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## 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)

N93718

This Notice is given by PoolWerx Corporation Pty Ltd ACN 061 535 493 (**PoolWerx** or **Franchisor**).

- (b) **Short description of business carried on by that person:**  
(Refer to direction 3)

#### **Description of business**

PoolWerx operates a franchise business that grants to franchisees the right to operate a total pool and spa maintenance and management service for domestic and commercial pools, including cleaning, water balancing, equipment and chemical sales, repairs, renovation and installation services.

#### **Background**

PoolWerx requires the growth and development of its franchisees and the evolution of its franchisees' businesses from a single mobile service unit, to a multi-van service and ultimately, should the franchisee perform exceptionally, to a retail hub based franchise with a fleet of mobile units operating from the relevant premises.

PoolWerx has the right to use and grant to franchisees the right to use comprehensive systems, methods and procedures and controls on the operation of PoolWerx businesses (**System**). The System must be followed by franchisees. Many of the policies and procedures forming part of the System are designed to protect the integrity and grow the value of the PoolWerx brand and ensure that high quality products and services are supplied by PoolWerx franchisees to their customers.

#### **Quality Control**

The quality of the suppliers to the PoolWerx network and the quality of the products (including the chemical composition of those products) used and sold by PoolWerx franchisees has direct impact on:

- the value and integrity of the PoolWerx brand;
- customer satisfaction levels;

- the ability of PoolWerx franchisees to satisfy the demands of customers and perform services to a level which is acceptable to PoolWerx;
- the profitability of PoolWerx franchisees; and
- ultimately, the ability of franchisees to compete for customers in the relevant market.

As the PoolWerx network and brand grows, ensuring that franchisees use suppliers that satisfy PoolWerx's standards is becoming increasingly important. Based on PoolWerx's experience the most efficient and cost effective way of ensuring consistent quality standards are maintained throughout the franchise network is via the approved supplier arrangements.

### **Approved Supplier's Selection Process**

The approved suppliers are, and will be carefully selected by PoolWerx having regard to a range of factors, including:

- product quality
- competitive pricing,
- availability of free in store (FIS) freight arrangements for all franchisees based on KPI's set for delivery,
- availability of rebates,
- whether the supplier has a broad product range and can supply the required products;
- ability of the supplier to achieve national service levels (including state based support),
- delivery service level requirements;
- promotions;
- level of merchandising;
- availability of initial training - pool school; and
- willingness to provide on-going training to franchisees via winter and spring workshops and attend, and provide further training at the PoolWerx Annual convention.

PoolWerx works closely with the suppliers of the PoolWerx network to ensure that the suppliers understand its requirements, the requirements of PoolWerx customers and that the suppliers are in a better position to contribute to the growth and development of the PoolWerx brand and satisfy the expectation of customers.

### **Approved Supplier and Product Reviews**

PoolWerx reviews all of its approved suppliers on a national basis quarterly and on a state basis monthly and during this process it refines the supply process and checks that the best levels of service and supply to its franchisees are being maintained and that suppliers are achieving any agreed key performance indicators.

Products are also tested to ensure that they satisfy PoolWerx's quality standards.

Formal meetings are held with agendas and minutes being taken. This process helps to ensure that participants adhere to the agendas and that specific action items are set and followed up. Supplier information and issues are tabled at these meetings for further action either by the Supply partner or franchisee.

PoolWerx also conducts monthly "Health Checks" and "Quarterly Reviews" of its franchisees (whilst these are franchise related, franchisees have the opportunity to provide feedback to PoolWerx on product quality and delivery and other product related issues. In addition, PoolWerx utilises an Intranet system of Q&A forums which are hosted by 2-3 of the main supply partners. This gives franchisees an opportunity to raise issues and questions with the suppliers so that the franchisees are in a better position to satisfy the requirements of its customers.

Trials are conducted at various franchise levels for both chemicals and equipment and cleaning equipment used by franchisees with feedback being given and supplied to supply partners.

