

3 July 2019

Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601



Business SA
Chamber of Commerce
and Industry South Australia

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Dear Sir/Madam

I write in response to the ACCC's request for submissions to its Draft – Collective bargaining class exemption notice. For clarity, none of Business SA's comments in any way, shape or form relate to collective bargaining for labour agreements across industries or sectors of business.

Working for your business.
Working for South Australia

Executive Summary

- Any move to level the playing field for SMEs to negotiate with large businesses is welcome but in order for the proposed class exemption to be a genuine incentive, it is likely to need to include all businesses up to \$100 million in turnover.
- As the largest business membership body in South Australia, with 80 per cent of our members having less than 20 employees, Business SA recognises the realities of aggregating small businesses to enter into a collective arrangement and it will be necessary to have medium businesses included to form any group which is likely to achieve some reasonable degree of negotiating power.
- The ACCC's efforts are very welcome and the simplicity of the class exemption, if properly structured, could be quite advantageous to incentivise potential aggregators such as not-for-profit business membership organisations to explore potential collective bargaining options without the need for costly legal advice.
- Considering a key plank of recent competition law reforms was about recasting s46 of the *Competition and Consumer Act 2010* to only have effect in the event of a substantial lessening of competition, allowing for the aggregation of SMEs should not be a risk to this purpose and should ultimately result in savings which can then be passed on to consumers.

Should you require any further information or have questions, please contact Andrew McKenna, Senior Policy Adviser, on _____ or _____

Yours sincerely,

Anthony Penney
Executive Director, Industry and Government Engagement





Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, with a history dating back to 1839, Business SA is the peak business membership organisation in the State. Our more than 3,000 members are affected by this matter in the following ways:

- With recent changes to competition law, particularly s46, the reality is that SMEs are less protected from the misuse of market power unless it substantially lessens competition, and consequently, need greater flexibility to join in counteracting larger forces of market power
- The opportunity to collectively bargain for SMEs is substantial, but regulatory hurdles in place do lessen the incentive for SMEs to pursue such opportunities, particularly when the resulting outcome is uncertain
- Competition in markets like utilities is known to be quite concentrated in South Australia and SMEs need every opportunity to negotiate cost competitive outcomes against larger market players

Business SA raises the following observations and arguments on this topic:

1. While Business SA has not formally applied for an exemption to collective bargain on behalf of its members, we did investigate the possibility to do so in relation to energy costs at the height of our electricity crisis in 2017. At the time, we found the ACCC staff were very helpful in guiding us through the process. However, the reality was that we still needed to engage legal advice to ensure that if and how we advanced any further, our moves were executed in full compliance with competition law.

Passing back the costs of legal advice to members was just one deterrent in trying to encourage small and medium sized businesses to consider entering into a collective bargaining arrangement.

Furthermore, Business SA incurred preliminary legal costs in the investigatory stage which could not be recovered upon deciding not to proceed. Had there been a class exemption in place which gave us confidence to proceed without attaining ACCC approval, these types of preliminary costs would have been significantly reduced. In future, consideration of other collective bargaining opportunities is much more likely to be undertaken by not-for-profit business associations with confidence that ACCC approval is one less step requiring legal advice.

2. Business SA recognises that the likelihood of concluding a successful collective bargaining process on behalf of our members is highly dependent on the size of commitment to purchase amongst our membership. Consequently, we request the ACCC to carefully consider the \$10 million turnover threshold as currently proposed to enable businesses to be eligible for the class exemption.

The ACCC's intention through this exemption appears to be an exercise in levelling the playing field for small businesses. However, Business SA argues that capping the eligibility threshold for businesses at \$10 million might not have the desired impact.



For example, if small businesses realistically require a given volume of goods or services to exercise market power equivalent to suppliers in a concentrated market, it is unlikely that degree of market power would come solely through businesses with revenue limited to \$10 million. In the example of the electricity market, the level of market power required for a competitive outcome might be the equivalent needed to incentivise a new generator or retailer into the market.

While ideally, Business SA agrees with some of the other submitters to the inquiry that a market size measure may be more relevant, for ease of administration and to ensure consistency, at a minimum an eligible revenue threshold for a single business should be no less than \$100 million. By virtue of such a limit, this may extend to medium sized businesses but for the most part, it is unlikely those medium sized businesses are going to have superior bargaining power in their own right and would equally benefit from having the support of smaller businesses to reach competitive outcomes in concentrated markets.

Opening up the possibility of medium sized businesses joining in any potential collective bargaining arrangement would also increase the likelihood that organisations such as Business SA are going to initiate collective bargaining arrangements on behalf of our members. Like most industry organisations, we are not funded by Government, and rely primarily on membership fees and revenue from commercial services. It will be much more efficient and less costly to gauge interest in a potential collective arrangement if we are able to scope interest from medium sized businesses, rather than be limited to a group of potentially thousands of small businesses.

3. From your discussion paper, Business SA recognises that:

The ACCC can only make a collective bargaining class exemption if it is satisfied that the collective bargaining covered by the class exemption:

- *would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or*
- *would result in, or would be likely to result in, a benefit to the public that would outweigh any detriment.*

In making your final decision on the class exemption, we ask you to carefully consider the likely detriment of providing an exemption for businesses up to \$100 million in revenue and whether that would realistically outweigh the public benefit.

If the ACCC has reason to be cautious about any potential lessening of competition or other detriment to the public, it always has the option to limit the period of the class exemption to something in the order of 5 years. However, we would caution that any change in law is likely to take some time to realise material outcomes, and a shorter allowance may not sufficiently allow time for proponents of allowable collective bargaining arrangements to educate and market potential options to eligible businesses.



4. The fastest growing employers in Australian industry employ between 20 and 200 employees and businesses of this revenue size, which should by and large fit under \$100 million in turnover, need to have minimal barriers to participate in collective bargaining processes provided there is no substantial lessening of competition.

The Federal Government supports an Entrepreneur's Program, delivered by partners including Business SA, which is described as the Government's flagship initiative for business competitiveness and productivity. This program is designed to specifically support small and medium businesses and its eligibility is capped at \$100 million turnover.

While the Federal Government should do all it can to encourage small businesses, it also needs to have an eye on the sector of business which is achieving the best results in creating jobs. In fact, from 2016 to 2018, businesses with between 20 and 200 employees grew their labour force at the fastest rate of all sized businesses, nearly two-thirds higher than the average.¹

The ABS defines medium businesses as having between 20 and 199 employees and it is widely accepted that small to medium sized businesses (SMEs) covers all businesses with up to 200 employees.

At a minimum, the new class exemption for collective bargaining should include all SMEs under \$100 million in turnover.

5. Following changes to s46 of the *Competition and Consumer Act 2010*, SMEs are more exposed to potential misuse of market power, except if it is deemed to have caused a substantial lessening in competition.

SMEs can accept that for the greater good of the economy and in the interests of competitive outcomes for consumers, that they should be less protected from the perils of large businesses misusing their market power, but the Federal Government should take commensurate steps taken to enable SMEs to more effectively use their own market power to achieve competitive outcomes. In effect, this would mean extending the eligibility for the proposed class exemption to at least \$100 million in turnover.

6. Business SA supports the ACCC's efforts to ensure that the 'Collective bargaining class exemption notice' is quite simple and does not require legal advice or external assistance to complete. Such an efficient administrative process will be critical in order to adequately incentivise groups of SMEs to even consider a collective bargaining arrangement in the first place.

¹ ABS, Australian Industry 2017-18 – Table 5, 31 May 2018