

5 October 2018

Mr Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
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By email: adjudication@accc.gov.au

Dear Mr Jones

ACCC Discussion Paper – potential class exemption for collective bargaining

Introduction

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide its comments in relation to the Discussion Paper on a potential class exemption for collective bargaining issued by the ACCC on 23 August 2018 (**Discussion Paper**).
2. The Committee acknowledges that the availability of a class exemption for certain collective bargaining conduct may result in a number of potential benefits - particularly the reduction of compliance and administrative costs associated with individual notifications and authorisations, given the ACCC's current approach to granting immunity under those processes. The availability of a class exemption therefore has the potential to create greater certainty for businesses, and reduce transaction costs for those businesses.
3. However, it is also important to ensure that exemptions from the operation of Australia's competition laws are clear as to their application and do not compromise competition to the detriment of consumers.

The importance of clarity for small businesses

4. There are a range of different thresholds that the ACCC could specify for the application of any class exemption. However, it is important that those thresholds are expressed clearly and unambiguously, and can be readily applied by, the businesses -- often small businesses -- that may seek to benefit from the protection available under class exemption. This is critical, given that the potential consequences for conduct falling outside an immunity granted by the ACCC include prosecution under Australia's criminal cartel laws.
5. The Committee considers that, in specifying these thresholds, the ACCC can draw on its experience in considering potential ambiguities and practical difficulties in

applying the thresholds for the application of the unfair contract terms regime to small businesses under Part 2-3 of the Australian Consumer Law.

6. Although the application of class exemptions will necessarily involve a self-assessment by parties wishing to avail themselves of the relevant exemption, the Committee also encourages the ACCC to consider providing a helpline or other resource to assist businesses – particularly small businesses – in assessing whether the class exemption applies.
7. This is because the process of collective bargaining can involve the exchange of information, and care should be taken to ensure that the small businesses do not exchange confidential information in relation to the proposed "target" of the collective bargaining including as to pricing or engage in price fixing or boycott activity (particularly where the proposed target does not wish to collectively bargain). Further, it needs to be clear that the collective bargaining exemption does not override any commercial confidentiality provisions applying between the small businesses and the proposed target of the collective bargaining.
8. The Committee also believes that it is very important that there is a clear explanation of the conduct that is covered by the class exemption to ensure that small businesses do not engage in conduct outside the terms of the exemption, to the detriment of other businesses dealing with them and, importantly, to the detriment of consumers dealing with them.

The ACCC should apply well-established competition law principles

9. In setting the appropriate thresholds for application of any class exemption, the Committee also encourages the ACCC to consider the following key principles:
 - As class exemptions involve a self-assessment, and the relevant conduct will not benefit from individual consideration of potential harm to competition or public benefits by the ACCC, the class exemption should only apply to conduct where there is very limited (if any) risk to competition. If the conduct may present a potential risk to competition, then the existing authorisation and notification processes remain more appropriate, and these processes are not unduly burdensome for applicants.
 - In determining the types of conduct that should benefit from the class exemption, the ACCC should apply competition law principles that have been established over a long period of time. For example:
 - Competition concerns are more likely to arise if the relevant conduct (in this case, joint negotiations and the likely exchange of competitively sensitive information about pricing and other non-price terms) is undertaken by parties that, individually or collectively, have market power.

This may suggest that a threshold based on the collective market share of the proposed participants to the collective bargaining conduct may be an appropriate threshold, or part of the threshold, for application of the class exemption. This is broadly analogous to the 20% indicative market share threshold set out in the ACCC's Merger Guidelines – the ACCC encourages application to the ACCC for an individual assessment of

transactions under section 50 of the *Competition and Consumer Act 2010* (Cth) if the parties' combined share exceeds 20%.

However, the Committee appreciates that an approach based solely on market shares would be unlikely to deliver the required level of certainty, given that the size of a party's market share necessarily depends on how they define the market. This can be a complex task (particularly for small businesses), and the consequences of mistakenly defining the market too broadly may be a contravention of the cartel laws.

As the ACCC states in its Discussion Paper, market shares are often difficult to calculate and subject to divergent views – even more so when individuals or businesses are required to estimate their market share. A threshold of this nature may also require businesses to disclose confidential and commercially sensitive market share data to others in the class.

