

Draft Determination

Note: This is a draft determination issued for the purpose of advancing the Commerce Commission's decision on this matter. The conclusions reached in this draft determination are preliminary and take into account only the information provided to the Commission to date.

This is a draft determination under the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. The application is made by:

HP New Zealand Limited

The Commission: Anna Rawlings
Dr Derek Johnston
Dr John Small
Vhari McWha

Summary of application: HP New Zealand Limited has applied for authorisation to engage in resale price maintenance in relation to its proposed arrangements for its HP online stores and prospective HP online marketplace stores.

Determination: The Commerce Commission's preliminary decision is to grant authorisation as it is satisfied that the proposed arrangements will in all the circumstances result, or be likely to result, in such a benefit to the public that the conduct should be permitted.

Date of draft determination: 6 August 2021

Confidential material in this report has been removed. Its location in the document is denoted by [].

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Introduction

1. On 22 March 2021, the Commerce Commission (the Commission) received an application from HP New Zealand Limited (HPNZ) under section 58(7) of the Commerce Act 1986 (the Act) for authorisation of proposed resale price maintenance (RPM) in relation to new online stores that HPNZ intends to open in New Zealand (the Application).¹
2. HPNZ proposes to open the following new online stores in New Zealand:
 - 2.1 public and private HP online stores (HP Online Stores);² and
 - 2.2 HP online marketplace stores (HP Online Market Place Stores),
(collectively, the HP Stores).
3. HPNZ says the HP Stores, and its proposed approach, are part of a global HP initiative. HPNZ intends to operate the HP Stores with a logistics partner. Currently, the proposed partner is [] (the Partner), []. HPNZ would operate most aspects of the HP Stores itself and would set retail prices. It would use the Partner to hold stock, process orders, and deal with deliveries and returns.
4. HPNZ says that due to technological and commercial issues, the Partner will need to take ownership of stock before sale and to be the retailer of record. This means that as HPNZ would be setting retail prices it may be engaging in RPM conduct. Accordingly, HPNZ seeks authorisation for RPM in relation to the HP Stores.
5. HP does not seek authorisation to engage in RPM conduct with any other wholesaler or retailer, including in relation to the prices the Partner charges on volumes that it carries as an independent wholesaler.
6. Since late October 2020, HP Inc. (HP)³ has been operating online stores in Australia using the same approach as proposed here. It notified the Australian Competition and Consumer Commission (ACCC) in two separate notifications of its intention to engage in RPM using the same proposed approach. The ACCC decided not to revoke the legal protection afforded by either notification.
7. To date, HP has had no direct online presence in New Zealand. Until March 2020, there was a HP-branded online store run by a previous partner of HPNZ's, Acquire Co NZ Limited (Acquire). Acquire [] and ran it independently. HPNZ says it allowed Acquire to use HP branding as a temporary measure, []. Acquire's store experienced quality and service-delivery issues, and only ever generated a very small

¹ Unless authorised by the Commission under section 61(8), a supplier of goods unlawfully engages in RPM when it enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods.

² The private HP Online Stores may include an HP corporate employee store, an HP employee store and an HP student stores, together with call centres and online chat teams that would support the HP Stores.

³ As discussed below, HPNZ is a member of the HP group.

proportion of HPNZ's revenues. It was closed as HPNZ's plans for the proposed new online stores reached their final stage. HPNZ says it will not reopen Acquire's store or a store using any model other than that now proposed.

8. Currently, HPNZ distributes most of its stock through a network of wholesalers and retailers, which it says will be unaffected by the HP Stores. HPNZ says it will continue to distribute most of its stock through the network, and that its contracts and supply arrangements will not change.
9. HPNZ submits that authorising RPM in this case would create a net public benefit. It submits that the HP Stores can only go ahead with RPM and that they would provide high-quality customer experiences and may add to price competition in the retailing of products they carry. It also submits that there would be no detriments since it is only seeking to engage in RPM with its Partner in the HP Stores, its other distributors and resellers will be unaffected and significant and numerous competitors will remain in the market.

Determination

10. The Commission's preliminary view is that authorising the proposed RPM in relation to the HP Stores would likely lead to some public benefits with no likely detriments.
11. Our preliminary view is based on our assessment of likely benefits and detriments, and if not realised, may mean that the balance of benefits and detriments differ from our assessment in this draft determination. We therefore consider that it would be appropriate to authorise the proposed RPM for five years in the first instance. If HPNZ seeks reauthorisation for the RPM conduct after this time, we expect that evidence of actual benefits and detriments arising from the conduct will be available.
12. Accordingly, the Commission's draft determination is to authorise the proposed RPM in relation to the HP Stores for a period of five years.

Assessment procedure

13. In making this draft determination, we:
 - 13.1 reviewed the information and analysis in HPNZ's Application;
 - 13.2 sought further information from HPNZ, the Partner and Acquire; and
 - 13.3 interviewed and received information from a number of interested parties (including the ACCC).

