



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Narta International Pty Ltd

in respect of

**arrangements to set a minimum
advertising price on a range of goods
collectively acquired by its members**

Date: 11 April 2013

Authorisation number: A91335

Commissioners:

Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC has decided to deny authorisation to Narta to amend its Code of Conduct to allow it to impose a minimum advertising price on products that are jointly acquired by its members.

The conduct

Narta International Pty Ltd (**Narta**), a buying group of unrelated electrical goods retailers, has lodged an application for authorisation of potential cartel conduct within the meaning of the *Competition and Consumer Act 2010* (the **Act**) and potential breaches of section 45 of the Act. Narta is seeking authorisation to enable it to amend its Code of Conduct to allow it to impose a minimum advertising price (**MAP**) on particular goods that are collectively acquired by members (**the Conduct**).

Decision

For the reasons outlined in this determination, the Australian Competition and Consumer Commission (**ACCC**) is not satisfied that the Conduct meets the statutory tests for granting authorisation.

Narta submits that a number of public benefits are likely to arise from the Conduct. These include increased retail competition and consumer choice arising from the enhancement of Narta members' competitiveness in acquiring and retailing consumer electrical products. The ACCC considers that the Conduct is likely to result in minimal public benefit in the form of increased competition between electrical goods retailers for the acquisition and supply of consumer electrical products and increased choice of retail service for consumers in some, limited circumstances. However, the ACCC considers that, on the whole, the claimed public benefits are not adequately supported by the information before the ACCC, including the evidence and arguments provided by Narta.

Narta submits that, for a variety of reasons, the Conduct is unlikely to generate public detriment from any lessening of competition. However, the ACCC considers that the likely public detriments of the Conduct include higher retail selling prices for products subject to a MAP and a lessening of competition between retailers of consumer electrical products more generally. The extent of any such public detriment will depend on a number of factors including the number of products subject to a MAP, consumer demand for those products, the availability and closeness of substitutes for MAP products, and the extent to which a MAP becomes a reference point for actual selling prices.

The ACCC is not satisfied that the Conduct is likely to result in public benefit that would outweigh the likely detriment to the public from the Conduct. The ACCC has therefore decided to deny authorisation.

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Glossary

the Act	the <i>Competition and Consumer Act</i> 2010
ACCC	the Australian Competition and Consumer Commission
advertising price	the price at which a product is promoted for sale to the consumer
the Conduct	proposed action by Narta to amend its Code of Conduct to allow it to impose a minimum advertising price on particular goods that are collectively acquired by members; the conduct for which Narta seeks authorisation
Exclusive Products	electrical goods that may be referred to as: belonging to brands exclusively available to one or a limited number of retail groups; new release products with exclusive or limited retail distribution; and exclusive models available to one or a limited number of retail groups
MAP	minimum advertising price
MAP Products	<p>the range of products over which Narta proposes to be able to impose a MAP; goods that:</p> <ul style="list-style-type: none">a) are collectively acquired by Narta's members;b) may or may not be jointly advertised; andc) fall into at least one of the following three categories of products: (i) Beko branded electrical products, which Narta sells exclusively within Australia; (ii) new release electrical goods; and (iii) exclusive models of electrical goods as may be negotiated by Narta from time to time
Narta	National Associated Retail Traders of Australia; Narta International Pty Ltd
selling price	the price at which a product is sold to the consumer. The selling price may be the same or lower than the advertising price
supplier	any supplier and/or manufacturer with whom Narta negotiates for the acquisition of electrical products

The application for authorisation

The authorisation process

1. On 17 September 2012, Narta International Pty Ltd (**Narta**) lodged an application for authorisation (A91335) with the Australian Competition and Consumer Commission (**ACCC**).
2. Authorisation is a transparent process whereby the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the **Act**). Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation, the ACCC must first issue a draft determination.¹
3. On 17 January 2013, the ACCC issued a draft determination² proposing to deny authorisation of the Conduct. A conference was requested in relation to the draft determination. This conference was held on 15 February 2013.

Statutory test

4. Pursuant to subsections 90(5A), 90(5B),³ 90(6) and 90(7)⁴ of the Act, the ACCC must not make a determination granting an authorisation under subsections 88(1) and 88(1A) for conduct making and/or giving effect to a provision in a contract, arrangement or understanding which is or may be a cartel provision (other than a provision which is or may be an exclusionary provision) or which has or may have the effect of substantially lessening competition unless the ACCC is satisfied in all the circumstances that the conduct for which authorisation is sought:
 - a. is likely to result in a public benefit; and
 - b. that public benefit would outweigh the public detriment constituted by any lessening of competition that would be likely to result from the conduct.

The conduct

Narta's description of the Conduct

5. Narta seeks authorisation for current and future Narta members to make and give effect to a proposed amendment of clause 5.8 of its Code of Conduct, which would allow Narta to impose a minimum advertising price (**MAP**) on particular goods that are collectively acquired by Narta members (the **Conduct**).

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation, available on the ACCC's website, www.accc.gov.au.

² Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

³ Subsections 90(5A) and 90(5B) relates to authorisation of a provision of a contract, arrangement, or understanding that is or may be a cartel provision.

⁴ Subsections 90(6) and 90(7) relates to authorisation of a provision (other than a provision that is or may be an exclusionary provision) of a contract, arrangement, or understanding.

6. Narta has applied for authorisation for Conduct that will provide for the fixing of the minimum price at which Narta members will advertise certain collectively acquired electrical goods.⁵ However, Narta submits that the effect of a MAP will not be to fix the price at which Narta members sell products to which a MAP is applied.⁶ It submits that selling prices will continue to be driven by negotiation either at the point of sale, online or by telephone. Narta submits that no Narta member will range all products that have a MAP applied.⁷
7. Narta's Code of Conduct currently contains the following version of clause 5.8:

When you take advantage of a Narta initiated collective purchase then when advertising any goods so purchased you agree to do so at the Narta minimum advertising price as set by Narta from time to time in any joint advertising or promotional activity whether initiated by Narta or by you.⁸
8. While the clause provides for joint advertising or promotional activity by Narta on behalf of its members, Narta submits that its members have not previously engaged in either joint advertising or joint promotional activity because they prefer to maintain their separate brand identities.
9. Narta proposes to amend clause 5.8 of its Code of Conduct to read as follows:⁹

When advertising the price of goods purchased under a Narta initiated collective purchase for Beko branded electrical products, new release electrical goods, and exclusive models of electrical goods, you agree not to advertise at any price less than any minimum advertising price as may be specified by Narta for those goods from time to time. The selling price of those goods remains completely at the individual member's discretion.
10. This wording (a variation from the original wording of Narta's application, as considered in the ACCC's draft determination) clarifies that a MAP is intended to be a *minimum* advertising price only and Narta members will have discretion to advertise a price at or above any MAP set by Narta.¹⁰ As a result, the advertising price of each product to which a MAP is applied will not necessarily be the same for all Narta members that advertise the product.
11. Of particular relevance to Narta's application for authorisation is the ability of various retailing groups to acquire consumer electrical goods which may:
 - belong to brands exclusively available to one or a limited number of retail groups; and/or
 - be new release products; and/or
 - be exclusive product models available only to one or a limited number of retail groups.

⁵ Narta International Pty Ltd, Form B, 2.(a), lodged 17 September 2012.

⁶ Narta International Pty Ltd, Submission of 18 December 2012.

⁷ Narta International Pty Ltd, Submission of 5 December 2012, page 2.

⁸ Narta International Pty Ltd, Form B, 2.(b), lodged 17 September 2012.

⁹ Following the draft determination, Narta submitted to the ACCC that Narta members would remain free to set advertising prices for products to which a MAP is applied at levels above the MAP. The ACCC noted that this did not appear to be consistent with the wording of the original proposed amendment to clause 5.8, which would oblige members to use "only the minimum advertising price". In response, Narta clarified that this wording was a mistake and redrafted clause 5.8 to reflect Narta's intention that members could independently set prices above the MAP.

¹⁰ Narta International Pty Ltd, Submission of 14 March 2013, p. 1.

