



FILE No:
DOC:
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27 May 2008

Mr Scott Gregson  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
Level 7, Angel Place  
123 Pitt Street  
SYDNEY NSW 2000

Dear Mr Gregson

**Notification of Exclusive Dealing**

We act for GESB Mutual Limited (“GML”).

Please find enclosed a notification under section 93(1) of the *Trade Practices Act 1974* prepared on behalf of GML together with a cheque in the amount of \$100 for the lodgment fee.

**1 Background**

The notification relates to conduct that will arise out of proposed changes to the structure and regulatory framework of the superannuation schemes for employees of the public sector in the State of Western Australia.

Those Western Australian public sector superannuation schemes are not regulated by Commonwealth superannuation legislation. However, the State of Western Australia is a signatory to a Commonwealth/State Heads of Government Agreement which requires it to conform with the principles of the Commonwealth’s Retirement Income Policy.

Pursuant to Commonwealth law, most employees in Australia may choose their superannuation fund. Once an employee has chosen a complying fund, and informed their employer of their choice, their employer must make superannuation contributions to the superannuation fund on behalf of the employee.

In contrast, currently, employees of the public sector in Western Australia, in almost all cases, may not choose their superannuation fund.

Under the existing system, the only superannuation fund available to almost all employees of the public sector in Western Australia is the Government Employees Superannuation Fund which is administered by the Government Employees Superannuation Board (“GESB”).

In October 2007, the Parliament of Western Australia introduced the *State Superannuation Amendment Act 2007* (WA). When implemented, the Act will give employees of the public sector in Western Australia the freedom to choose their superannuation fund (“**Choice of Fund**”). It is envisaged that this will occur in late 2008.

Pursuant to the *State Superannuation Amendment Act*, the Government Employees Superannuation Fund will be renamed the State Superannuation Fund and divided into two sub-funds. The two sub-funds will be known as the Defined Benefit Fund and the West State Fund. In addition, a new superannuation fund will be established. It will be named the GESB Superannuation Fund.

GESB will be renamed the State Superannuation Board (“**SSB**”). SSB will administer the Defined Benefit Fund, which will no longer accept new members, until the end of its life cycle.

When Choice of Fund is introduced, the State Superannuation Fund will no longer be the only superannuation fund available to public sector employees of Western Australia. Instead, employees will be able to choose between the West State Fund, the GESB Superannuation Fund and any other superannuation fund available on the market.

## 2 **GML**

The *State Superannuation Amendment Act* provides for the establishment of a mutual company, GML. GML will take over some of the functions of GESB.

The Act requires GML to enter into three service agreements with the entities that will be responsible for administering the Defined Benefit Fund, the West State Fund and the GESB Superannuation Fund. Please note that the service agreements, which are not yet in existence, will be confidential.

Under one of the confidential service agreements, GML will provide administration and investment services to SSB (in relation to the Defined Benefit Fund) on the condition that SSB will acquire investment products specified by GML, from time to time.

## 3 **Notified conduct**

The proposed conduct that is being notified consists of an offer by GML to supply administration and investment services to SSB on the condition that SSB will acquire investment products specified by GML from parties that are not necessarily related to GML.

#### 4 Net public benefits

The proposed conduct will give rise to a net public benefit.

The proposed conduct will take place in the context of a reorganisation mandated by the Parliament of Western Australia in the form of the *State Superannuation Amendment Act*.

The proposed conduct serves to achieve the key purpose of that Act, which is to give employees of the public sector in Western Australia the freedom to choose their superannuation fund.

The *State Superannuation Amendment Act* regulates in detail the arrangements that the newly created entities (including GML) are to enter into. The proposed conduct is necessary to implement the requirements of the legislation in a way that gives rise to substantial efficiency increases and cost savings for the State of Western Australia and for superannuation fund members.

In particular, the arrangements between GML and SSB will result in significant benefits accruing to the State of Western Australia. One such benefit is the maintenance of economies of scale through GML's management of SSB's investment options. The State of Western Australia has a strong interest in achieving economies of scale, particularly because the Defined Benefit Fund will decline over time due to its closed membership. The State of Western Australia and the public will, therefore, benefit from the proposed conduct.

If you have any questions concerning the notification, please contact us.

Thank you for your assistance.

Yours sincerely



Sharon Henrick

Partner

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Direct fax +61 2 9296 3999

Email [sharon.henrick@malleons.com](mailto:sharon.henrick@malleons.com)

**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 in 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)

N93424 GESB Mutual Limited (ACN 129 271 549) ("GML").

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

GML has come into existence as a result of the reorganisation of superannuation arrangements for employees of the public sector in the State of Western Australia.

