

NOTIFICATION

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1)(a) of the Competition and Consumer Act 2010 of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47 (6) or (7), of that Act in which the person giving notice engages or proposes to engage.

1 Notifying Party

- (a) Name of persons giving notice
Employsure Mutual Limited Ltd ACN 630 256 478 (**Mutual**).
Registered office Suite G 2 Geils Court, Deakin ACT 2600
Employsure Pty Limited ACN 145 676 026 and Employsure Limited (NZ Company No. 5878527) (**Employsure**)
- (b) Contact for the purposes of this notification
C/o Marianne Robinson Sparke Helmore Lawyers
Level 29 MLC Centre 19 Martin Place
Sydney NSW 2000
Email [REDACTED]
- (c) Description of the business activities
 - (i) The Mutual is owned by 27,000 small business entities (**Members**) who are clients of Employsure.
 - (ii) The Mutual offers its Members the opportunity to access discretionary benefits called 'Employsure Protect' by paying a Contribution to the Mutual for the selected Protection.
 - (iii) To gain access to Employsure Protect the person must first be a client of Employsure and then successfully apply for membership of the Mutual.
 - (iv) Employsure provides employers with employment relations and health and safety advice and consultancy services..
- (d) Email address for service of documents in Australia for the purposes of this notification
[REDACTED]

2 Details of the notified conduct

The notified conduct is for exclusive dealing Section 47 of the Competition and Consumer Act 2010 (Cth).

A corporation engages in the practice of exclusive dealing if the corporation supplies, or offers to supply, goods or services on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

- (a) As a precondition to membership of the Mutual and the benefits offered by it in the form of Employure Protect, small businesses are first required to be a client of Employure which is not a related body corporate.

3 Provide details of the notified conduct including:

- (a) A description of the notified conduct
 - (i) The Mutual offers its Members the opportunity to access discretionary benefits called 'Employure Protect' by paying a contribution fee to the Mutual for the selected Protection. To gain access to Employure Protect the person must first be a client of Employure Pty Ltd ACN145 676 026 and then successfully apply for membership of the Mutual.
 - (ii) Employure is not a related company of the Mutual but a subsidiary of Peninsula Business Services Group Ltd, based in the United Kingdom, and comes under the banner of Rainy City Investments Ltd, also based in the UK. Peninsula has been providing professional services to small businesses across the UK since 1983.
- (b) The rationale for the notified conduct
 - (i) The Mutual was established for small business owners sharing common employment and work safety issues so that they could pool their limited resources and knowledge.
 - (ii) By limiting the membership to clients of Employure, the Mutual is able to build on the needs of a similar group of members that share a common desire to proactively reduce risks as evidenced by their purchase of Employure's professional services before becoming entitled to Employure Protect through the Mutual.
 - (iii) Clients of Employure receive professional services from Employure and receive benefits that complement the discretionary benefits provided by the Mutual. This includes the advantage of receiving access to 24 hour helpline services and advice so that assistance can be provided before a problem escalates to the stage where legal services are required.

4 Provide documents submitted to the notifying party's board or prepared by or for the notifying party's senior management for purposes of assessing or making a decision in relation to the notified conduct and any minutes or record of the decision made.

- (a) Third Line Forcing occurs when a business will only supply goods or services on the condition that the purchaser buys goods or services from a particular third party. If the buyer refuses to comply with this condition, the business will refuse to supply them with goods or services.
- (b) The Mutual has made it a condition of membership that the discretionary product issued by it will only be supplied to members that are already clients of Employure. Prima facie this is an example of third line forcing.
- (c) The Mutual has received advice from its lawyers Sparke Helmore advising that by making it a precondition to eligibility for membership of Employure Mutual that the purchaser first purchases professional services from a particular third party is third line forcing.
- (d) This form of exclusive dealing is open to the allegation of anti-competitive conduct for the following reasons:

- (i) The effect of the pre-condition of membership is that in order to gain access to the Mutual's discretionary benefits the person must also pay for the services of EmploySure. Small businesses wanting just the benefits provided by the Mutual are prevented from purchasing these benefits and services.
- (ii) The requirement means that the Mutual is not required to compete for clients in the open market and is protected from potential competition.

5 Provide the names and/or a description of the persons or classes of persons who may be directly impacted by the notified conduct (including targets in collective bargaining or boycott conduct) and detail how or why they might be impacted.

- (a) The notified conduct may affect the following markets:
 - (i) the market for the supply of professional services to small business operators with employment and health safety obligations;
 - (i) the market for small business employers that require services not available from traditional legal or insurance service providers.
- (b) There are more approximately 880,00 small businesses in Australia which employ staff. This sector accounts half of Australia's workforce.
- (c) Over 27,000 of these small businesses are the owners of the Mutual and receiving the benefits of the membership.

