



Draft Notice

Notification lodged by
Stanley Black & Decker Australia Pty Ltd
in respect of
proposed resale price maintenance conduct on Dewalt branded
power tools, accessories and attachments

Notification number: RPN10000455

27 March 2020

Commissioners: Keogh
Rickard
Court
Ridgeway

Summary

The Australian Competition and Consumer Commission (the **ACCC**) proposes to revoke the resale price maintenance (**RPM**) notification lodged by Stanley Black and Decker Australia Pty Ltd (**SBD**) on 17 October 2019 for its Dewalt branded power tools, accessories and attachments (the **Notified Products**).

The notification would allow SBD to stipulate a minimum advertised price (**MAP**) for the Notified Products below which authorised SBD dealers could not advertise to sell the notified products (the **Notified Conduct**).

When businesses lodge a notification for RPM arrangements, they receive legal protection for those arrangements automatically after 14 days. For RPM notifications, the initial decision for the ACCC is whether to take steps to remove that legal protection by revoking the notification. The ACCC can only revoke a notification if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely public detriment from the conduct.

Legal protection for the Notified Conduct commenced on 31 October 2019. However, SBD agreed to not engage in the Notified Conduct until after the ACCC completed its assessment of the notification.

SBD submits that Dewalt products, which are marketed to professional users require a high level of pre- and post-sales services. Due to aggressive pricing behaviour dealers are often not prepared to invest in high levels of service if they are unable to earn a sufficient margin. Margins on Dewalt products are low and as a result dealers are deciding to de-range Dewalt products. The Notified Conduct would support SBD's investments in improving customer service, particularly through its dealer training initiatives.

The ACCC considers that SBD stipulating a MAP below which dealers cannot advertise the Notified Products is likely to result in public detriments. It will reduce price competition and increase prices for the Notified Products. Suppliers of competing products are likely to increase their prices in response to increases in the prices for the Notified Products.

The ACCC considers that the Notified Conduct is likely to result in some public benefit by increasing consumer choice.

The ACCC considers that any increase in price for the Notified Products or other brands of power tools is likely to impact a wide range of consumers and any benefit is likely to be smaller and experienced by a narrow group of buyers.

Accordingly, the ACCC is satisfied the likely benefit to the public will not outweigh the likely detriment to the public from the Notified Conduct.

The ACCC now invites submissions and further information from SBD and other interested parties by **24 April 2020**.

In addition, SBD or an interested party may request that the ACCC hold a conference to discuss this draft notice. Any such request must be made by **15 April 2020**.

The ACCC will then proceed to make a final decision on the notification.

The notification

1. Stanley Black and Decker Australia Pty Ltd (**SBD**) lodged the RPM notification on 17 October 2019. Under the notification, SBD proposes to amend its reseller (dealer) trading agreements to include a requirement that dealers not advertise Dewalt branded power tools (both corded and cordless), accessories and attachments (the **Notified Products**) below a price specified by SBD (the **Notified Conduct**).
2. Specifically, SBD proposes to amend its dealer agreements to impose a requirement that dealers do not advertise the Notified Products:
 - (a) below the "invoice price" for those products, being the standard SBD price charged by SBD to dealers for the products excluding any rebates or discounts offered by SBD off that price to individual dealers or
 - (b) where a dealer elects to participate in a special price promotion that is funded (in part or whole) by SBD, below the promotional price specified by SBD.
3. The proposed amendment to SBD's dealer agreements will involve specifying a minimum advertised price (**MAP**) for the Notified Products. It will apply to all advertising, including online and in print. It will not apply to in-store activity and will not restrict or prevent SBD dealers from selling the Notified Products at a price below the MAP to customers who seek to negotiate a discount directly with the dealer.
4. SBD provides its dealers with a price list setting out the recommended retail price (**RRP**), the stockist/invoice price (which would be the MAP) and a volume discount price for each product.¹ SBD submits that it will continue to set RRP's at a price taking into account a range of factors including competitor products and prices.²
5. In addition to the volume discount price, SBD offers additional rebates to its dealers. These are negotiated on an annual basis and can include:³
 - a base rebate which is a guaranteed rebate
 - for buying groups, a buying group rebate
 - marketing rebate, to assist in funding catalogues and other marketing activities
 - long term incentive rebates which are generally volume based rebates for meeting certain sales targets.
6. The actual price paid by the dealer (being the stockist or invoice price less the various discounts and rebates that may apply) is known as the '*net net price*'.⁴
7. If the Notified Conduct is allowed to stand, dealers will be able to advertise the Notified Products at or above the stockist/invoice price but not below the stockist/invoice price.
8. SBD submits the stockist/invoice price is below SBD's recommended retail price (**RRP**),⁵ and accordingly dealers will be able to continue to advertise discounts on the Notified Products below the RRP but above the stockist/invoice price.⁶

¹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.7.

² Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p. 7

³ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p. 7

⁴ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p. 7

9. SBD also proposes to make consequential amendments to its dealer agreements providing for steps that SBD can take if dealers breach the MAP requirement, including an ability to reduce or remove rebates or discounts offered to the dealer and an ability to terminate for repeated breaches over a 12 month period.
10. Legal protection for the Notified Conduct commenced on 31 October 2019. However, SBD agreed to not engage in the Notified Conduct until after the ACCC completed its assessment of the notification.⁷
11. SBD is an importer and wholesaler of a range of tools, hardware products and related accessories, including power tools, hand tools and automotive tools. SBD distributes tools, hardware products and accessories under a range of brands in addition to Dewalt, including Standley, Black & Decker, Porter Cable, Irwin Tools, Lexon, Bostitch and Sidchrome.
12. SBD submits its Dewalt products are manufactured outside of Australia by other companies in the SBD group and supplied to SBD as the exclusive importer of Dewalt products in Australia. SBD distributes its products, including Dewalt, through its range of distributors and dealers across Australia (collectively, dealers).
13. SBD requests that the Notified Conduct be allowed on an ongoing basis.
14. Further information in relation to the RPM notification is available from the ACCC's [public register](#).

The RPM notification process and public benefit test

15. In broad terms, RPM occurs when a supplier of goods or services (for example, a manufacturer or wholesaler) specifies a minimum price below which a dealer must not on-sell, or advertise for sale, those goods or services.
16. RPM is a *per se* breach of the *Competition and Consumer Act 2010 (the Act)*, which means it is prohibited outright, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition.⁸
17. The Act allows a business⁹ to obtain protection from legal action for RPM conduct by lodging a notification describing the conduct (under section 93 of the Act) or by obtaining an authorisation for the conduct (under section 90 of the Act).
18. The legal protection provided by an RPM notification commences automatically at the end of a period of 14 days starting on a day the notification is validly lodged, unless the ACCC issues a draft notice objecting to the notification, within that 14 day period.¹⁰
19. In this case, the ACCC did not issue a draft notice within the 14 day period because SBD agreed not to engage in the Notified Conduct until after the ACCC has completed its assessment of the notification.

⁵ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.14.

⁶ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.15.

⁷ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.27

⁸ Section 48 of the Act.

⁹ Under the Act, a corporation or other person may lodge an RPM notification: s 93(1)(b) of the Act.

