

Statement of Reasons

in respect of a notification lodged by

Games Workshop Oz Pty Limited

Games Workshop Oz Pty Limited (GWOP) proposes that any independent business which wishes to acquire goods from it (i.e. hold a Trade Account with GWOP) must enter into a Trade Agreement that will contain certain terms restricting the re-supply of the products supplied by GWOP.

Date: 19 November 2014

Notification no. N97404

Summary

Games Workshop Oz Pty Limited (GWOP) proposes that any independent business which wishes to acquire goods from it (i.e. hold a Trade Account with GWOP) must enter into a Trade Agreement that will contain certain terms restricting the re-supply of the products supplied by GWOP.

GWOP submits that the notified conduct does not have the purpose or effect of substantially lessening competition but rather, that it is intended to address a free riding problem and increase the incentives for Trade Accounts to enhance the retail services offered to consumers.

The ACCC considers that the notified conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition in any market. Accordingly, the ACCC does not intend to take any further action at this time.

1. Introduction

- 1.1. This Statement of Reasons outlines the basis on which the ACCC has reached its view on notification N97404 lodged by Games Workshop Oz Pty Limited (**GWOP**) on 4 May 2014 in relation to exclusive dealing other than third line forcing.
- 1.2. Section 47 of the *Competition and Consumer Act 2010 (the Act)* prohibits exclusive dealing conduct. Businesses may obtain protection from legal action to engage in exclusive dealing conduct by lodging a 'notification' with the ACCC. Legal protection provided by a notification for exclusive dealing (other than third line forcing) commences on the day the notification is lodged.
- 1.3. The ACCC assesses notifications involving exclusive dealing conduct other than third line forcing by applying the test outlined in s. 93(3) of the Act. The ACCC may revoke a notification for exclusive dealing conduct other than third line forcing if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition in a market and in all the circumstances:
 - the conduct has not resulted or is not likely to result in a benefit to the public; or
 - the benefit will not outweigh the detriment to the public by a lessening of competition resulting from the conduct.
- 1.4. Having regard to the information available, the ACCC considers that the notified conduct¹ is unlikely to have the purpose, effect or likely effect of substantially lessening competition in any market.
- 1.5. As with any notification, the ACCC may act to remove statutory protection afforded by the notification at a later stage if it considers that the relevant test to revoke a notification is satisfied.

¹ See paragraphs 2.4 – 2.6.

2. Background

Games Workshop

- 2.1. GWOP is part of the Games Workshop group of companies. Games Workshop manufactures and sells various hobby kits and games including miniatures, board games, paints and glues, associated hobby products, related books and literature and other related products.
- 2.2. GWOP sells to consumers in Australia through three main sales channels, being:
 - its own physical retail outlets (approximately 40 outlets)
 - its own online store
 - independent trade accounts (**Trade Accounts**). Trade Accounts may sell by way of a face-to-face transaction through a physical retail outlet and/or distance selling such as online (around 160 outlets).

The Games Workshop hobby

- 2.3. Games Workshop has three core games, being *Warhammer*, *Warhammer 40K* and *Lord of the Rings Strategy Battle Game*. The hobby may be broken down into several activities including building models, painting, collecting figures / armies, playing the games, reading and competing. Consumers of Games Workshop products may engage in one or more of these activities.

Conduct

- 2.4. GWOP proposes that any independent business that wishes to acquire goods from it (i.e. hold a Trade Account with GWOP) must enter into a Trade Agreement that will contain certain terms restricting the re-supply of the products supplied by GWOP. In broad terms, the Trade Terms include the following:
 - Trade Accounts must have at least one bricks and mortar outlet. In other words, GWOP will not supply on-line only retailers.
 - Trade Accounts must not supply GWOP products to a third party who will sell the products through a market stall or any websites hosted by third party platforms (including Amazon Marketplace and eBay).
 - Trade Accounts must not resupply GWOP products acquired for an outlet except through that outlet.
 - Trade Accounts must respect embargos concerning new products, with a penalty of delays in supply of new products where a Trade Account breaches the condition.

