

3 July 2019

Mr Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Via email: adjudication@accc.gov.au

Dear Mr Jones

Proposed collective bargaining Class Exemption

Thank you for the opportunity to provide this submission on the Australian Competition and Consumer Commission's (ACCC) proposed "Class Exemption" for collective bargaining.

We have reviewed the consultation material, including the *Draft Guidance Note*, *Draft Collective Bargaining Class Exemption Notice* and *Draft Legislative Instrument*.

In this submission, we focus on the Class Exemption for small businesses generally rather than matters that may be relevant to the franchise and fuel sectors.

We do not oppose the proposed measure which would allow small businesses, to negotiate collectively (rather than individually) with a target business, and to strike bargains with them on terms, conditions and/or prices.

We broadly agree that the participants in the collective bargaining process should be able to proceed without risk of breaching competition law and welcome the intent of the proposed approach to remove 'any legal doubt' about negotiating with members of a collective bargaining group.

Key issue

Noting the above, we respectfully raise four key issues for the ACCC's consideration which we believe need to be addressed in any *Final* package, including any final Guidance Note, Exemption Notice and Legislative Instrument. We submit that addressing these issues would provide greater certainty and better-defined protection, remove legal doubt and improve the integrity of the Class Exemption:

1. How are innocent participants protected if it turns out that one of the group members was not actually eligible for the Class Exemption?
2. Does the Class Exemption remove 'any legal doubt' for targets who are considering participating in the collective bargaining process?
3. Does a target receive sufficient certainty that it is dealing with the right businesses (i.e. protected, eligible group members)?
4. Has the integrity of the Class Exemption been sufficiently addressed?

1. How are innocent participants protected if it turns out that one of the group members was not actually eligible for the Class Exemption?

The first step in all collective bargaining under the draft Class Exemption is the "initial contract". The following example illustrates how a group of commercial cleaning businesses might make an initial contract. It highlights the issues which may arise if it turns out that one of the group members was not actually eligible when it joined the group.

Example 1

Five competing commercial cleaning businesses are interested in forming a collective bargaining group so they can negotiate on prices with shopping centre managers. Each business self-assesses¹ its eligibility by:

- using the aggregated turnover test under the tax laws;² and
- applying the test to its tax information for the previous financial year.³

In this example, three of the businesses have self-assessed turnover of less than \$3 million, one is around \$7 million, and one is around \$9.6 million.

Under the draft Class Exemption, the group has made an “initial contract” because:

- they have made an arrangement⁴ that is about the supply of services, namely cleaning services, to one or more other persons, namely shopping centre managers; and
- they made the arrangement for the purpose of negotiating one or more contracts with shopping centre managers (the “targets”).⁵

The group needs the protection of an exemption because, for example, there is arguably a risk that their collective bargaining arrangement contains a cartel provision under the *Competition and Consumer Act 2010* (the Act)⁶. That is because:

- the members of the bargaining group (the cleaning businesses) are in competition with each other in relation to the supply of services,⁷ namely their cleaning services; and
- the purpose of the collective bargaining arrangement is:
 - to fix, control or maintain the price for their services; or
 - to provide for the fixing, controlling or maintaining of the price for their services.⁸

There are civil and criminal penalties for making an arrangement which contains a cartel provision.⁹ For instance, section 45AF (3) provides:

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) \$10,000,000;

(b) if the court can determine the total value of the benefits that:

(i) have been obtained by one or more persons; and

(ii) are reasonably attributable to the commission of the offence 3 times that total value;

(c) if the court cannot determine the total value of those benefits—10% of the corporation’s annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

¹ Draft Guidance Note at page 4, “Each business must self-assess whether they meet the eligibility criteria and, therefore, whether they can rely on the class exemption.”

² Draft Class Exemption at Clause 5: aggregated turnover is calculated in accordance with section 328-115 of the Income Tax Assessment Act 1997.

³ Draft Class Exemption at Clause 5: the test of eligibility is applied to aggregated turnover for the previous financial year.

⁴ A ‘contract’ means a contract, arrangement or understanding: clause 5.

⁵ Draft Class Exemption at Clause 6.

⁶ Section 45AD of the Act defines ‘cartel provision’.

⁷ See sections 45AD(4)(a), (b) and (c).

⁸ See sections 45AD(2) (a), (b) and (c).

⁹ See sections 45AF and 45AJ.

