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24 May 2012

Our reference
ASUT.MDEA.10050905

By email and post: adjudication@accg.gov.au

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Dear Sir

Hotel Employers Mutual Limited - Exclusive Dealing: Notification

We act for the Hotel Employers Mutual Limited (HEM), a general insurer authorised by the Australian Prudential Regulation Authority pursuant to the *Insurance Act 1973* and a specialised insurer presently licensed by WorkCover NSW.

On behalf of HEM, we enclose for lodgement:

- (a) Exclusive Dealing Notification (Form G) relating to HEM's specialised workers compensation insurance product; and
- (b) a cheque in the sum of \$100.00 in payment of the lodgement fee.

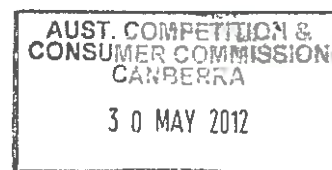
We would be grateful for acknowledgement of receipt of the notification and payment in due course.

Please do not hesitate to contact me if you have any queries in relation to this notification.

Yours faithfully



Murray Deakin
Partner



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Royal Exchange NSW 1225
DX 170 Sydney
www.middletons.com

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52 Martin Place
Sydney NSW 2000
Australia
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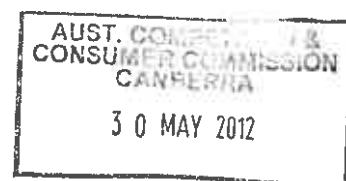
Contact
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Middocs 7841511v1 ASUT

Form G

Commonwealth of Australia

Competition and Consumer Act 2010 — 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 *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

N95906 Hotel Employers Mutual Limited (ACN 124 091 470)

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

Hotel Employers Mutual Limited is a general insurer authorised by the Australian Prudential Regulation Authority pursuant to the *Insurance Act 1973* and a specialised insurer presently licensed by WorkCover NSW to underwrite workers compensation insurance for the following divisions of the hospitality industry:

- (i) Accommodation; and
(ii) Pubs, Bars and Taverns.
- (c) Address in Australia for service of documents on that person:

Murray Deakin
Middletons
Locked Bag 1
ROYAL EXCHANGE NSW 1225

2. Notified arrangement

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

The supply of workers compensation insurance by Hotel Employers Mutual Limited and the acquisition of membership services from:

- (i) the Australian Hotels Association NSW (**AHA (NSW)**); or
- (ii) the Registered Clubs Association of New South Wales (**ClubsNSW**).

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

Hotel Employers Mutual Limited proposes to offer members of AHA (NSW) and ClubsNSW specialised workers compensation insurance policies at competitive premiums.

For further details, see Attachment A

(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)

Hospitality businesses that are current or future members of:

- AHA (NSW); or
- ClubsNSW.

- (b) Number of those persons:

- (i) At present time:

There are approximately 1,711 members of AHA (NSW). These members are already eligible to access Hotel Employers Mutual Limited's specialised workers compensation insurance.

There are approximately 1,250 members of the ClubsNSW. These members will become eligible to access Hotel Employers Mutual Limited's specialised workers compensation insurance.

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

Any new members of AHA (NSW) or ClubsNSW will also become eligible to access Hotel Employers Mutual Limited's specialised worker's compensation insurance.

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

Not applicable.

4. Public benefit claims

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

See Attachment A.

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

See Attachment A.

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)

See Attachment A.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)

See Attachment A.

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

See Attachment A.

7. Further information

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

Murray Deakin
Middletons
Level 26, 52 Martin Place
SYDNEY NSW 2000
T: +61 2 9513 2335
F: +61 2 9513 2399
E: murray.deakin@middletons.com

Dated 24 May 2012

Signed on behalf of the applicant



Murray Deakin
Partner
Middletons



DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* 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.

