

**Confidential**

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16 May 2003

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Mr T Grimwade  
General Manager Adjudication  
Australian Competition &  
Consumer Commission  
Level 7  
123 Pitt Street  
**By Hand Delivery**

Dear Sir

**Capricorn Mutual Limited**  
**Exclusive Dealing Notification**

We refer to the Exclusive Dealing Notification on behalf of Capricorn Mutual Limited (CML), which is enclosed together with a cheque for \$100 by way of lodgement fee.

CML is a discretionary mutual formed by its parent the Capricorn Society Limited (CSL) to provide benefits to its members from 1st June 2003 in response to the difficult professional indemnity and general insurance market. The traditional insurance policies of many of CSL's members expire in June and in order to ensure continuity of covers for members CML wishes to offer the new benefits to members from the beginning of June 2003.

CML is a wholly owned subsidiary of CSL that is a cooperative society operating throughout Australia. CML has formed a wholly owned subsidiary called Capricorn Insurance New Zealand Limited (CINZ), which as an authorised insurer in New Zealand will provide a very specific insurance cover to members of CML.

CML wishes to offer membership of CML only to members of CSL. CML also wishes to restrict membership in the CML to members who have insured the non-discretionary membership benefits with CINZ. CML will provide the first \$25,000 of any claim on benefits by a member and CINZ will insure the member for any claim in excess of the \$25,000 or for claims on benefits that CML has refused subject to the normal policy restrictions.

CML is of the view that this arrangement is of a type that is beneficial to the members of CSL and the public generally. It assists in the management of risks associated with the activities of business activities of the members of CML and in doing so eliminates the unnecessary duplication of resources which in turn impacts on premiums and the costs of services to the public generally. CML believes that this arrangement will reduce the cost of the financial risks affecting the business operations of CML's members and will make available a financial risk facility that will fill the gap in the difficult professional indemnity market.

If there is any detriment from the proposed conduct, our client believes that it would be far outweighed by the benefits to the public.

Yours sincerely



**Marianne Robinson**  
Manager – Compliance Solutions  
Direct +61 2 9286 8017  
Email [marianne.robinson@phillipsfox.com](mailto:marianne.robinson@phillipsfox.com)

On behalf of Capricorn Mutual  
Limited.

**Form G**

Commonwealth of Australia  
*Trade Practices Act 1974 ---- Sub-section 93(1)*

**EXCLUSIVE DEALING  
NOTIFICATION**

To the Australian Competition and 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) or (7), or paragraph 47 (8) (a), (b) or (c) or (9) (a), (b), (c) or (d) of that Act in which the person giving notice engages or proposes to engage.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of person giving notice

**Capricorn Mutual Limited ACN 24104601194 (CML)**

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

**CML is a discretionary mutual formed for the members of the Capricorn Society Limited (CSL), a co-operative society formed under the WA Co-operative and Provident Societies Act of 1903, for the provision of membership benefits which allows members to manage their business related financial risks.**

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

**C/o Marianne Robinson  
Phillips Fox  
255 Elizabeth Street  
Sydney NSW 2000  
Email [Marianne.robinson@phillipsfox.com](mailto:Marianne.robinson@phillipsfox.com)**

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

**Supply of membership services through a discretionary mutual for members of a cooperative society.  
Supply of insurance services for members of the discretionary mutual**

(b) Description of the conduct or proposed conduct

**CML proposes that membership and the benefits associated with membership only to be made available to members of its parent CSL and that members of CML be required as part of the membership package to acquire an individual insurance policy provided by Capricorn Insurance New Zealand (CINZ) which is also a wholly owned subsidiary of CML. The insurance policy will insure the member for any claim for indemnity made on the member that is above the level paid by CML for the discretionary benefits.**

**CML considers its proposed conduct will benefit the members of CSL and so the public by:**

- 1. providing the members of CSL with an alternative means of managing the financial risks associated with their personal needs and business operations other than by the purchase of traditional insurance which members of CSL are experiencing difficulties in obtaining.**
- 2. providing a more affordable alternative to insurance for members of CSL many of whom are experiencing premium increases of 200-300% for the new insurance year.**
- 3. extending the range of benefits provided by CSL to its members.**

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

**Registered automotive repairers, panel beaters, auto electricians, service stations and general workshops throughout Australia who are members of CSL**

(b) Number of those persons--

- (i) At present time 5,500 in Australia and NZ**
- (ii) Estimated within the next year 6,600**

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

N/A

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

**C/o Marianne Robinson  
Phillips Fox**

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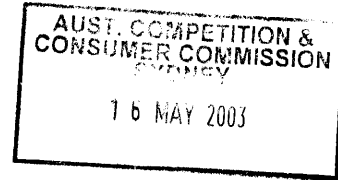
**255 Elizabeth Street  
Sydney NSW 2000**

Dated *16 May*, 2003  
applicant/giving notice

*[Handwritten Signature]*  
.....  
(Signature)

Marianne Robinson, Solicitor  
Manager  
Compliance Solutions  
Phillips Fox

Signed by/on behalf of the



## **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 sub-section 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 sub-section 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 sub-section 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 sub-section 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.

## **NOTIFICATION APPLICATION – SUPPORTING SUBMISSION**

**Submission in support of notification of exclusive dealing lodged by Capricorn Mutual Limited (ACN 24104601194) on 16th May 2003 in accordance with section 93(1) of the Trade Practices Act 1974.**

This submission supports a notification of exclusive dealing lodged by Capricorn Mutual Limited (**CML**) with the Australian Competition and Consumer Commission (**Commission**) on 16<sup>th</sup> May 2003

In accordance with the Commission's Guide to authorisation and notification for third line forcing conduct (February 1998), this submission identifies the public benefits and detriment likely to result from the notified conduct. It also provides information on relevant products and markets.