- Trade Accounts must not supply GWOP products to customers outside of Australia and New Zealand, or such territories as may be determined by GWOP from time to time.
 - Trade Accounts must supply GWOP products in the form provided and must not alter, divide or break down the products into their component parts.
 - Trade Accounts must not supply to customers that it reasonably suspects intend to alter, divide or break down GWOP products into component parts for the purpose of resale.
 - Trade Accounts must not supply GWOP products pre-painted, but may offer a painting service after the point of purchase.
- 2.5. GWOP is also proposing to introduce a value added service pricing model (VASP) in its agreements with Trade Accounts. Under the VASP, each outlet of a Trade Account would be scored against certain criteria. The score achieved would then determine which wholesale pricing tier was relevant for each outlet. GWOP proposes to apply the VASP to all outlets, whether they sell online or only through a shop front.
- 2.6. Trade Accounts (other than online stores) may choose to participate in a 'Stockist Program' which provides fixed value rewards and incentives for shop front channel outlets that maintain stock levels of certain core product ranges, including best seller and new release ranges.
- 2.7. Paragraphs 2.4 – 2.6 are collectively referred to as the **notified conduct** hereafter.

3. Submissions

GWOP submissions

- 3.1. GWOP submits that the relevant area of competition affected by the notified conduct is the market in Australia for the purchase by resellers of model kits, tabletop games (including miniature wargames), board games, collectible card games, role-playing games and interactive entertainment games.
- 3.2. GWOP submits that the notified conduct is likely to result in public benefits by supporting the shop front / bricks and mortar sales outlets to provide an enhanced level of customer experience. GWOP submits that the shop front channels are the key to the establishment of local hobby communities.
- 3.3. GWOP submits that there is no discernible public detriment because:
- Trade Accounts remain free to buy hobby products from other manufacturers and suppliers of those products

- consumers remain freely able to obtain hobby products from a number of other third parties
- participation in the Stockist Program is optional for Trade Accounts.

Interested party submissions

- 3.4. The ACCC received 10 public submissions and a number of confidential submissions from interested parties. Of the public submissions, six were from consumers while the remaining submissions were from Trade Accounts.
- 3.5. The consumers who made submissions were typically very experienced with the Games Workshop hobby. These customers also primarily purchased Games Workshop products online rather than through shop front stores. These submissions generally contained the following key themes:
- the market definition proposed by GWOP is too broad - while the different aspects of the hobby were acknowledged (e.g. building models, painting, actually playing the game and reading), these consumers generally considered that there is no real substitute for Games Workshop products for actually playing the games. Interested parties submitted that the relevant market was 'wargaming miniatures' or 'tabletop war games' rather than the broader market described above at paragraph 3.1.
 - the potential public benefits are non-existent or at least have been overstated by GWOP - these customers do not appear to value additional retail services, but instead are price conscious and like the convenience of purchasing online.
 - the notified conduct would result in significant detriments to competition by removing online only competitors such as '*The Black Cultist*', which would result in price increases to the detriment of consumers.
- 3.6. The ACCC notes that GWOP has subsequently confirmed in a public response to submissions that it considers '*The Black Cultist*' to be linked to a shop front store, '*Good Games Canberra*', and that it would therefore meet the requirements of the Trade Terms and continue to be supplied by GWOP.
- 3.7. Several submissions were also received from Trade Account holders.
- 3.8. *The Mighty Ape* submits that:
- Tabletop gaming is a broad market, including a wide variety of themes such as historical gaming, fantasy and scifi; as well as scales of miniatures ranging from Flames of War's 15mm WW2 miniatures to GWOP's own 28mm heroic scale. Miniatures from one company or game can be used to represent, also known as proxy or 'counts as', those from the GWOP product range on an informal basis between customers but not in any official sense.

3.9. *The Combat Company* submits that:

...there are numerous other newer companies that manufacture high quality tabletop wargaming miniatures, at varying prices, aimed at different genres. These new games are increasing in popularity.

However, Games Workshop has had a seminal influence in tabletop wargaming: Games Workshop is the 'grand-daddy'.

3.10. Similarly, *War Puppy* submits:

...GWOP are more than simply being a game that uses miniature figurines. It is a massive compilation of intellectual property developed over some 35 years. The genre of the games and the 'world setting' are as much a factor determining a person's interest in GWOP as the quality and styling of their miniatures, or the rules of play.

