

Deacons

07 June 2005

Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2602

Attention: Mr Scott Gregson
A/g General Manager
Adjudication Branch

Our Ref: 185133

Dear Mr Gregson

Honda MPE Exclusive Dealing Notification N40769

We refer to your letter of 27 April 2005 and the request for information contained in that letter. This letter and its annexures constitute the response of Honda Australia Motorcycle and Power Equipment Pty Ltd (**Honda MPE**).

Please note that Honda MPE claims confidentiality in respect of components of this letter, as indicated below.

1. Executive Summary

- 1.1 Honda MPE is concerned that Chinese manufactured copies of Honda's small internal combustion engines (**Honda Products**) and Complete Built Units (**CBUs**) containing copy engines (**Copy Products**) are being marketed in Australia on the basis that they are equivalent to genuine Honda engines and Honda powered CBUs. This is damaging to the Honda brand and reputation, and potentially misleading to consumers.
- 1.2 In response to this concern, Honda MPE has adopted a policy of insisting that Australian based manufacturers who acquire Honda Products to make finished products (namely Original Equipment Manufacturers (**OEMs**)) do not acquire Copy Products for use in finished products, and that both OEMs and Honda dealers more generally do not acquire for re-supply CBUs containing copy engines.
- 1.3 This is the conduct that was the subject of Honda MPE's notification of 14 September 2004 (**Notification**).

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- 1.4 We wish to emphasise that Honda MPE does not seek to prevent the entry of Chinese manufactured products into Australian markets, nor the acquisition by OEMs or other Honda dealers of Chinese products that are not copies of Honda Products. Honda MPE seeks only to protect the Honda brand and reputation against the consequences of the marketing in Australia of Copy Products and to minimise the risk of consumers being misled.
- 1.5 Honda MPE has a substantial reputation in Australia deriving from both the quality of Honda Products and its developed distribution networks. These networks provide substantial benefits to consumers, including with respect to training and product safety, servicing and parts availability.

2. Confidentiality

Honda MPE claims confidentiality over the following parts of this submission (which includes annexures) on the grounds that they contain details of Honda MPE's customer base, market share, production output and/or pricing, in each case comprising information which is commercially sensitive to Honda MPE:

- (1) Response to question 2;
- (2) Column 7 (Recommended Retail Price) of Annexure 4;
- (3) Annexures 6 to 10 inclusive;
- (4) Response to question 8; and
- (5) Response to question 10.

3. Response to ACCC questions

The following are Honda MPE's responses to the questions asked by the ACCC in its letter of 27 April 2005.

- (1) ***Confirm (or otherwise) earlier advice concerning instances of refusal to supply or offer discounts.***

Honda MPE notified its customers via a Dealer Bulletin on 24 March 2003 (attached as Annexure 1) and a Bulletin to OEM Purchasers on 1 October 2003 (attached as Annexure 2) that it would terminate their dealer/OEM agreements should they deal in Copy Products. Honda MPE sent a further letter to dealers on 9 September 2004 in similar terms (attached as Annexure 3).

However, there have been no instances in which Honda MPE has refused to supply Honda Products or to give a discount, allowance, rebate or credit in relation to the supply of Honda Products on the basis that a customer or other person has acquired or not agreed not to acquire copies of Honda Products.

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- (3) ***Please describe all (Honda and non-Honda) products to which Honda MPE considers the notifications apply.***

Honda MPE considers the Notification applies to the list of Honda Products set out in Annexure 4. This list will also provide you with information such as the specification type, horsepower, the shaft configuration, type and size, and the recommended retail price for each Honda engine.

The list of Honda Products also indicates the type of finished products that each engine is suitable for as the power source.

It is not possible to supply an equivalent list of Copy Products. This is because there are many instances where Honda Products are copied, particularly by Chinese manufacturers, and Honda MPE cannot be confident that it is aware of all of them. Furthermore, there is not a high degree of consistency in the range of Copy Products manufactured (by Chinese factories) and imported into Australia (by Australian distributors). The roles of these manufacturers and distributors are described more fully in our response to Question 8 below.