There are similarly heavy penalties for “giving effect to” a cartel provision.¹⁰ To “give effect to” means, relevantly, to “do an act or thing in pursuance of, or in accordance with” a cartel provision.¹¹

The relevant protection offered under the draft Class Exemption is set out in Clause 7(1)(a):

7 Class Exemption—collective bargaining

(1) Subject to the limitations specified in Division 2, sections 45AF, 45AG, 45AJ, 45AK and 45 of the Act do not apply to a corporation engaging in:

(a) eligible corporation collective bargaining conduct...

Note: Sections 45AF, 45AG, 45AJ and 45AK of the Act are offence and civil penalty provisions that deal with making a contract containing a cartel provision, and with giving effect to a cartel provision. Section 45 of the Act deals with contracts that restrict dealings or affect competition.

“Eligible corporation collective bargaining conduct” is defined in Clause 7(2), relevantly:

(2) A corporation engages in ***eligible corporation collective bargaining conduct*** if:

(a) while it is an eligible corporation, it:

(i) makes an initial contract; or

(ii) engages with one or more persons in a concerted practice in relation to an initial contract; or

(b) it gives effect to an initial contract that it made while it was an eligible corporation.

Applying these provisions, so long as the commercial cleaning businesses are eligible, they are protected when they make their initial contract and when they “give effect” to it.

However, one of the businesses made a mistake when it self-assessed its eligibility. Instead of having only \$9.6 million in aggregated turnover it actually had \$10.2 million. It was not eligible when the initial contract was made and it tells this to the other group members.

The remaining, eligible cleaning businesses wonder how they might be affected. They consult the draft Guidance, which states:

“Any eligible members of the group who are unaware that another member is eligible are unaffected and retain their legal protection to collectively bargain as part of the group.

However, if the group becomes aware that one or more members are ineligible, the group should immediately stop including that member in their discussions and collective negotiations.”

While it may be intended to ensure that the remaining eligible group members are not affected, there appear to be no provisions in the draft Class Exemption which state this or provide for how this is achieved. For example, the draft Class Exemption does not state that the initial contract still exists, continues or that the parties to it are the remaining, eligible group members.

The remaining, eligible cleaning businesses also notice that they are only ‘unaffected’ if they are ‘unaware’ of the other member’s ineligibility. Each of them self-assessed their eligibility using their own individual tax information. As soon as the ineligible member told them it was ineligible, they stopped including that member in their discussions. They all thought the ineligible member was relatively large and they wonder whether that means they have been sufficiently ‘aware’, and whether they are exposed to a risk of being in breach of the competition law.

The draft Class Exemption does not appear to contain a definition of what being “aware” means. It does not provide that group members who were “aware” of ineligibility are affected, in what way they are affected and whether they lose their exemption. Nor does it contain provisions

¹⁰ See sections 45AG and 45AK.

¹¹ Section 4, definition of “give effect to”.

addressing the position of any business with whom group was collectively negotiating, or with whom they had contracted (i.e. the targets).

What may warrant further consideration in cases of ineligibility is whether the onus to take action ought to be on the ineligible business which made the wrong self-assessment, rather than to focus on whether other participants were “aware” of ineligibility.

An example of the action an ineligible business might take is to notify the other group members, the ACCC, the business the group is negotiating with and any other businesses with whom collective bargains have been struck in the past. In this way, the participants receive greater certainty of their protection, the uncertainty around ‘awareness’ is eliminated and the participants will still be in a position to stop including the ineligible business in their future discussions or negotiations.

2. Does the Class Exemption remove ‘any legal doubt’ for targets who are considering participating in the collective bargaining process?

The ACCC’s Media Release states:

“Some franchisors have flagged competition law concerns as a reason not to negotiate with their franchisees as a group,” Mr Keogh said.

“This exemption would remove any legal doubt, and would ensure that all franchisees who have contracts with the same franchisor or fuel supplier could form a single collective bargaining group, with no franchisees excluded.”

We respectfully submit that the draft Class Exemption does not appear to remove legal doubts a targeted business may have about participating in the collective bargaining process.

Example 2

This example, which follows on from Example 1, illustrates the next steps in the process – the collective negotiations and striking a bargain with the ‘target’ business.

The commercial cleaning bargaining group approaches a shopping centre manager and proposes a collective negotiation with a view to striking a bargain and entering into a contract. The shopping centre manager wonders whether it is protected from a risk of breaching the competition law.

