

RESALE PRICE MAINTENANCE

Competition Policy Review (Harper Review) Final Report

Current position

Substantive law

- Minimum resale price maintenance by suppliers prohibited per se (s 48)
- Various forms of prohibited RPM set out in s 96(3)
- Loss leader defence available

Harper Panel final recommendation (rec 34)

Substantive law

- Retain per se ban
- No change to substantive provision

Exemption

- Add exemption for RPM conduct between related bodies corporate (consistent with ss 45 and 47)

Notification

- Add option to notify RPM conduct to ACCC
(See model legislative provision drafted by Harper Panel, below)

Harper Panel model legislative provision (Appendix A)

Section 93 Notification of exclusive dealing or resale price maintenance

- (1) Subject to subsection (2), a corporation that engages, or proposes to engage, in conduct of a kind referred to in sections 47 or 48 or both may give to the Commission a notice setting out particulars of the conduct or proposed conduct.
- (2) Where a corporation has given notice under subsection (1), section 47 or section 48 (as the case may be) does not prevent the corporation from engaging in the conduct referred to in the notice, unless:
 - (a) the Commission has given notice under subsection (3) and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or
 - (b) the notice has been withdrawn and the conduct takes place after the notice was withdrawn.
- (3) If the Commission is satisfied in all the circumstances that a corporation engaging in conduct of a kind described in section 47 and referred to in a notice given by the corporation under subsection (1):
 - (a) has, or would have or be likely to have, the effect of substantially lessening competition; and
 - (b) would not result, or is not likely to result, in a benefit to the public that would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from engaging in the conduct,

the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied including a statement setting out its reasons for being so satisfied.
- (4) If the Commission is satisfied in all the circumstances that a corporation engaging in conduct of a kind:
 - (a) described in section 48; or
 - (b) described in both section 47 and 48,

and referred to in a notice given by the corporation under subsection (1) would not result, or is not likely to result, in a benefit to the public that would outweigh the detriment to the public from engaging in the conduct, the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied including a statement setting out its reasons for being so satisfied.

[summary prepared 17 June 2015]