

22 December 2005

Mr Scott Gregson  
Adjudication  
Australian Competition and  
Consumer Commission  
470 Northbourne Avenue  
Dickson ACT 2602

FILE No:	
DOC:	
MARS/PRISM:	

A90997 - A90998

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Dear Mr Gregson

### Application for authorisation and interim authorisation

We enclose, on behalf of Allianz Australia Insurance Limited, QBE Insurance (Australia) Limited and Insurance Australia Limited (trading as NRMA Insurance) (the **Applicants**) an application for revocation of Authorisation A30217 and A30218 and substitution of a replacement authorisation under ss 91C and s88(1) of the *Trade Practices Act 1974* (Cth). The Applicants are parties to an unincorporated joint venture operating through an agent and trading as Community Care Underwriting Agency (**CCUA**). CCUA has been providing public liability insurance to eligible not for profit organisations (**NFPOs**) since December 2002.

As the Commission is aware, the current authorisations A30217 and A30218 in respect of the joint venture arrangement expire on 31 December 2006. It is the Applicants' current intention to continue offering public liability insurance to NFPOs that satisfy the eligibility criteria, and this is the subject of the application for extension of the current authorisation (by way of revocation and substitution).

We therefore enclose the following documents in support of the application:

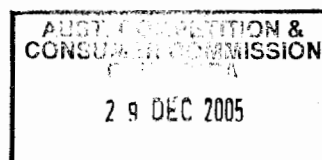
- completed Forms A and B; and
- Attachment A, the submission accompanying the application for revocation and substitution of Authorisation A30217 and A30218.

The Applicants request that authorisation be granted for a period of 5 years.

The Applicants also request that the Commission grant interim authorisation to the arrangement pending the outcome of the full authorisation application. The effect of the time limit imposed by the current authorisation is that it does not extend to CCUA entering into contracts to cover events occurring after the expiry date of 31 December 2006. This has a significant impact on the ability of CCUA to write new annual business or accept annual renewals after **31 December 2005**. The vast majority of policies written by CCUA are annual policies. If the arrangements were not authorised after 31 December 2006, this would require all annual policies written after 31 December 2005 to be terminated before their expiry at considerable inconvenience to those NFPOs that have sourced insurance for the year. Many NFPOs are staffed by volunteers who have little experience of arranging insurance cover and who have only limited time available to them to consider administrative issues, such that the need to make changes to insurance arrangements during the

Our Ref CYOS: EXMS:205111182

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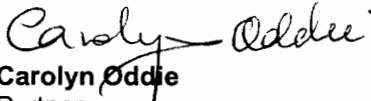
Sydney  
Melbourne  
Brisbane  
Perth  
Bangkok  
Beijing  
Hong Kong  
Jakarta  
Phnom Penh  
Port Moresby  
Shanghai  
Singapore

course of a year would often cause significant difficulties. The mid term cancellation of an NFPO's policy could also have far reaching effects on their ability to comply with their funding contracts with Government Departments which require them to maintain current insurance at all times. If alternative insurance cannot be arranged, the NFPO's funding could be withdrawn and they would be required to cease operating.

In the light of this and the significant public benefits which flow from the pool arrangement, as described in detail in Attachment A, the Applicants therefore request that the Commission grant interim authorisation to the arrangement to allow CCUA to enter into contracts to cover events occurring up to 12 months after the Commission makes its final determination in respect of the full authorisation application.

If the Commission has any questions or requires any further information regarding any aspect of the application, please contact Carolyn Oddie or Emma Marsh.

Yours sincerely



**Carolyn Oddie**

Partner

Carolyn.Oddie@aar.com.au

Tel 61 2 9230 4203

Encl



**Emma Marsh**

Senior Associate

Emma.Marsh@aar.com.au

Tel 61 2 9230 4136

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Form A  
Commonwealth of Australia  
*Trade Practices Act 1974 - Subsection 88(1)*  
Exclusionary Provisions:  
Application for Authorisation

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the *Trade Practices Act 1974* for an authorisation under that subsection

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act
- to give effect to a provision of a contract, arrangement or understanding where the provision is or may be an exclusionary provision within the meaning of section 45 of that Act.

1. (a) **Name of applicant**

**Allianz Australia Insurance Limited** (ACN 000 122 850);  
**QBE Insurance (Australia) Limited** (ACN 003 191 035); and  
**Insurance Australia Limited (trading as NRMA Insurance)** (ACN 000 016 722)  
(together the "Applicants").

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(b) **Short description of business carried on by applicant**

Provision of general insurance services in Australia.

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(c) **Address in Australia for service of documents on the applicant**

c/o Carolyn Oddie  
Partner  
Allens Arthur Robinson  
The Chifley Tower  
2 Chifley Square  
Sydney NSW 2000  
Tel: (02) 9230 4203  
Fax: (02) 9230 5333

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- 
2. (a) **Brief description of contract, arrangement or understanding and, where already made, its date**

Joint venture agreement for the supply of public liability insurance to Not for Profit Organisations which provide services to the broader community dated 18 November 2002.

Joint venture amendment agreement dated 11 August 2005.

- 
- (b) **Brief description of those provisions of the contract arrangement or understanding that are, or would or might be, exclusionary provisions**

See Attachment A.

- 
- (c) **Names and addresses of other parties or proposed parties to contract, arrangement or understanding**

None.

- 
3. **Names and addresses (where known) of parties and other persons on whose behalf application is made**

None.

- 
4. (a) **Grounds for grant of authorisation**

See Attachment A.

- 
- (b) **Fact and contentions relied upon in support of those grounds**

See Attachment A.

- 
5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding**

- (a) **Is this application to be so expressed?**

No.