Attachment A

Background

1. Hotel Employers Mutual Limited (**HEM**) is a general insurer authorised by the Australian Prudential Regulation Authority pursuant to the Insurance Act 1973.
2. HEM is also a specialised insurer licensed by WorkCover NSW to underwrite workers compensation insurance for members of the NSW branch of the Australian Hotels Association (**AHA (NSW)**) in the accommodation and pubs, bars and taverns divisions of the hospitality industry.
3. The current shareholders of HEM are:
 - (a) Employers Mutual Limited (ABN 67 000 006 486), a public company limited by guarantee (**EML**); and
 - (b) Australian Hotels Association (NSW) Holdings Pty Ltd (ACN 124 070 042) (**AHA Holdings**), a wholly owned subsidiary of Australian Hotels Association NSW (ABN 64 243 628 807), which is the NSW branch of the Australian Hotels Association.
4. WorkCover has granted a specialised insurer licence to HEM under Division 3 of Part 7 of the Workers Compensation Act 1987. HEM's current specialised insurer licence contains a restriction that HEM shall not issue or renew any policy of insurance other than to members of AHA (NSW).
5. Therefore, at present, HEM offers existing members of AHA (NSW) a competitive rate in respect of its specialised workers compensation insurance for the accommodation and pubs, bars and tavern divisions of the hospitality industry. This conduct was previously the subject of a Notification to the ACCC (N92887) dated 11 April 2007. On 27 April 2007, the ACCC acknowledged that legal immunity conferred by that notification commenced on 26 April 2007. Given HEM's success to date in providing competitively priced workers compensation insurance within the accommodation and pubs, bars and tavern divisions of the hospitality industry, and ClubNSW's mandate to secure a specialised insurance partner, HEM proposes to increase the scale of its operations by offering workers compensation insurance within the club division of the hospitality industry. The existing shareholders of HEM as well as ClubsNSW take the view that ClubsNSW taking a 25 per cent interest in HEM – thereby effectively becoming a joint venture partner – is the most effective means of HEM achieving additional scale and support for writing workers compensation insurance for ClubsNSW members in addition to its existing business.
6. HEM's existing shareholders (EML and AHA Holdings) wish to allow ClubsNSW Insurance Holdings Pty Limited (ACN 158 304 235) (a wholly owned subsidiary of the Registered Clubs Association of New South Wales (ABN 61 724 302 100) (**ClubsNSW**)) to take up shares in HEM.
7. Once this share restructuring has been completed, the shareholders of HEM will comprise the following:

- (a) EML (50 per cent of the voting shares of HEM);
 - (b) AHA Holdings (25 per cent of the voting shares of HEM); and
 - (c) ClubsNSW Insurance Holdings Pty Limited (25 per cent of the voting shares of HEM).
8. At or following completion, it is proposed that the name of HEM will be changed to Hospitality Employers Mutual Limited.
 9. In order to extend its offering of specialised workers compensation insurance to members of ClubsNSW as well as members of AHA (NSW), an application has been lodged with WorkCover NSW to extend the scope of the licence so that HEM is also able to offer specialised workers compensation insurance to members of ClubsNSW.
 10. Once HEM's licence is expanded, HEM will offer specialised workers compensation insurance to members of AHA (NSW) and ClubsNSW in the accommodation, pubs, bars and taverns divisions and the club division of the hospitality industry in New South Wales (collectively **NSW Hospitality Industry**).
 11. The operations of HEM will continue to be managed by EML. EML has set up a separate dedicated team (the "HEM Team") to cater for the specific needs of the NSW Hospitality Industry.
 12. Given the nature of the restructure due to take place, HEM being the party to the 2007 notification intends to broaden the scope of the notified conduct to include offering workers compensation insurance to members of ClubsNSW (in addition to members of AHA (NSW)).
 13. HEM is lodging a new notification to reflect the following changes:
 - (a) HEM intends to change its name from Hotel Employers Mutual Limited to Hospitality Employers Mutual Limited; and
 - (b) the number of shareholders in HEM will increase to include ClubsNSW Insurance Holdings Pty Limited.

Proposed conduct

14. HEM intends to offer members of AHA (NSW) and ClubsNSW (**Members**) specialised workers compensation insurance policies at competitive premiums, on condition that the insurance policyholder acquires, or has acquired, membership of either:
 - (a) AHA (NSW); or
 - (b) ClubsNSW (**Membership**).

