



OUT18/13015

The Proper Officer
Australian Competition & Consumer Commission
By email: adjudication@accc.gov.au

Dear Sir or Madam,

POTENTIAL 'CLASS EXEMPTION' FOR COLLECTIVE BARGAINING – DISCUSSION PAPER

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business in government, and makes it easier to do business through policy harmonisation and regulatory reform.

The ACCC's discussion paper arrives at a time of acute focus across all levels of government, business, and the community on the need for more effective regulation of the franchising sector. The OSBC therefore welcomes its publication as both considered and timely.

We are pleased to provide the following comments and recommendations for the ACCC's consideration. Our submission addresses general considerations relating to the business and regulatory environment in which the ACCC has proposed the class exemption, the overarching merit of the proposal, and the specific questions posed in the discussion paper.

Summary of Recommendations

Recommendation 1: The ACCC should implement a class exemption under Section 95AA of the *Competition and Consumer Act 2010* (Cth) to support collective bargaining by small businesses.

Recommendation 2: The class exemption should be available to small businesses. The exemption should define 'small business' as a business employing less than 20 people, or with aggregated annual turnover of less than \$10 million.

Recommendation 3: The class exemption should not limit the size of a collective bargaining group, either in and of itself or relative to a target.

Recommendation 4: The class exemption should provide that a collective bargaining group may not bargain with an individual small business.

Recommendation 5: The class exemption should not limit multiple collective bargaining groups from engaging a common representative.

Recommendation 6: The class exemption should allow a collective bargaining group to negotiate for joint procurement and joint supply.

Recommendation 7: The class exemption should prohibit a collective bargaining group from sharing information that is not necessary to collectively bargain.

Recommendation 8: The class exemption should require a collective bargaining group to keep written records of its composition, and to notify the ACCC when the group is formed.

Recommendation 9: The class exemption should allow groups of franchisees to bargain collectively with a common franchisor, or a subsidiary of a common franchisor, irrespective of the size of businesses within the group. This exception should extend to collective alternative dispute resolution.

Bargaining power of small businesses

The relative bargaining power held by contracting parties strongly influences the course of all business relationships. A business' relative size, resources, and market influence are key determinants of the power it possesses in any such relationship.¹ That is, larger businesses typically possess the power to impose their will on small businesses with which they contract – including through the imposition of unfair and exploitative terms,² and abusive behaviour around contractual interpretation and enforcement.³

Such inequity is recognised by businesses across markets,⁴ and may be observed across the Australian industry landscape. To evoke a prominent example, it is widely identified in the food and grocery industry.⁵ There, a small number of very large supermarket businesses⁶ exercise significant power over a fractured supply chain consisting in large part of small businesses.⁷ A power imbalance in the relationship between large shopping centres and their small retail tenants is also broadly acknowledged.⁸ Both sectors have been subjected to numerous inquiries addressing purported abuse of power by larger businesses over the last decade.⁹

However, inequality of bargaining power is particularly prominent within franchising – an 'industry within industries' comprising around 3.5% of all Australian businesses.¹⁰ Franchisees are nearly invariably small businesses.¹¹ Indeed a franchisee's inherent value to its franchisor is largely its accessible and personable qualities as a small business.¹² In turn, most franchisors are large businesses.¹³ The franchise agreement is a franchisee's foundational and guiding document, and its most important business relationship is invariably with its franchisor.

But most franchisees are relationally disadvantaged in multiple respects.¹⁴ A franchisee commonly possesses inferior business experience, education, and/or sophistication, as well as inferior resources, to that of its franchisor.¹⁵

The bargaining power of franchisees is further weakened by the peculiar nature of the franchising business model. Franchisees and franchisors seek both mutual¹⁶ and separate profitability.¹⁷ This '*natural tension between cooperation and conflict*'¹⁸ gives rise to numerous conflicts of interest.¹⁹ Given the franchisor's superior bargaining power, these conflicts are invariably managed and resolved in its favour.²⁰ Indeed abuse of franchisor power has been the focus of particular concern in recent years – a focus of at least six Parliamentary inquiries.²¹

Utility of collective bargaining

There is considerable evidence suggesting collective bargaining is a potentially effective tool for small business to "*level the playing field*"²² in its engagements with larger businesses.

