



Submission to the ACCC on a Potential Class Exemption for Collective Bargaining

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I INTRODUCTION

The Centre for Law, Markets and Regulation (**CLMR**) is a joint centre between UNSW Law and the UNSW Business School and is Australia's premier research centre for the study of the dynamics of market regulation. The CLMR conducts research on the legal, regulatory and contextual aspects of markets, corporations, finance and business transactions. CLMR members produce high quality research to deepen understanding, influence opinion and support action with real-world impact. The CLMR's work is distinctive in the range of market institutions it studies, and its focus on understanding the nature and effects of regulation. The work is also distinctive because while in a commercial context, the CLMR's research often has social justice aspects.

This submission makes the following key submissions:

- A class exemption for collective bargain should apply to businesses with a gross annual turnover of less than \$5 million where the agreement is effectively standard form. This should include franchisees which meet these constraints.
- Representatives of a group of businesses must not have a conflict of interest.
- An exempt class of franchisees should be permitted to engage in multiparty mediation to resolve disputes under the Franchise Code.
- We submit that the proposed class exemption will address power imbalances between businesses and their counter-parties with minimum risk to competition. Public benefits will outweigh any potential competitive detriments.
- The size of the proposed class will be significantly smaller than the number of small businesses that are currently permitted to engage in collective bargaining by notification to the ACCC

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The views expressed in this submission are those of the individual authors and should not be taken to reflect the views of the UNSW Sydney or all CLMR members. The authors acknowledge with thanks the financial support provided by the CLMR in the preparation of this submission.

II ISSUE AND BACKGROUND

A Class Exemptions

The Australian Competition and Consumer Commission (**ACCC**) has the power to determine class exemptions, which will allow eligible businesses to collectively bargain with various parties.¹ These class exemptions will operate alongside existing authorisation and notification processes. The purpose of class exemptions is to ‘remove the need for individual applications for authorisation by creating “safe harbours” for business and thereby reduce compliance and administration costs and increase certainty’.² Class exemptions raise competition concerns and are not generally appropriate for large businesses. The risk to competition that flows from collective bargaining is high.³

B Small Businesses and Franchises

There are good reasons for a class exemption for small businesses that do not individually or collectively have a level of market power that could adversely affect the competitive process. Small businesses that acquire goods and services, including franchisees, are in a weaker bargaining position in negotiations with larger businesses including franchisors.

Larger businesses and franchisors often have bargaining power in contract negotiations with small businesses or franchisees. They present small businesses with

¹ Competition and Consumer Act 2010 (Cth) pt VII div 3 (‘CCA’); Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth) s 22.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2017, 3788 (Scott Morrison, Treasurer).

³ Australian Competition and Consumer Commission, ‘Potential ACCC “Class Exemption” for Collective Bargaining’ (Discussion Paper, 23 August 2018) 3.

agreements that are either standard form or effectively standard form. Such standard form agreements mean that the only two options available to the small business or franchise are to “take it or leave it”. The terms of such agreements are effectively non-negotiable.⁴ In other words, the outcome of a standard form agreement does not necessarily reflect the will of both contracting parties.⁵ Franchise agreements are an example of this.^{6 7} The power imbalance between franchisors and franchisees is well understood and documented.^{8 9 10} Small businesses and franchisees are not generally entitled to the benefits of the consumer guarantees provided under the Australian Consumer Law.^{11 12 13 14 15}

III RECOMMENDATIONS

A Types of Businesses Covered under This Class Exemption

The authors submit that businesses below a certain size should be eligible for a class exemption for collective bargaining in negotiations with suppliers, acquirers or franchisors. The class exemption should only apply to businesses with a gross annual revenue of less than \$5 million. For this size of business, the \$1,000 cost of the existing notification or authorisation process is significant.

The exemption should only allow collective bargaining where the agreement is effectively standard form. That is, in the case of a “take it or leave it” agreement a collective could strike a reasonable bargain.

This revenue limitation of the proposal means that not all franchisees should be eligible for a class exemption in relation to negotiations with their franchisor. Larger businesses that would fall outside the threshold include fuel and motor vehicle franchises. Franchisees under the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) (**Franchise Code**) would generally be eligible for

⁴ Ibid 5; Rob Nicholls and Jenny Buchan, ‘Failing Firm, Failing Franchisor: Local Market Analysis in Australian Merger Clearance’ (2016) 23 *Competition & Consumer Law Journal* 247, 249.

⁵ Economics and Finance Committee, Parliament of South Australia, *Franchises Final Report* (2008) 17 cited in Jenny Buchan, ‘Consumer Protection for Franchisees of Failed Franchisors: Is There a Need for Statutory Intervention?’ (2009) 9 *Queensland University of Technology Law & Justice Journal* 232, 233.