12. According to Narta's submissions, each of these types of products are likely to be supplied to a retail group on an exclusive or limited distribution basis and are thus, for the purposes of this determination, referred to generically as '**Exclusive Products**'.
13. Should it gain authorisation to amend its Code of Conduct, Narta states that the range of products over which it may impose a MAP will be limited to Exclusive Products that:
- are collectively acquired by its members;
 - may or may not be jointly advertised;¹¹ and
 - fall into at least one of the following three categories of products:
 - Beko branded electrical products,¹² which Narta sells exclusively within Australia (a MAP would be imposed indefinitely);
 - new release electrical goods¹³ (a MAP would be imposed for no more than three months from the date of first supply, in order to gain some form of exclusivity from the supplier); and
 - exclusive models of electrical goods as may be negotiated by Narta from time to time (a MAP would be imposed for no more than 12 months)(collectively, **MAP Products**).
14. Narta submits that the length of time for which it would impose a MAP will depend upon the particular product and the terms of Narta's agreement with the supplier. For example, exclusivity periods (and thus a MAP) for some new release electrical goods may last no more than two or three weeks, while others may require up to three months.¹⁴
15. Narta submits that the Beko branded products are a special case as the brand was not sold in Australia until Narta introduced it in November 2011. Narta has agreed a period of exclusivity in the Australian market with the supplier in return for sponsoring the entry of the brand. However, in order to maintain this exclusivity in the future, Narta submits that it will need to offer Beko a MAP on all Beko branded products indefinitely.¹⁵ Narta submits it would only apply a MAP where it is necessary in order to obtain supply of particular products, or supply on preferential terms. That is, in order for Narta to:
- have access to a new release product at launch,
 - qualify for a period of exclusivity or limited retailer distribution of a new product at launch,
 - be able to negotiate an exclusive model for a promotional period, or

¹¹ The ACCC notes that, under section 44ZZRV of the Act, even without authorisation, Narta members would be entitled to jointly advertise the price of products that have been jointly acquired. However, the meaning of "joint advertising" in the context of section 44ZZRV is not defined.

¹² Beko is a Turkish brand of kitchen and laundry appliances.

¹³ Narta initially sought to apply a MAP to 'premium' products but in its submission of 14 March 2013, it deleted the reference to 'premium' electrical goods from the proposed new clause 5.8 in acknowledgement of the ACCC's concerns about the potential scope of the Conduct.

¹⁴ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 9.

¹⁵ A91335 - Narta International Pty Ltd, Record of Pre-Decision Conference, 15 March 2013.

- have access to an exclusive house brand product.¹⁶
16. Narta submits that the proposed MAP would be set unilaterally by Narta, and not by agreement between competitors, although the ACCC notes that Narta members will give effect to the Code of Conduct, which is technically an agreement between competitors.¹⁷
 17. The level of a MAP for a particular MAP Product would be set by the Narta Senior Category Manager with responsibility for the particular category of products, such as whitegoods, cooking or audio visual. According to Narta, this would occur once negotiations with the supplier to secure the product had concluded.¹⁸
 18. In its submission of 9 November 2012, Narta submits that the Senior Category Manager would set a MAP after reviewing the market conditions, including having regard to:
 - competitor advertised pricing of substitutable products;
 - the projected level of consumer interest in the product;
 - the duration of any product exclusivity; and
 - the supplier recommended retail price.¹⁹
 19. However, in its submission of 14 March 2013, Narta seeks to alter the factors that its Senior Category Manager would have regard to in setting a MAP, stating that a MAP will not be linked to a supplier's recommended retail price. Narta submits that a MAP will be based on current market conditions and will be adjusted from time to time to reflect changes in those market conditions. A MAP may also vary between geographic regions to reflect local market conditions.²⁰
 20. After a MAP has been set, Narta will notify members of this MAP. Narta submits that it will not impose any limitations or restrictions upon a member's actual selling prices.

Conclusion

21. On the basis of the information provided by Narta, and the new wording of the proposed amendment to clause 5.8 of Narta's Code of Conduct for which authorisation has been sought, the ACCC understands that a MAP would remove Narta members' ability to advertise a MAP Product at a price lower than the relevant MAP. Narta members would retain flexibility to advertise a price above a MAP. Each Narta member would retain discretion over the selling price and may choose how to advertise its own MAP Products including by use of catalogues, websites, newspapers, television and radio advertising.

Narta

22. Narta is an acronym for the National Associated Retail Traders of Australia, a buying group of unrelated electrical goods retailers operating in Australia and

¹⁶ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 3.

¹⁷ Narta International Pty Ltd, Form B, 2.(a), lodged 17 September 2012.

¹⁸ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 2.

¹⁹ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 2, question 2.

²⁰ Narta International Pty Ltd, Submission of 14 March 2013, p. 1.

New Zealand. Narta employs staff to carry out its functions, including acting as an intermediary between its members and wholesale suppliers of electrical goods and negotiating supply terms with those suppliers. Narta's Board of Directors includes the Chief Executive Officers of certain Narta members, such as Bing Lee and Radio Rentals.

23. Narta submits that it currently has over 30 members across Australia, including Bing Lee, David Jones, JB Hi-Fi, Radio Rentals, Ted's Cameras and Winning Appliances (and its subsidiary, Appliances Online).²¹ The ACCC notes that Myer also joined Narta in January 2013. Narta members retail a wide range of consumer electrical goods of the type sourced by Narta, including: audio visual products, whitegoods, cooking appliances, IT hardware, imaging (including photography) products, seasonal products (e.g. air conditioning and heating) and small appliances. As well as being able to acquire these products through Narta, Narta members may choose to source products independently.
24. Various Narta members also sell a range of products that do not fall within the category of consumer electrical products (and that are therefore not sourced by Narta), including furniture, gaming, car audio, music, DVD titles, software and musical instruments.
25. In contrast to other electrical goods retail buying groups, which are single brand, 'banner' groups, Narta's members are independent retailers with differentiated store brands, who are otherwise in competition with one another. Narta members compete on both price and non-price terms by offering consumers different types and ranges of products as well as an overall 'shopping experience' based on store ambience, marketing strategy and customer service. Each Narta member undertakes its own advertising and marketing, which may differ according to delivery channel as well as content, although Narta does offer assistance to prepare advertising and catalogues in a consistent format (excluding price and branding).²²

Background

26. Narta submits that consumer electrical goods retailing is dominated by retail buying groups and large corporate groups.²³
27. Buying groups are either groups of retailers that trade under a single banner (or brand name) or groups of retailers who buy collectively but retail products solely under their own names (like Narta members). The single banner groups commonly consist of a mix of company-owned and franchise (independently-owned) stores. In Australia, major single banner buying groups of consumer electrical goods include Harvey Norman, the Good Guys and Camera House.
28. Narta submits it is the only consumer electrical goods buying group consisting solely of independent retailers with different retail brands.²⁴

²¹ Narta International Pty Ltd, Form G, 1.(b).

²² Narta International Pty Ltd, Submission of 1 March 2013, p. 2, paragraph 1.4(a).

²³ Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, p. 1; Submission providing further information, 9 November 2012, p. 11, paragraph 11.2.

²⁴ Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, p. 1; Submission providing further information, 9 November 2012, p. 9.

29. Narta submits that there are also a number of large corporate retail groups that are able to individually obtain consumer electrical products on competitive terms due to their bargaining power. These include the Woolworths Group (Woolworths, Masters and Big W), Wesfarmers (Coles, Bunnings, Target, K-Mart) and Costco. The ACCC notes that some Narta members are also able to individually obtain products on competitive terms and do this regularly.

Submissions received by the ACCC

30. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
31. The ACCC sought submissions from over 30 interested parties potentially affected by this application, including consumer electrical product suppliers, retailers and industry associations.
32. The ACCC also conducted its own market enquiries throughout the assessment period and obtained information relevant to its assessment from a range of interested parties. This information was reflected in the draft determination.
33. A summary of the public submissions received from Narta and interested parties follows.

Prior to the draft determination

Narta

34. Broadly, Narta submitted that the Conduct will make Narta members more attractive to suppliers as distributors of the suppliers' Exclusive Products. Prior to the draft determination, Narta submitted that (compared to other retail buying groups) its members had difficulty in sourcing these types of products from suppliers due to an inability to guarantee that the products would be advertised at a consistent price across all Narta members. Narta submitted that suppliers of Exclusive Products place a high value on brand protection of their products and this depends on consistent advertised prices.²⁵
35. Narta submitted that the Conduct would allow its members to advertise products at a consistent price and that this would be likely to lead to the following public benefits:
- a. suppliers would have a greater choice of retail distribution for Exclusive Products. This would:
 - i. allow suppliers to use Narta's retail distribution as an alternative or in addition to existing retail distribution, increasing competition between retailers and retail buying groups to acquire these products from suppliers;
 - ii. facilitate Narta members' ability to sponsor entry by overseas suppliers, increasing the level of retail product choice; and

²⁵ Narta International Pty Ltd, Submission of 8 February 2013, p. 2.

- iii. provide suppliers with more attractive alternatives to agency selling models and company owned stores (which Narta submits decrease competition and consumer welfare).
 - b. consumers will have increased choice of products (due to greater supply) and greater choice of retail channels and stores from which to buy these products;
 - c. access to Exclusive Products will maintain the competitiveness and viability of Narta members, contributing to greater overall levels of competition in the industry.
- 36. Narta submitted that the Conduct would be unlikely to lead to significant detriment through a reduction in competition since:
 - a. selling prices diverge significantly from advertising prices;
 - b. advertising prices are compared online;
 - c. Narta would only apply a MAP to a small proportion of goods;
 - d. Narta members would not be required to stock products that are subject to a MAP;
 - e. the conduct addresses Narta members' need to respond to increased concentration in the electrical supplier market; and
 - f. joint advertising of the price of collectively acquired goods is exempt from 'price fixing' liability under section 44ZZRV of the Act. Narta does not qualify for this exemption due to the technicalities of the wording of the section.
- 37. The ACCC notes that aspects of Narta's submissions regarding the potential benefits and detriments of the Conduct and the mechanisms by which these may arise have been clarified and amended since the release of the draft determination.