- 
- (b) **If so, the following information is to be furnished:**

- (i) **the names of the parties to each other contract, arrangement or understanding**

- 
- (ii) **the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application**

- 
6. (a) **Does this application deal with a matter relating to a joint venture?**

Yes.

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- 
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes.

- (c) If so, by whom or on whose behalf are those other applications being made?

The Applicants listed in 1(a).

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7. **Name and address of person authorised by the applicant to provide additional information in relation to this application**

Carolyn Oddie  
Partner  
Allens Arthur Robinson  
The Chifley Tower  
2 Chifley Square  
Sydney NSW 2000  
Tel: (02) 9230 4203  
Fax: (02) 9230 5333

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Date: 22nd December 2005

Signed on behalf of the Applicants

C. Oddie

(Signature)

CAROLYN ODDIE

(Full Name)

Carolyn Oddie

LAWYER, ALLENS ARTHUR ROBINSON

(Description)

Authorised to sign on behalf of  
the Applicants

**Form B**  
**Commonwealth of Australia**  
***Trade Practices Act 1974* - Subsection 88(1)**  
**Agreements Affecting Competition:**  
**Application for Authorisation**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the *Trade Practices Act 1974* for an authorisation under that subsection

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

**1. (a) Name of applicant**

**Allianz Australia Insurance Limited** (ACN 000 122 850);  
**QBE Insurance (Australia) Limited** (ACN 003 191 035); and  
**Insurance Australia Limited (trading as NRMA Insurance)** (ACN 000 016 722)  
(together the "Applicants").

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**(b) Short description of business carried on by applicant**

Provision of general insurance services in Australia.

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**(c) Address in Australia for service of documents on the applicant**

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2. (a) **Brief description of contract, arrangement or understanding and, where already made, its date**

Joint venture agreement for the supply of public liability insurance to Not for Profit Organisations which provide services to the broader community dated 18 November 2002.

Joint venture amendment agreement dated 11 August 2005.

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- (b) **Names and addresses of other parties or proposed parties to contract, arrangement or understanding**

None.

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3. **Names and addresses (where known) of parties and other persons on whose behalf application is made**

None.

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4. (a) **Grounds for grant of authorisation**

See Attachment A.

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- (b) **Fact and contentions relied upon in support of those grounds**

See Attachment A.

---

5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.**

- (a) **Is this application to be so expressed?**

No.

---

- (b) **If so, the following information is to be furnished:**

(i) **the names of the parties to each other contract, arrangement or understanding**

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(ii) **the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application**

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6. (a) **Does this application deal with a matter relating to a joint venture?**

Yes.

---

- (b) **If so, are any other applications being made simultaneously with this application in relation to that joint venture?**

Yes.

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- (c) If so, by whom or on whose behalf are those other applications being made?

The Applicants listed in 1(a).

7. Name and address of person authorised by the applicant to provide additional information in relation to this application

Carolyn Oddie  
Partner  
Allens Arthur Robinson  
The Chifley Tower  
2 Chifley Square  
Sydney NSW 2000  
Tel: (02) 9230 4203  
Fax: (02) 9230 5333

Date: 22nd December 2005

Signed on behalf of the Applicants

  
(Signature)

CAROLYN ODDIE  
(Full Name)

Carolyn Oddie

LAWYER ALLENS ARTHUR ROBINSON  
(Description)

Authorised to sign on behalf of  
the Applicants





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## **Attachment A**

# **TRADE PRACTICES ACT 1974**

Application for Revocation and Substitution of Authorisation  
in respect of a pool arrangement for the provision of public liability  
insurance to Not for Profit Organisations which provide services to the  
broader community

by

QBE Insurance (Australia) Limited

Allianz Australia Insurance Limited

Insurance Australia Limited (trading as NRMA Insurance)

December 2005

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## 1. Submission

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This submission is being made on behalf of Allianz Australia Insurance Limited, QBE Insurance (Australia) Limited and Insurance Australia Limited (trading as NRMA Insurance) (the **Applicants**) who are parties to an unincorporated joint venture operating through an agent and trading as Community Care Underwriting Agency (**CCUA**). CCUA has been providing public liability insurance to eligible not for profit organisations (**NFPOs**) since December 2002.

The current authorisation (A30217 and A30218) in respect of the joint venture arrangement expires on 31 December 2006. The effect of this time limit is that authorisation will not extend to CCUA entering into contracts to cover events occurring after that date. However, it is the Applicants' current intention to continue offering public liability insurance to NFPOs that satisfy the eligibility criteria. The Applicants have in recent months engaged in correspondence with the Commission about whether there is a need to seek an extension of the current authorisation, by way of revocation and substitution, given some amendments which have been made to the pool arrangements and other matters. The Applicants have decided to seek such an extension.

The Applicants therefore provide this submission in support of their application for the revocation of the current authorisation (A30217 and A30218) and substitution with a new authorisation under ss 88(1) and 91C of the Trade Practices Act 1974 (Cth) (**the Act**).

For the Commission's ease of reference, the Applicants have repeated some of the information contained in the submission accompanying the original application for authorisation, dated 22 October 2002.

Representatives of the Applicants would be pleased to meet with the Commission if required to discuss the application and the contents of this submission.

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## 2. Background to the application

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### 2.1 Liability Insurance

Liability insurance provides cover for damages arising from liability which an insured has to a third party under the law. It may also cover the insured's own costs relating to the claim such as legal costs. Typically the liability is for civil liability for damages and will be subject to particular conditions or exclusions, such as an exclusion of liability under the policy for intentional acts of the insured.