¹⁰ Section 93(7A) of the Act; regulations 9(a) and 9(b) *Competition and Consumer Regulations 2010*.

Legal test

20. The ACCC is required to assess an RPM notification by applying the public benefit test in section 93(3A) of the Act. The test requires that in order to revoke a notification, the ACCC must be satisfied that the likely benefit to the public from the Notified Conduct will not outweigh the likely detriment to the public from the Notified Conduct.

Steps in the RPM notification process

21. Before the ACCC issues a notice under section 93(3A) revoking a notification, it must:
 - (a) issue a draft notice (such as this one) providing a summary of its reasons for considering that the likely public benefits from the Notified Conduct will not outweigh the likely public detriments from the Notified Conduct.¹¹ This draft notice will be sent to the notifying business and interested parties and will be placed on the ACCC's public register;
 - (b) seek submissions from the notifying business and interested parties in response to the draft notice; and
 - (c) invite the notifying business and interested parties to request that the ACCC hold a conference in relation to the draft notice. Any conference request must be made in writing within 14 days from the date nominated by the ACCC.¹² In this case, a conference must be requested no later than **15 April 2020**.
22. If a conference is requested, it must be held no later than 30 days after the expiration of the 14 day period nominated by the ACCC.¹³ In this case, if a conference is called the ACCC will hold it by **15 May 2020**. The purpose of a conference is to allow the notifying party or an interested party to put their views to an ACCC Commissioner and potentially respond to other parties' views. If a conference is held, the ACCC will invite the notifying business and all interested parties to attend, and will prepare a record of the main points raised during the conference. Copies of this record, and all written submissions, will be placed on the public register.
23. The ACCC will then decide whether to issue a final notice revoking the notification. If the ACCC decides to issue a final notice to revoke the notification, the legal protection provided by the notification ends on the 31st day after the ACCC issues the final notice or on a later day specified in writing by the ACCC.¹⁴
24. Alternatively, the ACCC may decide not to revoke the notification. If the ACCC decides not to revoke the notification, the legal protection provided by the notification, which commenced 14 days after valid lodgement, continues.¹⁵

Imposing conditions

25. If the ACCC reasonably believes it has grounds to revoke an RPM notification and these grounds would not exist if particular conditions relating to the RPM conduct were complied with by a notifying party – for example, requiring annual reporting on sales

¹¹ Sections 93A(1) and (3) of the Act.

¹² Section 93A(2) of the Act.

¹³ Section 93A(5) of the Act.

¹⁴ Section 93 (7C) of the Act

¹⁵ Section 93(7A)(a) of the Act.

and pricing information for the relevant goods – then the ACCC can impose conditions on a notification which must be complied with.¹⁶

ACCC consideration of RPM conduct

26. Removing price competition between dealers of a particular brand of products has the potential to result in significant consumer harm. It can result in dealers selling goods or services at prices higher than they would otherwise and consumers paying more for those goods or services without receiving any or commensurate additional value. It can also result in retailers (or dealers) deranging competing products in favour of products with an artificially high price (and hence higher retail margin). In some circumstances, RPM may also increase the risk of co-ordination or collusion between upstream competitors (suppliers or manufacturers) or signal an opportunity for manufacturers to raise prices.
27. Given these potentially significant detriments, including preventing dealers offering or advertising discounts, the ACCC will normally have significant concerns and may move to revoke an RPM notification unless this detriment is limited by competition and there are clear offsetting benefits.
28. It is less likely that RPM will cause consumers to pay more for the good or service without receiving any or commensurate additional value if the supplier seeking to impose the RPM faces strong competition from other suppliers. In these circumstances, the supplier seeking RPM would be less likely to be able to set retail prices above the competitive level.
29. In certain circumstances, RPM can result in public benefits, including by promoting competition in non-price dimensions, particularly service quality. For example, producers of particularly complex or ‘experience-based’¹⁷ goods or services may seek to engage in RPM to create incentives for a dealer to invest in pre-and post-sales services such as in-store product demonstrations that highlight key and unique features and training staff to be able to provide advice about the products, which is valued by consumers. Faced with the same prices across all dealers, consumers are more likely to make their purchase from the dealer that offers the best service and support.
30. Without RPM, other dealers who do not invest in providing the same high level of service could ‘free ride’ on these investments by setting lower prices. Free riding can occur when customers visit one retail outlet and receive high levels of service such as product demonstrations and an opportunity to try the product but then buy from another retail outlet. One dealer free rides on the services provided by another dealer. Eventually, high-service dealers may not gain sufficient returns on product sales to continue to provide these services. This is more likely to be the case where a relatively high proportion of consumers use high levels of retail services in deciding what to buy, but purchase from low-service online discounters. Consumers ‘shopping around’ to understand products and check prices before purchasing does not constitute a free rider problem.
31. In some cases RPM can help to align the incentives of the dealer with those of the wholesaler, allowing them to compete more strongly with vertically integrated competitors. RPM can also create an incentive for dealers to be innovative in providing

¹⁶ Section 93AAA(1) of the Act.

¹⁷ Products where experiencing them or seeing them work helps inform consumers of their attributes.

valuable services to consumers and an incentive for manufacturers to develop more advanced products.

Tooltechnic 2014 RPM authorisation

32. On 5 December 2014 the ACCC granted conditional authorisation A91433 to Tooltechnic Systems (Aust) Pty Ltd (**Tooltechnic**) to set minimum retail prices on Festool products for a period of five years. This was the first application for authorisation of RPM conduct since 1995, when the Act was amended to allow the ACCC to authorise such conduct.
33. Tooltechnic submitted that a variety of pre-sales services are needed in order to communicate the unique features of the Festool range, in particular its specialised functionalities, high durability and complex integrated systems. Tooltechnic claimed that these features are not obvious to customers. Tooltechnic was concerned that there was a risk customers would access pre-sale retail services from one retailer but purchase the product at a discount from another retailer who did not provide the full range of services (the 'free rider' problem).
34. The ACCC concluded that:
 - Festool products are complex products which are highly differentiated in terms of their attributes and quality, and the provision of services to customers is important to the sale of Festool products. These services include pre-sale explanations, demonstrations and 'try-before-you-buy' of Festool products and post sales services such as repairs, loan tools and training in use of a product.
 - As a result of the RPM conduct, dealers would likely invest in pre- and post-sales services, as the risk of 'free riding' by other retailers who do not provide those services would be addressed.
 - The RPM conduct was likely to result in public benefits from improved retail services and in particular, it would allow some customers to be able to make more informed decisions and was likely to assist retailers to maintain high service levels for trade quality power tools.
35. The ACCC also concluded that the Notified Conduct would eliminate price competition between dealers for Festool products. This would result in clear public detriment as some customers would face a higher retail price for the products. However, the extent of the detriment was likely to be limited by the wide range of alternative trade quality power tools available to customers, Festool's small market and the fact that Tooltechnic has little incentive to set minimum retail prices above competitive levels because doing so would likely reduce sales of Festool products overall.
36. The ACCC determined that the public benefit resulting from the increase in retail services would likely outweigh the clear, but limited, detriment resulting from the fact that some customers will face a higher retail price for Festool products.
37. The ACCC noted that it was difficult to weigh the public benefits and detriments before the conduct commenced, and decided to impose conditions requiring Tooltechnic to provide certain information to allow the ACCC to monitor the impact of the conduct over the four year period of authorisation.

