

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD1220/2021
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TECHTRONICS INDUSTRIES AUSTRALIA PTY LTD ACN 002 277 509
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 25/11/2021 9:00:03 AM AEDT

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.

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## CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD OF 2021

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

TECHTRONIC INDUSTRIES AUSTRALIA PTY LIMITED  
ACN 002 277 509

Respondent

### INTRODUCTION

1. This proceeding concerns allegations that the respondent, Techtronic Industries Australia Pty Limited (**Techtronic**), engaged in the practice of resale price maintenance by: (a) the terms of trade upon which it made it known it would supply, and in fact supplied, Milwaukee-branded power tools, hand tools and accessories (**Milwaukee Products**) to buying groups and individual retailers who were prospective or current dealers (**Dealers**), and (b) conduct seeking to enforce, and in fact enforcing, those terms of trade.
2. The applicant (**ACCC**) alleges that, between 2015 and 2021 (the **Relevant Period**), Techtronic issued written documents to Dealers that set out the proposed terms and conditions of trade that would apply to any supplied goods (**Proposed Terms of Trade**). Those Proposed Terms of Trade included terms that prohibited Dealers from offering for sale or selling Milwaukee Products below a price specified by Techtronic (**Specified Minimum Price**), being the lesser of the price of a product (plus GST) as displayed on the tax invoice in respect of that product, or the price of a product (plus GST) that appeared on Techtronic's price list. Techtronic thereby made it known that it would only supply the goods on such terms, offered to agree on such terms, and induced or attempted to induce Dealers to trade on such terms.
3. Techtronic proceeded to enter into a number of agreements on such terms (**Agreement Conduct**). By such conduct, Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(a), (b) and (c) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), in contravention of section 48 of the CCA.
4. Further, by issuing oral and written warnings and "breach notices" to certain Dealers who offered to sell or did sell Milwaukee Products below the Specified Minimum Price, and by suspending dealer rebate entitlements and suspending trade with some of those Dealers (**Enforcement Conduct**), Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(a), (b) and (d) of the CCA, in contravention of section 48 of the CCA.

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Filed on behalf of the Applicant, ACCC

File ref: 21001655

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## **IMPORTANT FACTS GIVING RISE TO THE CLAIM**

5. Techtronic is, and was throughout the Relevant Period, a major supplier of power tools, hand tools and accessories in Australia. It is, and was throughout the Relevant Period, a wholesale supplier of Milwaukee Products (among other products not the subject of these proceedings).
6. Techtronic is the Australian subsidiary of the Hong Kong based company Techtronic Industries Co Ltd and has operated since 2005.

### **Agreement Conduct**

7. During the Relevant Period, before supplying Milwaukee Products to Dealers, Techtronic provided Dealers with Proposed Terms of Trade.
8. Dealers entered into agreements on the terms set out in the Proposed Terms of Trade with Techtronic in one of two ways: by (a) signing a written contract on the Proposed Terms of Trade directly with Techtronic; or (b) making a credit application (together, the **Dealer Agreements**).
9. There was some variation between the Dealer Agreements, but each Dealer Agreement included a term to the effect that the Dealer would not offer to sell, or sell, any Milwaukee Product below the Specified Minimum Price (**Price Restriction Clause**). The three relevant versions of the Price Restriction Clause that applied during the Relevant Period were (subject to minor immaterial variations):

#### **Version 1: 16. SALE OF PRODUCTS (MODEL NUMBERS) AND SELLING BELOW COST PRICE**

...16.3 Subject to all applicable laws, the Buyer must not sell any Product below its Cost Price except where there is a genuine clearance sale and Techtronic Industries has consented in writing to the sale below Cost Price.

16.4 The Buyer acknowledges that any breach of clauses 16.1, 16.2 or 16.3:

- (a) is a default for the purposes of clause 9.1(b);
- (b) will result in the termination of any rebate entitlements granted by Techtronic Industries to the Buyer in respect of the sale of Products by the Buyer; and
- (c) may result in Techtronic Industries withholding the supply of Products to the Buyer, in Techtronic Industries' absolute discretion.