Liability insurance falls broadly into three classes - public liability, professional indemnity and product liability insurance. Public liability covers liability for property damage and personal injury and death caused by the insured. It is this type of liability insurance which is the subject of this submission.

Public liability insurance like other liability insurances protects the financial position of the insured particularly in cases where the insured may not have large financial resources or capital. This is the case for many not for profit organisations.

It is also a facility by which an injured third party can be assured of receiving compensation for economic loss and the means to rehabilitate from any injury suffered.

The liabilities covered under public liability insurance can arise under one of three heads:

- common law and equity;
- statute; and
- contract.

Public liability insurance is insurance against liability for property damage and personal injury or death but it does not cover those risks covered under workers' compensation or motor accident schemes.

## **2.2 Background to Public Liability Insurance crisis**

During the mid to late 1990s public liability was very competitive and premium rates reduced steadily.

However, by about 1998 many insurers were realising losses from public liability and either increasing premiums, cutting back the amount and type of business they were willing to write or pulling out of the market or large segments of it altogether.

FAI and HIH were significant competitive forces in the market. HIH in particular became the market leader by size and was widely regarded as being one of the main forces reducing premium rates during the mid 1990s and then keeping them low from 1997 – 1999.

Events and changes occurred, particularly during the late 1990s and early 2000s which had a direct effect on the provision of public liability insurance in Australia, including:

- HIH collapsed – it had a large proportion of the policies in Australia written for public liability insurance;
- a number of insurers withdrew from providing liability insurance (e.g. St Paul);
- a number of insurers merged (e.g. AMP General and GIO (NSW) were taken over by Suncorp);
- some insurers restricted the cover they were prepared to provide;
- the attitude of society to making a claim for injury changed as people became more aware of their rights to recover damages from third parties;
- particularly in some states, consumers began receiving higher damages verdicts than in the past;
- courts started tending to uphold strict liability for damage caused by defective products; and
- joint and several liability often resulted in defendants who only contributed to part of the loss being found liable for the entire loss.

The events of September 11 2001 also had a significant influence on the insurance industry worldwide, including Australia. The immediate effect was a major reduction in available capital which led to increases in reinsurance rates and a corresponding increase



in premiums. Reinsurance prices were under pressure prior to the September 11 terrorist attacks due to significant losses incurred by the insurance industry. This pressure then increased even further.

The effects of September 11 were compounded by the impact of the downturn in equity markets which further reduced available capital for insurers. It needs to be remembered that for an insurer to write new public liability insurance, which is a long-tail liability class, as well as obtaining the premium for the risk, the insurer must have capital to provide against the new business which is written in order to meet the prudential capital requirements required under the *Insurance Act 1973*. If an insurer does not have capital available to it for this purpose, it will not be able to write new business. Hence, the availability of capital as well as the availability of reinsurance which in turn requires capital is critical to the ability of an insurer to write this class of business.

The prudential standards have been strengthened in Australia so that even more capital is required for underwriting long-tail classes than was previously the case.

The reduction in capital as a result of the downturn in equity markets led to increased competition between national markets for the capital that remained. Foreign insurers indicated that Australia was not attractive, because they perceived it as a small market with a history of poor returns (especially in the liability classes) and poor prospects for improvement.

As a result of the events and changes discussed above, the unavailability of capital and low returns, foreign and Australian insurers had to become more selective about the risks they were prepared to underwrite. Among the poorer prospects were long-tail liability classes since they were unprofitable for many years and require significant reserves. Insurers' exposure to claims also increased dramatically in the late 1990s and early 2000s. Strengthening of the prudential standards had a further impact on the level of premiums, since premiums are set taking into account future claims growth and the cost of capital required to support the business.

Insurers have been reluctant to provide cover to NFPOs for public liability because of the poor prospects of a profitable return on capital and also because of a perceived high risk of claims against them. Often, one hears NFPOs indicating that as individual risks, they have no history of claims being made against them and that they cannot understand why it is that insurance is either unavailable or too costly. The reality is that the insurance cover is only viable from the point of view of insurers if the pool of moneys available from premiums is sufficient to meet the likely claims that will arise from this class of business. Although in particular cases there may be a low probability of a claim arising, if such a claim does arise, then there is a much higher probability that the claim may involve significant cost. People can be injured very seriously from simple accidents which may arise from negligence and in some cases the awards or settlements are extremely high. Although the risk profile of a particular NFPO will be relevant to an underwriting decision, at the end of the day the pool of moneys available must be adequate to cover the risks associated with that pool and also adequate to provide a reasonable prospect of a profitable return on capital.



In addition, the only insurance that many NFPOs seek to obtain is public liability insurance and there is a general reluctance in the industry to provide stand alone liability policies.

Around 2000 - 2002, a high level of community concern developed about the provision of liability insurance in Australia, including the provision of public liability insurance. The Federal Government introduced legislation with respect to waivers for people undertaking high risk activities and enabling structured compensation payments to victims of accidents as opposed to lump sum payments. 2002 also saw a number of ministerial meetings on public liability insurance, which led to the appointment by the Federal and State governments of a panel to review the law of negligence. This panel was chaired by Justice Ipp, and released its final report recommending a number of changes to the law of negligence on 2 October 2002.

Since that time, the States have all introduced legislation dealing with civil liability reforms, the purpose of which is ultimately to seek to reduce claims costs and make public liability insurance more affordable for customers and cost-efficient for insurers to provide.

### **2.3 The Pool Arrangement for the provision of public liability insurance to certain NFPOs**

The pool arrangement was an initiative of the Insurance Council of Australia (**ICA**) that resulted from a perceived need for public liability insurance cover for certain NFPOs that did not have the financial capability to purchase such insurance at the premiums they were being offered. At the time the initiative was conceived, members of the ICA were aware of public concern regarding the cost and availability of public liability insurance for certain organisations, and in particular certain types of NFPOs.

