

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Hornet Industries Pty Ltd ACN 166 829 536

1. Person giving the Undertaking

- 1.1 This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Hornet Industries Pty Ltd ACN 166 829 536 for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**) (the **Undertaking**).

2. Background

- 2.1 Hornet Industries Pty Ltd (**Hornet Industries**) is an importer and distributor of pit motorbikes, dirt motorbikes, quad motorbikes, and balance bicycles (**Recreational Bikes**). It also supplies spare parts for Recreational Bikes.
- 2.2 Hornet Industries sells Recreational Bikes directly to consumers via its website and retail outlets, and to independent resellers (**Dealers**) throughout Australia via its Dealer network. Hornet Industries has, at the time of giving this Undertaking, 42 Dealers Australia-wide.
- 2.3 Hornet Industries offered to enter into agreements with Australian Dealers for the supply of Recreational Bikes based on terms used in similar dealer agreements in the United States.

3. Conduct of concern

- 3.1 From at least March 2021 to December 2022, Hornet Industries, in trade or commerce, in connection with the supply and potential supply of Recreational Bikes:
- (a) offered to enter into agreements with 42 of its Dealers which prevented them from selling Recreational Bikes at a price less than the 'minimum advertised price' (**MAP**) specified as the 'manufacturer's suggested retail price' (**MSRP**) provided on price lists to Dealers;
 - (b) emailed its Dealers directing them not to sell under the MAP, being a price less than the MSRP specified on price lists; and
 - (c) made one or more statements relating to the MAP that were likely to be understood by its Dealers as statements of price below which Recreational Bikes were not to be sold;

collectively referred to as the 'retail price maintenance conduct' (**RPM Conduct**).

- 3.2 The ACCC considers that by engaging in the RPM Conduct described at paragraph 3.1 above, Hornet Industries engaged in resale price maintenance within the meaning of sections 96(3)(b), 96(3)(c), and 96(3)(f) of the CCA, in contravention of section 48 of the CCA.

4. Admission and Resolution

- 4.1 As a result of the ACCC's investigation and in response to the ACCC's concerns, Hornet Industries:
- (a) admits that it engaged in the RPM Conduct within the meaning of sections 96(3)(b), 96(3)(c), and 96(3)(f) of the CCA, and that the RPM Conduct is likely to have contravened section 48 of the CCA;
 - (b) has ceased the RPM Conduct;
 - (c) will provide a corrective notice to all Dealers consistent with the obligations set out in paragraph 6.2 below; and
 - (d) has offered this Undertaking to the ACCC to resolve the ACCC's concerns.

5. Commencement of this Undertaking

- 5.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Hornet Industries, and
 - (b) this Undertaking so executed is accepted by the ACCC (the **Commencement Date**).
- 5.2 This Undertaking has effect for 3 years from the Commencement Date (the **Term**).
- 5.3 From the Commencement Date, Hornet Industries undertakes to assume the obligations set out in paragraph 6 below for the purposes of section 87B of the CCA.

6. Undertaking

RPM Conduct

- 6.1 Hornet Industries undertakes that it will not, in trade or commerce:
- (a) offer to enter into agreements with its Dealers which contain minimum price requirements;

- (b) communicate minimum prices to its Dealers; and
- (c) communicate retail prices to its Dealers without a statement to the following effect as outlined in section 97 of the CCA: "The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation."

Corrective Notice

- 6.2 Hornet Industries undertakes that it will, within 7 calendar days of the Commencement Date, email the corrective notice set out in **Annexure A** to all Dealers that are listed in **Annexure B** to notify them that:
- (a) the Dealer agreements offered by Hornet Industries contained minimum price requirements which are likely to have contravened section 48 of the CCA, and that Hornet Industries has now withdrawn those Dealer agreements;
 - (b) communications sent by Hornet Industries that refer to the MAP, specified as the MSRP provided on price lists to Dealers, are likely to have contravened section 48 of the CCA;
 - (c) Dealers are free to set their own retail prices; and
 - (d) any prices contained within Hornet Industries communications are recommended prices only and there is no obligation to comply with the recommendation.

CCA Compliance Program

- 6.3 Hornet Industries undertakes to, at its own expense:
- (a) establish and implement a Competition and Consumer Compliance Program (**Compliance Program**) in accordance with the requirements set out in **Annexure C**, being a program designed to minimise Hornet Industries' risk of future breaches of the CCA and to ensure its awareness of its responsibilities and obligations in relation to the requirements of the CCA;
 - (b) maintain and continue to implement the Compliance Program for a period of 3 years from the Commencement Date; and
 - (c) provide a copy of any documents required by the ACCC, if requested, in accordance with this Undertaking, including **Annexure C**.

