

21 September 2018

Our ref: KB-CCLC+FRLC

Rod Sims
Chairman
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By email: adjudication@accg.gov.au

Dear Chairman

Collective bargaining class exemption – submission

Thank you for the opportunity to provide comments on a potential ACCC collective bargaining class exemption. The Queensland Law Society (QLS) appreciates being consulted on this important issue

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

We have responded to the questions posed in the discussion paper. This response has been compiled by the QLS Competition and Consumer Law Committee and Franchising Law Committee whose members have substantial expertise in this area.

1. What types of businesses should be covered under this class exemption?

- **whether any of the defined approaches to defining eligibility (or a combination of them) would be appropriate and workable**
- **any alternative approaches to defining eligibility.**

We note that these reforms have been discussed since 2015 during the Competition Law Review and are aimed at reducing the time and cost to individual businesses in making applications to the ACCC. QLS supports the introduction of a class exemption for collective bargaining.

As to who an exemption should cover, we would support, as a basis for an exemption, something similar to what has historically been permitted by the ACCC in these circumstances. That is, that such an exemption is reasonable for agricultural groups, for example, groups of producers and graziers who are negotiating with a processor.

It may be problematic to set certain criteria for an exemption based on a group size, turnover or other factors if this is an arbitrary line, as this might exclude some businesses who are in fact the target of these reforms.

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2. Other issues:

- a. 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 stated above, we consider that an arbitrary number may prohibit some groups from benefiting from this exemption when it is appropriate that they do so.

However, we consider that assessing market share is appropriate. That is, if the party with whom the group is negotiating with has a 75% share of the market, then it is appropriate that the group have the exemption to negotiate with that party. There may not be the same need if the party has a 25% share of the market as this would mean there are a number of other parties who could be negotiated with.

We submit that the term, “substantial market share” should be used and interpreted in the same way as it is in competition law, generally. If there is a dispute about who has a substantial market share, the ACCC or the court can look at this issue further.

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

We consider that the issue of whether or not there is common representation across the collective bargaining group should not determine whether the exemption should apply.

- c. Should the class exemption allow the bargaining group to negotiate with both customers they sell to (joint supply) and with suppliers they buy from (joint procurement)?**

In our view, yes. If the businesses have justified that they have the right to collectively bargain at one end of the process, then they should be able to exercise this right at the other end to obtain a fair deal.

- d. Should the class exemption exclude sharing of information or arrangements between members of the group that are not necessary to collectively bargain with a target?**

Yes. The purpose of these reforms is to enable collective bargaining when appropriate. Information should not be shared beyond what is necessary to achieve this.

- e. Should other obligations apply? For example, should a class exemption only apply where the bargaining group does one or more of the following:**
- keeps written records of the composition of the group
 - notifies the ACCC when the group is formed
 - notifies the target when the group is formed?

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It is important to notify the ACCC when a group is formed. We agree that there should also be an obligation to notify the target group and to keep written records, especially if there is a dispute as to who is in or outside of the group.

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

These businesses would be in the same position as any other business in the market in that they would need to apply to the ACCC for authorisation to collectively bargain.

g. What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?

QLS is not able to comment on this question and would suggest that information from business and economists be obtained.

3. Should a class exemption allow collective bargaining by all franchisee with their franchisor, regardless of their size or other factors?

a. Should all groups of franchisees be eligible for a class exemption in relation to negotiations with their franchisor, including group mediation, regardless of franchisee size and without any other limitations on membership of the bargaining group?

It is submitted that all franchisees should be eligible for a class exemption in regard to negotiations with their franchisor when the negotiation is being conducted in regard to a matter which is common to all franchisees. There are a number of reasons why this submission is made:

1. Many franchise systems have a franchise advisory board or similar named body that is a representative group of all the franchisees who deal with franchisors in negotiating many aspects of the franchise system. It would be unreasonable for a smaller franchisee with say under 20 employees to be able to be a member of that group whereas a larger franchisee with over 20 employees could not be a member of the group and could not take advantage of any matters negotiated with the franchisor.
2. If a franchisor accepts dealing with the franchisees as a group, then the franchisor must treat each of the franchisees the same and cannot prefer one over the other. A franchisor might be seen as having engaged in unconscionable conduct by excluding some franchisees from the group simply because of the number of employees or their turnover.
3. If the matter is common to all franchisees, then all franchisees should be given the opportunity to make submissions on that matter.

However, if the matter which is the subject of the negotiation, is in regard to only a select number or group of franchisees, then only the people in that group should be eligible to be part of the class. For example; in regard to a national franchise system where the cost of transport to

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franchisees in one State is the issue then only franchisees in that State should be eligible to join.

In regard to mediation with the franchisor, whilst franchisees should be given the opportunity to join a mediation if the matter is relevant to their business, not all franchisees should be forced to join every mediation if the matter is not relevant to them.

Mediations are often about issues which are individual to a franchisee and not matters that are relevant to all franchisees as a group. For example: a franchisee may dispute a termination notice issued on specific grounds. That is not a matter other franchisees would want handled as a group mediation.

Franchisees should be given the choice of whether they wish to join a group mediation and should not be forced to be part of the group. If a franchisor is to be given the right to decline to deal with the franchisees as a group then in the case of mediations, a franchisee should also be given the right to decline to be part of the group.

b. If not, what characteristics should determine whether a group of franchisees is able to use the collective bargaining class exemption to negotiate with their franchisor?

It is submitted that because of the nature of franchising, it would not be appropriate to exclude any franchisees from being able to use the collective bargaining class exemption to negotiate with their franchisor.

c. What other issues specific to collective bargaining by franchisees with their franchisor should be considered in developing the class exemption.

It is submitted that procedures would need to be put in place for the group of franchisees. Issues to be considered would include:

1. All franchisees should be eligible to join, propose and vote on matters to be negotiated with the franchisor regardless of size, length of franchise and number of employees;
2. Whether all franchisees should be given only 1 vote again regardless of size and regardless of how many franchises are run by that franchisee or an associated company or whether size and the number of businesses should be a factor. In our members' experience, many franchisees set up individual companies with common directors to run different businesses. If there is a system of 100 franchisees, but 5 franchisees have control over 60 businesses, then they will dominate the voting and other franchisees' views will not receive due consideration. The ACCC should consider what is appropriate in these circumstances.
3. Matters should then be decided on a majority of votes.
4. If a matter is negotiated by the franchisees by way of collective bargaining then it will be binding on all franchisees and the franchisor and the franchisor must amend the franchise agreement to reflect the outcome of the negotiation for future franchisees.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitors, [redacted] by phone on [redacted] or by email to [redacted] or [redacted] or by email to [redacted]

Yours faithfully



Ken Taylor
President