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**PUBLIC
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**Response to ACCC
Discussion Paper
for Potential ACCC
“Class Exemption”
for Collective
Bargaining**

21 SEPTEMBER 2018

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the Discussion Paper on a potential ACCC 'class exemption' for collective bargaining.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The IPA-Deakin SME Research Centre submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA-Deakin SME Research Centre Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou at vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours sincerely



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21 September 2018

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Collective Bargaining Class Exemption – Submission

The ability to collectively bargain is of great benefit to the small business community.

“By negotiating as a collective, small business may be able to negotiate with bargaining power equal to a larger firm, and achieve a more efficient and pro-competitive outcome.” [Explanatory Memorandum to *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, para 9.11]

The Harper amendments which improved the notification procedure for collective bargaining were welcomed by the small business community.

The IPA-Deakin SME Research Centre welcomes the opportunity to comment on a potential ACCC ‘class exemption’ for collective bargaining. According to the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill*, \$450,000 worth of regulatory burden costs are anticipated to be saved annually by business as the result of a class exemption power being available¹.

The proposed class exemption

“The Harper Review recommended granting the Commission the power to issue a ‘class exemption’ for business practices (types or kinds of conduct) that are unlikely to generate competition concerns, or are likely to generate a net public benefit. Such exemptions would remove the need to make individual applications by creating ‘safe harbours’ for business and thereby reduce compliance and administration costs and increase certainty.” [Explanatory Memorandum to *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, para 9.9]

The concept of a class exemption has been commonplace in Europe and the United Kingdom (where it is known as a ‘block exemption’) for many years. Other jurisdictions that follow the European model (such as Singapore, Malaysia and Hong Kong) have also adopted the concept.

From a policy perspective, the key benefit of the proposed class exemption is the removal of legal uncertainty for those small businesses wishing to engage in collective bargaining. To ensure that competition concerns are unlikely to arise, a class exemption should:

¹ Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, Table 15.1

- (a) only apply to that group of small businesses who, together, are incapable of distorting the relevant market;
- (b) impose conditions to ensure that the hard-core cartel provisions are not infringed in the process of the collective bargaining;
- (c) impose conditions to ensure that agreements between the parties do not go beyond what is necessary to achieve the required outcome;
- (d) recognise the potential application of section 45(1)(c) (the new concerted practices provision).

These issues are addressed below.

Discussion Paper Question 1: What types of businesses should be covered under this class exemption?

The scope of the class exemption will be critical to ensuring that competition concerns are unlikely to arise. The ACCC is proposing that the class exemption only apply to businesses below a certain size. A definition of 'small business' is likely to be required.

Businesses eligible to benefit from the proposed class exemption

As the ACCC is aware, there are already a large number of definitions of 'small business' used throughout the *Competition and Consumer Act* (CCA) and in other federal and state legislation. For example:

- the Australian Bureau of Statistics (ABS) classifies a small business as one with between **5-19 employees**;
- the Australian Tax Office classifies a small business as one with less than **\$10million in revenue**;
- the *Australian Small Business and Family Enterprise Ombudsman Act 2015* considers a business to be 'small' if it has fewer than **100 employees** and a **revenue** of up to **\$5million**;
- the CCA defines a small business contract as one that is for the supply of goods or services (or a sale of an interest in land), at least one party has fewer than **20 employees** and either the **upfront price payable under the contract** does not exceed **\$300,000 or \$1million** (if the contract is for more than 12 months).

Of most relevance is the provision in the CCA that only allows a small business to *notify* a collective bargaining agreement if the price for the supply or acquisition of the goods or services under the contract (or sum of the prices where there is more than one contract) does not exceed **\$3,000,000** in any 12 month period². Importantly, the regulations may prescribe different amounts for different industries³.

In this context, the IPA-Deakin SME Research Centre supports a definition that contains three criteria, where two of the three need to be satisfied. Research undertaken by Deakin University shows that the inclusion of several criteria to support definitional correspondence leads to more reliable outcomes.