Background

HPNZ

14. HPNZ is a member of the HP group. Its US listed parent company, HP, is a manufacturer of HP-branded technology products including desktop computers, notebooks, printers and related accessories.

15. HPNZ imports, distributes and supplies HP products in New Zealand through its network of authorised distributors, resellers and retailers. HPNZ does not currently sell direct to consumers in New Zealand through an online platform.
16. HPNZ classifies its distribution partners into four groups, namely “T1 Distributors”, “T1 Resellers”, “T2 Resellers” and “T1 Retailers”.
- 16.1 HPNZ has [] T1 Distributors that supply HP products to T1 Resellers, T2 Resellers and T1 Retailers. The T1 Distributors include Ingram Micro, Exceed Limited, Sektor Limited and Dove Electronics.
- 16.2 There are [] T1 Resellers that purchase HP products from the T1 Distributors and, where certain volume criteria are met, HPNZ sells directly to T1 Resellers. The T1 Resellers only supply HP products to large corporate and government end-users. The T1 Resellers include Acquire, Fujitsu, Datacom and Spark Digital.
- 16.3 There are over [] T2 Resellers that purchase HP products from T1 Distributors. The T2 Resellers sell to a broad range of end-users, including Government, large corporates, small-to-medium enterprises, and to a lesser extent, home consumers. The T2 Resellers include Code Blue, Lexel and the Instillery Group.
- 16.4 There are [] T1 Retailers that purchase HP products directly from HPNZ and, in some instances, from T1 Distributors. The T1 Retailers sell to home consumers and small-to-medium enterprises. The T1 Retailers include Warehouse Stationery, The Warehouse, Noel Leeming, Harvey Norman and JB Hi-Fi.

The former HP-branded online store in New Zealand

17. Since March 2020, HPNZ has not had an online retail presence in New Zealand after its former distribution model with Acquire ceased. Acquire is a T1 Reseller in New Zealand and Australia.⁴ It sells to large corporate and government customers online from its own proprietary e-commerce platforms.
18. HPNZ sold a limited range of HP products online through a public HP-branded website that was created, hosted and managed on Acquire’s e-commerce platform (the Former HP Store).

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⁴ See <https://acquire.co.nz/> and <https://acquireit.com.au/> respectively.

⁵ Commerce Commission interview with Acquire (23 April 2021).

⁶ *Ibid.*

⁷ *Ibid.*

19. []].
20. Acquire effectively operated the Former HP Store as an independent retailer, but with HP branding. In particular, it set retail prices independently. []].⁸ This model proved unsustainable for HPNZ. Some of the key limitations of the model were []].
21. The model failed largely because it was not commercially sustainable for HPNZ. At the peak of the Former HP Store's operations in the 2017/2018 financial year, HPNZ made [] in sales compared to the [] it made in the same financial year via the rest of its New Zealand distribution network.

The HP Stores in Australia

22. On 16 July 2019 and 20 July 2020, one of HPNZ's related companies, HP PPS Australia Pty Ltd (HP Aus), notified the ACCC of its intention to engage in RPM in relation to its online stores in Australia. The ACCC decided not to revoke the legal protection afforded by either notification (which continues to apply as at the date of this draft determination).
23. As a result, [] was appointed as HP Aus's distribution partner for its online stores in Australia, using the same approach as proposed by HPNZ for the HP Stores. HP Aus's notifications to the ACCC were made in respect of:
- 23.1 its HP online stores in Australia. Following a supplementary submission by HP Aus on 26 September 2019, the ACCC published its Statement of Reasons for this notification on 10 October 2019;⁹ and
- 23.2 its HP online marketplace store in Australia.¹⁰ The ACCC published its Statement of Reasons for this notification on 2 October 2020.¹¹
24. In both decisions, the ACCC considered that the likely benefits of HP Aus's RPM would outweigh its likely detriments. The ACCC noted in particular that the RPM:

⁸ *Ibid.*

⁹ See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/hp-pps-australia-pty-ltd>

¹⁰ The only online marketplace on which HP Aus operated an online store at the time was eBay.

¹¹ See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/hp-pps-australia-pty-ltd-0>

- 24.1 would apply only to the HP online stores and marketplace, both of which represented a very small portion of total sales of HP products in Australia; and
- 24.2 was likely to realise efficiencies through the appointment of a third party with expertise in logistics to fulfil orders, while HP Aus maintained control over the pricing and promotional strategies which it was likely best placed to manage.

