act where appropriate.<sup>4</sup>

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<sup>4</sup> Section 155(1).

## Amending or withdrawing notifications

A notification cannot be amended after it is lodged.

A notification can be withdrawn by the notifying business by writing to the ACCC at any time. If a notification is withdrawn, it will remain on the ACCC's public register in the 'withdrawn notifications' subsection.

Where a notification has been withdrawn, the notifying business is unable to lodge a notification in relation to the same conduct or for conduct to like effect.<sup>5</sup> Businesses are encouraged to contact the ACCC before lodging further notifications.

## Commencement of legal protection

The protection from legal action provided by a notification automatically commences 28 days<sup>6</sup> after the date the notification was validly lodged, unless the ACCC issues a draft notice objecting to the notification within that period.

While the notification is in force, the business is able to engage in the RPM conduct as described in the notification without the risk of breaching the RPM provisions of the Act.

The protection will continue unless or until the notification is revoked or withdrawn.

## 4. ACCC assessment

### Legal test

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.

### Public benefits and public detriments

The Act does not define what constitutes a public benefit or public detriment. The ACCC adopts a broad approach and will assess matters on a case by case basis.

RPM is prohibited by the Act *per se*, meaning that it is illegal (unless an authorisation or notification is in place), regardless of whether it has an anti-competitive purpose or effect. This reflects the fact that RPM can result in detriments to competition and the public. In particular, RPM can cause harm to the competitive process by reducing or eliminating price competition between resellers. This 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.

The risk of 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 set retail prices above the competitive level.

The ACCC recognises that, in certain circumstances, RPM can result in 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-sales services such as

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<sup>5</sup> Section 93(10).

<sup>6</sup> 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.

demonstrations and advice that are valued by consumers. Without RPM, other resellers could 'free ride' on these investments by setting lower prices.

The likely benefits and detriments resulting from RPM conduct will be assessed on a case by case basis. In 2014, the ACCC considered the public benefits and detriments from RPM conduct as part of its assessment of an application for authorisation by Tooltechnic, as set out in the box below. The ACCC will take the same approach to assessing benefits and detriments regardless of whether legal protection for the RPM conduct is sought via notification or through the authorisation process.

#### **Case study: Tooltechnic**

In 2014, Tooltechnic sought authorisation from the ACCC to engage in RPM. (Tooltechnic could not lodge a notification because, at that time, notification was not available for RPM conduct).

Tooltechnic sought authorisation to amend agreements with its dealers to include a requirement that dealers not sell any Festool products below minimum prices, as nominated by Tooltechnic. Festool products were expensive and complex, and Tooltechnic encouraged its dealers to provide high levels of pre- and post- sale services to customers. Tooltechnic was concerned that there was a risk customers would access pre- and post-sale services from one retailer but purchase the product at a discount from another retailer who did not provide the services, thereby reducing the incentive to provide the services. Tooltechnic sought authorisation to address this risk, as it was concerned that high-servicing retailers may not gain sufficient return on product sales to continue providing these services.

In granting conditional authorisation the ACCC considered that, in this case, RPM conduct would likely address 'market failures' in respect of the sale of Festool products. In particular, the ACCC considered that, as a result of the RPM conduct, retailers would be likely to invest in pre- and post-sale services, as the risk of free-riding would be addressed. Such an increase in service was likely to generate public benefits including that some customers would make more informed decisions in purchasing quality power tools and customers would continue to receive the choice of a premium trade quality power tool product which is accompanied by a high level of pre- and post-sales service.

The ACCC noted that the risk of harm from RPM conduct would be minimised where the product was subject to strong competition from other goods. In this instance, this was the case – Tooltechnic only had a very small share of the market.

The ACCC granted authorisation to Tooltechnic subject to conditions, including a requirement that Tooltechnic report annually on pricing and sales information on the relevant products and provide any additional information requested by the ACCC.

Importantly, the ACCC emphasised in its determination that, though RPM may in certain circumstances address market failure and generate benefits, this will depend on the circumstances of each case.

## Imposing Conditions

If the ACCC reasonably believes that it has grounds to revoke an RPM notification because the net public benefit test is not satisfied, but that these grounds would not exist if particular conditions relating to the RPM conduct were complied with, then the ACCC can issue a 'conditions notice' imposing those conditions.<sup>7</sup>

The ACCC must provide a written statement of its reasons for issuing a conditions notice.<sup>8</sup>

Following the issue of a conditions notice, if the ACCC is satisfied that the business has not complied with those conditions, it can take steps to revoke the notification.<sup>9</sup>

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<sup>7</sup> Section 93AAA(1).