To remain as consistent as possible with existing criteria, we suggest a definition where two of the following three criteria need to be satisfied:

² Section 93AB(4) CCA

³ Petrol retailing - \$15million, New motor vehicle retailing - \$20 million, Farm machinery retailing - \$10million, Primary production - \$5million

- i. less than 20 employees, based on the ABS definition;
- ii. up to \$10 million revenue, based on the ASBFEO definition;
- iii. value of the contract does not exceed \$3,000,000 in any 12 month period, to be consistent with the current collective bargaining notification provision. As is the case with the collective bargaining notification thresholds, different contract thresholds are likely to be required for different industries.

In relation to the value of the contracts in question, the Discussion Paper states that the ACCC has only denied two authorisations and revoked two notifications in the period 1 January 2007 to 31 December 2017⁴. An analysis of the value of the collective bargaining contracts already authorised by the ACCC could be undertaken to determine the appropriate threshold. (This exercise may already have been completed to determine the \$3 million threshold set for collective bargaining notifications under section 93AB(4).) This analysis would need to be done by sector/industry to determine appropriate thresholds and appropriate mean/median levels.

The downside of this approach is that it creates yet another definition of small business which increases the burden of regulatory compliance. That said, small businesses seeking the protection of the class exemption are likely to need some assistance in order to satisfy themselves that they meet all the (other) criteria and do not breach any conditions, a point that is revisited below.

Businesses ineligible to benefit from the class exemption based on the criteria

The IPA-Deakin SME Research Centre is not supportive of allowing businesses that do not satisfy the criteria to benefit from the class exemption, even where the target is supportive. The competition policy behind the granting of the class exemption to small businesses is that such a collective bargain is unlikely to distort competition in the relevant market. If larger businesses are allowed to benefit from the class exemption, the ACCC will not have an opportunity to assess whether the conduct would have the effect (or likely effect) of substantially lessening competition (as required by section 95AA(1) CCA).

Size of the target businesses

The IPA-Deakin SME Research Centre does not consider it necessary to impose a minimum size on the target business under the class exemption. Such a restriction could limit the potential target businesses unnecessarily. There may still be benefits for a target to collectively bargain, even where the 'collective' has more bargaining power than the target. If there are no benefits, the target is not compelled to collectively bargain.

⁴ ACCC, *Potential ACCC "class exemption" for collective bargaining – discussion paper*, 23 August 2018, footnote 1

Discussion Paper Question 2: Other issues

- a. Should the class exemption only be available to collective bargaining groups below a certain size? For example, should it specify a limit on the number of businesses in any group, or their combined market share?

Before granting a class exemption, the ACCC must be satisfied that the conduct would not have the effect or likely effect of substantially lessening competition or that it would result in such a benefit to the public that would outweigh any detriment (section 95AA(1) CCA).

Without a limit on the collective group, there is a significant risk that a distortion of competition could occur. A cap on the number of businesses is unlikely to prevent a distortion. Assuming the number is set at 10, the effect on the market of 10 micro businesses collectively bargaining is unlikely to impact competition. However, the effect may be substantially different if there are 5 small businesses and 5 medium sized businesses.

Although the IPA-Deakin SME Research Centre recognises the difficulties associated with defining the relevant market and determining market shares, this is likely to be the only mechanism that can truly measure the impact of the collective bargaining agreement on the market.