How we assess restrictive trade practices authorisations

- 25. Section 37 of the Act prohibits a supplier from engaging in RPM. A supplier of goods engages in RPM when it enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods.¹² RPM is per se unlawful unless authorised by the Commission.
- 26. The Commission is empowered under section 61(8) of the Act to authorise RPM conduct that is otherwise subject to the per se prohibition in section 37.
- 27. To grant authorisation the Commission must be satisfied:
 - 27.1 that the conduct amounts to RPM, as described in section 37; and
 - 27.2 that the conduct “will in all the circumstances result, or be likely to result, in such a benefit to the public” that it should be authorised.
- 28. In determining whether the conduct is likely to result in such a benefit to the public, the Commission is, however, required to assess the detriments associated with the conduct. Specifically, it is required to perform a qualitative and, to the extent practicable, quantitative assessment of any lessening of competition likely to result from the RPM, with which to compare the associated benefits, noting that:¹³
 - 28.1 the lessening of competition need not be found to be substantial;
 - 28.2 the lessening of competition may be found to be negligible, or even non-existent.
- 29. The benefits and detriments must arise from the conduct for which authorisation is sought.¹⁴ To determine whether benefits and detriments are specific to the conduct, we assess:
 - 29.1 what is likely to occur in the future with the conduct, ie, the factual;

¹² See Commerce Commission, *Resale Price Maintenance Fact Sheet* (July 2018).

¹³ The courts have said it is “implicit” in the benefits assessment that the Commission is required to assess qualitatively, and to the extent practicable quantitatively, any lessening of competition associated with the conduct (see *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA), at 447 and *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) (*Air New Zealand*) at [319]).

¹⁴ Commerce Commission, *Authorisation Guidelines* (updated December 2020) at [39].

- 29.2 what is likely to occur in the future without the conduct, ie, the counterfactual; and
- 29.3 once identified, we then assess all likely benefits and detriments relevant to our assessment of the conduct. As a general principle, benefits and detriments will be likely if there is a real and substantial risk or real chance that they will happen if the conduct proceeds.¹⁵
30. When assessing the conduct, we compare what is likely to occur in the future with the conduct with each scenario that is likely to occur in the future without the conduct. By assessing the relative states of competition in each of these scenarios, we determine whether the conduct will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be authorised.

Relevant markets

31. Usually when we consider an application for authorisation of potentially restrictive trade practices, we assess the competitive effects that the practices could have within the relevant market(s) in New Zealand.¹⁶
32. When defining product markets, we assess whether products are sufficiently close substitutes as a matter of fact and commercial common sense to provide significant competitive constraints on each other. Markets are defined in a way that best isolates the key competition issues that arise from an application.

HPNZ's submissions

33. HPNZ submits that the relevant markets can broadly be defined as the national retail markets for personal computers and print products.¹⁷ HPNZ further submits that the markets can be segmented:
- 33.1 for personal computers into consumer desktops, consumer notebooks, commercial desktops, commercial notebooks and PC accessories; and
- 33.2 for print products into home printers, office printers, home print supplies and office print supplies.

Our assessment

34. In this case, we do not think it is necessary to precisely define the boundaries of the markets in order to assess the application.
35. In relation to the product market we note that:

¹⁵ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

¹⁶ Section 3(1A) of the Act: "the term market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them."

¹⁷ Application at [24] to [25].

- 35.1 HPNZ supplies a wide range of computers, printers and accessories for consumer and business customers, and may operate within many separate product markets, where HPNZ (as a member of the HP group) competes with other computer and printer manufacturing groups. However, it is not clear which product categories may be affected by the HP Stores [].¹⁸
- 35.2 We consider that our assessment would be the same regardless of how the product market is defined. In this instance, defining markets would not help us assess key claimed benefits of the HP Stores, relating to the service quality, support, convenience, and other experience benefits that HP submits they will provide. Any such benefits are likely to apply regardless of the products sold in the HP Stores. Product market definition also does not assist with the counterfactual assessment of whether HPNZ could implement similarly effective online stores without engaging in RPM, by using a different commercial model.
36. We consider that the geographic market is likely to be national. The HP Stores will sell to consumers nationally. They will do so in direct competition with most of the largest electronic retailers in New Zealand who tend to have online stores and national distribution networks. However, we consider that our assessment will be the same regardless of geographic market definition.

With and without the proposed conduct

The situation with the proposed conduct

37. The proposed conduct is RPM. If the proposed conduct is authorised, HPNZ would impose RPM on the Partner that would assist it in operating the proposed new online stores in New Zealand.¹⁹
38. HPNZ intends to open multiple online stores – ie, the HP Stores – to carry a range of its consumer-oriented computers, printers and accessories.
- 38.1 The HP Online Stores would be run from HP websites. Initially, there would be one store for general customers, carrying around [] SKUs [].²⁰ In subsequent years, HPNZ plans to open

¹⁸ HPNZ intends to launch the HP Stores with approximately [] stock-keeping units (SKUs) [] (Application at [28] to [29]; and Commerce Commission interview with HPNZ (8 June 2021)). [] (Microsoft Teams meeting between Commerce Commission and K&L Gates (4 May 2021)).

¹⁹ HPNZ describes the proposed conduct in the Application at [13] to [14], and at [21] to [24].