One quantitative study analysed franchise agreements across 154 US franchise networks trading in the hospitality, automotive service, and home maintenance industries.²³ The study identified a correlation between franchisee networks employing collective bargaining and positive outcomes for franchisees. Those outcomes were longer franchise agreements (21% longer on average); fewer terminations and non-renewals of an agreement by the franchisor (one per year per network on average); and shorter non-compete terms for exiting franchisees (29% on average).²⁴ The ACCC itself has also concluded that collective bargaining lowers the costs of negotiation for small businesses engaging with larger businesses.²⁵

A qualitative study of German franchise networks, relying on interviews with senior representatives of three franchisors and contractual analysis,²⁶ also determined that collective bargaining likely facilitated more positive outcomes for franchisees, and a more equitable franchise relationship overall.²⁷ The latter suggestion was also made in a similar study of a Brazilian franchise network.²⁸

Moreover, while the franchising model places franchisees at a particular disadvantage in their dealings with franchisors, it is also likely to increase the utility of collective bargaining as a means of addressing this imbalance. Franchisors are able to offer standard form franchise agreements to franchisees on a 'take it or leave it' basis.²⁹ Given the uniformity of the contract at the heart of the franchisee-franchisor relationship, many franchisee grievances are likely to be shared across a franchising network. It is also common practice for franchisors to prescribe geographic areas to individual franchisees as exclusive markets.³⁰ Franchisees within a single network are therefore less likely to be in direct competition for a particular clientele than comparable small businesses trading independently. Finally, the control exercised by the franchisor over the franchisee may cause the franchisee to act in the manner of an employee of the franchisor, rather than its independent contractor.³¹ Collective bargaining rights are an established and appropriate means of regulating such relationships.³²

Current collective bargaining provisions

The *Competition and Consumer Act 2010* (Cth) currently allows for businesses to attain an exemption from general prohibitions on 'cartel provisions' and related conduct for the purpose of collective bargaining.³³ Businesses acquire an exemption

by lodging an application – either a ‘notification’ or ‘authorisation’ – to the ACCC. The application is assessed according to prescribed criteria.³⁴

However, the data suggest that businesses make scant use of these provisions. Over the last three years for which figures are available, the ACCC issued an average of 13 authorisations for collective bargaining, and just three collective bargaining notifications, per annum.³⁵

Particularly concerning is that, despite the typically inferior bargaining power held by small business in dealing with larger businesses, small businesses “*continually fail*” to take advantage of the collective bargaining scheme.³⁶ While franchisees are placed in a particularly disadvantageous position when bargaining with franchisors, this cohort appears least likely to access collective bargaining provisions. The ACCC’s collective bargaining notifications register appears to indicate that no such applications have been lodged by franchisees in the last five years.³⁷

The disinclination of small business to access current collective bargaining provisions may be principally attributable to two factors. First, obtaining regulatory consent to collectively bargain is complex. Small businesses are particularly burdened by both the task of completing government forms, and understanding regulatory obligations.³⁸ However, both the notification and authorisation forms are not ‘forms’ in the conventional sense, but guidelines detailing a wide array of information a business must submit to the ACCC. Both forms also require considerable engagement with highly legalistic and labyrinthine legislation.³⁹ Though provisions of the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) intended to make the notification process easier and more flexible for small business,⁴⁰ it the OSBC’s view that these reforms did not substantially alter this process.

In addition, as small businesses are often cash-poor,⁴¹ the considerable application fee of \$1,000 for the notification form and \$7,500 for an authorisation form⁴² is likely to represent a barrier.

Utility of the proposed class exemption

Given the clear power imbalance in most relationships between small business and larger businesses, the evidence supporting the utility of collective bargaining rights for small businesses, and the disinclination or incapacity of small businesses to engage with current provisions, the OSBC strongly supports the introduction of a class exemption.

We are confident a class exemption will deliver increased collective bargaining, and improved outcomes, for the small business community. Indeed, the simplification of regulatory processes to improve the small business experience of engaging with government is entirely consistent with the OSBC’s own ‘*Easy to do Business*’ philosophy and programs.

Recommendation 1: The ACCC should implement a class exemption under Section 95AA of the *Competition and Consumer Act 2010* (Cth) to support collective bargaining by small businesses.