The imposition of a market share 'cap' is commonplace in European Commission block exemptions:

- The *Vertical Agreements Block Exemption*⁵ applies to vertical agreements where the combined market share of the parties to the agreement does not exceed **30%** (subject to the other conditions being satisfied).
- The *Research and Development Block Exemption*⁶ applies to agreements between non-competitors without a market share threshold. However, it applies a **25%** market share threshold where the parties to the agreement are competitors (subject to the other conditions being satisfied).
- Likewise, the *Technology Transfer Block Exemption*⁷ applies a 20% market share threshold where the parties to the agreement are competitors. Where the parties to the agreement are non-competitors, the combined market share threshold is **30%** (subject to the other conditions being satisfied).
- The *Specialisation Agreements Block Exemption*⁸ applies a combined market share threshold of **20%** (subject to the other conditions being satisfied).
- The *Consortia Liner Shipping Block Exemption*⁹ applies a combined market share threshold of **30%** (subject to the other conditions being satisfied).

Market shares are calculated on the basis of market sales value or, if that data are unavailable, then estimates based on other reliable market information can be used to establish the market share of the parties.

⁵ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

⁶ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements

⁷ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements

⁸ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements

⁹ Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

In addition, the European Commission has issued a *De Minimis Notice*¹⁰ which states that agreements between competitors are unlikely to appreciably restrict competition where the combined market shares of the parties is less than **10%** and the cumulative effect of a network of parallel agreements is less than **30%**. The potential cumulative effect point is discussed further below.

The UK has implemented a *Public Transport Ticketing Scheme Block Exemption*¹¹ which does not contain a market share threshold. The market share threshold is not as relevant in this case as the objective of the exemption is to facilitate as many bus companies as possible to accept one another's tickets for the ease of consumer travel. The Exemption contains a number of conditions designed to protect the competitive market, including a prohibition on agreeing bus fares and dividing up bus routes.

Many non-European jurisdictions also have the ability to grant block exemptions. Singapore, Malaysia and Hong Kong have this power and have used it to grant exemptions in the shipping liner industry. In the case of Singapore¹² and Hong Kong¹³, market share thresholds of 50% and 40% respectively have been set. Where those thresholds are exceeded, parties can apply to the Commission. Malaysia did not impose a market share threshold but do have an extensive list of conditions.

Although block exemptions do not exist in the US, the *Antitrust Guidelines for Collaborations Among Competitors* issued by the Federal Trade Commission and the US Department of Justice create a 'safety zone' for any collaboration between competitors when the combined market shares of the participants and the collaboration itself do not exceed 20%¹⁴.

The IPA-Deakin SME Research Centre is of the view that the ACCC needs to give consideration to imposition of a market share cap. A review of 'authorised' collective bargaining may be instructive to the extent that market shares were considered. (We note the recent authorisation of the Independent Cinema Association collective bargain where the market share of the members was 29%). Based on overseas jurisdictions, a market share of around 30% may be appropriate.

A market share cap may present issues in terms of non-discrimination. Once a market share cap is reached, members of the collective bargaining group will be reluctant to allow additional parties to join the group as that would result in the market share limit being exceeded. This could be addressed by allowing a 5% market share 'buffer'. Assuming a market share cap of 30% is set, the class exemption could stipulate that the market share limit is not exceeded if

¹⁰ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)

¹¹ Available at http://www.legislation.gov.uk/ukxi/2001/319/pdfs/ukxi_20010319_en.pdf, accessed 19 September 2018. See also the CMA guidance available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553470/cma53-public-transport-ticketing-schemes-block-exemption-guidance.pdf, accessed 19 September 2018

¹² *Competition (Block Exemption for Liner Shipping Agreements) Order 2006*, available at <https://sso.agc.gov.sg/SL/CA2004-OR1>, accessed 19 September 2018 and *Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2015*, available at <https://sso.agc.gov.sg/SL-Supp/S718-2015/Published/20151125?DocDate=20151125>, accessed 19 September 2018

¹³ *Competition (Block Exemption for Vessel Sharing Agreements) Order 2017*, available at https://www.compcmm.hk/en/enforcement/registers/block_exemption/files/Block_Exemption_Order_and_Guidance_Note_final.pdf, accessed 19 September 2018

¹⁴ Paragraph 4.2. Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdoiguidelines-2.pdf, accessed 21 September 2018

the parties combined market shares do not exceed 35% for two consecutive years¹⁵. If it does, the parties would need to seek authorisation or notification.

b. Should the class exemption apply only where there is not common representation across collective bargaining groups?