Tooltechnic 2018 RPM notification

38. On 12 February 2018, Tooltechnic lodged a RPM notification for its Festool and Fein branded power tools. The ACCC conducted an assessment of the benefits and detriments of the conduct having regard to the information Tooltechnic reported under the conditions of its 2014 authorisation. Accordingly, a key aspect of the ACCC's consideration of the notified conduct was to closely review the impact of the 2014 authorisation, particularly whether the expected public benefits have eventuated, and the extent of the detriments arising from higher prices.
39. The ACCC accepted that Festool and Fein products are complex and are highly differentiated in terms of their attributes and quality, and the provision of pre- and post-sales services to customers is important in the sale of these products. Feedback from dealers suggested that setting a guaranteed minimum price for these products had given a large network of Festool/Fein dealers the certainty they need to invest in facilities and staff to provide better levels of pre- and post-sales retail services. This had resulted in consumers being able to make more informed decisions about the purchase and maintenance of these relatively complex products. The ACCC considered that this was likely to result in increased service-based competition between Festool/Fein power tool dealers (particularly enabling smaller dealers to better compete with larger dealers) and promote inter-brand competition.
40. The ACCC concluded that while the loss of discounting entailed by RPM was a clear detriment to some consumers, the detriment was likely to be reduced by the fact that Festool and Fein had relatively low market shares (less than 5 percent) and face numerous competitors.
41. Accordingly, the ACCC was ultimately not satisfied that the legal test to revoke the notification had been met and decided, at that time, to take no further action in respect of notification. The ACCC stated that it would monitor the effects of the proposed conduct closely, both in deciding whether it became necessary to revoke the Tooltechnic notification in the future and in determining any changes to its approach to any future notifications. The ACCC also stated that it should not be assumed that because it allowed the Tooltechnic notification to stand, the ACCC will not object to future RPM notifications.

Weldclass notification

42. On 28 February 2020, the ACCC published a Draft Notice proposing to revoke the RPM notification lodged by JWL Marketing Pty Ltd, trading as Weldclass Welding Products (Weldclass), for certain welding and plasma cutting machines.¹⁸
43. The ACCC considered that Weldclass' proposed conduct was likely to pose a significant risk of public detriments in the form of higher retail prices for the relevant Weldclass products, competitors of Weldclass responding by increasing wholesale prices of competing machines, and retailers deranging competing machines in favour of the Weldclass products.¹⁹
44. A final decision on the Weldclass RPM notification has not yet been made.

¹⁸ ACCC, Weldclass Resale Price Maintenance Notification, Draft Notice, p. 1 Available <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/weldclass>

¹⁹ ACCC, Weldclass Resale Price Maintenance Notification, Draft Notice, p. 7

The Notified Products

45. The Notified Products include the following categories of both corded and cordless power tools, as well as power tool accessories and attachments:²⁰
- saws (including mitre saws, plunge saws, circular saws, jigsaws and reciprocating saws)
 - routers, trimmers, planers and biscuit joiners
 - sanders and polishers
 - drills, screwdrivers and hammers
 - grinders
 - cutters
 - landscaping tools (chainsaws, line trimmers)
 - Dust extraction systems.
46. SBD submits that its FlexVolt range and its dust extraction systems are particularly innovative, high quality power tool products that require additional education and support.²¹
47. SBD submits that the market for professional quality power tools is competitive and the Notified Products compete with 11 other brands of professional power tools.²²
48. Based on ACCC market inquiries there is an extensive range of a wide variety of power tools. Margins for professional quality power tools are low and specialist power tool retailers, such as Total Tools and Sydney Tools, compete with other tool dealers such as Bunnings, as well as online dealers including eBay and Amazon sellers.

FlexVolt range

49. The FlexVolt range is a range of power tools designed for professional tradespeople. DEWALT FlexVolt products run off a flexible battery platform. FlexVolt batteries plug into and operate cordless power tools powered by either 54 volt or 18 volt batteries. Battery voltage changes automatically when plugged into a 54 volt or 18 volt cordless tool.²³
50. A battery that can supply either 54 volts or 18 volts may be particularly useful for professional tradespeople. A cordless power tool operating at 54 volts is likely to be sufficiently powerful to complete work that might otherwise require a corded power tool, which requires regular testing on many construction sites. FlexVolt batteries can also power 18 volt cordless power tools for longer than other 18 volt battery packs.²⁴

Dust extraction systems

51. Dewalt dust extraction systems are designed to be used together as a system and will not be fully effective unless they are used correctly. Construction dust exposure and

²⁰ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.16.

²¹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.16.

²² Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, pp. 24-25.

²³ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, pp. 16-17.

²⁴ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, pp.16-17

dust management on construction sites is becoming an increasingly important work health safety issue in the construction industry.²⁵

52. It is also important that the correct dust extraction products are used to deal with the particular dust issues arising on a job-site. For instance, the maximum allowable concentrations for concrete dust are much lower than for soft wood dust. Accordingly, a higher filter performance is required for dust extraction systems used in conjunction with power tools for working with concrete.²⁶
53. There are clearly significant public health benefits in ensuring that tradespeople are educated on dust issues for construction sites, dust extraction technology for their power tools and how to use this technology correctly.²⁷

Rationale for the Notified Conduct

54. The following section summarises SBD's rationale for the Notified Conduct.²⁸
55. SBD submits that Dewalt power tools are high quality, technically innovative products aimed at the professional segment of the market. The innovative nature of Dewalt's products can be seen with DEWALT's FlexVolt range as well as its dust extraction systems.

Improving sales service levels

56. SBD submits that its distribution model for Dewalt relies on its dealers being able to provide a high level of pre- and post-sales services to end user customers, who are largely in the professional segment of the market. In particular:
 - Professional tradespeople need advice about which product best suits their needs, how to use a particular product and the best accessories and attachments to use, so that they can use the product effectively.
 - To provide this advice, dealer staff need to be trained on the products and be willing to spend time with customers to explain and demonstrate products to customers. This requires significant investment by SBD and dealers.
 - Dealers need to carry a wide range of Dewalt products with sufficient display space so that customers can inspect products out of the box. Appropriate display space is particularly important to support new products and promotions.
 - High levels of post-sales support including ad hoc advice, trouble shooting, and good warranty and repair services ensure that customers have a good overall experience of Dewalt products.

Excessive price discounting

57. SBD submits that in a market with very aggressive pricing behaviour, such as the market for power tools, dealers are often not prepared to invest in high levels of service if they are not going to earn a sufficient return on their investment. Increasing price competition for trade quality power tools has resulted in dealers continually undercutting each other on advertised prices. Margins on Dewalt products are

²⁵ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.17.

²⁶ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.17.

²⁷ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.17.

²⁸ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, pp. 8-14.

considered by many dealers to be too low, particularly when compared to the margins that they earn on products from competitors, including Makita, Milwaukee and Festool.

