

3 July 2019

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By Email: adjudication@acc.gov.au

Dear Sir/Madam,

SUBMISSION TO CONSULTATION PAPER ON CLASS EXEMPTION TO COLLECTIVE BARGAINING

Macpherson Kelley Lawyers acts for hundreds of manufacturers, importers, suppliers and service providers of all sizes in Australia, but predominately in the mid-size market (\$5-\$500 million turnover). We also act for franchisors, from small to mid-size, and advise franchisees, relevantly, when entering into franchise systems.

We have also advised and assisted clients in considering or obtaining collective bargaining approvals through the Australian Competition and Consumer Commission (**ACCC**).

As such, we consider that we are well positioned to comment on some pertinent questions posed in the consultation paper: 'Class Exemption for Collective Bargaining'.

Executive Summary

We submit that the ACCC should re-evaluate its commitment to creating a class exemption for collective bargaining, for the reasons explained in the [attachment](#) to this letter.

We do provide our views on the specifics of the consultation paper, because, if a class exemption is adopted, then certain further or consequential considerations ought also be taken into account. Having said that, in considering the class exemption proposal, we have concluded that improvements to the collective bargaining approval regime would be better achieved by other means.

In our view, the current provisions in the *Competition and Consumer Act 2010* (Cth) (**CCA**) are already more effective and appropriate than the proposed class exemption. From our real life experience in dealing with the practicalities of business operations, the current provisions already sufficiently enable small businesses to successfully engage in collective bargaining where there is a commercial benefit and/or economic need to do so.

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If the underlying concern supporting the introduction of the class exemption is that the current approval process is overly complex or expensive, or imposes a unreasonable burden on the ACCC, then these concerns are better addressed by reviewing the current processes and perhaps adopting a more streamlined or "short form" process for small businesses.

We consider that making this class exemption - in the format proposed - will give rise to a range of scenarios with unforeseen problems, which may result in:

- (a) unfairness to smaller suppliers, customers and franchisors; or
- (b) anti-competitive effects in the relevant market, impacting consumers.

The key reasons behind our opinion are:

1. The eligibility criteria for the class exemption is not appropriate. In particular, it is our view that tying it to turnover is not a good measure of a business' ability, competitiveness, market position or negotiating power.
2. The eligibility criteria give no consideration of the size, strength, competitiveness or negotiating power of the supplier or customer. The balance of bargaining power in any negotiation is determined by the *respective* positions of both sides, and cannot be determined by looking at just one party, however small. When permitting a group of smaller businesses to collectively bargain, it is very likely that the combined strength of the group would far outweigh that of the target supplier or customer, unless they are very large and powerful businesses. Whilst this may be the case in some instances, this would not be the case for the vast majority of businesses in Australia.
3. Collective bargaining by competitors, without an exemption, inherently demonstrates the hallmarks of cartel or anti-competitive conduct, and can be highly damaging to a market. The fact that one party may be small does not change this. The current process ensures collective bargaining is an independent and case by case assessment of whether the outcome is likely to be pro-competitive and for the public benefit. Without a specific assessment, and having an automatic class exemption (and especially one that may remain in place for up to 10 years), we can foresee situations where it is utilised in a manner that is not pro-competitive or in the public interest.
4. Currently, it is common for potential parties to a collective bargaining application to share the costs of the advice and application. This already lowers the financial burden on small businesses. Small businesses will still require legal assistance in negotiating the class exemption and during the collective bargaining process, and the costs can be shared. Either way, we do not see the cost factor to be overly detrimental to an application.

We acknowledge that there may be some specific industries and small businesses where there is an imbalance in bargaining power. However, it is our view that these industries and businesses are also currently supported by other existing ACCC mechanisms (eg. the Code of Conduct for franchising and the 'unfair terms' regime for

small business, standard-form contracts) to ensure the relevant businesses can access the collective bargaining authorisation and notification process and a range of other legislative protections.

