

30 March 2009

Email to: Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Attention: Tess Macrae

Your Ref: 2655848

Subject: **Third line forcing notification N93718 lodged by PoolWerx Corporation Pty Ltd**

I am writing in relation to the above application made by PoolWerx.

**Background**

My wife and I became PoolWerx franchisees in

We have become disillusioned as the level of support we were promised before becoming franchisees has not materialised and the net profit that PoolWerx has stated that can be achieved is indeed extremely difficult to achieve.

Profitability levels could improve significantly if we had the flexibility to source our purchases from suppliers that give franchisees the best pricing.

**Matter for consideration**

We are opposed to PoolWerx receiving rebates from suppliers. We have evidence the payment of these rebates increases the cost of our purchases and as such increases the sale price to the consumer.

We are opposed to PoolWerx forcing us to purchase 100% from “approved” suppliers. This arrangement will prevent franchisees from purchasing goods of comparable quality from some suppliers whose pricing is generally lower than the approved suppliers.

Section 47 of the *Trade Practices Act 1974* prohibits conduct known as exclusive dealing.

*“A key objective of the Trade Practices Act is to prevent anticompetitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.”<sup>1</sup>*

*“Requiring franchisees to acquire stock or equipment from nominated suppliers can reduce competition that might otherwise exist in two ways. First, franchisees are unable to source supplies based on their views regarding quality and price. This can reduce franchisees’ ability to compete in downstream markets. Second, nominated suppliers may view the franchise as guaranteed custom, which limits their incentives to compete on price and quality.”<sup>2</sup>*

### **Payment of Rebates by Suppliers to PoolWerx**

As our turnover increased we approached our major suppliers seeking more competitive pricing. If we buy better, we can reduce the sale price to customers.

Not one supplier has been able to reduce their pricing and we have been repeatedly advised that if they could they would, but they are unable to because of the 10% payment they are required to make on all sales to PoolWerx.

One of the things that attracted me to PoolWerx was the promise that franchisees get the best buy prices from suppliers in the market. This rhetoric suddenly changed to “best available” pricing, but franchisees are unclear as to whether this includes or excludes the rebates paid to PoolWerx.

Many franchisees have provided evidence to PoolWerx that we do not always get the best pricing.

Early last year, a group of franchisees sought legal advice from a specialist franchise lawyer regarding a number of concerns about the level of support provided by our franchisor. They were advised that exclusive dealing is prohibited under the Trade Practices Act unless notification has been lodged with the ACCC. I am advised that when the group met with PoolWerx and raised this matter, it was informed by PoolWerx that its legal advice was that it was not involved in Third Line Forcing.

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1. *Section 1.1 - Notices in respect of notifications lodged by Seal-A-Fridge Pty Ltd and Others - Notification numbers N50197, N50198, N50199 and N92676 dated 13 September 2007.*

2. *Section 6.12 - Notices in respect of notifications lodged by Seal-A-Fridge Pty Ltd and Others - Notification numbers N50197, N50198, N50199 and N92676 dated 13 September 2007.*

Of the rebates paid to PoolWerx, it is my understanding that 50% is paid into the National Marketing Fund (NMF) and the other 50% is absorbed by PoolWerx. We already pay franchise fees and the rebates paid by suppliers which are absorbed by PoolWerx are essentially another fee paid by franchisees to the franchisor.

Another concern of some franchisees is that the NMF pays rent to PoolWerx for the floor-space the marketing area occupies in the head office. It also pays the wages of several head office personnel some of whom are not directly involved in marketing, but more in a business development role.

One of the things that attracted me to PoolWerx was the promise that we get the best buy price, and that approved supplier pricing is locked in for 12 months.

Over the years we have been continually told that the yearly supplier negotiations are lengthy and rigorous and there are performance criteria written into the contracts. We've always been told that pricing is locked in for 12 months.

Late last year and early this year, the majority of our suppliers increased their prices. I acknowledge that these are extraordinary times, but we have now learned that the agreements with suppliers allowed for "best buy" and not "fixed" pricing. PoolWerx has failed to respond to repeated questions as to why we have been misled about the arrangements in the supplier agreements.

### **Approved Supplier Arrangements**

The present franchise agreements, I understand, require franchisees to purchase 95% from approved suppliers. PoolWerx now seeks to raise this to 100%.

There is certainly a significant benefit in directing the bulk of our purchases to "approved" suppliers. The service is reasonably good, quality with most suppliers is very good and some franchisees do receive supplier training.

However, history clearly demonstrates that we need to have some flexibility in purchasing arrangements.

These anticompetitive arrangements will *reduce our ability to compete in downstream markets*, and will clearly limit our ability to provide *greater choice for consumers in price, quality and service*.

- some brands / products / parts are simply not sold or distributed by the “approved” suppliers. If a consumer needs a part we must have the flexibility to be able to source parts from non-approved suppliers.
- as indicated previously, pricing from approved suppliers is not always as competitive as we are led to believe it is.
- there are other suppliers selling the same products where the quality is comparable or even better, and the price is cheaper.
- PoolWerx has formed partnerships with a number of specialist suppliers, but they tend to select one supplier for each specific area of our business, eg equipment, chemicals, spare parts, etc. If we ally ourselves to one supplier and that supplier experiences supply problems, we may not be able to source products that we need on a day-to-day basis in a timely or cost effective manner. In such situations the consumer is disadvantaged.

Indeed, earlier this year one of our major suppliers experienced financial difficulties. They were unable to source their raw materials and as a result they were unable to supply us with their products during the height of the season. This cost PoolWerx franchisees around the country a significant amount of grief and had a big impact on profit margins. It also considerably inconvenienced our customers.

- our approved supplier of cleaning equipment and spare parts is having more and more parts manufactured in Asia and there have been problems with quality and longevity. Fast selling items are regularly on backorder, which adds to our and our customers’ frustrations. Having parts manufactured overseas must lead to cost savings, yet this supplier’s pricing is competitive on very few items.

*“However, franchisors should explain why similar benefits cannot be delivered through negotiating supply on the basis of voluntary supply agreements with individual franchisees. Franchisors may also be able to negotiate preferred supplier arrangements which allow franchisees to source products from other suppliers if they offer greater value for money or better service.”<sup>3</sup>*

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3. Section 6.8 - Notices in respect of notifications lodged by Seal-A-Fridge Pty Ltd and Others - Notification numbers N50197, N50198, N50199 and N92676 dated 13 September 2007.

**Conclusion**

I understand in circumstances where franchisees raise concerns in relation to notified arrangements, the ACCC will consider those concerns and may choose to consult more broadly and, if widespread concern is identified, the ACCC is likely to review a notification.

Before considering the notification further, I request that the ACCC direct PoolWerx to bring this matter to the attention of its franchisees to enable more widespread feedback from franchisees.

[Redacted]

Accordingly, I ask that the highlighted parts of this letter be excluded from the public register.

Thank you for considering this submission.

Yours faithfully

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PUBLIC REGISTER

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