

Deacons

30 August 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 Notifications N40557, N40595 and N40769

We refer to your letter of 21 July 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**).

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 (**Honda CBUs**) containing copy engines (**Copy Products**) are being marketed in Australia in a manner that is misleading to consumers. It is also damaging and disruptive to the small businesses that comprise Honda MPE's servicing dealer network, as they are increasingly confronted by the consequences of consumers being misled and seeking rectification work on Copy Products.
- 1.2 Honda MPE submits that the conduct which is the subject of notification N40769 (lodged on 14 September 2004):
 - (1) protects the interests of members of the public who might otherwise be misled into thinking that the Copy Products are of the same or similar quality to Honda Products (this is discussed further below); and
 - (2) has no anti-competitive effect. In particular, ultimate consumers are free to acquire Copy Products (if they so desire) from a wide range of persons other than Original Equipment Dealers (**OEMs**) and authorised Honda dealers. Copy Products are widely and increasingly available.

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2. A definition of Copy Product

2.1 As specified at our meeting on 9 June 2005, Honda MPE defines Copy Products as products that have:

- (1) the external overall shape and colour combination which is the same or similar to Honda Products or Honda CBUs;
- (2) the same or similar external overall shape to Honda Products or Honda CBUs but the colour combination is different; or
- (3) main engine component parts that are interchangeable with Honda Product parts.

2.2 This definition of Copy Products is necessary to prevent consumers being misled in a variety of ways when acquiring Copy Products. The most obvious case of consumers being misled is where the Copy Product is significantly similar in appearance to the corresponding genuine Honda Product or Honda CBU, with the likely consequence that the consumer believes they are acquiring a genuine product when they are not.

2.3 Being misled on the basis of appearance includes shape as well as colour. In a study undertaken by Honda it was demonstrated that there was a high degree of recognition and association with Honda Products based on shape as well as colour.

2.4 However, evidence and feedback gathered from authorised Honda dealers and consumers indicates that the confusion among consumers is much broader than this, and occurs not only when the consumer is misled as to whether the product is genuine or not, but also where the consumer knows that the product is not genuine but nevertheless believes that the Copy Product has characteristics that it does not in fact have.

2.5 Evidence collected from authorised Honda dealers and consumers suggests that consumers are being misled to believe that:

- (1) the Copy Products are "the same as" or "as good as" or "nearly as good as" Honda Products;
- (2) the Copy Products are made by Honda, a Honda affiliate, or a manufacturer who is licensed by Honda; and/or
- (3) they are able to obtain replacement parts or repairs for Copy Products from authorised Honda Product service centers.

As has been previously demonstrated by Honda MPE, all three of the above beliefs are factually incorrect. We will provide additional evidence if appropriate.

3. Public Benefit

- 3.1 There is significant public benefit to be derived from the reduction of consumer deception with regards to Copy Products as a result of them being sold through Honda branded outlets and OEMs. It is arguable that there is benefit in stopping them being sold altogether, but Honda recognises that it has no standing to argue such a point.
- 3.2 Honda MPE's policy towards Copy Products will assist both in protecting consumers and for the reasons given above its dealer network (comprising approximately 500 authorised servicing dealers). Honda MPE has previously demonstrated (through previous submissions and presentations to the ACCC) that Copy Products are inferior to Honda Products in performance, reliability and safety.
- 3.3 Other public benefits in ensuring that members of the public are not misled as to the characteristics of Copy Products (as previously drawn to the ACCC's attention in our letter of 14 September 2004) include:
- (1) **Origin** – Copy Products do not generally clearly identify the place of manufacture or the name of the manufacturer. As Honda manufactures in a number of countries, this could lead to a belief that the Copy Products are manufactured by Honda Motor Co Ltd or a company associated with Honda Motor Co Ltd;
 - (2) **Distribution origin** – the distributors of Copy Products are often ephemeral. In most cases they are not recognised entities. This heightens the perception in some cases that Honda must have an involvement in the distribution of these Copy Products;
 - (3) **Price/Value** – One of the significant disadvantages for consumers of Copy Products is the lack of well-developed markets for Copy Products, in the sense that there is an absence of efficient competition among the manufacturers of Copy Products which leads to a tension between price/quality. Among established and branded manufacturers such as Honda, Briggs & Stratton, Yamaha, Robin and Kawasaki the price/quality relativities are well established and well understood by the markets. Consumers know with these products that "you get what you pay for". A cheaper product can be expected to perform less effectively, and vice versa. This does not apply to Copy Products. A Copy Product may retail for half the price of the genuine product, but the consumer has no way of knowing if the product is half as good. The manufacturer and importer has no brand reputation to protect, and accordingly suffers no market detriment if the Copy Product turns out to be extremely poor value. Therefore, Copy Products may be overpriced having regard to their inferior quality. This over-pricing is also made possible if the purchaser is encouraged to assume that the Copy Product is essentially an unlabelled Honda Product or of similar quality;