### **Rebates**

PoolWerx receives rebates from most of the suppliers to the PoolWerx franchise network. The amount of the rebate varies depending on the commercial arrangements between PoolWerx and the relevant suppliers. In the majority of cases percentage of the rebate is remitted to PoolWerx's marketing fund and the balance (if any) is used by PoolWerx to cover a range of costs, which ultimate benefit franchise network. Typically, the rebates that are retained by PoolWerx are used by PoolWerx to help pay the costs of developing the PoolWerx system and network, including research, development, supply and logistics and learning and development costs.

PoolWerx discloses to its franchisees in its Disclosure Document and in its franchise agreement that PoolWerx may from time to time receive rebates in connection with the supply of products by approved suppliers to franchisees.

### **Administration Costs**

There are some administration costs incurred by PoolWerx in connection with the approved supplier arrangement, including costs incurred in negotiating with, and monitoring suppliers; salaries for supplier managers; and travel costs. In PoolWerx's opinion there will not be any additional administration costs for franchisees.

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

c/- Phillip Hourigan  
Deacons  
175 Eagle Street  
Brisbane QLD 4000

**2. Notified arrangement**

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

This Notice relates to the purchase by franchisees of approved products, including:

pool cleaning products (including chemicals (chlorine (liquid & granular), algescides, buffer, clarifiers and specialty chemicals for green pools and other specialty treatments, salt);

equipment (including; pool pumps, filters, cleaners (suction, pressure and commercial) heaters (electric, gas and solar), pool blankets and rollers, salt cell chlorinators);

inflatable and plastic toys;

accessories;

fitting equipment (PVC pipes etc),

service vans, van signage; and

telecommunications, printing, insurance, water testing and calibration equipment and work uniforms.

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

***Approved Supplier Arrangements***

PoolWerx franchisees will be required to purchase all approved products and services of the kind referred in paragraph 2(a) above from suppliers or the supplier approved by PoolWerx.

***Vehicle Arrangements:***

PoolWerx franchisees that must use a vehicle in connection with the operation of their franchised business, will be required to purchase the particular make and model of vehicle specified by PoolWerx in PoolWerx's operations manual. Currently the vehicle specified by PoolWerx is a Transporter Volkswagen.

However, PoolWerx franchisees are entitled to purchase the vehicle from any supplier

A key purpose of a single nominated vehicle type is to ensure consistency in the presentation of the PoolWerx brand on mobile units across the entire network and the way in which the brand and the PoolWerx image is communicated to the market. PoolWerx considered a number of the factors set out on page 2 of this Notice under the paragraph headed "Approved Supplier Selection Process" when determining its vehicle arrangements. In addition, vehicle types were compared by PoolWerx on many levels from fuel efficiency to cargo space to load carrying capacity and head space in rear were all considered and the Transporter by Volkswagen was the best in its class at the time. Certain safety considerations, including whether the vehicle had a cargo barrier, whether the vehicle had a self contained rear so that fumes are separated from chemicals, load carrying requirements and others were also considered.

New franchisees or existing franchisees that are granted a renewal of their franchise agreement will be required to sign a franchise agreement, which includes the following clauses:

***"Key Definitions***

***Approved Equipment PIP*** means a partner in profit approved by PoolWerx to supply the Equipment as specified in the Operations Manual or otherwise approved in writing by PoolWerx;

***Approved Products and Services*** means Approved Products and/or Approved Services;

**Approved Products** means the range, types and brands of products specified as approved in the Operations Manual, or otherwise approved by PoolWerx in writing according to the terms of this Agreement for supply in a PoolWerx Business and includes the Approved Services and Licensed Products;

**Approved Service** means the services specified as approved in the Operations Manual, or otherwise approved by PoolWerx according to the terms of this Agreement;

**Approved PIP** means a partner in profit specified in the Operations Manual or approved in writing by PoolWerx for the supply of:

- (i) a particular Approved Product or Service to the Franchisee;
- (ii) sign writing, Vehicle decoration and Vehicle fit services in accordance with clause 17.6;
- (iii) training in accordance with clause 15.1; and
- (iv) Fitout, redecoration or other services as required in accordance with clause 20.10

## **10. Acquisition of products, suppliers and services**

### **10.1 Purchase of Approved Products**

10.1.1 PoolWerx will specify lists of products, services and suppliers that are Approved Products and Services and Approved PIPs.

