



Australian
Competition &
Consumer
Commission

Draft 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: 17 January 2013

Authorisation number: A91335

Commissioners:

Sims
Schaper
Walker

Summary

Decision

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

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

The conduct

Narta International Pty Ltd (**Narta**), a buying group of 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 (the **MAP**) on particular goods that are collectively acquired by members (the **Conduct**).

Draft decision

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

Narta has submitted that a number of public benefits are likely to arise from authorisation permitting it to impose a MAP. These include increased retail competition and consumer choice arising from the enhancement of Narta members' competitiveness in acquiring and retailing consumer electrical products. However, the ACCC considers that the claimed public benefits are not adequately supported by the information before the ACCC, including the evidence and arguments provided by Narta.

Narta has submitted that public detriment from any lessening of competition due to the MAP is unlikely to arise for a variety of reasons. However, the ACCC considers that the likely public detriments of the Conduct include higher prices for products subject to a MAP and reduced competition between retailers 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, the availability of substitutes and consumer demand for those products, and the extent to which the MAP becomes a reference point for actual selling prices.

The ACCC is not satisfied that the Conduct is likely to result in a public benefit or that any public benefit that may result would outweigh the likely detriment to the public from the Conduct. The ACCC therefore proposes to deny authorisation.

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Abbreviations

the Act	the <i>Competition and Consumer Act</i> 2010
ACCC	the Australian Competition and Consumer Commission
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 which may be referred to as: belonging to brands exclusively available to one or a limited number of retail groups; premium and 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 or premium 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

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 where 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

The conduct

3. Narta is seeking authorisation for Narta members to make and give effect to a proposed amendment of clause 5.8 of its Code of Conduct to allow it to impose a minimum advertising price (a **MAP**) on particular goods that are collectively acquired by members (the **Conduct**).
4. 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.
5. While the clause provides for joint advertising or promotional activity by Narta on behalf of its members, Narta members have not previously engaged in either joint advertising or joint promotional activity because they prefer to maintain their separate brand identities.
6. Narta proposes to amend clause 5.8 of its Code of Conduct to read as follows:

When advertising the price of goods purchased under a Narta initiated collective purchase for Beko branded electrical products, new release or premium electrical goods, and exclusive models of electrical goods, you agree to use only the 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.
7. 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 goods that:
 - a. are collectively acquired by its members;

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.

- b. may or may not be jointly advertised;² and
- c. fall into at least one of the following three categories of products:
 - i. Beko branded electrical products which Narta sells exclusively within Australia³ (the MAP would be imposed indefinitely as Narta is seeking to maintain exclusivity over this brand);
 - ii. new release or premium electrical goods (the 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 (the MAP would be imposed for no more than 12 months)

(collectively the **MAP Products**).
8. Narta submits that the length of time that Narta would impose a MAP will depend upon the particular product and the terms of Narta's agreement with the supplier or manufacturer. For example, exclusivity periods (and thus the MAP) for some new release or premium electrical goods may last no more than two or three weeks, while others may require up to three months.⁴
9. 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 manufacturer 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.
10. Narta submits it would only apply a MAP where this has been 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 access an exclusive house brand.⁵
11. The level of the MAP would be set by the Narta Senior Category Manager with responsibility for the particular category of products, such as whitegoods, cooking and audio visual. According to Narta, this would occur once negotiations with the manufacturer or supplier to secure the product had concluded.
12. The Senior Category Manager would set the 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

² 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.

³ Beko is a Turkish brand of kitchen and laundry appliances.

⁴ Narta, *Response to ACCC Information Request*, 9 November 2012, p. 9.

⁵ Narta, *Response to ACCC Information Request*, 9 November 2012, p. 3.

- the supplier recommended retail price.
13. After the 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.
 14. On the basis of the information provided by Narta, and the wording of the proposed amendment to clause 5.8 of Narta's Code of Conduct, the ACCC considers that the MAP would remove flexibility on advertising prices for those products to which a MAP is applied. Each Narta member may choose how to advertise the MAP Products using catalogues, websites, television advertising, etc. However, the advertising price of each of these MAP Products will be consistent between Narta members.