What types of businesses should be covered under this class exemption?

It follows from our analysis of the business environment, current regulations, and the utility of collective bargaining that the OSBC supports the implementation of a collective bargaining exemption for small businesses specifically.

Given the limited bargaining power of small business in engaging with larger businesses, and the inherently limited market power of small businesses, limiting the exemption to this cohort would also support the imperative that the exemption does not substantially lessen competition, and results in a net public benefit.⁴³

The OSBC acknowledges that the term 'small business' attracts a multitude of definitions in Australian regulations and public discussion. However, in our experience, two definitions are referred to and relied upon much more commonly than any others. First is the Australian Bureau of Statistics' longstanding definition of a small business as a business (other than an agriculture business) that employs less than 20 people.⁴⁴ Second is the Australian Taxation Office's definition of small business as an entity with aggregated annual turnover of less than \$10 million.⁴⁵

In addition to their familiarity, these definitions are also very simple. Accordingly, small businesses are likely to know whether they meet them without having to engage in analysis or research.

We do not propose that one of these definitions is inherently more appropriate than the other. Most small businesses are likely to meet both definitions. But, given the widespread acceptance of both measures, it would be patently inequitable if an operation satisfying one but not the other were excluded from accessing the class exemption. The class exemption should therefore be accessible to small businesses that meet either definition.

This dual definition would also mitigate the risk that the class benefit would distort the growth of businesses relying upon it (see '*What would be the effect of a collective bargaining class exemption on businesses which fall outside it?*').

<p>Recommendation 2: The class exemption should be available to small businesses. The exemption should define 'small business' as a business employing less than 20 people, or with aggregated annual turnover of less than \$10 million.</p>
--

Should the class exemption be limited only to collective bargaining with target businesses that are above a certain size? ...

Should the class exemption only be available to collective bargaining groups below a certain size? ...

The OSBC does not support the discussion paper's suggestion that the class exemption might be limited with reference to the size of the collective bargaining group ('the group') or by the group's size relative to a target.⁴⁶

It is unclear why a negotiation in which a group of small businesses was large – or larger on aggregate than the target - would be inherently less equitable than the alternative. That is, a group may possess superior bargaining power than the target.

But as the preceding analysis demonstrates, a power imbalance exists in all business relationships. Negotiations between individual members of the group and a target would not occur on an even keel - relative power would, in all likelihood, simply revert to the target as the larger business.⁴⁷

In any case, superior bargaining power would not necessarily flow from the larger size of a group. Though size is an important determinant of bargaining power, it is not the sole determinant in all business relationships.⁴⁸ In particular, a large group of franchisees may be prevented from exercising superior bargaining power over a target franchisor - due to restrictive limitations on their conduct, or a heavy reliance on the franchisor, arising from the franchise agreement.⁴⁹

The discussion paper also raises the prospect that a collective bargaining group might reduce competition by representing most or all suppliers in a single market.⁵⁰ However, there are enormous practical impediments to small business organising so effectively. By virtue of its nature, a single small business almost always holds negligible market share. Small businesses are also unlikely to be in a position to allocate the time required to organise en masse.⁵¹ In franchising networks, potential collaborators are perhaps more readily identifiable. But the fractured nature of the sector - with over 1,000 franchise networks active in Australia⁵² - would still prevent any such conglomeration. A group could only feasibly aspire to represent most suppliers within a single franchise network, rather than a majority of suppliers within a market as a whole.

Of course, the *Competition and Consumer Act* also allows the ACCC to withdraw the benefit of a class exemption on the basis that rights exercised under the exemption lessen competition.⁵³ It would plainly be within the regulator's power to do so in the unlikely event that any such super-collective was formed.

Recommendation 3: The class exemption should not limit the size of a collective bargaining group, either in and of itself or relative to a target.

However, on balance, the ACCC should not implement a class exemption allowing a group of small businesses to bargain with another small business. This would clearly undermine the interests of some small businesses as it supports others - thereby limiting the potential of the reform to empower the small business community as a whole. Any such measure would also expose relationally disadvantaged businesses to the prospect of further disadvantage still. In our submission, any such outcome would risk failing the 'net public benefit' test.

Moreover, as the vast majority of small businesses struggle to navigate regulations,⁵⁴ it is essential that the reform be designed as simply as possible. A restriction that merely prevented any collective bargaining group from bargaining with an individual small business would satisfy this imperative.