3.11. *War Puppy* submits that other tabletop games, board games, card games, role playing games and interactive games are not comparable products to Games Workshop products. *War Puppy* further submits that:

A person with an interest in miniatures wargames is not necessarily interested in other types of games and vice versa. Whilst some cross over can exist, in that a person may play miniature wargames and play board games, there is generally a distinct social divide between miniature wargamers and each sub category of other gamers. That social factor plays a major role in determining what game type and sub-genre of game type a person will choose to play.

You cannot substitute a board game for a miniature wargame.

3.12. *The Combat Company* and *War Puppy* submit that sales of Games Workshop products have declined in recent years as a result of a number of factors, including:

- an increase in the number of smaller, up-and-coming businesses selling high quality games that compete with customer demand for Games Workshop products - examples include Privateer Press, Corvus Belli. *The Combat Company* submits that the ranges offered are cheaper and easier to start playing.
- kickstarter and other crowd-funding campaigns that enable new entrants to bring their products to market
- increased popularity of 'ChinaForge', which are Chinese reproductions of Games Workshop style products that are high quality and cheaper, and can be used by long term gamers to play Games Workshop games
- customer attitudes to Games Workshop have changed as a result of their 'trade embargo' tactics to prevent Australian customers purchasing products from overseas
- continual price increases
- core components of the game such as rule books are updated too frequently making it difficult for players to keep up to date

- difficult trade terms for retailers to meet.

3.13. *The Combat Company* and *War Puppy* also submit that GWOP's argument about the importance of the shop front sales channel is undermined by the fact that Games Workshop has its own significant online store. However, *The Combat Company* submits that the notified conduct is unlikely to reduce competition because the number of competitors is unlikely to be dramatically reduced.

GWOP submissions in response

3.14. GWOP submits that relevant competitors are those in the area of hobby products and hobby activities. It submits that customers may invest their money and time into these areas interchangeably. However 'GWOP does not assert that these substitute products can necessarily be used within GWOP's products'. GWOP submits that if a consumer wants to collect or use GWOP products, it is a matter of customer preference rather than as a result of a lack of alternatives.

3.15. GWOP submits that it invests a great deal into its own shop front retail stores and that it hopes the VASP will encourage other retailers to do likewise. GWOP has determined 'that the atmosphere in retail stores, interaction with staff and the ability to discuss, examine and try out Games Workshop Products in a social atmosphere are amongst the most influential features in the recruitment of new customers'.

3.16. GWOP submits that the VASP model is not a method of anti-competitive price discrimination as all outlets can achieve the best possible price from GWOP. GWOP submits that it is a matter for each retailer, whether shop front or online, to determine whether they invest in services to be offered to consumers. GWOP submits that the pricing system pursues the same objectives whether the store sells through a shop front and online or only through a shop front.

3.17. GWOP's response to submissions also clarified the extent to which it would no longer supply its existing "online only stores" as a result of the notified conduct. GWOP submits that there are only two stores that do not sell through a shop front channel.

4. ACCC Assessment

4.1. In examining whether the notified conduct has the purpose, effect or likely effect of substantially lessening competition and whether the notified conduct is likely to result in public benefits that outweigh any detriment to the public, the ACCC considered the information provided by GWOP and interested parties, including information provided on a confidential basis.

Market definition

4.2. Defining the market(s) affected by the notified conduct is required to enable the ACCC to assess whether the notified conduct has the purpose, effect or likely effect of substantially lessening competition in a market.

4.3. The ACCC has followed the approach to defining markets that is set out in its *Merger Guidelines*, while recognising that market definition is a 'purposive' exercise

in relation to the conduct under consideration. A market includes goods or services that are closely substitutable for the goods or services under consideration. The concept of substitution involves switching from one product to another in response to a change in the relative prices, service or quality of two products (holding unchanged all other relevant factors). The ACCC uses the conceptual framework provided by the hypothetical monopolist test (HMT) to define the relevant markets. The HMT identifies the product and geographic space within which a hypothetical, profit maximising monopolist could effectively exercise market power by imposing a small but significant and non-transitory increase in price (SSNIP). The process of applying the HMT starts with the product and geographic areas supplied by the firm. If a hypothetical monopolist cannot profitably impose a SSNIP because of customer switching to alternative products, then those alternative products are also included in the relevant market. The collection of products included in the market is expanded until a hypothetical monopolist could profitably impose a SSNIP.