Narta

15. Narta is an acronym for the National Associated Retail Traders of Australia, an independent buying group of electrical goods retailers. It acts as an intermediary between its members and wholesale suppliers of electrical goods.
16. Narta currently has 29 members across Australia, including Bing Lee, David Jones, JB Hi-Fi, Radio Rentals, Ted's Cameras and Winning Appliances (and its subsidiary, Appliances Online). 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 sourcing these products through Narta, Narta members may also choose to source products independently.
17. 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.
18. In contrast to other electrical goods retail buying groups, Narta's members are independent retailers who are otherwise in competition with one another. They 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 and customer service. Each Narta member undertakes its own advertising and marketing, which may differ according to delivery channel as well as content.

Background

19. Narta submits that consumer electrical goods retailing is dominated by retail buying groups and large corporate groups.
20. Buying groups are either groups of retailers that trade under a single banner 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, Retravision (Northern) and Camera House.

21. Narta submits it is unique because, although its members buy product collectively, all of its members are independent retailers who trade under distinct trading names and make distinct retail offerings.
22. There are also a number of large corporate retail groups that are able to individually obtain products on competitive terms due to their bargaining power. These include the Woolworths Group (Masters and Big W) and Wesfarmers (Coles, Bunnings, Target, K-Mart).
23. Of particular relevance to Narta's application for authorisation is the ability of various retailing groups to access electrical goods which may be referred to as:
 - belonging to brands exclusively available to one or a limited number of retail groups;
 - premium and new release products; and
 - exclusive models available to one or a limited number of retail groups.
24. According to Narta's submissions each of these types of products are likely to be available to a retail group on an exclusive or limited distribution basis and are thus, for the purposes of this draft determination, referred to generically as '**Exclusive Products**'.

Submissions received by the ACCC

25. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
26. The ACCC sought submissions from 31 interested parties potentially affected by this application, including consumer electrical product manufacturers, suppliers and retailers. No submissions were initially received from interested parties. In response to a letter from Narta to its suppliers, a number of manufacturers and suppliers have provided letters in support of the Conduct. Their submissions broadly support Narta's claims regarding the likely benefits and detriments of the Conduct.
27. Narta's submission in support of its application and the information provided in response to the ACCC's request for information are considered in conjunction with the application and are available on the public register on the ACCC's website at www.accc.gov.au/authorisationsregister.

ACCC evaluation

28. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefit tests⁶ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that a public benefit is likely to arise and that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
29. In order to measure and assess the 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 should authorisation not be granted.

⁶ Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment A.

The relevant areas of competition

30. 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 accuracy 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 authorisation of its Conduct.
31. Narta submits that the relevant areas of competition are:
- the market for the wholesale acquisition of consumer electrical goods from manufacturers / 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.
32. Narta submits that its members' total share of each of the product categories in the Australian market for the retail supply of consumer electrical goods is as follows:⁷

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

33. 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.⁸
34. 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 with all other retailers of electrical goods broadly defined. For example, because of the specialist nature of its offering, Ted's Cameras is unlikely to compete with Bunnings or Kitchen HQ.

⁷ Narta submits these figures based on the GfK Business Manager Report, June 2012 and June 2011. Narta, *Response to ACCC Information Request*, 9 November 2012, p. 10.

⁸ Narta, *Response to ACCC Information Request*, 9 November 2012, p. 4.

35. Rather, and consistent with its view in previous relevant matters,⁹ 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 manufacturers and suppliers. It is likely that the categories of products are broadly analogous to the product categories identified by Narta in paragraph 32 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 32 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 types are considerably narrower than the product categories nominated by Narta in paragraph 32. 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

36. The ACCC considers the '*likely future with-and-without*' to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹⁰ The ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.
37. Narta submits that if authorisation is not granted, it will not amend its Code of Conduct and (despite the existing clause of its Code Conduct¹¹) 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.
38. Narta submits that absent authorisation the ability of its members to compete with other electrical goods retailers would continue to be compromised and ultimately some member businesses may fail.

⁹ See: ACCC Public Competition Assessment GUD Holdings Limited – proposed acquisition of Breville Group Limited 22 January 2010.

¹⁰ 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.

¹¹ Narta's Code of Conduct currently contains the version of clause 5.8 set out in paragraph 4 above.

39. The ACCC considers that absent authorisation, Narta is unlikely to impose a MAP in relation to its members' individual marketing exercises and Narta members will continue to individually determine the advertising prices of products acquired through Narta. The ACCC considers that Narta members will continue to jointly acquire products through Narta.