Recommendation 4: The class exemption should provide that a collective bargaining group may not bargain with an individual small business.

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

OSBC does not support the discussion paper's suggestion that the class exemption might be restricted so as to limit a collective bargaining group's capacity to access representation.

The discussion paper states that a representative acting on behalf of a number of groups may influence a "*substantial segment of the market*."⁵⁵ However, as OSBC has established, there are major practical barriers to any group of small businesses organising so effectively as to represent a major portion of the market.⁵⁶ Indeed, under the current collective bargaining framework, industry associations commonly act as representatives on behalf of a group.⁵⁷ However, no dedicated mechanism exists to prevent multiple groups from procuring common representation, through their industry association or otherwise. Of course, the legislative failsafe allowing the ACCC to withdraw the benefit of a class exemption on the basis of a substantial reduction in competition⁵⁸ could also be applied, if a common representative ever did come to exercise improper influence over a market.

Moreover, small businesses should be entitled to pool limited cash resources⁵⁹ to secure the most effective representation possible in what will often be multi-faceted, protracted, and legalistic negotiations. Any restriction on common representation could limit the capacity of small businesses to access suitably expert advice at all. Given the difficulty small businesses face in understanding regulations unassisted,⁶⁰ the effect would be akin to a double disadvantage.

In any case, the discussion paper's suggestion mischaracterises the proper role of the representative. A representative's expertise should be expected to guide its client's understanding of the relevant matter. But representatives are still only capable of acting on their clients' instructions.⁶¹ That is, agency would remain with the businesses within any one group, irrespective of the presence of a common representative across multiple groupings. Thus, any consistency in decision-making between collective bargaining groups within the same industry would not necessarily represent a market distortion or impropriety.

Recommendation 5: The class exemption should not limit multiple collective bargaining groups from engaging a common representative.

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 OSBC concurs with the ACCC's stated position that the class exemption should allow a collective bargaining group to negotiate for both joint supply and joint procurement.⁶² Small businesses occupy myriad of positions in complex modern supply chains⁶³ – making regulatory support for joint supply bargaining as important as that for joint procurement bargaining.

Recommendation 6: The class exemption should allow a collective bargaining group to negotiate for joint procurement and joint supply.

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?

In OSBC's submission, a restriction on information sharing within a group, so as to prevent the sharing of information to that necessary for the purpose of collective bargaining is inherent to the design of any exemption of the type proposed.

That is, the ACCC does not suggest allowing a group of businesses to act as a collective for all purposes, but for the specific purpose of collective bargaining with a relevant target. If the class exemption supported information sharing that was not necessary for collective bargaining, it could be used by collective bargaining groups as a vehicle through which to achieve unrelated ends. This would be plainly inconsistent with any purpose of the reform, and would risk facilitating conduct that failed the requirements that the exemption confer a net public benefit and not substantially reduce competition. An explicit provision that a group may only share information that is necessary for the purpose of collective bargaining is an appropriate means of addressing any such risk.

Recommendation 7: The class exemption should prohibit a collective bargaining group from sharing information that is not necessary to collectively bargain.

'Should a class exemption only apply where the bargaining group keeps written records of the composition of the group, and notifies the ACCC when the group is formed?'

The discussion paper's suggestion that a collective bargaining group be required to keep a written record of its composition, and notify the ACCC of its formation, appears a reasonable and proportionate imposition on small business. It is important that the ACCC monitors collective bargaining arrangements arising out of the proposed reform, so as to assess its successes and address its shortcomings. Denying the regulator basic data regarding the existence of groups formed under the class exemption, or potential access to documents outlining their composition, would represent a major barrier to effective assessment and oversight.

Recommendation 8: The class exemption should require a collective bargaining group to keep written records of its composition, and to notify the ACCC when the group is formed.

What would be the effect of a collective bargaining class exemption on businesses which fall outside it?

The discussion paper suggests that a business that was excluded from a collective bargaining group due to its size could miss out on benefits attained by those within the group.⁶⁴ However, given the adverse impacts on small business arising from limited bargaining power, and the need for a class exemption to preserve competition and confer a net public benefit, it is appropriate that it support small business specifically.⁶⁵ It follows as necessary and inherent that the benefits of collective bargaining would not flow to larger businesses.

