

21 February 2018

David Jones
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131, CANBERRA, ACT, 2601

By email: David.jones@acc.gov.au

Dear Mr Jones

Small business collective bargaining guidelines

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) welcomes the opportunity provide this submission in response to the release of the Australian Competition and Consumer Commission's (**ACCC**) Small business collective bargaining guidelines (**Guidelines**).

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.

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 SME Committee believes that the collective bargaining and collective boycott provisions are important tools for small business in their dealings with those in a more powerful market position.

We note the recent amendments to the *Competition and Consumer Act 2010* (Cth) (**CCA**) provisions in relation to collective activity and make the point that these amendments largely assist the ACCC's administration of the collective bargaining provisions rather than benefiting small business applicants.

Having said that, there are some welcome changes for small business, including the elimination of the need for the lodgement of a fresh Notification where a bargaining group changes its composition.

The Committee makes the following specific comments on the Guidelines:

1. In the SME Committee's view, it has been the practice of those applying to the ACCC for a collective bargaining authorisation to undertake a very limited assessment of the anti-competitive impact of their proposed conduct. Often applicants have simply

assumed an anti-competitive impact exists. However, the ACCC can only grant an authorisation where there is a demonstrable substantially lessening of competition. In our view, the ACCC in its Guidelines should make it clear to applicants that they are required to address the potential anti-competitive effect of their conduct in their application.

2. A related issue is the fact that an exemption from various provisions of the CCA is only needed if there is a clear breach of the CCA. SME Committee members with considerable experience in this area believe that this fact is not well understood by small business. Indeed, often due to the particular circumstances of the proposed agreement it is likely that the proposed collective bargaining conduct or even collective boycott conduct will not have the effect of substantially lessening competition in a market and as such would not constitute a breach of the CCA. In our view, the Guidelines should include more discussion about both this issue and the issue outlined at point (1) above.
3. Based on our experience, small businesses often decide to avoid the notification of boycott conduct because they believe that all parties who may decide to participate in the boycott must be specifically identified in the application and consent in writing to being part of the application. Small businesses often see this as a particularly onerous requirement. The Guidelines are not clear whether this is an actual requirement in relation to proposed collective boycott conduct.
4. The Guidelines are not clear as to whether a trade association which has made a collective boycott application on behalf of its members is permitted to maintain confidentiality over its membership lists.
5. It appears to the SME Committee that in relation to claimed public benefits the ACCC historically accepted economic benefits as being public benefits. However, the Guidelines are unclear as to whether non-economic benefits may be considered public benefits for the purposes of a collective bargaining or collective boycott application. For example, in our view the very act of engaging in collective negotiations can be a public benefit to the extent that it avoids conflict between the parties.
6. The SME Committee notes that the Guidelines suggest that the onus of proof in relation to establishing public benefits falls on the applicant. In our view, that is incorrect as a matter of law. Rather in our view, it is incumbent on the ACCC to establish that there is either insufficient or no public benefit in relation to a particular application.
7. We think the Guidelines would be improved by including information about the Victorian Poultry Growers case in the section which discusses collective boycotts.
8. Furthermore, we think the section on collective boycotts could be improved if it stated that even if a collective boycott application is successful, that does not provide the parties with an immunity from an action for breach of contract, but only as to enforcement or damages actions under the CCA. In this regard, we note that in the past the ACCC has made it clear to applicants that it does not encourage any parties to engage in conduct which may constitute a breach of contract.
9. Finally, in the Guidelines the ACCC states that “increased potential for collective action beyond the notified bargaining” is one reason why the ACCC may refuse to grant the authorisation or notification. We do not agree that this should be included

in the Guidelines as a factor against granting an authorisation or notification as this involves the ACCC speculating as to what may or may not happen in the future. In our view, the ACCC should limit its consideration to the relevant conduct and not to future eventualities. Having said this, future events may form a legitimate basis for the ACCC choosing to exercise its discretion to revoke an authorisation or notification on the basis that there has been a material change in circumstances.

Please contact Meghan Warren, the Chair of the SME Committee, on 0439 467 800 or (03) 9822 8588 in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rebecca Maslen-Stannage', written in a cursive style.

Rebecca Maslen-Stannage
Chair, Business Law Section