Public benefit

40. 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.¹²

Narta's submissions

41. Narta submits that the following public benefits are likely to arise from authorisation of the Conduct:

- increased retail competition;
- increased consumer choice;
- assisting the competitive process and increased consumer welfare; and
- improved competitiveness of the retail supply chain.

42. Narta submits that its members compete against each other and other major retailers in a highly competitive retail market. However, Narta members have found themselves at a competitive disadvantage to major corporate and single banner buying groups when:

- a. suppliers seek a retail platform that protects their brand for new release or 'top of the range' products; and
- b. when seeking a competitively priced exclusive 'house brand' product similar to those offered by major corporate and single banner buying groups.

43. Narta submits that the source of this disadvantage is its inability to guarantee that all of its members will present the supplier's product to consumers at a consistent advertising price.¹³ As a result, suppliers may regard Narta members as individual retailers rather than a single retail group. This inhibits Narta's members' ability to leverage their combined scale when negotiating for access to Exclusive Products.

44. In addition, Narta submits that the ability to offer consistent and coordinated product marketing has become increasingly important to manufacturers and suppliers of electrical goods who are seeking to protect the value of their brands.

¹² *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.

¹³ That is, the advertising price is consistent across all Narta members, without being set by the supplier.

Narta considers that a key facet of this brand protection is the ability of a retail platform to offer consistent marketing of Exclusive Products, including by applying a consistent advertising price. Narta submits that the ability to impose a MAP will enable it to provide suppliers with brand protection and this will make the Narta group more attractive in competing for Exclusive Products.

45. Narta identified nine recent examples of Exclusive Products where it has been unable to negotiate a supply of the product for its members during the product's initial launch period. In some cases the Exclusive Product was supplied exclusively to a competing single banner retail group.¹⁴ For example, Narta submits that all of its members' major competitors have negotiated access to at least one exclusive model of Sony television for the Christmas retail period. Narta submits that, in all of these cases, its inability to secure supply was a direct result of its inability to provide and execute coordinated marketing. Narta submits that authorisation of the Conduct will allow it to offer suppliers and manufacturers an overall consistent marketing message for Exclusive Products.
46. In the absence of the ability on Narta's part 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 or manufacturer) owned stores (e.g. Apple and Samsung); and
 - c. selling products through an 'agency' model, allowing suppliers and manufacturers to directly control the marketing and retail pricing of their products.¹⁵
47. Based upon the above arguments, Narta submits that the ability to impose a MAP will result in a number of benefits to both suppliers (including manufacturers) 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 and manufacturers 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 or manufacturer) owned stores or to implementing an agency selling model;
 - b. give existing suppliers and manufacturers of Exclusive Products access to wider retail distribution for their Exclusive Products; and

¹⁴ Narta, *Response to ACCC Information Request*, 9 November 2012, p. 8.

¹⁵ 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 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.

- c. facilitate entry into Australian markets, particularly by overseas suppliers and manufacturers, 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.
- 48. In relation to consumers, Narta submits that its improved ability to source Exclusive Products from suppliers and manufacturers 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. to the extent that the entry of new products is encouraged, particularly from overseas suppliers and manufacturers, a greater choice of consumer electrical products. Narta notes in this regard that its members' ability 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 and manufacturers, this benefit may be passed on to consumers in the form of a more competitive retail offer across an extended product range.

ACCC consideration

- 49. The ACCC does not accept that the imposition of a MAP will lead to public benefits in the form of a pro-competitive outcome by increasing retail competition. Narta's submissions in relation to increased retail competition are considered below.

A more competitive retail offering from Narta members

- 50. The ACCC accepts that an ability to access Exclusive Products is likely to be an important factor in retail competition and enables retailers to differentiate their retail offer. However, the ACCC is not satisfied that Narta's inability to impose a MAP has been a decisive factor in its perceived inability to negotiate supply of certain Exclusive Products.
- 51. Submissions from suppliers and manufacturers in support of the MAP (and the ACCC's own investigations) suggest that 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, the ACCC considers that these suppliers are likely to welcome the ability by Narta to impose MAPs and support Narta's application for authorisation of the Conduct.