10.1.2 PoolWerx may at any time by written notice to the Franchisee:

10.1.2.1 add or remove any product or service from the lists of Approved Products and Services; or

10.1.2.2 add or remove any supplier from the list of Approved PIPs.

10.1.3 The Franchisee must obtain each Approved Product and Service only from an Approved PIP unless PoolWerx first gives the Franchisee written approval to obtain any such product or service from an alternative supplier in accordance with clause 10.2.

### **10.2 Alternative suppliers, products and services**

10.2.1 If the Franchisee:

10.2.1.1 is approached by a supplier, who is not an Approved PIP, to supply products or services to the PoolWerx Business;

10.2.1.2 wishes to obtain for resale in the PoolWerx Business a product that is not an Approved Product; or

10.2.1.3 wishes to obtain a product from a supplier who is not an Approved PIP,

the Franchisee must immediately notify PoolWerx and provide details of the products or services being offered or sought and the terms and conditions upon which they are offered by the supplier.

10.2.2 Approval by PoolWerx in accordance with clause 10.2.1 may be given or withheld at its discretion and in consenting, PoolWerx may at a minimum

*require that the Franchisee satisfies PoolWerx that the product, service or supplier meets the quality set out in clause 10.3 (where applicable) and gives PoolWerx (as the context requires):*

*10.2.2.1 written notice of:*

*10.2.2.1.1 the nature and quantity of the products or services to be provided by the proposed alternative supplier;*

*10.2.2.1.2 the name and address of the proposed alternative supplier;*

*10.2.2.1.3 the price that will be charged by the proposed alternative supplier including, where applicable, the price per unit;*

*10.2.2.2 a sample of the product that the proposed alternative supplier is to provide or evidence of examples of previous work produced by the proposed alternative supplier;*

*10.2.2.3 provides a written statement from the proposed alternative supplier setting out:*

*10.2.2.3.1 the period that the price for the product or service will be fixed;*

*10.2.2.3.2 the terms and conditions of supply including details of warranties provided;*

*10.2.2.3.3 that the alternative supplier will be able to do the work in a timely and professional manner;*

*10.2.2.3.4 that the proposed alternative supplier is able to maintain a continuity of supply of the product; and*

*10.2.2.3.5 an undertaking to provide cooperation, training, rebates, services and incentives required from suppliers to the Network as specified in the Operations Manual.*

*10.2.3 If the Franchisee requests the approval of PoolWerx under this clause 10.2, PoolWerx must advise the Franchisee of its decision in writing.*

*10.2.4 Any products or services approved by PoolWerx in accordance with this clause 10.2 become Approved Products or Approved Services unless and until withdrawn in accordance with clause 9.5/.*

*10.2.5 Any alternative suppliers approved by PoolWerx in accordance with this clause 10.2 become Approved PIPs until PoolWerx advises the Franchisee in writing that the approval has been withdrawn.*

### **10.3 Quality control**

*Any product or service to be obtained by the Franchisee from an alternative supplier must:*

*10.3.1 be at least equal in quality to the product or service it substitutes;*

*10.3.2 be suitable for the purpose for which it is intended;*

*10.3.3 be consistent with, and not prejudicial to, the Image or the Standards; and*

10.3.4 *not create a different look or feel to the result produced by existing Approved PIPs in a way that may result in an inconsistent look and feel of vehicles across the Network.*

10.4 **Acknowledgment by Franchisee**

*The Franchisee acknowledges that the provisions of this clause 10 are reasonable and are necessary to maintain strict quality control in respect of the supply of all products and services in the Network.*

11. **Rebates**

11.1 *The Franchisee acknowledges that PoolWerx may receive rebates or other financial incentives from the manufacturers and suppliers of Approved Products whether or not the Franchisee purchases the products from PoolWerx, an Approved PIP, any other independent supplier or the manufacturer of the product.*

11.2 *The Franchisee agrees that:*

11.2.1 *PoolWerx may retain for its own benefit all rebates or payments it receives from the suppliers or manufacturers of Approved Products whether or not the rebates or payments are made as a consequence of purchases by the Franchisee; and*

11.2.2 *PoolWerx may pay any rebates or financial incentives received from the manufacturers or supplies into the Marketing Fund.....*