- 4.4. GWOP supplies tabletop war game products. It submits that the relevant market is broader than tabletop war games as there is a broad range of hobby products that are close substitutes for GWOP products. On the other hand, some submissions suggest that there are no close substitutes for GWOP products and thus the relevant market is very narrow, confined to GWOP products alone.
- 4.5. On the basis of the submissions received, including confidential material, the ACCC considers that there are a number of customer segments for GWOP products. The segments likely overlap to some extent but can be identified according to the purpose and use for which GWOP products are purchased. The extent to which other products are substitutes for GWOP products may vary across these customer segments. For example, consumers who are mainly interested in the modelling and painting aspects of GWOP products may not necessarily wish to play the game, or even learn its rules. Other modelling and painting products may be close substitutes for GWOP products for these types of consumers. There are likely to be fewer close substitutes available to consumers in other segments. For example, consumers who wish to play tabletop war games and enjoy all aspects of the experience are unlikely to consider other types of board games to be close substitutes for tabletop war games. For those consumers, other types of tabletop war games may be close substitutes for GWOP products. However, the ACCC considers that there is a segment of consumers for whom there are no close substitutes for GWOP products. This segment includes consumers who have invested considerable time and money in their hobby.
- 4.6. For the purpose of its assessment of the notified conduct and on the basis of the information available, the ACCC has defined the market as the market for tabletop war games, while recognising that some consumers may have more or less close substitutes available to them. The ACCC considers that other tabletop war games are likely to be each other's closest substitute. The ACCC does not consider that the market should be defined broadly as submitted by GWOP. This is because consumers who wish to play tabletop war games are unlikely to switch to other hobby products to such an extent as to make a SSNIP for tabletop war games unprofitable. In particular, tabletop war games can be distinguished from other hobby products, including other board games, by their technical and physical characteristics. The function and use of other hobby products is also likely to be different to tabletop war games for most consumers.

- 4.7. The functional dimension of the relevant market is complex. GWOP supplies its own, vertically integrated, retail outlets in addition to supplying independent retailers of hobby products. These independent retailers generally stock a range of products in addition to GWOP products.
- 4.8. The ACCC considers that there are likely to be local and national elements to retail competition. Although retail bricks and mortar stores primarily supply local areas, and access to a physical retail outlet is important for at least some aspects of pre-sales service, they also compete with online suppliers who can supply nationwide. Similarly, the scope of the upstream product market is also likely to be national as GWOP and other retailers supply nationwide at uniform prices.

The future without the notified conduct

- 4.9. The ACCC considers that in the absence of the notified conduct, the status quo would largely apply. That is, GWOP would continue to supply its own stores in addition to independent retailers (Trade Accounts). However, the ACCC also considers that GWOP may be likely to pursue other contractual adjustments that would not raise concerns under the Act in order to increase the incentives for retailers to invest in retail services.

GWOP's position in the market

- 4.10. GWOP competes in the national market for the supply of tabletop war games with other suppliers of differentiated tabletop war games including Privateer Press (Warmachine), Battlefront (Dust) and Battlefront Miniatures (Flames of War).
- 4.11. The ACCC has not obtained estimates of market shares. However, based on information available to the ACCC, the ACCC considers that GWOP is the clear market leader and has some degree of market power associated with its brand loyalty and installed customer base.
- 4.12. Factors that contribute to GWOP's market position include:
- Network effects whereby the value of the tabletop wargame to some customers depends in part on the number of other players of the same game that are available to play with. This means that a tabletop war game with a large existing base of customers is likely to be more attractive to some consumers than an alternative tabletop war game that has a smaller customer base. The ACCC understands that GWOP's existing customer base is substantially larger than that of rival suppliers of tabletop war games.