Interested parties

- 38. No submissions were initially received from interested parties in response to the ACCC's request for submissions on Narta's application for authorisation of the Conduct. In response to a letter from Narta to its suppliers, a number of suppliers provided confidential letters in support of the Conduct. Their submissions broadly supported Narta's claims regarding the likely benefits and detriments of the Conduct. No public submissions were received prior to the draft determination.
- 39. In addition to these submissions, the ACCC conducted market inquiries with potentially interested parties. While no submissions were received as a result of these inquiries, the concerns raised by the potentially interested parties (on a confidential basis) were communicated in summary to Narta prior to the draft determination being issued. The information gained by the ACCC in its market inquiries is reflected in the discussion of benefits and detriments in this determination.

Following the draft determination

- 40. On 24 January 2013, Narta requested that the ACCC hold a pre-decision conference to discuss the draft determination. The conference was held in Sydney on 15 February 2013. A record of the conference may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

41. At the conference, Narta and those of its members that attended made submissions to the effect that:
- the consumer electrical industry has been in decline in recent years. Suppliers have been announcing losses and are now trying to differentiate themselves by building their brands. Suppliers want retailers who can provide an overall marketing package and maintain their brand. A MAP is the missing piece of the product marketing package that Narta can offer suppliers;
 - suppliers are increasingly using exclusive products as a strategy to segment the market and are targeting particular demographics by introducing models at particular price points;
 - suppliers place importance on price consistency as part of a retailer's ability to 'execute' a product launch or placement. Without a MAP, Narta will be unable to access Exclusive Products;
 - Narta members' ability to compete to attract consumers will decrease without access to Exclusive Products; and
 - consumers have the ability to negotiate on all major online retailer websites.²⁶
42. Beko also attended the conference and submitted that an ability to offer marketing consistency, including a MAP, was important to it as a supplier in the current economic climate.
43. Following the conference, the ACCC received further public submissions in response to the draft determination:
- Media Merchants (15 February 2013) submits that the advertising price point can be more critical to a brand than the actual selling prices, as while neither will directly affect a supplier's wholesale pricing of the product, the advertising of a product (including its advertised retail price) will determine how it is positioned in the market and ultimately influence sales volume. It is imperative for consumer electronics retailers that they can go to market with a price point or price range on their advertised products.
 - Narta (8 February 2013, 1 March 2013, 14 March 2013 and 26 March 2013) submits that:
 - suppliers' behaviour, particularly since the release of the draft determination, indicates that a guaranteed consistent advertised price is a decisive factor in Narta members' ability to negotiate the acquisition of Exclusive Products;
 - without a MAP the marketing package that Narta can offer to suppliers will be incomplete;
 - Narta acknowledges that the reason a MAP is attractive to suppliers is that it will slow the retail discounting cycle (and Narta claims various public benefits as a result) but submits that this does not mean that a MAP will fix, maintain or control selling prices;
 - a MAP is unlikely to significantly impact upfront online discounting (and through comparison, negotiations in bricks and mortar stores) since

²⁶ This submission was further developed in Narta's Submission of 14 March 2013, p. 3.

- online suppliers do negotiate their selling price and generally advertise higher prices than bricks and mortar stores in any case; and
 - in the absence of the ability of Narta members to gain access to Exclusive Products its members will become increasingly uncompetitive, leading to decreased retail competition.
 - The Australian Retailers Association (27 February 2013) submits that:
 - the Conduct would provide Narta with a 'level playing field' by enabling Narta to acquire Exclusive Products that are supplied to Narta's competitors. Narta will not be able to access these products without the Conduct and will be unable to compete effectively;
 - the Conduct will not result in any competitive detriment because electrical goods retailing in Australia is highly competitive and a MAP will have no effect on selling prices. Competition between electrical retailers generally is unlikely to be affected by a MAP, which will apply to only a limited range of products; and
 - the ACCC should take a broader view of the relevant area of competition because electrical goods are generally broadly functionally substitutable across a range of different models and brands.
44. The ACCC also consulted with GfK Retail & Technology²⁷ regarding confidential data provided by Narta to the ACCC in support of its submission of 1 March 2013. The data, in combination with data from CMS Marketing²⁸, was intended to illustrate that the online prices of consumer electrical products are commonly higher than the prices of the same products offered at bricks and mortar stores.²⁹
45. GfK's representative stated that reporting by GfK panel members in relation to online retailing in Australia is generally less developed and less sophisticated than overseas. Accordingly, many retailers do not separate their online from their offline sales in their statistical data which means that GfK is unable to separately report upon online and offline sales.³⁰
46. Narta also provided the ACCC with data from CMS to support its submissions that online advertising prices are usually higher than bricks and mortar stores' advertising prices for the same product. CMS provided information to the ACCC regarding online and offline advertising prices in the industry and the methodology used by CMS to collect its advertising data.
47. Narta's submission in support of its application and the information provided in response to the ACCC's request for information and submissions from interested parties are considered in the next section of this determination. Copies of public

²⁷ GfK is a market research company that collects and analyses data to interpret how consumers experience and regard brands, as well as how consumers engage with content across platforms. GfK investigates factors such as changing consumer trends, store experience, and what consumers are buying and why. GfK also investigates which items are selling best, where, over which channels and why.

²⁸ CMS is a market research company that offers research and analysis into all business sectors, with marketing data on customer satisfaction, attitudes, uses, product and concept tests.

²⁹ Narta International Pty Ltd, Submission of 1 March 2013, p. 6, paragraph 4.9(c).

³⁰ GfK Retail & Technology, Record of Conversation, 14 March 2013.

submissions are available on the public register on the ACCC's website at www.accc.gov.au/authorisationsregister.

ACCC evaluation

48. In considering applications for authorisation, the ACCC's evaluation of the proposed conduct is conducted in accordance with the statutory framework set out in subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act. Each application is considered taking into account the information, evidence and submissions before the ACCC in relation to the application.³¹
49. In order to assess the likely effect of the Conduct and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future with and without the Conduct.

The relevant areas of competition

Narta's submissions

50. To assess the competitive effects of an authorisation, the ACCC needs to understand the areas of competition relevant to the Conduct. To satisfy the ACCC as to the strength of its public benefit and detriment claims, an applicant must also provide sufficient contextual information and supporting evidence regarding the commercial and competitive relationships likely to be affected by the Conduct for which authorisation is sought.
51. Narta submits that the relevant areas of competition are:
- the market for the wholesale acquisition of consumer electrical goods from suppliers – Narta competes for such supply with other buying groups, corporate retail groups and individual retailers of consumer electrical goods.
 - the Australian market for the retail supply of consumer electrical goods – Narta members compete in this market with all other retail groups and retailers of consumer electrical goods.
52. Narta submits that its members' total share by value of each of the product categories in the Australian market for the retail supply of consumer electrical goods is as follows:³²

Product category	2009/10 (%)	2010/11 (%)	2011/12 (%)
audio visual	25.50	27.46	30.30
whitegoods	15.50	15.16	16.10
cooking appliances	16.27	17.00	18.32
IT hardware	25.68	28.49	28.77
imaging (including cameras)	30.30	31.94	35.22
seasonal product (air conditioners/heaters etc)	13.39	13.36	14.10
small appliances	11.31	10.00	9.89

³¹ The relevant tests are set out in Attachment A.

³² Narta submits these figures based on the GfK Business Manager Report, June 2012 and June 2011. Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 10.

53. Despite identifying these product categories, Narta submits that its members need to retail (and therefore source) a full range of consumer electrical products in order to provide a competitive offer to consumers. Accordingly, Narta submits that from the perspective of a retailer, all consumer electrical products have a degree of substitutability and therefore form a single product market.³³
54. As noted above, at the pre-decision conference, Narta made submissions about the significant changes that the consumer electrical product industry is currently undergoing at the supplier and retail level. Following several years of significant growth in sales of consumer electrical products, the industry has recently experienced a downturn in retail sales. Narta submits that several electrical retailers have exited the industry, including Clive Peeters and RetraVision. Several electrical suppliers have also exited the industry, or segments of the industry. For example, Hitachi and Pioneer no longer manufacture televisions. This has resulted in a more concentrated market at both the supplier level and the retailer level.
55. Narta submits that suppliers are moving to a new marketing strategy that aims to maximise profits by targeting different product (and service) offerings at different segments of the market. For the past two years, suppliers have been focusing more on branding than they have in the previous 15 years.