<sup>8</sup> Section 93AAA(2).

<sup>9</sup> Section 93(3B).

## Steps in the process

Upon a notification being lodged, the ACCC will assess the notification and decide either to:

- **take no further action** at the current time, which allows the legal protection provided by the notification to commence or continue unless and until the ACCC decides to revoke the notification, or
- **take steps to remove the protection** from legal action by revoking the notification.

### No further action

If the ACCC is satisfied that the proposed conduct is likely to result in a net public benefit the ACCC will decide to take no further action at that time. The ACCC will advise the notifying business and any interested parties of its decision and update the public register.

The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notification. Triggers for review might include complaints from those affected by the conduct, a change in market conditions or new information coming to light.

### Revoking a notification

If the ACCC considers that the test to revoke a notification in section 93(3A) of the Act is met (i.e. that the likely public benefits of the notified conduct do not outweigh the likely public detriments) the ACCC may issue a written notice objecting to the notification. Before the ACCC does so, it must:

- issue a draft notice outlining the reasons why the ACCC proposes to revoke the notification
- seek submissions from the notifying business and interested parties in response to the draft notice, and
- hold a conference, if requested.

### Draft notice and consultation

Before removing the legal protection provided by a notification, the ACCC must issue a draft notice outlining its reasons for considering that the likely public benefits from the notified conduct will not outweigh the likely public detriments.

The draft notice will be sent to the notifying business and placed on the public register to allow for public consultation.

The ACCC will seek submissions on the draft notice from the notifying business and from interested parties.

### Opportunity for a conference

When the ACCC issues a draft notice objecting to a notification, it will provide the notifying business and interested parties with an opportunity to request that a conference be held. Conferences of this kind are chaired by an ACCC commissioner and provide the notifying business and interested parties with an opportunity to make oral submissions relating to the draft notice and the notification.

Any conference request must be made in writing within 14 days from the date nominated by the ACCC. If a conference is requested, it must be held no later than 30 days after the expiration of the 14-day period.<sup>10</sup>

The ACCC 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.

### **Final decision**

If the ACCC decides to issue a final notice to revoke a notification, the legal protection provided by the notification will cease on the 31<sup>st</sup> day after the notice is given or on any later date specified in writing by the ACCC.<sup>11</sup>

The ACCC will place a copy of the final notice on the public register and will provide it to the notifying business and interested parties.

When a notification is revoked, the notifying business cannot lodge a further notification in relation to the same conduct or for conduct to like effect.<sup>12</sup> Businesses are encouraged to contact the ACCC before lodging further notifications.

Alternatively, the ACCC may decide not to revoke the notification. If this is the case, the legal protection provided by the notification will continue.

### **Tribunal review**

The giving of a final notice revoking a notification by the ACCC is subject to review by the Australian Competition Tribunal.<sup>13</sup> A person seeking review must lodge an application for review with the Tribunal within 21 days of the ACCC giving the final notice.<sup>14</sup>

If an application to the Tribunal is lodged, the legal protection continues unless and until the Tribunal makes a decision affirming the giving of the final notice.

The Act does not provide for review by the Tribunal of an ACCC decision to allow a notification to continue.

## **5. Public register**

Under the Act the ACCC must maintain a public register containing documents provided in relation to a notification.<sup>15</sup>

The public register enables the notification process to be as open and transparent as possible. This allows the claims made by the notifying business about the impact of the proposed conduct to be tested and gives interested parties the opportunity to put their views.

The public register is available on the [ACCC's website](#).

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<sup>10</sup> Section 93A(5).

<sup>11</sup> Section 93(7C).

<sup>12</sup> Section 93(10).

<sup>13</sup> Section 101A.

<sup>14</sup> Reg. 20(2) *Competition and Consumer Regulations* 2010.

<sup>15</sup> Section 95(c).

## 6. Contacts and further information

The ACCC is available to discuss the notification or authorisation process with parties before they lodge a notification or apply for authorisation. We can provide guidance on the type of information that is likely to be relevant to the ACCC's assessment and we can provide comments on a draft notification before it is lodged.

### Related publications

[Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes](#)

[Guidelines for Authorisation of Conduct \(non-merger\)](#)

### ACCC contacts

Competition Exemptions – [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au)  
Infocentre 1300 302 502  
Website [www.acc.gov.au](http://www.acc.gov.au)