

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — 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 *Competition and Consumer Act 2010*, 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.

1. Applicant

(a) Name of person giving notice:

N99441 Fireplace Products Australia Pty Ltd (ACN 117 303 554) (“FPA”)

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

FPA supplies gas and wood heating products wholesale to retailers for re-supply in Australia.

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

Coulter Roach Lawyers

PO Box 700

GEELONG VIC 3220

2. Notified arrangement

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

FPA supplies the following goods under the Regency® brand (“Goods”):

1. Gas log fire places
2. Outdoor gas fireplaces
3. Inbuilt gas and wood heaters
4. Freestanding gas and wood stoves

(b) Description of the conduct or proposed conduct:

FPA has offered to supply its products to the retailers on the condition that they do not re-supply the products outside a thirty kilometre radius of their business premises, without first seeking FPA’s consent.

A copy of the relevant conditions are contained in **Annexure B**.

- 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:
There are two classes of persons to which this conduct relates, namely:
1. consumers of the Goods; and
 2. retailers of the Goods.
- (b) Number of those persons:
- (i) At present time:
1. consumers – unknown
 2. retailers – 123
- (ii) Estimated within the next year:
Same as 3(b)(i)
- (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:
See **Annexure A**
- (b) Facts and evidence relied upon in support of these claims:
See **Annexure A**

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):

See **Annexure A**

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:

See Annexure A

- (b) Facts and evidence relevant to these detriments:

See Annexure A

7. Further information

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

Emily Capill or Paul Washington of Coulter Roache Lawyers

PO Box 700

GEELONG VIC 3220

(03) 5273 5263

Dated..... 16TH NOVEMBER 2016.....

Signed on behalf of FPX

.....
(Signature)

Full name: William Matthew McLean

Organisation: Fireplace Products Australia Pty Ltd

Position: Director

ANNEXURE A - SUBMISSIONS

Market definition

1. FPA submits that the relevant market is the retail supply of wood and gas log fired heater products in Australia (“**Market**”).

Market background

2. FPI Fireplace Products International Ltd (“**FPI**”) is a company registered and incorporated in British Columbia, Canada, that manufactures and distributes gas and wood heater fireplace products. FPI is the registered owner of the Regency® trade marks in Australia (“**Trade Marks**”). All gas heater products are manufactured in Canada and the majority of wood heater products that are supplied in Australia are manufactured in China under licence by an entity authorised by FPI, and the Trade Marks are applied to them.
3. FPI has two international distribution channels for the Goods, which are in the following countries:
 - (a) Australia; and
 - (b) North America.
4. FPA is one of two distributors in Australia that imports and supplies the Goods in Australia. FPA does not supply the Goods at the retail level.
5. FPA has been distributing the Goods wholesale to retailers and distributors in Australia since 2006 and whilst most of its retailers only supply the Goods at their physical premises, FPA is aware that some of its retailers also supply the Goods online and that this appears to be a growing trend among its retailers.
6. FPA is currently supplying the Goods for re-supply to 123 retailers and one distributor. The distributor supplies wholesale to retailers in Western Australia.
7. The retailers are located across all States and Territories in Australia, except for Western Australia, in the following proportions:

State/Territory	Number of retailers	Approx. %
New South Wales	51	42
Victoria	43	35
South Australia	18	15
Queensland	5	4
Tasmania	3	2
Australian Capital Territory	2	2
Northern Territory	1	0.1

8. **Exhibit A** is a map of Australia which identifies the locations of FPA’s retailers.

9. The retailers are a combination of:

Type of retailer	Description	% of FPA's retailers
Department stores	Stores which employ more than 15 staff and which supply a large range of outdoor furniture and homeware products.	5%
Specialty retail stores	Stores which employ approximately 15 staff or less and which are usually operated by families. These stores specialise in heating products and accessories but may also supply other furniture products including outdoor barbeques and dining settings.	95%

10. All of the retailers supply the Goods alongside competing products. None of the retailers distribute only the Goods, so there are no retailers whose business depends entirely on FPA.
11. Other products which are substitutable for the Goods and which are supplied by the retailers are listed in **Exhibit B**.
12. **Exhibits C and D** are confidential and disclose FPA's assessment of its market share and the wood industry statistics which support its assessment.
13. Among the many competing products to its Goods, FPA considers that its major competitors (because of the strength of the brand), are those listed in confidential **Exhibit E** ("**Major Competitors**"). These Major Competitors are supplied Australia wide. FPA estimates that almost all its retailers supply at least one of the Major Competitors alongside the Goods.
14. In addition to FPA's retailers, FPA is aware that the Major Competitors are also supplied at the wholesale and retail level by other distributors and retailers throughout Australia. Some examples of the other suppliers that FPA is aware of that supply the Major Competitors are contained in confidential **Exhibit F**. FPA is aware that there are many more suppliers that supply the Major Competitors than those contained in Exhibit F but it is unable to provide specific details of them.