A Working Group was formed by the ICA to consider the manner in which these concerns relating to the availability of public liability insurance could be addressed by the general insurance industry. These discussions resulted in the pool arrangement initiative which was discussed with State Treasurers and the Commission.

The proposals initiated by ICA were taken up by Allianz, QBE and Insurance Australia Limited who are together the Applicants in respect of this application for authorisation.

The pool arrangement was given interim authorisation by the Commission on 28 November 2002. Since that time, the Applicants have put the pool arrangement in place and been operating it through an agent. The agent is QBE Insurance (Australia) Limited trading as CCUA. The Commission's final determination granting authorisation to the Applicants for the pool arrangement was given on 24 March 2004 and expires on 31 December 2006.

## **3. The Pool Arrangement**

### **3.1 The arrangement**

The Applicants entered into an arrangement or understanding pursuant to which public liability insurance is made available through an unincorporated joint venture to certain NFPOs that are experiencing difficulties in obtaining cover.

Each insurance policy is written by the pool members as follows:

- Allianz      25%
- QBE          37.5%
- Insurance Australia Limited 37.5%

QBE Insurance (Australia) Limited (trading as CCUA) was appointed as an agent to act as the intermediary for each pool member in connection with arranging business through the pool arrangement.

Cover is not offered to all NFPOs. Eligibility criteria include those discussed below.

**(a) Eligibility**

The NFPOs that can be considered eligible need to have the following characteristics:

- provide services to the broader community
- have a NFPO tax status or turnover/funding less than \$5 million per annum
- does not distribute profits to its members
- comprises mainly of "volunteer" members

A volunteer means a person who carries out community work for which no remuneration is received, other than remuneration for reasonable expenses incurred whilst performing community work.

The NFPOs which are likely to meet these criteria are those involved in the areas of:

- personal services;
- cultural and recreational services – small sporting groups;
- services to the arts – local music and drama groups;
- creative arts – artists operating under Government grants;
- health and community services – welfare and community groups;
- interest groups – pensioner groups, ratepayers' associations and the like; and
- community radio and television operations.

The arrangement does not provide coverage for larger organisations with the financial capability to purchase public liability insurance. Examples include:

- religious organisations;
- semi-government bodies; and
- national and State sporting bodies e.g. rugby league, rugby union, Australian Football, hockey, etc.

**(b) Dispute resolution**

An Internal Dispute Resolution Process is also in place to consider any appeals from decisions as to whether or not a particular organisation qualifies as an NFPO. The Internal Dispute Resolution Process is available for disputes arising from eligibility decisions – i.e. where it has been determined that an organisation does not have the characteristics of an NFPO.

The process involves the referral of all complaints in the first instance to QBE's Compliance Manager. The Compliance Manager then meets with the Agent to discuss the complaint and if it cannot be resolved, the Compliance Manager refers the complaint to the Complaints Board for review. The Complaints Board comprises one Senior Insurance Manager from each pool member who has underwriting experience and authority to make a final decision that will be binding on the Agency.

The same process operates in respect of claims except that in that case the members of the Complaints Board may include Senior Claims Officers and legal counsel. At the time that a proposal or claim is declined the Agent provides the client with a brochure setting out the Internal Dispute Resolution process.

In its final determination on the original application for authorisation, the Commission raised some concern that this dispute resolution process is not formally provided for by the joint venture agreement and may give rise to some degree of uncertainty. As a result of this concern, it imposed two conditions on the Applicants. The first of these was that a complaints handling procedure consistent with AS4269-1995 be implemented by CCUA and be open to both eligible and ineligible NFPOs, and the second was that CCUA report on a quarterly basis to the Commission on the complaints it has received and their outcome.<sup>1</sup> CCUA has implemented a dispute resolution process for complaints in respect of underwriting and claims decisions. CCUA has also reported complaints on a quarterly basis to the Commission. As the Commission is aware, CCUA has received very few complaints in its period of operation.

#### **4. Terms of Authorisation Sought**

Application is made under subsections 91C(1) and 88(1) of the Act, as appropriate, for the revocation of authorisation A30217 and A30218 and substitution with a new authorisation:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of s 45 of that Act;
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of s 45 of that Act;
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of ss 45 or 45A of that Act; and
- to give effect to a provision of the contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of ss 45 or 45A of that Act.

<sup>1</sup> Commission's Determination, paragraph 6.79.

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## **5. Arrangement for which authorisation is sought and public benefits resulting from the specific provisions of the arrangement**

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### **5.1 Arrangements with brokers**

As part of the arrangement, the Applicants agreed that no commission is to be paid to brokers who sell the insurance offered through the pool arrangement, although brokers are able to charge customers themselves for the services they provide if they wish.

It is possible that the provision by which the pool members agreed that no commission will be paid to brokers who sell the insurance offered through the pool arrangement could be regarded as an exclusionary provision under ss 45(2)(a)(i) or 45(2)(b)(i) of the Act because it could be seen as restricting the acquisition of brokerage services from brokers who might wish to supply services to the pool members on particular conditions.

However, the Applicants submit that properly construed in the light of recent case law, the agreement not to pay commission to brokers would not be viewed as a possible exclusionary provision by a Court. The Applicants submit that the High Court appeal in the case of *South Sydney Rugby League Football Club Ltd v News Ltd* has clarified the circumstances in which an exclusionary provision will be found. This decision was handed down after the date of the original authorisation application. Based on the Court's decision in that case, the Court will focus on the subjective purpose of the provision in question and the provision will be assessed in the context of the agreement as a whole.