### **1. The notified conduct**

CM is a discretionary mutual wholly owned subsidiary of the Capricorn Society Limited (**CSL**). CSL is a registered co-operative owned by its automotive industry members across Australia, New Zealand and South Africa. All profits made by CSL are paid back to its members as dividends or rebates.

CML has been incorporated in order to provide membership benefits to the Australian members of CSL, as an alternative to the purchase of insurance cover from the traditional insurance market. The ability to purchase affordable public liability and professional indemnity insurance in Australia has become increasingly difficult. CML has been formed to provide members of CSL with access to an affordable alternative by combining a first layer of discretionary benefits with a second layer of insured coverage. The formation of CML will allow members of CSL to have a continuity of liability coverage for the new insurance year.

Each CML member will acquire a collection of rights by which the member will be able to manage the financial consequences of risk arising from liability. CML membership will include a general insurance layer of cover which protects the member when the discretionary benefits have been exhausted.

CML wishes to only offer membership to members of CSL and to require that members of CML acquire an insurance policy from CINZ for that part of their individual membership benefit that exceeds the amount of the discretionary benefit.

## **2. Relevant products and markets**

The relevant market is a national market for the provision of membership in discretionary mutuals and the provision of insurance (and in particular public liability and professional indemnity insurance) to business operators.

## **3. Public benefits**

The proposed conduct is a competitive and realistic response by CSL to benefit its members who are experiencing difficulty in obtaining insurance in difficult insurance market conditions.

There are a number of public benefits which arise from the CML offering its membership benefits in this way:

### **(a) Fostering business efficiency**

Members of CSL were surveyed and reported that, despite good claims histories, their ability to obtain certain forms of insurance for their business operations was proving difficult and when obtained the traditional insurance market pricing was showing significant escalation of premiums. Because of their status as a small to medium business operators, the individual members have neither the time nor the resources to locate alternative insurers, particularly from the international insurance market. They have a pre-existing relationship with CSL as a member of the co-operative which was formed specifically to meet their business needs and as such it is fully conversant with the issues facing its membership and has a long tradition in providing membership benefits.

### **(b) Complies with public policy**

The Federal Government is aware of the present difficulties in the liability insurance market and has met with State and Territory governments to explore the means by which individuals in need of such insurance covers can obtain them. While recognising the problem there have been no solutions achieved.

CSL wishes to provide its members with a realistic and affordable alternative to insurance by combining the benefits supplied by its discretionary mutual topped up by the insurance cover provided by CML's wholly owned insurance company.

The Government has accepted the recommendations of the Dawson Committee in respect of third line forcing only being an offence where the substantial lessening of competition is the purpose, effect or likely effect of the conduct. Once the Trade Practices Act is amended, CML's conduct would not be in breach of the third line forcing provisions as its effect is not to substantially lessen competition.



**(c) Expansion of consumer choice.**

Recent insurance company mergers have created concern and confusion within some areas of the industry and the number of global re-insurance providers are contracting in number, with the likely outcome of there being less than 5 major world-wide reinsurers in the medium term. The impact of such structural changes within Australia has led to a significant reduction in the number of general insurance companies offering public liability and professional indemnity insurance to the public and as the industry consolidates through failure, merger or acquisitions, there will be less sector affinity for insurance needs.

Where insurance is being made available, the premiums are at a significantly higher rate and not affordable to the members of CSL. Negotiations conducted by CSL with the current commercial and general insurance supplier for CSL members have not led to any decreases in premiums despite significantly increased volumes of business and improved risk management practices by CSL members.

CML has been created to provide the members of CSL with an alternative to the traditional insurance market. Members of CSL will not be compelled to join CML and will have the ability to choose the traditional market if they wish to do so. But as CML would not exist without CSL, the proposed conduct of limiting membership of CML to members of CSL will allow CML to provide services that are tailor made for the specific needs of its members and will provide a feasible alternative which in turn will foster competition and encourage stable and competitive pricing.

**(d) Cost control**

CML's ability to offer competitive pricing is dependent on its membership being limited to CSL members and the insurance component being provided by CINZ so that it can utilise the efficiencies of offering tailor made services. By offering a commercial alternative to traditional insurance CML will reduce the cost to members and in achieving this will assist in controlling the costs of insurance premiums which in turn will impact on the cost of automotive services to the public. It will also act as an incentive for members to remain in the industry rather than closing down their business and in doing this will foster continuing competition in the automotive industry.

## **4. Detriment**

We submit that there is no detriment associated with the proposed conduct. The offer of CML membership benefits only to CSL members enables the delivery of a cost competitive alternative to insurance and will increase the level of competition in the existing insurance market. The tailor made nature of CML's services will enable an efficient and cost-effective delivery to its members. The requirement that the member acquire the insurance layer from CINZ allows CML to provide a competitive product to

its members while not leaving the members exposed to the potentially expensive claims. CINZ will re-insure its liabilities through an international reinsurer.

It is submitted that the notified conduct is an initiative which has demonstrable public benefits for consumers and the wider community.

## **5. Assessment**

It is submitted that the proposed conduct does not result in a substantial lessening of competition, nor any anti-competitive detriment. In addition, there are distinct public benefits attaching to the provision of CML's services only to CSL members.

## **6. Conclusion**

For these reasons and based on the information provided in this submission and the Form G Notification which it supports, it is submitted that the notified conduct should not be opposed by the Commission.