52. Narta has also submitted that the ability for it to offer to impose a MAP would be particularly attractive for some suppliers of electrical products with a short life cycle. In this situation the supplier has only a relatively short window of opportunity to recover the costs of product innovation before the product is superseded. According to Narta, making short life cycle products generally available to all retailers can lead to 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. By implication, a MAP would only be effective in avoiding harmful levels of discounting if it did affect the selling price by limiting discounting.
53. In relation to the value suppliers place upon advertising consistency, 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.¹⁶ For example, the submissions from suppliers supporting the MAP refer generally to consistent advertising and marketing rather than simply to consistent advertising prices. It is not clear to the ACCC how Narta's ability to impose a MAP would facilitate the consistent advertising and marketing of MAP Products, given Narta's members' current diversity in advertising and marketing (which the authorisation application is intended to support).
54. 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 for the supplier associated with dealing with the retail group; and
 - g. the typical consumer profile and price points serviced by the retail group.
55. The ACCC considers that individual Narta members are likely to have the capacity to provide consistency across these factors. However, due to the differing retail models adopted by its members, Narta is unable to provide such consistency on the factors in points 54.b. to 54.g. across its group. The ACCC considers that these differences indicate a degree of differentiation and lack of consistency across the

¹⁶ 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.).

Narta group as a whole and that this is a key factor in suppliers' unwillingness to treat the Narta members as a single retail group.

56. In these circumstances, single-banner retail groups and corporate retail groups may have an implicit competitive advantage over Narta members. However, this would be the situation with or without the imposition of a MAP. Given the number of factors that may influence a supplier's decision whether to provide Exclusive Products to a particular retail group, the ACCC considers Narta's ability to impose a MAP is unlikely to significantly influence its attractiveness to suppliers of Exclusive Products.

Increased choice of consumer electrical products

57. Narta's submissions suggest that the MAP would facilitate new entry by overseas suppliers (including manufacturers) through:
- 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.
58. The ACCC accepts that facilitation of market entry by new manufacturers/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 authorisation of the Conduct would significantly facilitate entry by overseas suppliers.
59. Narta submits 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. Narta submits that this brand protection requires a consistent advertising price.
60. 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 notes in this regard that Narta has submitted that it has been able to sponsor the entry of new overseas brands to Australia without authorisation of the Conduct.
61. Narta also submits that, in the absence of a MAP, it is unable to negotiate a sufficient exclusivity period over overseas 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. Narta submits that it will be unable to maintain exclusivity over these products in the absence of a MAP.

62. The ACCC considers that Narta members will continue to have 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. It is not clear to the ACCC that the Beko exclusivity period was insufficient to recover any costs its members incurred in sponsoring Beko's entry.

63. Therefore, the ACCC is not satisfied that:

- overseas suppliers are significantly influenced in their decision as to whether to enter the Australian market by Narta's inability to impose a MAP;
- Narta members lack the incentive to compete strongly with other retail groups by sponsoring the entry of overseas suppliers; and
- the ability to impose a MAP would enable Narta members to negotiate longer periods of exclusivity from overseas suppliers, or that this would increase Narta members' incentive to compete with other retail groups by sponsoring the entry of overseas suppliers.

Choice of retail channels

64. Narta submits that the ability to impose a MAP will increase the attractiveness of the Narta group to suppliers that might otherwise choose to implement an agency model or company-owned store model.¹⁷ Narta submits that this would benefit suppliers by maintaining their choice of retail channels.

65. The ACCC notes that there has been considerable innovation in retail models in the past few years with online and agency models competing with traditional bricks and mortar retail models.

66. In relation to maintaining choice of retail channels, the ACCC notes that consistent advertising prices are simply one aspect of an agency selling model or a company owned store model. Both models require a substantial investment to establish but also allow the manufacturer or 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).

67. Given these considerations, the ACCC is not satisfied that:

- a. the likely future levels of agency selling or company owned stores will lead to less choice of retail channel for suppliers, or that this would necessarily be an anti-competitive outcome;
- b. most manufacturers or suppliers considering moving to either an agency model or company owned store model are motivated to do so by inconsistent advertising prices (particularly on Exclusive Products); or

¹⁷ 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.

- c. existing retail groups that are able to offer consistent advertising prices are insufficient to the commercial requirements of manufacturers or suppliers, such that the best alternative is to move to an agency model or company owned store model.

ACCC conclusion on public benefits

68. For the reasons outlined, the ACCC is not satisfied that authorisation of the Conduct would be likely to lead to public benefit.