In relation to the pool arrangement, it is the Applicants' submission that the subjective purpose of the provision by which they agree not to pay commission to brokers is to enable them to supply public liability insurance to NFPOs at the lowest possible price, by reducing the costs of the business and the consequent premium payable by NFPOs. Furthermore, brokers are not restricted from charging customers a fee for the services they provide. In the light of this, the Parties submit that the issue of a potential exclusionary provision in this regard no longer arises.

If the Applicants were to amend the joint venture agreement to delete the provision in which they agree that no commission is to be paid to brokers, the costs of the business would increase. Additional staff would need to be employed to deal with the increased administration created as a result of making commission payments to brokers, and changes would need to be made to CCUA's operating systems. The outcome of this would be that premiums would have to be increased to help to cover the increase in costs. The Applicants therefore submit that even if the Commission does not accept the Applicant's view of the case law, the agreement not to pay commission to brokers does not result in a substantial lessening of competition in the relevant market, and results in such a benefit to the public that the proposed arrangement should be allowed.

### **5.2 Proposed models for setting premiums**

The pricing model is designed to set a base or average level premium for different categories of NFPOs.

Technical premium rates are established by the pool members using the following criteria:



- type of activity;
- size of organisation;
- claims history; and
- risk analysis.

Using these criteria, each NFPO is allocated into one of the following categories or combinations of categories:

Low Hazard (e.g. book clubs, rostrum clubs and community arts)

Medium Hazard (e.g. historical associations, street markets and eisteddfods)

High Hazard (e.g. crisis centres, fetes and pony clubs).

A rating system based on a Hazard Index scale from 1 to 10 is then applied to each NFPO as follows:

Low Hazard – 1 to 4

Medium Hazard – 5 to 8

High Hazard – 9 to 10.

In conjunction with the Hazard Index, a minimum Base Premium is used, which has been developed to reflect the performance of community style risks using Insurance Statistics Australia (**ISA**) data. The minimum Base Premium of \$500 was set to reflect a standard risk with very low exposures and was set to ensure that the Applicants cover processing expenses. A Multiplier Factor is then applied to the relevant Base Premium to reflect exposures within each category of the Hazard Index.

When determining the Multiplier Factor to be applied the following examples of Exposure Measures are taken into account:

- number of attendees;
- turnover;
- total funding (government and non-government);
- number of stallholders;
- number of full or part time staff and volunteers;
- number of beds;
- frequency and nature of events; and
- full range of activities undertaken.

The model used for rating purposes is based on the classification of each risk into the appropriate ANZSIC/ISA classification. The classification determines both the Hazard Index and the Base Premium to be charged for a standard low exposure risk. Once this decision is made the Applicants take into account the Exposure Measures applicable to the risk and determine which Multiplier Factor to apply to the Base Premium to arrive at the actual premium to be charged.

An example of the way the model works is set out below:

Client:	Neighbourhood Centre
Activities:	Advocacy, Information Referrals, Counselling, Adult Education classes and Social and Support Groups
ANZSIC Classification:	8729
Hazard Index:	5
Base Premium:	\$1,100
Funding:	\$559,252
Staffing:	3 full time, 19 part time, 20 volunteers
Additional Activities:	Respite Care, Respite Outings, Community Transport and Home Support.

A multiplier factor, driven by the level of funding, staffing and additional activities, is then applied to the base rate to determine the total premium payable.

A rating model has also been developed for the 1 to 5 day event style risks such as fetes, and art shows etc. This model is based on a Hazard Index 6 and multipliers are again applied to the Base Premium based on exposures. The multiplier is reduced to reflect the fact that the risk is for a short period of time.

These rating models may be modified over time as a result of the continuing experiences the Applicants have in providing public liability insurance to NFPOs.

The Applicants submit that the costs of the pool are kept down since no commission is paid to brokers or to the agent, CCUA. Average industry commissions range between 15% and 20% of the net premium. The Applicants also collate data which enables CCUA to continue to develop more sophisticated rating methodology. The model is adjusted over time to reflect real claims experience and the impact of legislative change enabling better forecasting of claims, and setting premiums to reflect accurately the experience of NFPOs.

### **5.3 No price fixing because of joint venture exception**

Section 45A of the Act provides that a provision of a proposed contract, arrangement or understanding shall be deemed, for the purposes of s 45, to have the purpose or to have or be likely to have the effect of substantially lessening competition, if the provision has the purpose or has or is likely to have the effect (as the case may be) of fixing, controlling or maintaining of, the price for or a discount, allowance, rebate or credit in relation to, goods or services supplied by the parties to the contract, arrangement or understanding in competition with each other.

The Applicants are competitive with each other in relation to the supply of general insurance including public liability insurance to customers in Australia.

As part of the arrangement, the Applicants agree on the premium to be charged to each customer who wishes to take out a public liability insurance policy through the pool arrangement.

However, the pool members fall within the definition of "joint venture" in s 4J of the Act. This is because there is an activity in trade or commerce which the Applicants submit is

carried on jointly by the pool members, even though the pool members maintain several liability in respect of each individual claim. In addition, the joint venture involves the supply of public liability insurance by all the parties to the joint venture in proportion to their respective interests in the joint venture, and made available as a result of the joint venture (s 45A(2)(b)).

The Applicants therefore submit that any agreement between them regarding the premiums or renewal premiums to be charged to a customer does not amount to price fixing under s 45A of the Act, since it falls within the joint venture exception in s 45(A)(2)(b).