²⁰ See Commerce Commission interview with HPNZ (8 June 2021) and Application at [29]. We note that HPNZ respectively forecasts annual returns of [] and [] for the HP Stores in the first and second years of their operation (HPNZ's response to information request from Commerce Commission (18 May 2021)). These returns are relatively modest by comparison to the [] HPNZ made in sales in New Zealand during its 2018/2019 financial year. Cf. the Partner's response to information request from Commerce Commission (11 June 2021) where, in an earlier forecast, HPNZ predicted [] in revenue for the HP Stores in the first 18 months.

stores for particular customers, including HP employees and university students.

- 38.2 The HP Online Marketplace Stores would operate within marketplaces such as Amazon. These would mirror the HP Online Stores – carrying the same stock and using the same processes and Partner for logistics.
39. The HP Stores would follow the model already established in Australia. They would all share the same technology platform, processes, and personnel, deriving many of those resources from the operations in Australia. In particular, []:
- 39.1 all the stores would be run on HP’s new global ecommerce platform, [] (the Platform), which provides much of the customer functionality [] (such as product search, delivery options and payment processing) as well as back-end functionality used by HP’s commercial teams (such as customer tracking and insights);
- 39.2 HPNZ would control most aspects of the HP Stores, in particular the “Four Ps”: product, place, pricing and promotions. Commercial teams from HP Australia would oversee these aspects of the New Zealand HP Stores. [].
40. HPNZ submits that it needs a logistics partner to help operate the HP Stores because:
- 40.1 physical logistics is not its core expertise. In particular, HPNZ submits that it needs assistance handling stock movements, deliveries and returns; and
- 40.2 it needs to use the Platform to operate the HP Stores, [], but could not use the Platform without a partner in the medium term. The Platform needs to run within a wider enterprise software system. []. Therefore, HPNZ submits that for the HP Stores in New Zealand to be rolled out, [] as planned, then a partner with an enterprise system capable of supporting the Platform must be used.
41. HPNZ submits that it needs to use RPM because:
- 41.1 it needs to control retail pricing []. It notes that HP is committed to a strategy of controlling the Four Ps, including pricing, []. It also submits that if the Partner set retail prices then []; and
- 41.2 HPNZ plans to supply wholesale stock to the Partner periodically in advance, in volumes sufficient to meet projected customer demand at the HP Stores.

Accordingly, the Partner would be the retailer of record for stock sold to customers, and HPNZ would need to use RPM to control the retail prices charged. HPNZ notes that, in principle, it might control retail prices without using RPM by instead retaining ownership of stock physically transferred to the Partner for warehousing before delivery, in a 'consignment' model.

However, it submits that

[] It says HP's
[] HP Stores in New Zealand.

41.3 HPNZ also says [] due to complexities from a financial and accounting perspective. HPNZ submitted that []²¹

42. Lastly, HPNZ emphasises that it seeks authorisation to impose RPM only on its Partner in the HP Stores, to solve the technical and commercial issues described above. It is not seeking to impose RPM on the Partner as a distributor to resellers, or on any other distributor or reseller in its network.

The situation without the proposed conduct

HPNZ's submissions

43. HPNZ submits that it could not realistically use an alternative model for the HP Stores because:²²

43.1 it would not revert to allowing a partner to fully operate HP-branded websites, using an approach like the fully outsourced Acquire model or any improved logistical model. Any arm's-length approach would be inconsistent with []. The arrangement with Acquire was only ever intended as a temporary measure, [].

43.2 HPNZ needs to work with a logistics partner but could not do so in any way other than as proposed.

44. Therefore, HPNZ submits that if authorisation is not granted for RPM then the HP Stores will not go ahead, and HP will not have a direct online presence in New Zealand.

²¹ Commerce Commission interview with HPNZ (8 June 2021).

²² All submissions below are made in the Application at [33] to [35]. HPNZ further developed these submissions during an interview with the Commission on 8 June 2021 (which has already been referred to above). Additional references are provided where HPNZ provided detailed further evidence.

45. HPNZ provided evidence that HP's regional management would no longer support an arm's-length approach like its former model with Acquire in New Zealand to support its view of the counterfactual.²³
46. The reasons why HPNZ considers that the use of alternative partnership models without RPM are not a likely counterfactual are:
- 46.1 The HP Stores would not be worthwhile for HP without RPM. Specifically, HP submits that the Partner, and perhaps any distributor, lacks the expertise and resources to set retail prices well enough to optimise stock and []. HPNZ says it needs to set retail prices in a highly dynamic fashion to clear stock efficiently, [], and to conform to HP's regional commercial policies.²⁴ It says it uses dedicated teams to achieve these aims.
- 46.2 As noted at paragraphs 41.2 and 41.3 above, HPNZ also submits that it could not realistically use a consignment model.
47. Overall, HPNZ submits that all of the alternative models described above would involve HP overcoming major technological hurdles and require investment of significant resources by HP. They could also compromise its commercial objectives and/or branding. HPNZ also submits that it would be inefficient to use different models for the HP online stores in New Zealand from those in Australia since the New Zealand HP Stores will rely on many of the same personnel and resources. And since HPNZ believes that the HP Stores [] in New Zealand in the medium term, it submits that HP has no incentive to open them unless it can implement RPM.²⁵ Accordingly, HPNZ submits that HP will not have a direct online presence in New Zealand if RPM is not authorised.