Public detriment

69. 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.¹⁸

70. 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.
71. Narta submits that the potential exists for authorisation of the Conduct to reduce competition. However, it submits that this potential will not be realised because:
 - selling prices are significantly divorced from advertising prices;
 - advertising prices are compared online;
 - Narta will only apply the MAP to a small proportion of goods;
 - Narta members will not be required to stock products that are subject to a MAP;
 - the conduct addresses the need of Narta's members to respond to increased concentration in the electrical supplier market. For example, Narta notes the number of manufacturers of flat screen panel televisions has fallen by more than half since 2009. As the pool of actual and potential suppliers of particular products has shrunk, so too has their incentive to compete, and as a result Narta's ability to negotiate with suppliers has declined;¹⁹ and
 - joint advertising of the price of the collectively acquired goods is exempt from 'price fixing' liability under section 44ZZRV of the Act. In relation to this last point, the ACCC considers that the effect of Narta members independently advertising the same product at the MAP and the effect of

¹⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

¹⁹ Narta, Submission in support of its application for authorisation, 17 September 2012, p.11.

joint advertising of the price of the collectively acquired goods cannot be presumed to be identical.

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

Reduced competition between electrical goods retailers

73. The ACCC considers that authorisation 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**).

74. The ACCC considers that the imposition of a MAP is likely to reduce Narta members' incentive to compete strongly with other Narta retailers in relation to MAP Products and with retailers of products that are substitutable with MAP Products. The scope of the Conduct is potentially very broad and thus the ACCC is of the view that the potential for public detriment as a result of a lessening of competition is significant.

75. The lessening of competition is likely to arise because the MAP will:

- a. become a reference point for selling prices, which are likely to be higher as a result;
- b. enable retailers to earn higher margins on products subject to a MAP;
- c. disadvantage online Narta retailers who do not discount from advertising prices. For such retailers, imposition of a MAP will unambiguously increase their selling prices and reduce the competitive constraint that they impose on other Narta retailers;
- d. reduce intra-brand competition between Narta retailers generally; and
- e. reduce inter-brand competition overall.

76. The extent of any impact is also likely to be a function of the scope of the products to which the MAP may be applied.

Reduced intra-brand competition

Interaction between bricks and mortar retailing and online retailing

77. Narta submits that selling prices are disconnected from advertising prices such that authorisation will not reduce overall competition between Narta members. In particular, Narta submits that its members will be able to discount their selling prices from the 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.

78. The ACCC's investigations have indicated that products' selling prices are likely to be dependent upon 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 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 (**Reference Pricing**). Currently, individual Narta members advertise a particular brand or product at different prices and so their selling prices differ, despite Reference Pricing.
79. In contrast, the selling prices offered through online retailers are rarely negotiated (although a limited number of websites such as Bing Lee do offer negotiation services).²⁰ The ACCC notes that consumers have the ability to view and compare advertising prices for a particular product and for substitute products quickly and easily online. The ACCC considers that this 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. Further, the ACCC notes that online retailers are usually able to offer lower selling prices than bricks and mortar retailers because their costs are often lower.
80. This process of quick and easy online comparison, in turn, gives consumers a point of leverage in negotiating prices with bricks and mortar retailers, even if little or no price negotiation occurs online. That is, the online advertising price, which is often lower than the bricks and mortar advertising price, may be used as a Reference Price for sales at bricks and mortar retailers.
81. The ACCC notes that authorisation will remove existing advertising price competition between electrical goods retailers in respect of each particular MAP Product because the proposed new clause 5.8 in Narta's Code of Conduct will require all Narta members to use only the MAP. The ACCC considers that, across all retail distribution channels, a MAP is likely to be set at a level that provides a minimum margin for all retailers (including premium retailers) and the manufacturer of the product to which it is applied. Accordingly, each MAP is likely to be set at a higher level than the advertising price that most Narta members would otherwise set, either online or in their bricks and mortar stores.
82. In the case of bricks and mortar retailers, if authorisation is granted, the ACCC considers that Narta members are likely to use the MAP as a Reference Price for negotiating actual selling prices. Accordingly, authorisation of the Conduct is likely to reduce intra-brand competition between bricks and mortar retailers on sale prices in addition to advertising prices and lead to higher sales prices than would otherwise be the case.
83. In the case of online retailing, the ACCC considers that Narta members are likely to use the MAP as the selling price, thereby removing online discounting, which

²⁰ 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.

generally occurs upfront as part of the advertising price. In the ACCC's view, negotiations by consumers 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 occurs without a MAP. In particular, consumers are unlikely to consider this facility an attractive substitute to upfront discounts and the costs of implementing a real-time negotiation facility would also be likely to reduce online discounting. 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 the advertising price. The retail model adopted by most online retailers does not lend itself to negotiation and emphasises convenience and low operation costs.