ACCC consideration

56. The ACCC considers that the relevant areas of competition affected by the Conduct are likely to be narrower than those identified by Narta. The ACCC notes that Narta members are differentiated and do not all sell the same range of electrical goods. Therefore they may not compete for wholesale acquisition or retail supply with all other retailers of consumer electrical goods broadly defined. For example, because of the specialist nature of its offering, Ted's Cameras is unlikely to compete closely with Bunnings or Kitchen HQ.
57. The ACCC also notes that Narta intends to set different MAPs in different geographic regions to reflect local retail market considerations.³⁴
58. Consistent with its view in previous relevant matters,³⁵ the ACCC considers that the relevant areas of competition are likely to include:
- the national wholesale acquisition of various categories of consumer electrical products from suppliers. It is likely that the categories of products are broadly analogous to the product categories identified by Narta in paragraph 52 but may be broader or narrower in some cases;
 - the supply of retail services in relation to the sale of various categories of consumer electrical products with competition at national, state and local levels. It is likely that the categories of products sold by specialist retailers amongst Narta's members are broadly analogous to the product categories identified by Narta in paragraph 52 but may be broader or narrower in some cases; and
 - the retail supply of particular types of consumer electrical products with competition at national, state and local levels. It is likely that these product

³³ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 4

³⁴ Narta International Pty Ltd, Submission of 14 March 2013, p. 1.

³⁵ See: ACCC Public Competition Assessment GUD Holdings Limited – proposed acquisition of Breville Group Limited, 22 January 2010.

types are considerably narrower than the product categories nominated by Narta in paragraph 52. In some circumstances, competition may be limited to a particular product or even a particular brand of product if the brand of product is a 'must have' product for consumers.

The likely future with and without

59. The ACCC considers the '*likely future with-and-without*' the conduct to identify and weigh the public benefits and public detriments generated by conduct for which authorisation has been sought.³⁶

Narta's submissions

60. Narta submits that if authorisation is not granted, it will not amend its Code of Conduct and (despite the existing clause of its Code of Conduct³⁷) will not impose a MAP in the context of joint advertising. Pursuant to section 44ZZRV of the Act, Narta submits that its members are entitled to jointly advertise the price of products that have been jointly acquired. However, Narta submits that its members do not want to engage in joint advertising on the basis that:
- a. their brands are distinct, and
 - b. the risk of potential liability for cartel conduct is unacceptable to Narta and its members.
61. Narta submits that it is already able to offer all aspects of the consistent marketing package that suppliers demand except for a consistent advertising price. In the future with the Conduct, Narta will be able to fill the final gap in the marketing package that its members are able to offer suppliers. Consequently, its members will gain the ability to access Exclusive Products and will be able to compete on a level playing field with banner group retailers. Narta submits that access to Exclusive Products will increase Narta members' ability to attract customers into shops and to make related sales.
62. If Narta members are not able to offer an overall consistent marketing message (including a consistent advertising price), Narta submits suppliers are more likely to consider the following alternatives:
- a. more limited initial distribution of Exclusive Products, including providing initial or continuing product exclusivity only to selected retail banner groups and corporate groups that can provide a level of brand protection acceptable to the supplier;
 - b. opening company (supplier) owned stores (e.g. Apple and Nespresso); and/or
 - c. selling products through an 'agency' model, allowing suppliers to directly control the marketing and retail pricing of their products.³⁸

³⁶ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

³⁷ Narta's Code of Conduct currently contains the version of clause 5.8 set out in paragraph 4 above.

³⁸ When a retailer acts as an agent for a manufacturer, they receive a payment for making the products available to consumers on their shop floor. The products are owned and sold by the manufacturer directly to the consumer via the retailer's shopfront. In some cases, the manufacturer may also provide additional sales support such as their own salespeople who

63. Narta submits that, as a result of electrical goods suppliers' changing marketing strategies, if Narta members cannot secure access to Exclusive Products, they are likely to lose access to the consumers seeking these high value products. This will reduce their ability to compete with other retailers by offering a full range of products to consumers. In turn, consumers will have less choice of retail service provider and retail prices are likely to be higher because Narta members will not be able to provide a competitive constraint on other major consumer electrical goods retailers such as Harvey Norman and the Good Guys. Narta members will suffer financial losses from foregone sales of goods, accessories and add-ons. Narta submits that, absent the Conduct, its members' ability to compete with other electrical goods retailers would continue to be compromised and ultimately some member businesses may fail.

ACCC consideration

64. The ACCC considers that, in the future without the Conduct Narta members will continue to individually determine the advertising prices of all products acquired through Narta. The ACCC considers that Narta members will also continue to jointly acquire products through Narta and, based on its inquiries, some Narta members will continue to acquire products, including Exclusive Products, independent of any arrangements with Narta.
65. The ACCC acknowledges that, in some cases, Narta members may be unable to acquire Exclusive Products from the relatively small number of suppliers that would value a MAP in order to agree to supply those Exclusive Products to Narta.
66. However, the ACCC considers that it is more likely that, if suppliers decide not to supply Narta with Exclusive Products, they will make that decision for a variety of reasons whether or not a MAP is imposed. This is discussed in more detail in the following sections.

Public benefit

67. Public benefit is not defined in the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.³⁹

Narta's submissions

68. Narta submits that the following public benefits are likely to arise from the Conduct⁴⁰:

- increased retail competition;

have been specially trained to sell the product. In other cases, instead of providing trained staff, the manufacturer may provide the retailer a commission for each sale of that manufacturer's product. Under this model, manufacturers commonly also arrange after sales services such as delivery and maintenance.

³⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁴⁰ Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, p. 9.

- increased consumer choice;
 - assisting the competitive process and increased consumer welfare; and
 - improved competitiveness of the retail supply chain.
69. Narta submits that its members have found themselves at a competitive disadvantage to major corporate and single banner buying groups when⁴¹:
- a. suppliers seek a retail platform that protects their brand for new release products; and
 - b. seeking a competitively priced exclusive 'house brand' product similar to those offered by major corporate and single banner buying groups.
70. Narta submits that its members compete against each other and other major retailers in a highly competitive retail market. However, Narta members are at a disadvantage to members of single banner buying groups. Because these buying groups operate under the same brand and engage in joint advertising of electrical products, they are able to advertise a consistent price at all stores in that banner group, nationwide. In contrast, because Narta members maintain distinct brands, they do not wish to advertise jointly. As a result, any agreement between Narta members to advertise collectively acquired products at an agreed minimum price may not be covered by section 44ZZRV of the Act.
71. Narta submits that supplier investment in research and development has led to suppliers demanding more from Narta in terms of its 'brand value' and total marketing presentation. The ability to offer consistent and coordinated product marketing has become increasingly important to suppliers of electrical goods who are seeking to protect the value of their brands.
72. Narta considers that a key facet of this brand protection is a retail platform's ability to offer consistent marketing of Exclusive Products, including by applying a consistent advertising price. However, Narta's inability to guarantee a consistent advertising price by advertising jointly has resulted in suppliers regarding Narta members as individual retailers rather than a single retail group.⁴² Narta submits that this inhibits its members' ability to leverage their combined scale when negotiating for access to Exclusive Products.
73. Narta identified nine recent examples of Exclusive Products where it has been unable to negotiate acquisition of the product for its members during the product's initial launch period. In some cases, the Exclusive Product was acquired exclusively by a competing single banner retail group.⁴³ For example, Narta submits that all of its members' major competitors negotiated acquisition of at least one exclusive model of Sony television for the 2012 Christmas retail period but Narta was not able to do the same. Narta submits that this was a direct result of its members' inability to provide and execute coordinated marketing, including offering a consistent advertising price. Narta submits that the Conduct will allow its members to offer suppliers an overall consistent marketing message for Exclusive Products.

⁴¹ Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, p. 5.

⁴² That is, the advertising price is consistent across all Narta members, without being set by the supplier. Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, pp. 2, 5.

⁴³ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 8.

74. Narta submits it was clear in Narta's discussions with its suppliers that a total marketing strategy included price consistency for brand positioning. Narta has provided the ACCC with confidential submissions from several of its suppliers, indicating their support for the Conduct.
75. Narta submits that there has recently been a trend for suppliers to enter an agency model. Two years ago, there was only one supplier (Miele) operating under an agency model in the market, now there are many (e.g. AG, Electrolux, Asko). Narta submits that the agency retail model is becoming more popular with suppliers because it legally allows the supplier to have brand consistency in relation to brand execution and price.
76. Narta submits that suppliers want total brand marketing (that is, the inclusion of components such as in-store product training, investment in selling the product through floor space, displays, etc.) as well as price consistency for brand positioning. As consumers are researching products in greater detail than before, suppliers consider it to be important that consumers are not confused about price in relation to a particular product's brand positioning.
77. Narta submits that the ability to impose a MAP will result in a number of benefits to both suppliers and consumers. In particular, Narta's ability to offer access to a retail distribution network with the attraction of consistent advertising prices will:
- a. give existing suppliers of Exclusive Products access to a retail distribution network which is an alternative to existing retail banner groups and corporate retail groups, to opening company (supplier) owned stores or to implementing an agency selling model;
 - b. give existing suppliers of Exclusive Products access to a wider range of retail distribution that is suitable for distributing their Exclusive Products; and
 - c. facilitate entry into Australian markets, particularly by overseas suppliers, by encouraging more competition between retailers to source such products. Narta notes in this regard its members' attempts to source Exclusive Products from overseas brands such as Beko to act as a house brand. Narta submits that suppliers will not take the risk of supplying into Australia unless they have a degree of confidence as to how their products will be marketed.
78. In relation to consumers, Narta submits that its improved ability to source Exclusive Products from suppliers for its members will result in the following benefits:
- a. a greater diversity of the retail networks that have access to stocks of Exclusive Products. This is likely to result in greater choice for consumers as to where to purchase such products;
 - b. a greater choice of consumer electrical products to the extent that the entry of new products is encouraged, particularly from overseas suppliers. Narta notes in this regard that its members' ability to continue to use Beko as an exclusive house brand (and by implication its members' incentive to sponsor entry by other overseas brands) is likely to depend upon its ability to impose a MAP;
 - c. the maintenance of diversity in the variety of retail channels (retail group, company owned stores or agency selling), by which consumers may access Exclusive Products; and

- d. to the extent that Narta members are able to obtain better terms from suppliers, this benefit may be passed on to consumers in the form of a more competitive retail offer across an extended product range.

