

Our Ref: ALS:554808

15 May 2015

General Manager, Adjudication Branch  
Australian Competition and Consumer  
Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

**Attention** David Hatfield

**Email:** [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Sir

**Exclusive dealing notification N98230 (Notification) by Virgin Internal Pilots Association (VIPA)**

We act for the Australian Air Pilots Mutual Benefit Fund (AAPMBF), a financial risk product provider referred to in VIPA's Notification.

Our client is concerned that the ACCC has been provided with incomplete and misleading information and that there is not a net public benefit from the third line forcing that is the subject of the notification.

**Third line forcing**

VIPA is breaching section 47(7) of the Competition and Consumer Act 2010 by providing "platinum" membership of VIPA, which carries up to a 25% discount on VIPA membership fees, only to pilots who take out income protection insurance with CommInsure Aviation Cover Income Protection (CommInsure) through one particular financial planner (with whom VIPA has a commercial relationship), namely Income Solutions Pty Ltd (Income Solutions). As we understand it, a pilot with a CommInsure policy arranged through another financial intermediary does not qualify for the membership fee discount.

**Relevant markets**

There are 2 highly concentrated markets that are affected by the third line forcing.

The first is the market for industrial representation of pilots (the Representation Market). VIPA is one of only four industrial organisations registered under the Fair Work Act that represent pilots in dealings with employer airlines. The other three are the Australian

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Federation of Airline Pilots (AFAP), the Australian & International Pilots Association (AIPA) and the Transport Workers Union (TWU). There is substantial competition between VIPA, AFAP and AIPA, and that competitiveness has significant influence on the second affected market.

The second affected market is the market for managing the financial risks faced by pilots (the Pilot Protection Market). This market is properly characterised so narrowly, because air pilots face a specific material risk factor that is unique to their industry, the risk of having suspended or cancelled an essential medical certificate issued by the Civil Aviation Safety Authority, without which the pilots cannot fly. While there are approximately 14,000 commercial pilots in Australia, there are only a tiny handful of financial risk products available to meet the special needs of pilots. CommInsure's product and AAPMBF's "loss of licence cover" are among the limited market.

Among the aspects of interface between these markets, the third line forcing has the effects of:

- improving VIPA's financial capacity to compete in the Representation Market; and
- providing a cross-subsidy between suppliers in the different markets.

### **Probable public detriments**

The following probable public detriments attach to the third line forcing. We use the word 'probable' because this submission is based on the incomplete information in the Notification and on VIPA's website. As explained below, subtle differences and insufficient disclosure of the financial arrangements between the financial planner and VIPA require rectification, both for individual consumers and for the market.

### **Not a level playing field**

In the Representation Market, VIPA has a financial advantage (by its ability to offer a lower membership fee) in attracting members, and that advantage arises other than through the normal operation of the business of an industrial organisation in a competitive market.

### **Pilots with the same risk management treated differently**

Pilots who are insured by CommInsure or a competitor, and have either a different financial planner or no financial planner, are treated disadvantageously. This inequity extends to existing VIPA members.

### **Irrational bundling of different products**

There is no functional purpose served by the third line forcing, but rather a bundling of different services with an anti-competitive purpose or effect.

### **Incomplete market information**

Market participants and the ACCC have not been given a clear or comprehensive explanation of the financial relationship between VIPA, VIPA IP and Income Solutions. No applicable product disclosure statement or financial services guide issued by VIPA IP is available on the VIPA website.

### **Conflicts of interest?**

While it could be inferred, it is not clear whether Income Solutions pays any commission, rebates or gives other benefit(s) to VIPA that would facilitate the discounted membership fee.

The Notification states that "VIPA IP facilitates the insurance application". A search of ASIC's professional registers does not reveal VIPA IP nor any VIPA officer or employee as an authorised representative of Income Solutions for the purposes of the applicable Australian Financial Services Licence regime that applies to the offer of financial risk products. In what capacity, with what duties and subject to what safeguards are VIPA IP staff facilitating insurance applications?

**Comments on aspects of the Notification**

We wish to draw to the ACCC's attention the following aspects of the explanation given by VIPA (rather than VIPA IP) in the Form G submitted by it. Those items set out in bold are on the issue of VIPA's claimed public benefit.

Statement in the Form G	Issue
"VIPA IP acts as a representative for members seeking income protection insurance" (section 1(b))	The legal basis for so acting is not explained. Is VIPA IP an agent for a VIPA member?
"It has a commercial relationship with Income Solutions Pty Ltd which acts as a financial adviser..." (section 1(b))	What is the nature of the relationship? Who advises whom and who has duties to whom in the tripartite relationship involving VIPA IP, Income Solutions and the insureds?
"VIPA takes the view that the services provided by VIPA IP are provided by a company related to VIPA because VIPA IP facilitates the insurance application." (section 2(b))	This statement does not make sense. It makes answers to the issues above all the more significant.
"Persons ...likely to be affected by the notified conduct: VIPA members" (section 3(a))	All Virgin Group pilots will be affected, not just VIPA members. There are a substantial number of Virgin Group pilots in the AAPMBF who are not members of VIPA.
<b>"The main benefit ... is to provide discounts to VIPA members to reduce the overall cost of their insurances..." (section 4(a))</b>	<b>For this statement to be substantiated there needs to be some explanation of how the membership fee discount is funded. If the membership discount is funded by an undisclosed commission or payment from Income Solutions to VIPA there is no real benefit, and other issues arise.</b>
<b>"It [the third line forcing] also prevents a situation where members may be uninsured..." (section 4(a))</b>	<b>This does not follow logically and is, literally, incorrect.</b>

<p><b>"Other competitor pilot unions ... may view the offer of these discounts as an incentive to offer similar discounted services..." (section 4(a))</b></p>	<p><b>Even if they do (which we doubt), it is not in the public interest to create more vertical restraints on competition.</b></p>
<p>"There are many alternative financial service providers ... who can offer similar or competing products ... to pilots." (section 4(b))</p>	<p>This statement is at odds with the statement in section 4(b) of the Notification. Our client also disagrees with it.</p>

**No public benefit**

Our submission has identified above a number of probable public detriments associated with the third line forcing, and a number of associated regulatory and public policy concerns.

Our client disputes that there is any public benefit, and that any arguable public benefit outweighs the detriments.

In the bold text above we have commented on the finite public benefit claims of VIPA. We submit that the claims are without merit. Among other things, we consider to be quite extraordinary the propositions that:

- bundling of unrelated services,
- cross-subsidies, and
- the desire to induce more vertical restraints on competition,

are public benefits.

**Further information**

Given our client's unique and direct insights into the two relevant markets, we would be pleased to assist the ACCC with whatever further information or analysis that would be useful.

Yours sincerely

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