84. 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. Since the MAP is likely to incorporate a margin for bricks and mortar retailers, which generally have more expensive costs 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, reducing the benefit to consumers' from comparing advertising prices online.²¹
85. In summary, the ACCC considers that imposition of a MAP would reduce the competitive pressure between Narta members on MAP Products, resulting in higher selling prices on MAP Products at both bricks and mortar and online retailers.

Availability of Exclusive Products to all Narta members

86. 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.
87. 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.²² 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 the MAP Products, the less choice consumers will have in terms of retail service and, potentially, selling price.

²¹ 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.

²² 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.

88. 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.²³
89. Therefore, the ACCC is not satisfied that the ability for Narta members to choose not to stock MAP Products will reduce the likelihood of public detriment in the form of reduced competition between electrical goods retailers.

Reduced inter-brand competition

90. The ACCC notes that, currently, products that may be subject to the MAP if authorisation is granted compete on price with other similar, substitutable products available from Narta members and competing electrical goods retailers. As noted above, the ACCC considers that, if authorisation is granted, the selling price of MAP Products is likely to be higher than otherwise. As a result, if authorisation is granted, there is likely to be less pressure on other brands (including other brands of MAP Products) to compete on price with MAP Products. Therefore, prices for similar products to MAP Products are likely to be higher if authorisation is granted than if it is not granted.

Scope of products to which a MAP is applied

Narta's submissions

91. Narta submits that it will only apply the 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 the MAP each year, based on the proportion of potential MAP Products last year.²⁴ Narta provided further detail in a later submission, which indicated that it was likely to apply the MAP to less than:²⁵
- 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
 - 20 products in the 'cooking' market segment (4.78% of member sales by category).

²³ Narta, *Further submission in support of application for authorisation A91335*, 5 December 2012, p.2.

²⁴ Narta, *Response to ACCC Information Request*, 9 November 2012, p. 3.

²⁵ Narta, *Further submission in support of application for authorisation A91335*, 5 December 2012, p.2.

92. 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:²⁶

- limit the total number of new release models to which the 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 the 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 the MAP; and
- provide the ACCC with details of the imposition of the 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.

ACCC's consideration

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

- the terms 'new release', 'premium' 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.

94. 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.

95. 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 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

²⁶ Narta, *Further submission in support of application for authorisation A91335*, 5 December 2012, p.2.

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”.²⁷

96. 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 the 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.
97. The ACCC therefore considers that authorisation to apply the MAP, which is likely to reduce 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.

ACCC conclusion on public detriments

98. The ACCC considers authorisation of the Conduct is likely to result in public detriments from reduced competition between electrical goods retailers.

Balance of public benefit and detriment

99. 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, including any lessening of competition.
100. In the context of applying the net public benefit test in subsection 90(8)²⁸ 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.²⁹
101. For the reasons outlined in this draft determination, the ACCC is not satisfied that the Conduct is likely to result in a public benefit or that any benefit to the public which 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.
102. Accordingly, the ACCC is not satisfied that the relevant net public benefit tests are met.

²⁷ Available at <http://www.narta.com.au/aboutus.html>, accessed 20 December 2012.

²⁸ 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.

²⁹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

Draft determination

The application

103. 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 or premium electrical goods, and exclusive models of electrical goods, you agree to use only the 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.

104. 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 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 (the MAP would be imposed indefinitely as Narta is seeking to maintain exclusivity over this brand);
 - ii. new release or premium electrical goods (the 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 (the MAP would be imposed for no more than 12 months)

(collectively the **MAP Products**).

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

The net public benefit test

106. For the reasons outlined in this draft determination, the ACCC is not satisfied that the Conduct for which authorisation is sought is likely to result in a public benefit or that any public benefit which may arise would outweigh the likely detriment to the public constituted by any lessening of competition arising from the conduct.

107. The ACCC therefore **proposes to deny** authorisation to application A91335.

Further submissions

108. The ACCC will now seek further submissions from interested parties. In addition, Narta or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

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.