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COMPETITION & REGULATION UPDATE

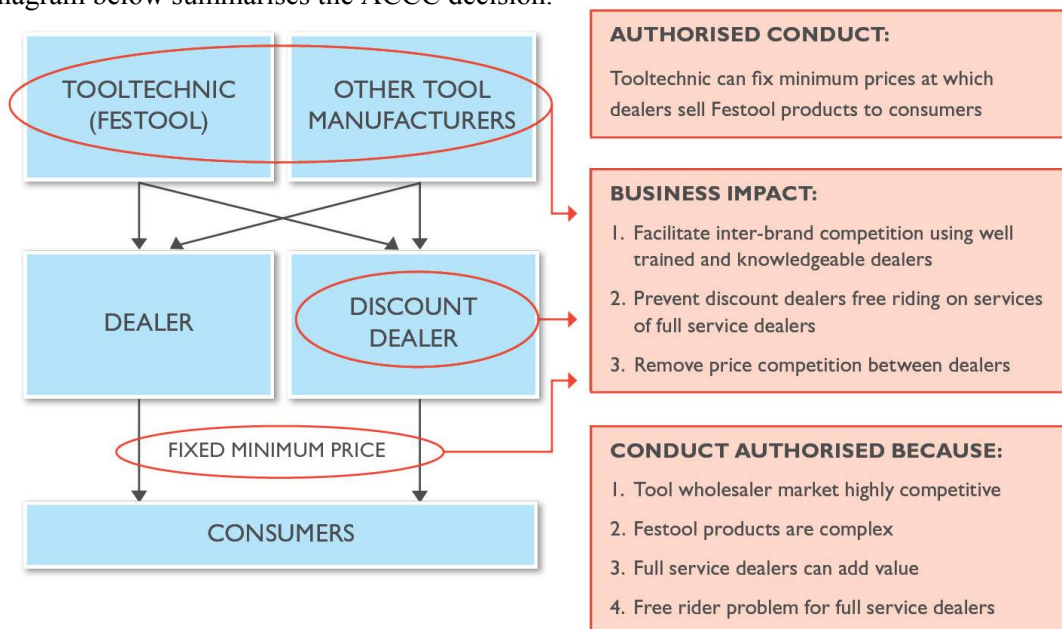
A WIN FOR HIGH QUALITY BRANDS AND DISTRIBUTORS

IN DECEMBER 2014, THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) AUTHORISED TOOLTECHNIC TO FIX THE MINIMUM PRICE AT WHICH ITS DEALERS COULD SELL FESTOOL TOOLS TO CONSUMERS - THAT IS, TO ENGAGE IN RESALE PRICE MAINTENANCE (RPM).

This is the first time since the legislative change in 1995 enabling such authorisation that a company has successfully obtained authorisation to engage in RPM conduct. The decision paves the way for:

- further RPM authorisations; and
- potential legislative change to reduce the red tape associated with obtaining such authorisations. Currently, obtaining authorisation takes approximately five to six months and involves a lodgement fee of \$7,500. The Harper Review draft recommendations propose a simplified process.

The diagram below summarises the ACCC decision.



IMPLICATIONS

The decision is boost for:

Quality brands

- The decision recognises the importance of competition between brands based on quality and features rather than simply price.
- Quality brands constantly battle distribution inefficiencies arising from free-riding by discount dealers. Some brands resort to alternative distribution models such as agency and exclusive geographical regions. This decision provides a precedent for a more straightforward route to a high quality distribution network. Removing intra-brand price competition between dealers encourages dealers to provide high quality services because they are more likely to be remunerated through achieving sales.

"Bricks and Mortar" retailers

- "Bricks and Mortar" retailers face many headwinds. Online commerce has exacerbated the well-recognised economic problem of free riding by discount stores. Smart phones have facilitated even more intense retail price competition.
- This decision recognises that customers value full service bricks and mortar dealers and there is a public benefit to providing a means for those dealers to be properly remunerated. It also reinforces that without authorisation, resale price maintenance is per se illegal. Indeed, Tooltechnic itself incurred a penalty of \$125,000 in 2007 for resale price maintenance conduct similar to the conduct now authorised.

Harper review recommendations regarding RPM

- The Draft Harper Review of Competition Policy suggested that immunity from the RPM prohibitions should be available through the notification process (14 days) rather than the authorisation process (five to six months).
- This ACCC decision is an excellent example of the public benefits that can arise from RPM conduct and thus lends weight to the Draft Harper Review proposal. Although the ACCC rightly confines its decision to the specific

facts in this application, there are many products that are likely to have the same key characteristics that the ACCC relied upon in granting authorisation in this case, namely:

- High inter-brand competition;
- Complex product such that the benefit of product features is not immediately apparent;
- Significant consumer benefit from full service distributor (for example, knowledgeable sales staff can assist consumers in their purchase decision); and
- Free rider problem in that full service distributors may not get adequately remunerated if consumers use them only to obtain information and then purchase from discount distributors.

The decision may have implications for the industry more generally. For example, other tool manufacturers will likely be re-examining their dealer agreements to assess whether the authorisation could negatively impact their sales by increasing the incentive for high quality dealers to recommend Festool products.

The decision is also likely to fortify the ACCC in its enforcement of RPM conduct that has not been authorised. In December 2013, the ACCC instituted proceedings against Mitsubishi Electric Australia and obtained a penalty of \$2.2 million, the second highest penalty ever awarded in Australia for RPM conduct.

MORE INFORMATION

Please feel free to contact us should you wish to discuss your agency network, distributors or retail network.



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