

**RESTRICTION OF PUBLICATION OF**  
**PART CLAIMED**  
**Pages 9 & 10 Paragraph 5**  
**Annexure**

**Form G**

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 93 (1)*

**NOTIFICATION OF EXCLUSIVE DEALING**

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

**1. Applicant**

(a) **Name of person giving notice:**

*(Refer to direction 2)*

N93925 Marine Power International Pty Ltd (ABN 25 003 100 007) ("**Marine Power International**")

(b) **Short description of business carried on by that person:**

*(Refer to direction 3)*

Marine Power International imports and distributes, among other things, Mercury and Mariner branded outboard boat engines, Mercruiser branded inboard and sterndrive boat engines and Quicksilver branded parts and accessories for boat engines (collectively "**Products**"). Marine Power International is a subsidiary of the Brunswick group of companies which manufacture and supply these products internationally.

(c) **Address in Australia for service of documents on that person:**

C/- John Lancefield

TressCox Lawyers

Level 9, 469 La Trobe Street

MELBOURNE VIC 3000

**2. Notified arrangement**

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

Mercury branded outboard boat engines ("**Mercury Outboards**").

- (b) Description of the conduct or proposed conduct:

**Background**

Marine Power International distributes Products in Australia primarily through its networks of independent Mercury, Mariner and Mercruiser dealers and boat manufacturers. These dealers are authorised to market and sell specified lines of Products to end user customers in accordance with the terms of their respective dealer agreements with Marine Power International and to provide after sales servicing, maintenance and repairs. The boat manufacturers supply boats fitted with Mercruiser, Mercury and/or Mariner engines and accessories direct to consumers and to boat resellers (including Mercury, Mariner and Mercruiser dealers).

Mercury and Mariner dealers are also authorised to perform warranty repairs to Mercury and Mariner outboard engines on behalf of Marine Power International in accordance with its factory warranty obligations.

Most of Marine Power International's engine sales are Mercury branded engines. At present Marine Power International has 105 Mercury dealers, 36 Mariner dealers and 32 dealers who sell both Mercury and Mariner branded product.

Marine Power International presently provides support to its dealers to promote the sales, after sale assistance and safety of Mercury Outboard engines. Such support includes:

- Financial assistance to some dealers to establish dealer premises and showroom facilities, such as contribution to signage costs;
- Product information and technical support;

- Sales and marketing support;
- Training for servicing and repair of Products.

At present, the dealer agreements which Marine Power International enters into with each of its Mercury, Mariner and Mercruiser dealers (the **Standard Dealer Agreement**) do not preclude the dealer from selling products which are similar to or compete with Marine Power International's engines . The Standard Dealer Agreement provides that either Marine Power International or the dealer may terminate the Dealer Agreement without assigning a reason on 30 days notice.

In practice many Mercury dealers choose not to sell non-Mercury outboards (**"Mercury Mono Dealers"**), while others sell Mercury and one or more other brand or brands of outboards.

Marine Power International offers its Mercury dealers a performance based dealer benefits program. Under this program, dealers can qualify for benefits such as sales rebates, more attractive floor plan finance terms and financial contributions to promotional activities by achieving specified targets for Mercury Outboard sales. The benefits available increase with the sales target achieved by the dealer. Also, higher benefits are available to Mercury Mono Dealers.

### **Conduct or Proposed Conduct**

Marine Power International intends to offer a new dealer agreement (**"Premium Dealer Agreement"**) to some of its Mercury dealers and prospective Mercury dealers. This Agreement will differ from the Standard Dealer Agreement by containing the following additional provisions:

- a restraint which prohibits the dealer from reselling outboard engines which compete with Mercury Outboards (**"Competitor Outboards"**) except in accordance with the Agreement (the **"exclusivity term"**). The Premium Dealer Agreement will permit such sales where either:
  - (i) the products are noted in the Premium Dealer Agreement as being products sold by the dealer before the Premium Dealer Agreement came into operation and therefore not subject to the exclusivity term; or

- (ii) Marine Power International consents to the sale. The Agreement provides that Marine Power International must not unreasonably withhold its consent where the volume of sales of Competitor Products does not exceed 5% of the dealer's quarterly sales target for Products.