7. ACCC Enquiries


- 7.1 During the Term, the ACCC may make reasonable enquiries of Hornet Industries with respect to compliance with this Undertaking and Hornet Industries will respond to such enquiries within a reasonable period of time.
- 7.2 If requested by the ACCC during the Term, Hornet Industries will, at its own expense, cause to be produced and provide to the ACCC copies of such documents (excluding any legally privileged documents) in its power, possession or control evidencing Hornet Industries' compliance with the obligations set out in this Undertaking.

8. Acknowledgements

- 8.1 Hornet Industries acknowledges that:
- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
 - (b) the ACCC may, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
 - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed as an Undertaking

Executed by Hornet Industries Pty Ltd ACN 166 829 536 pursuant to section 127(1) of the Corporations Act 2001 by:


Signature of director

Name of director (print)
Date 26/7/23

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

2 August 2023

Date

and signed on behalf of the Commission:



Chair

2 August 2023

Date

Annexure A

DEALER CORRECTIVE NOTICE

Hornet Industries Pty Ltd

We're contacting you as a dealer of recreational bikes supplied by Hornet Industries. This includes pit motorbikes, dirt motorbikes, quad motorbikes, and balance bicycles.

We want to let you know about things we've done that are prohibited under Australia's competition laws.

We:

1. offered to enter into dealer agreements that required our recreational bikes to be sold at or above a minimum price that we had set
2. emailed a price list to dealers with minimum prices and the words "MAP = Minimum Advertised Price - Cannot sell under this price".

These actions are known as resale price maintenance and are prohibited under Australia's competition laws. It is illegal for suppliers to impose minimum prices for the resale of their goods or services.

Resale price maintenance is illegal because it stops retailers competing on price, increasing what customers pay.

The Australian Competition and Consumer Commission, known as the ACCC, investigated our business for doing these things. The ACCC has recently accepted our court enforceable undertaking where we agreed to not set minimum retail prices again.

We want to notify you that:

- you're free to set your own prices for goods supplied to you by Hornet Industries
- we've withdrawn all agreements that contained requirements about minimum prices
- any prices contained within our communications are recommended prices only. You're not obligated to comply with our recommendation.

For more information on setting minimum resale prices and competition law, see <https://www.accc.gov.au/business/competition-and-exemptions/minimum-resale-prices>.

Annexure B

LIST OF DEALERS

Hornet Industries must send the following Dealers the corrective notice set out in **Annexure A** in accordance with the requirements set out in paragraph 6.2 of the Undertaking:

- | | |
|----------------|----------------|
| 1. [REDACTED] | 31. [REDACTED] |
| 2. [REDACTED] | 32. [REDACTED] |
| 3. [REDACTED] | 33. [REDACTED] |
| 4. [REDACTED] | 34. [REDACTED] |
| 5. [REDACTED] | 35. [REDACTED] |
| 6. [REDACTED] | 36. [REDACTED] |
| 7. [REDACTED] | 37. [REDACTED] |
| 8. [REDACTED] | 38. [REDACTED] |
| 9. [REDACTED] | 39. [REDACTED] |
| 10. [REDACTED] | 40. [REDACTED] |
| 11. [REDACTED] | 41. [REDACTED] |
| 12. [REDACTED] | 42. [REDACTED] |
| 13. [REDACTED] | |
| 14. [REDACTED] | |
| 15. [REDACTED] | |
| 16. [REDACTED] | |
| 17. [REDACTED] | |
| 18. [REDACTED] | |
| 19. [REDACTED] | |
| 20. [REDACTED] | |
| 21. [REDACTED] | |
| 22. [REDACTED] | |
| 23. [REDACTED] | |
| 24. [REDACTED] | |
| 25. [REDACTED] | |
| 26. [REDACTED] | |
| 27. [REDACTED] | |
| 28. [REDACTED] | |
| 29. [REDACTED] | |
| 30. [REDACTED] | |

Annexure C

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

LEVEL 1

Hornet Industries Pty Ltd (**Hornet Industries**) will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

Staff Training

1. For a period not less than 3 years from the Commencement Date, all employees at Hornet Industries complete:
 - 1.1. the ACCC's Small Business Education Program offered on its website at (<https://www.accc.gov.au/business/selling-products-and-services/small-business-education-program>); or
 - 1.2. an equivalent small business education program offered by the ACCC.
2. Hornet Industries will ensure that the training referred to in paragraph 1 above is completed within 1 month for new employees commencing their employment at Hornet Industries.

Complaints handling

3. Within 3 months of the Commencement Date, Hornet Industries will develop procedures for recording, storing, and responding to competition and consumer law complaints (**Complaints Handling System**).

Provision of Compliance Program documents to the ACCC

4. Hornet Industries will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than 5 years from the Commencement Date.
5. If requested by the ACCC during the period of 5 years from the Commencement Date, Hornet Industries will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 5.1. a certificate or other information from the ACCC that verifies that the training referred to in paragraph 1 has occurred; and
 - 5.2. an outline of the Complaints Handling System referred to in paragraph 3.

ACCC Recommendations

6. Hornet Industries will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems material to ensure that Hornet Industries maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.