The risk with common representation across collective bargaining groups is that a network of parallel agreements will be created, which could affect a much larger proportion of the relevant market.

The *Vertical Agreements Block Exemption* granted by the European Commission does not apply where there is a network of parallel agreements that cover more than 50% of the market, even where the market shares affected by each agreement are below 30%. The concern is the cumulative effect of these agreements on the market. The same condition is imposed in the *Technology Transfer Block Exemption*.

If the ACCC decides to impose a market share cap in the class exemption, the IPA-Deakin SME Research Centre would be supportive of a cumulative effect cap also being imposed.

c. Should the class exemption allow the bargaining group to negotiate with both customers they sell to (joint supply) and with suppliers they buy from (joint procurement)?

The IPA-Deakin SME Research Centre would be concerned with a bargaining group being able to collectively negotiate with both suppliers and customers. If the same group are negotiating both with suppliers and customers, the result will be substantially increased transparency on both sides of the market. Particularly where the market is for heterogeneous products, this increased transparency could lead to a higher risk of cartel conduct.

d. Should the class exemption exclude sharing of information or arrangements between members of the group that are not necessary to collectively bargain with a target?

Yes. It will be very important that the conditions imposed in the class exemption ensure that the information exchanged and the matters discussed and agreed do not go beyond what is reasonably necessary to achieve the legitimate objective of the collective bargain. The UK *Public Transport Ticketing Scheme* provides good examples of the types of conditions that could be considered.

In this context, the ACCC may wish to consider:

- A condition that any party may join the collective bargaining group, although this would have to be carefully considered, especially if a market share threshold is to be imposed;
- A condition that the parties be free to decide the price of their goods and services and to whom they sell;
- A condition that requires members of the collective bargaining group to make (or not be prohibited from making) independent decisions about their business;

¹⁵ See for example, Article 7 of the Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements

- A condition that prevents the exchange of commercially sensitive information, other than that which is indispensable to the collective bargain.

e. [Should other obligations apply?](#)

The Discussion Paper suggests other options such as keeping written records of the composition of the group, notifying the ACCC when the group is formed or notifying the target when the group is formed.

Given this is the first class exemption proposed by the ACCC, the IPA-Deakin SME Research Centre believes there would be substantial benefit in monitoring the number of businesses relying on the proposed exemption. Information that would be beneficial to collect might include:

- Number of businesses in each collective bargaining group;
- Estimated total market shares;
- Duration of the agreement affected by the collective bargain;
- Value of the agreement/s affected by the collective bargain;
- Industry(ies) affected by the collective bargain;
- Dates of the collective bargain.

This sort of data would be invaluable in any subsequent review of the proposed class exemption.

The IPA-Deakin SME Research Centre would also be supportive of the proposed class exemption only be valid for an initial period of 5 years. This will be especially important if no market share cap is to be imposed. This would force an early review of its effectiveness and any potential harm to competition arising from the collective bargaining agreements.

f. [What would be the effect of a collective bargaining class exemption on businesses which fall outside it?](#)

There is a risk that businesses that fall outside the class exemption (and therefore potentially miss out on the opportunity to collectively bargain) will not be able to negotiate with the same 'power' as those within the group. That said, the presumption must be that those businesses are large enough to negotiate in their own right. If they are not, then perhaps the definition of 'small business' will need adjusting. Data collected under (e) above would be beneficial to any subsequent review.

g. [What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?](#)

The IPA-Deakin SME Research Centre assumes that, in asking this question, the ACCC is concerned that a small business that currently benefits from the class exemption because it meets the criteria, may be discouraged from growing as a business if that would result in the business no longer benefiting from the class exemption.