We do support a simplification or streamlining of the current collective bargaining approval process, to open its availability to smaller businesses. However, we consider this would be better served by having a second assessment stream for small businesses or smaller industries, where a case-by-case assessment can still be made by the ACCC. The "automatic" approval nature of a class exemption is concerning when considered for conduct that would otherwise be acknowledged as highly unlawful (cartel conduct), to the extent that it is and remains a key enforcement priority for the ACCC and criminal prosecutions are possible.

Further information

Thank you for the opportunity to make submissions. If you have any questions, or require any further information, please do not hesitate to contact the writer on

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Paul Kirton', with a long horizontal flourish extending to the right.

Macpherson Kelley

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SUBMISSION TO CONSULTATION PAPER ON CLASS EXEMPTION TO COLLECTIVE BARGAINING

Specific Responses

1. **The eligibility criteria, including whether the thresholds and other features of the class exemption are appropriate**

In our view, the threshold of \$10 million in revenue per financial year is not appropriate in determining "who is" or "what constitutes" a small business. Turnover often does not provide good correlation with bargaining strength, nor the need for collective bargaining in a market.

If a "small business" is to remain in the criteria, we consider a small business to more appropriately be in line with the definition in the *Australian Small Business and Family Enterprise Ombudsman Act 2015 (ASBFEO)*, that being revenue of up to \$5 million.

We also recommend that there be more thresholds that need to be met, such as meeting two of three specified criteria. These should be:

- i. Less than 20 employees, based on the *Australian Bureau of Statistics (ABS)* definition;
- ii. Up to \$5 million revenue, based on the ASBFEO definition;
- iii. Value of the contract does not exceed \$3 million in any 12 month period, to be consistent with the current collective bargaining notification provision (this may require different contract thresholds for different industries as is currently in the CCA).

However, and more importantly, any eligibility criteria must consider the nature and size of the other, target party to the bargaining negotiation (the supplier or customer). The balance of bargaining power in any negotiation is determined by the respective positions of *both* sides, and cannot be determined by looking at just one party, however small.

When permitting a group of smaller businesses to collectively bargain, it is very likely that the combined strength of the group would far outweigh that of the supplier or customer, unless they themselves are very large and powerful businesses. Whilst this may be the case in some instances, this would not be the case for the vast majority of businesses in Australia.

Further, because a business might be categorised as a 'small business', this does not, on its own, mean that any collective bargaining with a supplier or customer will necessarily and automatically be of more benefit to the public than the facilitation of cartel or anti-competitive conduct.

It is our view that adopting the above suggested threshold will enable the ACCC to ensure that the composition of the bargaining group and its activities are appropriately constrained to avoid anti-competitive conduct arising from collective bargaining. Furthermore, the ACCC needs to consider that collective bargaining in one market

might facilitate anti-competitive conduct in a related market. It is our view that providing further provisions to restrict this is required.

We consider that the eligibility criteria as presently drafted is not sufficient to ensure market share within collective bargaining arrangements is appropriate. If the ACCC is to impose this class exemption, it is our view that the ACCC should also provide further limitations on market share. For example:

- (a) The collective bargaining group should only have a modest market share of each and every market in which the negotiations will take place; and
- (b) The target company (supplier or customer) should hold a significant market share in those markets.

Imposing these additional restrictions will ensure that small businesses that meet the above criteria do not abuse the class exemption where they are already in positions whereby they hold good negotiating power.

Another problem that we foresee with the threshold / definition presently proposed, is that it differs to many other 'small business' definitions (be it in competition law or tax law etc), which fundamentally creates confusion and uncertainty for businesses about their alignment and eligibility under the various other regimes. If one of the purposes of the exemption is to assist 'small businesses', reduce red-tape and reduce their reliance on seeking legal advice, then consistency of threshold / definition is of central importance.

2. Other concerns with a class exemption

Access and cost

One key argument for the exemption is the fees associated with notification and authorisation. Although the current authorisation fee may be relatively expensive for small businesses in isolation, it is possible (and common in our experience) for all parties on behalf of the application to contribute to the fee. Where there are more parties, the proportional sharing of the cost is likely to result in fees that are not burdensome.