The HEM insurance policy will be offered to both existing and future Members.
15. The proposed conduct involves:
 - (a) HEM supplying or offering to supply specialised workers compensation insurance to persons who acquire or have acquired **Membership**; or

- (b) HEM refusing to supply specialised workers compensation insurance to persons who have not acquired or agreed to acquire Membership; and
 - (c) HEM giving or allowing or offering to give or allow, a competitive premium in relation to the supply of specialised workers compensation insurance to existing and future policyholders who acquire or have acquired Membership; or
 - (d) HEM refusing to give, offer or allow a competitive premium in relation to the supply of specialised workers compensation insurance for the reason that an existing or future policyholder has not acquired or has not agreed to acquire Membership.
16. Importantly, Members will be under no obligation to buy HEM's specialised workers compensation insurance policy or take advantage of any competitive premiums on offer if they do not wish to. Members will always retain the option to buy workers compensation insurance policies from a number of other workers compensation scheme insurers in NSW.
17. Similarly, it should be noted that in restricting the supply of specialised workers compensation insurance policies to persons holding Membership, HEM is merely complying with the existing and proposed conditions imposed by WorkCover NSW as part of HEM's specialised insurer licence.
18. Accordingly, whilst the conduct may be characterised as a form of exclusive dealing conduct within section 47(6) and 47(7) of the *Competition and Consumer Act 2010*, we submit that there are strong arguments that the provision of these policies will not breach these provisions because there is no element of 'compulsion' involved, as recognised in *SWB Family Credit Union Ltd v Parramatta Tourist Services Pty Ltd* (1980) 48 FLR 445. Viewed in this manner, the offer of workers compensation insurance (and any competitive premiums) is simply a benefit of Membership.
19. HEM will not be in a position to commence the proposed conduct with respect to the supply of policies to ClubsNSW members until its application for amendments to its WorkCover licence has been approved. However, once approved HEM proposes to engage in this proposed conduct until further notice.

Market definition

20. The relevant markets are:
- (a) the market for the supply of workers compensation insurance in New South Wales; and
 - (b) the market for the acquisition of trade association membership in the NSW Hospitality Industry.
21. *Workers' Compensation Insurance*
- 21.1 The NSW Workers Compensation Scheme (**Scheme**) provides protection to workers and their employers in the event of a work-related injury or disease. The Scheme operates pursuant to the *Workers Compensation Act 1987* and the *Workers Injury and Management and Workers Compensation Act 1998*

and associated regulations. The aim of the Scheme is to maintain a financially viable workers compensation system that is fair and affordable for employers and improves outcomes for injured workers.

- 21.2 The Scheme is funded through the premiums paid by employers and provides medical and financial support to injured workers. All employers in New South Wales are required by law to have a workers compensation insurance policy in place. These policies are supplied in NSW by the following WorkCover appointed agents (**Scheme Agents**):
- (a) Allianz Australia Workers' Compensation (NSW) Limited;
 - (b) Xchanging Integrated Services Australia Pty Ltd;
 - (c) CGU Workers Compensation (NSW) Limited;
 - (d) Employers Mutual NSW Limited;
 - (e) Gallagher Bassett Services Pty Ltd;
 - (f) GIO General Limited; and
 - (g) QBE Workers Compensation (NSW) Limited.
- 21.3 The mandatory nature of the Scheme means that there is always guaranteed demand for workers compensation insurance and that competition in this market is vigorous. Scheme Agents effectively compete through the value of the extra service offerings they provide to policyholders such as:
- (a) better claims management service;
 - (b) more effective rehabilitation of injured workers; and
 - (c) improved return to work ratios.
- 21.4 Numerous Scheme Agents can and do provide workers compensation insurance policies. This competition is evident from the fact that since HEM began offering specialised workers compensation insurance designed for the NSW Hospitality Industry to AHA (NSW) members for the first time in 2008, HEM has yet to penetrate approximately 50 per cent of the current AHA (NSW) members. Further penetration of AHA (NSW) members is only expected to increase by up to 5 per cent in the next 12 months.
- 21.5 It is anticipated that once a similar product is offered to members of ClubsNSW, HEM penetration of the ClubsNSW members is only likely to progress incrementally.
- 21.6 Therefore, the proposed conduct will not lessen, but facilitate, competition in the market for the supply of workers' compensation insurance by encouraging other suppliers to continue offering competitively priced and serviced workers compensation insurance to the NSW Hospitality Industry in order to retain their current policyholders.