Deakin University has undertaken research on the reasons why small businesses do and do not seek to grow¹⁶. The decisions are multi-faceted and it seems unlikely to us that the application (or not) of a class exemption would be determinative.

¹⁶ Further information can be provided, but it is not directly relevant to this discussion.

Discussion Paper Question 3: Should a class exemption allow collective bargaining by all franchisees with their franchisor, regardless of their size or other factors?

The IPA-Deakin SME Research Centre does not see any reason why franchisees should not be permitted to collectively negotiate with their franchisor on the same basis as other small businesses.

The option of ‘widening’ the exemption to apply to all franchisees, regardless of size, could result in a restriction of intra-brand competition, e.g. competition between all the McDonald’s franchisees. It may be less likely to affect inter-brand competition e.g. competition between McDonald’s franchisees and Hungry Jacks’ franchisees.

Other issues to consider

Self assessment

Although the objective of the class exemption is to simplify (or even remove) the administrative burden for small businesses in notifying or seeking authorisation of collective bargaining conduct, it is unlikely that small business will be able to navigate the class exemption without some legal assistance. In the UK and Europe, the block exemptions create legal certainty for those businesses who benefit from them, but the complexity of the exemptions mean that legal advice is commonly required before this legal certainty can be obtained.

While we accept that the ACCC intends to draft a class exemption that is simple and clear, it will be a legislative instrument that will inevitably use legal language. This in itself will be a potential barrier for small business, who are likely to need some assistance. The IPA-Deakin SME Research Centre therefore expresses some initial doubts about the ability of small businesses to “confidently self-assess whether they and the arrangements they propose are covered”¹⁷.

Given the introduction of the new prohibition against concerted practices, small businesses may be especially reluctant to rely on a class exemption without legal advice confirming it is applicable.

Concerted practices

The relationship between the new concerted practices prohibition and this proposed class exemption needs to be considered. Small business may be reluctant to enter into a collective bargain (or even start to discuss the possibility) if it is concerned about breaching the concerted practices prohibition.

Information shared to negotiate a collective bargaining agreement could potentially lead to a concerted practice. This is recognised by the ACCC in footnote 2 of the *Collective bargaining guidelines* (page 2). Presumably, the class exemption will make clear that section 45(1)(c) is inapplicable to the collective bargain, if the conditions of the class exemption are met. However, it is not clear what the position will be during the negotiation stage or where a proposed collective bargain is abandoned for commercial reasons (but after information has been exchanged).

¹⁷ Discussion Paper, page 5

In the process of determining whether any class exemption is applicable, a certain amount of information about pricing, customers and/or suppliers and the terms and conditions of doing business may be shared amongst the small businesses. This information may also be discussed with the target business (as suggested in the *Collective bargaining guidelines* (p 11)). Information once known is not able to be 'un-known'.

In *theory*, this risk could be avoided by an independent party (such as a trade or industry association or other representative), discussing the potential for a collective bargain with each of the proposed members and the potential target/s, individually. The representative could also assist in determining if the class exemption is applicable. In this way, the individual members do not receive or share any sensitive information with other members until after the exemption is confirmed.

Although this presents a theoretical solution, it is likely to deter cooperation in practice. The representative will have the unenviable responsibility of ensuring that commercially sensitive information is not shared. It also excludes the very people designed to benefit from the collective bargain. The best result will be achieved if these people are part of the design of the collective bargain.

Role of trade associations

In the context of collective bargaining, small businesses are likely to need a champion or representative to facilitate negotiation of collective bargaining agreements and assist with the application of the class exemption. Industry and trade associations are obvious candidates to fill that role. However, given the introduction of the prohibition against concerted practices, this facilitation role will not be without risk. Clear guidance will be needed for trade and industry associations to allow them to navigate this terrain.

Legal certainty

The Discussion Paper does not indicate which provisions of Part IV would be exempted under the class exemption. A debate on this issue should be considered.