

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/10/2020 9:35:47 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: QUD316/2020  
File Title: AUSTRALIAN COMPETITION AND CONSUMER v B & K HOLDINGS (QLD) PTY LTD (ABN 47 092 133 858)  
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 13/10/2020 3:21:29 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

**CONCISE STATEMENT**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: QUEENSLAND  
DIVISION: GENERAL**

**NO QUD OF 2020**

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

**B & K HOLDINGS (QLD) PTY LTD (ABN 47 092 133 858)**

Respondent

**A. INTRODUCTION**

1. This proceeding concerns allegations that the respondent, which trades as “FE Sports” (**FE Sports**), engaged in the practice of resale price maintenance by the terms of trade upon which it made it known it would supply and/or in fact supplied high-end bicycle products and accessories (**goods**) to current and prospective retailers (**Dealers**) in Australia. Many of the Dealers were small businesses, such as local and family-owned bike shops.
2. The applicant (**ACCC**) alleges that, between at least 5 February 2017 and at latest 26 June 2019 (**Relevant Period**), FE Sports issued contracts to Dealers with terms that prohibited those Dealers from advertising goods for sale below an “RRP” (recommended retail price) specified by FE Sports. Through this conduct, FE Sports made it known that it would only supply the goods on such terms and, in a large number of cases, in fact made agreements on such terms.
3. FE Sports engaged in this conduct from at least 5 February 2017, despite receiving several letters from the ACCC in 2015 and 2016 specifically raising concerns with FE Sports about suspected resale price maintenance conduct. The last of those letters sent on 27 April 2016 informed FE Sports that resale price maintenance was against the law and warned FE Sports that the ACCC may take legal action against FE Sports if the conduct continued.

**B. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

4. FE Sports commenced operations in or around 2000. It is, and was throughout the Relevant Period, a wholesale supplier of approximately 24 brands of goods to approximately 565 Dealers.

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Filed on behalf of the Applicant

File ref: 20200631

Prepared by: Jody Marshall

AGS lawyer within the meaning of s 551 of the *Judiciary Act 1903*

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5. In the Relevant Period, before supplying goods of a particular brand to a Dealer, FE Sports provided that Dealer with a written document setting out the proposed terms and conditions of supply in respect of that brand of Product (**Dealer Agreements**). As the Dealer Agreements were specific to particular brands of Product, any one Dealer may have had multiple Dealer Agreements with FE Sports.
6. There was some variation between the Dealer Agreements depending on the brand of Product to be supplied. However, each of the Dealer Agreements the subject of this proceeding contained one of the following terms:
  - 6.1. in relation to 3T, 100%, or Stages products: *“The Dealer is permitted to advertise and promote [Brand] products through its internet home page provided that no reference is made to a price other than RRP. Under no circumstances is a [Brand] product to be advertised for sale by the Dealer at a discount” (Term 1);*
  - 6.2. in relation to Wahoo Fitness products: *“The Dealer is permitted to advertise and promote Wahoo Fitness Products through its internet home page at any price that is not less than the RRP. Under no circumstances is a Wahoo Fitness Product to be advertised for sale by the Dealer at a discount or via any auction website. Further the Dealer agrees that a breach of this term prohibiting the advertising of Wahoo Fitness Products on the internet at less than the RRP is fundamental and will lead to immediate termination of the Agreement without notice” (Term 2);*
  - 6.3. in relation to Pirelli PZero Velo products: *“The Dealer is permitted to advertise and promote Pirelli PZero Velo Products through its internet home page provided that no reference is made to a price other than the RRP. Under no circumstances is a Pirelli PZero Velo Product to be advertised for sale by the Dealer at a discount” (Term 3).*
7. The Dealer Agreements did not define the term “RRP”, nor were the RRP’s for the goods specified in the Dealer Agreements. FE Sports sent each of the Dealers to which the Dealer Agreements was sent log-in access to a restricted part of the FE Sports website, [www.fesports.com.au](http://www.fesports.com.au), in which the applicable RRP for each Product was specified and Dealers placed orders.
8. During the Relevant Period, FE Sports also maintained a master price list of RRP’s, which it updated from time to time and provided to Dealers in hard copy upon request.
9. FE Sports provided a Dealer Agreement to an existing or prospective Dealer containing one of Term 1, Term 2 or Term 3 on **328 occasions** during the Relevant Period. A table setting out how many Dealer Agreements containing each of Terms 1, 2 and 3 were provided to Dealers during the Relevant Period is attached as **Schedule 1**.
10. FE Sports proceeded to enter into agreements with some of the Dealers who had been provided with a Dealer Agreement. Those Dealers placed an order for supply, which was accepted by FE Sports in accordance with the following terms of the Dealer Agreements:
  - 10.1. *The Dealer’s placement of an order or conduct of business in accordance with this Agreement following receipt of this Agreement will constitute an offer by the Dealer to become a retailer of [Brand]’s products.*