The purpose and effect of the conditions

15. FPA has recently reviewed its arrangements with its retailers and it proposes to insert the conditions in **Annexure B** ("**Conditions**") in its terms and conditions which govern the supply of the Goods from FPA to its retailers.
16. The purpose of the Conditions is to enable FPA to manage the quality of the Goods and services supplied under the Trade Marks, including the installation and maintenance of the Goods in accordance with industry standards and product specifications.
17. FPA provides Goods which are complex in nature and which can be harmful to the customer if the Goods are not properly installed and serviced. For this reason, FPA has sought to manage the retailer's ability to:
- (a) sell the Goods off-site, where proper advice, service and technical support for the Goods may not be available; and

- (b) attract customers who intend to install the Goods at a location where the retailer will not be able to provide adequate advice, service and technical support to the customer in relation to the Goods.
18. The combined effect of the conditions is to limit the retailers' ability to advertise or sell the Goods outside a thirty kilometre radius of its business premises ("**Territory**").

Substantially Lessen Competition

19. Given:
- (a) the Goods occupy a relatively small share of the Australian market for wood and gas heater products;
 - (b) there are currently many competing products in the Australian market which can be substituted for FPA's Goods; and
 - (c) none of FPA's retailers' businesses are dependent on the supply of FPA's Goods because the retailers supply a range of competing products;

it is unlikely that the effect of the Conditions will be to substantially lessen competition in the Market.

Public benefits

20. The following public benefits are likely to ensue from imposing the Conditions:
- (a) the customer will receive higher quality services from the retailers in relation to the supply of the Goods before the Goods are acquired by the customer;
 - (b) the customer will receive higher quality services from the retailers after the Goods are acquired by the customer, particularly in relation to installation, maintenance, repair and warranty issues, and this in turn will reduce the risk to customer safety arising from defective Goods and/or installation; and
 - (c) the customer will have the benefit of the FPA customer warranty ("**Warranty**") in relation to the Goods. The services under the Warranty apply to all customers who acquire the Goods from a retailer, however:
 - (i) there is a requirement that the customer bear the cost of any travel expenses of a technician who is required to travel outside the Territory of the retailer who sold the Goods to the customer, for purposes of servicing the Goods under the Warranty; and
 - (ii) the Warranty will not extend to defects or losses that result from installation or servicing by an agent who is not a qualified technician for the particular installation.

Quality and cost of services

21. In order to ensure:
- (a) its retailers provide services of a high standard to its customers; and
 - (b) the safety of its Goods;

FPA trains the staff and technicians engaged by the retailers in relation to the Goods. FPA also provides technical support to staff and technicians engaged by the retailers, which is provided by telephone or by sending its own agent to the retailer or the customer (whichever is applicable) to address the issues. Although some retailers engage technicians who may not have received formal FPA training, the technicians engaged by the retailers are usually

reputable and have experience with installing and servicing FPA's Goods. FPA has been working closely with its retailers for several years to ensure that both their staff and their technicians receive adequate training and technical support from FPA.

22. To ensure that there is a trained or experienced technician available to assist the customer, FPA limits the supply of the Goods to an area where those trained or experienced technicians will be available and willing to assist the customer. In the course of FPA's dealings with its retailers over the years, it is apparent that the retailers are willing to assist customers who purchase the Goods from them within their Territory.
23. If the Goods are supplied and installed within the Territory of the retailer who supplied the Goods to the customer, the retailer will be required to assist the customer using trained or experienced technicians at minimal or no further cost to the customer (assuming the service issue falls within the scope of the Warranty). Notably, services that are provided by the retailer are more efficient in time, administration and cost than if the services are supplied by FPA.
24. If the Goods are supplied outside the retailer's Territory and there is a retailer located nearer to the customer's location, FPA has observed that, for convenience, the customer may contact the local retailer, rather than the retailer it originally purchased the Goods from. In many instances, the local retailer is unwilling to assist the customer because the customer did not acquire the Goods from them. In such cases, the customer or the retailer contacts FPA to assist as the retailer is unable or unwilling to provide service support to such customers.
25. There have been instances where, in response to a customer's service issue, FPA has arranged for a trained technician to travel to the customer's premises. Because the customer was not located within the retailer's Territory, FPA was unable to locate a reputable local technician to assist the customer. Consequently, the customer was liable to bear the travel costs of the trained technician.