Our assessment

48. We consider there is one likely counterfactual: that HP would not have a direct online presence in New Zealand. In reaching this preliminary view, we also considered the likelihood of a second counterfactual: that the HP Stores go ahead broadly as planned but with the Partner able to set retail prices freely.
49. We accept, for the reasons discussed in paragraphs 50 to 52, HPNZ's submissions that it would not use an arm's-length model and that it would not use a consignment model. Further, while we consider it possible, we do not consider it likely that HPNZ would implement the HP Stores broadly as planned, with the Partner or another

²³ See Attachments 1 and 9 in Confidential Annexure D of the Application.

²⁴ HPNZ gave an example to illustrate how HP Aus manages price points dynamically to respond to market conditions.
[

]. In Australia, HP Aus currently runs about [] promotions a year (Commerce Commission interview with HPNZ (8 June 2021)).

²⁵ See HPNZ's response to information request from Commerce Commission (18 May 2021), above n 20.

partner, but merely without RPM. We set out our reasons for this view in paragraph 53.

50. We consider that, as submitted, HPNZ would not use an arm’s-length approach, such as an improved fully outsourced model or any other approach involving a partner operating HP-branded websites, for the following reasons.

50.1 We are persuaded by the available evidence which shows that HP’s regional management is sceptical about arm’s-length models, because of the little commercial success HPNZ achieved under the fully outsourced Acquire model. By way of illustration, some of HP’s internal documents respectively note that:^{26, 27}

[

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[

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51. We also consider that HPNZ would not implement the HP Stores with a consignment model for the following reasons.

51.1 We are convinced by the available evidence that
[
]. HPNZ explained that such a model
would be impossible [
]. HPNZ provided
“three core issues” for this which we give weight to in our assessment:²⁸

[

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[

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[

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²⁶ See Attachment 2 in Confidential Annexure D of the Application (own emphasis added).
²⁷ See Attachment 10 in Confidential Annexure D of the Application (own emphasis added).
²⁸ Commerce Commission interview with HPNZ (8 June 2021).

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52. We consider that, as submitted, HPNZ would only implement the HP Stores by using the Platform and a logistics partner for the following reasons.

52.1 HPNZ’s core expertise is not physical logistics (a vital component of the HP Stores’ successful daily operations). We were told by HPNZ that:²⁹

[
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52.1.1 It is clear from the available evidence that HPNZ needs the assistance of a logistics partner to handle stock movements, deliveries and returns. This is illustrated by the significant weight ([]%) HP placed on the importance of warehousing and distribution requirements in its selection criteria for a new distribution partner after the Former HP Store ceased.³⁰

52.2 HPNZ needs to use the Platform to operate the HP Stores in New Zealand³¹ and could not do so without a partner in the medium term. The evidence shows that the Platform needs to run with a partner’s wider enterprise software system that is capable of supporting the Platform,
 []³² As of mid-September 2020,
 []³³

53. Finally, we are persuaded by HPNZ’s submissions that it is unlikely to implement the HP Stores broadly as planned but without RPM. Our reasons are the following.

53.1 []³⁴ We acknowledge this and also place weight on HPNZ’s submissions that HP’s regional management would prefer not to relinquish control of retail pricing [] that the HP Stores are expected to sell.

²⁹ Commerce Commission interview with HPNZ (8 June 2021).
³⁰ See Attachment 12 in Confidential Annexure D of the Application.
³¹ HPNZ submitted some forecasted performance metrics for the Platform relative to the Former HP Store’s website historical performance as evidence – eg:
 []
 (Attachment 19 in Confidential Annexure D of the Application).
³² See Attachment 13 in Confidential Annexure D of the Application.
³³ *Ibid.*
³⁴ Commerce Commission interview with the Partner (23 April 2021).