For instance, if a bargain is struck, the resulting contract would, arguably, contain a cartel provision. This is because:

- the purpose of the contract is to fix, control or maintain the price for cleaning services;¹²
- it is not necessary that all parties to the contract supply those services, it is sufficient that any party does;¹³
- nor is it necessary for all parties to the contract to be in competition with each other in relation to those services, it is sufficient that “at least 2” parties are;¹⁴
- Clause 7 of the draft Class Exemption does not include provisions specifically directed to the contract with the targeted business. Clause 7(2) (set out above) is the only potentially relevant protection. It has two requirements before protection will apply:
 - a corporation must make an initial contract; and
 - the corporation must be eligible when it made the initial contract.

An “initial contract” is defined in Clause 6:

(1) For this determination, a contract or a proposed contract between a corporation and 1 or more other persons (the **contracting parties**) is an **initial contract** if:

(a) it is about:

¹² See section 45AD (2) (a), (b) and (c); and see further s.45AD(8).

¹³ See section 45AD(2)(c), “goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding”.

¹⁴ See section 45AD(4)(c)

(i) the supply of particular goods or services to; or

(ii) the acquisition of particular goods or services from;

one or more other persons (the **target** or **targets**) by the corporation and the contracting parties; and

(b) the corporation and the contracting parties made the contract for the purpose of collectively negotiating one or more contracts with the target or targets.

The initial contract is between the members of the bargaining group. They are the "contracting parties". The shopping centre manager is one of the "targets". It does not make an initial contract and is not one of the "contracting parties." For completeness, the shopping centre manager also self-assesses its eligibility and determines that it not eligible based on the turnover test.

Arguably, then, the shopping centre manager does not meet either of the requirements of Clause 7(2) and does not receive protection under the draft Class Exemption. This would represent a significant legal doubt facing the target, which is not removed by the draft Class Exemption.

Considering the same contract from the point of view of the commercial cleaning businesses, the only potentially relevant part of Clause 7 is sub-paragraph (c). That paragraph offers protection for "giving effect" to the initial contract. Clause 7 does not state that giving effect to the initial contract extends to making a contract with a target or giving effect to *that contract*.

We recommend that the final Class Exemption should include further provisions which explicitly and comprehensively protect all the participants in the collective bargaining process, including the target. The protection should extend to all stages of the process, including negotiating, making and giving effect to contracts with targeted businesses.

3. Does a target receive sufficient certainty that it is dealing with the right businesses (i.e. protected, eligible group members)?

We respectfully submit that "target" businesses do not receive sufficient certainty that they are dealing with the right entities: businesses who have the protection of the Class Exemption. This uncertainty is significant for a target because the target itself may risk a breach of the competition law if it collectively bargains with the wrong (i.e. non-exempt) entities.

Example 3

This example, which follows on from Example 1, illustrates how the members of the collective bargaining group approach a target and the information the target receives.

Within 14 days of making their initial contract, the commercial cleaning group obtains the form for a Collective Bargaining Class Exemption Notice, fills it out and sends it in to the ACCC. Following the draft Guidance Note, the group members:

- provide a 'general description of the group', so that new members can join over time,¹⁵ say, "A group of commercial cleaners in the Sydney metropolitan area of New South Wales.";
- provide a general description of the type of target businesses they intend to collectively bargain with, say, "Shopping centre managers";
- describe what they propose to bargain about, say, "Supply of cleaning services"

Broad, non-specific descriptions are suggested in the draft Guidance.¹⁶ This is because the ACCC considers that if the members of the bargaining group (or the targets) change, a new Collective Bargaining Class Exemption Notice must be prepared and lodged:

"If the members of your group or targets change from those described in the Collective Bargaining Class Exemption Notice provided to the ACCC, you will need to provide a new notice before the new members of the group, or collective bargaining with new targets, will be covered by the Class Exemption.

¹⁵ Draft Guidance Note at page 8.

¹⁶ Draft Guidance Note at page 8.

“When preparing a Collective Bargaining Class Exemption Notice, you should consider describing your bargaining group in broad enough terms to cover both persons or classes of persons who are currently members of the group and/or may join the group in the future. For example, if the group will comprise of a small number of persons and new members will not be added over time, you can name each member of the group. Alternatively, you can describe your group in general terms, for example: A group of dairy farmers in the Manning Valley area in New South Wales.

