

28 September 2018

Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Via email: adjudication@accc.gov.au

Dear Sir/Madam

Submission - potential "class exemption" for collective bargaining

Thank you for the opportunity to provide this submission in response to the potential ACCC "class exemption" for collective bargaining – discussion paper.

The Shopping Centre Council of Australia (SCCA) represents the interests of Australia's major owners, managers and developers of shopping centres. A full list of our members is available at <http://www.scca.org.au/about-us/members/>.

As the ACCC would be aware, the SCCA was an active participant in the application for re-authorisation by the Australian Newsagents Federation (ANF) to engage in collective bargaining with a range of suppliers (A91407, August 2014). We understand that the reference to previous notifications regarding newsagents (page 3) may be a reference to this authorisation.

Intent

The SCCA's primary position is that class exemptions for collective bargaining are not necessary as the notification process under Part IV Division 2 of the *Competition and Consumer Act 2010* (Act) already works efficiently and effectively in the circumstances where collective bargaining might typically be regarded as pro-competitive. In other circumstances, where authorisation is required, such greater scrutiny of the application by the ACCC is typically warranted.

That said, the SCCA understands the intent of the proposed "class exemption", specifically the desire to expedite the ability for groups of businesses to collectively bargain and for them to do so cost effectively - where the collective bargaining:

- 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, to collectively bargain.

The challenge, of course, is for the ACCC to achieve this outcome without also exempting from further scrutiny and ACCC oversight collective bargaining which does have such effects and does not have such public benefits. Certainly, to meet the requirements of section 95AA of the Act the ACCC might only make a class exemption where it is first "*satisfied in all the circumstances*" the proposed collective bargaining meets these two criterion.

Suggested Limits

To be satisfied, in all the circumstances, that particular proposed collective bargaining "*would not have the effect, or would not be likely to have the effect, of substantially lessening competition*" or a public benefit the ACCC would typically need to have a good understanding of the market or markets in which the proposed collective bargaining is to take place and the characteristics, including the market shares individually and as collective, of the persons involved (both as to who is to be collectively bargaining and with whom). Any collective bargaining class exemption should, therefore, be specific to industries and in markets with which the ACCC is already familiar and should only apply for such terms as that familiarity is likely to remain current.

Further, any collective bargaining exemption should only be available to collective groups where the ACCC can be satisfied on an ongoing basis that:

1. the individual members of that group are small (whether gauged by number of employees or turnover);
2. the group as a collective whole has only a modest market share of each and every market in which the negotiations are to take place; and
3. the target company or companies themselves have a significant market share in those markets.

Certainly it is not sufficient for a class exemption to only take into account the characteristics of individual members of a group since, by way of analogy, a large trade union can exercise substantial market power in any industrial negotiations it undertakes notwithstanding its members are individuals who individually lack market power. Further, the SCCA agrees with the suggestion that the class exemption should not apply where there is common representation across collective bargaining groups and those commonly represented collective bargaining groups as a whole have a substantial market share.

Whilst the SCCA agrees with the sentiment that the participation of a 'target' of a collective group in any resultant negotiation must be voluntary, and that, consequently, the 'target' of a group of businesses observing/utilising a future class exemption may elect to continue to negotiate with businesses individually, the SCCA does not believe the imposition of such a requirement could satisfy the ACCC, as required by section 95AA when making a class exemption, that the two criterion referred to above will thereby be satisfied. Let's assume the individual members of the group are not prepared to negotiate except as a group then, depending on the collective market share of the members of the group, it may be a commercially imperative for the target to negotiate with that group notwithstanding the stated 'voluntary' requirement.

In particular, the SCCA disagrees with the suggestion in the discussion paper that groups which otherwise do not meet the criteria in a future class exemption, but otherwise have the consent of the 'target', may be eligible to utilise the class exemption. We do not understand how the ACCC could be satisfied that the 'boundaries' of the class order could possibly be met in this scenario.

The SCCA's ANF Experience

In the context of our engagement in the ANF's application, authorisation was provided for the ANF to collectively bargain on matters not specified in the ANF's application. In that context, we expressed concerns about the ACCC's ability to assess whether there is a benefit to the public and whether that public benefit outweighs any possible detriment to the public. While acknowledging the ACCC's experience in determining such matters, the concerns we raised then are amplified with regard to a future class exemption.

In the context of our participation in the ANF application for re-authorisation, we also raised concerns about the ANF collectively bargaining with counterparties not identified in the ANF's application. A similar concern arises in the context of a future class exemption.

The conditions imposed in the context of the ACCC's authorisation of the ANF's application, including (in summary) that the ANF must write to the counter-party inviting them to participate, advising them that participation is voluntary, seek and obtain written consent from the counterparty, and provide ongoing annual reports to the ACCC, may be instructive in the context of a future proposed class exemption.

Consideration may also need to be given to how assurances will/must be provided to the ACCC and potential 'targets' that each business in the collective group utilising a class exemption sits below/satisfies any threshold which is ultimately adopted. We also question whether some level of protection needs to be provided to any 'target' which chooses to bargain with a collective group (i.e. they can rely on representations given by the collective group that each member satisfies the criteria of the class exemption).

"Small business" definition

When seeking to limit any class exemption to small businesses the SCCA sees benefits in drawing upon existing legislative thresholds for small business, such as those applicable to in the context of the business-to-business unfair contract term law. We note, for example, that the proposed contract value threshold suggested in the discussion paper (page 5) – e.g. \$3 million in any 12-month period – varies from the contract value in the context of the business-to-business unfair contract term law.

We also note that the unfair contract terms law also, in effect, requires the satisfaction of a two-limb small business 'test' (number of employees and contract value).

Although we acknowledge their different contexts, consistency in the application of thresholds would be a useful starting point for further consideration.

The SCCA would be pleased to discuss this letter further. Please do not hesitate to contact me on [redacted] or [redacted].

Yours sincerely,

 28.7.2019

Angus Nardi
Executive Director