ACCC consideration

A more competitive retail offering from Narta members

79. The ACCC notes Narta's submissions that the Conduct will enable its members to provide a more competitive retail offering to suppliers, thus increasing competition for the acquisition of Exclusive Products by retailers. In assessing this claimed public benefit, the ACCC has considered the following three key issues:
 - the importance of consistent retail advertising price to suppliers;
 - whether the Conduct is likely to achieve a consistent advertising price; and
 - whether the Conduct is likely to increase competition between retailers for the acquisition of Exclusive Products from suppliers.

Importance of consistent advertising price to suppliers

80. The ACCC accepts that an ability to acquire Exclusive Products enables retailers to differentiate their retail offering and is likely to be an important factor in retail competition. However, the ACCC is not satisfied that the Conduct would substantially improve Narta's ability to acquire Exclusive Products from suppliers.
81. The ACCC considers that some suppliers of consumer electrical goods prefer consistent marketing and delivery of their products. This consistency may include advertising price but is likely to encompass a range of other retail services. The ACCC accepts that retailers who are not able to offer overall consistent marketing to these suppliers are likely to be less competitive in acquiring consumer electrical products from these suppliers.
82. The ACCC has consulted with electrical goods suppliers, retailers and industry experts and taken into account publically available information. Confidential submissions that Narta has provided to the ACCC on behalf of suppliers in support of a MAP (and the ACCC's own investigations) suggest that some suppliers value consistent advertising prices for certain types of products (particularly Exclusive Products), regardless of any effect on selling price. Accordingly, to the extent that suppliers have Exclusive Products in their range and a MAP results in a consistent advertising price, the ACCC considers that these suppliers are likely to welcome Narta's ability to impose a MAP and support Narta's application for authorisation of the Conduct. The mechanism by which public benefits may arise in this case are discussed below.
83. However, the ACCC notes that a consistent advertising price is only one aspect of consistency in advertising and marketing which may be offered by a retail group to suppliers.⁴⁴ Submissions from suppliers supporting a MAP refer generally to

⁴⁴ Based on Narta's submissions, the ACCC understands that consistent advertising means that all retail group members would use the same advertisements for a product. Consistent marketing means that all retail group members would present the product for purchase in the same way (that is, using the same promotion activities, presentation, retail service, placement, etc.).

consistent advertising and marketing rather than simply to consistent advertising prices. However the ACCC notes that some suppliers have indicated that consistent marketing and execution of a product includes consistent advertising price.

84. The ACCC considers there are a range of factors that are relevant to a supplier's consideration of whether or not to supply products (including Exclusive Products) to a retail group and the terms of such supply, including:
- a. the volume and value of sales achieved by the retail group (historical and projected);
 - b. the level of marketing and advertising support to be provided by the retail group;
 - c. the quality of the retail group's sales staff and the quality of the retail experience provided by the retail group to consumers;
 - d. the ability and willingness of the retail group to maintain the necessary level of stock, in order to cover the supplier's projected demand;
 - e. the nature and quality of after-sales services provided by the retail group;
 - f. the convenience of billing arrangements and other costs associated with supplying the retail group; and
 - g. the retail group's typical consumer profile and price points.
85. The ACCC considers that individual Narta members are likely to have the capacity to provide consistency across these factors and Narta submits that it provides assistance to its members in relation to these factors.
86. However, the ACCC notes that individual Narta members are clearly distinguishable from one another in terms of the advertising and other retail services that they offer to consumers. This differentiation would largely continue with or without the Conduct. The only difference in the future with the Conduct is that Narta members would offer consistent advertising prices for MAP products. All other aspects of their differentiated retail offers would likely remain unchanged. The ACCC considers that Narta members are unlikely to be able to provide overall consistency on the factors in points 84b to 84g with or without the Conduct. Thus, the ACCC does not consider that the Conduct will enable Narta members to offer overall consistency in marketing a product or brand.
87. The ACCC notes Narta's submission that its members are currently able to address each of the factors in paragraph 84 other than price.⁴⁵ However, for suppliers that value overall marketing consistency, the ACCC considers that the differentiation between Narta members plays a role in a supplier's decision to offer Narta Exclusive Products. This differentiation can operate in some circumstances as a competitive advantage for Narta members because it enables suppliers to reach consumers in more geographic areas and to target different consumers through specialty retailers.
88. In relation to consistent marketing, single-banner retail groups and corporate retail groups⁴⁶ may have an implicit competitive advantage over Narta members with or

⁴⁵ Narta International Pty Ltd, Submission dated 1 March 2013, p.2

⁴⁶ Retailers that fit into these categories are outlined at paragraph 29 above.

without the Conduct, although the ACCC notes that even individual members of single banner groups advertise different prices at the local level.

89. The ACCC considers Narta's ability to set a MAP for Exclusive Products is unlikely to significantly influence its attractiveness to suppliers of Exclusive Products that seek overall consistent marketing from retailers. Furthermore, the ACCC notes that Narta has made inconsistent and sometimes contradictory submissions regarding the importance to suppliers of consistent advertising price.

Whether a MAP is likely to achieve a consistent advertising price in most situations

90. Even if consistency in advertising prices is a key determinant of a supplier's choice of retail distribution, the ACCC does not consider that the Conduct would facilitate such consistency.
91. The ACCC notes that:
- a. Narta proposes to amend clause 5.8 of its Code of Conduct to allow its members to advertise a MAP Product at a price higher than the relevant MAP;
 - b. a MAP may not be consistent across the geographic area of competition as defined by Narta; and
 - c. a MAP may change over time.⁴⁷
92. None of these factors is conducive to a consistent advertising price. Thus Narta members are unlikely to be able to offer suppliers a consistent advertising price with or without the conduct.
93. The ACCC also notes that suppliers will have no input into a MAP, a MAP will not be based on Recommended Retail Price and Narta may change a MAP to reflect changing market conditions. The ACCC considers that these features are unlikely to assure suppliers that a MAP would be set at a level that provides their desired product positioning.
94. Accordingly, the ACCC considers that the Conduct will not guarantee a consistent advertising price.

Other reasons suppliers may value a MAP

95. Narta has also submitted that its ability to impose a MAP would be particularly attractive for some suppliers of consumer electrical products where those products would otherwise face immediate discounting to a level where retailers are not interested in stocking or actively promoting the product. The ACCC notes that Narta's arguments in this respect are contrary to the main thrust of its submissions: that imposing a MAP will not raise the selling prices of MAP Products.⁴⁸ By implication, a MAP would only be effective in maintaining margins and encouraging product promotion by retailers if it did affect the selling price by limiting discounting.

⁴⁷ Narta International Pty Ltd, Submission in support of application for authorisation A91335, 17 September 2012, paragraphs 5.2, 5.13, 6.2, 9.2.2, 9.2.4, 10.1.3; Submission providing further information, 9 November 2012, pp. 3, 7, 8; Submission of 5 December 2012, p. 1; Submission of 8 February 2013, pp. 1-4; Submission of 1 March 2013, p. 2.

⁴⁸ Narta International Pty Ltd, Submission in support of application for authorisation, 17 September 2012, pp. 4, 5, and 10.

