

BAD NEWS FOR MINIMUM PRICES – MEREDITH DAIRY UNSUCCESSFUL IN BID TO SET LIMITS FOR CHEESE

By Mark Armstrong, Solicitor

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Supermarket savings are something that most shoppers look forward to stumbling across, however, the folks at Meredith Dairy were less than thrilled to see their goat cheese sold for a heavy discount and wanted to put a stop to it, only to end up feeling a tad sheepish with the outcome.

What happened?

Last week, Meredith Dairy's attempt to stop stores selling their goat cheese products below a certain price was slapped down by the Australian Competition & Consumer Commission (ACCC). The Dairy were concerned about smaller retailers selling their cheese at discounted rates to increase competition with major supermarket chains. The Dairy submitted a notification to the ACCC, which if approved, would have protected them from legal action for conduct amounting to resale price maintenance, an area of law similar to but distinct from price fixing, however their claim was unsuccessful. But firstly, what is resale price maintenance and how is it different to price fixing?

Price Fixing vs Resale Price Maintenance

Both price fixing and resale price maintenance are considered anti-competitive behaviour under the Competition and Consumer Act. Price fixing involves competitors forming agreements between themselves in relation to the pricing of goods and services, as opposed to using pricing as a competitive tool against others. Essentially, price fixing is collusion between suppliers, and can involve formal or informal agreements that may set specific prices, establish minimum prices, generate formulas for pricing or discounting goods and services, or allowing for credit terms, rebates or allowance. The rationale behind this is that suppliers controlling pricing outside normal market forces can artificially inflate prices and is detrimental to the market.

On the other hand, resale price maintenance is conduct by a supplier that coerces resellers to charge a set price, (either their recommended retail price or any other set price,) or stops resellers from selling goods below a minimum price, or from discounting beyond an agreed limit. Such conduct can involve refusing or threatening to refuse to supply goods without a guarantee to sell above the supplier's given price, or entering an agreement specifying that resellers will sell their goods above a certain price. The rationale behind this is that suppliers preventing discounting can be bad for consumers, pressures retailers and can ultimately drive prices up.

The two can be distinguished in the following scenarios:

- Four competing cheese suppliers agree to sell their goat cheese to all supermarkets at the same price (price fixing).
- A cheese supplier threatens to stop supplying cheese to a supermarket if they sell their goat cheese for less than the recommended price (resale price maintenance).

Note that it is still legally acceptable to give a recommended price, and generally acceptable to set a maximum price.

Despite these prohibitions, it is possible to overcome the risk by obtaining authorisation, or submitting a notification to the ACCC, who have the power to excuse behaviour that would otherwise infringe certain parts of the Competition & Consumer Act. Unfortunately for Meredith Dairy, the ACCC weren't having a bar of it in this case.

Authorisation, notifications and loss leader selling

Suppliers can ask the ACCC for authorisation or submit a notification if they propose to engage in conduct constituting resale price maintenance. The ACCC has the power to authorise a supplier to engage in resale price maintenance conduct if it is satisfied that in all circumstances, the conduct would be or is likely to be a benefit to the public and this benefit would outweigh the detriment or likely detriment. Similarly, suppliers can lodge a resale price maintenance notification with the ACCC before resale price maintenance conduct occurs, which operates on the basis that the ACCC will only disapprove the submission if they think the conduct described in the notification is contrary to the public's interest.

For both authorisation and notification, businesses must describe the proposed conduct and how they will affect areas of competition in addition to benefits and detriments. Approved authorisations generally are for a specific time frame, whereas notifications deemed valid after the ACCC's evaluation, will be published on the ACCC website and protection for the described conduct will last until the notification is revoked or withdrawn.

Suppliers may be allowed to suspend supply to a reseller, if the reseller employs 'Loss Leader Selling', which occurs when goods are sold below the cost price for purposes of promoting their business or to attract customers who are likely to purchase other goods and services. This will not apply if this was part of a genuine clearance or if it was permitted by the supplier in the first place.

Why is this case important and what does this mean for you?

Meredith Dairy's claim is one of the few cases of notification directly related to resale price maintenance and the ACCC's response unequivocally prevented them from setting minimum prices. This sets an example for all suppliers concerned about their products being sold for less than they had hoped for.

Allowing retailers to independently set their own prices fosters healthy competition and benefits consumers through the potential savings from bargain hunting. Comparably, setting maximum prices can ensure that goods are not retailed for excessive amounts. Fundamentally, if suppliers choose to engage in resale price maintenance, consumers may face higher prices.

This present case will impact suppliers, as the ACCC has signalled that the setting of minimum prices for goods and services will not be allowed lightly. The bottom line is that unless resale price maintenance conduct will have an overwhelming public benefit, it'll get the ACCC's goat.

Contact us

In the meantime, if you would like further information on the above and how it impacts on your next marketing activity, please contact one of our experts below.

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