



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Plumbing Plus Bathroom Kitchen Laundry Pty Ltd

in respect of

collective bargaining, a catalogue program and
exclusive dealing arrangements

Date: 24 March 2016

Authorisation numbers: A91523 and A91524

Commissioners:
Sims
Rickard
Court
Featherston
Keogh

Summary

The ACCC proposes to grant authorisation for ten years to allow Plumbing Plus Bathroom Kitchen Laundry Pty Ltd (Plumbing Plus) and its current and future members to:

- collectively bargain and negotiate trading terms and supply arrangements with domestic and offshore suppliers, wholesalers and importers for the supply of plumbing and hardware materials to its members
- participate in a catalogue program, whereby members may elect to take part in joint promotions involving recommended (maximum) prices, and
- source, establish and negotiate a series of arrangements for the supply of specific products imported from overseas and domestic suppliers to its members for periods of up to five years on the condition that those suppliers will not provide or supply those specific products to non-members in Australia.

Next steps: The ACCC now seeks submissions in relation to this draft determination before making its final decision.

The applications for authorisation

1. On 18 January 2016 Plumbing Plus Bathroom Kitchen Laundry Pty Ltd (Plumbing Plus) lodged applications for authorisation A91523 and A91524 with the ACCC.
2. Plumbing Plus, on behalf of itself and its current and future members, is seeking authorisation in relation to conduct involving collective bargaining with suppliers, exclusive supply arrangements with suppliers in respect of certain plumbing products and the administration of a catalogue program where members may elect to take part in joint promotions involving recommended prices.
3. Authorisation is sought for a ten year period.
4. At the time of lodging the application, the Applicant also requested interim authorisation to enable it to engage in the proposed conduct while the ACCC is considering the applications for authorisation. Interim authorisation was granted on 19 February 2016.

The Applicant

5. The Applicant is Plumbing Plus Bathroom Kitchen Laundry Pty Ltd as trustee for The Plumbing Plus Unit Trust, a banner brand and buying group for plumbing and hardware merchants.
6. Units in the Trust are held by 29 Plumbing Plus members. Members own around 160 independent plumbing and hardware stores across Australia. In terms of brand recognition, all members draw on the Plumbing Plus banner brand.
7. However, the extent to which each Member displays and uses the Plumbing Plus name or logo may vary. For example, some members will incorporate the words 'Plumbing Plus' as part of their trading names, while others may simply display the Plumbing Plus logo on their website or advertising material.

The proposed conduct

8. The Applicant seeks authorisation for a period of ten years for itself and its current and future members to engage in the conduct outlined below (the **proposed conduct**).

Collective bargaining

9. The Applicant seeks authorisation for itself and its members to collectively bargain and negotiate trading terms and supply arrangements with domestic and offshore suppliers, wholesalers and importers in relation to the supply of plumbing and hardware materials to its members.
10. Authorisation of such an arrangement will not compel suppliers or members to participate, and individual members are free to negotiate beyond or outside the terms negotiated by Plumbing Plus with suppliers.

Catalogue Program

11. The Applicant seeks authorisation to run a Catalogue Program which includes recommended prices for the goods advertised.
12. Under the Catalogue Program, the Applicant releases an advertisement catalogue containing various plumbing, kitchen, bathroom and related products which are offered for sale to the public by its members.
13. The Catalogue provides a price for each listed product and, on the final page, contains a list of ‘participating’ Member owned stores. The Applicant will release two catalogues per year. A Catalogue will usually have an advertised active period of two months.
14. The Applicant is currently administering a Catalogue Program for members in Queensland, and intends to roll the program out across each state and territory. Each Catalogue Program would be restricted to a particular state or territory.
15. The majority of products listed in any catalogue released via the Catalogue Program will be available from suppliers other than the Applicant’s members.
16. Members will, prior to the Catalogue’s release, be invited to express their interest in receiving a copy of the Catalogue and potentially to “participate” in the Catalogue program by having their names listed as suppliers of the goods listed in the Catalogue. As such, the Catalogue will only contain a list of those members who have chosen to participate.
17. Participation in the Catalogue Program is voluntary for members. Members who choose to participate in the Catalogue Program are free to sell products which appear in a catalogue at prices lower than those listed in the catalogue. Members may choose to sell at prices below those listed in a Catalogue Program for a number of reasons, including competition in the market and/or in tailoring a sale to meet specific customer requirements.
18. The Applicant determines the price for the products listed in the Catalogue by a review of competitive pricing for each product in the relevant State or Territory, and also via input from participating members. Suppliers may, to a lesser degree, provide input into the prices for products listed in the Catalogue.

