

ANZARUT & HOLM LAWYERS

Our ref: NART001-004:PRH

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Imogen Hartcher-O'Brien
Director
Adjudication Branch
Australian Competition & Consumer Commission
Canberra ACT 2601

By email: Imogen.Hartcher-O'Brien@accc.gov.au

Dear Imogen,

Narta International Pty Ltd Authorisation Application A91335

Thank you for your letter of 17 January 2013 attaching the Commission's draft Determination (Draft) in this matter. The following is my client's response to the Draft and we adopt the defined terms as used in the Draft.

Public Benefit

Narta notes that the ACCC is not satisfied that Narta's inability to impose a MAP is a decisive factor in its inability to negotiate supply of certain Exclusive Products. (Draft Determination Paragraphs 49, 50).

While Narta acknowledges that Supplier Submissions have primarily referenced 'consistent advertising and marketing', in essence the key factor in relation to supply of Exclusive Product is one of consistent advertised pricing. Unfortunately, as the ACCC is aware, suppliers are very circumspect about referencing advertising prices to the ACCC as they are conscious that supplier actions, such as a refusal to supply product due to a retailer discounting from a minimum advertising price specified by them, is a strict liability offence. The fact that the conduct sought to be authorised relates to advertising price specification only by Narta, without reference to the supplier, unfortunately has not relieved this understandable supplier sensitivity.

Narta however submits that the best evidence that minimum advertising price is a decisive factor in a supply decision for Exclusive Product is that the ACCC's release of its draft determination resulted to 2 suppliers promptly withdrawing supply offers currently under negotiation. In essence we submit that all experience proves that being able to guarantee a minimum advertising price during the period immediately after launch of a key product is a critical factor for a supplier in relation to supply of any new release or 'Exclusive Product' and

'consistent advertising and marketing' is in reality a euphemism used by many suppliers for a consistent advertised price. If this were not the case then this authorisation application would never have been lodged.

The importance of a consistent advertising price to a supplier is linked to the costs they incur in producing a run of product for the Australian market. Any such product decision will be based upon an anticipated level of demand based upon prior orders. Product has a life cycle and usually the retail price of product will decline during the course of that life cycle. An issue for a supplier is if the price declines too quickly retailers will not be interested in promoting or supporting the product and may cancel orders. The supplier may even be left with part of an Australia specific production run that they cannot move. Being able to guarantee a minimum advertising price is therefore seen as a way of slowing the 'race to the bottom' in terms of retail pricing of the product.

In this regard Narta acknowledges that its setting MAP would be likely to slow the inevitable reduction in retail pricing during a product's life cycle. This is indeed the reason that it is a decisive factor for suppliers in making a supply decision for such products. We however do not agree that this fact is inconsistent with our submission that a MAP does not 'fix, maintain or control' actual selling price. All pricing data shows that actual selling prices are, on average, at a significant discount to the advertised price and that the discounting varies transaction by transaction.

Narta disagrees with the ACCC's conclusion that the factors listed in paragraph 54 (a)-(g) of the Draft are determinative of a suppliers decision to supply Exclusive Products. Rather the listed considerations, such as the volume and value of sales (historical and projected) and the ability of members to commit to a level of stock and the costs for a supplier of dealing with a retail group are key factors in Narta negotiating access and best pricing for product in general. However these factors, in the absence of a minimum advertised price commitment, have proven to be insufficient to also provide Narta with regular access to Exclusive Products at launch.

Narta can attest that the differing retail models adopted by Narta members of itself has never been a factor in suppliers' willingness, or otherwise, to supply Exclusive Products. Indeed most suppliers are more than happy to see these products ranged by the spread of Narta members.

Reduced competition between electrical goods retailers

At paragraph 74 the Commission has stated the 'scope of the conduct is potentially very broad'. Narta's submission is rather that the scope of the conduct is quite limited and it has demonstrated this in its prior submissions. Narta has no interest and has no benefit in applying the MAP more broadly than is required in order to access the small proportion of 'must have' categories of product.

The Commission also appears to have given no weight to the fact that Narta is effectively the last bastion of the independent electrical goods retailer. It is incontrovertible that no electrical goods retailer can be competitive in the current market unless they have significant size and scale. Narta is of the view that most, if not all, of its members are not large enough to independently command the bargaining power, or the economies of scale and scope, necessary to remain competitive in the current market for wholesale acquisition of electrical goods.