Quality of supply

26. In order to ensure the customer is purchasing Goods that are suitable and appropriate for their needs and premises, the customer will need advice from the retailer in relation to the specifications and features of the Goods prior to acquiring them. Sometimes this will involve the retailer sending a technician or a trained store representative to the customer's premises to inspect the premises to ensure that the Goods will be appropriate for the premises, including that a unit of an appropriate size is purchased that can be installed in the required area.
27. If the customer is located outside the retailer's Territory, the retailer will be unlikely to:
 - (a) inspect the customer's premises to ensure/assess the suitability of the Goods; and/or
 - (b) deliver and install the Goods free of charge to the customer.
28. If the retailer is not able or willing to inspect and understand more about the customer's premises and location prior to the customer acquiring the Goods, then there is a greater risk that the customer will acquire Goods which are not suitable for its premises. If the customer wishes to return the Goods because they are not suitable, the issues discussed in paragraphs [24]-[25] are likely to arise.
29. In order to address the issues discussed in paragraph [28], FPA has sought to manage the retailers' ability to:
 - (a) supply the Goods to customers online. If the customer acquires the Goods online it is likely that they will not receive the appropriate advice from the retailer prior to acquiring the Goods. Further, online supply of the Goods is likely to encourage customers to:

- (i) acquire the Goods without first seeking appropriate advice; and
 - (ii) install the Goods in a location where there is no trained or experienced technician to install or service the Goods; and
- (b) advertise the price of any sales applied to the Goods online. If customers can view the value of the sales online rather than in store:
- (i) they will be encouraged to attend a retailer that may be located more than 30 kilometres away from where they intend to install the Goods. For reasons discussed in these submissions, attracting customers who are located significant distances away from the retailer who supplies them the Goods is not in the public benefit; and
 - (ii) the customer may be enticed by the advertised sale price to attend the retail store, without having knowledge of whether the advertised Goods are suitable for their needs and their premises; and
- (c) engage in bait advertising or mislead the customer in relation to the “sale” price of the Goods. FPA is particularly concerned about its retailers advertising sales of the Goods on the internet, which are not genuine sales, but is a mere mechanism for attracting customers to the retailer’s store. FPA is aware that at least one of its retailers has been advertising discounted prices on its Goods on the retailer’s website for several months in a row.

Quality of installation

30. If the retailer offers to deliver and install the Goods outside its Territory, it is likely to do so at an additional cost to the customer. This is because the Warranty does not cover travel expenses for technicians outside the retailer’s Territory. If the customer arranges for the Goods to be installed themselves rather than engage a technician recommended by the retailer, it is possible that:
- (a) if the person who installed the Goods is not a licensed plumber and gas fitter, the Warranty for the Goods will not apply to defects arising as a result of the installation of the Goods by that plumber; and
 - (b) the Goods may be installed incorrectly, which is not only a safety hazard for the customer (and may also cause issues under the customer’s insurance policies), but it also increases the number of complaints and service issues that the retailers and FPA need to deal with. Some examples of installation issues which have arisen, of which FPA is aware, as a result of the customer not retaining a trained or experienced technician to install the Goods include:
 - (i) the isolation switches not being fitted;
 - (ii) the flues being connected back-to-front;
 - (iii) the log arrangement being incorrectly set-up;
 - (iv) the gas pressures and restrictor settings not being checked;
 - (v) incorrect flue runs being installed; and
 - (vi) incorrect finishing materials being used as well as installation clearances not being adhered to. This can cause walls to crack and also be a safety hazard.
31. The installation process, particularly for gas log fire places is complex, which means there is more opportunity for the Goods to be installed incorrectly, particularly if the plumber and gas

fitter has not been properly trained by FPA prior to installing the Goods. Examples of the matters which should be addressed by the technician who is installing the Goods include:

- (a) the gas logs need to be set up precisely in the correct locations (as specified in the manual for the Goods), otherwise the Goods may produce carbon and soot, which may result in product performance and safety issues;
 - (b) the gas pressure needs to be set correctly;
 - (c) the restrictor plates need to be checked and adjusted depending on the flue runs;
 - (d) non-combustible walls and framing specifications (specified in the manual for the Goods) need to be adhered to; and
 - (e) isolation switches need to be fitted appropriately.
32. Due to the complex nature of the Goods and the installation, it is likely that a licensed plumber and gas fitter will not have the requisite degree of knowledge and skill to install the Goods correctly, unless they had first been trained by FPA. This is evident from the examples of poor installation identified in subparagraphs [30](b)(i)-(vi). If the Goods are installed incorrectly, the cost to rectify the issues that arise from the defective installation is usually high. This is because walls may need to be removed and replaced in order to fix the problem. If the defective installation is not caused by a licensed plumber and gas fitter, the customer will bear the cost of the repair.
33. If the Goods are supplied to a customer and the customer intends to install the Goods within the retailer's Territory:
- (a) it is more likely that there will be a trained technician or an experienced technician recommended by the retailer available and willing to assist the customer;
 - (b) there will be no additional costs charged to the customer for the travel of the technician as the travel costs will be covered by the Warranty; and
 - (c) the risk of defective installation and harm to the customer's safety and premises will be reduced, thus reducing the cost to FPA and/or the customer relating to any further repair work.

Public detriments

34. The main public detriment that may ensue from the imposition of the Conditions is that the retailers will not be free to directly compete with retailers outside their Territory in relation to the supply of the Goods. However, this is unlikely to have a detrimental impact on:
- (a) the customer because:
 - (i) customers who reside outside the retailer's Territory may still acquire the Goods from the retailer, provided the sale takes place within the retailer's Territory;
 - (ii) prices of, and service support applicable to, the Goods will be affected by the prices of competing products that are offered by the retailer or other suppliers in the market; and
 - (iii) the customer may still be made aware of the existence of sales on the Goods (that are available at the retailer's physical store) through online advertising; or
 - (b) the retailer because:
 - (i) the retailer does not exclusively supply FPA's Goods;

- (ii) if the retailer wishes to supply the Goods outside its Territory to a customer who does not reside within 30 kilometres of a retailer, it may do so provided it seeks the consent of FPA and FPA is satisfied that:
 - (A) the supply will not compromise the safety of the Goods or the quality of the services provided to the customer; and
 - (B) the supply will not compromise FPA's reputation under the Trade Marks; and
 - (C) the customer is unlikely to receive higher quality services if it was supplied by a retailer who is not the retailer seeking the permission; and
- (iii) the retailer will still be able to compete with other retailers by advertising the existence of the Goods and sales online and by supplying the Goods at reduced prices at their physical store.

ANNEXURE B - CONDITIONS

- Clause 16(a)** Subject to clause 18, the Customer must not, sell or supply, or offer to sell or supply (whether express or by implication), the Goods outside the Territory.
- Clause 16(b)** The Customer must not sell or supply, or offer to sell or supply (whether express or by implication), the Goods via the internet. Nothing in this clause prevents the Customer from generally using the internet as a mode for marketing the availability of the Goods at the Customer's physical business premises.
- Clause 16(c)** The Customer may advertise the recommended retail price of the Goods via the internet, but the Customer must not advertise the specific value of any discounts, offers or sales affecting the sale of the Goods via the internet. Nothing in this clause prevents the Customer from selling or offering for sale the Goods at a discounted price in store, or advertising the existence of any discounts, offers or sales affecting the Goods via the internet.
- Clause 16(d)** The Customer must obtain the approval of the Managing Director of the Supplier prior to advertising any discounts, offers or sales in relation to the Goods on the internet.
- Clause 18** If the Customer ("First Customer") wishes to supply the Goods to a Purchaser who is located:
- (a) outside the Territory of the First Customer; and
 - (b) the Purchaser's location does not fall within the Territory of any other Customer;
- the First Customer may seek the written consent of the Supplier and the First Customer shall not supply the Goods to the Purchaser unless the Supplier has granted its consent in writing. The Supplier may in its absolute discretion grant or withhold consent, but it will only withhold consent if it has reasonable grounds for believing that:
- (i) the supply would compromise the safety of the Goods or the quality of the services provided to the Purchaser; or
 - (ii) the supply would compromise the Supplier's goodwill under the Trade Mark; or
 - (iii) the Purchaser would receive higher quality services if it was supplied by a Customer who is not the First Customer.
- Customer** means the party who has made an application for credit and/or acquiring the Goods from the Supplier.
- Goods** means any goods supplied by the Supplier under these Conditions, including wood and gas heaters and their accessories.
- Purchaser** means a person who acquires the Goods and services from the Customer.
- Supplier** means, in connection with the supply of any Goods or Services, Fireplace Products Australia Pty Ltd (ACN 117 303 554) making the supply to the Customer.
- Territory** is the geographical region determined by a 30km radius from the Customer's physical business premises.