58. SBD submits that the price competition and comparatively low margins on Dewalt products has been largely driven by two inter-connected factors:
 - The significant growth in the online promotion and sale of power tools (including the growth and use of price comparison websites).
 - The price guarantee policies of various which promise to beat a competitor's lower price. These price guarantee policies mean that dealers with these policies will reduce their prices to match another dealer's online advertised price. Some dealers offer additional discounts if their prices are higher than a competitor's advertised price.
59. SBD submits that the heavy discounting is often driven by certain smaller dealers who may have a single store but mainly sell online, offering much lower levels of service (as most of their sales are online).
60. SBD submits that there is also discounting pressure as a result of advertised online prices from non-authorized dealers. These dealers acquire product through non-authorized channels and advertise products online at highly discounted prices. In some cases, dealers do not actually stock the products they offer for sale, presumably hoping that customers will buy an alternative product once they are on their website. However, other dealers, with price guarantee policies, still lower their prices to meet these non-authorized dealers' advertised prices.²⁹

Undermining promotions

61. SBD submits that the aggressive price competition in the market is also undermining promotions. Promotions drive both intra- and inter-brand competition, and can offer significant benefits to customers, providing them with access to favourable terms for a particular product. Promotions often require significant investment by both SBD and participating dealers, however that investment can be put at risk if other dealers decide to undercut the promotion. If promotions do not provide the expected return to SBD and its dealers, then they will both be less likely to invest in promotions in the future.
62. During a Dewalt promotion, customers were given the opportunity to purchase a Dewalt FlexVolt product for \$199, compared to the recommended resale price of \$459. One dealer acquired a relatively small number of kits and promoted them online at \$189. Two other dealers that had invested heavily in the promotion matched this lower price, reducing their price to \$189 also.
63. SBD submits that this type of behaviour results in dealers being less likely to support similar future promotions.

Removing free riding

64. SBD submits that customers visit specialist dealers in-store who carry a range of Dewalt products that are on display and are able to offer a high level of pre-sales service and advice, but then purchase the product at a lower price from another dealer who provides little or no pre- or post-sales services but promotes a cheap price online. In many cases, the in-store retailer needs to match the other dealer's price if they wish to retain the sale. As a result, dealers who do invest in providing high levels of pre- and post-sales service do not earn sufficient margins to reward their efforts and are likely to

²⁹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p. 9

reduce their sales service levels to cut costs and in some circumstances de-range Dewalt products.

65. SBD submits that this will result in a reduction in consumer welfare, through reduced service and reduced consumer choice.

Dealers de-ranging Dewalt products

66. SBD submits that dealers matching other (discount) dealers' low prices adversely affects dealer margins, which in turn impacts dealer ranging decisions unless SBD is willing to provide additional financial support so that they can maintain margin.
67. SBD submits that there are currently specialist power tool dealers who will not carry Dewalt products because they do not believe they will be able to earn a sufficient margin to justify the investment that would be required. Competitor brands where margins are protected are preferred. SBD submits that the Notified Conduct would mean that more of these dealers, who are often the smaller independents who invest in high quality service, would be willing to carry Dewalt products.

Supporting SBD's investment in customer service

68. SBD submits that the Notified Conduct will support SBD's current and proposed increased investments in improving customer service, particularly through its training initiatives. SBD currently makes significant investment in promoting high quality retail services through the extensive training it provides to its employees, its dealers and end-users. SBD submits that it has plans to significantly increase these investments over the next few years.
69. SBD submits that its ability to make these and the planned future investments will be compromised if these investments are not supported by its dealers, and if it has to provide additional rebates and funding to dealers to support them maintaining their margins as a result of having to provide additional discounts to their customers.
70. SBD submits that if the Notified Conduct is allowed to stand, it proposes to re-introduce a premium dealer program as a means of ensuring that its dealers are investing in and actually providing better retail services. The program would include metrics around such matters as employee training, in-store displays, product ranging and stock levels, and customer-facing activities such as demonstrations. When introduced previously, this program was unsuccessful and withdrawn by SBD as dealers were not prepared to make investments in better retail services.

ACCC Assessment

Future with or without the proposed RPM conduct

Future with

71. SBD will set the minimum advertised price for the Notified Products and SBD dealers will be unable to advertise prices below the level set by SBD. The minimum advertised price would not apply to Dewalt dealers that have not signed dealer agreements, that is, un-authorised Dewalt dealers.
72. The Notified Conduct will not prevent dealers from selling the Notified Products to consumers at a price less than the price advertised by any dealer. So consumers will still be able to negotiate cheaper prices with a dealer but they will be unable to negotiate based on another dealer's lower advertised price. The absence of lower

advertised prices of authorised dealers is likely to significantly limit consumers' ability to negotiate.

73. SBD submits that part of the rationale for the Notified Conduct is in response to aggressive price discounting by online non-authorised dealers of Dewalt products. Under the Notified Conduct, SBD will amend its dealer trading agreements preventing advertising for the Notified Products below the level set by SBD. While SBD can enforce its dealer trading agreements and then penalise dealers for breaching them, SBD is unlikely to be able to influence the pricing behaviour of un-authorised dealers.

Future without

74. SBD submits that if it is unable to engage in the Notified Conduct:³⁰
- SBD is likely to increase its use of exclusive distribution whereby it limits certain Dewalt products and/or specific Dewalt promotions to a specific dealer or group of dealers (which are likely to be dealers such as Bunnings, Total Tools and Sydney Tools and not smaller independent power tool dealers given their much lower sales volumes).
 - Dealers are likely to continue to de-range Dewalt products. In these circumstances or where SBD has to reduce its margins to ensure that dealers continue carrying Dewalt, SBD may not be able to continue to make the planned increased investment in training and improving dealer customer service.
 - Dealers will also reduce their investment in Dewalt, including by allocating it less display space and reducing their investment in Dewalt training.
 - Smaller dealers providing high levels of customer service will be less likely to carry the Notified Products and will carry those brands where they consider their retail margins are protected.
75. The ACCC considers that in the future without the Notified Conduct, current levels of price and service based competition are likely to continue both between Dewalt dealers (intra-brand competition) and between brands of professional power tools (inter-brand competition). Based on market inquiries, the ACCC understands that some current Dewalt dealers are considering whether to stop selling, or significantly reduce, the range of Dewalt power tools they currently sell.
76. SBD may decide to increase its use of exclusive distribution for some or all of the Notified Products limiting the number of dealers that can resell the products. The ACCC understands that some other brand distributors have taken this approach in the face of highly competitive markets with aggressive price discounting.

Area of competition

77. SBD did not provide a view on the relevant area of competition, however it submits that the market for the supply of professional quality power tools is highly competitive and with a range of strong and effective competitors. SBD submits that there are 11 competing brands of power tools selling 15 brands of power tools.
78. The ACCC notes that SBD competes with other brands of professional quality power tools, accessories and attachments. SBD's dealers include large hardware dealers such as Bunnings, Sydney Tools and Total Tools as well as online suppliers selling via

³⁰ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p. 30.

their own websites and selling on platforms such as eBay. Dealers will sell to both professional tradespeople and to do-it-yourself consumers.