- 53.2 We consider that it would be highly unusual for a supplier to give a distributor the ability to set retail prices other than under a fully outsourced distribution model. This is particularly so when the distributor has been chosen primarily for its logistics ability – as in this case with the Partner – rather than for its ability to set retail prices.
- 53.3 We also consider that this approach would likely give rise to certain practical difficulties – namely, we expect each time the Partner sets or changes a price of an HP product, it would need to notify HPNZ to make a change to the pricing on the HP Stores through the Platform. This would give rise to logistical difficulties.
- 53.4 Lastly, the evidence available to us does not suggest that this approach is a likely one HPNZ would adopt.
- 53.4.1 It is possible that some distributors may tend to develop insights into retail pricing because they need to have knowledge of retail prices to be able to set wholesale prices competitively, and may be able to design competitive promotional offers with relatively little resource.³⁵ Consequently, a distributor may be able to set retail prices and design promotions itself.³⁶
- 53.4.2 However, evidence we have considered on this issue does not provide a sufficient basis from which to find that such a counterfactual is likely to occur. We do not consider it likely that HPNZ would adopt the HP Stores broadly as planned but with the Partner able to set retail prices freely. This would be contrary to HPNZ's expressed need to itself set retail prices in a highly dynamic fashion to clear stock efficiently, and conform to HP's regional prices.
- 53.5 On balance, we consider it is unlikely that HPNZ would implement the HP Stores broadly as proposed but without RPM. We have therefore not assessed this scenario as one that is likely to occur in the future without the proposed conduct.

Our assessment of benefits and detriments

54. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the proposed conduct will in all the circumstances result, or will be likely to result, in a net benefit to the public. In making this assessment, the Commission considers the quality of the evidence and makes value judgements about how much weight to give to the evidence.

³⁵ [].
³⁶ *Ibid.*

55. In *Godfrey Hirst* the Court of Appeal observed that the Commission must consider a broad range of benefits and detriments in applications for authorisation. This may include efficiencies and non-economic factors.³⁷
56. In particular, the Court of Appeal indicated that the Commission must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits. The Court said that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”³⁸
57. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so.³⁹ Regarding the weight that can be given to qualitative factors, the Court of Appeal said in *Godfrey Hirst* that “[q]ualitative factors can be given independent and, where appropriate, decisive weight”.⁴⁰
58. In general, RPM has the potential to cause both benefits and detriments.⁴¹ When a supplier imposes RPM on any resellers of its goods (such as wholesalers or retailers) it can reduce price competition between sellers of the same product and also between products, which may result in customers paying higher prices.⁴² Also, in some circumstances, RPM can increase the risk of collusion between competitors. On the other hand, RPM can sometimes promote competition between competing products by improving resellers’ incentives to invest in promotions and support services.⁴³
59. In this case, HPNZ emphasises that it only seeks to impose RPM on its Partner in the HP Stores and only in respect of the volumes sold through them. It is not seeking to impose RPM on the Partner’s other sales of HP products, or on any of its other

³⁷ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 (CA) at [24] and [31] (*Godfrey Hirst*).

³⁸ *Godfrey Hirst* at [36].

³⁹ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand* at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington API68/96, 16 December 1996 at [47] to [48].

⁴⁰ *Godfrey Hirst* at [38].

⁴¹ See the OECD’s “*Vertical Restraints for On-line Sales*”, *Policy Roundtables, 2013* for commentary on RPM’s benefits and detriments. Sourced from: <https://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.

⁴² Impacts depend on how RPM is applied and on how the resellers, and competing suppliers, respond. RPM immediately reduces ‘within-brand’ competition between the resellers affected, who can no longer compete to discount the supplier’s goods. RPM can also reduce ‘between-brand’ competition because resellers or rival suppliers may not need to discount rival suppliers’ goods as much to make sales.

⁴³ For example, suppliers of complex goods may seek to use RPM to create incentives for resellers to invest in ancillary services that can promote non-price competition, such as in-store demonstrations and post-sales support. Without RPM, resellers may lack incentives to make such investments due to the ‘free-riding’ problem. For example, if providing in-store demonstrations is costly – and if resellers need to pay for extra staff or training by charging higher retailer prices – then with free retail pricing some resellers may choose to avoid the costs and charge low retail prices, hoping to make sales from customers that used demonstrations provided by resellers that did invest in staff and training. But if resellers inclined to invest in demonstrations could predict this they may not invest. Imposing minimum resale prices may remove this free-riding problem and give more resellers incentives to invest.

distributors or resellers. Therefore, the RPM for which authorisation is sought is of a particular and limited nature.

Potential benefits

60. We assess the benefits that the HP Stores could provide in the factual, with RPM, against the benefits that the stores' customers would experience in the likely counterfactual. The counterfactual is that of HP having no direct online presence in New Zealand.