17. **Vehicle**

17.1 **Application of Vehicle obligations**

17.1.1 *This clause 17 applies only where the Franchisee is required to have a Vehicle (or Vehicles) for the conduct of the PoolWerx Business in accordance with its Franchise Tier.*

17.1.2 *If, by virtue of a Tier Transition, the Franchisee becomes bound by the terms of this clause 17, the Franchisee must immediately, or within a timeframe notified by PoolWerx to the Franchisee, comply with the terms of this clause 17.*

17.2 **Purchase of Vehicles**

*The Franchisee must purchase or lease at least one Vehicle for use in the conduct of the PoolWerx Business.*

17.3 **Specifications of Vehicle**

*Vehicles to be used in the PoolWerx Business must:*

17.3.1 *be of the make and model as specified in the Operations Manual and;*

17.3.2 *at all times during the term, be not more than 5 years old unless authorised in writing by PoolWerx;*

17.3.3 *at all times bear the Trade Marks and otherwise be decorated and fitted out as specified in the Operations Manual;*

17.3.4 bear only PoolWerx's central telephone number;

17.3.5 be appropriately equipped to transport the Equipment and to otherwise facilitate the provision of the Services by the Franchisee; and

17.3.6 conform to any other specifications set out in the Operations Manual."

(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)

PoolWerx franchisees or existing franchisees that are granted a renewal of their franchise agreement. However, ultimately the proposed approved supplier arrangements will affect all PoolWerx franchisees.

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

**(i) At present time:**

140 franchisees. Also see (ii) below.

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

(Refer to direction 6)

Approximately 20 new franchises will be granted to franchisees by PoolWerx and approximately 22 existing franchise agreements will be renewed within the next year.

**(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)

*Substantially Lessening of Competition in the relevant market*

PoolWerx submits that the proposed approved supplier arrangements will not have or be likely to have the effect of substantially lessening competition in the retail or wholesale markets.

*Retail Market*

The retail market for the supply of pool cleaning services and products is highly competitive and there are a large number of participants, including suppliers such as Swimart and Clark Rubber, Bio-gard (buying group) and retail pool shops ("Mum and Dad" operators) and many independent mobile service operators.



Competitive pressures arise principally from the following areas:

- (i) a large number of other existing suppliers of pool cleaning services and products, including mass market (department store / bulk discounters eg Bunnings, K-mart, Woolworths (via Big W speciality chain) and in regional areas bulk produce & Irrigation wholesalers and retailers who also cross sell like product of pumps and filters and chemicals;
- (ii) low barriers of entry to the relevant market; and
- (iii) Internet Trading;

PoolWerx has not undertaken a detailed market analysis and it is difficult to determine its exact market share. However, PoolWerx and its suppliers generally estimate that the Australian swimming pool and spa after market for the supply of cleaning products and pool cleaning services, and pumps, filters, chlorinators, solar heating and some speciality products is \$1.2 billion, which is split between the domestic market and commercial market as follows:

Domestic market: approximately \$650 million; and

Commercial market: approximately \$450 million (this includes servicing pools)

PoolWerx Group Annual Turnover for the past 3 years was as follows:

Estimated Market Share		
FY2006	\$22mil	2%
FY2007	\$34mil	3%
FY2008	\$42mil	4%

Thus representing a share of the national market for the supply of pool cleaning services and products is somewhere in the range of 5%.

In some specific equipment markets its market share may be higher or lower.

The proposed approved supplier arrangements may have the effect of increasing competition in the relevant retail markets by reducing the product acquisition costs for PoolWerx franchisees and placing them in a better position to compete with other suppliers at the retail level.

The proposed approved supplier arrangements will also have the benefits for customers set out in the paragraph headed "*Benefits of the Approved Supplier Arrangements*" below.

#### *Wholesale Market*

PoolWerx is not a wholesale supplier of pool cleaning products or services.

The wholesale market for the purchase of cleaning products and equipment from wholesale suppliers is also highly competitive and there are a large number of participants.

The proposed approved supplier arrangements would only be likely to affect competition in wholesale market in the following ways:

- (i) it would prevent franchisees from being able to choose between suppliers themselves; and
- (ii) it would effectively prevent suppliers who are not approved suppliers from being able to supply PoolWerx franchises with certain products.