While it is not possible to provide a definitive account (and therefore description) of all Copy Products, Honda MPE wishes to bring your attention three of the more prominent examples of Copy Products which are marketed as:

- (i) Villiers
- (ii) Kama
- (iii) Selecta Power.

Annexure 5 includes photographs of these Copy Products and photographs of the genuine Honda Products that were copied.

Honda MPE could, on request, provide information on other Copy Products.

(4) *Please describe the end use of the products described in question three and potential substitutes for these products.*

The engine types considered in this letter have no use on their own. The engines are only of use when they form part of a finished product. A list of relevant finished products can be found in column 1 of the table in Annexure 6.

Annexure 6 is a summary of power equipment sales in Australia during the 1 year period between 1 April 2004 and 31 March 2005. Because there is no data source able to provide this information independently, the Sales Summary has been compiled by Honda MPE on the basis on information from a variety of sources including the Outdoor Power Equipment Association (OPEA), the PRC (Chinese) Customs service, the Australian Bureau of Statistics (ABS) and Honda MPE's own knowledge.

Due to the unavailability of some information, Honda MPE has had to make some assumptions and estimations in preparing the Sales Summary in Annexure 6. These assumptions are set out in the notes to the Annexure.

Sales of end products are broken down into 3 broad categories:

- Vertical engine powered products (mowers);
- Horizontal engine powered products (pumps, generators, others); and
- Small engine products (brush cutters, others).

These 3 categories are also used in the list of Honda Products (Annexure 4).

You will see from Annexure 4 that there is substitutability of some engines between these categories of products. There are also many products (both Copy Products and legitimate substitutes) which are substitutable for Honda Products in all of the categories set out in Annexure 6. The legitimate substitutes include well-known brands such as Kawasaki, Yanmar, Yamaha, Mitsubishi, Robin and Briggs & Stratton. Please refer to the responses to Questions 5 and 6 (below) for information on legitimate substitutes and price comparisons.

- (5) ***Please provide a comparison of the prices of the products to which Honda MPE considers the notifications apply with the prices of the 'copy products' to which the notifications refer.***

It is not possible to supply a list of genuine Honda Products and corresponding Copy Products with price comparisons for the reasons stated in our response to question 3 and because there are no pricing lists or equivalent prices for Copy Products.

However, Honda MPE is able to provide a comparison of prices of some Honda Products and corresponding Copy Products based on advertising of Copy Products.

Annexure 7 consists of advertisements for Copy Products. These advertisements have been extracted from the marketing materials of various retailers. The price of the equivalent Honda Product has been indicated beside the advertisement for each Copy Product.

- (6) ***Are there any products that are substitutable for Honda products to which Honda MPE considers the notifications apply and which Honda MPE does not consider constitute 'copy products'? If so, what are the comparative prices of these products?***

There is a myriad of products that are not Copy Products which are substitutable in varying degrees for Honda Products and for end products manufactured using Honda Products.

The 1st page of Annexure 8 contains photographs of engines which Honda MPE considers to be legitimate substitutes for certain Honda Products. The remainder of Annexure 8 consists of graphical price comparisons of certain types of Honda Products and legitimate substitutable engines. These comparisons show that Honda Products are generally in the mid-range of prices when compared with such legitimate substitutes.

- (7) ***Please provide a list of customers (including contact details) affected by the notified conduct.***

A list of Honda MPE's OEM customers is provided in Annexure 9. A list of Honda MPE's dealer customers is provided in Annexure 10.

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- (9) ***Is there a history of new competitors entering the supply chain (at any level) of the products to which Honda MPE considers the notifications apply? Please describe any barriers to entry of the supply chain that may exist.***

It is clear from market behaviour and the number of participants involved in the retail supply of engines and CBUs (as indicated by Annexure 11) that barriers to entry are low, that is, new competitors can quickly establish themselves and old competitors can quickly re-establish themselves.

Honda MPE estimates that there are approximately 7,442 retail outlets in Australia which stock power equipment products. Honda power equipment dealers constitute a very small proportion of the overall power equipment distribution channel. Ultimately, customers can readily acquire Copy Products through many other hardware channels.