#### **Version 2: 16. SALE OF PRODUCTS (MODEL NUMBERS) AND SELLING BELOW COST PRICE**

...16.3 Subject to all applicable laws, the Buyer acknowledges and agrees that it will not sell any Product below its Cost Price where such sale would constitute Loss Leader Selling, except where there is a genuine seasonal or clearance sale or Techtronic Industries has consented in writing to the sale below Cost Price.

16.4 The Buyer acknowledges that any breach of clauses 16.1, 16.2 or 16.3:

- (a) is a default for the purposes of clause 9.1(b);
- (b) will result in the termination of any rebate entitlements granted by Techtronic Industries to the Buyer in respect of the sale of Products by the Buyer; and
- (c) may result in Techtronic Industries withholding the supply of Products to the Buyer, in Techtronic Industries' absolute discretion.

**Version 3: 17. Sale of products (model numbers) and selling below cost price**

...17.3 Subject to all applicable laws, the Buyer acknowledges and agrees that it will not sell any Product below its Cost Price where such sale would constitute Loss Leader Selling, except where there is a genuine seasonal or clearance sale or Techtronic Industries has consented in writing to the sale below Cost Price.

17.4 Notwithstanding any other clause in these Terms, the Buyer must not issue vouchers or offer discounts which results in the sale of any Product below its Cost Price. For the avoidance of doubt, the Buyer will be considered to be selling below Cost Price if the Buyer issues a voucher or offers a discount that results in the sale of a Product below its Cost Price except where Techtronic Industries has consented, in writing, to the sale below the Product's Cost Price.

17.5 The Buyer acknowledges that any breach of clauses 17.1, 17.2, 17.3 or 17.4:

(a) is a default for the purposes of clause 10.1(b);

(b) will result in the termination of any rebate entitlements granted by Techtronic Industries to the Buyer in respect of the sale of Products by the Buyer; and

(c) may result in Techtronic Industries withholding the supply of Products to the Buyer, in Techtronic Industries' absolute discretion.

10. During the Relevant Period, Techtronic maintained a price list which it provided to Dealers once annually in the lead up to April each year, with that new price list to take effect on 1 April each year. Techtronic communicated the price list to Dealers primarily by email, and, on occasion, by post or delivery of a printed copy.
11. Techtronic updated its price list internally to account for its launch of new products from time to time, and advised Dealers of those new products and associated prices from time to time, but did not provide Dealers with an updated version of its price list more than once a year.
12. Techtronic entered 96 Dealer Agreements containing a Price Restriction Clause during the Relevant Period. In proposing terms on 97 occasions and proceeding to enter 96 agreements on the basis of such terms, Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(a), (b) and (c) of the CCA.

**Enforcement Conduct**

13. During the Relevant Period, Techtronic:
  - 13.1. sent written warnings and reminders to certain Dealers on 19 occasions about selling, advertising and/or offering to sell Milwaukee Products at a price below the Specified Minimum Price; and
  - 13.2. communicated verbal warnings to certain Dealers on 10 occasions about selling, advertising and/or offering to sell Milwaukee Products at a price below the Specified Minimum Price.
14. On at least eight of those occasions, Dealers responded to Techtronic's conduct by lifting their pricing so as not to sell Milwaukee Products at less than the Specified Minimum Price.
15. Further, in 2018, Techtronic withheld the supply of goods to two Dealers within the expanded meaning of that concept in section 98(1) of the CCA, by initially suspending trade with both of those Dealers and later suspending both of those Dealers' loyalty rebates, for the reason that the Dealers had sold or were likely to sell Milwaukee Products at a price less than the Specified Minimum Price. One of those Dealers responded to Techtronic's conduct by lifting its pricing so that it was not selling or offering to sell Milwaukee Products at less than the Specified Minimum Price.