- (4) **Emissions** – the Copy Products do not generally have the emission control equipment of the Honda Product. Honda products are designed to meet the emission control requirements of the USA and EU. Therefore they are less environmentally responsible, and yet this is not apparent from a visual inspection;
- (5) **Fuel efficiency** – Honda Products are likely to be more fuel efficient than Copy Products;
- (6) **Design** – Copy Products lack sophistication in key componentry, notably ignition and carburetion. This impacts both emissions and fuel efficiency;
- (7) **Warranty** – Honda gives an express warranty greater than the warranties implied by the Trade Practices Act. For example, its standard warranty on a Honda Product is 24 months for domestic and commercial use. It is not apparent that any express warranty applies to Copy Products. In any event, given the often ephemeral nature of the manufacturers and distributors of Copy Products, the value of any such warranty may be questionable. There is a genuine risk that the prospective purchaser of a Copy Product will assume that the Honda warranty, or a warranty similar to the Honda warranty, applies to the Copy Product. Honda MPE can provide you with evidence collected from Honda dealers and/or consumers which confirms an instance/s where such confusion has arisen;
- (8) **Parts supplied** – the Copy Products are generally imported without accompanying supplies of parts. There is an insufficient amount of parts supplies for Copy Products maintained in Australia by the manufacturers, distributors or sellers. There is a risk that the prospective purchaser of the Copy Products will assume that the Honda will be providing supplies of parts as it does for Honda Products. Honda MPE can provide you with evidence collected from Honda dealers and/or consumers which confirms an instance/s where such confusion has arisen;
- (9) **Service availability** – there is no network of authorised dealers with obligations to provide warranty service and other service to all users of the Copy Products (as there is for Honda Products). There is a genuine risk that the prospective purchasers of the Copy Products will assume that the persons authorised to service Honda Products, including the Honda dealer network, will be obliged to service the Copy Products. Honda MPE can provide you with evidence collected from Honda dealers and/or consumers which confirms an instance/s where such confusion has arisen. By contrast, Honda has a trained servicing dealer network, well established and sophisticated manufacturing facilities, established inventory control, ordering systems and supply chains, which have all been developed of many years. Honda also offers support through 1800 enquiry lines, web-site information and other means of providing after-sales support to consumers. This is generally not available in respect of Copy Products;

- (10) **Public safety** – Honda Products are often used in situations which require high performance and a high level of reliability, and the consequence of failure involves public safety – e.g. water pumps used in fire fighting equipment. This safety aspect makes it highly important that users of such equipment are not misled as to the qualities of the product which is powering the equipment. In addition Copy Products often do not have warning labels and safety information in their user manuals.

4. No anti-competitive detriment (competition issues)

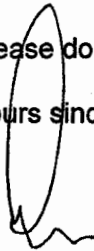
- 4.1 You have raised an issue with us which concerns the scope of several notifications lodged by Honda MPE. The manner in which Copy Products have been marketed in Australia has changed significantly over time. In response to this, Honda MPE has had to lodge three notifications (namely notification N40557, lodged on 25 March 2003, notification N40595, lodged on 24 September 2003 and notification N40769, lodged on 14 September 2004). All three notifications support Honda MPE's on-going policy of protecting both consumers and the Honda servicing dealer network against products that are deceptively similar to Honda Products and Honda CBUs, but which are of significant lower quality.
- 4.2 Most recently, Honda MPE has adopted a policy of insisting that Australian based manufacturers who acquire Honda Products to make finished products (namely OEMs) do not acquire Copy Products for use in finished products, and that both OEMs and authorised Honda dealers more generally do not acquire for re-supply CBUs containing Copy Products. For the avoidance of doubt, this is the conduct that was intended to be the subject of Honda MPE's notification of 14 September 2004 and to the extent that this is not clear, Honda MPE is prepared to modify the notification. The persons affected by this notification are:
- approximately 200 OEMs (of which about 70 are currently active); and
 - approximately 500 authorised Honda servicing dealers.
- 4.3 The conduct protected by notification N40769 would assist in minimising the extent to which consumers are misled and tend to reduce the negative reputation impact of Copy Products on the Honda brand.
- 4.4 The protected conduct has been made particularly necessary due to the heightened likelihood of consumers being misled when purchasing Copy Products from authorised Honda dealers and OEM's. Apart from the deceptively similar shape and/or colour of Copy Products to Honda Products, a consumer's tendency to associate Copy Products with Honda Products is intensified when the products are placed side-by-side and when the Copy Products are surrounded by the prevalent Honda branding present at these outlets. This would give the Copy Products a credibility they do not deserve.
- 4.5 Further, if the notified conduct was to cease, only a small proportion of authorised Honda dealers or OEMs would be likely to stock Copy Products in any event. This disparity among authorised Honda dealers or OEMs would heighten confusion as

consumers may be led to believe that those who stock Copy Products were stocking some form of "second tier" Honda Product.

- 4.6 We wish to reiterate that Honda MPE does not seek to prevent the entry of Chinese manufactured products into Australian markets. We do not believe the notified conduct has the effect of limiting the avenues to market Copy Products generally. Honda MPE estimates that there are approximately 7,442 retail outlets in Australia which stock power equipment products. There are also field-days and sales through newer channels such as the internet (eg eBay). Honda power equipment dealers and OEMs constitute a very small proportion of the overall power equipment distribution channel. Ultimately, customers can readily acquire Copy Products through many other hardware channels, and their ability to do so will not be affected by the notified conduct.
- 4.7 Honda MPE intends to withdraw notifications N40557 and N40595 which have now been rendered redundant by the terms of notification N40769 and to modify the latter to make it clear that the notified conduct applies only to authorised Honda dealers and OEMs. You will understand that we need to assure our client that the existing notifications will not be withdrawn or modified until the new or modified notification comes into effect so that there is no hiatus in coverage.

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

Yours sincerely



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