79. The ACCC does not consider it necessary to precisely define the relevant area of competition to be able to assess this notification. Nevertheless, given the focus of the conduct is mainly on retail competition, the ACCC considers the primary relevant markets to be a series of local retail markets across Australia for corded and cordless power tools, accessories and attachments supplied to both tradespeople and DIY consumers.

Consultation

80. The ACCC sought submissions from a wide range of interested parties including power tool dealers and competing power tool wholesalers.
81. The ACCC received four public submissions from interested parties in response to the notification, from:

Techtronic Industries Australia Pty Ltd

- Techtronic opposes the Notified Conduct and considers it will create an unfair playing field for the rest of the competitors in the power tools market. Techtronic submits that the Notified Conduct will have the effect of restricting dealers from discounting Dewalt products in store, as in store staff and dealers will maintain the MAP price as the sale price. Techtronic also considers Dewalt products to be mid-range, and not premium, products.³¹

Total Tools

- Total Tools agrees generally with SBD's observations about the nature of Dewalt products; end user customers' reliance on service, stock range and depth requirements; and potential de-ranging decisions for products which cannot meet hurdle margin returns.

Bunnings Group Limited

- Bunnings considers that within its power tools category, Dewalt products are towards the higher end of the quality and price spectrum. Bunnings considers the outcome of applying its 'lowest price guarantee' to Dewalt products is that customers have been able to purchase Dewalt products at a lower price, without any diminution in the level of available customer service.³²
- Bunnings' submits that none of the purported public benefits associated with the Notified Conduct would outweigh the likely public detriment. In Bunnings' view, the Notified Conduct will result in public detriment in the form of a reduction of intra-brand price competition for Dewalt products, consumers being likely to pay higher retail prices for the Notified Products and lower incentives for dealers to invest in cost savings initiatives. Bunnings also considers that the Notified Conduct will not address unauthorised dealer activity, and that increasing customer awareness of dust management is better addressed through initiatives other than the Notified Conduct.³³

³¹ Techtronic Industries Australia Pty Ltd submission, 11 November 2019, p.1-2.

³² Bunnings Groups Limited submission, 15 November October, p.2.

³³ Bunnings Groups Limited submission, 15 November October, p.1-4.

A supplier of power tools in Australia (that requested not to be identified)

- The supplier submits that the Notified Conduct will result in consumers paying higher prices for the Notified Products. Customers who are already on the Dewalt “system” will be particularly disadvantaged, as the costs of their future purchases won’t be determined by a competitive market.³⁴
- The supplier considers that while the power tool market has become more competitive and price erosion has occurred, power tool companies have responded by becoming more efficient and ensuring best business practices.³⁵

SBD response to submissions

82. In response to the submissions from interested parties, SBD submits that the notification will promote competition, including by levelling the playing field and supporting the smaller, independent dealers who often struggle to compete against larger dealers such as Bunnings, Sydney Tools and Total Tools. SBD doesn’t consider the notification will have the effect of chilling competition in the market for power tools due to the limited scope of the notification and the strong inter-brand competition.³⁶
83. SBD disagrees that the MAP will restrict dealers from discounting Dewalt products in store and states that in SBD’s experience, dealers do negotiate price in-store with potential customers in order to obtain a sale. SBD asserts it is well accepted in the market that Dewalt is a premium, trade quality brand.
84. All public submissions received by the ACCC in relation to SBD’s RPM notification are available on the ACCC’s public register.
85. The ACCC also visited a number of power tool retail outlets that stock Dewalt products.

Public detriments

86. The ACCC considers that, in general, consumers are best served by dealers being able to advertise product prices based on their own assessment of prevailing market conditions and their own business strategies. Any restriction on their ability to do so impedes their ability to compete, including through an advertised differentiated price offering, to attract customers.

Reduction in intra-brand price competition leading to some customers paying higher retail prices for Dewalt Products

SBD submission

87. SBD submits that any public detriment arising as a result of the Notified Conduct, particularly in relation to any impact on competition, will be limited.³⁷
88. SBD contends that, due to the vigorous price competition in the market, it will not be able to set MAPs above competitive levels.³⁸ SBD submits that although it is the third

³⁴ A supplier of power tools in Australia submission, 18 November 2019, p.1.

³⁵ A supplier of power tools in Australia submission, 18 November 2019, p.1.

³⁶ Stanley Black & Decker Australia, Resale Price Maintenance Notification, Supplementary Submission 18 December 2019, Available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/stanley-black-decker-australia-pty-ltd>

³⁷ Stanley Black & Decker Australia, Resale Price Maintenance Notification, 17 October 2019, p.29.

³⁸ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29-30.

largest power tool supplier in the market, both Techtronic and Makita are much larger suppliers of power tools.³⁹ Accordingly, if Dewalt products are not price competitive, both dealers and end-users would switch to competing brands. Further, SBD does not supply any 'must have' Dewalt products.⁴⁰

89. In addition, SBD submits the scope of the Notified Conduct, and the likely public detriment, is limited by the following factors:
- The Notified Conduct will not eliminate advertised price competition for the Notified Products. The MAP will be set at the stockist/invoice price which is below RRP and, accordingly, dealers will have some scope to compete on advertised prices by advertising below RRP.⁴¹
 - The Notified Conduct only imposes a MAP for online and in-print advertising. It does not restrict in-store competitive activity by dealers and it will not restrict or prevent end-user customers negotiating discounts below the MAP with dealers.⁴²
90. SBD submits that the combined effect of these factors is that the Notified Conduct will not have an adverse impact on competition at the retail level and will not permit dealers to increase their margins above competitive levels.⁴³

Interested party submissions

91. Bunnings submits the Notified Conduct will result in public detriment in the form of a reduction of intra-brand price competition for Dewalt products, resulting in end-consumers being likely to pay higher retail prices for the Notified Products than they otherwise would have.⁴⁴ Bunnings also contends that as the third largest market share power tools dealer, SBD's proposal to impose an effective floor on advertised price for Dewalt Products risks having broader consequences of chilling price competition in the market for high-quality tools, attachments and accessories.⁴⁵
92. Similarly, a supplier of power tools in Australia provided a submission stating that the Notified Conduct will result in consumers paying higher prices for the Notified Products.⁴⁶
93. Techtronic contends that the Notified Conduct will have the effect of restricting dealers from discounting Dewalt products in store as well as online, as the RPM conduct will flow through to in-store activity, and in store staff and dealers will maintain the MAP as the sale price.⁴⁷

ACCC view

94. The ACCC considers the Notified Conduct is likely to have the effect of eliminating deep discounting (being discounting below the MAP/invoice price) for the Notified Products, and therefore will restrict the ability of dealers to compete on price. The ACCC considers this reduction in intra-brand competition will likely result in public

³⁹ Stanley Black & Decker Australia, Supplementary Submission, dated 18 December 2019, p.2.

⁴⁰ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29-30.

⁴¹ Stanley Black & Decker Australia, Supplementary Submission, dated 18 December 2019, p.3.

⁴² Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.30.

⁴³ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.30.