Whether a MAP is likely to increase competition between retailers in relation to some Exclusive Products

96. Notwithstanding the preceding discussion, the ACCC considers that in the circumstances, where suppliers value a MAP but do not require overall marketing consistency, in the future with the Conduct Narta is likely to be able to compete more strongly for acquisitions of Exclusive Products from those suppliers and thereby promote competition between retailers.
97. If the Conduct enables Narta members to acquire Exclusive Products that are also acquired by competitors⁴⁹ such as Harvey Norman or the Good Guys, a MAP may increase the number of retail groups selling an Exclusive Product. The ACCC therefore considers that the Conduct is likely to increase competition between retailers to sell those Exclusive Products to consumers. It may also increase consumer choice of retailers and locations from which to buy those Exclusive Products.
98. Narta submits that an ability to offer Exclusive Products (and by implication impose a MAP) is also necessary to enable its members to compete more effectively across their entire product range with banner groups and other retailers of electrical goods (to improve inter-brand competition). To the extent that a MAP is necessary to enable Narta members to acquire Exclusive Products, the ACCC accepts that Narta members will be able to provide a more differentiated product offering with the Conduct, compared to a future without the Conduct. This may enable Narta members to compete more strongly on this dimension in the retail market.
99. Narta members may benefit to some extent from increased foot traffic and sales of these types of Exclusive Products, substitute products, add-ons and accessories. The ACCC acknowledges that this may result in some public benefit associated with increased competition between retailers to the extent that Narta members offer a more diverse retail experience to consumers. However compared to the future without the Conduct the ACCC is not satisfied that on the whole suppliers consider a MAP to be essential to their decision to supply Exclusive Products to Narta. Therefore the ACCC considers that this public benefit is likely to be minimal.

Conclusion on a more competitive retail offering

100. In summary, the ACCC considers that the Conduct may result in some increased competition between retailers for the acquisition and retailing of Exclusive Products in some limited circumstances compared to a future without the Conduct. Any such increase in competition would be a public benefit. However, the ACCC considers that this public benefit is likely to be minimal.

Increased choice of consumer electrical products

101. The ACCC notes that Narta's submissions suggest that the Conduct would facilitate new entry by overseas suppliers through⁵⁰:

⁴⁹ That is, Exclusive Products that have limited distribution rather than being solely supplied to one retail group.

⁵⁰ Narta International Pty Ltd, Submission in support of application for authorisation A91335, 17 September 2012, p. 9, paragraph 9.2.2.

- increasing the attractiveness of Narta members as a retail group to overseas suppliers. This will encourage entry by suppliers which otherwise may not consider entering Australia; and
 - enabling Narta members to maintain exclusive access to overseas brands whose entry Narta sponsors. This will provide Narta members with continued incentive to sponsor the entry of overseas suppliers.
102. The ACCC accepts that facilitation of market entry by new suppliers would be likely to increase choice of consumer electrical products and this would be a public benefit. The ACCC also accepts that new entrants are likely to prefer a retail model that gives them confidence that their entry will be successful. However, the ACCC is not satisfied that the Conduct is likely to have the effect of facilitating entry by overseas suppliers.
103. The ACCC notes Narta's submission that an overseas supplier will not consider entering Australia unless the supplier is confident that its brand will be protected by the retailers that it supplies. The ACCC also notes Narta's submission that this brand protection requires a consistent advertising price.⁵¹
104. The ACCC accepts that overseas suppliers are interested in ensuring that their brand is protected as part of entry into new markets. However, the ACCC considers that there are a range of factors that impact on brand protection, including the level and consistency of the overall retail experience provided by a retail group. Accordingly, the ACCC considers that a consistent advertising price, as a single aspect of advertising consistency, is unlikely to be a decisive factor in most overseas suppliers' decisions to enter Australia. The ACCC also considers that setting an advertising price floor, independent of supplier input, is unlikely to convince suppliers to enter Australia.
105. The ACCC notes in this regard that Narta has submitted that it has been able to sponsor the entry of new overseas brands to Australia without the Conduct. Narta submits that this entry was made on the understanding that Narta would be able to set a MAP in future. However, the ACCC is aware that individual electrical goods retailers are able to acquire Exclusive Products independent of any arrangements with Narta and to sponsor entry of particular brands into the Australian market.
106. The ACCC notes Narta's submission that, in the absence of a MAP, it will be unable to negotiate a sufficient exclusivity period over foreign brands for which it sponsors entry. Without a sufficient exclusivity period, Narta submits that its members will not have an incentive to continue to sponsor the entry of overseas suppliers. Narta uses the example of Beko branded products and submits that it will be unable to maintain exclusivity over these products in the absence of a MAP.
107. The ACCC considers that in the future without the Conduct Narta members will continue to have an incentive to sponsor entry by overseas suppliers to the extent that the profits from doing so are sufficient to cover any costs (including opportunity costs) incurred in doing so.
108. Therefore, the ACCC is not satisfied that in the future without the Conduct:
- new suppliers would have less incentive to enter the Australian market;

⁵¹ Pre-decision conference minutes, 15 February 2013, p. 6; Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 7.

- Narta members would have less incentive to compete strongly with other retail groups to sponsor the entry of new suppliers; and
- Narta members would be able to negotiate different periods of exclusivity from new suppliers.

109. Therefore the ACCC considers that, in the future with the Conduct, a MAP is unlikely to result in a public benefit in the form of increased choice of consumer electrical products.

Choice of retail channels

110. Narta submits that the ability to impose a MAP for Exclusive Products will increase the attractiveness of the Narta group to suppliers that might otherwise choose to implement an agency model or company-owned store model.⁵² Narta submits that this would benefit suppliers by maintaining their choice of retail channels.

111. The ACCC notes that there has been considerable innovation in retail models in the past few years with online, suppliers' company owned stores and agency models competing with traditional bricks and mortar retail models.

112. The ACCC notes that consistent advertising prices are simply one aspect of an agency selling model or a supplier owned store model, and that these prices are set at the Recommended Retail Price. Both models require a substantial investment to establish but also allow the supplier to potentially control many aspects of the retail experience including non-price aspects of marketing and advertising, product display, training of sales staff, after-sales services and retail sale prices (including any discounting).

113. The ACCC is not satisfied that the factors influencing a suppliers' decision to move to an agency or company-owned retail distribution model are likely to be different in the future with the conduct compared to the future without the conduct. In particular, the ACCC is not satisfied that:

- a. most suppliers considering moving to either an agency model or company owned store model would be persuaded not to do so by consistent or floor advertising prices offered by Narta members (particularly on Exclusive Products); or
- b. existing retail groups that are able to offer consistent advertising prices are insufficient for the commercial requirements of suppliers, such that the best alternative is to move to an agency model or company owned store model.

114. Therefore the ACCC considers that the Conduct is unlikely to result in a public benefit in the form of increased choice of retail channels.

⁵² That is, a store that is owned and operated directly by a supplier or manufacturer and bears that manufacturer's brand name, such as Apple stores or Bose stores. The ACCC notes that these types of company owned stores are rare in comparison to agency selling arrangements, and are particularly rare in comparison to arrangements where products are sold to retailers for resale.

ACCC conclusion on public benefits

115. For the reasons outlined, the ACCC considers the Conduct is likely to result in minimal public benefits from increased competition between retailers for the acquisition and retailing of Exclusive Products in some limited circumstances compared to a future without the Conduct.

Public detriment

116. Public detriment is also not defined in the Act but the Australian Competition Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵³

117. By definition, a horizontal agreement involves coordination between the parties to the agreement. Such agreements can create or enhance the market power of participants to the agreement and thus enhance their ability to raise prices, or reduce output or quality. Horizontal agreements may also create or enhance the potential for coordinated (rather than competitive) conduct on other matters, as well as across the market more generally. Where firms are able to coordinate their conduct more generally, substantial detriment is also likely to arise through higher prices, reduced output and/or reduced quality.

118. Narta submits that the potential exists for the Conduct to lessen competition. However, it submits that this potential will not be realised for the reasons set out in paragraph 36 of this determination.

119. The ACCC's assessment of the likely public detriments from the Conduct follows.

Lessening of competition between electrical goods retailers

120. The ACCC considers that the Conduct is likely to affect two main aspects of competition between electrical goods retailers:

- a. competition in relation to the price that Narta members, including bricks and mortar retailers and online retailers, each charge for a particular MAP Product (**intra-brand competition**); and
- b. competition between retailers, including Narta members and non-Narta members, in relation to the retail supply of electrical goods that are MAP Products (including competition between different MAP Products) or substitutable for MAP Products (**inter-brand competition**).

Lessening of intra-brand competition

Lessening of price competition

121. The ACCC considers a MAP will reveal to each Narta member as well as other retailers the lowest price at which all Narta members will advertise MAP Products. This will reduce the strength of price competition between retailers. A MAP will eliminate Narta members' downward flexibility on the advertising price of a MAP Product, leaving only room for an increase in advertising price above a MAP.

⁵³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

Without a MAP, Narta members are likely to compete more strongly with each other, including by lowering the advertising price of Exclusive Products.

122. The ACCC considers that, across all retail distribution channels, a MAP is likely to be set at a higher level than some retailers would otherwise advertise the MAP product given that one of the reasons for setting a MAP is to ensure brand protection and thus limit discounting. To the extent that Narta prioritises consistency of advertising price over flexibility, a MAP is likely to be set at a level that ensures that all retailers that supply the MAP product, including premium retailers, would be able to make a profit from sales of the product. This is likely to be higher than the advertising price that most Narta members would set absent a MAP. As a result, advertising prices are likely to be higher in the future with the Conduct.