#### **5.4 Arrangements with brokers and the agent**

As discussed above, brokers are able to sell the insurance offered by the pool members. The insurance is sold through the agent, CCUA. To reduce the costs of the business and the consequent premiums payable by NFPOs the pool members do not pay commission to brokers or the agent, CCUA, for the services they provide in relation to any business placed under the arrangement. Brokers are not prevented from charging fees to customers for whom they source public liability insurance.

The Applicants are competitive with each other in relation to the supply of general insurance including public liability insurance to customers in Australia and arguably for the acquisition of agency services and broker services.

The joint buying exception within s 45A(4)(a) excepts agreements relating to the price for goods or services to be acquired collectively by the parties to the agreement. The Applicants submit that the pool members' acquisition of:

- agency services from the agent; and
- brokerage services from any brokers who sell the proposed pool insurance;

benefit from this exception.

Consequently, the agreement not to pay commission to brokers or the agent does not amount to price fixing under s 45A of the Act.

#### **5.5 Terms and Conditions, Policy Wording and Underwriting**

Agreement between the pool members on the policy wording resulted in certain risks being excluded (some of these may have been the subject of previous cover). CCUA will be undertaking a full review of the policy wording in the early part of 2006.

The current policy is based on a standard liability policy wording with agreed modifications:

- the definition of employee includes volunteers so that they are not considered to be third parties;
- a "Participant to Participant" exclusion was added;
- a "Child Molestation/Sexual Abuse" exclusion was added;
- an exclusion for claims brought under certain sections of the TPA was added;
- territorial limits are restricted to Australia only. Policy can be extended to cover overseas trips on a case by case basis;

- removal of the care, custody and control sub limit;
- removal of vicarious professional liability to cover first aid only;
- limit of liability is inclusive of defence costs;
- maximum limit of liability of \$20 million per policy;
- minimum deductible of \$1000 per occurrence applies. Higher levels of deductible may be imposed based on exposures.

There are some instances where cover may not be provided, for example, where an NFPO presents poor loss history, unduly high risk or overseas exposure. If a risk is considered unsuitable for inclusion in the pool arrangement due to any of these criteria, the risk may be considered for special inclusion in the pool on the basis that the terms and conditions of inclusion may be different from the standard policy which is offered.

The agreement on terms and conditions, policy wording and underwriting and any amended agreement could arguably give rise to concerns under s 45. However, for reasons given below the Applicants submit that no such concerns arise.

## **6. Effect on competition of the proposed arrangement**

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Section 45 of the Act prohibits a corporation from, amongst other things:

- making a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- giving effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or would have or be likely to have the effect, of substantially lessening competition.

Given the fact that the Applicants submit that the pool arrangement does not give rise to any automatic breaches of the TPA, the only other potential issue is whether or not the arrangement could be said to have or be likely to have the effect of substantially lessening competition. For reasons set out below, the Applicants submit that none of the arrangements have the effect of substantially lessening competition.

In the final determination granted by the Commission on 24 March 2004, the Commission concluded that the relevant market in which to assess the potential effect on competition of the pool arrangement was the national market for the supply of public and product liability insurance<sup>2</sup>. The Applicants have adopted the same market definition for the purposes of the analysis below.

The relevant question is whether competition in the market with the arrangement will be lessened compared with the state of competition in the market without the pool arrangement. The Applicants submit that without the arrangement, each applicant would individually choose whether or not it wanted to supply public liability insurance to NFPOs (and may unilaterally decide not to in certain circumstances). With the arrangement,

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<sup>2</sup> Commission's Determination, paragraph 6.9 and 6.10.

CCUA provides an additional player in the market, which is specifically focussed on providing insurance to NFPOs and has set up its own systems to assist with this. The continuing existence of CCUA will not preclude each applicant from supplying public liability insurance individually to NFPOs but acts as an additional option. For example, by its nature, CCUA may quote on some risks that each party may individually choose not to do, because the pool arrangement allows the Applicants to distribute between them the risk of claims being made which makes it more economically viable for them to provide cover in some circumstances, thus creating greater competition overall within the market.

The Applicants also submit that the continuation of the pool arrangement will not significantly inhibit other competitors from operating in or entering the market.

Additional issues relevant to the Applicants' submission that the pool arrangement will not have or be likely to have the effect of substantially lessening competition moving forward include the fact that there is increased competition in the relevant market, evidence of new entry and scope for new entry, CCUA's emphasis on risk management and improvements in industry wide data collection and publication. These issues are discussed below.

#### **6.1 Increased competition from new participating insurers**

At the date of the application for the original authorisation, the Applicants noted that the following companies/facilities provided public liability insurance services to NFPOs:

- QBE Insurance (Australia) Limited, Allianz Australia Insurance Limited and Insurance Australia Limited, (these three being the participants in CCUA);
- QBE Mercantile Mutual;
- ANSVAR;
- Suncorp Metway;
- Concord Underwriting Agency – using local and overseas insurers;
- Global Underwriting Agency – using local and overseas insurers;
- Triton Underwriting Agency – Transpacific Insurance Company based in the Cayman Islands;
- Marsh Insurance Services – using local insurers;
- AON Client Placement Facility – using local insurers;
- Jardine Lloyd Thompson Commercial and Domestic Facility – using local insurers; and
- Catholic Church Insurances<sup>3</sup>.

At the present time, in addition to the above:

- CGU, IAG and QBE Commercial also write public liability insurance for NFPOs;

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<sup>3</sup> Authorisation Application, section 6.4.

- CGU and QBE Commercial participate in the bulk buying arrangement brokered by AON for NCOSS (New South Wales Council of Social Services);
- Lloyds of London writes public liability insurance for a bulk buying arrangement brokered by Meals on Wheels for hundreds of NFPO groups, initially in NSW but now spreading across Australia;
- Calliden Group Limited is a new entrant to the relevant market, specialising in the SME sector including NFPOs; and
- Employers Mutual Limited provide capacity to Renaissance Underwriting Agency (formerly Triton Underwriting Agency).

