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ACCC Adjudication Branch

By email: adjudication@acc.gov.au

ALNA Submission on ACCC proposal for “class exemption” for collective bargaining

The ACCC is seeking views on a potential ‘class exemption’ that would provide eligible small businesses, agribusinesses and franchisees with legal protection to collectively bargain with customers or suppliers, without having to apply to the ACCC’.

Under a class exemption the ACCC can grant businesses an exemption from competition law for certain ‘classes of conduct’ that could otherwise carry a risk of breaching competition laws, but: do not substantially lessen competition, and/or - are likely to result in overall public benefits.

While a class exemption would provide a ‘safe harbor’ for eligible businesses to collectively bargain without breaching the competition law and the ACCC points out that the ‘class exemption’ would operate alongside the existing authorization and notification processes contained in the CCA, as an industry body involved in collective bargaining for some time we have some real concerns about this proposed model.

The Australian Lottery & Newsagents Association (ALNA) has a strong interest in collective bargaining arrangements, as authorised collective bargaining has been utilised and undertaken by Newsagents and Lottery Agents through their associations for many years, due to a power imbalance between individual agents and their large multi-national suppliers in negotiations.

As highlighted in the discussion paper, this is a feature of our industry, and a number of associations in our industry bargain collectively and have successfully used the authorisation and notification process for many years including; ALNA nationally, The Lottery Retailers Association (LRA) and the Victorian Authorised Newsagents Association (VANA) in Victoria, and previously the Lottery Agents Association of Tasmania (LAAT) until its recent merger with ALNA.

Collective bargaining is readily available through a range of associations in our industry and so access to collective bargaining is not difficult for individual or small groups of businesses.

This availability has given small businesses and their suppliers in our industry certainty in negotiations and lowered the risk of legal breaches.

We are very concerned about the issue of self-assessment by small businesses, which for example may lead to possible demands by targets to prove the exemption and we can see targets saying no. What small business wants is a comfort letter or something from the ACCC determining that they are exempt, and many targets will want proof of exemption.

It will potentially become very confusing for suppliers who currently know who they are dealing with, to make decisions about who they may voluntarily negotiate with under this new model. Without an official tick from the ACCC, this may lead to a lower willingness to engage. The industry’s

strong collective bargaining history may fragment, and suppliers' cost to engage will increase. A class exemption will not assist in such circumstances.

The self-assessment issue is a real one and it mirrors on a minor scale what happened in mergers. In 1977 clearance was abolished for merger and self-assessment introduced. Business, mainly big business, did not self-assess and the informal ACCC merger review regime developed and is now still in place.

Another large issue is that collective bargaining regimes are currently transparent, under a class exemption model it will move to an underground regime.

ALNA is of the view that a broad class exemption in our industry would be unhelpful as collective bargaining is easily accessible and is occurring already. It may also lead to unnecessary complications that could stall and in fact harm important authorised collective bargaining that is presently underway and ongoing and that our members are relying on.

Responses to Questions

Question 1

We do not support another small business definition in the CCA, it is suggested that the definition already used for collective bargaining be used- Option c.

We do not agree that the exemption could apply to businesses that are otherwise not eligible if they can show that the target agrees. The whole proposal is aimed at assisting small businesses and this suggestion could mean that large businesses become part of the collective bargaining group and the threshold of minimal anti- competitive effect and/or public benefit may be difficult to assess.

Exemption should apply to any size target, limiting it to certain size causes confusion and uncertainty. Targets do not have to negotiate- they always have the upper hand.

Question 2

- a- No, this leads to confusion and as the size of the group changes does the exemption lapse? Also, the smaller groups are more likely to hold together and have an anti-competitive effect.
- b- No, experienced representation is critical and such skills are limited. The targets are well advised, and the bargaining groups should not be weakened. There is little evidence in our industry that this would occur, and the targets do not have to negotiate- they always have the upper hand.
- c- Yes, as now.
- d- No, the chance of that sharing being a problem is very limited.
- e- Agree with all and it should go onto an ACCC public register. We suggest that the exemption only apply to groups where a trade association is the representative body.
- f- No effect that does not apply now.
- g- Any threshold has issues and that is just a fact of life. I doubt that the ACCC would be too concerned if some group members fell outside the threshold.

Question 3

Agree, but as per Q2 (e), the group should record, and notify ACCC and the target, and go onto an ACCC public register. We also suggest that the exemption only apply to groups where a trade association is the representative body. If a group wishes to bargain with other than the franchisor, then the normal exemption criteria should apply.

Other Question

There is the issue of existing authorisations and notifications. Industry bodies with limited resources have had to invest in many cases in legal advice before applications, and where a waiver is not available, in application fee's. Would the ACCC simply let these existing applications lapse or revoke them if a class exemption is in place?

We appreciate the ACCC taking on board our concerns in relation to this issue. We do not want to see the many positive attributes of the work of trade associations, for both their small business members, their suppliers and also regulators, unnecessarily weakened by not fully determining the implications and impacts of this reform.

We thank you for your time and consideration.

Kind regards
Ben

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