

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
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File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v EMMA SLEEP GMBH & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Concise Statement

No. of 2023

Federal Court of Australia
District Registry: New South Wales
Division: General

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

EMMA SLEEP GMBH and others named in the schedule

Respondents

1. The Applicant (**ACCC**) alleges that the Respondents (together **Emma Sleep**) have made false or misleading representations and engaged in misleading or deceptive conduct on the Emma Sleep website and on a range of other media platforms in contravention of ss 18 and 29(1)(i) of the Australian Consumer Law (**ACL**). In general terms, the representations were that the Third Respondent's (**Emma Sleep AU**) products were on sale or discounted, when they were not; and that its products could only be purchased on sale for a limited period of time, when in fact that was not the case. Emma Sleep ran continuous sales and promotional campaigns which created an artificial sense of urgency in relation to the availability of sales pricing for the relevant products.

IMPORTANT FACTS GIVING RISE TO THE CLAIM

The Respondents' business

2. The First Respondent (**Emma Sleep GmbH**) is a bedroom furniture supplier incorporated in Germany. The Second Respondent (**Bettzeit**) and Emma Sleep AU are subsidiaries of Emma Sleep GmbH.
3. Emma Sleep AU launched in Australia in 2020, and supplies mattresses, bed frames, pillows and accessories (**Products**) to Australian consumers, primarily through its website at <https://www.emma-sleep.com.au> (**Emma Sleep Website**).
4. Emma Sleep advertises Products to Australian consumers on online platforms including the Emma Sleep Website, Facebook, Instagram, by email and on a product review website (<https://www.top5bestmattress.com.au>) (**Top 5 Best Mattress Website**) registered to Emma Sleep AU, and operated by DIBMat GmbH (another subsidiary of Emma Sleep GmbH) in conjunction with a division of Emma Sleep, Country Team Australia. Emma Sleep also advertises Products to Australian consumers on third-party retailer websites (including Woolworths Everyday

Filed on behalf of (name & role of party) Australian Competition and Consumer Commission, Applicant

Prepared by (name of person/lawyer) Daniel Marquet Ref: DJM/DR ACCC1000-9187953

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(include state and postcode)

Market), as well as on television, radio, in newspapers and by other offline means. Collectively, the various media platforms on which Emma Sleep advertises its Products to Australian consumers are referred to as the **Platforms**.

5. Country Team Australia is responsible for developing, approving and updating the advertising of the Products on the Platforms. Emma Sleep GmbH provides guidance and, from time to time, directions to Emma Sleep AU, Bettzeit and Country Team Australia in relation to the advertising of the Products on the Platforms.

Savings Statements

6. In the period from at least 15 June 2020 to 27 March 2023 (**Relevant Period**), Emma Sleep advertised Products for sale on the Emma Sleep Website and other Platforms by presenting two prices: a price for the purchase of the Product (**Purchase Price**), and a higher price that was displayed in strikethrough form (**Strikethrough Price**).
7. During the Relevant Period, Emma Sleep also advertised Products for sale on the Platforms as being subject to:
 - (a) a percentage discount — for example, Emma Sleep advertised Products accompanied by the text '50% OFF', 'GET UP TO 55% OFF', '55% SAVINGS' and '-50%' (**Percentage Discount**); and/or
 - (b) a price saving — for example, Emma Sleep advertised Products accompanied by the text 'Save as much as \$3,531' (**Savings Discount**).
8. Emma Sleep advertised almost all of the Products for sale using a combination of one or more of a Strikethrough Price, Percentage Discount and/or Savings Discount.
9. In fact, during the Relevant Period, in respect of 79 Products:
 - (a) the Products were not sold at the Strikethrough Price;
 - (b) the Strikethrough Price was higher than any of the prices at which these Products were in fact supplied to consumers ;
 - (c) the Products were not sold at a price equivalent to the price without the Percentage Discount;
 - (d) the Products were not sold at a price equivalent to the price without the Savings Discount;
 - (e) in respect of 62 of these Products, the Products were not offered for sale at the Strikethrough Price or a price equivalent to the price without the Percentage Discount and/or Savings Discount; and
 - (f) in respect of the other 17 Products, the Products were almost never offered for sale at the Strikethrough Price or a price equivalent to the price without the Percentage Discount and/or Savings Discount.
10. In respect of all other Products:

- (a) the Products were almost never sold, or offered for sale, at the Strikethrough Price;
- (b) the Strikethrough Price was higher than the prices at which these Products were almost always supplied to consumers, or offered for sale to consumers;
- (c) the Products were almost never sold, or offered for sale, at a price equivalent to the price without the Percentage Discount; and
- (d) the Products were almost never sold, or offered for sale, at a price equivalent to the price without the Savings Discount.

11. In light of the matters set out in paragraphs 9 and 10, a consumer who purchased a Product would not have received savings in the amount of the difference between the Strikethrough Price and the Purchase Price and/or the amount of the Percentage Discount and/or the amount of the Savings Discount.

Limited Time Sale Statements

12. During the Relevant Period, Emma Sleep advertised **Sales Campaigns** on the Platforms, which were stated to be limited periods of time in which the Products were advertised for sale:

- (a) with a Purchase Price and Strikethrough Price;
- (b) subject to the Percentage Discount; and/or
- (c) subject to the Savings Discount.