You should also consider whether the description of the target businesses is broad enough to cover known target businesses and, if relevant, classes of target businesses the group proposes to collectively bargain with in the future. For example, if your bargaining group intends to negotiate with a specific target business or a small number of known target businesses, you can name each target business. Otherwise, you can describe the type of target businesses the group intends to collectively bargain with in general terms. For example: Dairy processing companies.”

Sometime after lodging their notice with the ACCC, the group of commercial cleaners decides to approach its first shopping centre manager. The membership of the bargaining group has remained the same. The group appoints one of its members as its representative.

To ensure the group is protected, when the representative first approaches the shopping centre manager it gives the manager a copy of the Collective Bargaining Class Exemption Notice¹⁷ containing the broad descriptions set out above.

While the group’s membership is well known, to the group, it is not a requirement of the draft Class Exemption, or the form of notice to provide the target with any details of who the target is entering into the collective bargaining process with (or who the representative represents). This means the group members know who is protected under the draft Class Exemption but the target would not. This appears to be an unintended consequence of allowing a Collective Bargaining Class Exemption notice to contain such broad descriptions.

We recommend that a target should be in the same position as the group members – it should know who is within the protected group and have confidence that it is dealing with (or later contracts with) the right businesses. The draft Class Exemption could be modified to, for example, require the group members to identify all the members of the group to the target. This could be done at the same time as the group members give the target a copy of the Collective Bargaining Class Exemption Notice.

4. Has the integrity of the Class Exemption sufficiently addressed?

We make two points about the integrity of the exemption:

- the size of a general bargaining group appears to be unlimited in significant respects; and
- the aggregated turnover test does not appear to address the potential for ineligible businesses to seek to inappropriately access the Class Exemption.

While each group member must have an aggregated turnover of less than \$10 million, there is no limit on the number of members of a collective bargaining group. This means there is no upper limit on the aggregated turnover of the group *as a whole*. For example, a group of 20 eligible members could have over \$100 million in turnover between them.

Under the existing collective bargaining notification provisions, there is an upper limit on the aggregated price of the contracts which the bargaining group expects to make with targets. The baseline limit is \$3 million in any 12-month period.¹⁸ Unlike the existing notification, there appears to be no upper limit in the draft Class Exemption.

Further, as we have explained above, it is suggested to include broad descriptions in the Collective Bargaining Class Exemption Notice. There appears to be no requirement to specifically identify the members of the group to the ACCC, or to provide the ACCC with details of their turnover.

The draft Guidance states:

¹⁷ Draft Guidance Note at page 6.

¹⁸ Section 93AB(4)(b). Certain specific limits are set under the regulations.

"The ACCC can withdraw the benefit of the Class Exemption from particular businesses (but not retrospectively) if the ACCC is satisfied that the business, or businesses, is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits."

The difficulty is that the ACCC does not appear to receive the information it would need to decide whether or not to withdraw the benefit of the Class Exemption. There is therefore a risk that collective bargaining may occur which substantially lessens competition and is not likely to result in overall public benefits. The risk is heightened because the ACCC may only take action prospectively. The draft Class Exemption does not appear to mitigate this risk.

Another difficulty is that like the ACCC, the target is not required to be given details of the members of the collective bargaining group. This does not allow the target an opportunity to consider whether the collective bargaining would substantially lessen competition and would not be likely to result in overall public benefits and therefore consider whether to request that the ACCC withdraw the Class Exemption.

A separate, but related issue is whether the aggregated turnover definition, which has been taken from the taxation law is sufficiently robust to ensure that access to the Class Exemption is limited to the intended class of small businesses. The test under the taxation law is backed by a powerful general anti-avoidance rule in Part IVA of the *Income Tax Assessment Act 1936*. The draft Class Exemption appears to incorporate the aggregated turnover calculation but does not appear to contain any anti-avoidance rule or integrity provision. The risk of larger, ineligible entities 'gaming' the Class Exemption, for instance through the use of so-called 'special purpose entities', does not appear to be mitigated.

The definition of an "eligible corporation", as currently drafted, places total reliance upon the 'aggregated turnover test', is too broad and not sophisticated enough for other group members, the target or the ACCC to have confidence that if there is not a "special purpose entity" participating for the purposes of 'gaming the system'.

Thank you for considering this submission, including the four key issues we have raised which we respectfully submit will need to be considered and addressed in any *final* package. We would welcome an opportunity to discuss this with you. Please do not hesitate to ask your staff to contact me on _____ or _____, if needed.

Yours sincerely,



Angus Nardi
Executive Director
Shopping Centre Council of Australia