Exclusive dealing arrangements

19. The Applicant seeks authorisation for ten years for itself and its members to source, establish and negotiate a series of arrangements for specific products supplied by overseas and domestic suppliers. These will be supplied under agreements of up to five years duration to members on the condition that those suppliers will not provide those specific products to non-members in Australia.
20. The types of exclusive products may include hot water systems, water pipes, downpipes, guttering, plumbing tools and bathroom, kitchen and laundry fixtures and fittings.
21. The exclusive arrangements contemplated by the Applicant will only apply to a specified group of products or product ranges supplied / manufactured by a supplier and will not extend to all products supplied by each supplier.
22. Members will not be obliged to purchase or sell any minimum amount of exclusive products.
23. Currently, five suppliers have entered into exclusive dealing arrangements with the Applicant.
24. The Applicant believes that the number of suppliers who may be a party to exclusive dealing arrangements with the Applicant will not exceed 25 at one any time.

Consultation

25. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
26. The ACCC invited submissions from 100 potentially interested parties such as major competitors, suppliers (including potential collective bargaining targets) and a plumbing industry association. No submissions were received in response.
27. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC assessment

28. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests¹ contained in the *Competition and Consumer Act 2010* (Act). In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied 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. Likely public benefits and public detriments associated with the proposed conduct are detailed below.

¹ Subsections 90(5A), 90(5B), 90(6), 90(7). The relevant tests are set out in Attachment A.

Relevant areas of competition

30. The ACCC considers that the precise definition of the relevant areas of competition is not required to assess the Applicant's proposed conduct. It is sufficient to consider the areas of competition in a broad sense when assessing any public benefits or detriments likely to arise from the proposed conduct.
31. The Applicant submits that the relevant area of competition concerns the supply of plumbing, bathroom and kitchen products in Australia. The Applicant submits that the primary competition that members face is from non-Member retailers and wholesalers operating in close proximity to their stores. The Applicant notes that members do not have stores within close physical proximity to stores operated by other members. Given the geographic location of the members, there is little likelihood that they will be in competition with each other for the same customers.
32. The ACCC considers that the relevant areas of competition are likely to include:
 - a. the wholesale acquisition of certain plumbing and hardware products from manufacturers and suppliers at the national level
 - b. the retail supply of certain plumbing and hardware products at national, state and local levels.

Future with and without

33. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
34. The Applicant submits that if authorisation is not granted, members of Plumbing Plus may negotiate with suppliers individually. In those circumstances, the Applicant submits:
 - a. The level of effective negotiation between members and suppliers may not be significant or yield any beneficial result for members.
 - b. The price for obtaining the relevant goods, and the transactions costs, would be much higher, while efficiencies would be markedly reduced.
 - c. Members acting individually would often not have the capacity to negotiate with offshore suppliers, particularly due to the low volume involved.
 - d. Given its intention to negotiate with suppliers for products and/or product ranges that are not offered by major competitors such as Reece Australia, Fletcher Building Ltd and Wesfarmers Ltd, in the absence of the proposed conduct there would likely be a reduced product diversity and choice for consumers.

35. The ACCC considers that the likely future without the proposed conduct is that Plumbing Plus members would separately negotiate with suppliers and run limited promotions.²

Public benefits

36. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.³

Submissions by the Applicant

37. Plumbing Plus submits that the proposed conduct is likely to result in a number of public benefits, including:

- a. lower transaction costs, increased efficiency and reduced information asymmetry, through:
 - i. streamlined arrangements for the supply and movement of exclusive products
 - ii. fewer separate independent contracts, which decreases administration costs
 - iii. increased contractual certainty for members and suppliers
 - iv. reduction in potential legal disputes.
- b. consumer benefits including access to a more diverse product range and cheaper prices
- c. a positive environmental impact
- d. increased competition in the wholesale acquisition and retail supply of plumbing products.

ACCC view

38. The ACCC considers that, broadly, the proposed conduct is likely to result in some public benefits as set out below.

Transaction cost savings

39. An individual Plumbing Plus Member negotiating with a supplier will incur transaction costs, such as administrative costs, the time taken to negotiate and the cost of obtaining legal and other expert advice. A supplier will also incur transaction costs in negotiating with each customer it deals with. Individual negotiations will stop

² For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

³ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

when the costs of continued negotiation outweigh the expected benefits for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade.

40. Collective bargaining reduces the extent of bilateral negotiation required and, in doing so, is likely to result in public benefits from transaction cost savings, including a reduction in administrative costs and the sharing of advisor costs for Plumbing Plus members. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.

Improved input into contracts

41. Individual negotiations between small businesses and large suppliers can result in standard form contract terms weighted in the supplier's favour. When negotiating with large suppliers, small businesses can be at a disadvantage in terms of resources and negotiating experience. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of Plumbing Plus members, in relation to common issues. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with suppliers to achieve more efficient outcomes.

Increased retail competition and lower prices for consumers

42. Plumbing Plus is likely to have more bargaining power than an individual Member, and may therefore be able to negotiate better terms and conditions of supply on behalf its members. As a result of the collective negotiations, Plumbing Plus members may be able to acquire plumbing and hardware products at lower prices or with better non-price terms (e.g. quality or service). To the extent that the savings to members are passed on to consumers in the form of lower prices there is likely to be an increase in competition at the retail level which would also be a public benefit.
43. Consumers are likely to be able to access a wider range of products, as Plumbing Plus has an incentive because of the exclusive arrangements to work with suppliers to develop new products in response to changes in consumer demand.