6 Market information and concentration

- (i) Both EmploySure and the Mutual operate nationally throughout Australia and New Zealand;
- (ii) The only way to be eligible to join the Mutual is to acquire the professional services sold by EmploySure;
- (iii) The only way of obtaining EmploySure Protect is to be granted membership of the Mutual.
- (b) Describe the relevant industry or industries.
 - (i) EmploySure markets professional services on its website and through various other marketing strategies to potential clients who are small to medium sized businesses in Australia and New Zealand;
 - (ii) EmploySure Protect is a financial product and as such is subject to the Chapter 7 provisions of the Corporations Act, 200 (Cth) both in terms of how it is distributed, sold and the disclosure documents that are required to accompany any financial advice provided during the sales process.
- (c) The professional services marketed by EmploySure, which includes access to 24 hour, 7 day helpline assistance does not extend to the payment of legal fees when there is a breach of the Fair Work Act or health and safety legislation.
- (d) The Mutual offers discretionary protection to members who have been financially impacted by the cost of legal action brought against them through the availability of discretionary protection for:
 - (i) Legal liability and defence costs in respect of employment claims and actions brought by the Fair Work Commission arising out of an employment claim;
 - (ii) Defence costs and penalties (where protection of such penalties is lawful) arising from any wrongful breach of the health and safety legislation;

- (iii) Investigation costs up to \$5,000.
- (e) The ability to combine the professional services provided by EmploySURE with the financial product provided by the Mutual allows customers to limit the risk of financial loss.

7 In assessing a notification, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously.

- (a) Existing competitors and ACCC accepted notifications
 - (i) Similar mutual entities providing discretionary mutual risk products in Australia are not operating specifically in this area of employment relations or health and safety. For example:
 - (A) Capricorn Mutual Limited provides a discretionary product to members of Capricorn Society Limited which is a co-operative operating for motor vehicle repairers Exclusive Dealing Notifications N31230, N93096
 - (B) Taxi Care Club Limited provides a discretionary product to members of Taxicare Australia members for certain taxicab, limousine and hire car risks Exclusive Dealing Notification
 - (ii) There are insurers that sell Employment Practices Liability (**EPL**) insurance in Australia and attention is drawn to successful applications lodged with the ACCC in the past involving EmploySURE and various insurers:
 - (A) 30 March 2011 EmploySURE, Protecsure Pty Ltd and Chubb Insurance Company of Australia Pty Ltd
Exclusive dealing notifications N95337, N95338 & N9533
 - (B) 13th July 2012 EmploySURE and QBE Insurance (Australia) Limited
Exclusive dealing notifications N96014 & N96015
 - (C) 1 December 2015 EmploySURE and various parties on behalf of members of MyAFSA.com.au
Exclusive dealing notifications N98727 - N98731
 - (iii) In addition to general insurance companies providing employment liability insurance there are also law firms that specialise in employer related legal services.
- (b) Likely entry by new competitors
 - (i) The Mutual has no knowledge of this.
- (c) Any countervailing power of customers and/or suppliers
 - (i) Customers are able to seek other options through insurance brokers or law firms as they have done historically before the Mutual was formed.
- (d) Any other relevant factors
 - (i) The Mutual was formed and EmploySURE Protect created to meet a demand identified by the clients of EmploySURE who wanted to have more control and input over the protection benefits offered which was not a need met by traditional insurance products.

8 Public benefit

Describe the benefits to the public that are likely to result from the notified conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

- (a) The proposed conduct is a competitive and realistic response by the Mutual to benefit its members who are experiencing difficulty in obtaining suitable insurance in difficult insurance market conditions and access to proactive support.
- (b) There are a number of public benefits which arise from the Mutual offering its membership benefits in this way:
 - (i) Fostering business efficiency
 - (A) Because of their status as small to medium business operators, the individual members have neither the time nor the resources to locate alternative insurers, particularly from the international insurance market. They have a pre-existing relationship with EmploySURE as a client and as such know it is fully conversant with the issues facing its membership.
 - (ii) Complies with public policy
 - (A) The Federal Government is aware of the present difficulties in the insurance market and has met with State and Territory governments to explore the means by which individuals in need of such insurance covers can obtain them. While recognising the problem there have been no solutions achieved.
 - (iii) Expansion of consumer choice.
 - (A) Recent insurance company mergers have created concern and confusion within some areas of the industry and the number of global re-insurance providers are contracting in number, with the likely outcome of there being less than 5 major world-wide reinsurers in the medium term.
 - (B) The impact of such structural changes within Australia has led to a significant reduction in the number of general insurance companies offering affordable employment related insurance to the public and as the industry consolidates through failure, merger or acquisitions, there will be less sector affinity for insurance needs.
 - (iv) Providing the members, who own the Mutual, with an alternative to the traditional insurance market. Clients of EmploySURE are not compelled to join the Mutual and have the ability to choose the traditional market if they wish to do so. But as the Mutual would not exist without clients of EmploySURE the proposed conduct of limiting membership of the Mutual to clients of EmploySURE will allow the Mutual to provide services that are tailor made for the specific needs of its members and will provide a feasible alternative which in turn will foster competition and encourage stable and competitive pricing;
 - (v) Providing the members of the Mutual with an alternative means of managing the financial risks associated with their personal needs and business operations other than by the purchase of traditional insurance which is not available in the format offered by the Mutual;
 - (vi) Providing a more affordable alternative to insurance for members of the Mutual many of whom are experiencing significant employment related issues as a part

