Order NOT Entered

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

No: **(P)QUD26/2009**

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
Applicant

TELWATER PTY LTD ACN 010 795 507
First Respondent

PAUL MATTHEW PHELAN
Second Respondent

ORDER

JUDGE: Justice Spender

DATE OF ORDER: 5 March 2009

WHERE MADE: Brisbane

THE COURT DECLARES THAT:

1. By providing to dealers of Quintrex-branded products (Quintrex dealers):

   a) a price for each boat, trailer and motor package supplied to Quintrex dealers (Quintrex package) that was described as a "brochure price" or "recommended retail price" or "RRP" (Brochure Price); and

   b) a document entitled "Quintrex and Dealer Expectations" that required Quintrex dealers to advertise Quintrex packages at Brochure Price,

   from about June 2004, the first respondent (Telwater) contravened section 48 of the *Trade Practices Act 1974* (Cth) by:

   c) engaging in the act described in section 96(3)(b) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by attempting to induce Quintrex dealers not to advertise Quintrex packages at a price less than the Brochure Price;

   d) engaging in the act described in section 96(3)(c) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by entering

into an agreement with Quintrex dealers a term of which was that a Quintrex dealer could not advertise Quintrex packages at a price less than the Brochure Price; and

e) engaging in the act described in section 96(3)(f) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7) of the *Trade Practices Act 1974* (Cth) by using, in relation to Quintrex packages, a statement of price that was likely to be understood by Quintrex dealers as the price below which Quintrex packages were not to be advertised.

2. By

a) providing to dealers of Stacer-branded products (Stacer dealers) a Brochure Price for each boat, trailer, and motor package supplied to Stacer dealers (Stacer Package); and

b) requiring Stacer dealers to advertise Stacer packages at Brochure Price,

from about June 2003 Telwater contravened section 48 of the *Trade Practices Act 1974* (Cth) by:

c) engaging in the act described in section 96(3)(b) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by attempting to induce Stacer dealers not to advertise Stacer packages at a price less than the Brochure Price;

d) engaging in the act described in section 96(3)(c) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by entering into an agreement with Stacer dealers a term of which was that a Stacer dealer could not advertise Stacer packages at a price less than the Brochure Price; and

e) engaging in the act described in section 96(3)(f) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7) of the *Trade Practices Act 1974* (Cth) by using, in relation to Stacer packages, a statement of price that was likely to be understood by Stacer dealers as the price below which Stacer packages were not to be advertised.

3. By making known to Quintrex dealers and Stacer dealers that Telwater would not subsidise the cost of a Quintrex dealer's or Stacer dealer's advertising if Quintrex packages

or Stacer packages were advertised at a price below Brochure Price from about June 2005, Telwater contravened section 48 of the *Trade Practices Act 1974* (Cth) by engaging in the act described in section 96(3)(b) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by attempting to induce Quintrex dealers and Stacer dealers not to advertise Quintrex packages and Stacer packages at a price less than the Brochure Price.

4. By contacting Quintrex Dealers and Stacer dealers when they advertised at a price below Brochure Price, including:

   a) Jet 1 Marine, a Stacer dealer, in about November 2006 and February 2007;

   b) Pacific Powerboats, a Stacer dealer, in about December 2006;

   c) Sugar City Marine, a Quintrex dealer, in about December 2006;

   d) Sundown Marine, a Quintrex dealer, in about December 2006;

   e) TR Marine, a Quintrex dealer, in about December 2006;

   f) Hayway Marine, a Stacer dealer, in about November 2007; and

   g) Cooloola Marine, a Stacer dealer, in about November 2007,

   Telwater contravened section 48 of the *Trade Practices Act 1974* (Cth) by:

   h) engaging in the act described in section 96(3)(b) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7)(a) of the *Trade Practices Act 1974* (Cth) by attempting to induce Quintrex dealers and Stacer dealers not to advertise Quintrex packages and Stacer packages at a price less than the Brochure Price; and

   i) engaging in the act described in section 96(3)(f) of the *Trade Practices Act 1974* (Cth) by the operation of section 96(7) of the *Trade Practices Act 1974* by using, in relation to Quintrex packages and Stacer packages, a statement of price that was likely to be understood by Quintrex dealers and Stacer dealers as the price below which Quintrex packages and Stacer packages were not to be advertised.

5. The second respondent (Mr Phelan) was knowingly concerned in, or party to, Telwater's contraventions of section 48 of the *Trade Practices Act 1974* (Cth) set out in paragraphs 1, 2, 3, and 4.

THE COURT ORDERS THAT

6. Telwater pay to the Commonwealth pursuant to section 76 of the *Trade Practices Act 1974* (Cth) a pecuniary penalty of $210,000 in respect of the contraventions of section 48 of the *Trade Practices Act 1974* (Cth) set out in paragraphs 1, 2, 3, and 4.

7. Mr Phelan pay to the Commonwealth pursuant to section 76 of the *Trade Practices Act 1974* (Cth) a pecuniary penalty of $28,000 in respect of his involvement in Telwater's contraventions of section 48 of the *Trade Practices Act 1974* (Cth) set out in paragraphs 1, 2, 3, and 4.