Currently, there is only one superannuation fund into which employer agencies of the State of Western Australia ("**Employer Agencies**") can make superannuation contributions<sup>1</sup> on behalf of their employees. That fund is the Government Employees Superannuation Fund, which is currently administered by the Government Employees Superannuation Board (ABN 43 418 292 917) ("**GESB**"). GESB is a statutory corporation established under section 5 of the *Government Employees Superannuation Act 1987 (WA)*.

Pursuant to the *State Superannuation Amendment Act 2007 (WA)*,<sup>2</sup> the State of Western Australia has now determined to offer employees of the State freedom to choose their superannuation fund. In order to offer this freedom, which is envisaged to occur in late 2008, the Western Australian Government has determined to reorganise the way the Government Employees Superannuation Fund is administered.

The reorganisation will include renaming the Government Employees Superannuation Fund to the State Superannuation Fund and dividing it into two

<sup>1</sup> Superannuation payments for employees of the public sector in the State of Western Australia are not regulated by Commonwealth superannuation legislation but the State of Western Australia is a signatory to a Commonwealth/State Heads of Government Agreement which requires it to conform with the principles of the Commonwealth's Retirement Income Policy. It is on this basis that employer agencies of the State of Western Australia are required to make superannuation contributions on behalf of their employees.

<sup>2</sup> Assented to on 16 October 2007.

sub-funds, the Defined Benefit Fund and the West State Fund. Further, a new superannuation fund, the GESB Superannuation Fund, will be established.

When choice of fund is introduced, employees will be able to choose between the West State Fund, the GESB Superannuation Fund and any other superannuation fund available on the market.<sup>3</sup>

However, section 50 of the *State Superannuation Amendment Act* provides that the GESB Superannuation Fund will be the prescribed default superannuation fund. That is, if employees do not choose another superannuation fund, then their employer will make the contributions on their behalf into the GESB Superannuation Fund.

The entity previously responsible for the administration of the Government Employees Superannuation Fund, GESB, will be renamed the State Superannuation Board (“SSB”).<sup>4</sup> SSB will continue to administer the Defined Benefit Fund until the end of its life cycle.

GML will provide, under a total of three service agreements, administration and investment services to the entities that will be responsible for administering the Defined Benefit Fund, the West State Fund and the GESB Superannuation Fund. The service agreements to be concluded by GML are a requirement of section 47 of the *State Superannuation Amendment Act*.

The service agreements, which have not yet been concluded, will be confidential.

Under one of the service agreements, GML will be providing administration and investment services to SSB. The administration and investment services will relate to the performance by SSB of its functions in respect of the Defined Benefit Fund.

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

Sharon Louise Henrick  
Partner  
Mallesons Stephen Jacques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

Telephone: 02 9296 2294  
Fax: 02 9296 3999

#### **Notified arrangement**

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

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<sup>3</sup> The Defined Benefit Fund is not available for choice as it is closed and no longer accepts new members. It will therefore naturally decline and eventually cease to exist.

<sup>4</sup> Section 5(3) of the *State Superannuation Act 2000 (WA)*, as amended by the *State Superannuation Amendment Act 2007 (WA)*, provides that SSB is “a continuation of, and the same legal entity as, the Government Employees Superannuation Board”.

This notice relates to:

- (i) administration and investment services to be provided by GML to SSB; and
- (ii) unit trusts, cash, or other investment products to be acquired from third parties with the assets of any superannuation scheme for which SSB is responsible.

(b) Description of the conduct or proposed conduct:

GML proposes to supply the administration and investment services to SSB on the condition that SSB will use the assets and income of any superannuation scheme for which it is responsible (currently the Defined Benefit Fund) to acquire such unit trusts, cash or other investment products as GML may specify, from time to time.

Further, GML may refuse to supply the administration and investment services for the reason that SSB has not agreed to acquire unit trusts, cash or other investment products, as specified by GML.

*(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)*

The Government Employees Superannuation Board (ABN 43 418 292 917) (to be known from 1 July 2008<sup>5</sup> as the State Superannuation Board).

- (b) Number of those persons:

- (i) At present time:

One.

- (ii) Estimated within the next year:  
*(Refer to direction 6)*

One.

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

Government Employees Superannuation Board  
(to be known as the State Superannuation Board)  
Level 4 Central Park  
152 St Georges Terrace  
Perth WA 6000

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<sup>5</sup> Pursuant to the *State Superannuation Amendment Act 2007 (WA)*, the change of name is to occur at the "transfer time" as defined by that Act, which is to be fixed by the Treasurer of Western Australia. Currently, it is envisaged that the transfer time will be 1 July 2008. However, this may be delayed.