of the fallout from COVID -19 and cannot afford to engage lawyers to assist them;

- (vii) Employment and workplace relations are governed by complex and rapidly changing laws and regulations;
 - (viii) Standard worded insurance policies, procedures and training are no longer enough to protect employers from employment-related litigation and defending against an employment-related claim can be time consuming, expensive and disruptive to an employer's business;
 - (ix) The complexities have been compounded by the complications of the present economy and Job Keeper payments which have resulted in employers needing financial assistance that compliments the professional services provided by EmploySURE;
 - (x) EmploySURE Mutual is controlled by a board that includes directors who are members of the Mutual who understand the risks and challenges of running a small business. The board is able to exercise its discretion in areas of membership, scope and cost of protections and claims. This discretion provides a level of flexibility that commercial insurers can find difficult to balance with the competing needs of shareholders;
 - (xi) Members pooling their risks and knowledge through the Mutual produces a cost saving to the members of the Mutual and the clients of EmploySURE as employment liability insurance is very expensive and not readily obtainable. By working together to deal with common problems small businesses manage their risks by using the combination of the professional services purchased from EmploySURE with the discretionary risk benefit provided by the Mutual. Small businesses that are not clients of EmploySURE have higher risk profiles and so are a higher risk if they were permitted to join the Mutual without being required to be a client of EmploySURE and accessing the advice provided by it.
- (c) Overcoming difficulties in obtaining insurance
- (i) On 28 July 2020, the Australian Small Business and Family Enterprise Ombudsman launched an inquiry to investigate the practices of the insurance industry that impact small businesses and consider whether small business insurance products are fit for purpose.
 - (ii) At that launch the following statement was made by the Australian Small Business and Family Enterprise Ombudsman Kate Carnel
There is a growing trend of insurance companies denying small businesses insurance or pricing insurance policies out of reach. In this new operating environment, small businesses that have held insurance policies for over a decade without a single claim are being refused renewal, or if offered renewal are discovering the cost has more than doubled. Many businesses with current policies have been subjected to unilateral changes that have reduced their coverage without consent, and with no refund of premiums.

9 Public detriment (including likely competitive effects)

Describe any detriments to the public that are likely to result from the notified conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments. Contact details of relevant market participants

- (a) The Mutual submits that there is no detriment associated with the notified conduct. The conduct is very unlikely to harm competition, for the reasons set out below.
- (i) The offer of membership benefits only to clients of EmploySURE enables the delivery of a cost competitive alternative to insurance and will increase the level of competition in Australia which has been limited to the existing insurance market. The tailor made nature of the Mutual's services enable an efficient and cost-effective delivery to its members.
 - (ii) It is submitted that the notified conduct is an initiative which has demonstrable public benefits for consumers and the wider community.
 - (iii) There are no similar mutual entities providing a discretionary mutual risk product for employment relations or health and safety in Australia.
 - (iv) There are a limited number of insurers that sell Employment Practices Liability (EPL) insurance but this is intended for actions related to such things as alleged discrimination, unfair dismissal and sexual or workplace harassment. Claims in relation to occupational health and safety or similar legislation are excluded from this policy.
 - (v) EPL insurance is a standard policy which reacts to a claim after the event while the combined services of EmploySURE and EmploySURE Protect operates to provide proactive advice before the legal problem.

10 Any other information

The Mutual was formed and EmploySURE Protect created to meet a demand identified by the clients of EmploySURE who wanted to have more control and input over the protection benefits offered which was not a need met by traditional insurance products.

Declaration by notifying party

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).

Signature of authorised person Marianne Robinson, Solicitor Sparke Helmore Lawyers on behalf of Employsure Mutual Limited Ltd and on behalf of Employsure Pty Limited.

Note: If the Notifying Party is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Notifying Party, this fact must be stated.

C/o Marianne Robinson
Sparke Helmore
Level 29
MLC Centre
19 Martin Place
Sydney NSW 2000



Signed on behalf of and with the authority of the applicant giving notice

This 15th day of December 2020