A further challenge in setting a market share threshold – say 20% -- may mean that other participants in the market may not be invited to participate in the collective bargaining. This may risk introducing further distortions or exclusionary conduct.

- Competition concerns are more likely to arise if the goods or services the subject of the collective bargaining represent a significant proportion of the costs incurred (or prices set) by the parties participating in the collective bargaining process. If this is the case, then collective bargaining may result in less price competition between those firms, to the ultimate detriment of consumers.
- Competition concerns are more likely to arise if participants in the collective bargaining process are able to (or do) exchange competitively sensitive information that goes beyond the information that is strictly necessary to undertake collective bargaining in relation to the relevant goods or services.
- Significant competition concerns may arise if the parties to the collective bargaining arrangements have an ability to (or do) boycott, or threaten to boycott, dealings with a supplier or customer, or to compel participation by other parties.

In its consideration of the Collective Bargaining Notification submitted by Hertz Australia Pty Limited in 2010, the ACCC stated that:

“Collective boycotts can have significant anti-competitive effects. In collective negotiation, the right to impose a collective boycott could enable a collective bargaining group to inflict significant commercial damage on those that it negotiates with and cause significant disruption not only for the target, but also for upstream and downstream businesses and ultimately consumers

...

Given the significant disruption and commercial damage collective boycotts can cause the ACCC is generally very reluctant to allow

*protection for collective boycott activity without extremely strong justification for the arrangements being provided”.*¹

It is therefore critical that, for any class exemption, participation by any person (whether as a supplier, customer or participant in the collective bargaining) is voluntary.

Potential thresholds for application of the class exemption

10. As set out in the Discussion Paper, there are a number of possible thresholds that the ACCC could use to make clear which conduct falls in or outside of the proposed class exemption. These include thresholds relating to:
 - **market share** – as set out above, this type of threshold may involve some challenges;
 - **number of employees** – if this threshold is adopted, it should expressly apply to the corporate group, not only the individual company engaging in the collective bargaining;
 - **turnover** – if this threshold is adopted, the ACCC should provide clear guidance on how turnover should be calculated; and/or
 - **value of the relevant contract** – again, if this threshold is adopted, the ACCC should provide clear guidance on how “value” should be calculated. This is particularly important in cases where the consideration includes more than cash payments, is contingent on whether or not certain events occur, and/or the contract continues for a number of years (potentially including extensions). As experience has shown in relation to the unfair contracts terms regime, lack of clarity on these issues can create significant practical challenges.
11. Each of these thresholds may operate as a broad proxy for determining whether a business is a “small business” such that it may benefit from application of the class exemption. However, for many reasons (including those set out above), these matters do not operate as a proxy for assessing market power.
12. Regardless of which threshold or thresholds the ACCC ultimately chooses to specify, the Committee encourages the ACCC to ensure that those thresholds are expressed clearly and unambiguously, and so that they can be applied with confidence by the businesses -- often small businesses – seeking protection.
13. The Committee also considers that any class exemption should only apply to conduct where there is very limited (if any risk) to competition. In determining the appropriate thresholds, the ACCC should apply well-established competition law principles. If the relevant conduct may present a potential risk to competition, then the existing authorisation and notification processes remain more appropriate.

Other potential class exemptions

14. The Committee welcomes the ACCC’s approach in considering potential class exemptions.

¹ Australian Competition and Consumer Commission, Objection Notice in Respect of a Collective Bargaining Notification Lodged by Hertz Australia Pty Limited, Notification No CB00143, 16 July 2010, [5.56]–[5.57].

15. If the ACCC wishes to consider other conduct that may potentially benefit from a class exemption, then the Committee suggests that the ACCC may wish to consult further in relation to the possible benefits of a class exemption that applies to resale price maintenance (and other pricing conduct) as between franchisees and franchisors. To the extent there is risk of any technical contraventions of the CCA, those matters are unlikely to have any adverse impact on competition.

Further questions

16. If the ACCC would like to discuss any of the issues raised in this submission, please contact the Chair of the Committee, Geoff Carter, on (03) 8608 2090 or at geoff.carter@minterellison.com .

Yours sincerely



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5 October 2018

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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 0439 467 800 or mwarren@burkes-law.com if you require further information or clarification.

Yours faithfully



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Chair, Business Law Section