

3 July 2019

Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

By email: adjudication@acc.gov.au

Dear Sir/Madam

Collective bargaining class exemption – submission

The SME Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to provide comments to the Australian Competition and Consumer Commission (**ACCC**) on the Collective Bargaining Class Exemption (**Class Exemption**) documents which are currently under consideration.

The SME 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 Committee has a keen interest in this matter.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

The Committee welcomes any move by the ACCC to make compliance with competition law less onerous for small businesses. Consequently, it is the Committee's position that, subject to comments and suggestions, the Class Exemption should proceed, although with a review sooner than the proposed 10 years.

The Committee has some specific comments on the draft Guidance Note (**Guidance Note**) and the draft Collective Bargaining Class Exemption Notice (**Notice**).

Guidance Note

The Committee understands that the purpose of the Class Exemption is to remove the risk that collective bargaining by eligible businesses will breach competition law.

The Committee notes that to date collective bargaining can and does occur between groups of small businesses and larger target businesses without breaching the anti-collective bargaining provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and that the ACCC has generally not had concerns about these practices. The Committee then notes that the introduction of the Class Exemption will give greater visibility to these practices, clarify the application of the CCA to them and, through the provision of Notice, enable the ACCC to recognise the value of them.

The Guidance Note provides for businesses to self-assess the \$10 million aggregate turnover threshold if that is an applicable exemption criterion, and the Committee notes this threshold has been included so as to be consistent with the criteria the Australian Taxation Office uses for small business eligibility for tax concessions. The Committee raises a concern with regard to this criterion that, unlike the authorisation process under which small businesses do not need to make such an assessment as to turnover threshold, the inclusion of the threshold may cause some small businesses to inadvertently make a mistaken assessment and then be unable to avail themselves of the Class Exemption, and yet not have availed themselves of the authorisation processes. The Committee encourages the ACCC to exercise flexibility should such mistakes occur and not take punitive action against such small businesses, given the Committee is not of the view such mistakes should cause competitive harm to any party.

The Committee further notes that the Legislative Instrument requires that where relevant targets can be identified those targets must be given a Notice when the Class Exemption group first approaches the targets, although it does not provide a sanction for not doing so. The Committee's position is that it would be preferable that the Notice be provided to identified targets earlier than when the Class Exemption group first approaches targets and should be given to targets when the Class Exemption group lodges the Notice with the ACCC.

The Committee confirms its understanding that the description in the Notice should be broad enough to cover a range of Class Exemption group participants so that a new notice should not be needed when a member drops off or is added.

Although the Class Exemption is proposed to remain in place until 2029, it is the Committee's position that there should be a review in 5 years (2024).

The Committee notes the Guidance Note could be clearer in relation to the application of existing authorisations. Does the group holding the existing authorisation need to lodge a Notice?

The Committee also notes that the Guidance Note says that the ACCC can withdraw the exemption provided but not retrospectively, without providing any reason for this limitation.

The Guidance Note does say that a target can refuse to bargain or bargain on aspects of what the Class Exemption group are looking to negotiate. The Committee is aware that the ACCC has in the past limited what can be part of the collective bargaining regime and notes that targets may therefore wish to limit the scope of the negotiation issues sought by the Class Exemption group. The Committee notes that the Guidance Note confirms that no matter what the Class Exemption group includes in the notice, any collective bargaining process is voluntary, and a target may refuse to participate.

The Committee will be interested as to whether the ACCC will be looking to encourage a target to allow the group seeking to collectively bargain to avail itself of the Class Exemption if the target says initially it will only co-operate if the group seeks authorisation or notification.

Notice

The Committee notes that the Notice is to be a simple one-page document, to be lodged with the ACCC and provided to any identified targets.

The Committee further notes that the description information to be provided in the Notice will generally be broad and will often not specifically name either the businesses availing themselves of the Class Exemption through membership by description of the Class Exemption group, nor the targets.

The signature on the form of the representative contact person for members of the Class Exemption group also does not require that person, either on their own behalf or on behalf of the Class exemption group, to make any attestations.

Consequently, the Notice does not operate for legal purposes other than as a compliance document for notification purposes to identify to ACCC and to target the Class Exemption group availing themselves of the Class Exemption, and thereby not needing to use the existing ACCC 'authorisation' or 'notification' processes to facilitate a collective bargaining exercise.

The Committee makes the following comments in relation to the draft Notice:

Item 1 - The Committee notes the suggestion in the Guidance Note that the description given should be as flexible as possible so as not to require additional changed Notices to be lodged whenever a member of the group leaves, or a new member joins and that the Guidance Note and the Notice instructions suggest that actual names of members of the Class exemption group should only be listed if there is a small member group that will not change.

The Committee observes that as a consequence, although the Notice must be lodged with ACCC and will be publicly available, it is not designed to provide transparency as to the names of businesses that are members of the Class Exemption group.

Item 2 - The Committee notes that similarly to the description of members of the Class Exemption group, the details of targets need not include targets' names and can be by way of a broad flexible description, again so as not to require additional changed Notices to be lodged whenever a target is added or dropped.

Item 3 - The Committee considers that it is essential that the description provided as to the topic to be collectively bargained should give sufficient clarity to enable the targets to understand the purpose and to be able to effectively identify Class Exemption group businesses it may need to deal with.

Item 4 - The Committee notes that the Notice needs only to be signed by the contact person for the Class Exemption group, who may not be a member of the group, and that details of the contact person will not appear on the public version of the Notice.

Further discussion

The Committee would be happy to discuss any aspect of this feedback. Please contact Meghan Warren, Chair of the SME Committee (mwarren@burkelawyers.com.au or 03 9822 8588) in the first instance, if you would like to do so.

Yours sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section