22. Trade Association Membership in the NSW Hospitality Industry

22.1 The market for the supply of trade association membership in the NSW Hospitality Industry includes the following associations:

- AHA (NSW);
- ClubsNSW;
- Accommodation Association of Australia;
- Restaurants and Catering NSW;
- Leagues Clubs Australia;
- The RSL and Services Clubs Association;
- The Royal NSW Bowling Association (Bowls NSW);
- NSW Golf Association; and
- The Federation of Community Sporting and Workers Clubs.

22.2 **AHA (NSW)** is the state branch of the national Australian Hotels Association. The Australian Hotels Association represents the interests of the hotel industry and lobbies government at a local, state/territory and federal levels. As an organisation of employers in the hotel and liquor industry federally registered under the *Fair Work (Registered Organisations) Act 2009*, the Australian Hotels Association represents more than 5,000 members across Australia and 1711 members in New South Wales. AHA (NSW)'s members represent approximately 65 per cent of the hotel division of the NSW Hospitality Industry.

22.3 The majority of the AHA (NSW)'s members are pubs and taverns, while a significant number are accommodation hotels. The AHA (NSW)'s accommodation hotel members are serviced by Tourism Accommodation Australia (**TAA**). TAA is a division of members within the Australian Hotels Association (representing the specific interests of the accommodation division of the NSW Hospitality Industry) which also has a NSW branch linked to AHA (NSW). The President of TAA sits on the National Executive of the Australia Hotels Association.

22.4 AHA (NSW) and its TAA division both provide a wide range of benefits for members through partnerships with many corporate sponsors and suppliers. The specialised workers compensation insurance benefit currently provided by HEM is one of the many benefits offered by AHA (NSW) to its members.

22.5 **ClubsNSW** delivers a range of services and representation for NSW registered clubs and for the benefit of those working within the New South Wales club industry. There are approximately 470 registered clubs in New South Wales including bowling, golf, RSL and Leagues Clubs. Over 85% of these clubs are members of ClubsNSW. ClubsNSW contributes to both state and national policy direction and development for industry-specific legislation as well as actively lobbying for almost 250 Member venues. In addition, ClubsNSW's services for members include the management of an industry

code of practice; member assistance and educational business services; financial and insurance services; industry and community marketing and communications campaigns; industry-specific conferences, and trade exhibitions. Many of Australia's leading companies provide valuable long-term support through corporate partnerships and industry support programs as well as offering substantially discounted products and services to members.

- 22.6 **Accommodation Association of Australia (AAA)** is a third active trade association in NSW Hospitality Industry, a member owned association specialising in lobbying for employers specifically in the accommodation segment of the market. It represents a cross section of industry members including hotels, resorts, motels, bed & breakfasts, backpackers, caravan parks, timeshares, chains and independent operators in metropolitan and regional Australia. The AAA also offers a wide range of benefits and services to assist members in their day to day business activities. AAA membership also confers discounts on a wide variety services from a host of partnered suppliers, including insurance, legal and recruitments services for example.
- 22.7 **Restaurant and Catering NSW** is the state association which represents the interests of restaurants and catering businesses within New South Wales. The association is the peak industry association representing restaurants, caterers and other suppliers to this division of the NSW Hospitality Industry. The association offers a range of services to its members, including industry news, discounts on a range of services (including banking, superannuation, business insurance and stationery) education and training, accreditation and award programs, networking opportunities, workplace relations advice and marketing.
23. The last five associations listed in clause 22.1 above, in relation to registered clubs in NSW, were all parties along with ClubsNSW to an MOU with the now NSW Government that committed to setting up a registered club industry workers compensation scheme. The proposal to which the notified conduct relates, to the extent that it is in respect of registered clubs in New South Wales, represents the implementation of that joint commitment. Further, those last five associations whilst independent are all affiliated with ClubsNSW and represented on the ClubsNSW State Council. The majority of NSW registered clubs that are members of any of those other Associations are also members of ClubsNSW.
24. All the associations offer significant membership benefits to registered members. Therefore, acquisition of a trade association membership is not likely to rest purely on the offer of any one single benefit. By conferring an additional benefit on Members, the proposed conduct will not result in any anti-competitive effect in this market but will result in a positive benefit for Members.
25. The proposed conduct will mean that in offering specialised workers compensation insurance policies at competitive premiums, ClubsNSW will be able to offer an additional benefit to its members. This benefit is already available to members of AHA (NSW). The AAA currently offers a significant range of discounts and benefits for its members and is not precluded from fostering a relationship with other Scheme Agents or licensed insurers in order to offer workers compensation products as a membership benefit.