The exclusivity term would cease to operate on the termination of the Premium Dealer Agreement.

- an initial term of 3 years (which may be terminated early by either party by giving the appropriate period of notice) and a right to extend the Premium Dealer Agreement for a further term of 3 years if the dealer is not in default;
- either party may terminate the dealership at any time without assigning a reason upon giving 180 days notice;
- an obligation on the dealer to meet quarterly sales targets and a right by Marine Power International to terminate the Premium Dealer Agreement if targets are not met for two consecutive quarters or if the parties fail to agree upon variations to the quarterly sales target.

(collectively **"the Premium Dealer Terms"**)

Marine Power International intends to retain the Standard Dealer Agreement as its primary form of dealer agreement for Mercury Dealers and the Premium Dealer Agreement will generally be offered to selected Mercury dealers or prospective Mercury dealers based in populated regions in which there exists retail competition from other boat and engine resellers and in which areas Marine Power International believes that sales of its Mercury Outboards would benefit from distribution through a specialist Mercury reseller. In these areas, there is generally strong inter-brand competition for outboard engines.

Marine Power International does not intend to offer dealer agreements with exclusivity terms for use with its Mariner and Mercruiser dealerships.

Accordingly, the notified conduct can be formulated as Marine Power International:

- (a) supplying or offering to supply Products to Premium Dealers for resale on the condition that the Premium Dealer will not or will not except to a limited extent resupply products which compete with the Products;
- (b) giving or allowing or offering to give or allow a credit, discount, allowance, rebate or credit in relation to the supply of Products or the proposed supply of Products on the condition that the Premium Dealer will not or will not except to a limited extent resupply products which compete with the Products.

While Marine Power International denies that the notified conduct has the purpose or has or is likely to have the effect of substantially lessening competition in any relevant market, Marine Power International appreciates that if such conduct were found to have such purpose or effect or likely effect, the conduct may be construed as falling within the provisions contained in Sections 47(1), 47(2), (possibly) 47(3) and 47(10) of the Trade Practices Act 1974 ("TPA"). Accordingly, Marine Power International wishes to notify the conduct under Section 93(1) of the TPA.

*(Refer to direction 4)*

**3. Persons, or classes of persons, affected or likely to be affected by the notified conduct**

- (a) Class or classes of persons to which the conduct relates:

*(Refer to direction 5)*

- wholesale suppliers of outboard engines and associated products
- Mercury Premium Dealers
- other Mercury Dealers
- end-user purchasers of outboard engines and boats with outboard engines

- (b) Number of those persons:

(i) At present time:

- Wholesale suppliers of outboard engines:
  - Yamaha Motor Australia Pty Ltd (Yamaha)
  - Marine Power International (Mercury and Mariner)
  - Honda Australia Pty Ltd (Honda)
  - The Haines Group Pty Ltd (Suzuki)
  - BRP Australia Pty Ltd (Evinrude)

- Lakeside Marine Pty Ltd (Tohatsu).

In addition, there are a small number of suppliers of China built products as well as a number of parallel importers of the above brands of outboard engines. Marine Power International does not know the number of these suppliers but believes that they supply only a small portion of total wholesale outboard engine sales in Australia.