The outcome described in the discussion paper is therefore likely to be consistent with a well-functioning and suitably targeted class exemption

What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?

The discussion paper raises the issue that a class exemption may cause a business to deliberately impede its growth in order to enjoy continued access to the exemption. Our proposal that the class exemption be available to small businesses – that is, businesses employing less than 20 people, or with aggregated annual turnover of less than \$10 million – would serve to mitigate any such risk. While a business may restrict the number of persons it employs with relative ease, turnover is much less predictable or open to manipulation.

The only means by which to extinguish the risk described entirely is to implement a class exemption that is open to all businesses. But as OSBC has established, this would give rise to substantially greater risks of notably reduced competition and public dis-benefit, reducing the efficacy of the reform as a targeted measure to address an issue faced by small businesses.⁶⁶ Nonetheless, any business to which collective bargaining was so crucial that it would contemplate limiting not only its human capital, but also its very takings, could still seek access through the authorisation and notification processes, regardless of its size.⁶⁷ Presumably, any such business would be heavily incentivised to navigate these processes despite their complexity and expense.

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

Should all groups of franchisees be eligible for a class exemption in relation to negotiations with their franchisor, including group mediation..?

The peculiarities of the franchise business model are such that the suggestion that franchisees may be allowed to bargain collectively with their franchisor, irrespective of their size, is likely appropriate.⁶⁸ As OSBC has detailed, a franchisor nearly invariably holds an unusually broad power over its franchisees - arising not only from size disparity, but also inferior education and sophistication, and the contracting practices of franchising itself.⁶⁹ In any case, as most franchisees are small businesses,⁷⁰ larger businesses are highly likely to comprise no more than a minority in any such group.

There may also be merit in extending this exception beyond strict franchisor-franchisee bargaining. The OSBC notes the ongoing public outcry around high-profile cases of franchisees obliged to procure on unfavourable terms from suppliers that are related to their franchisor.⁷¹ While collective bargaining cannot represent a complete solution to this issue, the corporate veil should at least not be allowed to insulate a franchisor from a collective bargaining group. It is therefore appropriate that the exemption be extended to apply to any group collectively bargaining with a subsidiary of its franchisor.

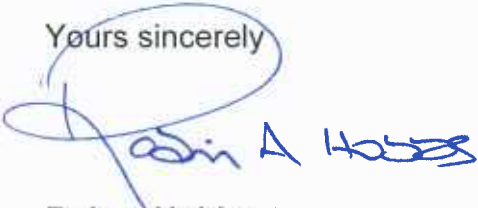
The OSBC sees no reason why this exemption should not extend to franchisee groups seeking to access alternative dispute resolution. It is well established that alternative dispute resolution is significantly cheaper and more time-efficient than

litigation,⁷² and thus beneficial to all participating parties. Furthermore, the Office of the Franchise Mediation Adviser has identified that franchisees are already seeking collective mediation in increasing numbers, and has advocated reform akin to a class exemption to support that very purpose.⁷³

Recommendation 9: The class exemption should allow groups of franchisees to bargain collectively with a common franchisor, or a subsidiary of a common franchisor, irrespective of the size of businesses within the group. This exception should extend to collective alternative dispute resolution.

The OSBC would welcome further engagement with the ACCC as it progresses with development of the proposed class exemption. To discuss this submission, please contact _____, Senior Advisor, Advocacy and Strategic Projects, on _____ or _____.