#### 4 Public benefit claims

- (a) Arguments in support of notification:  
(Refer to direction 7)

The proposed conduct will give rise to a net public benefit for the following reasons.

**It will be part of the arrangements which will give employees of the public sector in Western Australia the ability to choose their superannuation fund**

In October 2007, the Parliament of Western Australia introduced the *State Superannuation Amendment Act*. Implementation of the Act will give employees of the public sector in Western Australia the freedom to choose their superannuation fund. It is envisaged that this will occur in late 2008.

The proposed conduct is part of the arrangements by which employees of the public sector in Western Australia will achieve the freedom to choose their superannuation fund. That is a substantial benefit to the public.

**It will allow the State of Western Australia to reduce its costs and administrative burdens**

Notwithstanding the reorganisation referred to in item 1 above, the defined benefit schemes, because of their unfunded nature, will retain their existing government guarantee. Unlike the other sub-funds, the Defined Benefit Fund will remain under State regulation, with oversight by SSB. This arrangement will allow the State of Western Australia to carry out its supervisory activities in the areas where it bears financial risk.

At the same time, the State of Western Australia will wish to minimise its costs, particularly given that the Defined Benefit Fund will decline over time due to its closed membership.

The confidential service agreement between GML and SSB will be entered into for exactly this purpose: to allow the State Government to reduce its costs (see, for example, attached pages 1 and 7 of the Explanatory Memorandum to the State Superannuation Amendment Bill 2007).

The confidential service agreement will require GML to provide investment and administration services to SSB. Given that GML will, under two similar confidential agreements, also provide identical services in relation to the other sub-funds that will be created as a result of the reorganisation, the confidential service agreement should permit the State of Western Australia to reduce unnecessary administrative duplication.

Further, a common management of all sub-funds by GML will allow for a pooling of funds and provide additional administrative costs savings.

The State of Western Australia and, therefore, the public will benefit from those costs savings and reduced administrative burdens.

However, the State of Western Australia will only be able to realise the benefits described above if GML has the ability to make decisions on the particular investments that will be made by SSB. This requires that the provision of administration and investment services by GML to SSB be conditional upon GML's ability to specify what investments are to be made.

#### **Approval by the Treasurer of Western Australia**

The confidential service agreement between GML and SSB, including the provision that provides for the proposed conduct, will be approved by the Treasurer of Western Australia and entered into in accordance with section 47 of the *State Superannuation Amendment Act*.

The Treasurer is also a special member of GML.

The involvement of the Treasurer will ensure that the proposed conduct will be consistent with the public interest.

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

Please see above.

#### **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)*

Various financial services markets.

#### **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 item 2 (a) above and the prices of goods or services in other affected markets:

*(Refer to direction 9)*

None.

- (b) Facts and evidence relevant to these detriments:

- (i) The proposed conduct will not lessen competition because:

- the number of persons affected by the proposed conduct (1) will be immaterial compared to the total number of persons who acquire unit trusts, cash or other investment products in Australia (whether in the course of investing the assets of a superannuation fund or whether in the course of other investment activities);

- GML has no interest in favouring one particular investment product over another. Its only interest is in coordinating its investment decisions across the several sub-funds. GML will be contractually bound to make these decisions in a bona fide manner and in the interests of both SSB and the fund members, and having regard to the investment objectives agreed with SSB in the service agreement.

7 Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Sharon Louise Henrick  
Partner  
Mallesons Stephen Jacques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

Telephone: 02 9296 2294  
Fax: 02 9296 3999

Dated 27 May 2008

Signed by/on behalf of the applicant



(Signature)

SHARON LOUISE HENRICK

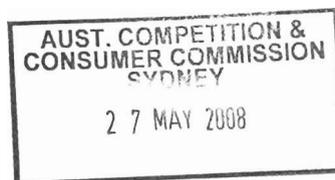
(Full Name)

MALLESONS STEPHEN JACQUES

(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 the 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.

# STATE SUPERANNUATION AMENDMENT BILL 2007

## Explanatory Memorandum

### Overview of Bill

The State Superannuation Bill 2007 ("Bill") will amend the *State Superannuation Act 2000* ("Act"). The predecessor to this Act established the Government Employees Superannuation Board ("Board"), which administers the State's public sector superannuation arrangements.

The Board is responsible for two types of superannuation arrangements:

- (a) defined benefit schemes, where investment risk is borne by the State; and
- (b) accumulation schemes, where investment risk is borne by members.

The Board's activities and the superannuation schemes are not regulated by Commonwealth superannuation legislation but the State is a signatory to a Commonwealth/State Heads of Government Agreement to conform with the principles of the Commonwealth's Retirement Income Policy.