13. Advertisements for the Sales Campaigns featured:

- (a) a **Countdown Timer** which purported to indicate the number of days, hours, minutes and seconds remaining before the Sales Campaign was scheduled to end; and/or
- (b) text that the Sales Campaign was ending soon, for example, 'Last chance to get up to 55% off' or 'Ending Soon! Until 3rd of July only',
(together, the **Limited Time Sale Statements**).

14. In fact, during the Relevant Period, contrary to the Limited Time Sale Statements, the Sales Campaigns were not limited in time, because:

- (a) prior to the conclusion of a Sales Campaign, the Countdown Timer reached zero and reset to another period of days, hours, minutes and seconds; and/or
- (b) at the conclusion of a Sales Campaign and thereafter, the Products continued to be advertised for sale at the same or similar discount.

RELIEF SOUGHT FROM THE COURT

15. The ACCC seeks the relief set out in the accompanying Originating Application, which includes declarations, injunctions, pecuniary penalties, corrective notices, a compliance program, consumer redress and costs.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

16. By engaging in the conduct set out in paragraphs 6 to 8, Emma Sleep made the following representations, in trade or commerce, in connection with the supply or possible supply of goods and/or in connection with the promotion of the supply of goods to consumers on the Platforms:

- (a) the Purchase Price was a discounted price;
- (b) the Strikethrough Price was the price at which the Product was offered for sale by Emma Sleep to consumers before the discount was applied;
- (c) the Strikethrough Price was the price at which the Product was usually offered for sale to consumers absent any discounts;
- (d) the amount of the discount that a consumer purchasing the Product would receive was equivalent to:
 - (i) the difference between the Strikethrough Price and the Purchase Price;
 - (ii) the Percentage Discount; and/or
 - (iii) the Savings Discount,

(the **Savings Representations**).

17. By engaging in the conduct set out in paragraphs 12 and 13, Emma Sleep made the following representations, in trade or commerce, in connection with the supply or possible supply of goods and/or in connection with the promotion of the supply of goods to consumers on the Platforms:

- (a) the Products were only on sale at the advertised price for a limited period of time; and/or
- (b) consumers could only purchase the Products at the advertised sale price during the period of the Sales Campaign,

(the **Limited Time Sale Representations**).

18. The Savings Representations and Limited Time Sale Representations were false, misleading or deceptive and/or likely to mislead or deceive consumers for the reasons set out in paragraphs 9 to 11, and 14, respectively.

19. On each occasion that a consumer viewed the Savings Representations or the Limited Time Sale Representations, Emma Sleep contravened:

- (a) s 18 of the ACL by engaging in conduct that was misleading or deceptive, or likely to mislead or deceive; and
- (b) s 29(1)(i) of the ACL by making false or misleading representations with respect to the price of goods.

20. The conduct of Emma Sleep AU was conduct that Emma Sleep AU engaged in on its own behalf and:

- (a) as the agent of Emma Sleep GmbH and/or Bettzeit and within the scope of its actual or apparent authority under that agency; and/or
- (b) at the direction of Emma Sleep GmbH and/or Bettzeit.

21. Each of Emma Sleep's contraventions of the ACL were deliberate or reckless, or occurred in circumstances where Emma Sleep consciously courted the risk of misleading consumers.

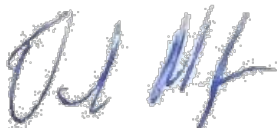
ALLEGED HARM SUFFERED

22. By its conduct, Emma Sleep misled consumers about the savings that could be obtained in relation to the Products offered for sale. The Savings Representations had the effect of substantially overstating the extent of any discount being offered to consumers. In addition, by making the Limited Time Sale Representations, Emma Sleep created an artificial sense of urgency in relation the availability of sales pricing for the Products. As a result, consumers were deprived of genuine consumer choice including the opportunity to compare the Products with other competing products in an informed way. Emma Sleep's conduct may have also unfairly disadvantaged its competitors. It is likely that, had the contravening conduct not occurred, some or all of the consumers who purchased Products from Emma Sleep would not have purchased those Products either at all or from Emma Sleep.

OTHER

23. The Applicant does not consider the issues in this Concise Statement are suitable for a report by a referee under s 54A of the *Federal Court Act 1976* (Cth).

Date: 14 December 2023



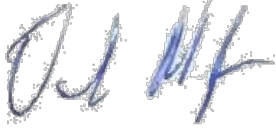
Signed by Daniel John Marquet
Partner, Corrs Chambers Westgarth
Lawyer for the Applicant

This Concise Statement was prepared by Daniel Marquet and Dane Robinson of Corrs Chambers Westgarth and settled by Daniel Tynan of Counsel.

Certificate of lawyer

I, Daniel Marquet, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 14 December 2023

A handwritten signature in blue ink, appearing to read 'D. Marquet', is positioned above a horizontal dotted line.

Signed by Daniel Marquet

Lawyer for the Applicant

Schedule

No. of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

Respondents

Second Respondent: **BETTZEIT SOUTHEAST ASIA INC**

Third Respondent: **EMMA SLEEP PTY LTD**