⁶ Nicholls and Buchan, above n 4.

⁷ Economics and Finance Committee, above n 5, 11.

⁸ Nicholls and Buchan, above n 4.

⁹ Jenny Buchan, ‘Deconstructing the Franchise as a Legal Entity: Practice and Research in International Franchise Law’ (2014) 21 *Journal of Marketing Channels* 143, 151.

¹⁰ Buchan, above n 5, 239, 240.

¹¹ The Australian Consumer Law is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

¹² Jenny Buchan, ‘Franchising: A Honey Pot in a Bear Trap’ (2013) 34 *Adelaide Law Review* 283.

¹³ Buchan, above n 9.

¹⁴ Buchan, above n 12, 301.

¹⁵ Buchan, above n 9, 147.

the class exemption. However, those under the *Competition and Consumer (Industry Codes – Oil) Regulations 2017* (Cth) would, by virtue of their revenue, be ineligible.

We submit that the risk to competitive processes of the class exemption would be low. The indicators of anti-competitive conduct resulting from collective bargaining are when the group of businesses comprise a significant share of the market and are in close competition in a related market.¹⁶ The proposed class is unlikely to meet these indicators and is unlikely to support ‘tacit’ collusion’.¹⁷

The ACCC has recently completed two collective bargaining notifications that were allowed to stand, and which have similar characteristics to the class proposed in this submission. These relate to PaintRight Ltd and Farmers Own.¹⁸

In PaintRight, the ACCC considered that the conduct was likely to result in the following public benefits from improved efficiencies through:

- transaction cost savings (such as negotiation and contracting costs) for the target suppliers and the participating paint stores, compared to a situation where there would be a larger number of separate negotiations;
- providing better input into contracts with target suppliers relative to a situation where there are individual negotiation.

In Farmers Own, the ACCC considered that the conduct was likely to result in the following public benefits from improved efficiencies since:

- the Participants will have the opportunity for greater input into raw milk supply contracts relative to a situation where there are individual negotiations.
- Sharing transaction costs (such as negotiation and contracting costs) will improve the Participants’ ability to obtain professional advice in relation to their contracts.

We submit that the public benefits of the class exemption will be similar.

The larger businesses with stronger bargaining power are not obliged to engage in collective bargaining. The class exemption simply functions as a “safe harbour” so businesses can engage in collective bargaining without breaching competition law.¹⁹

¹⁶ Stephen P King, ‘Collective Bargaining by Business: Economic and Legal Implications’ (2013) 36 *University of New South Wales Law Journal* 107, 124.

¹⁷ Ibid.

¹⁸ ACCC Collective Bargaining Notification Register at <<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/collective-bargaining-notifications-register>> accessed 21 September 2018.

¹⁹ CCA s 95AA; Australian Competition and Consumer Commission, above n 3, 3–4.

Within the class, the size or membership of the bargaining group should not be limited, as this would inhibit ‘the ability of the group to adopt pro-competitive bargaining strategies, such as sponsoring new entry [eg: a new supplier] to compete’.²⁰

Collective bargaining would increase available information to allow involved parties to design more nuanced and mutually beneficial contracts tailored to their specific needs.²¹ Parties would thus be able to ‘negotiate past inefficient take-it-or-leave-it contracts’.²² Collective bargaining through a class exemption may also lead to benefits for consumers.²³ In respect of franchisees, the homogeneity of the group means that the benefits of collective bargaining are more likely to follow.²⁴

B Representation

Representatives of a group of businesses must not have a conflict of interest. For example, a representative must not be an employee of a competitor of the contracting party.

C Dispute resolution for franchisees

An exempt class of franchisees should be permitted to engage in multiparty mediation to resolve disputes under the Franchise Code. The ACCC has experienced the difficulties of not having multiparty alternative dispute resolution in the negotiate/arbitrate model.²⁵ This experience provides evidence to support the view in this submission.

D Collective Boycotts

Any class exemption for businesses, including franchises, should not include automatic exemption from competition law for collective boycotts. The risk to the competitive process that flows from collective boycotts is too great to be covered under a class exemption. The authors agree with the ACCC’s decision not to consider a class exemption for this conduct.

²⁰ King, above n 16, 137.

²¹ Ibid 136.

²² Ibid 119.

²³ Ibid 136–7.

²⁴ Ibid 131–3.

²⁵ The Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* (Cth) notes that “it is clear that the ‘negotiate-arbitrate’ model is not producing effective outcomes for industry or consumers” at page 4.