



**Australian  
Competition &  
Consumer  
Commission**

Our Ref: C2004/1499  
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21 July 2005

Mr Michael Wilton  
Partner  
Deacons  
GPO Box 4592  
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By facsimile: (03) 8686 6505

Dear Mr Wilton

**Exclusive dealing notifications N40557, N40595 and N40769 – Honda MPE**

Thank you for your letter dated 7 June 2005 regarding exclusive dealing notification N40769 lodged by your client, Honda Australia Motorcycle and Power Equipment Pty Ltd (Honda MPE). Thank you also for the extra information provided by your client at our meeting on 9 June 2005.

As you are aware, notification N40769 is one of three notifications lodged by Honda MPE which concern 'copy products' and which seek to restrict the dealings of parties who purchase 'copy products' as well as Honda products. In summary:

- Notification N40769, lodged on 14 September 2004, concerns conduct whereby Honda MPE will only supply Honda Products on condition that the person to whom Honda MPE supplies Honda Products (Person Supplied) and/or related bodies corporate of the Person Supplied, and persons controlled by or associated with (within the meaning of the *Corporations Act* 2001) the Person Supplied (Affiliates) do not acquire and do not re-supply 'copy products'. Further, Honda will only give, or offer to give, a rebate in relation to the supply of Honda Products on condition that the Person Supplied and its Affiliates do not acquire and do not re-supply 'copy products'.
- Notification N40595, lodged on 24 September 2003, concerns conduct whereby Honda MPE will only supply Original Equipment Manufacturers (OEMs) on condition that they do not deal in or use 'copy products' in the products they manufacture. Further, OEMs' Conditions of Sale Agreements will be terminated if they do deal in or use 'copy products'.
- Notification N40557, lodged on 25 March 2003, concerns conduct whereby Honda MPE will only supply Honda Power Equipment Dealers (Dealers) in Australia on condition that they do not deal in any 'copy products'. Further, dealer agreements will be terminated if Dealers do deal in 'copy products'.



From the information provided to the Australian Competition and Consumer Commission (ACCC) by Honda MPE, including in the context of the discussion at our meeting on 9 June 2005, I understand that Honda MPE considers that the conduct the subject of the three notifications generates public benefit with respect to reducing the likelihood of consumers being misled by 'copy products' and enhancing consumer safety. I also understand that Honda MPE considers the restrictions contained in the notifications reduce the potential negative impact of 'copy products' on the Honda brand.

As previously advised, the ACCC may review a notification at any stage. In light of concerns raised in relation to Honda MPE's notifications, the ACCC has revisited the three notifications and has identified two issues of concern. These issues are discussed below.

## **1. A definition of 'copy products'**

Notifications N40769, N40595 and N40557 all refer to 'copy products', although a consistent definition of 'copy products' is not used across the three notifications. While notifications N40557 and N40595 describe 'copy products' as 'copies of genuine Honda engines', notification N40769 describes 'copy products' as 'copies of Honda Products'.

I am concerned that the broad descriptions of 'copy products' are so general and ambiguous as to provide little guidance to affected parties as to whether Honda MPE might consider a particular product to be a 'copy product' or not, and may be used in a manner which could limit competition. The potential for the notified conduct to limit competition is a key factor in the ACCC's assessment of the public detriment likely to arise from the notified conduct.

In this context, I am not convinced that all of the 'copy' engines exhibited at the meeting on 9 June 2005 would result in consumers being misled into believing that the so called 'copy' engines were Honda products.

I note that at our meeting on 9 June 2005, Honda MPE defined 'copy products' as products that have:

1. the external overall shape and the colour combination the same as or similar to genuine Honda engines; or
2. the external overall shape the same as or similar to genuine Honda engines but the colour combination is different; or
3. main engine component parts that are interchangeable with genuine Honda engine component parts.

While the first of the above definitions appears to address the possibility of consumers being misled by 'copy products', I consider that the second and third definitions above extend beyond this and raise concerns of potential anti-competitive outcomes, thus reducing the public benefit arising from the notified conduct.

To address this issue, the ACCC requests that Honda MPE provide a clear and detailed definition of a 'copy product' for placement on the ACCC's public register. In preparing the definition, it is suggested that Honda MPE take into account the concerns expressed above.

## 2. The scope of the notifications

I note that the scope of notification N40769, lodged on 14 September 2004, appears to be much broader than the scope of notification N40595, lodged on 24 September 2003 and notification N40557, lodged on 25 March 2003.

In particular, while notification N40557 restricts Dealers and applies to Honda engines and copies of Honda engines and notification N40595 restricts Honda Original Equipment Manufacturers and applies to Honda engines and copies of Honda engines, notification N40769 restricts persons supplied with Honda products and applies to Honda products and copies of Honda products.

There would appear to be some inconsistency between the language used in notification N40769 and Honda MPE's understanding of the restrictions imposed by notification N40769. I note that at our meeting on 9 June 2005, Honda MPE advised that it is only Dealers and OEMs that are restricted by N40769. I also note that in your letter of 7 June 2005, 'Honda Products' are defined as being 'namely, engines or parts for Honda engines'.

The ACCC would appreciate confirmation of Honda MPE's understanding of the restrictions imposed by notification N40769 and clarification of the reasons for the development in language between N40557, N40595 and N40769. The ACCC proposes to place this clarifying information on the public register.

I would appreciate a response to these issues by Wednesday, 3 August 2005.

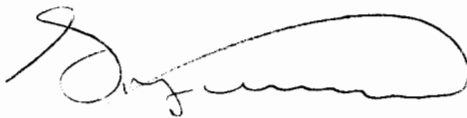
The ACCC intends to place this letter, and the following earlier correspondence, on the public register:

- ACCC to Mr Michael Wilton of Deacons – 30 March 2005;
- Ms Laura Smyth of Deacons to ACCC – 15 April 2005;
- ACCC to Ms Laura Smyth of Deacons – 27 April 2005;
- Mr Michael Wilton of Deacons to ACCC – 7 June 2005 (subject to the claims for confidentiality asserted within); and
- PDF version of the presentation by Honda MPE to ACCC on 9 June 2005.

If you have any concerns in relation to these documents being placed on the public register, please contact Kate Eckermann on (02) 6243 1236 by Wednesday, 27 July 2005.

Should you wish to discuss any other aspect of this matter, please do not hesitate to contact Ms Eckermann.

Yours sincerely



Scott Gregson  
A/g General Manager  
Adjudication Branch