Yours sincerely



**Robyn Hobbs OAM
NSW Small Business Commissioner**

27 September 2018

- ¹ Meehan, J. & Wright, G. (2012), '[The origins of power in buyer-seller relationships](#)', *Industrial Marketing Management*, vol 41, no 4, pp. 5, 15, 19
- ² Spencer, E. (2009), '[Consequences of the Interaction of Standard Form and Relational Contracting in Franchising](#)', *Franchise Law Journal*, vol 29, p. 33; Buchan, J. (2009), '[Consumer protection for franchisees of failed franchisors: Is there a need for statutory intervention?](#)', *QUT Law and Justice Journal*, vol 9, p. 236
- ³ Terry, A. & Di Lernia, C. (2009), '[Franchising and the quest for the Holy Grail: Good faith or good intentions?](#)', *Melbourne University Law Review*, vol 33, pp. 546
- ⁴ Meehan, J. & Wright, G. (2012), '[The origins of power in buyer-seller relationships](#)', *Industrial Marketing Management*, vol 41, no 4, p. 14
- ⁵ Beaton-Wells, C. & Paul-Taylor, J. (2017), '[Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct](#)', University of Melbourne Law School, p. 204; Office of the Australian Small Business Commissioner (2014), '[Improving commercial relationships in the food and grocery sector](#)', p. 2; Australian Food & Grocery Council (2014), '[Competitiveness and Sustainable Growth](#)', p. 15
- ⁶ IBISWorld (2018), '[Supermarkets and grocery stores in Australia](#)', p. 19
- ⁷ Australian Food & Grocery Council & EY (2017), '[State of the Industry](#)', p. 8;
- ⁸ Senate Economics Reference Committee (2015), '[Need for a national approach to retail leasing arrangements](#)', pp. 5-6, 9
- ⁹ Senate Standing Committees on Economics (2015), '[Competition and Consumer Act 2010 – Competition and Consumer \(Industry Codes – Food and Grocery\) Regulation 2015 – Terms of reference](#)'; Senate Select Committee on Australia's Food Processing Sector (2012), '[Terms of reference](#)'; Senate Standing Committees on Economics (2011), '[The impacts of supermarket price decisions on the dairy industry – Terms of reference](#)'; ACCC (2008), '[Grocery inquiry 2008](#)'; Australian Senate Economics Reference Committee (2015), '[Need for a national approach to retail leasing arrangements](#)', pp. 5-6, 9
- ¹⁰ Australian Bureau of Statistics (2018), '[Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017](#)', Table 13; Frazer, L. Weaven, S. Grace, A. & Selvanathan, S. (2016), '[Franchising Australia 2016](#)', Griffith University Asia-Pacific Centre for Franchising Excellence, p. 18
- ¹¹ Spencer, E. (2009), '[Consequences of the Interaction of Standard Form and Relational Contracting in Franchising](#)', *Franchise Law Journal*, vol 29, p. 31
- ¹² Spencer, E. (2009), '[Consequences of the Interaction of Standard Form and Relational Contracting in Franchising](#)', *Franchise Law Journal*, vol 29, p. 31
- ¹³ Frazer, L. Weaven, S. Grace, A. & Selvanathan, S. (2016), '[Franchising Australia 2016](#)', Griffith University Asia-Pacific Centre for Franchising Excellence, p. 24
- ¹⁴ Emerson, R. (2014), '[Assessing Awwah v Coverall North America, Inc: The franchisee as a dependent contractor](#)', *Stanford Journal of Law, Business, and Finance*, vol 19, no 2, p. 221
- ¹⁵ Spencer, E. (2009), '[Consequences of the Interaction of Standard Form and Relational Contracting in Franchising](#)', *Franchise Law Journal*, vol 29, p. 32
- ¹⁶ Terry, A. & Di Lernia, C. (2009), '[Franchising and the quest for the Holy Grail: Good faith or good intentions?](#)', *Melbourne University Law Review*, vol 33, pp. 544; Giddings, J. Weaven, S. Grace, D. & Frazer, L. (2011), '[Taking care of business: Are franchise systems structured to promote conflict?](#)', *Australasian Dispute Resolution Journal*, vol 22, p. 48
- ¹⁷ Giddings, J. Weaven, S. Grace, D. & Frazer, L. (2011), '[Taking care of business: Are franchise systems structured to promote conflict?](#)', *Australasian Dispute Resolution Journal*, vol 22, p. 48
- ¹⁸ Lawrence, B. & Kaufmann, P. (2011), '[Identity in franchise systems: The role of franchisee associations](#)', *Journal of Retailing*, vol 87, no 3, p. 289
- ¹⁹ Spencer, E. (2009), '[Consequences of the Interaction of Standard Form and Relational Contracting in Franchising](#)', *Franchise Law Journal*, vol 29, p. 35
- ²⁰ Spencer, E. (2008), '[Conditions for effective disclosure in the regulation of franchising](#)', *International Review of Applied Economics*, vol 22, p. 513
- ²¹ Joint Committee on Corporations and Financial Services (2018), '[The operation and effectiveness of the Franchising Code of Conduct – Terms of reference](#)'; Wein, A. (2013), '[Review of the Franchising Code of Conduct](#)', Department of Jobs and Small Business; Weaven, S., Frazer, L. & Giddings, J. (2010), '[New perspectives on the causes of franchising conflict in Australia](#)', *Asia Pacific Journal of Marketing and Logistics*, vol 22, no 2, p. 137
- ²² Daniels, J. & Harvey, J. (2011), '[Collective bargaining and small business](#)', *Keeping Good Companies*, vol 63, no 9, p. 550
- ²³ Argyres, N. & Bercovitz, J. (2015), '[Franchisee associations as sources of bargaining power? Some evidence](#)', *Journal of Economics & Management Strategy*, vol 24, no 4, p. 820
- ²⁴ Argyres, N. & Bercovitz, J. (2015), '[Franchisee associations as sources of bargaining power? Some evidence](#)', *Journal of Economics & Management Strategy*, vol 24, no 4, pp. 828-829
- ²⁵ Daniels, J. & Harvey, J. (2011), '[Collective bargaining and small business](#)', *Keeping Good Companies*, vol 63, no 9, p. 553
- ²⁶ Cochet, O. & Garg, V. (2008), '[How do franchise contracts evolve? A study of three German SMEs](#)', *Journal of Small Business Management*, vol 46, no 1, pp. 137-138