Evidence of increasing competition in the relevant market is discussed in further detail below.

The Applicants therefore submit that there is increased competition within the market compared with the level of competition that existed at the date of the Commission's final determination on the original application for authorisation, and these other market players act as a constraint upon the conduct of the pool.

## **6.2 New entrant and additional scope for new entry**

At the date of the original application, the Applicants submitted that there were no significant barriers to entry to insurance companies wishing to enter the market from within or outside Australia<sup>4</sup>.

The Applicants believe this is confirmed by the fact that the Calliden Group Limited has recently entered the relevant market. Calliden was formerly Reinsurance Australia Corp, a reinsurance company that ceased writing new reinsurance business in February 2000 after reporting an underwriting loss of \$480 million. After a successful run-off period, the company re-entered the market in early 2005. It was granted a general insurance licence by APRA on 18 March 2005 and an Australian Financial Services licence on 5 April 2005.

Calliden has stated (see [www.calliden.com.au](http://www.calliden.com.au)) that it will focus on providing customised insurance solutions for affinity groups and associations in the SME sector only and distribute their products solely through insurance intermediaries. Calliden have defined affinity groups as a group of customers defined by a common affinity to each other; this can be characterised by a specific industry, professional association or membership, or recognised sector of society, e.g. NFPOs. Their definition of SME is small to medium sized enterprises with a turnover of up to \$20m and/or up to 20 employees, including NFPOs.

In addition, clause 3.11 of the joint venture agreement has been deleted and the Parties can and do write public liability insurance, including for NFPOs, in competition with the pool arrangement. As a result, the Parties submit that the pool arrangement does not of itself have the effect of increasing market concentration or barriers to entry; rather, it has created an additional competitor in the market.

<sup>4</sup> Authorisation Application, section 6.4.

### 6.3 Risk Management

At the date of the original application, the Applicants submitted that the arrangement would facilitate the education of NFPOs as insureds by providing a central information facility for risk management and the cost implications of certain activities. This would also enable possible aggregation of NFPOs as purchasers resulting in cost savings<sup>5</sup>.

At the date of the final authorisation, the Commission observed that improved risk management might reduce the potential for NFPOs to suffer detriment caused by moral hazard and adverse selection<sup>6</sup>. Measures aimed at improving risk management and providing NFPOs with improved information resources to enable them to identify the cost implications of certain activities are likely to be of benefit. However, the Commission also commented that the education service might simply replace that traditionally provided by brokers and did not attach much weight to this claim<sup>7</sup>. Similarly, it did not consider that adequate evidence had been provided of how aggregation would occur<sup>8</sup>.

#### (a) Risk management

The Applicants submit that its risk management education program is far in excess of any such education service traditionally provided by brokers. Since CCUA began issuing public liability insurance policies to NFPOs in December 2002, it has worked with a number of organisations to inform NFPOs of the concepts behind and the benefits of implementing risk management plans.

Risk management workshops have been run in conjunction with:

- Local councils, including Mildura Rural City Council, Baulkham Hills Shire Council, Caloola Shire Council and Coonabarabran Shire Council – representatives of NFPOs attend each workshop;
- Play Groups NSW – presentation to zone managers who pass on information to groups within their zones;
- Joanna Gash, Federal Member for Gilmore (4 regional towns) – around 200 representatives of local NFPOs attended;
- NSW Film & Television Office – Community cinema events (Dungog, Broken Hill and Young); and
- Regional Arts NSW – Orana Arts, Dubbo, Southern Tablelands Arts – around 100 representatives of NFPOs attended.

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<sup>5</sup> Authorisation Application, section 7.

<sup>6</sup> In the final determination, the Commission commented that moral hazard arises when the incentive of the insured parties to avoid 'accidents' is reduced. NFPOs may lack the level of financial resources or economies of scale needed to allow for sufficient risk management procedures to be implemented. Consequently, it is thought that some insurance companies may be reluctant to offer cover to NFPOs compared to organisations with risk management procedures in place (footnote 33). In relation to adverse selection, the Commission commented that this refers to the situation where the insured may know more about their own risks than the insurer. NFPOs are diverse in the degree of risk they carry, even across similar organisations or the same organisation over time (footnote 34).

<sup>7</sup> Commission's Determination, paragraph 6.66.

<sup>8</sup> Commission's Determination, paragraph 6.67.



CCUA has developed or is in the process of developing risk management materials including:

- Sample forms and checklists to help NFPOs plan safe events; and
- Risk assessment templates which provide a framework for the development of a risk management plan and an example plan as a training aid.

In conjunction with CLUBSINC, CCUA is making available a series of 'How to' booklets, including 'The role of the President', 'How to run a committee meeting', 'How to keep minutes' and 'Conflicts of interest'.

CCUA has also purchased the copyright in three booklets developed by the Nonprofits' Insurance Alliance of California, and has undertaken to modify the booklets to reflect Australian conditions and laws in an attempt to assist small to medium sized NFPOs to improve their understanding of the risk management process. The booklets are:

- 'SAFE – Sound Advice for Functions and Events';
- 'Managing Volunteers: Balancing Risk and Reward'; and
- 'Surviving a Crisis: Practical Strategies for Non profit Organisations'.

The booklets are in the process of being amalgamated into one booklet, entitled 'Keeping Community fun alive and well'.

All of the above risk management materials will be made available free of charge on the CCUA website within the next couple of months.

CCUA currently offers a 20% reduction of premium to NFPOs which have an acceptable risk management plan in place. Risk management plans will vary depending on the nature of the NFPO and the type of events they hold.