Interaction between bricks and mortar retailing and online retailing

123. The ACCC notes that Narta has made a number of substantial submissions in relation to the role of online advertising price and whether online comparisons will limit the level of public detriment arising from the Conduct. Accordingly, the ACCC has considered the interaction between online and bricks and mortar pricing in detail. The ACCC considers that the effect of a MAP on online pricing and the interaction between online pricing and bricks and mortar pricing is likely to be detrimental to competition but that this issue is not pivotal to its assessment that public detriments are likely to result from the Conduct.

Relationship between advertising and selling prices

124. Narta submits that selling prices are disconnected from advertising prices such that the Conduct will not lessen overall competition between Narta members. In particular, Narta submits that its members will be able to discount their selling prices from a MAP and that consumers will continue to be able to compare prices online. However, the ACCC is not satisfied that the advertising price will not be used as a reference for the selling price (**Reference Pricing**).
125. The ACCC's investigations have indicated that products' selling prices are likely to be influenced by the products' advertising prices. At bricks and mortar outlets, the selling prices of electrical goods are often negotiated below the advertising price. However, the ACCC notes that retailers use the advertising price as a starting point for negotiations and may offer either lump-sum discounts or percentage discounts off this price. Thus, in the case of bricks and mortar retail, the advertising price of goods sold by electrical goods retailers may act as a reference for the selling price. Currently, individual Narta members advertise a particular brand or product at different prices and so their selling prices can differ significantly, despite Reference Pricing.
126. In contrast, the selling prices offered through online retailers are rarely negotiated.⁵⁴ The ACCC notes online shopping enables consumers to view and compare advertising prices for a particular product and for substitute products quickly and

⁵⁴ The ACCC notes that Narta has submitted that several of its members have confirmed that they often received calls or emails seeking to negotiate a lower price and they commonly provide discounts in response to such enquiries. However, the ACCC's investigations indicate that this anecdotal evidence is not representative of the average online shopping experience with Narta members. These websites do not advertise negotiation services and the typical model of online retail effectively discourages this practice.

conveniently. The ACCC considers that this pricing transparency increases online retailers' incentive to offer their lowest selling price as their advertising price, saving consumers time and resources spent on the comparison and negotiation processes.

Lessening of retail channel competition

127. The ACCC notes that consumers tend to consider that online retailers usually offer lower selling prices than bricks and mortar retailers because online retailers' costs are often lower. However Narta submits that its members' online selling prices of consumer electrical products are higher than bricks and mortar selling prices. It is not clear to the ACCC whether online prices are higher or lower on average than bricks and mortar prices.⁵⁵ However to the extent that Narta members would otherwise have priced lower online than in bricks and mortar stores, this is less likely to occur in the future with the Conduct.
128. The process of quick and convenient online price comparison means that if there is a lower online price than in bricks and mortar stores for a particular product consumers can easily use this online price as a point of leverage in negotiating selling prices with bricks and mortar retailers, even if little or no price negotiation occurs online. That is, the online advertising price may be used as a Reference Price for sales at bricks and mortar retailers.
129. The ACCC notes that the Conduct will limit existing advertising price competition between consumer electrical goods retailers in respect of each particular MAP Product. In the case of bricks and mortar retailers the ACCC considers that Narta members are likely to use a MAP as a Reference Price for negotiating selling prices. Accordingly, the Conduct is likely to lessen competition between bricks and mortar retailers and lead to higher selling prices than would be the case without the Conduct.
130. In the case of online retailing, the ACCC considers that a MAP would reduce the scope for online discounting which generally occurs upfront as part of the advertising price. As noted, the ACCC considers that the conduct is likely to raise the advertising price of MAP Products. As the online advertising price is likely to be the same as the online selling price, the ACCC considers that online selling prices for MAP products are also likely to be higher in the future with the Conduct than in the future without.
131. In the ACCC's view, any ability for consumers to negotiate online through a negotiating service on or additional to a retailer's website is unlikely to be an effective substitute for the upfront discounting behaviour that would occur without a MAP. In particular, consumers are unlikely to consider these facilities an effective substitute for upfront discounts due to the costs and inconvenience associated with negotiating multiple discounts online to ensure that the consumer buys at the lowest selling price. These search costs are likely to have the effect of softening competition between retailers and reducing price transparency. The costs of implementing a real-time negotiation facility would also be likely to reduce online discounting.
132. The ACCC considers that, over the medium term at least, online retailers are unlikely to adopt mechanisms to allow them to differentiate the selling price from

⁵⁵ Narta submissions dated 8 February 2013 and 14 March 2013; CMS, Record of conversation 19 March 2013; GfK Retail & Technology, Record of conversation, 14 March 2013.

the advertising price. The retail model adopted by most online retailers does not lend itself to effective negotiation and emphasises convenience and low operating costs.

133. As a result, the ACCC considers that, in the case of online retail, the advertising price of goods sold by electrical goods retailers is likely to be the same as the selling price in the future with or without the Conduct. Since a MAP is likely to incorporate a margin for bricks and mortar retailers, which generally have higher cost structures than online retailers, the online selling price is likely to be higher with a MAP than otherwise. As a result, competition is likely to be reduced between online retailers and bricks and mortar retailers.⁵⁶

Disadvantage to online stores

134. The ACCC also considers a MAP is likely to disadvantage Narta members that are online-only brands of electrical goods retailers. Online-only retailers have different business strategies to bricks and mortar stores and their online counterparts. While these online-only brand retailers may offer upfront discounting and loyalty rewards, the ACCC understands that they do not discount from advertising prices through negotiation with the customer. The ACCC notes that as at the time of this determination, no online retailers appear to have a clearly marked negotiation service for consumers.⁵⁷ The ACCC also notes that, while online negotiation may occur, as discussed above, it is not common⁵⁸ and does not provide the same transparency as upfront discounted prices.

Conclusion

135. The ACCC considers that the imposition of a MAP is likely to increase the advertising price of online retailers in the same way that it is likely to increase advertising prices in bricks and mortar stores. Because online retailers do not negotiate selling prices with consumers, a MAP is likely to lessen the competitive constraint that online retailers can impose on bricks and mortar Narta retailers. Therefore the ACCC considers that online comparisons are unlikely to mitigate the effect of reduced price competition resulting from the Conduct.

⁵⁶ The ACCC notes that overseas online retailers may sell products which, when sold in Australia, would be subject to a MAP. However, the ACCC considers the extent to which Narta members would be constrained by sales from overseas online retailers is limited. The ACCC notes that consumers are generally less likely to purchase more expensive items and/or bulky items such as electrical goods from overseas retailers for a range of reasons, including shipping costs, the risk involved with transacting with an online entity, the potential for product damage during shipping, length of shipping times, validity of product warranties in Australia, after sales service, differences in product standards between countries, differences in electrical plugs and voltage specifications and other product specifications such as language interface.

⁵⁷ The ACCC notes that prior to this determination Bing Lee had a clearly marked negotiation mechanism on its website. However on or about 22 March 2013 the Bing Lee website (www.binglee.com.au) appears to have been updated to remove this mechanism.

⁵⁸ GfK Retail & Technology, Record of conversation, 14 March 2013, p. 2.

Availability of Exclusive Products to all Narta members

136. The ACCC notes Narta's submission that its members will not be required to stock products that are subject to a MAP and that this would help to mitigate any potential competitive detriment.
137. However, the ACCC considers that Narta members (particularly bricks and mortar retailers) will have a strong incentive to stock Exclusive Products that are within the member's desired product range and are subject to a MAP because of the incorporated higher margin on any sales of these products.⁵⁹ In any case, the ACCC considers that the fact that Narta members will not be required to stock products that are subject to a MAP is unlikely to mitigate any potential detriment from the Conduct. This is because the fewer members that stock a MAP Product, the less choice consumers will have in terms of retail service and, potentially, selling price.
138. In addition, the ACCC has concerns that Narta members may not have equal access to MAP Products (for example, access may depend upon the type of distribution channel a retailer uses) and that this may affect competition in relation to MAP Products. The ACCC notes Narta's submission that no Narta member will range all products that have a MAP applied.⁶⁰
139. Therefore, the ACCC considers that the ability for Narta members to choose not to stock MAP Products is unlikely to mitigate the public detriment from a lessening of competition between electrical goods retailers.

Conclusion on lessening of intra-brand competition

140. The ACCC considers that the Conduct is likely to result in significant public detriment from a lessening of intra-brand competition.

Lessening of inter-brand competition

141. The ACCC notes that Exclusive Products would compete with other similar, substitutable products available from Narta members and competing electrical goods retailers in the future with and without the Conduct. The ACCC considers that, in the future with the Conduct, the advertising and selling price of MAP Products is likely to be higher than without the Conduct. As a result, in the future with the Conduct, there is likely to be less pressure on other brands (including other brands of MAP Products) to compete on price with MAP Products. Therefore, both advertising and selling prices for similar products to MAP Products are likely to be higher with the Conduct than they would otherwise be.
142. In addition, when substitute products become available to competing retailers, in setting their advertising prices, these retailers are likely to have regard to the advertising price of the MAP Product which has already been signalled and established by Narta. While the advertising price of the MAP Product and its substitutes may be competed down over time, the ACCC considers it is likely that the advertising price of these products will be inflated for a period of time and that

⁵⁹ The ACCC notes that Narta members' product ranges vary considerably and some exclusive products will be outside the product range of certain members. For example, washing machines are outside the product range of Ted's Cameras.