- ²⁷ Cochet, O. & Garg, V. (2008), 'How do franchise contracts evolve? A study of three German SMEs', *Journal of Small Business Management*, vol 46, no 1, p. 147
- ²⁸ Da Silva, T. Melo, P. Esteves, K. & Gomes, G. (2016), 'Franchisee association and its mediation of relationship', *Mackenzie Management Review*, vol 17, no 5, p. 143
- ²⁹ Buchan, J. (2009), 'Consumer protection for franchisees of failed franchisors: Is there a need for statutory intervention?', *QUT Law and Justice Journal*, vol 9, p. 234
- ³⁰ ACCC (2018), 'Inquiry into the operation and effectiveness of the Franchising Code of Conduct – ACCC submission' p. 36
- ³¹ Emerson, R. (2014), 'Assessing *Auwah v Coverall North America, Inc: The franchisee as a dependent contractor*', *Stanford Journal of Law, Business, and Finance*, vol 19, no 2, p. 232, 235
- ³² Emerson, R. (2014), 'Assessing *Auwah v Coverall North America, Inc: The franchisee as a dependent contractor*', *Stanford Journal of Law, Business, and Finance*, vol 19, no 2, p. 233, 235
- ³³ *Competition and Consumer Act 2010* (Cth), Part VII, Division 2, Subdivision B; Part IV
- ³⁴ *Competition and Consumer Act 2010* (Cth), ss45AM, 93AC; ACCC (2018), 'Guidelines for authorisation of conduct (non-merger)', pp. 5-6
- ³⁵ ACCC (2017), 'ACCC & AER annual report 2016-17', p. 57; ACCC (2016), 'ACCC & AER annual report 2015-16', p. 57; ACCC (2015), 'ACCC & AER annual report 2014-15', p. 47
- ³⁶ Daniels, J. & Harvey, J. (2011), 'Collective bargaining and small business', *Keeping Good Companies*, vol 63, no 9, p. 551
- ³⁷ ACCC (2018), 'Collective bargaining notification register'
- ³⁸ The NSW Business Chamber's 'Red Tape Survey' – surveying over NSW 1,000 businesses, including 680 small businesses – reported that over 70% of small businesses found the burden of 'understanding regulatory obligations' to be large or very large. That figure was higher than for large businesses; NSW Business Chamber (2016), 'Red tape survey - report', pp. 5, 6
- ³⁹ i.e. The *Competition and Consumer Act 2010* (Cth)
- ⁴⁰ ACCC (2017), 'ACCC & AER annual report 2016-17', p. 112; House of Representatives (2017), 'Competition and Consumer Amendment (Competition Policy Review) Bill 2017 – Explanatory memorandum', p. 74
- ⁴¹ Australian Small Business and Family Enterprise Ombudsman (2017), 'Payment times and practices inquiry – final report', pp. 4-5
- ⁴² ACCC n.d., 'Fees & forms'
- ⁴³ *Competition and Consumer Act 2010* (Cth), s95AA(1)
- ⁴⁴ Australian Bureau of Statistics (2002), 'Small business in Australia'
- ⁴⁵ Australian Taxation Office n.d., 'Definitions'
- ⁴⁶ Discussion paper, p. 6
- ⁴⁷ Meehan, J. & Wright, G. (2012), 'The origins of power in buyer-seller relationships', *Industrial Marketing Management*, vol 41, no 4, pp. 5, 15, 19
- ⁴⁸ Meehan, J. & Wright, G. (2012), 'The origins of power in buyer-seller relationships', *Industrial Marketing Management*, vol 41, no 4, pp. 14-18
- ⁴⁹ Spencer, E. (2008), 'Conditions for effective disclosure in the regulation of franchising', *International Review of Applied Economics*, vol 22, p. 513
- ⁵⁰ Discussion paper, p. 7
- ⁵¹ The report arising from NSW Business Chamber's 'Red Tape Survey' – surveying 680 NSW small businesses – highlighted the very large time demands of owning and operating a small business; NSW Business Chamber (2016), 'Red tape survey - report', p. 6
- ⁵² Frazer, L. Weaven, S. Grace, A. & Selvanathan, S. (2016), 'Franchising Australia 2016', Griffith University Asia-Pacific Centre for Franchising Excellence, p. 17
- ⁵³ *Competition and Consumer Act 2010* (Cth) s95AB
- ⁵⁴ NSW Business Chamber (2016), 'Red tape survey - report', pp. 5-6
- ⁵⁵ Discussion paper, p. 7
- ⁵⁶ See this submission's analysis on 'Should the class exemption be limited only to collective bargaining with target businesses that are above a certain size?'
- ⁵⁷ Daniels, J. & Harvey, J. (2011), 'Collective bargaining and small business', *Keeping Good Companies*, vol 63, no 9, p. 551
- ⁵⁸ *Competition and Consumer Act 2010* (Cth), s95AB
- ⁵⁹ Australian Small Business and Family Enterprise Ombudsman (2017), 'Payment times and practices inquiry – final report', pp. 4-5
- ⁶⁰ NSW Business Chamber (2016), 'Red tape survey - report', pp. 5-6
- ⁶¹ Most importantly, this is provided explicitly in the professional conduct rules applying to Australian solicitors: "A solicitor must follow a client's lawful, proper and competent instructions"; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), cl 8.1
- ⁶² Discussion paper, p. 7
- ⁶³ Wilding, R. (1998), 'The supply chain complexity triangle: uncertainty generation in the supply chain', *International Journal of Physical Distribution and Logistics Management*, vol 2, no 8, p. 2
- ⁶⁴ Discussion paper, p. 8