10.2. *The offer shall be accepted by FE Sports when it confirms acceptance of the Dealer's offer in writing or by electronic means or starts to provide the goods or otherwise acts in accordance with this Agreement.*

11. FE Sports entered into agreements for the supply of goods to a Dealer containing one of Term 1, Term 2 or Term 3 on **242 occasions** during the Relevant Period. A table setting out how many Dealer Agreements containing each of Terms 1, 2 and 3 were entered into by FE Sports during the Relevant Period is contained in Schedule 1.

**C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

12. By engaging in the conduct outlined at paragraphs 5 to 10 above, FE Sports:
- 12.1. on 328 occasions, made it known to a Dealer that FE Sports would not supply goods to the Dealer unless the Dealer agreed not to advertise for sale those goods at a price less than RRP. On each such occasion, FE Sports therefore engaged in the practice of resale price maintenance as described in sections 96(3)(a) and 96(7)(a) of the CCA, in contravention of section 48 of the CCA;
- 12.2. on 242 occasions, entered into agreements for the supply of goods to a Dealer, being an agreement one of the terms of which was that the Dealer would not advertise for sale the goods at a price less than RRP. On each such occasion, FE Sports therefore engaged in the practice of resale price maintenance as described in sections 96(3)(c) and 96(7)(a) of the CCA, in contravention of section 48 of the CCA.
13. By operation of section 96(7)(a) of the CCA, the reference in section 96(3)(a) and (c) to the selling of goods at a price less than a price specified by the supplier includes a reference to the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale.
14. For the purposes of section 96(3)(a) and (c) of the CCA, the reference to RRP in each of Terms 1, 2 and 3 constituted a "price specified" or a price "that would be specified" by FE Sports. In the alternative, the reference to RRP in each of Terms 1, 2, and 3 constituted a "formula" specified by FE Sports from which a price could be ascertained, within the meaning of section 96(4) of the CCA.

**D. RELIEF SOUGHT FROM THE COURT**

15. The ACCC seeks the relief set out in the accompanying Originating Application, comprising:
- 15.1. declarations pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**);
- 15.2. injunctive relief pursuant to section 23 of the FCA and/or section 80 of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
- 15.3. pecuniary penalties pursuant to section 76 of the CCA;
- 15.4. an order requiring the establishment of a compliance and education program pursuant to sections 80 and 86C of the CCA;


15.5. an order requiring FE Sports to send corrective letters to Dealers, and to place a corrective notice on its website, pursuant to section 86D of the CCA; and

15.6. costs.

**E. ALLEGED HARM**

16. FE Sport's conduct had the potential to cause Dealers not to advertise the goods at a discount to the RRP. If Dealers did not advertise at a discount to the RRP, this would have reduced the Dealers' ability to compete in respect of price, and meant that discounted prices were not offered to consumers of the goods.

Date: 13 October 2020

  
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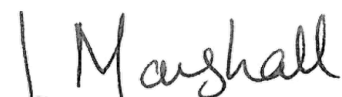
Jody Marshall  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

This statement was prepared by Jody Marshall of the AGS and settled by Stephen Free SC and Naomi Oreb of counsel.

**CERTIFICATE OF LAWYER**

I Jody Marshall certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 13 October 2020

  
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Jody Marshall  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

## Schedule 1

Brand	Relevant Term	“Made it known” (s 96(3)(a))	“Entered into an agreement” (s 96(3)(c))
		Number of Dealer Agreements provided to Dealers containing the Relevant Term	Number of Dealer Agreements entered into by Dealer placing an order for supply
3T	Term 1	169 Dealer Agreements	122 Dealer Agreements
100%	Term 1	44 Dealer Agreements	25 Dealer Agreements
Stages	Term 1	46 Dealer Agreements	35 Dealer Agreements
Wahoo Fitness	Term 2	5 Dealer Agreements	5 Dealer Agreements
Pirelli PZero Velo	Term 3	64 Dealer Agreements	55 Dealer Agreements
<b>TOTAL</b>		<b>328 Dealer Agreements</b>	<b>242 Dealer Agreements</b>