Any detrimental impact upon competition likely to arise out of the consequences set out above would be small, particularly taking into account the large number of other retail suppliers in the relevant market.

In the wholesale market, the volumes and certainty of supply to PoolWerx franchisees may result in cost savings by the relevant wholesale suppliers, increasing efficiency and competition amongst suppliers. Also, the suppliers may in a better position to plan for future production, which may offer greater incentives to invest in capital improvements.

#### *Vehicle Arrangements*

The proposed vehicle arrangements will not have the effect of substantially lessening competition in the market for the supply of vehicles to end users. The market is highly competitive and has a large number of participants. The proposed vehicle arrangements are unlikely to have any impact on that market.

#### *Benefits of the Proposed Arrangements*

The purpose of the proposed approved supplier arrangements is not to substantially lessen competition.

The proposed arrangement will help to:

- ensure franchisees are able to purchase products at lower average prices, which will place franchisees in a better position to compete in the relevant market;  
  
reduce the time and costs that would otherwise need to be incurred by franchisees in monitoring the quality of the relevant products and the suppliers;  
  
reduce PoolWerx costs in the long term of monitoring and enforcing its quality control requirements;
- give PoolWerx franchisees more time to focus on running their businesses;
- promote consistency between PoolWerx franchised stores and businesses,  
  
ensure PoolWerx can effectively monitor and control the quality of products used or sold by franchisees so that the reputation and the value of the PoolWerx brand is maintained;
- maximum returns for the network from suppliers;  
  
reduce franchisees' average transaction costs by limiting the number of suppliers;
- improve the quality of products sold or used by franchisees;  
  
improve the ability of PoolWerx to work with suppliers to help them improved the products, which will ultimately benefit customers;
- ensure that the vehicles used by PoolWerx franchisees are of high quality, convey a consistent image and appropriately communicate the PoolWerx brand to customers and potential customers; and

through training from suppliers to help ensure safe systems of work for franchisees and consistency of risk profile in respect of occupational health and safety issues across the franchise network.

The intended effect of the arrangement is to ensure:

the risk of franchisees selling defective or substandard products is minimised;

- franchisees are able provide services and products to customers that consistently satisfy the expectations and demands of customers in relation to the PoolWerx brand;

PoolWerx franchisees provide high quality products and service to customers;

only products, which satisfy the franchisor's high quality standards are sold by franchisees to customers;

- the value and reputation of the PoolWerx franchised businesses is maintained by ensuring that the products sold by PoolWerx franchisees are consistent with the high standards and image of the PoolWerx franchise System;
- customers get a consistent experience across all PoolWerx franchises; and
- that the market positioning of the PoolWerx brand continues to grow.

As a result of the proposed arrangement, PoolWerx will be able to achieve lower purchase prices for franchisees as the volume of products purchased by franchisees from a particular supplier increases.

By limiting the number of approved suppliers, PoolWerx will be in a better position to negotiate more favourable terms and conditions upon which franchisees can acquire products as the volume of the franchise network's purchasing requirements increases its negotiating power.

Also, see the comments in paragraph 1(b) of this Notice.

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

These claims are supported by basic marketing principles.

**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)

PoolWerx does not consider it necessary to precisely identify the market to assess the likely competitive effects. PoolWerx submits that it would be appropriate to consider the proposed conduct in the following markets:

- (a) the various markets for the provision to consumers of pool cleaning products and services in the geographical areas serviced by franchisees; and
- (b) the various markets for the provision by wholesalers to retailers of the products referred to in paragraph 2(a) of this notification.

**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)*

PoolWerx submits that there are no substantial public detriments of the proposed arrangement.

- (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:**

Phillip Hourigan  
Deacons  
GPO Box 407  
Brisbane QLD 4001

Phone: (07) 3309 0865

Dated..... *5 December 2008*

Signed by/on behalf of the applicant

  
.....  
(Signature)

Phillip Hourigan  
(Full Name)

Deacons  
(Organisation)

Partner  
(Position in Organisation)



## DIRECTIONS

1. 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.

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. 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 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.
5. Describe the business or consumers likely to be affected by the conduct.
6. 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.
7. 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.
8. 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.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.