The following excerpt from a broker's report describes these network effects:²

Normally success on this scale would invite competition but to play a tabletop wargame and enter competitions, you need other people to play it with. Warhammer is an alternate universe, and it helps if lots of other people inhabit it. Once a player and collector has invested the time and money in the models, the

² Richard Beddard, *Games Workshop and the risk from within*, 6 August 2013.

lore, and the rules, he is captivated. Games Workshop is exploiting the network effect, whereby the bigger the network the better it is, and the more hopeless the task of a competitor attempting to establish a rival. Competitors like Warmachine and Kings of War, are small, and likely to remain so.

- Brand loyalty – many existing customers appear to be loyal to GWOP products. This may be due to the network effects described above as well as the considerable investment that they may have made in their Games Workshop hobby. New customers may be introduced to the hobby by their peer group or families and friends and may subsequently develop loyalty to it.

- 4.13. Barriers to entry are not insurmountable. However, Games Workshop has been developing its products and intellectual property for a significant period of time, resulting in a significant depth of gaming experience that is not quickly replicated by newer tabletop war game suppliers.

Purpose, effect or likely effect of substantially lessening competition

- 4.14. The ACCC considers that the notified conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition in a relevant market. There are a number of reasons for this conclusion which are set out below.
- 4.15. The ACCC considers that GWOP is currently the market leader in the relevant market for the supply of table top war games. However, the notified conduct is unlikely to protect or enhance GWOP's existing market position. In particular, the notified conduct does not include any restriction on the ability of GWOP's Trade Account holders to stock products other than Games Workshop products. Therefore the ACCC does not consider that the notified conduct will foreclose GWOP's upstream competitors' ability to access retail customers.
- 4.16. The notified conduct may result in a reduction in intra-brand price competition (or competition between retailers to supply GWOP products to consumers) and higher average retail prices for GWOP products, to the detriment of some consumers. Intra-brand competition may be reduced because online-only retailers will be unable to supply GWOP products.
- 4.17. Higher average retail prices may also result if the notified conduct (and in particular, the VASP) increases the wholesale price of GWOP products for retailers who offer a low level of retail services. Such retailers may offer lower retail prices than retailers who provide a higher level of retail services.
- 4.18. However, the ACCC considers that GWOP products are complex and some customers are likely to value pre and post sales retail services so as to enhance their overall gaming experience. GWOP is able to provide some of these retail services itself but also relies on independent Trade Account holders. GWOP submits that the notified conduct, and in particular the introduction of the VASP model, is designed to reduce the risk of some retailers free-riding on the investment made by other shop front channel outlets (and online retailers that offer a high level of service). This free-riding is a problem if customers are able to obtain the retail services from one retailer and then obtain the GWOP product at a lower price from a retailer that does not offer these retail services, thereby undermining the incentive to provide those services despite their value to consumers. The ACCC considers

that the notified conduct is one way for GWOP to address this free-rider problem by providing greater incentives for independent retailers to invest in the provision of retail services to customers.

- 4.19. The ACCC accepts GWOP's submission that the notified conduct does not have the purpose of substantially lessening competition, but rather that it is intended to increase the incentives for Trade Accounts to enhance the retail services offered to consumers in the expectation that its overall sales and profits will increase.
- 4.20. The ACCC notes that if retail services are not actually valued by many of GWOP's customers, the notified conduct will most likely not be profitable; and as there is no exclusion of rival suppliers of tabletop wargame products, those suppliers and retailers will be well placed to try and attract disaffected consumers.
- 4.21. Thus the ACCC considers that the notified conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition in a market.

5. Conclusion

- 5.1. Having regard to the information available, the ACCC considers that the notified conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition in a market. On this basis, the ACCC has decided to allow Notification N97404 to stand.
- 5.2. Given the assessment that the notified conduct is unlikely to have the purpose, effect or likely effect of substantially lessening of competition, it is not necessary for the ACCC to form a view on whether the conduct is likely to result in a benefit to the public, and whether or not that benefit would outweigh the detriment to the public constituted by any lessening of competition.
- 5.3. As with any notification, the ACCC may act to remove the statutory protection afforded by the notification at a later stage if it considers that the relevant test to revoke a notification is satisfied.