Public detriments

44. The Act does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.⁴

Submissions by the Applicant

45. Plumbing Plus submits that any public detriment arising from the proposed conduct is likely to be mitigated by a number of factors including:

⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- a. Members represent a minimal share of the plumbing wholesale and retail sector, which is unlikely to increase significantly as a result of authorisation.
- b. Membership in Plumbing Plus is voluntary, and authorisation of the conduct will not compel any supplier to participate and individual members are free to individually negotiate with any suppliers. Similarly, participation by members in the Catalogue Program is voluntary.
- c. As most of the products listed in any catalogue are not sold exclusively by the members, consumers will, in almost all instances, have the ability to source catalogue products from non-members in their local area.
- d. The exclusive arrangements contemplated by the Applicant will only apply to a specified group of products and will not extend to all products normally supplied by each supplier.
- e. There will remain comparable products to those the subject of any exclusive dealing arrangements.
- f. When considering the geographical location of the members are geographically dispersed, and are unlikely to be in competition with each other at the retail level.
- g. No collective boycott activity is proposed.

ACCC view

46. The ACCC considers that, broadly, the proposed conduct is likely to result in limited public detriment since:

- a. The ability of members to influence the outcome of individual negotiations with suppliers is likely to be low in the absence of the proposed conduct.
- b. Participation in the arrangements is voluntary for suppliers and members.
- c. Plumbing Plus members appear to account for a small proportion of the wholesale acquisition and retail supply of plumbing and hardware products, and members face significant competition at the wholesale and retail levels for most products.
- d. The arrangements do not involve any collective boycott activity.
- e. The composition of the bargaining group is likely to remain a relatively small proportion of the total number of buyers and retailers of hardware and plumbing products in Australia.
- f. Joint promotions involving recommended prices are likely to only have a small effect on price competition, given that members:
 - i. generally do not operate in close proximity to each other
 - ii. are able to negotiate with individual customers, and have the flexibility to charge a lower price than the one advertised in a catalogue.

47. The ACCC expects that the outcome of the Catalogue Program will be that members who participate will sell products at or below the listed catalogue price. Discounting from the listed catalogue price may occur for a number of reasons, including responding to competition in the market or to tailor arrangements to meet specific customer requirements.
48. The exclusive arrangements may have some effect on competition in certain markets by removing the ability of non-Plumbing Plus members to access the specific products which are subject to exclusive arrangements.
49. Overall, the ACCC considers that the proposed conduct is likely to result in limited public detriment.

Balance of public benefit and detriment

50. For the reasons outlined in this draft determination, the ACCC considers that the proposed conduct is likely to result in public benefit that would outweigh any public detriment, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

51. The Act allows the ACCC to grant authorisation for a limited period of time.⁵ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
52. Plumbing Plus is seeking authorisation for ten years. This period will allow it to properly develop a market for exclusive products or product ranges, and to allow the parties to enter into arrangements (including five year supply contracts) with a sufficient degree of commercial stability.
53. Based on the material before it, the ACCC considers that ten years is an appropriate period of authorisation, as it would provide Plumbing Plus with a viable period in which to further develop and sustain Plumbing Plus as an effective buying group and allow Plumbing Plus to enter into long-term agreements with suppliers.

Draft determination

The application

54. Plumbing Plus has sought authorisation for itself and its members to engage in the proposed conduct that might otherwise constitute exclusive dealing or the making or giving effect to agreements which contain cartel provisions and/ or provisions which have the purpose or effect of substantially lessening competition.
55. Application A91523 was made using Form B, under subsection 88 (1 and 1A) of the Act, for the proposed conduct. Application A91524 was made using Form E, under subsection 88(8) of the Act, for the proposed conduct.

⁵ Subsection 91(1).

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

Net public benefit test

57. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.

Conduct which the ACCC proposes to authorise

58. The ACCC proposes to grant authorisations A91523 and A91524 to Plumbing Plus and its current and future members to engage in the proposed conduct, namely to:

- a. collectively bargain with suppliers in circumstances where:
 - i. Members are not obliged to avail themselves of agreements negotiated by the Applicant, and
 - ii. Members are able to approach any suppliers directly and negotiate beyond the terms negotiated with suppliers by the Applicant
- b. participate in a catalogue program whereby members may elect to take part in joint promotions involving recommended (maximum) prices, and
- c. agree with suppliers that they will not supply certain products to non-Plumbing Plus members and give effect to agreements of this kind.

59. The ACCC proposes to grant authorisations A91523 and A91524 for ten years.

60. Under section 88(10) of the Act, the ACCC proposes to extend the authorisations to future parties to the proposed conduct.

61. This draft determination is made on 24 March 2016.

Interim authorisation

62. At the time of lodging the application, Plumbing Plus requested interim authorisation for conduct the subject of the application for authorisation. The ACCC granted interim authorisation on 19 February 2016.

63. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Next steps

64. The ACCC now seeks submissions in response to this draft determination.

65. In addition, the applicant 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.