Narta membership therefore supports a significant proportion of the smaller independent electrical retailer who themselves generate significant competitive tension in the retail market. These retailers are however being disadvantaged because they cannot now compete on a level footing with groups that are able to legitimately apply a consistent advertising price and therefore have better access to key ranges of product.

A recent example of Narta performing this small business support role is that it assisted Retravisson member businesses, upon the recent winding up of that business, by agreeing to take over this brand and providing former Retravisson members with price competitive access to wholesale product. If this had not occurred it is likely that many of these existing businesses, including those in regional areas, may have well been out of business within months.

Balance of public benefit and detriment

Narta submits that the Commission's draft analysis of the potential reduction in competition between electrical goods retailers is flawed. In particular because the anti-competitive factors that the Commission identifies as arising from the proposed conduct are substantially those that currently exist; rather than what will arise due to the proposed conduct.

Narta's position is that this is a dynamic market and one that has become increasingly concentrated at the wholesale acquisition level. In essence, since the recent demise of the Retravisson group, the major 'collective acquisition' buying group wholesale customers are now Narta, Harvey Norman and the Good Guys. As previously submitted Harvey Norman and The Good Guys, due to the drafting in the legislative exemption in section 44ZZRV of the Act, are able to legitimately apply uniform retail advertising pricing across both company owned and franchised stores and this uniformity of advertising price is not limited to Exclusive Products. In the current market this is benefiting them as they are consistently able to source products (Exclusive Product) often denied to Narta (and hence its members).

The market scenario that the Commission would perpetuate by refusing the authorisation sought is therefore potentially one of increased dominance by the major corporates and buying groups Harvey Norman and the Good Guys and one where Narta members are less able to offer effective competition, because they are increasingly denied access to Exclusive Product, or equivalent ranges of product.

Unfortunately a consistent failure to stock such products is a significant issue for Narta members, as it inevitably leads to a loss of customers. Customers will be loyal to a retailer while they can stock 'must have' or new product. If that retailer consistently fails to stock such products at launch the customers will stop visiting that retailer. The phenomenon can be illustrated by the demise of Retravisson (North) where it went from a business with a market share of approximately 25% in 2006 to approximately 5% market share prior to its being liquidated late in 2012. Part of the reason for this rapid decline was the group not sourcing the new products sought by customers and therefore its member retailers rapidly losing custom.

Narta therefore submits that the correct approach to weighing the anti-competitive detriment against public benefit is to contrast the following positions:

1. Only the 2 major group buying entities and the corporate retail groups are able to regularly access Exclusive Product at launch and these entities will commonly apply

a uniform national advertising price to those products;

and

2. Narta members are also able to similarly access those Exclusive Products (or equivalent) at launch and (while advertising them from a Narta determined minimum price) will provide direct and increased competition to those other retailers.

Narta does not disagree with the proposition that any advertising price (not just the proposed MAP) is a reference point for selling prices in that it is commonly the starting point for any price negotiation. It however does not follow that the end point of a price negotiation is pre-ordained by having a uniform starting point. Different retailers have different willingness to discount and ultimate selling prices do not become uniform because of a uniform advertising price. Similarly it does not follow that selling prices are always higher as a result of Narta members having advertised the product at the same price. Narta however submits that a likely effect is that the inevitable movement to increased retail discounting during a product life cycle is (on average) slowed and it is slowing the pace of what is sometimes referred to as the 'race to the bottom' that is of value to suppliers.

In this regard Narta notes that this 'race to the bottom' is often driven by less sophisticated retailers who may not be aware that they are running their businesses at a loss, or are themselves in financial difficulty, or are seeking to use a product as a 'loss leader' to drive foot traffic.

Conclusion

In Narta's submission the ACCC's Draft has arrived at an erroneous conclusion in its finding that consistent advertising pricing is not a decisive factor in supplier's deciding whether or not to supply Exclusive Product. This has contributed to an error in the balancing of public benefit against public detriment, both in that the Commission has not recognised the public benefit that accrues and has not given sufficient weight to the increase in competition that would follow from putting Narta in a competitively neutral position with the large corporate retail groups and the other major buying groups.

We look forward to discussing these matters further at the pre-decision conference on 15 February 2013.

Yours sincerely



Paul Holm
Director

Direct Line: (02) 9261 2704
Email: prh@anzarut.com.au