Collective Bargaining Class Exemption Submission

My relevant experience has been mainly in the agricultural sector, in particular, but not exclusively, in the chicken meat and dairying sectors. A number of authorisations for collective bargaining have been granted in these sectors and the comments in this submission are made mainly from two perspectives:

1. Firstly, the possibility that class exemptions may be granted which will cover any gaps in these sectors, and eventually replace authorisations, relieving supplier organisations of the necessity to renew authorisations or utilise the notification procedure.
2. Secondly, the possible application of class exemptions to other industry sectors which have structural similarities in terms of suppliers who supply a large processor company and have geographical or other limitations restricting their ability to shift to another processor and their negotiating ability.

Types of Business

It is not clear from the discussion paper whether it is intended that the size criteria will of themselves be determinative of the class, so that any groups of businesses falling within the criteria may engage in collective bargaining with a target, or whether it is intended to grant class exemptions applicable to specific industry sectors, but available only to businesses within that sector which fall under the size limitations.

A common feature of some of these agricultural sectors is an imbalance of bargaining power between individual suppliers and large processing companies, who as an operational reality do not in any real sense negotiate contract terms, but simply present standard contract terms. The ACCC appears to have recognised the structural issues and the lack of likely impact on competition, in granting a number of authorisations in the chicken meat and dairying industries, and with respect to the latter industry, has more specifically recognised the issues in its recent report and recommendation that a mandatory code of conduct should apply to the industry.

So far as I am aware, none of the authorisations which have been granted limit participation by criteria such as the number of employees, turnover or value of the participants' contracts.

It is submitted that there is no logic in applying such limitations. In many of these sectors, there is a cross-section of suppliers, and some have quite large operations, for example, in both the chicken meat and dairying industries. The cohesive unity of supplier groups in particular regions has been central to the effectiveness of collective bargaining where it has occurred, and it is submitted that effectiveness would be greatly reduced if a number of the bigger suppliers were excluded, leaving only the smaller and more vulnerable suppliers able to deal collectively.

It is my view that in these sectors, it is a case of "one in, all in" if there is to be any meaningful collective bargaining. In my experience, there is nothing to suggest that inclusion of larger suppliers creates an anti-competitive imbalance of bargaining power in favour of suppliers. The examples of possible size limitations mentioned in the discussion paper appear to have their inspiration in the limitations incorporated in the Small Business Unfair Contracts legislation which in my view were misconceived, for example, the implications seem to be that unfair contracts are in order if the subject business employs twenty-one people. In addition, the upfront price criterion has proved unworkable in the case of many supplier contracts where payment depends on the actual volume of supply that is subsequently experienced and cannot be determined in advance. In the present case, the size criteria will create the same arbitrary cut off points, where there appears to be no logic in the exclusion of a business which may be above the arbitrary level. If a turnover or contract value test is adopted, there will be the same difficulties of determining amounts which are entirely governed by the volumes of supply subsequently experienced.

There may be a case for size criteria to apply to eligibility of participants in some business sectors which are not dominated by a small number of processor companies, eg. some franchisors may be relatively small business seeking traction in the marketplace.

It is therefore my contention that types of businesses to be covered by class exemptions may vary from business sector to business sector and that any threshold criteria for participants based on size would be unworkable in some cases. What would possibly be more relevant would be minimum size criteria applying to the target of the collective bargaining.

The basic difficulty with size criteria applied to participants in the collective bargaining group is that it runs counter to the whole notion of collective bargaining which depends on cohesive collective unity being presented.

Other Issues

For the same reasons as mentioned above, I do not think that class exemptions should only be available to collective bargaining groups below a certain size, whether in numbers or combined market share. This would be mechanically and arbitrarily restrictive in many situations. If, as has occurred, a company in the agricultural sector sought to roll out its standard supply contract across Australia, there would be efficiency and transaction cost gains in representatives of suppliers, on a national basis, negotiating the contract terms and conditions with the company, although this would effectively involve nearly all of the company's suppliers Australia wide, it would not in my experience have any anti-competitive impact. Whether it happens or not depends on the company's willingness to engage on this basis.

I do not think that common representation across collective bargaining groups negotiating with the same target is an issue at all. A perception that common representation across collective bargaining groups is anti-competitive and should not be sanctioned seems to have featured historically in authorisations which have been granted. Certainly, in the agricultural sector in the modern age of communication, it is a fantasy to imagine that suppliers do not know the deals which have been struck with other suppliers elsewhere. In most business sectors, suppliers are members of industry associations, the very point of the existence of which is to provide market intelligence, pricing and other information. The greater access to such information which large processor companies enjoy seems to have been perceived as a matter which authorisations help address. The notion of compartmentalisation of supplier groups negotiating with the same processor in my view does not match reality. I do not think it matters who does the actual negotiation. Suppliers often require representation by persons with some negotiation skills.

With respect to the related issue raised in the discussion paper, whether members of a group should share information or arrangements that are not necessary to collectively bargain with a target, I do not see how any realistic or practical distinction can be made, or why it should be an issue. Obviously, extensive exchange of information happens in supplier industry organisations. Permitted collective bargaining necessarily involves sharing of information relevant to prices and contract terms and conditions, which one would think would be the only competition sensitive information. Most industry associations provide forums for exchange of a range of information, designed to assist members and raise standards.

I would support class exemptions allowing bargaining groups to negotiate with common suppliers to them. It is a sensible and frequently mutually successful arrangement for members of a group to negotiate a supply arrangement with respect to common consumables. I am aware of an example where supplier companies compete and are anxious to secure an arrangement to supply members of an industry group at negotiated prices which are favourable to members, compared with what can be achieved individually.

Clauses 2(f) and 2(g) only emphasise the issues referred to above, of the unsatisfactory results of excluding some suppliers from participating in the collective bargaining group, which in my view is inconsistent with the whole purpose of collective bargaining.

I have made reference to the variety of situations which may apply with respect to franchisor/franchisee situations. As suggested above, the size of the target in the context of franchise arrangements may be more relevant than the size of the franchisees. For instance, there would not seem to be many problems in franchisees of McDonalds or other fast food giant collectively negotiating with their franchisor.

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