Trade Mark

means the trade marks owned or used by or associated with any of the following:

- (a) FPI Fireplace Products International Ltd;
- (b) the Supplier; and/or
- (c) the Goods,

whether the trade marks are registered or unregistered.

EXHIBIT A – RETAILERS LOCATION MAP

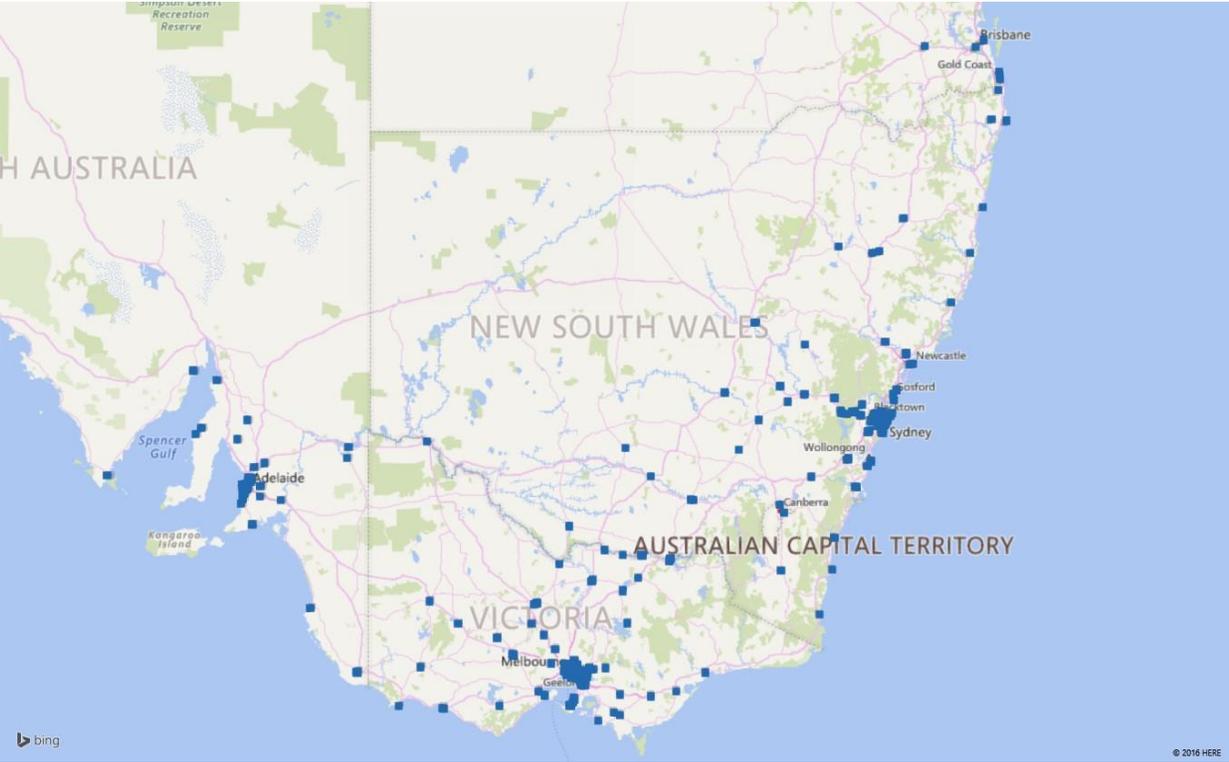


EXHIBIT B – COMPETING PRODUCTS

Competitor	Gas	Wood	Both
1. Rinnai	X		
2. Heat & Glo	X		
3. Jetmaster		X	
4. Escea	X		
5. Real Flame	X		
6. Masport		X	
7. Heatmaster			X
8. Cannon	X		
9. Kent		X	
10. Coonara/Heatcharm/Arrow			X
11. Nectre			X
12. Lopi			X
13. Osburn			X
14. Eureka		X	
15. Archer	X		
16. Jindara		X	
17. Clean Air		X	
18. Heatilator	X		
19. Saxon	X		
20. Scandia		X	
21. Yunca		X	
22. Esse		X	
23. Pacific Energy		X	
24. Jarrahdale		X	
25. Stovax/Castworks		X	
26. Sculpt		X	
27. Nedkelly		X	
28. Aranbe		X	
29. Firefox		X	
30. Aurora		X	
31. Vogue/Mr Stoves		X	
32. Enviro Fireplaces		X	
33. Focus/Oblica		X	
34. SBI (Stove Builder International)		X	
35. Pyroclassic		X	
36. Ultimate/Illusion			X