⁶⁰ Narta International Pty Ltd, Submission of 5 December 2012, p.2.

this inflated price will in no way be connected to supplier requirements on retail service to support innovation, product quality or product marketing.

143. The ACCC considers the Conduct is likely to result in significant public detriment from a lessening of inter-brand competition. The magnitude of the detriment depends on the scope of the Conduct (discussed below).

Reduced ability to respond to local competition

144. The ACCC considers that competition at the retail level has national, regional and local dimensions. In the future without the Conduct, Narta members would be able to respond quickly and flexibly to changes in competitive conditions at any of these levels by varying their advertised prices for Exclusive Products. Such flexibility may be particularly valuable at the local level where the ACCC understands advertised prices of some products may change quickly and for short periods of time. A retailer's ability to respond quickly to such changes is likely to be an important aspect of their competitiveness.

145. The ACCC notes Narta's clarification that it may vary a MAP between geographical areas to respond to local competition and also over time. The ACCC considers that this may result in a MAP that is more flexible than without this ability to respond. However, the ACCC considers that Narta is unlikely to have as much local market information as its members, will not have as immediate access to any such information and will not be able to respond with the same timeliness and flexibility as a member in a particular local or regional area.

146. The ACCC considers that a MAP is likely to result public detriment from a lessening of local retail competition as Narta members are likely to have less ability to respond to local competitors. This is likely to lessen both inter-brand and intra-brand competition.

Detriment arising from the scope of products to which a MAP is applied

147. The extent of the public detriment arising from the Conduct is in part influenced by the scope of a MAP and the range of Exclusive Products to which it is applied.

Narta's submissions

148. Narta submits that it will only apply a MAP to a small proportion of goods. In its initial submission, it estimated that less than two per cent of its members' products by value and less than two per cent by volume of sales would be subject to a MAP each year, based on the proportion of potential MAP Products last year.⁶¹ Narta provided further detail in a later submission, which indicated that it was likely to apply a MAP to less than:⁶²

- 11 products in the 'laundry' market segment (8.48% of member sales by category);
- 18 products in the 'refrigeration' market segment (9% of member sales by category);
- 13 products in the 'dishwasher' market segment (5.8% of member sales by category); and

⁶¹ Narta International Pty Ltd, Submission providing further information, 9 November 2012, p. 3.

⁶² Narta International Pty Ltd, Submission of 5 December 2012, p.2.

- 20 products in the 'cooking' market segment (4.78% of member sales by category).

149. Initially, Narta did not propose to limit the scope of potential MAP Products. However, in response to concern expressed by the ACCC, Narta has offered to:⁶³

- limit the total number of new release models to which a MAP will be applied to five models at any time in each major product category (audio visual, whitegoods and cooking);
- limit the period of application of a MAP on these new release product models to a maximum of three months;
- exclude the product categories of Information Technology, Gaming, Car Audio and Software from a MAP; and
- provide the ACCC with details of the imposition of a MAP at three-year intervals during any period of authorisation granted, or agree to any other reasonable form of monitoring that the ACCC may wish to apply.

150. Narta has also limited the scope of a MAP to exclude premium products.⁶⁴

ACCC's consideration

151. The ACCC has concerns regarding the scope of the Conduct. In particular the ACCC notes that:

- the terms 'new release' and 'exclusive model' as used by Narta in its application are subject to inherent ambiguity and imprecision within the context of the electrical retailing industry, allowing for a significant increase in scope depending upon future interpretations of these terms;
- according to Narta's submissions, truly innovative new products are relatively rare and appear unlikely to exceed five products in a category at a time. Narta submits that the ability to impose five MAPs in a category is required, in order to allow a MAP to be applied across various screen sizes of a TV at launch. However, Narta's proposed limits are unlikely to inhibit its ability to place a MAP on the majority of innovator products released should it negotiate access to such products and desire to do so; and
- a small number of the most popular product models in each category are likely to account for a high proportion of sales in terms of both volume and value. Any MAP imposed on such models is therefore likely to have a disproportionate effect.

152. The public detriments identified in relation to a MAP above remain even with the limitations proposed by Narta in paragraphs 148 and 149.

153. As noted in the ACCC's discussion in the 'The relevant areas of competition', Narta members sell a particularly wide variety of electrical products, including white goods such as refrigerators and washing machines, and brown goods such as televisions, cameras, computers, kitchen appliances and bathroom appliances.

154. Narta members also compete in a range of product markets. The ACCC notes that, in some categories of products, Narta members as a whole are likely to have

⁶³ Narta International Pty Ltd, Submission of 5 December 2012, p.2.

⁶⁴ Narta International Pty Ltd, Submission of 14 March 2013.

significant market presence. This is indicated in the Total Market Retail Value Shares for Fiscal Year 2011/12 table provided in Narta's submission in support of its application for authorisation, which indicates that the Narta group of members had a 25.3% share of the market, compared to 27.5% for Harvey Norman, 14.7% for the Good Guys and 14.7% combined share for the Woolworths Group and Wesfarmers. Narta also indicates on its public website that its members include "category dominant specialists".⁶⁵

155. Narta submits that any MAP applied by Narta will need to be responsive to the market, otherwise Narta members will not stock the product and sales will fall below committed volumes. However, the ACCC considers that the reduction in competition on MAP Products means that Narta members will not face the same competitive pressure to reduce the advertising price of MAP Products as it would in the absence of the Conduct. In the case of truly exclusive products, consumers will not be able to acquire the products from alternate retailers and so Narta members will only have an incentive to reduce a MAP if there is a high level of inter-brand competition. The ACCC also notes that the Conduct does not preclude a product from being subject to a MAP for two or more consecutive periods.

156. The ACCC therefore considers that authorisation to apply a MAP, which is likely to lessen competition between electrical goods retailers, on a broad scope of electrical products is likely to have a significant detrimental effect on the relevant areas of competition.

Conclusion

157. The ACCC considers that the magnitude of the public detriments is likely to be directly related to the scope of the Conduct and as the scope is likely to be broad, the ACCC considers that the public detriment is likely to be significant.

ACCC conclusion on public detriments

158. The ACCC considers the Conduct is likely to result in significant public detriments from the lessening of competition between electrical goods retailers.

Balance of public benefit and detriment

159. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Conduct is likely to result in a public benefit and that public benefit will outweigh any likely public detriment constituted by any lessening of competition.

160. In the context of applying the net public benefit test in subsection 90(8)⁶⁶ of the Act, the Australian Competition Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁶⁷

⁶⁵ Available at <http://www.narta.com.au/aboutus.html>, accessed 20 December 2012.

⁶⁶ The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

⁶⁷ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

161. For the reasons outlined in this determination, the ACCC considers that the Conduct is likely to result in minimal public benefits and significant public detriments. The ACCC is not satisfied that any benefit to the public that may arise would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

162. Accordingly, the ACCC is not satisfied that the relevant net public benefit test is met.

Determination

The application

163. On 17 September 2012, Narta lodged application for authorisation A91335 using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsections 88(1) and 88(1A) of the Act for Narta to make and give effect to amendments to clause 5.8 of its Code of Conduct to enable it to impose a minimum advertising price (**MAP**) on particular goods that are collectively acquired by its members (the **Conduct**). In particular, the amended clause 5.8 of Narta's Code of Conduct provides:

When advertising the price of goods purchased under a Narta initiated collective purchase for Beko branded electrical products, new release electrical goods, and exclusive models of electrical goods, you agree not to advertise at any price less than any minimum advertising price as may be specified by Narta for those goods from time to time. The selling price of those goods remains completely at the individual member's discretion.

164. Narta states that the range of products over which it would have imposed a MAP would be limited to goods that:

- a. are collectively acquired by members;
- b. may or may not be jointly advertised; and
- c. fall into the following three categories of products:
 - i. Beko branded electrical products which Narta sells exclusively within Australia (a MAP would be imposed indefinitely as Narta is seeking to maintain exclusivity over this brand);
 - ii. new release electrical goods (a MAP would be imposed for no more than three months from the date of first supply, in order to gain some form of exclusivity from the supplier); and
 - iii. exclusive models of electrical goods as may be negotiated by Narta from time to time (a MAP would be imposed for no more than 12 months)

(collectively **MAP Products**).

The net public benefit test

165. For the reasons outlined in this determination, the ACCC is not satisfied that the Conduct for which authorisation is sought is likely to result in a public benefit that

would outweigh the likely detriment to the public constituted by any lessening of competition arising from the conduct.⁶⁸

166. The ACCC therefore **denies** authorisation to application A91335.

⁶⁸ See subsections 90(5A), 90(5B), 90(6) and 90(7) and Attachment A.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.