

4 July 2019

General Manager
Adjudication
Australia Competition and Consumer Commission

Our ref: KS-CCL&FrLC

By post and by email: adjudication@accc.gov.au

Dear Sir/Madam

Collective bargaining class exemption – submission

Thank you for the opportunity to provide comments on the draft class exemption and associated documents. Queensland Law Society appreciates being consulted on this important update.

This response has been compiled with the assistance of the Competition and Consumer Law Committee and the Franchising Law Committee who have substantial expertise in this area.

The Queensland Law Society (**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. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

1. General comments

We note these reforms have been discussed since 2015 during the federal government's Competition Policy Review. QLS supports the introduction of a class exemption for collective bargaining which is aimed at reducing the time and cost to individual businesses in making applications to the ACCC. However, in order to provide clarity for businesses, the criteria for the exemptions must be clear and must also be balanced so as not to cause detriment to consumers. We make the following observations with respect to the information and documents under review.

2. Eligibility criteria

We note the ACCC is proposing a \$10 million aggregated annual turnover threshold and that the limit does not apply to franchisees and fuel retailers negotiating with their franchisor or fuel retailer.

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QLS supports the broad application of the exemption across the economy and the approach taken using the meaning from the *Income Tax Assessment Act 1997* to protect against attempts to abuse it.

Eligibility for franchisees

We agree that any franchisee, regardless of turnover should be able to participate in collective bargaining with a franchisor. This will assist in ensuring that the group is representative of the whole of the franchisee network. Due to 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. Therefore, in our respectful submission, any size or turnover distinction would be arbitrary and potentially burdensome to the group to undertake an enquiry into the size or turnover of each member to ensure the group falls within the eligibility criteria.

However, with respect to collective bargaining by franchisees with their franchisor, we submit that there is a need for a provision to ensure that the matter the subject of the collective bargaining exemption must be a 'common matter' to all franchisees seeking to be a party to the group. If this recommendation is accepted, we respectfully submit that further guidance will also be required in the guidance notice which is set out below.

Lapsing of the exemption

We note that the class exemption will remain in place until 30 June 2029 unless revoked by the ACCC before the date. We query if the legal protection of the exemption should be required to be renewed, say after 1 year. This is to ensure fairness to the target business and to ensure notice is also provided to the ACCC particularly where the information to be included in the notice is likely to be of a very general nature.

3. Draft class exemption notice

For clarity we recommend a minor amendment as underlined:

In addition to these requirements, the proposed collective bargaining group must provide this notice providing details about the formation of the group:

- *to the ACCC when the bargaining group is formed, and*
- *to any target business the group proposes to collectively bargain with, when the group or their representative first approaches the target business regarding a collective bargaining proposal.*

We are also concerned that the notice specifically suggests that businesses do not need to seek legal advice. In particular it states:

"The notice does not require technical or complex information, so it can be completed without the need to seek legal advice or other outside assistance".

While the form may be in plain language and appear simplistic, the implications for businesses who believe (erroneously) that the class exemption applies to their dealings, may face adverse impacts including regulatory action. As such, we submit that businesses should be encouraged to seek legal advice to ensure that eligibility criteria is met.

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We also propose that a start date be included to detail when the negotiations began or are intended to begin. This is to ensure protection is afforded at the relevant time and to ensure compliance with the notice requirements under proposed section 9.

In addition, to assist businesses in determining whether the class exemption is the right option given the status of their business and the nature of the contract to be negotiated, we also suggest inclusion of the comparison table from attachment A of the draft guidance notice in this notice.

4. Draft guidance note

In order to assist franchisees in determining what constitutes a common matter (as proposed at point 2) we submit that additional guidance should be included in the Guidance Note. In this regard, examples should be provided as to the types of conduct to illustrate where franchisees may want to seek to rely on these provisions. These examples should also be provided in the 'Collective bargaining class exemption notice'.

Franchise agreements often provide that the franchisor will offer the franchisees the "then current franchise agreement" upon renewal. Franchisees who will be renewing at a similar time or soon thereafter may wish to undertake group negotiations of the terms of the "then current franchise agreement". The types of examples which might be included as a 'common matter' therefore may include new standard terms, fee changes or changes to a common supplier.

It should also be clear that where a matter is common to all franchisees, then all franchisees should be given the opportunity to respond. Similarly, a franchisee should also be given the right to decline to be part of the collective bargaining group.

5. Draft legislative instrument

To ensure that the bargaining group has provided the requisite notice to the ACCC prior to attempting to negotiate as a collective with any target business, we suggest redrafting of section 9(3) as follows:

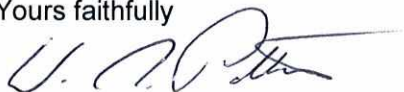
(3) Section 7 applies to conduct specified in that section in relation to that initial contract only if the conduct was engaged in after the notice was given to the Commission.

Finally, in relation to the sharing of information in section 13, we consider the provision could be strengthened by inclusion of a subsection (c) which states to the effect:

(c) the information is not shared beyond the scope of what is necessary to engage in the conduct specified in section 7.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Team by phone on (07) 3842 5930 or by email to policy@qls.com.au.

Yours faithfully



Bill Potts
President