PROHIBITION ON ADVERTISING BELOW THE RRP AMOUNTS TO ILLEGAL RESALE PRICE MAINTENANCE, ACCC ALLEGES

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IN BRIEF

- The Australian Competition and Consumer Commission (ACCC) has commenced proceedings against cycling wholesaler B & K Holdings (QLD) Pty Ltd, trading as FE Sports (FE Sports), alleging that it engaged in resale price maintenance (RPM).
- The proceedings are a timely reminder of the risks suppliers face if they restrict resellers' ability to advertise (in addition to actually selling) goods or services below specified prices, including digital advertising on websites.
- RPM is per se illegal or strictly prohibited under Australian competition laws.

WHAT IS RESALE PRICE MAINTENANCE?

The *Competition and Consumer Act 2010* (Cth) (CCA) prohibits RPM, which involves a manufacturer or 'upstream' supplier putting 'pressure' on a reseller to not sell goods or services (which includes advertising, displaying or offering goods or services for sale) at a price less than a price specified by the supplier.

For example, a supplier engages in RPM if they set a recommended retail price (RRP) and:

- make it known that they won't supply goods to a reseller unless they agree to sell or advertise the goods at a price not below the RRP; or
- induce or attempt to induce a reseller to sell or advertise the goods at a price not below the RRP; or
- threaten to withhold or actually withhold supply from a reseller unless they agree to sell or advertise the goods at a price not below the RRP.

Engaging in RPM is a 'per se offence', meaning it is illegal even if it doesn't have an anti-competitive effect. The maximum penalty for a corporation is the greater of AUD10 million, three times the value of the benefit attributable to the conduct, or 10% of annual turnover.

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THE ACCC'S PROCEEDINGS AGAINST FE SPORTS

The ACCC launched Federal Court proceedings against FE Sports on 14 October 2020, alleging that it engaged in RPM between February 2017 and June 2019.

FE Sports supplies cycling products and accessories across a number of brands to retailers (Dealers). The ACCC alleges that prior to supplying products to them, FE Sports provided Dealers with a set of proposed terms and conditions (Dealer Agreements). It then entered into Dealer Agreements with some of the Dealers.

Each Dealer Agreement contained a term similar to the following:

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 the RRP. Under no circumstances is a [brand] product to be advertised for sale by the Dealer at a discount.

Although the Dealer Agreements did not define or otherwise specify "the RRP", FE Sports gave Dealers access to a restricted part of its website, which contained a list of RRPs for each product. Dealers could also request a hard copy "master price list" of RRPs.

The ACCC alleges that FE Sports engaged in RPM by:

- providing Dealers with Dealer Agreements, thereby making it known that it would not supply products to them unless they agreed to not advertise them at a price below the RRP (on 328 occasions); and
- entering into Dealer Agreements, which contained a term that the Dealer would not advertise products at a price less than the RRP (on 242 occasions).

Among other remedies, the ACCC is seeking pecuniary penalties and orders restraining FE Sports from further undertaking the conduct, and requiring FE Sports to send corrective letters to Dealers.

KEY TAKEAWAYS

1. Strict Liability

Engaging in RPM is illegal, even if there is no substantial lessening of competition in any market. Courts have time and again explained that RPM is a 'per se' offence because price competition is central to the economic system.[1] Consistent with that understanding, the ACCC characterised the harm of FE Sports' alleged conduct as depriving consumers of discounted prices by preventing Dealers from competing on price.

2. Evidence of RPM

Often the clearest evidence of RPM is a term in an agreement that obliges a reseller to not sell goods below the supplier's RRP (as seen in the Dealer Agreements). The ACCC has brought prosecutions after finding such terms in franchise[2] and distribution[3] agreements.

However, communications - between suppliers and resellers, or internally within a supplier's business - can also provide evidence of RPM. The most recent proceedings where a defendant was directly involved in

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RPM[4], brought against Mitsubishi Electric Australia (MEA) in 2013[5], involved evidence of both types of communications.

This included an email between senior managers at MEA disclosing that one manager had spoken to a retailer to convince them to adjust their prices and informing the other manager that: "Of course this has all been of a verbal nature as we cannot be seen to be price fixing". The Court described the email as "significant" and MEA admitted that the email was evidence of RPM[6]. MEA was ordered to pay penalties totaling AUD2.2 million.

3. Digital Advertising

RPM conduct includes pressuring a reseller to not advertise goods for sale below a specified price. This extends to digital advertising, as was the case here.

The CCA makes clear that it isn't illegal to set a RRP, but it is illegal to pressure resellers to sell at the RRP, including where a price described as "recommended" is actually understood by resellers to be a price below which they cannot sell or advertise goods for sale.

4. Investigations

Although there hasn't been a significant RPM-related proceeding for some time, the ACCC is vigilant in investigating suspected RPM conduct. In the present case, the ACCC contacted FE Sports with concerns on three occasions, including as early as 2015.

The ACCC has also resolved investigations into RPM by seeking a court-enforceable undertakings under section 87B of the CCA (most recently in October 2019), under which the offending supplier promises to cease engaging in RPM and (usually) to perform other remedial actions (for example, implementing an internal compliance program).

If you wish to have any more detail about the above issues or discuss them further, please do not hesitate to contact a member of the K&L Gates' Competition & Consumer Law team.

FOOTNOTES

1 See, eg, *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2002] FCA 619 at [29].
2 See, eg, *Australian Competition and Consumer Commission v Jurlique International Pty Ltd* [2007] FCA 79.
3 See, eg, *Australian Competition and Consumer Commission v Hobie Cat Australasia Pty Ltd* [2008] FCA 402.
4 The ACCC brought proceedings in 2014 against OmniBlend for aiding and abetting an overseas supplier to engage in RPM: see *Australian Competition and Consumer Commission v OmniBlend Australia Pty Ltd* [2015] FCA 871.
5 *Australian Competition and Consumer Commission v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413.
6 Ibid at [41]-[42].

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