## **PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

16. By engaging in the Agreement Conduct, Techtronic:
  - 16.1. on 97 occasions, made it known to a Dealer that Techtronic would not supply goods to the Dealer unless the Dealer agreed not to sell or offer to sell Milwaukee Products for a price less than the Specified Minimum Price and, on each such occasion, Techtronic thereby engaged in the practice of resale price maintenance as defined in section 96(3)(a) of the CCA, in contravention of section 48 of the CCA;
  - 16.2. further or alternatively, on each of the occasions referred to in paragraph 16.1 above, offered to enter into an agreement for the supply of goods, one of the terms of which would be that the Dealer would not sell or offer to sell Milwaukee Products for a price less than the Specified Minimum Price and, on each such occasion, Techtronic thereby engaged in the practice of resale price maintenance as defined in section 96(3)(c) of the CCA, in contravention of section 48 of the CCA;
  - 16.3. further or alternatively, in connection with 96 of the occasions referred to in paragraph 16.1 above, proceeded to enter into agreements with Dealers for the supply of goods to a Dealer, a term of which was that the Dealer would not sell or offer to sell Milwaukee Products at a price less than the Specified Minimum Price and, on each occasion, Techtronic thereby engaged in the practice of resale price maintenance as defined in section 96(3)(c) of the CCA, in contravention of section 48 of the CCA;
  - 16.4. further or alternatively, on each of the occasions referred to in paragraph 16.1 above, attempted to induce a Dealer not to sell or offer to sell Milwaukee products supplied by Techtronic at a price less than the Specified Minimum Price and, on each such occasion, Techtronic thereby engaged in the practice of resale price maintenance as described in section 96(3)(b) of the CCA, in contravention of section 48 of the CCA.
17. By engaging in the Enforcement Conduct, Techtronic:
  - 17.1. on 10 occasions, made it known to a Dealer that Techtronic would not supply goods to the Dealer unless the Dealer agreed not to sell or offer to sell Milwaukee Products for a price less than the Specified Minimum Price. On each such occasion, Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(a) of the CCA, in contravention of section 48 of the CCA;
  - 17.2. on 31 occasions, induced or attempted to induce a Dealer not to sell or offer to sell Milwaukee Products supplied by Techtronic at a price less than the Specified Minimum Price. On each occasion, Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(b) of the CCA, in contravention of section 48 of the CCA; and
  - 17.3. on four occasions, withheld supply of Milwaukee Products to a Dealer, within the extended meaning of withholding supply set out in section 98(1)(a) and (b) of the CCA, for the reason that the Dealer had sold or was likely to sell Milwaukee Products supplied by Techtronic at a price less than the Specified Minimum Price. On each occasion, Techtronic engaged in the practice of resale price maintenance as defined in section 96(3)(d) of the CCA, in contravention of section 48 of the CCA.
18. For the purposes of section 96(3)(a), (b), (c) and (d) of the CCA, the reference to the Specified Minimum Price in each Dealer Agreement constituted a “price specified” or a price “that would be specified” by Techtronic. In the alternative, the reference to Specified

Minimum Price in each Dealer Agreement constituted a “formula” specified by Techtronic from which a price could be ascertained, within the meaning of section 96(4) of the CCA.

19. By operation of section 96(7)(a) and (c) of the CCA, for the purposes of section 96(3)(a), (b), (c) and (d), the reference to selling goods at a price less than specified by the supplier includes a reference to the offering or 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 offered or advertised for sale.

#### **RELIEF SOUGHT**

20. The ACCC seeks the relief set out in the accompanying Originating Application, comprising:
- 20.1. declarations pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**);
  - 20.2. injunctive relief pursuant to section 23 of the FCA and/or section 80 of the CCA;
  - 20.3. pecuniary penalties pursuant to section 76 of the CCA. The ACCC relies on the higher maximum penalty available pursuant to section 76(1A)(b)(iii) and considers the benefit obtained by Techtronic is not quantifiable;
  - 20.4. an order pursuant to section 86C of the CCA requiring the implementation of a revised compliance program;
  - 20.5. an order pursuant to section 86C of the CCA requiring Techtronic to send corrective letters to Dealers, and to place a corrective notice on its website; and
  - 20.6. costs.

#### **ALLEGED HARM**

21. Techtronic’s conduct had the potential to cause, and in some instances in fact caused, the relevant Dealers not to sell or offer to sell Milwaukee Products below the Specified Minimum Price. The conduct reduced the Dealers’ ability to compete in respect of price and meant that lower prices were not offered to consumers. This was in circumstances where the Specified Minimum Price was defined in such a way that it did not correspond with the actual cost to the Dealers, given that it did not take into account various rebates, including guaranteed rebates.

Date: 24 November 2021



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 Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 24 November 2021

A handwritten signature in cursive script, appearing to read 'J. Marshall', is written over a horizontal dotted line.

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