⁴⁴ Bunnings Groups Limited submission, 15 November October, p.1-4.

⁴⁵ Bunning Group Limited, Submission, dated 15 November 2019, p.5.

⁴⁶ A supplier of power tools in Australia submission, 18 November 2019, p.1.

⁴⁷ Techtronic Industries Australia Pty Ltd submission, 11 November 2019, p.1-2.

detriment in the form of some customers facing higher prices for Dewalt products than they otherwise would absent the Notified Conduct. The ACCC is of the view that the Notified Conduct is likely to be particularly detrimental to customers who would otherwise purchase Dewalt products from authorised online discount dealers at prices below the MAP, or who take advantage of major dealers' price matching policies to receive deep discounts on Dewalt products in store.

95. However the ACCC considers the extent of detriment caused by the higher retail prices for the Notified Products is likely to be limited by the competitive constraints imposed on Dewalt by its competitors. In this respect, the ACCC notes that SBD is the third largest supplier of power tools, and that Dewalt is the third largest brand of professional power tools. However, the ACCC accepts there are currently alternative comparable trade quality power tools available to customers, including Makita, Milwaukee and Bosch. The ACCC considers that the availability of substitute brands reduces SBD's incentive to set minimum advertised prices above competitive levels because doing so risks reducing sales volumes overall. The ACCC accepts that Dewalt's customers are likely to switch to other brands if prices for Dewalt products increase significantly above competitive levels. However as noted above, existing customers who have already invested in Dewalt's battery "system" are less likely to substitute an alternative brand in the event of a price increase, due to the costs associated with switching.
96. The ACCC also notes SBD's submission that the Notified Conduct will not eliminate competition between dealers on advertised price completely, as dealers will have some scope to compete on advertised prices by advertising below RRP. However, the ACCC is of the view that while dealers will be able to set advertised prices above the MAP, in practice they are unlikely to do so.
97. As noted by SBD, the extent of price competition for trade quality power tools has meant that dealers have been undercutting each other's advertised prices.⁴⁸ Based on market inquiries, the ACCC understands that as a result, dealers are routinely pricing Dewalt products below the MAP/invoice price, leading to low retail margins. It is likely this aggressive pricing behaviour will continue following the introduction of the RPM conduct, and that dealers will continue to price match the lowest advertised price. The ACCC considers that the Notified Conduct incentivises dealers to price the Notified Products at the MAP, as doing so enables dealers to earn an acceptable retail margin, without risking sales to other authorised dealers. Accordingly, the ACCC considers it likely that dealers will elect to set their advertised prices at the MAP and consequently, the Notified Conduct will have the practical effect of removing competition between dealers on advertised price and that prices for Dewalt products are likely to increase from current levels up to the MAP.
98. The ACCC notes SBD's submission that the Notified Conduct does not restrict dealers from offering discounts below the minimum advertised price in-store, and that customers will still be able to negotiate prices below the MAP with dealers. However the ACCC considers that in practice, occurrences of customers negotiating a price below the minimum advertised price in store are unlikely to be common.
99. The ACCC's market inquiries indicate that price competition for power tools primarily plays out online as customers typically compare advertised prices on their phones or laptops to decide which dealer to purchase from. The ACCC considers that if all online prices are homogenous, most consumers would be unlikely to attempt to negotiate a lower price for a Notified Product in store. For those customers who are inclined to

⁴⁸ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.9.

seek a better price in-store, the Notified Conduct removes the ability for customers to use competitor's online prices as leverage to negotiate a discount. Accordingly, the ACCC considers the Notified Conduct will have the effect of dampening price competition for Dewalt Products in store.

100. While the ACCC considers that the extent of the detriment resulting from the Notified Conduct is likely to be reduced by its relatively limited scope, it is still likely to result in significant detriments by reducing intra-brand price competition, resulting in higher prices for Dewalt products.

The Notified Conduct may reduce inter-brand competition, resulting in customers paying higher prices for competing products

101. The ACCC considers there is a risk that higher retail prices for the Notified Products may provide the freedom for suppliers of competing products to increase their prices (reduced inter-brand price competition). In this scenario, due to SBD credibly committing to maintain higher prices for its Dewalt products, competing suppliers of comparable products may decide to not compete as aggressively on price as they otherwise would, resulting in higher retail prices for competitor products. The degree to which this is likely depends on the strength of other constraints that affect the pricing of competing products.
102. As noted above, the ACCC is of the view that the availability of substitute brands reduces SBD's incentive to set minimum advertised prices above competitive levels because doing so risks reducing sales of Dewalt products. However the ACCC considers Dewalt's relatively large market share increases the risk of competitive detriment from the Notified Conduct by making it profitable for other manufacturers and/or dealers to also unilaterally increase their prices.

Public benefits

103. In the past the ACCC has accepted that in some circumstances, RPM can result in public benefits. Public benefits have been tied to addressing market failures, such as free riding that would otherwise result in inefficient under-provision of pre-and post-sales retail services. The existence and extent of public benefits depends on the circumstances of each notification.
104. SBD submits that the Notified Conduct will result in several public benefits. These benefits are described below.

Supporting investment by dealers and SBD in improved retail services and better outcomes for customers

SBD submission

105. SBD submits that high quality retail services require ongoing investment by both SBD and dealers. If dealers are not earning the required returns on the Notified Products due to having to meet aggressive advertised discounting by dealers who do not offer similar service or are losing sales to online dealers who offer minimal customer service, then they will be reluctant to make the necessary investment to support the continued provision of that service.⁴⁹

⁴⁹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.27.

106. SBD submits that the Notified Conduct will provide dealers with the incentive to continue to invest in and improve their provision of good pre- and post-sales service. This includes:⁵⁰
- Carrying a wider range of the Notified Products, having stock on hand and allocating additional display space so that customers can inspect products out of the box.
 - Ensuring that staff attend training so that they are knowledgeable about the features and benefits of the Notified Products, including new products as they are developed and released, and can provide better assistance to customers.
 - Dealers having sufficient numbers of trained knowledgeable staff present in-store who are able to advise customers on different power tools and their capabilities, as well as demonstrate the use of these products.
 - Partnering with SBD to provide product demonstrations and training to customers on Dewalt products.
 - Providing post-sales service, including ad hoc support to customers on the use of a Dewalt power tool and basic trouble shooting, as well as warranty and repair service support when a product has developed a problem.
107. SBD submits that a consequential benefit of dealers having trained staff on hand to advise and assist customers in their purchasing decision is that customers will be able to make more informed purchasing decisions.⁵¹
108. SBD submits that currently SBD sales representatives monitor dealer performance by visiting dealers and checking stock levels, product displays, marketing promotions and point of sale (POS) marketing material.⁵²
109. SBD submits that if the Notified Conduct is allowed to stand, SBD will also reintroduce its premium dealer program and introduce an accredited training program as a means of ensuring that its dealers are investing in and actually providing better retail services.⁵³

Interested party submissions

110. Bunnings submits that it recognises the need for its retail staff to have relevant product expertise when explaining the features and benefits of power tools generally, including Dewalt's range of power tools and accordingly invests in providing training to retail staff to develop their expertise. Bunnings notes that SBD does not charge dealers for the training that SBD offers dealers.
111. Market inquiries conducted by the ACCC suggest that the Notified Products are high quality and have a good reputation amongst professional power tool users, however the popularity of Dewalt power tools has declined in recent years. Makita power tools have always been popular and Milwaukee power tools have increased in popularity.
112. Market inquiries also indicate that consumers become loyal to a brand of cordless power tools because the battery is designed to fit the entire cordless range of tools. Once the decision is made to buy one cordless power tool, a suitable battery and

⁵⁰ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, pp. 27-28.