⁶⁵ See this submission's analysis on 'Bargaining power of small businesses' and 'What type of businesses should be covered under this class exemption?'

⁶⁶ See this submission's analysis on 'Bargaining power of small businesses' and 'What type of businesses should be covered under this class exemption?'

⁶⁷ Discussion paper, p. 3

⁶⁸ Discussion paper, p. 9

⁶⁹ See this submission's analysis on 'Bargaining power of small businesses'

⁷⁰ Spencer, E. (2009), 'Consequences of the Interaction of Standard Form and Relational Contracting in Franchising', *Franchise Law Journal*, vol 29, p. 31

⁷¹ The Sydney Morning Herald (9 December 2017), '[Cup of sorrow: The brutal reality of Australia's franchise king](#)'; News.com.au (8 August 2018), '[Inquiry uncovers tales of lives ruined by franchise sham](#)'; Australian Financial Review (4 May 2018), '[Domino's, Retail Food Group accused as franchise inquiry gets under way](#);

⁷² See, for example, Stinanowich (2004), '[ADR and the "Vanishing Trial": The growth and impact of "Alternative Dispute Resolution"](#)', *Journal of Empirical Legal Studies*, Vol 1, no. 3, pp. 5-7; v

⁷³ Minus, A. (2018), '[Submission to the Senate Inquiry – The Franchising and Oil Codes of Conduct](#)', Office of the Franchising Mediation Adviser, p. 20