New entrants have many avenues to sell both Copy Products and non-Copy Products, some of which include very large retail chains such as Bunnings, Mitre 10 and Thrifty Link. Some of these large retail chains are becoming competitors by importing power equipment themselves.

As indicated in our response to Question 8, distributors of Copy Products are also using forums such as eBay to sell Copy Products.

- (10) ***What is the status of Honda MPE's and Honda Motor Company Ltd and its associates' copyrights in regard to the products to which the notifications relate?***

Honda Motor Co. Ltd of Japan and other Honda Group companies resident in Japan own the copyright that subsists in Australia in the design drawings, point of sale materials, brochures, service manuals and other printed materials that relate to the Honda Products. Honda MPE is a licensee of this copyright.

- (11) ***Please clarify the precise role of Honda OEMs, including a description of their involvement in the importation, wholesale, manufacture, supply and/or retail of the products to which Honda MPE considers the notifications apply.***

The term "Honda OEMs" refers to manufacturers that purchase Honda Products (namely engines or parts for Honda engines) marketed or distributed by Honda MPE or an affiliate company and who use those products as components in manufacturing end products (typically those products listed in column 1 of Annexure 6). Most Honda OEMs (Honda

MPE estimates about 70%) use legitimate non-Honda engines in some of the end products that they make.

Honda OEMs sell the products that they manufacture using Honda Products to a range of wholesalers and retailers. Some maintain their own retail distribution networks.

Please do not hesitate to contact us if you require any further information.

Yours sincerely



Michael Wilton
Partner
Deacons

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Index to Annexures

- 1. Dealer Bulletin – 24 March 2003 (1 page)**
- 2. Bulletin to OEM Purchasers – 1 October 2003 (1 page)**
- 3. Letter to dealers – 9 September 2004 (1 page)**
- 4. List of Honda Products (4 pages)**

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Annexure 1
Dealer Bulletin – 24 March 2003 (1 page)



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DEALER BULLETIN

To: All Power Equipment Dealer Principals
From: Stuart Strickland, Senior Director
Date: 24 March 2003
Subject: Copies of Genuine Honda Products ("Copy Products")

We note an increasing number of engines, generators and water pumps being imported into Australia from Asian countries that are copies of genuine Honda products. It is necessary that we address with our Honda dealer network the importing, distribution and sale of these Copy Products.

Honda Motor Co Ltd has no relationship with the Asian factories producing these Copy Products. The visual similarity between genuine Honda products and the Copy Products may lead prospective purchasers to think there is some association between Honda and the Asian manufacturer. Honda will vigorously pursue through legal avenues any party passing off Copy Products as being, or associated with, genuine Honda products.

Honda Motor Co Ltd is the owner of the copyright in all design drawings and associated manuals relating to all genuine Honda engines and in particular to its GX range of horizontal engines (which most of the Copy Products are following). Internationally Honda is acting to ensure that Asian factories will not copy genuine Honda products in the future.

Copy Products do not have the benefit of Honda's strict research and development, production, manufacturing and testing processes. Honda's research into a selection of Copy Products being sold in Australia indicates considerable differences in the build, quality and performance of the Copy Products as compared with genuine Honda products.

Honda MPE's position regarding Copy Products is that any authorised Honda Power Equipment dealer in Australia who makes a decision to purchase, stock and sell copy Honda products will be in direct contravention of their dealer agreement with Honda- clauses 5.1, 5.2 and 5.5 in particular. Dealer Agreements of any dealers who contravene their Dealer Agreements by dealing in Copy Products will be terminated*.

We ask that, as an authorised Honda Power Equipment dealer in Australia, you support Honda by reporting any instances of "passing off" of Copy Products as genuine Honda products or that Copy Products are in some way associated with Honda. A dealer hotline 1800 089 789 has been established to facilitate the passing of information to Honda. Honda is concerned that Honda's excellent reputation as a manufacturer of quality Power Equipment may be compromised by consumers purchasing Honda Copy Products and being dissatisfied with their performance.

In conclusion Honda has no issue with any new manufacturers entering the Australian market providing they do so with products of their own design.

