

**FORM G**

**COMMONWEALTH OF AUSTRALIA**  
**Trade Practices Act 1974 - Sub-section 93(1)**

**EXCLUSIVE DEALING:**

**NOTIFICATION**

FILE No:
DOC:
MARS/PRISM:

**To:** The Australian Competition & Consumer Commission

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(6) and 47(7) of that Act in which the person giving notice engages or proposes to engage.

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

Performance, Inc.  
One Performance Way  
Chapel Hill, North Carolina, USA 27514

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

Performance Inc is a wholesale distributor and retailer of bicycles and bicycle related products.

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

Messrs Clayton Utz  
Level 34  
No.1 O'Connell Street  
Sydney NSW 2000  
Attention: Mr Bruce Lloyd.

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

This notice relates to the acquisition and sale of:

- men's and women's cycling apparel;
- bicycle accessories; and
- bicycle parts.

(more specifically described at Appendix "A" hereto)

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

The proposed conduct comprises:

- (i) the offer by Performance Inc to The Bicycle Authority Pty Limited (hereinafter "**The Bicycle Authority**" or "**TBA**") of an exclusive license to, amongst other things:

- A. advertise, distribute and sell specific lines of bicycles and bicycle related products (as specified by Performance Inc) ("**the Licensed Products**") bearing a Performance Inc trademark in Australia; and
- B. use the Performance Trademarks in connection with the Licensed Products in Australia (in the manner approved by Performance);

on the condition that The Bicycle Authority does not purchase or source any of the Licensed Products from a supplier other than those manufacturers authorised by Performance Inc to manufacture the Licensed Products ("**an Authorised Supplier**").

- (ii) the offer by Performance Inc to The Bicycle Authority of a licence to have the Licensed Products manufactured on TBA's behalf on the condition that the Licensed Products are manufactured by an Authorised Supplier.
- (iii) the refusal by Performance to grant TBA the right to use the Marks in connection with Licensed Products:
  - A. for the reason that TBA has not agreed to acquire the Licensed Products from manufacturers specified by Performance; or
  - B. not manufactured by an Authorised Supplier.

3. (a) **Class or classes of persons to which the conduct relates:**

The conduct relates to:

- Performance Inc and related bodies corporate of Performance Inc;
- The Bicycle Authority and related bodies corporate of The Bicycle Authority;
- retailers of the Licensed Products located in Australia approved by Performance Inc to sell the Licensed Products; and
- retail customers of the retailers approved by Performance to sell the Licensed Projects in Australia.

(b) **Number of those persons:**

(i) **At present time:**

A number exceeding 50.

(ii) **Estimated within the next year:**

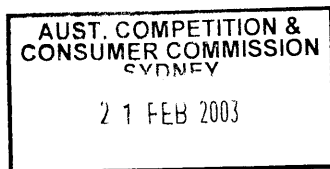
The estimated number of persons is unknown but is likely to substantially exceed 50.

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

4. **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:**

Mr Bruce Lloyd  
Clayton Utz  
Level 34  
No.1 O'Connell Street  
Sydney NSW 2000  
Telephone: (02) 9353 4219  
Facsimile: (02) 8220 6700.

Dated: *21 February 2003*



Signed by/on behalf of the person giving this notice

A handwritten signature in black ink, appearing to read 'B. Lloyd', written over a horizontal dashed line.

Bruce Lloyd  
Solicitor  
for and on behalf of Performance, Inc.

## DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
2. 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.
3. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in subsection 47(2),(3), (4), (5), (6), (7), (8) or (9) 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.
5. In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

## NOTICE

If this notification is in respect of conduct of a kind referred to in subsection 47(6) or (7), or paragraph 47(8)(c) or (9)(d), of the *Trade Practices Act* 1974 (the "**Act**"), it comes into force at the end of the period prescribed for the purposes of subsection 93(7A) of the Act (the "**prescribed period**") unless the Commission gives a notice under subsection 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996) starting on the day when this notification is given.

If the Commission gives a notice under subsection 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c), of the Act, it comes into force when it is given.

## **APPENDIX "A"**

### **Schedule of Goods in relation to the acquisition of which this notice relates Form G, paragraph 2(a).**

1. Men's cycling apparel:
  - (a) men's cycling tops;
  - (b) men's cycling bottoms; and
  - (c) men's cycling outerwear (eg. rain jackets).
2. Women's cycling apparel:
  - (a) women's cycling tops;
  - (b) women's cycling bottoms; and
  - (c) women's cycling outerwear.
3. Cycling apparel (non-gender specific):
  - (a) cycling gloves;
  - (b) socks;
  - (c) road bike shoes;
  - (d) mountain bike shoes;
  - (e) sports eye wear;
  - (f) casual eye wear; and
  - (g) miscellaneous apparel (eg. leg warmers, balaclavas, skull caps, arm warmers)
4. Bicycle accessories:
  - (a) drink bottles;
  - (b) bicycle pumps;
  - (c) bicycle tools;
  - (d) lights;
  - (e) adult helmets;
  - (f) children's helmets;
  - (g) indoor training equipment;
  - (h) indoor storage equipment;
  - (i) car racks;
  - (j) bicycle cases;

- (k) racks/child seats; and
- (l) bicycle back packs;
- (m) miscellaneous accessories.

5. Bicycle parts:

- (a) mountain wheels;
- (b) road wheels;
- (c) spokes access;
- (d) hubs;
- (e) bicycle electronics;
- (f) bicycle lubes;
- (g) derailleurs;
- (h) drive hardware;
- (i) saddles;
- (j) brakes;
- (k) stems/forks;
- (l) pedals;
- (m) bars/grips/tape;
- (n) tubes;
- (o) road tyres;
- (p) mountain tyres; and
- (q) miscellaneous components.