Public benefit claims

26. The proposed conduct will benefit the public because:
- (a) Members who chose to take up HEM's workers compensation insurance are likely to receive lower cost insurance due to the economies of scale achieved in providing workers compensation insurance on a large scale. The insurance is designed specifically for those working within the NSW Hospitality Industry. Employers not in the NSW Hospitality Industry would look elsewhere for their workers compensation insurance coverage in any event;
 - (b) the promotion and sale of HEM's specialised workers compensation insurance is likely to stimulate competition in the relevant markets by encouraging other Scheme Agents to offer their workers compensation products to the NSW Hospitality Industry as well as improving the service levels accompanying the products in order to compete effectively with HEM's product ;
 - (c) other industry trade associations may be encouraged to improve their promotions and membership benefits including seeking to foster a relationship with another Scheme Agent or licensed insurer offering competitive workers compensation insurance in order to attract and retain members. Therefore, businesses operating within the NSW Hospitality Industry will be provided with more choices and positive membership benefits from the relevant trade associations.

Public detriment

27. HEM does not consider that the proposed conduct would cause any detriment to customers or the public because:
- (a) in offering specialised workers compensation insurance policies to those who have acquired Membership, HEM is complying with a licence obligation imposed by WorkCover;
 - (b) there is no obligation on Members to take up the HEM workers compensation insurance product. A significant proportion of AHA (NSW)'s membership currently still acquires its workers compensation insurance from an insurer other than HEM;
 - (c) businesses operating without Membership will remain able to acquire workers compensation from Scheme Agents;
 - (d) Members will remain free to acquire workers compensation insurance from Scheme Agents (for example, GIO, Allianz). These alternative sources of workers compensation insurance presently satisfy a significant proportion of the NSW Hospitality Industry's workers compensation insurance requirements;
 - (e) The other identified associations are all alternative trade associations which offer significant membership benefits programs which relevant hospitality businesses are free to join;

- (f) the conduct forms part of HEM, AHA (NSW) and ClubsNSW's competitive activity and increases their product and service offerings in the relevant markets;
- (g) competition in the market for the supply of workers compensation insurance is vigorous (based largely around the administration of policies and claims management) and there are other large Scheme Agents in this market who offer alternative policies; and
- (h) competition in the market for the supply of trade association membership for the NSW Hospitality Industry will not be detrimentally affected as businesses will remain free to select a trade association based upon the range of services and discounts offered by an association. The offer of competitively priced workers compensation insurance is one of many products and services offered by associations as part of membership benefits to be considered when selecting whether to take a trade association membership. In this context, the proposed conduct can be characterised as a traditional membership benefit scheme offered to members of a trade association.

No anti-competitive effect

- 28. Competition already exists between HEM and other Scheme Agents within the accommodation and pubs, bars and tavern divisions of the NSW Hospitality Industry where AHA (NSW) members already have a choice of insuring through HEM or through other Scheme Agents. Once HEM commences its proposed conduct, HEM will compete with other Scheme Agents to supply workers compensation insurance policies within the club division of the NSW Hospitality Industry, thereby intensifying competition within this division.
- 29. HEM, AHA (NSW) and ClubsNSW do not see any anti-competitive effects flowing from the proposed conduct.
- 30. HEM's proposed conduct provides tangible benefits to members and no substantial detriment. Rather, it increases competition in the relevant markets by encouraging increased product service offerings, such as better claims management, improved return to work ratios and rehabilitation of workers. The proposed conduct also creates additional value for customers wishing to purchase these goods and services. Accordingly, HEM believes that the benefits of the proposed conduct outlined above outweigh any detriment considered to arise from the conduct.