HPNZ's submissions

61. HPNZ submits that the HP Stores would have significant benefits. HPNZ illustrates the potential benefits mainly by comparing the experiences currently provided by the HP Stores in Australia with the experiences provided by the Former HP Store run by Acquire in New Zealand. This comparison is useful while recognising, as discussed further below, that the correct counterfactual is one in which HP having no direct online presence in New Zealand.
62. While HPNZ submits, and we accept, that it would not revert to the Acquire model, []].
63. HPNZ submits that the HP Stores would give customers a greatly improved experience compared to that provided by the Former HP Store.
64. In particular, HPNZ submits that the HP Stores will provide:
- 64.1 improved website functionality, navigation, information and cross-sell opportunities, enabling customers to find products that meet their needs more quickly and easily.⁴⁴ HPNZ says these improvements will be delivered by the Platform and by teams dedicated to optimising user experience;
- 64.2 a wider range of payment options, including options such as PayPal, Google Pay and Apple Pay, which were not offered by the Former HP Store.⁴⁵ HPNZ says these will be made possible by a new payment gateway that will be integrated into the Platform;
- 64.3 faster delivery times.⁴⁶ []]. HPNZ says the proposed HP Stores would be able to deliver quickly because, under the proposed model, the Partner would periodically advance-purchase stock sufficient to cover reasonable projections of consumer demand. Also, HPNZ

⁴⁴ Application at [36].

⁴⁵ Application at [38].

⁴⁶ Application at [38] to [39].

says the Partner will have better resources to ensure timely delivery; and

- 64.4 a wider range of delivery options, [], and better delivery tracking and support.⁴⁷ HPNZ says the Partner has expertise in providing such options.
65. It also submits that the new HP Stores may run more promotional offers than the Former HP Store did, potentially adding more price competition over the products carried.
66. HPNZ [] but notes that the Australian stores run more than [] campaigns per year.⁴⁸ Accordingly, it submits that the HP Stores may “promot[e] intra-brand and inter-brand competition, at least to some degree.”⁴⁹

Our assessment

67. We consider that the HP Stores would likely provide the customer experiences as claimed. We consider that they could provide many benefits compared with the counterfactual of HP having no direct online presence in New Zealand – although it is impractical to quantify the benefits.
- 67.1 It is evident that the HP Stores would provide the broad functionality and experiences claimed, and that those would likely be high quality, because the HP stores in Australia already do so and the New Zealand HP Stores would mostly rely on the same teams and resources.
- 67.2 We also consider that the customer experiences of the HP Stores would likely be superior to the experiences provided by the Former HP Store.⁵⁰
- 67.3 Because the HP Stores would likely provide high-quality customer experiences, against the counterfactual of HP having no direct online presence in New Zealand, there could be many benefits if the HP Stores managed to serve at least moderate numbers of customers as HPNZ plans.

⁴⁷ Application at [40].

⁴⁸ Application at [28] to [29]. HPNZ’s internal correspondence with HP’s regional management notes, in relation to a promotional campaign calendar adopted in Australia, that:
[]; and
[]. (HPNZ’s response to information request from Commerce Commission (18 May 2021).

⁴⁹ Application at [36].

⁵⁰ As noted above, comparing the HP Stores to the Former HP Store [], since we do not see a real chance of HPNZ reverting to the Acquire model.
[]. HPNZ’s internal correspondence with HP’s regional management notes, in relation to the Former HP Store, that Acquire
[] (Attachment 3 in Confidential Annexure D of the Application). This stands in strong contrast to HPNZ’s claimed benefits for the HP Stores in New Zealand.

However, it is impractical to quantify these benefits in this comparison for two main reasons. First, such benefits would be qualitative in nature. Secondly, we would need to make assumptions about the number of customers that would use the HP Stores and thus benefit from these enhanced customer experiences. We would also need to make assumptions about the alternative outlets that those customers would use (if any) if the HP Stores do not go ahead in any form, and how the customer experiences would differ in both scenarios. We do not have a firm basis for making these assumptions. That being said, we would expect the HP Stores to provide experiences superior to those offered by at least some other online stores, [].⁵¹

68. As regards pricing, we consider that the HP Stores are not likely to create significant benefits compared to the counterfactual, although they may add price competition at the margin. Because any such effect would be marginal we have not sought to quantify it.

68.1 During our inquiries we heard evidence that HP's consumer computers, printers and accessories are subject to strong within- and between-brand competition. Retailers sell large volumes of HP products and competing brands, and discount all brands often and sometimes sharply.⁵² HPNZ has yet to determine [] at the HP Stores, but even regular promotions in the factual may not add significant competition to what may otherwise be seen in the counterfactual.

68.1.1 Against the counterfactual of HP having no direct online presence in New Zealand, it is relevant to our assessment that the HP Stores would add some promotions on [] SKUs. However, if other retailers continued to discount a wide range of HP's consumer products heavily then the HP Stores would only add marginal price competition.⁵³

⁵¹ HP's regional management have remarked that:
[] (HPNZ's response to information request from Commerce Commission (18 May 2021)).

⁵² These findings are supported by the evidence we obtained from distributors and retailers about HP's consumer computers, printers and accessories relative to those of its competitors. For example, JB Hi Fi (a T1 Retailer) commented: []. JB Hi Fi noted that, [] (Commerce Commission interview with JB Hi Fi (28 April 2021)).