⁵¹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.28.

⁵² Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.28

⁵³ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.30.

battery charger, it becomes expensive to switch brands and therefore consumers tend to purchase more of the same brand of tool ('skin').

113. Several dealers noted that many brands of power tools have five or six products that stand out and give those brands a competitive advantage for those particular tools. Dealers said that some Dewalt products, such as the FlexVolt range are innovative and have features that make them attractive to some users, but broadly the Dewalt range is on par with other brands in terms of complexity and the need for pre-sales service.

ACCC view

114. The ACCC notes the comments made by interested parties and accepts that Dewalt power tools are high quality and have a good reputation amongst professional power tool users. It is also likely that Dewalt power tools are well regarded by DIY users looking for professional quality tools.
115. Based on the information available to the ACCC, it does not appear that Dewalt Power tools require a higher level of pre and post sales service than other brands of power tools. In many cases, the decision to buy a power tool may come down to price and any existing brand loyalty and, for those not yet loyal to a brand, the availability of different brands of power tools in a retail outlet at a competitive price. In this case, the brand reputation and the skill of the salesperson may be a key factor influencing purchasing choice.
116. During site visits, the ACCC noted the vast array of power tools offered for sale by specialised power tool shops, including Sydney Tools and Total Tools as well as general hardware dealers like Bunnings. Many power tools are also supplied online via platforms such as eBay, Amazon and third party sellers. There appears to be many brands and models of power tools available to Australian consumers.
117. Based on market inquiries, SBD provides dealer training and employs representatives to visit dealers and provide information to customers. However other brand distributors engage in similar activities. During one site visit the ACCC observed a sales representative from another brand distributor engaging with staff and customers in a retail outlet.
118. The ACCC considers that public benefits are unlikely to arise from higher service levels for the Notified Products.
119. SBD submits that its FlexVolt and dust extraction/management systems are particularly innovative and therefore require high levels of service. These are discussed below.

Service levels for the FlexVolt range

SBD submission

120. SBD submits that pre sales support is particularly important for the Dewalt FlexVolt range and FlexVolt is unique in the power tool market because it can supply cordless tools that operate at two different voltages.⁵⁴ It requires additional initial investment by the customer to acquire both the tool (such as a drill, grinder or rotary hammer) and

⁵⁴ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.16.

the battery but can then offer significant value to the customer through its flexible platform.⁵⁵

ACCC view

121. Additional background information on the FlexVolt range is in 'The Notified Products' section above.
122. In relation to the FlexVolt range, the ACCC accepts that the ability to use one battery to power 18 volt and 54 volt power tools is innovative and valuable to some users, particularly those working on construction sites. However the ACCC notes that the FlexVolt battery automatically switches output voltage depending on whether it is inserted into an 18 volt or 54 volt tool and that there are several online videos available that explain how to use and highlight the benefits of the FlexVolt range. Based on the information available, the FlexVolt range does not appear to be sufficiently complex and difficult to use to warrant a higher level of pre-sales service, particularly for tradespeople that are likely to be familiar with power tools (including cordless power tools) and therefore easily understand how the FlexVolt range might benefit them. The ACCC notes that SBD has created several publically available instructional videos on the benefits and use of the FlexVolt range of batteries and tools.
123. Based on the information available, the ACCC considers that public benefits are unlikely to arise from higher service levels for the FlexVolt range of products.

Service levels for dust extraction/management systems

SBD submission

124. SBD submits that presales service is also important for its dust extraction/management systems. The Dewalt dust extraction systems are designed to be used with a range of products and will not be fully effective unless they are used correctly.⁵⁶
125. SBD submits that having trained staff on hand to advise and assist customers when purchasing products like dust extraction systems will result in broader public benefits as it will lead to better dust management on construction job sites.⁵⁷

Interested party submissions

126. Bunnings agrees with SBD's submissions that correct use of dust extraction products is important and that there are public health benefits in ensuring tradespeople are educated on dust issues for construction sites, dust extraction technology for power tools and how to use that technology correctly. Bunnings submits that the Notified Conduct is an inappropriate measure to ensure education outcomes are achieved and SBD could educate users via instructional manuals and guidance in product packaging, online instructional videos or in-store product demonstrations through existing retail channels.
127. Market inquiries indicate that dealers are often asked by consumers to explain issues relating to power tool dust extraction and management. Dealers indicated that there is a wide range of dust extraction systems available to users and it can be difficult to stay up to date on each system and which system might be better in specific circumstances. One dealer noted that servicing dust extraction systems is an important and often overlooked aspect of dust management.

⁵⁵ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.19.

⁵⁶ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.17.

⁵⁷ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.28.

ACCC view

128. The ACCC notes the recent increased focus on dust management on construction sites, the likely health impacts of dust inhalation and the role dust management products have in protecting workers and the community more generally. The ACCC also notes the submission by Bunnings and comments from several dealers about the need for dust extraction systems, the challenges in providing advice to users and the uncertainty about whether users will act on that advice. One dealer said that specialist power tool outlets need more information about all brands of dust extraction/management systems.
129. Dealers are asked to provide pre-sale service for most brands of dust extraction/management systems, not just Dewalt's systems. The ACCC considers that the provision of advice at the time of purchase is likely to be valuable for some consumers, particularly consumers that are less familiar with dust systems and how they attach to various power tools, however this face to face advice is not a substitute for the provision of information with the product that users can refer to later.
130. To the extent that the notified conduct would facilitate the provision of greater pre and post sales service that resulted in customers acquiring more appropriate dust extraction systems and/or using them more effectively, this would be a benefit. However, it is likely that some consumers will already be sufficiently informed about the risks and how to mitigate them using the available dust extraction/management systems and these consumers would benefit less from higher service levels. It is also likely that consumers will benefit from the provision of written material and/or videos to inform and remind them of how to use these systems. In these circumstances, all consumers would pay for higher service levels that only some consumers need.
131. Accordingly, ACCC considers that public benefits are unlikely to arise from higher service levels for the Dewalt dust extraction/management systems.

Promoting increased competition by dealers and manufacturers, as well as better ranging leading to increased consumer choice

SBD submission

132. SBD submits that the Notified Conduct will incentivise dealers to compete on service, not just price, for the supply of the Notified Products. This includes competing through providing better service having regard to product ranging, product knowledge and expertise, product displays, demonstrations and training.⁵⁸
133. SBD also submits that the Notified Conduct is likely to mean that there are less range reductions of Dewalt products, and more dealers, especially the high service, independent specialists, will be more willing to carry a wider range of Dewalt products as they will have greater certainty of being able to earn an acceptable margin on those products. In particular, some of the smaller, independent specialist dealers who have deliberately not supplied or elected to de-range Dewalt products are likely to be more willing to carry Dewalt products. The MAP Conduct will result in sustainable prices and mean that these dealers will be able to better compete with the larger dealers.⁵⁹

⁵⁸ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.28.