#### **(b) Aggregation**

In relation to aggregation, CCUA has aggregated arrangements in place with a number of groups, set out in Confidential Annexure 1.

### **6.4 Industry wide data**

At the time of the final determination, the Commission also commented on the lack of industry wide data which would assist insurers and their actuaries to set appropriate rates for individual risks and to set appropriate claims reserves<sup>9</sup>.

However, in January 2005, the Australian Prudential Regulation Authority (**APRA**) established the National Claims and Policies Database at the request of the Government 'in response to the liability 'crisis' observed in recent years'. This database should assist with any issues in this regard.

The following information is taken from the NCPD's website ([www.ncpd.apra.gov.au](http://www.ncpd.apra.gov.au)) :

The Database will provide insurers, the community and the government with a better understanding of public and products liability and professional indemnity insurance. It will

<sup>9</sup> Commission's Determination, paragraph 6.25



help make public and product liability and professional indemnity insurance products more affordable and available by:

- providing insurers with detailed information to help them assess risks and determine appropriate premiums for these insurance products; and
- helping insurers develop or enhance the products available to policyholders in the future.

It will also enable the government, the community and insurers to identify trends and implement changes to reduce the number of claims or lower the cost of claims for public and product liability and professional indemnity.

The Database was created by APRA at the request of the Federal Government.

A number of organisations contribute to the NCPD to ensure that it provides comprehensive information about public and product liability and professional indemnity insurance.

All APRA-regulated insurers that provide these types of insurance policies are required to contribute claims and policies data to the NCPD. Other organisations, such as state and territory insurers, will also submit data to the NCPD. The first data collection will occur in early 2005 and will include claims and policies data for the period from 1 January 2003 to 31 December 2004.

The NCPD should therefore assist insurers and their actuaries to set appropriate rates for individual risks and to set appropriate claim reserves. When NCPD reports are published, the data may provide further assistance to potential new entrants in deciding whether to enter the market.

## **7. Public benefit of the pool arrangement**

The Applicants understand that premiums for public liability insurance for corporate and commercial clients have reduced. This is true to a lesser extent in respect of public liability insurance for NFPOs. This is because the costs associated with the provision of public liability insurance to corporate and commercial clients have reduced more significantly than the costs associated with the provision of public liability insurance to NFPOs, allowing insurers to make more significant reductions in premiums to those classes of clients.

However, in relation to CCUA itself, there was no increase in premium for CCUA clients in 2005 unless there were changes in their operations which increased their risk exposure.

The Applicants therefore submit that although there is greater stability in the relevant market than at the time of the original application, and the market has softened to an extent (as evidenced by recent new entry), the impact of the tort reforms will not be seen for several more years. As a result, the Applicants submit that there is a continuing need for the pool arrangement and there are demonstrable public benefits which will continue to flow from the arrangement.

In particular, the Applicants submit that the pool arrangement enables them to distribute between them the risk of claims being made which makes it more economically viable for them to offer this type of insurance. Public liability insurance will therefore continue to be available to certain types of NFPOs which had previously been unable to obtain cover or had to cancel events because of the cost of cover. This in turn supports public events and



community initiatives, which contributes to the community spirit particularly in outlying communities.

The Applicants submit that the arrangement results in a benefit to NFPOs that provide services to the broader community. The arrangement provides increased access to public liability insurance cover for these types of NFPOs which will continue to allow them to maintain their current services and reduce the need for these organisations to approach Governments for increased funding.

The pool arrangement allows NFPOs to obtain cover from companies licensed in Australia, which affords them the protection of Commonwealth Government legislation which governs the conduct of these insurers.

The pool arrangement also benefits those who volunteer for a NFPO as it results in the provision of appropriate insurance to NFPOs. Many NFPOs are staffed by volunteers who have little experience of arranging insurance cover. The pool arrangement was established to provide insurance to NFPOs and provides a central facility that is directed especially at people involved in NFPOs. The Applicants anticipate that as a result of the pool arrangement these volunteers are better able to deal with NFPO issues and provide education through the facility to NFPOs about risks and the cost implications for insurance of certain types of activities. In addition, a link is included on the ICA website, together with publicity for the arrangements, providing a central point of contact for NFPOs regarding insurance. This provides an additional avenue for NFPOs and volunteers to access relevant information from people who are familiar with their activities and the risks to which they might be exposed.

Further, the Applicants encourage discussion between the agent and peak bodies in an attempt to develop collective purchasing arrangements that are of benefit to many small NFPOs in particular. These arrangements provide cost savings which can be passed on to the peak bodies and their members. Examples of aggregation have been provided above.

Finally, the Applicants believe that the arrangement continues to address widespread concerns regarding the provision of public liability insurance services to NFPOs that provide services to the broader community. Examples of NFPOs that were unable to obtain insurance and have now been provided with cover by CCUA are set out in Confidential Annexure 2.

This result provides clear public benefits and achieves outcomes which are supported by public policy.

## **8. Conclusion**

In conclusion, the Applicants submit that any lessening of competition which could flow from the continuing arrangement is clearly outweighed by the public benefits. The arrangement met and will continue to meet the calls from government and sections of the community for public liability insurance to be made more widely available to certain types of NFPOs. Without this insurance, the community may be deprived of many services and events that assist in enhancing community spirit and public cohesion.



On this basis, the Applicants request that the Commission grant the application for the revocation of authorisation A30217 and A30218 and the substitution with a new authorisation for a period of 5 years.

If the Commission requires further information regarding any aspect of this application, reference can be made to:

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**Confidential Annexure 1**

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**Confidential Annexure 2**

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