



HOUSING INDUSTRY ASSOCIATION



Submission to the
Australian Consumer and Competition Commission (ACCC)

Potential ACCC “class exemption” for collective bargaining

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 23 August the Australian Competition and Consumer Commission (ACCC) released a discussion paper considering a potential 'class exemption' for collective bargaining (Discussion Paper).

HIA provides the following comments in response to the Discussion Paper.

The Competition and Consumer Act 2010 (CCA) currently prohibits price fixing, cartels and other behaviour that substantially lessens competition. An exercise in collective power by a group of independent contractors, such as an agreement to withhold their labour supply to a specific target in support of a bargaining claim would constitute anti-competitive behaviour in breach of the legislation.

Historically, in order to be able to use collective bargaining and obtain immunity from liability 'approval' is required from the ACCC through the authorisation and notification process.

The Final Report of the 2015 Competition Policy Review (Harper Review) recommended that the ACCC be given the power to issue a 'class exemption' for business practices (types and kinds of conduct) that are unlikely to generate competition concerns, or are likely to generate a net public benefit. In 2017, legislation was passed implementing this recommendation.

The exemption would eliminate the need to make individual applications by creating 'safe harbours' for business and therefore reduce compliance and administration costs and increase certainty.

HIA has concerns with this approach.

Since the inception of the Trade Practices Act in 1974 small businesses, in particular, have been able to have their arrangements authorised on the grounds that public benefits flowing from the arrangements outweigh any anti-competitive detriment.

In 2007, via changes to the notification process to further assist small businesses, the burden of proof of establishing the benefits and detriments of the conduct shifted away from the parties seeking to collectively bargain and onto the ACCC. It also provided applicants with automatic immunity in the absence of objection by the ACCC.

HIA sees that establishment of 'class exemptions' as a further watering down of the authorisation or notification processes for small business collective bargaining. As such, a cautious and thorough approach should be adopted when developing these exemptions.

Traditionally collective bargaining has only been lawful when exercised by employees in the context of the industrial relations system via trade unions. Allowing an 'automatic' right to collectively bargain between businesses imposes an industrial relations process on what ought to be a competitive, market based outcome.

The inclusion of generous exemptions for small business in the CCA inappropriately assumes that small businesses are employee-like in character, in that they may individually lack bargaining power and should seek to join together and bargain collectively in the way employees can through their exemption from the CCA's competition provisions.

The major concern is that in assuming that small businesses are 'employee-like' changes personal services contractors, who compete to supply their own skill and labour, from small businesses into a type of employee.

If trade contractors in the residential building industry were to be able to routinely collectively bargain, the housing industry would turn into an analogue of the commercial building industry. This would impact on housing affordability.

If contractors in the building and construction industry are allowed to bargain collectively for the price they supply their labour, in the same way as employees do, logically and in practice they will adopt the same collective bargaining structures as employees do – a trade union – who will seek to extend enterprise bargaining rates and conditions onto independent contractors.



At an economic level, no evidence has been put forward of the market failure that collective bargaining will address. Collusive conduct and collective bargaining generate greater economic costs through an inefficient allocation of labour and resources. They also increase the potential for anti-competitive coordination between members of the bargaining group and creating competitive distortions that favour the bargaining group.

This is inconsistent with the notions of competitive independent contracting and significantly blurs the distinction between independent contracting and the union enterprise bargaining system.

HIA asks that these matters be considered in determining any potential 'class exemptions'.

2. OPTIONS FOR THE GRANT OF AN EXEMPTION

2.1 RESPONSE TO SPECIFIC PROPOSALS

Business characteristics

The Discussion Paper proposes potential limits on the eligibility of businesses for the class exemption based on the individual businesses characteristics, for example, the number of employees, the businesses turnover and/or the value of contracts that each member of the group expects to enter into with the target.

HIA sees utility in adopting an approach that combines these factors, so, for example, 2 out of 3 must be satisfied before considering whether the conduct can be captured by the class exemption.

Equally important are factors currently used by the ACCC through the notification and authorisation process such as market share, the industries characteristics and the impact on those outside of the bargaining group. These factors (more so that the businesses characteristics) go to the nub of understanding the impact of such arrangements on competition in a market.

The class exemption could apply to businesses that are otherwise not eligible if they can show that the target of the collective bargaining supports their proposal.

HIA does not agree with this approach. In the interests of certainty and consistency where a business does not meet the relevant criteria they should not be able to access the exemption.

The existing process is the appropriate method of dealing with a desire by businesses to collectively bargaining where they do not fall within the class exemption but the target supports their proposal.

Size of the target business

This should be an inherent consideration when assessing the effect of the class exemption on competition. If there is concern that the size of the target business would affect the bargaining position of the parties, then those proposing to bargain collectively should be required to go through the current process.

Should the class exemption only be available to collective bargaining groups below a certain size? For example should it specify a limit on the number of businesses in any group, or their combined market share.

As noted above the combined market share of the bargaining group is an important and critical factor to consider when determining the effect of collective bargaining on competition. It is certainly a factor considered in overseas jurisdictions where block exemptions are permissible and should form a part of any class exemption proposed by the ACCC.

Should the class exemption apply only where there is not common representation across collective bargaining groups?

Yes, where there is common representation there is a greater risk that the activities will lessen competition.

Application of the class exemption to joint supply and joint procurement.

No comment.

Information sharing

HIA agrees that information sharing beyond that necessary to engage in collective bargaining should not be allowed under any class exemption.

For example, in the UK, Article 9 of the *Public Transport Ticketing Schemes Block Exemption* prevents the exchange of commercially sensitive information, but allows the exchange of information that is 'directly related and indispensable'¹ to the effective operation of the group.

Should other obligations apply?

Yes, businesses seeking to rely on a class exemption to collectively bargain should be required to:

- Keep written records of the competition of the group.
- Notify the ACCC when the group is formed.
- Notify the target when the group is formed.

What would be the effect of a collective bargaining class exemption on businesses which fall outside it?

Obviously collective bargaining has implications for those businesses that are not part of the bargaining group but compete against the members of the bargaining group. These competitor businesses may be harmed by the activities of the bargaining group.

As such, and as is the current practice, the effect on those that fall outside of the group must be a factor when considering the kind of conduct to which a class exemption should apply. Further, it would seem appropriate that those that fall outside a class exemption in a market in which some businesses fall within that exemption and intend to take advantage of that, be provided an opportunity to object and/or raise concerns with the application of the exemption.

2.2 OTHER COMMENTS

HIA observes that the following matters are not canvassed in the Discussion Paper but are worthy of consideration:

- In line with the Harper Review recommendations, the ACCC should maintain a public register of all class exemptions including those no longer in force. This is consistent with the approach generally taken overseas and enables transparency and certainty in relation to the operation of any class exemption.
- Further clarification of how the 'kinds of conduct' will be described by a class exemption would be of utility. This is unclear from the Discussion Paper.
- HIA submits that a process to take objections to the application of the class exemption from the target and from those that may fall outside of the class exemption but may be affected by it be considered. This may prevent any unintended consequences arising from the application of a class exemption.
- While HIA understands that this process is designed to establish the types of business to be covered by a class exemption, any specific proposals to establish a class exemption should also be released for public comment. This would seem to be the approach taken overseas.

¹ Article 9 The public transport ticketing schemes block exemption: CMA Guidance pg.57 2016