Additionally, parties can already submit a request for the ACCC to waive the lodgement fee. If, for example, the fee will cause financial hardship to the parties, or if the applicant is a not-for-profit organisation, then the ACCC may waive the lodgement fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.

With a class exemption, it is still likely that most small businesses will still require legal assistance to navigate and properly respond to the requirements of the class exemption in any event. As before, they can share the costs across the proposed group.

Mitigation of potential market harm

Collective bargaining by competitors (regardless of size or market share), without an exemption, is inherently cartel or anti-competitive conduct, and can be highly damaging to a market. The fact that one party may be small does not, in and of itself, change this.

The current process ensures collective bargaining is an independent and case by case assessment, which we consider is a critical part of any assessment process, where conduct, improperly done, can cause such great harm in a market.

Requiring all businesses to receive approval from the ACCC ensures that collective bargaining will be for the benefit of the public and does not substantially lessen competition. This will, and should, be assessed on a case by case basis. Such a guarantee cannot be given if the 'automatic' class exemption is put in place.

It is our view that this class exemption will remove necessary checks and balances for small businesses who engage in collective bargaining, where the ACCC would have otherwise refused an authorisation or notification application, or at least, placed constraints on it.

Inference that all related conduct is lawful

Without this ACCC assessment, we also foresee that the proposed exemption may have unintended negative consequences, in that:

1. It might encourage small businesses to avoid seeking (or think that they do not need) legal advice where it is, in fact, needed or advisable. This could unwittingly increase the risk of cartel and other anti-competitive conduct arising from:
 - (a) improperly or mistakenly considering the class exemption applies to their group; and/or
 - (b) engaging in conduct beyond collective bargaining that is unlawful.
2. There may be an assumption that, because there is a class exemption available, any collective bargaining is automatically pro-competitive and for the public benefit.
3. Markets do change, as do the parties within them. Parties to a previous collective bargaining arrangement may engage in the same conduct again, without re-considering these changes, if the class exemption is still in place.
4. In an extension to point 3, if the ACCC grants an automatic class exemption, especially one that may remain for up to 10 years, it will be incumbent on the ACCC to continuously review it and the market, the players in it, the size of those players, the market shares of those players, the changes to bargaining positions, and the scope of the exemption.

Lack of engagement by target business

The proposed class exemption also notes that it is not compulsory for the target business to engage in collective bargaining negotiations.

Whilst this is the case currently, we consider that a class exemption regime may cause less imperative for a target business to engage in collective bargaining. In our view, target businesses are more likely to engage in collective bargaining if they know the ACCC has considered the market, the players in it, has determined that there is a need for collective bargaining, and also considers it broadly to be pro-competitive.

Without an ACCC assessment, there may be a lack of incentive for target businesses to engage in collective bargaining due to uncertainty.

Alternate approach?

As a law firm that has advised on or assisted clients in collective bargaining arrangements, we have some additional concerns about the proposed exemption. This exemption is tailored specifically to apply to small businesses. However, we are of the view that the authorisation and notification processes already provided by the ACCC sufficiently covers small businesses who wish to engage in collective bargaining. In particular, the notification process already enables small businesses to easily apply for protection from collective bargaining restrictions.

When considering the merits of a class exemption regime, consideration of and comparisons with other alternative approaches is needed. It may be that these alternate approaches achieve the same ends, but do not give rise to the same concerns.

For example, here, the key driver is to give small business easier access to collective bargaining. However, as explained above a class exemption regime loses the "case by case" assessment of whether the outcome is likely to be pro-competitive and for the public benefit. When considering the turnover of only one side of a negotiation and not considering the market, the potential for unfair treatment of the supplier/customer or adverse competitive impacts in the market is high.

Accordingly, would it be better to create a simplification or streamlining of the current collective bargaining approval processes, that is only open to smaller businesses? This could be done by having a second assessment stream for small businesses or smaller industries, where a case by case assessment can still be made by the ACCC. The need for complex criteria of "small business" or other self-assessment tests is reduced, given that all exemptions would still be critically considered by the ACCC.