THE COURT ORDERS BY CONSENT THAT

8. Pursuant to section 80(1) of the *Trade Practices Act 1974* (Cth), for a period of 5 years from the date of this order Telwater be restrained by itself, its servants or agents, or otherwise howsoever from:

   a) making it known to a Quintrex dealer that it may not advertise Quintrex packages for a price less than a price specified by Telwater;

   b) making it known to a Stacer dealer that it may not advertise Stacer packages for a price less than a price specified by Telwater;

   c) refusing to subsidise the cost of a Quintrex dealer's advertising because a Quintrex package is being advertised for a price less than a price specified by Telwater;

   d) refusing to subsidise the cost of a Stacer dealer's advertising because a Stacer package is being advertised for a price less than a price specified by Telwater;

   e) inducing, or attempting to induce, a Quintrex dealer not to advertise Quintrex packages for a price less than a price specified by Telwater;

   f) inducing, or attempting to induce, a Stacer dealer not to advertise Stacer packages for a price less than a price specified by Telwater.

9. Pursuant to section 80(1) of the *Trade Practices Act 1974* (Cth), for a period of 5 years from the date of this order Mr Phelan be restrained by himself, his servants or agents, or otherwise howsoever from:

a) making it known to a Quintrex dealer that it may not advertise Quintrex packages for a price less than a price set by Telwater;

b) making it known to a Stacer dealer that it may not advertise Stacer packages for a price less than a price set by Telwater;

c) refusing to subsidise the cost of a Quintrex dealer's advertising because a Quintrex package is being advertised for a price less than a price set by Telwater;

d) refusing to subsidise the cost of a Stacer dealer's advertising because a Stacer package is being advertised for a price less than a price set by Telwater;

e) inducing, or attempting to induce, a Quintrex dealer not to advertise Quintrex packages for a price less than a price set by Telwater;

f) inducing, or attempting to induce, a Stacer dealer not to advertise Stacer packages for a price less than a price set by Telwater.

10. Pursuant to section 86C of the *Trade Practices Act 1974* (Cth), Telwater establish and implement at its own expense a trade practices compliance program for its employees and other persons involved in its business that is designed to ensure their awareness of their responsibilities and obligations under section 48 of the *Trade Practices Act 1974* (Cth).

11. Pursuant to section 86C of the *Trade Practices Act 1974* (Cth), Telwater and Mr Phelan write to each Quintrex dealer and Stacer dealer in the form of **annexure A** at Telwater's expense.

12. Telwater and Mr Phelan pay the ACCC's costs of the proceeding fixed in the sum of $40,000.

Date that entry is stamped:

Deputy District Registrar

If you, Telwater Pty Ltd and Paul Matthew Phelan, do not obey this order within the time specified, you will be liable to court proceedings to compel you to obey it and punishment for contempt.

ANNEXURE A

Letter to Quintrex dealers and Stacer dealers

[To be placed on Telwater (or Quintrex or Stacer) letterhead, as appropriate]

[To Quintrex dealer or Stacer dealer]

[insert address]

Dear Sir/Madam (or personalise)

Resale price maintenance by Telwater

Following civil proceedings instituted by the Australian Competition and Consumer Commission (ACCC), the Federal Court of Australia has found that Telwater Pty Ltd engaged in resale price maintenance.

As an explanation, resale price maintenance is an attempt by a supplier (i.e. Telwater) to set a minimum price below which its retailers (i.e. dealerships) cannot sell, advertise, display or offer goods for sale. It is prohibited by section 48 of the *Trade Practices Act 1974*.

The Court has declared that Telwater engaged in resale price maintenance (thus contravening the *Trade Practices Act*) by:

a) requiring Quintrex and Stacer dealers to advertise boat, trailer and motor packages at brochure price;

b) refusing to subsidise the cost of Quintrex and Stacer's dealers advertising from the marketing fund if boat, trailer and motor packages were advertised below brochure price; and

c) contacting Quintrex and Stacer dealers when they advertised boat, trailer and motor packages below brochure price.

One of the Court's orders is that Telwater must write to each dealer (both Quintrex and Stacer) to notify them of the outcome of these proceedings and to inform them of the illegality of resale price maintenance.

Telwater has been ordered to pay a penalty of [amount] and to pay a contribution to the ACCC's costs of [amount]. The Court has also granted injunctions restraining Telwater from engaging in resale price maintenance in the future.

As a [Quintrex/ Stacer] dealer, you are free to set the price at which you advertise or sell our products you purchase from us. This freedom is protected by the *Trade Practices Act*. Any "brochure price" or "recommended retail price" or "RRP" used or set by us (or any other supplier for that matter) is a suggestion only.

Further, Telwater cannot refuse to subsidise the cost of your advertising under the marketing fund because a [Quintrex/Stacer] package is being advertised for a price less than a price set by Telwater.

I have enclosed a copy of the ACCC publication entitled "Resale Price Maintenance" for your perusal. You can also obtain further information about the ACCC's proceedings against Telwater and the *Trade Practices Act* generally from the ACCC website at www.accc.gov.au.

Yours sincerely

Paul Phelan

Managing Director