Stuart Strickland
Senior Director

** Please note that Honda MPE has given to Australian Competition and Consumer Commission a notice under section 93(1) of the Trade Practices Act 1974 before issuing this Dealer Bulletin.*

Annexure 2
Bulletin to OEM Purchasers – 1 October 2003 (1 page)



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BULLETIN FOR OEM PURCHASERS

To: All Original Equipment Manufacturer Purchasers
From: Stuart Strickland, Senior Director
Date: 01 October 2003
Subject: Copies of Genuine Honda Products ("Copy Products")

We note an increasing number of engines, generators and water pumps being imported into Australia from Asian countries that are copies of genuine Honda products. It is necessary that we address with our OEM Purchasers the importing, distributing and use in OEM products of these Copy Products.

Honda Motor Co Ltd has no relationship with the Asian factories producing these Copy Products. The visual similarity between genuine Honda products and the Copy Products may lead prospective purchasers to think there is some association between Honda and the Asian manufacturer. Honda will vigorously pursue through legal avenues any party passing off Copy Products as being, or associated with, genuine Honda products.

Honda Motor Co Ltd is the owner of the copyright in all design drawings and associated manuals relating to all genuine Honda engines and in particular to its GX range of horizontal engines (which most of the Copy Products are following). Internationally Honda is acting to ensure that Asian factories will not copy genuine Honda products in the future.

Copy Products do not have the benefit of Honda's strict research and development, production, manufacturing and testing processes. Honda's research into a selection of Copy Products being sold in Australia indicates considerable differences in the build, quality and performance of the Copy Products as compared with genuine Honda products.

Honda MPE's position regarding Copy Products is that any authorised OEM Purchaser in Australia who imports, distributes or uses in OEM Products any copy Honda Products will be in direct contravention of their Original Equipment Manufacturers Conditions of Sale Agreement with Honda MPE – clauses 7.1 and 11 in particular. Agreements of any OEM Purchasers who contravene their Agreements by importing, distributing or using in OEM products any Copy Products will be terminated*.

We ask that, as an OEM Purchaser with a current relationship with Honda MPE in Australia, you support Honda by reporting any instances of "passing off" of Copy Products as genuine Honda products or that Copy Products are in some way associated with Honda. A Honda Dealer and OEM Purchaser hotline 1800 089 789 has been established to facilitate the passing of information to Honda. Honda is concerned that Honda's excellent reputation as a manufacturer of quality Power Equipment may be compromised by consumers purchasing Honda Copy Products (whether separately or as part of any OEM Products) and being dissatisfied with their performance.

In conclusion, Honda has no issue with any new manufacturers entering the Australian market providing they do so with products of their own design.

Stuart Strickland
Senior Director

* Please note that Honda MPE has given to Australian Competition and Consumer Commission a notice under section 93(1) of the Trade Practices Act 1974 before issuing this Bulletin for OEM Purchasers

Annexure 3
Letter to dealers – 9 September 2004 (1 page)



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9 September 2004

Dear Dealer Principal

In March last year, Stuart Strickland, Honda MPE's Senior Director wrote to all PE Honda Power Equipment Dealers to advise them of our stance towards Copy Products and actions we would take against authorised dealers dealing in Copy Products.

In general, our authorised Honda dealers have acted responsibly to help us protect the reputation of genuine Honda Products by not dealing in Copy Products however, of late, we have noticed that some dealers have succumbed to the temptation of stocking and selling these Copy Products.

To repeat Stuart's previous statement.....Honda MPE's position regarding Copy Products is that any authorised Honda Power Equipment dealer in Australia who makes a decision to purchase, stock and sell copy Honda products will be in direct contravention of their dealer agreement with Honda – clause 5.1, 5.2 and 5.5 in particular. Dealer Agreements of any dealers who contravene their Dealer Agreement by dealing in Copy Products will be terminated. (In old dealer agreement – clauses 8.1, 8.2 and 8.5)

The complete Dealer Bulletin from 24 March 2004 is attached for your information.

The one thing that we, at Honda, value above all else is the reputation of our brand. Please be assured that we will do whatever is necessary to protect it.

Regards

Robert Toscano
Honda MPE Pty Ltd

Director
General Manager
Power Equipment & Marine

Annexure 4
List of Honda Products (4 pages)

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