- Mercury Premium Dealers  
Nil

- Other Mercury dealers

105 Mercury dealers and a further 32 dealers who sell both Mercury and Mariner engines

- End-user purchasers of outboard engines and boats with outboard engines wholesaled in 2008  
Approximately 38,000

(ii) Estimated within the next year:  
(Refer to direction 6)

- Wholesale suppliers of outboard engines.  
As above

- Mercury Premium Dealers  
30 to 50

Other Mercury Dealers

55 to 75 Mercury dealers and 32 who sell both Mercury and Mariner products

- End-user purchasers of outboard engines and boats with outboard engines  
Approximately 38,000

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

#### **4. Public benefit claims**

- (a) Arguments in support of notification:  
*(Refer to direction 7)*

Marine Power International expects that the introduction of the Premium Dealer Agreement will generate a number of public benefits, including the following:

- Encourage the dealer to consolidate the dealer's range of product brands which in turn will assist in:
  - (i) **reducing the dealer's operating costs through the improved efficiencies of scale that the dealer will enjoy by selling higher volumes of the one brand of Products instead of lower volumes of different brands. These efficiencies may include reduced product delivery and holding costs, reduced advertising and promotional costs, reduced costs of training staff and providing product information to consumers and reduced rental costs due to the smaller area of showroom and saleyards required to display stock and other point of sale promotional material. In the competitive sales markets in which dealers operate, these savings will assist dealers to compete in the retail market by discounting prices and thereby promote competition;**
  - (ii) **making it easier for the dealer to provide improved product information, point of sale materials and product displays to consumers at the dealer's showroom/showyard. This may assist consumers to make more informed choices about their purchases of Products and encourage competing resellers to improve their display of product information;**
- **Encouraging dealers to fund sales promotions and specials which will develop the dealer's business as a Premium Dealer and provide benefits to consumers which in turn will promote retail competition. Marine Power International believes that such encouragement will result from the dealer's increased security of tenure in remaining a**

Mercury dealer (due to the longer period of notice for termination without reason) and the commercial pressure that will be on the dealer to sell Products as a result of the dealer's obligation to meet quarterly sales targets and the fact that it will be harder for the dealer to fall back on sales of other brands of products which are substitutable with the Products.

- Encouraging Premium Dealers to develop specialized knowledge and procedures for repairing and servicing Products and to invest in equipment that is specialized for repairing and servicing the Products.

This may improve the quality of repairs and servicing, thus increasing product reliability and safety. Mercury outboards are built to a high level of specification and performance. Any failure by these engines to perform satisfactorily could have serious safety consequences.

Such investment and specialisation may also lead to a reduction in costs to the Premium Dealer of performing the repairs and servicing. The dealer would be able to pass on savings to its customers, which in turn may promote competition.

- Encouraging the dealer to increase sales of Mercury Outboard engines and thereby potentially qualify for rebates and other benefits under the Mercury dealer benefits program. Benefits received under this program will effectively reduce the cost of stock to the dealer. In the competitive markets in which the Premium Dealers will operate, the potential to qualify for rebates and other benefits will assist Premium Dealers to compete by discounting their selling prices and/or otherwise adding value to the buyer (eg. through free servicing or extended warranties). This in turn will promote competition in the retail market.

(b) Facts and evidence relied upon in support of these claims:

See attached Mercury Dealer Benefits program currently in force.

## **5. Market definition**



Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*(Refer to direction 8)*

Marine Power International considers that the markets primarily relevant to the assessment of this notification are:

- The wholesale market for boat engines and parts and accessories in Australia (“the Wholesale Market”).
- The retail market in Australia for powerboats, boat engines and related parts and accessories and servicing and repairs (“the Retail Market”).

### The Wholesale Market

The Wholesale Market comprises outboard engines and related parts and accessories (which Marine Power International believes make up around 80% to 90% of sales) and inboard and sterndrive engines (which Marine Power International believes make up the remaining 10% to 20%).

Marine Power International supplies around [Restriction of Publication of Part Claimed – Paragraph 5] of the new outboard engine component of the Wholesale Market under its Mercury and Mariner brands.

Other significant suppliers are the distributors of Yamaha, Suzuki, Honda, Evinrude and Tohatsu outboard engines parallel imports of these brands and a number of suppliers of China built engine.