By Commonwealth law most employees in Australia have Choice of superannuation fund ("Choice"). That is, employees may choose a complying fund, and if they do, their employer must make superannuation contributions for them to the superannuation fund. By contrast, Western Australian Public Sector Employees, in almost all cases, do not have Choice.

The Bill will amend the Act to provide for:

- a) WA Public Sector Employees to have Choice in regards to accumulation scheme (superannuation guarantee) contributions made to an accumulation scheme;
- b) the creation of two new entities and a new Commonwealth regulated superannuation fund ("New Structure"). The two entities are:
  - I. TrustCo, a proprietary limited company which will act as trustee/responsible entity of the new regulated fund; and
  - II. MutualCo, a company limited by guarantee whose members will be the members of the accumulation schemes.
- c) the transfer of assets and liabilities to the New Structure, which will be regulated by Commonwealth law;
- d) arrangements for transfer of the accumulation scheme known as West State Super to Commonwealth regulation under the New Structure whilst continuing its untaxed status but providing flexibility for a change of tax status dependent on outcomes of negotiations with the Commonwealth; Unless the Commonwealth agrees to a solution that ensures no detriment to members upon conversion of West State Super to a taxed scheme, West State Super will remain as an untaxed scheme under Commonwealth regulation.
- e) the removal of the State's liability for the payment of accumulation benefits;
- f) the transfer of employees of the Board to the New Structure;
- g) certain consequential changes to the Board's powers, which include renaming the Board as the State Superannuation Board; and
- h) the defined benefit schemes to continue to be under the responsibility of the Board.

In addition to providing Western Australian Public Sector Employees with Choice, the above amendments provide an appropriate corporate and regulatory framework for the new structure. They place the accumulation schemes in a new entity, able to operate and evolve in a competitive market and regulated in the same manner as accumulation funds generally. At the same time, the defined benefit schemes remain under State regulation with a government guarantee given the unfunded nature of these benefits. This arrangement provides a more focused vehicle for the State to carry out its supervisory activities in the areas where it carries financial risk. Through a services agreement with MutualCo, the State is able to retain scale economies as the defined benefit schemes decline over time due to their closed membership.

- that a transferring member's obligations as a member of the new fund will be no greater than the member's existing obligations under the member's current superannuation scheme";
- that if it is necessary to appoint a new trustee, then MutualCo will make the appointment.

Subsection (5) contains the definition of "compliance change" relevant to subsection (4). In determining whether a transferring member's benefit entitlements in the new fund will be no less favourable than under the member's current superannuation scheme under subsection (4), any changes of the following kinds are disregarded:

- (a) any changes to benefit entitlements that it is necessary to make to comply with, or that occur as a consequence of, the Commonwealth's superannuation laws (the SIS Act), tax laws or other Commonwealth laws; and
- (b) the fact that members' benefits in the new fund will not be guaranteed by the State under Section 31 of the Act.

#### **Section 46 Licences, approvals etc to be obtained**

Subsection (1) requires the Board, MutualCo and TrustCo to take all necessary steps to obtain licences, approvals and registrations as required under Commonwealth regulation.

Subsection (2) provides the definition of "necessary".

#### **Section 47 Service agreements**

The service agreement will enable MutualCo to provide investment and scheme administration services to TrustCo and the Board. The service agreements would significantly reduce scheme administration duplication, allow for pooling of funds under management and provide savings in administration costs. This means that the State is able to retain scale economies as the defined benefit schemes decline over time due to their closed membership. For all members this continues MutualCo as a single point of contact for their superannuation.

Subsection (1) provides that the Board must as soon as practicable prepare and submit to the Treasurer a draft of the service agreements.

Subsection (2) provides that the Treasurer may approve the service agreements or direct amendments to be made.

Subsection (3) provides that following the Treasurer's approval, MutualCo, TrustCo or the Board are to enter into an agreement on the terms approved.

### **Division 3 – Continuing provisions relating to MutualCo and TrustCo**

#### **Section 48 Constitutions of MutualCo and TrustCo to include certain provisions**

Requires the constitutions to contain provisions for the registered office and principal place of business to be in Western Australia and more than half the directors to be resident in Western Australia. Section 47(2) declares this aspect of the Constitutions of MutualCo and TrustCo to be excluded matters for the purposes of section 5F of the Corporations Act. This allows State law to override or modify provisions of the Corporations Act. The effect of section 47(2) is that the registered office and principal place of business of MutualCo and TrustCo and the requirement that more than half of the directors must ordinarily reside in Western Australia, cannot be changed without amending the Act.