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The Project Manager
Collective Bargaining – Small Business
Class Exemption
Adjudications Branch
Australian Competition and Consumer Commission

By email to: adjudication@accc.gov.au

Collective bargaining class exemption – submission

About WorkAccord

WorkAccord is a small Australian workforce and employment relations firm that uses integrative and collaborative approaches to help clients charter their workforce & employment relationships and keep them running smoothly and productively.

We undertake:

- ✓ workforce & value chain mapping
- ✓ strategic review, planning & implementation for accord making
- ✓ registry support including chartering of outcomes, solutions, follow-up, and action plans
- ✓ training program design & delivery.

Incorporated Workers & Independent Contractors

This submission addresses a particular interest in the position of "incorporated workers" and independent contractors.

An "incorporated worker" is essentially a small one or two-person business that trades through a company.

The sector would potentially benefit to the extent to which unfair terms in standard form small business contracts might be exposed and remediated.

Our submission is advanced only in respect of genuine independent contracting arrangements. However, we recognise that one additional spin off benefit of a collective bargaining exemption might be that sham arrangements would receive greater exposure.

Feedback

a. Should the class exemption only be available to collective bargaining groups below a certain size? For example, should it specify a limit on the number of businesses in any group, or their combined market share?

There need be no limit on the size of the group because the target is not compelled to bargain with the group and no boycott is contemplated. In our submission, issues of group size will sort themselves out in the market as parties look to optimise their bargaining models and outcomes.

WorkAccord agrees with the Commission's statement about the difficulty of assessing market shares. The process of doing so may become unduly costly and will slow down the negotiation process. The issue should only in cases of market power abuse, which may be dealt with adequately under s. 46.

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

In our submission, the inbuilt protections of non-compulsion and no boycott, are sufficient to ameliorate the adverse risks of "pattern bargaining" on targets. The provisions of s.45 provide protection against substantial lessening of competition.

The benefits of pattern bargaining - understood in terms of efficiency and reduced bargaining costs - are more likely to be achieved by small business if there is no restriction on common representation. Indeed, for very small operators in a high-density industry such as IT contracting, restrictions on common representation may result in a shortage of available and sufficiently skilled bargaining agents.

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)?

WorkAccord agrees with the Commission's starting position that the class exemption should cover collective bargaining with both customers and suppliers.

There is also a case to consider whether *triangulated* bargaining (bargaining with labour hire firms and hosts) and *vertical* bargaining (bargaining up layers of a labour contracting chain) might be permitted as a means of helping to ensure that supply models that engage the services of incorporated workers are sufficiently well-funded at source to enable the model to operate sustainably and without risk of exploitation.

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?

WorkAccord agrees with the Commission's starting position that information sharing beyond that necessary to engage in collective bargaining should not be allowed under any class exemption. Businesses wishing to engage in broader sharing of information would still be able to apply for authorisation for that conduct.

e. Should other obligations apply?

In our submission it should be a requirement to keep written records of composition and operation of the group; and to notify the Commission when the group is formed.

We would have reservations about a requirement to notify the target when the group is formed as this would provide too great an opportunity to disrupt the group before it initiates bargaining activity. There should, however, be a requirement to give a reasonable period of notice before commencing bargaining.

We have adopted a less restrictive approach on the basis that there are already sufficient protections in the Act to ameliorate the risks of adverse impacts upon targets or the market. We would, however, support requirements that bargaining agents should be fit and proper persons and that they should have established competition compliance programs to a level considered satisfactory by the Commission.

f. What would be the effect of a collective bargaining class exemption on businesses which fall outside it?

WorkAccord accepts that if a group of businesses was able to collectively bargain but some businesses were excluded from the group because of their size, those businesses could miss out on receiving the same benefits or savings as those within the bargaining group and may therefore be competitively disadvantaged.

However, our focus in this submission is upon the incorporated worker segment, the members of which, in almost every case, would ordinarily be expected to fall within the class exemption.

g. What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?

It is possible that a class exemption that applied only to businesses with less than a defined employee number or turnover might impede the growth of businesses that wished to rely on it but were close to these size thresholds - but only to the extent to which further growth was dependent on remaining a member of the group.

However, such a member might equally be in a position to exert disproportionate influence on the bargaining outcomes achieved by the group.

Rather than address the issue through group size requirements alone, there may be a case to consider whether bargaining members of different size might avail themselves of different methods of representation.

For example, in our submission, there is a case for considering whether the current prohibition on Trade Union representation might be relaxed in the case of very small businesses that are essentially incorporated workers.

One advantage of Trade Union representation amongst this cohort is that it may assist to expose and remediate any sham arrangements should they be encountered.

Contact

WorkAccord appreciates the opportunity to make this submission. We would be happy to respond to any questions the Commission may have about this submission.

Yours faithfully



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