

## **ACCC Public Consultation on 'Class Exemption' for Collective Bargaining**

***Submission by William van Caenegem (Bond University); Madeline Taylor (University of Sydney); Jen Cleary (University of Adelaide); and Brenda Marshall (Bond University)\****

### **BACKGROUND**

The main focus of our submission is the following issue raised by the ACCC: 'which businesses should come within the scope of the collective bargaining class exemption'.

The Discussion Paper acknowledges that the ACCC may specify 'one or more' of the following limitations:

- that the class exemption only applies in particular circumstances;
- that the class exemption only applies to particular types of businesses; and
- that the class exemption is subject to other specified conditions.

The Discussion Paper goes on to note that:

- a. The class exemption could be limited according to the number of employees of each business in the group.
- b. The class exemption could be limited according to the turnover of each business in the group.
- c. The class exemption could be limited according to the value of the contract that each member of the group expects to enter with the target they are proposing to collectively bargain with.
- d. The class exemption could be limited using a combination of these factors.
- e. The class exemption could apply to businesses that are otherwise not eligible if they can show that the target of the collective bargaining supports their proposal.
- f. Should the class exemption be limited only to collective bargaining with target businesses that are above a certain size?

The ACCC says that the requested feedback concerns: whether any of these approaches to defining eligibility (or a combination of them) would be appropriate and workable; and any alternative approaches to defining eligibility.

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The ACCC is also seeking comment in relation to specific questions, namely:

- a. Should the class exemption only be available to collective bargaining groups below a certain size?
- b. Should the class exemption apply only where there is not common representation across collective bargaining groups?
- 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)?
- 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?
- 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?
- f. What would be the effect of a collective bargaining class exemption on businesses which fall outside it?
- g. What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?

#### **GENERAL SUBMISSIONS**

The authors of the present submission draw attention to the 2015 Report produced for the Rural Industries Research and Development Corporation (RIRDC), now AgriFutures Australia, entitled *Collective Bargaining in the Agricultural Sector* and available at:

<https://www.agrifutures.com.au/product/collective-bargaining-in-the-agricultural-sector/>

Our submission therefore focuses on the specific and unique needs of the agricultural sector, and in particular, on pricing and supply contracts with wholesalers, supermarkets, and processors.

The thrust of the above mentioned Report was to support the process of collective bargaining in the agricultural sector, by increasing the accessibility and affordability of gaining a collective bargaining exemption from the full operation of the competition law for agricultural producers. The report stressed the very considerable difficulties that the existing collective bargaining application and notification procedures posed for farmers, who generally lack the time, expertise and cohesion necessary to engage with the ACCC.

We therefore strongly support the collective bargaining class exemption process and our submission favours making that process as clear, comprehensible and transparent as possible. In particular, one of the major recommendations of our report was the 'Development of a collective bargaining factorial matrix for farmer self-evaluation' (Recommendation 6.1.2 of the Collective Bargaining Report).

Accordingly, in the context of class exemptions we favour conditions for class exemption that are straightforward and limited in number, and are therefore readily understood by farmers who may wish to take advantage of them. The process of evaluation entered into by farmers interested in taking advantage of a class exemption should be made as accessible as possible. We therefore support a limited number of determining factors, and factors that are easily measured and complied with. For instance, in terms of farm production, this could be total volume available for supply during a given period.

Our Report also identified a lack of time and expert resources available to farmers, and therefore we favour a class exemption regime with minimal administrative and legal requirements.

In addition, we favour a regime that requires the target to object to the form and approach of a collective bargaining group. That is, the onus should be on the target, commonly a major agribusiness processor, to prove that conditions for a class exemption are not met. This shifts the onus from the collective bargaining group to the target in question to establish that exemption conditions were not met in the face of a dispute, shifting the burden of cost and complexity and limiting it for the collective bargaining group in the first instance.

We further note that our Report drew attention to an apparent inconsistency in the law, in that a number of farmers (usually within a region) are free to form a Co-operative, with its principal aim being to bargain with a target (a processor or supermarket for instance). If the same farmers formed a loose grouping for the purpose of a unified bargaining stance, for example agreeing on price parameters, they would be in potential breach of the Competition law under cartel provisions as defined in Part IV, Division 1 of the *Competition and Consumer Act 2010* (Cth). In effect, the class exemption system approximates the forming of a co-operative or, by extension, a corporation.

## **SPECIFIC SUBMISSIONS**

In response to the specific questions noted above we submit the following:

**a. Whether a class exemption should 'only be available to collective bargaining groups below a certain size?**

In our submission, relative size is the key, but is difficult to assess. We therefore advocate a simpler measure. In any case, a bargaining group can still notify or apply for authorisation. What should be under consideration is therefore a 'safe' limit, which is nonetheless not the only option available should the group concern a greater volume of production (or other measure). We therefore support a maximum volume of production or supply of the class as

a whole as the relevant measure. If supply volume is below this level, then notification or authorisation should not be required, but if it is above this level, that alternative approach can still be pursued.

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

We submit that the class exemption should certainly apply even where there is common representation across groups. This will allow for more regionally based groups to form, which is advantageous to farmers in terms of ease of communication and the collaboration required.

**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 submission, the critical problem in the agricultural market is the presence of monopsony competitive conditions. The class exemptions should, above all, apply to bargaining for joint supply so that farmers can command better prices from a stronger bargaining position. It is less important that farmers should be able to benefit from class exemptions concerning the acquisition of goods or services, for which the notification and authorisation process remains available. Farmers interested in both sides of the value chain can still form a co-operative for the purpose of bargaining both with their suppliers and their purchasers.

**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?**

We submit that naturally a degree of collaboration is required for class exemptions. However, farmers tend to prefer to share information on a limited basis in any case, and maintain a competitive advantage by not sharing other categories of information, as our Report noted. To maintain competitive conditions in the market, farmers should not be exempt from the normal rules that apply for purposes other than what is specifically enabled by the class exemption conditions.

**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?**

In our submission it is critically important to minimise administrative requirements, as the empirical research for our Report clearly establishes how time and resource poor farmers are – particularly within the currently drought-declared areas around the country. At the

same time, it might be necessary for a group to establish at some point that they fall within the requirements of a class exemption. However, if these requirements are kept simple and to a minimum, the record keeping requirement will not be onerous. Whatever record keeping requirements are imposed, they should be aligned as much as is practicable with the record keeping that those farmers in any case engage in for business and financial purposes.

We have no particular comments concerning questions f. and g.

A comprehensive account of our views on collective bargaining in agriculture can be found in our Report as referenced above.

We can be contacted for clarification or further comment on