

5 October 2018

Mr Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

By email: adjudication@acc.gov.au

Dear Mr Jones

ACCC Discussion Paper – potential class exemption for collective bargaining

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**Committee**) is pleased to make this submission in response to the Australian Competition and Consumer Commission (**ACCC**) proposal on “*class exemption for collective bargaining – discussion paper*”.

The Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

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.

Through 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.

This class exemption would relate to collective bargaining, which is a process that allows competing businesses, such as farmers or retailers, to jointly negotiate with customers or suppliers over common issues (e.g. terms, conditions and/or prices).

While collective bargaining may, and the Committee stresses may, breach competition laws, a class exemption would provide a “safe harbour” for eligible businesses to collectively bargain without breaching the competition law.

The ACCC points out that the "class exemption" would operate alongside the existing authorisation and notification processes contained in the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The Committee welcomes the ACCC's discussion paper and sees considerable merit in the principle of a "class exemption" for collective bargaining by small businesses.

However, the Committee has concerns about the issue of self-assessment by small businesses and possible demands by targets to prove the exemption.

The Committee is aware of some supply contracts which say that a party is not to be part of a collective bargaining arrangement unless authorised by ACCC. A class exemption will not assist in such circumstances.

Furthermore, small businesses would seek a comfort letter (or similar confirmation of exemption) from ACCC because many targets may want proof like this of such exemption.

The self-assessment issue is real and 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. The informal ACCC merger review regime then developed and is still in place.

Another issue is that collective bargaining regimes are currently transparent, whereas they will likely move to an underground regime.

An alternative

The Committee suggests that, based on ACCC experience, collective bargaining groups are generally authorised, letting notification stand. That being the case, they should be covered by a class exemption without the need to self-assess. That is, the ACCC has assessed.

However, the market needs to be aware and hence there must be some transparency. To claim the exemption, the groups must inform the ACCC and the target or targets.

Furthermore, trade associations should list on their website any collective bargaining groups they represent.

If anyone then has a concern about the claimed exemption, that can be raised and assessed by the ACCC at that point.

The ACCC Questions

Question 1 – What types of businesses should be covered under this class exemption?

It is suggested that there not be another small business definition in the CCA. Instead, it is suggested that the definition already used for collective bargaining be used - Option c. in the Question.

The Committee does not agree that the exemption could apply to businesses that are otherwise not eligible if they can show that the target agrees. The whole class exemption 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 the exemption to a certain size causes confusion and uncertainty. Targets do not have to negotiate as they always have the upper hand.

Question 2 – Other issues

- a) No, this leads to confusion. 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.
- c) Yes, as now.
- d) No, the chance of that sharing being a problem is very limited.
- e) Yes, all of those obligations listed and the bargaining group should go onto an ACCC public register. The Committee also suggests 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. The Committee doubts that ACCC would be too concerned if some group members fall outside the threshold.

Question 3 – Should a class exemption allow collective bargaining by all franchisees with their franchisor, regardless of their size or other factors?

In the Committee's view, any franchise is a total bargaining group or a series of such groups, regardless of their size, when it comes to bargaining with the franchisor.

However, if a group wish to bargain with others (other than the franchisor) the normal exemption criteria apply.

Other issue

There is the further issue of existing authorisations and notifications. Does the ACCC simply let them expire or revoke them once the class exemption is in place?

The Committee would be pleased to discuss this submission, if that would be helpful.

Please contact, Meghan Warren, the Chair of the SME Committee on in the first instance, on _____ or _____ if you require further information or clarification.

Yours faithfully



Rebecca Maslen-Stannage
Chair, Business Law Section