⁵⁹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, pp.28-29.

134. Accordingly, SBD claims that the Notified Conduct will increase the channels and outlets through which a wide range of Dewalt products are available, resulting in greater customer choice and promoting competition.⁶⁰
135. SBD submits that the Notified Conduct will also support SBD in being able to launch more products and more innovation into market, rather than limit supply. The current market issues result in some products not entering the market. Bunnings, Total Tools and Sydney Tools will not range products unless they expect those products to be able to meet their margin targets. For example, when building new power tool kits if SBD cannot make it to dealers' margin expectations SBD will not present it to their customers.⁶¹
136. In addition, the implementation of a promotional minimum advertised price will help enable SBD and those dealers who choose to participate to be able to continue to offer promotions on Dewalt products. For dealers, they will be able to commit to purchasing additional stock and setting up displays knowing that they won't be undercut by other dealers advertising a price lower than the promotional minimum advertised price.⁶²

Interested party submissions

137. ACCC market inquiries indicate that many specialist power tool dealers sell a wide range of both Makita and Milwaukee power tools and a much smaller range of Dewalt power tools. Some dealers have limited floor space and given the number of brands and models of power tools are unable to stock every type of power tool for each brand. Some dealers told the ACCC that if the Notified Conduct results in these dealers receiving a better margin on Dewalt products, they may decide to stock more Dewalt power tools and de-range other brands of tools. Several dealers indicated that the margin for a particular brand is a significant factor in making a recommendation to a customer that is not already brand loyal.
138. Some other dealers indicated that they have floor space available now and if the margin on the Notified Products was sufficient they would stock a larger range of Dewalt products. These dealers currently sell other brands of power tools because the margin they receive on those brands, while still low, is greater than the margin they receive on Dewalt power tools.

ACCC view

139. Based on market inquiries, it appears that the Notified Conduct is likely to result in some specialised power tool dealers increasing their range of Dewalt power tools. Some dealers, particularly those with limited floor space, will need to de-range other brands of tools, while it appears that some other dealers can increase the range of Dewalt power tools without de-ranging other brands.
140. Accordingly, the ACCC considers that the Notified Conduct is likely to increase the range of Notified Products sold by some power tool dealers because dealers are likely to receive a higher margin for the Notified Products and this is likely to increase availability of the Notified Products and increase consumer choice resulting in higher inter-brand competition.
141. The extent to which this is likely to occur is uncertain and difficult to predict. The ACCC notes that many users of power tools are already loyal to a particular brand because

⁶⁰ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29

⁶¹ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29.

⁶² Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29.

they invested in a battery that fits into multiple cordless power tools supplied by that brand. These users are unlikely to switch brands just because their local dealer sells a larger range of Dewalt products. Brand loyal users may switch brands if they become unhappy with the brand, for example due to reliability concerns.

142. Most consumers are also price sensitive. Should the Notified Conduct increase the availability of the Notified Products and increase prices as well, many consumers are unlikely to purchase them, particularly if they can compare the Notified Products with comparable other brands sold by the dealer at lower cost. In this scenario, the Notified Conduct would be unlikely to result in a public benefit.
143. Accordingly the ACCC considers that public benefits are likely to result from smaller independent power tool specialists receiving a higher margin and responding by maintaining or increasing their range of Dewalt products, increasing consumer choice. As already noted, any benefit is likely to be removed if dealers increase prices above a competitive level.

MAP Conduct is less restrictive compared to other options

SBD submission

144. SBD submits that the Notified Conduct is less restrictive than other alternatives that might be used to overcome the current market issues. Some dealers are increasingly seeking exclusive supply arrangements so that there will not be intra-brand competition on a particular range of products.⁶³

ACCC view

145. The ACCC notes that an alternative approach to the Notified Conduct includes restricting distribution of the Notified Products and using exclusive supply arrangements. This is likely to reduce the number of dealers selling Dewalt products reducing consumer choice at the retail level. In these circumstances and in the absence of any RPM conduct, dealers selling Dewalt products would compete with each other on price. Prices would be likely to be lower than prices with the Notified Conduct and in these circumstances, price sensitive consumers may benefit from an exclusive supply arrangement.
146. The ACCC accepts that an exclusive supply arrangement is likely to be more restrictive than the Notified Conduct, however it may result in public benefits due to lower prices.
147. An exclusive supply arrangement is unlikely to have any impact on the un-authorized dealers of the Notified Products as they are likely to continue to sell the products even if SBD narrows the number of authorized dealers.
148. An option not canvassed by SBD is to reduce the wholesale price charged to some dealers. SBD could target dealers currently struggling to make a suitable margin. This approach would likely improve the margin for these dealers and influence their ranging decisions for the Notified Products they stock. Reducing the wholesale price for some dealers may create more public benefits compared to the Notified Conduct if it increases consumer choice without increasing retail price.

⁶³ Stanley Black & Decker Australia, Resale Price Maintenance Notification, dated 17 October 2019, p.29.

ACCC conclusion on likely public benefits

149. The ACCC considers that the likely public benefits of the Notified Conduct are limited to an increase in the available range of Dewalt products, which will increase consumer choice. This would only happen if dealers believe that the Notified Conduct will result in higher retail margins.

Balance of public benefits and detriments

150. The ACCC considers that the Notified Conduct is likely to result in public detriments by:

- reducing price competition for Dewalt Products in store.
- suppliers of competing products increasing their prices in response to increases in the prices for the Notified Products.

151. The ACCC considers that the Notified Conduct is likely to result in some public benefit by resulting in some increase in consumer choice for those consumers that are not already loyal to another brand of power tool.

152. The ACCC considers that any increase in price for the Notified Products or other brands of power tools is likely to impact a wide range of consumers and any benefit is likely to be smaller and experienced by a narrow group of buyers.

153. Accordingly, the ACCC considers that the likely public benefits of the Notified Conduct do not outweigh the likely public detriments of the Notified Conduct.

Draft Notice

154. For the reasons set out in this draft notice, the ACCC, based on the information available and in accordance with s93(3A) of the Act, is satisfied the likely benefit to the public will not outweigh the likely detriment to the public from the Notified Conduct and therefore gives this notice under s93A proposing to revoke notification RPN10000455 lodged by SBD on 17 October 2019.

Next steps

155. The ACCC now invites submissions and further information from SBD and interested parties. In addition, consistent with section 93A of the Act, the notifying party or an interested party may request that the ACCC hold a conference to discuss the draft notice.

156. While there is no statutory timeframe for the next stage of the ACCC's assessment process, the ACCC intends to conclude its assessment in a timely manner and requests any further submissions be provided by **24 April 2020**.

157. Requests that the ACCC hold a conference to discuss the draft notice must be provided in writing by **15 April 2020**. The ACCC will then proceed to make a final decision on the notification.