



**Australian  
Competition &  
Consumer  
Commission**

Our Ref: N93925  
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**16** July 2009

Mr John Lancefield  
Special Counsel  
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*By email: [John\\_Lancefield@tresscox.com.au](mailto:John_Lancefield@tresscox.com.au)*

Dear Mr Lancefield

### **Marine Power International Pty Ltd – notification N93925**

The Australian Competition and Consumer Commission (the ACCC) has concluded its assessment of the exclusive dealing notification lodged by Marine Power International Pty Ltd (Marine Power). Please find attached an outline of the conduct notified by Marine Power and a summary of the notification process.

Under subsection 93(3) of the *Trade Practices Act 1974* (the Act), the ACCC may revoke a notification for exclusive dealing if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.

Based on an assessment of all the information currently before it, the ACCC is not satisfied that the notified conduct is likely to have the effect of substantially lessening competition. As a result, the immunity provided by notification N93925 will continue.

In making its assessment, the ACCC had particular regard to:

- Marine Power proposes to appoint a limited number of Premium Dealers (between 30 to 50).
- Existing Marine Power dealers who are offered a Premium Dealership will be free to decline the offer and remain under their Standard Dealer Agreement. The Standard Dealer Agreement does not preclude the dealer from selling products which are similar to or compete with Marine Power's engines.
- Single brand dealerships are not uncommon amongst the manufacturers of outboard motors.
- Most, if not all, Premium Dealers will already be single brand dealers. The ACCC considers that manufacturers will continue to be able to access a similar volume of dealers through which their products are sold.

- Selected existing dealers or prospective dealers will be appointed as Premium Dealers in populated regions in which there exists retail competition from other boat and engine resellers. Confidential information provided to the ACCC confirms that the regions in which Marine Power intends to initially offer Premium Dealerships have at least 3 or 4 competing dealers. The ACCC considers that consumers will continue to be able to compare brands and prices across dealerships within the region.
- The notified conduct will not prevent Premium Dealers from purchasing the genuine parts and accessories required to service those engines from competing manufacturers. Although the ACCC notes that the extent to which this is possible depends on the arrangements between the Premium Dealer and the specific manufacturer/wholesaler.
- Premium Dealer agreements will be offered for an initial term of 3 years.

Based on this information the ACCC does not consider that the notified conduct will foreclose access to dealers for manufacturers of competing brands of outboard boat engines. Further, the ACCC considers that a level of competition and consumer choice will remain at the regional level. As such the ACCC does not consider that the notified conduct will have the effect of substantially lessening competition in the relevant markets. The ACCC does not intend to take any further action in this matter at this stage.

The ACCC notes that this assessment has been made based upon Marine Power's advice that between 30-50 Premium Dealers will be appointed. The effect on competition associated with the notification may change if this number was to significantly increase or if Premium Dealers were being appointed in non-populated regions.

The ACCC further notes that under the Franchising Code of Conduct (the Code), a motor boat dealership agreement is taken to be a franchise agreement and depending on the terms of its agreements with dealers, Marine Power may therefore be required to comply with the provisions of the Code in relation to the notified arrangement. This assessment has also been made on the basis that Marine Power will disclose all relevant terms and conditions to current and prospective franchisees and comply with the disclosure requirements of the Code if applicable. Among other things, these specify that a franchisor must:

- provide prospective franchisees with a disclosure document, a copy of the Code and a copy of the franchise agreement in the form it is to be executed at least 14 days prior to entering into a franchise agreement or making a non refundable payment in connection with the agreement
- provide to prospective franchisees all other agreements that the franchisee is required to enter into under the franchise agreement, such as leases, hire purchase, security and confidentiality restrictions at least 14 days before they sign the franchise agreement if they are available at that time, or if they are not available, when they become available and

- provide information to franchisees in its disclosure document about any restrictions by a franchisor on the goods or services that a franchisee may supply.

As with any notification, the ACCC may act to remove the immunity afforded by the notification at a later stage if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.

The ACCC notes that the notification lodged by Marine Power only provides immunity for the exclusive dealing conduct notified by Marine Power (as outlined in the attachment).

A copy of this letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Monica Bourke of (02) 6243 1351.

Yours sincerely

A handwritten signature in black ink, appearing to be 'R' followed by a horizontal line and a flourish.

Dr Richard Chadwick  
General Manager  
Adjudication Branch

## **Exclusive Dealing Notification N93925 lodged by Marine Power International Pty Ltd (Marine Power)**

### **The notified conduct**

The conduct the subject of the notification is as follows:

Marine Power proposes to:

- (a) supply or offer to supply Products to Premium Dealers for resale on the condition that the Premium Dealers will not or will not except to a limited extent resupply products which compete with the Products
- (b) give or allow or offer to give or allow a credit, discount, allowance or rebate 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.

Products refers to Mercury branded outboard boat engines.

Under the proposed Premium Dealer Agreement sales of products which compete with Mercury branded outboard boat engines will be permitted 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 consents to the sale. The Premium Dealer Agreement provides that Marine Power 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.

### **Notification process**

Marine Power has lodged the notification under section 93(1) of the Trade Practices Act (the Act) because the conduct may fall within the exclusive dealing provisions contained in sections 47(1), 47(2) and 47(3) Act.

Broadly, exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals. Exclusive dealing of the type notified by Marine Power is prohibited where it substantially lessens competition.

However businesses can obtain immunity from legal action under the Act for exclusive dealing conduct by lodging a notification. Immunity commences automatically from the date the notification is validly lodged.

The ACCC may issue a notice revoking the immunity afforded by a notification if it is satisfied that the notified conduct has the purpose, effect or likely effect of

**substantially lessening competition in a relevant market and that in all the circumstances:**

- (a) the conduct has not resulted or is not likely to result in a benefit to the public  
or**
- (b) any benefit to the public that has resulted or is likely to result from the conduct  
will not outweigh the likely detriment to the public constituted by any  
lessening of competition that has resulted or will result from the conduct.**