**SUBMISSION BY PERFORMANCE INC  
IN SUPPORT OF A NOTIFICATION UNDER SECTION 93(1)  
OF THE TRADE PRACTICES ACT 1974**

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**2. Introduction**

**2.1 Performance Inc**

Performance Inc ("**Performance**") is a wholesale distributor and retailer of bicycles and bicycle related products.

Performance currently advertises, sells and distributes its products via 3 distribution channels:

- (a) the Performance Bicycle Catalogue;
- (b) the PerformanceBike.com Internet site; and
- (c) 42 Performance Bicycle retail stores located throughout the United States.

Performance's presence in the Australian market is presently limited to Australian consumers purchasing Performance products by way of online order on the internet.

**2.2 The Bicycle Authority**

The Bicycle Authority Pty Limited ("**TBA**") is a subsidiary of Gemini Bicycle Centres Pty Limited. TBA conducts its business as a wholesale distributor of bicycles and bicycle related products to retailers in Australia.

**2.3 Market**

The market to which the proposed conduct relates is the wholesale market in Australia for the supply of bicycles and bicycle related products.

**2.4 Proposed s47(6) and s47(7) conduct:  
the Trademark Licence Agreement**

Performance plans to enter the Australian market for the supply of bicycle and bicycle related products. To facilitate this strategy, Performance has appointed TBA the sole wholesale distributor of Performance products in Australia. The terms and conditions of the arrangement are set out in a Trademark Licence Agreement ("**the Agreement**") to be executed by the parties.

Under the Agreement, Performance will confer TBA with exclusive rights to advertise, distribute and sell specific lines of bicycles and bicycle related products (as specified by Performance Inc) ("**the Licensed Products**") bearing one or more of the Performance Inc trademarks in Australia on the condition that TBA does not purchase or source any of the Licensed Products from a supplier other than those manufacturers authorised by Performance Inc to manufacture the Licensed Products ("**an Authorised Supplier**").

In addition, TBA may only have the Licensed Products manufactured on its behalf on the condition that the Licensed Products are manufactured by an Authorised Supplier.

TBA is not obliged to acquire Licensed Products, however, it is required to pay a certain minimum royalty each year under the Agreement.

TBA may only distribute Performance products to the retailers specified in the Agreement.

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### **3. Analysis of the proposed conduct**

#### **3.1 No anti-competitive effect**

If this conduct is caught by section 47(6) or 47(7), Performance believes that the conduct does not have any anti-competitive effect and is not against the public interest for the following reasons:

- (a) Competition in the Australian market for the supply of bicycles and bicycle related products is vigorous. There are over 35 wholesale distributors of bicycles supplying to numerous mass merchants (such as department stores) and over 2500 specialty dealers located Australia wide.

The high level of competition in the market is largely attributed to the fact that there are no trade barriers or limitations on the import of cycling products. Customs duties do not apply to bicycle accessories except in the case of built up bicycles, frames and forks and their components where a 5% duty is imposed.

Given the highly competitive nature of the bicycle industry, the proposed conduct will have no adverse effect on competition in the market for the supply of bicycles and bicycle related products.

- (b) Under the Agreement which governs the proposed conduct, TBA is not prevented from selling and distributing products which it has sourced from third party licensors with which it has an existing licensing arrangement, even if those products are similar in style or appearance to the Licensed Products.



### **3.2 Public benefit**

Performance believes that the proposed conduct will result in a number of benefits to the Australian public.

#### *Purchasing patterns of consumers in the bicycle market.*

Price is not the sole determinant of consumer purchasing decisions in the bicycle market. Rather, consumers are predominantly concerned with price/quality relationships. In this sense, product differentiation is the platform upon which market participants promote their products.

Branding is the mechanism used by most competitors in the bicycle and bicycle accessory market to communicate the key points of differentiation. In the context of Performance bicycles and bicycle related products, significant resources have been committed to product development and the design and marketing of Performance Trademarks associated with those products.

The key feature of all Performance bikes and accessories is their perceived quality amongst consumers. By controlling the source of the products to which TBA may affix a Performance Trademark, Performance can ensure that the standard of its product is maintained in Australia. From this perspective, the proposed conduct may be described as the implementation of a brand management system as it will have the effect of preserving Performance's brand image in the Australian market.

#### *Public benefits*

Public benefits which will flow from the establishment of a brand management system for Performance products include:

- (a) The primary reason for the control of the manufacturers of Performance products is quality assurance. Performance is satisfied as a result of its appointment and dealings with its authorised manufacturers that retail consumers obtain top quality, safe products which conform to high manufacturing standards adopted over many years by Performance for all of its products.
- (b) The proposed conduct will result in a brand image that "tells" consumers certain information which is relevant to their purchasing decision. In this sense, the conduct will assist consumers to make informed choices about bicycles and bicycle related products.
- (c) The introduction of a new brand of product such as Performance, will not only

expand consumer choice but also drive competitors to improve and develop the quality of their own products. Considered cumulatively, these factors will have the effect of promoting competition in the industry. The promotion of competition is clearly in the interest of the Australian public.

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#### **4. Conclusion**

For the reasons stated above, Performance submits that the proposed conduct provides benefits to the public (in the form of quality assurance, increased competition in the bicycle market and greater consumer choice) and will have no anti-competitive effect on the market.