⁵³ In the factual, if HPNZ gradually moved to selling more of its products through the HP Stores, and less through its existing distribution network of distributors and resellers, price competition could be affected more significantly. For example, without distributors and resellers adding their margins, HPNZ may have more scope to price aggressively against rival brands. At the same time that scenario would remove within-brand competition over HP products. Overall, such effects are highly uncertain and may only

Potential detriments

HPNZ's submissions

69. HPNZ submits that the RPM for which authorisation is sought would cause no detriments.⁵⁴ HPNZ seeks to impose RPM only on the Partner, and only in its capacity as logistics partner in the HP Stores. HPNZ argues that doing so could not reduce competition in the retail of HP products that the HP Stores will carry. Rather, it submits that in this case RPM is merely a solution to technical and commercial issues created by the rollout of the HP Stores which, ultimately, would add to competition.

69.1 HPNZ submits that the Partner would continue to set prices freely on all stock that it supplies as a distributor to resellers. HPNZ says [] to preserve the Partner's freedom of pricing on all volumes that it handles as a distributor, outside the operation of the HP Stores.

69.2 HPNZ also submits that all other distributors and resellers in its network in New Zealand will continue to set prices freely as well. HPNZ is not seeking to change any contracts or other arrangements with the rest of its network as part of the proposed conduct. It predicts that other distributors and resellers will be unaffected by the operation of the HP Stores, save that they may gain incentives to respond to any added competition by improving their own offerings.

Our assessment

70. We consider that the RPM for which HPNZ seeks authorisation is unlikely to cause detriments.

70.1 We accept HPNZ's submission that its arrangement with its Partner for the HP Stores would not fetter the Partner's freedom of pricing as a distributor to resellers. We also accept that other distributors and resellers in HPNZ's network would retain freedom of pricing.

[]^{55, 56}

materialise after several years in the factual. For these reasons we disregard such effects in our assessment of net public benefits below.

⁵⁴ Application at [30] to [32] and [40] to [41].

⁵⁵

[

] (Attachment 24 in Confidential Annexure D of the Application).

⁵⁶

[

] (Attachment 15 in Confidential Annexure D of the Application).

]

70.2 Against the counterfactual of HP having no direct online presence in New Zealand, we consider that competition over relevant products would not be reduced in the factual by HPNZ imposing RPM on the Partner in the HP Stores. In the factual the HP Stores would add a new source of competition while applying RPM as proposed would not restrict how HPNZ's distributors and resellers price. Therefore, we would expect no reduction in within- or between-brand competition so long as distributors and resellers could obtain similar volumes of HP products in the factual and counterfactual.⁵⁷

Balancing of benefits and detriments

71. On the basis of evidence currently available, we consider that authorising RPM in this case is likely to lead to a net public benefit.
72. We have assessed the benefits and detriments, and then the net public effects (benefits less detriments), that would occur in the factual as compared to the counterfactual: that of HP having no direct online presence in New Zealand. Since we have not quantified effects, we have made this assessment qualitatively in accordance with the Court of Appeal's decision in *Godfrey Hirst*.
73. We consider that authorising RPM at the HP Stores would create:
- 73.1 no detriments;
 - 73.2 material albeit unmeasurable customer-experience benefits; and
 - 73.3 no material pricing benefits.
74. Overall, we would expect a net public benefit when comparing the factual to the counterfactual (due to the customer-experience benefits in the factual).
75. However, we emphasise that this assessment is sensitive to some issues that cannot be quantified. In particular, we cannot quantify potential benefits and detriments due to price effects. We also cannot quantify customer-experience benefits clearly due to the impracticality of comparing the experiences the HP Stores would provide with what customers would experience at other outlets if the HP Stores do not go ahead.

Length of the proposed authorisation

76. The Commission can grant authorisation for such period as it thinks fit.⁵⁸

⁵⁷ A similar point can be made here as in our discussion of potential pricing benefits above, at n 54. If HPNZ subsequently supplied more volumes through the HP Stores in the factual, and less through distributors and resellers, competition could become more or less intense than in the counterfactual, depending how HPNZ would set prices. But any such changes are unpredictable. HPNZ may just as well concentrate volumes among more or fewer distributors and resellers in the counterfactual, which might affect competition similarly. We disregard these effects because they are unpredictable and would be small.

⁵⁸ Section 61(2) of the Act.

77. Our preliminary view is based on our assessment of likely benefits and detriments. If the likely benefits and detriments we have assessed are not realised, this may mean that the balance of actual benefits and detriments differs from our assessment in this draft determination. We therefore consider that it would be appropriate to authorise the proposed RPM for five years in the first instance.
78. While our current assessment is that the proposed RPM is unlikely to create detriments in this case, we note that HPNZ reserves the right:
- 78.1 [], which may affect the benefits that the HP Stores could provide;
 - 78.2 to offer additional online stores in the future beyond the HP Stores; and
 - 78.3 to implement the HP Online Marketplace Stores at any time in the future after the HP Online Stores.