Their respective shares of the outboard engine segment of the wholesale market and the numbers of dealers are<sup>1</sup>:

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<sup>1</sup> This excludes engines supplied into the wholesale market by importers of China manufactured products and engines supplied by parallel importers of engines. Marine Power International believes that these suppliers collectively constitute a small portion of the overall outboard segment of the market, although Marine Power International has no data regarding these suppliers.

## [Restriction of Publication of Part Claimed – Paragraph 5]

The significant acquirers of boat engines and parts and accessories in the wholesale market are:

- Dealers and other resellers of Mercury, Mariner, Yamaha, Suzuki, Honda, Evinrude and Tohatsu. Some of these dealers acquire and resell only one brand of outboards and parts and accessories while others acquire and resell two or more brands. These dealers generally operate businesses that sell boats fitted with engines, engines which the dealer fits to a customer's boat and servicing and repairs for boats and boat engines;
- Wholesale distributors. Marine Power International does not supply Products to wholesale distributors in Australia.
- Boat Builders who supply powerboats with engines to the local and export markets.

### The retail markets

The retail market comprises the market at a retail level for these goods and services in Australia.

The resellers supplying this market are:

- Independent retailers of powerboat and engine and after sales services. These resellers operate retail outlets from which they sell, among other things, new and used powerboats (with outboard or sterndrive engines fitted), outboard engines (which the reseller will fit to a customer's boat) and after sales repairs, maintenance and servicing. The resellers generally acquire completed boats from boat builders and engines and parts and accessories from one or more of the wholesale suppliers. Outboard engines and parts and accessories are usually acquired under a dealer agreement with either Marine Power International, Yamaha, Suzuki, Honda or BRP (Evinrude). Some resellers have only one supplier while others have two or more.
- Boat builders who supply direct to consumers.
- Dealerships selling used boat and outboard engines.

- Private sales of boats and boat engines – eg trading post, ebay-
- Internet resellers of new boats and engines
- Independent mechanics who provide repairs and servicing. Some also sell new and/or used engines and boats.

## **6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:

*(Refer to direction 9)*

Marine Power International does not expect that its proposed introduction of the Mercury Premium Dealer Agreement will lead to any significant public detriment. Marine Power International only intends to offer and continue Premium Dealer Agreements in population centres where there exist boat and boat engine resellers that compete with the Premium Dealer. Accordingly, the market will continue to have access to Competitor Products and after sales repairs and servicing of these products.

Competition in these retail markets is strong and Marine Power International believes that the appointment of Premium Dealers in these markets will promote brand specialization and interbrand competition between resellers.

Marine Power International believes that there are no reasons for expecting that the proposed introduction will lead to any lessening of competition or other public detriment in the other markets identified.

To the extent the conduct may lead to public detriment, Marine Power International considers that the exceptions to the exclusivity clause will mitigate any detriment to the public. In particular, the Premium Dealer is permitted to continue to sell Competing Products that are noted in the Agreement as being previously supplied by the Premium Dealer. Furthermore, the proposed exclusivity clause imposes an obligation on Marine Power International to not unreasonably withhold consent to a Premium Dealer selling Competitor Products where such sales are less than 5% of the dealer's sales targets for Products.

(b) Facts and evidence relevant to these detriments:

Not applicable.

**7. Further information**

(a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Dated..... 23/3/09 .....

Signed by/on behalf of the applicant

.....  
(Signature) 

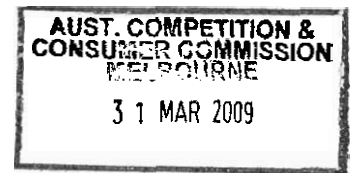
JOHN WILLIAM TEMPLE

(Full Name)

Marine Power International Pty Ltd(Organisation)

General Manager Australia, New Zealand & Pacific

(Position in Organisation)



## **DIRECTIONS**

In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.

Describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.

If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.

Describe the business or consumers likely to be affected by the conduct.

State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.

Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.

Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

**[Restriction of Publication of Part Claimed – Annexure]**