



Consultation Submission to ACCC

Collective Bargaining Class Exemption Proposal

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Introduction

The Franchise Council of Australia welcomes the opportunity to provide this submission to the ACCC in relation to the proposed class exemptions for collective bargaining.

We have taken a keen interest in the proposed reforms, given the proposal includes a specific exemption for franchisees collectively negotiating with their franchisor.

The FCA is the peak industry body for the Australian franchise sector. There are approximately 1,314 business format franchise systems in Australia, with 80,000+ individual franchised outlets generating more than \$182 billion in annual turnover. The sector employs over 594,500 people across Australia (IBIS November 2018).

The FCA makes policy contributions on issues in small business policy regularly. As such we consider we are ideally placed to provide informed and meaningful input into the consultation process on this issue. We always prefer a collaborative approach and endeavour to work with the ACCC and Government to achieve the best implementation of policy decisions.

A positive and fair relationship between franchisors and their franchisees is central to shared business success, including open and constructive dialogue, which the FCA encourages through our educational and member engagement programs.

The FCA is committed to facilitating a successful and healthy franchising industry. A fair and balanced regulatory environment is crucial to achieving this goal. The FCA is therefore supportive of sensible reforms which promote fairness in franchising, especially those which reduce red tape and compliance costs.

In forming our views on this policy, we have informed our members regarding the proposed reforms through various channels and have obtained valuable feedback from them. We therefore consider we have quite a unique perspective of the franchising community's views on the proposed reform and can provide valuable insight on its suitability.

Observations on proposed reform

The FCA is supportive of this reform in principle but, in this submission, tests some potential implementation risks and provides commentary on how these might be mitigated.

We note that our submission confines commentary to the specific exemption proposed for franchisees and fuel retailers (who for simplicity we refer to simply as franchisees in this submission), not the general exemption based on aggregate turnover.

The FCA makes the following general observations in relation to the proposal:

1. Preventing misunderstanding of the reforms by franchisees

- It is paramount that franchisees do not misunderstand the effect of the exemption. We acknowledge that the ACCC has included disclaimers in its guidance note and on its website regarding the limited effect of the class exemption, notably that an exemption does not:
 - give franchisees a right to re-negotiate their franchise agreements;
 - oblige a franchisor to participate in negotiations with a collective bargaining group;
 - override contractual obligations, such as confidentiality provisions; and
 - override statutory obligations, including the duty of good faith under the Franchising Code of Conduct.
- The FCA would like to see this type of detail, which clarifies the scope of the exemption, remain front and centre in all ACCC communication regarding this reform. This would include, in our view, an ongoing commitment to educating franchisees after implementation, by prominently providing warnings in the information published on the ACCC website and on printed material, engaging in proactive outreach to the franchise community, and informing franchisees at the time of applying for immunity.
- We would also suggest that appropriate disclaimers and warnings feature on the notes page of the exemption notice, as this is the best chance to ensure that the franchisees completing the notice are alerted to the limitations of the immunity at the outset.

2. Preventing collateral breaches of competition laws

- There is another significant risk to franchisees. A misunderstanding of the scope of the immunity might lead franchisees into committing competition offences which are not covered by the immunity.
- We are mindful that the immunity only extends to the formation of the collective bargaining group and actions taken in furtherance of the group negotiations. It does not provide a blanket immunity against competition offences, in the event that the franchisees engage in otherwise illegal conduct within the group setting.
- In our view, the boundaries of the immunity are somewhat vague, and it would be hard to decipher exactly where the immunity begins and ends in the context of a franchisee collective bargaining group. We suggest it will be difficult for franchisee groups to self-regulate, in the absence of constant advice from expert competition lawyers, which is inconsistent with the purpose of this initiative.
- For example, the legislation allows for the sharing of information to the extent reasonably necessary for the franchisees to participate in the collective negotiation. It does not, as we understand it, allow franchisees to enter into other anti-competitive arrangements, such as agreements regarding division of markets or setting of prices.
- We do not want to see franchisees tempted into illegal conduct due to a false sense of comfort provided by the class exemption immunity. This is a realistic by-product of the class exemption process, which could cause significant harm to franchisees, so we would expect the ACCC to caution and educate franchisees seeking an exemption as to the limits of the immunity and the type of conduct they must still avoid.
- We suggest that the ACCC publish warnings regarding franchisees' continuing legal obligations in relation to anti-competitive conduct whilst participating in a group of competitors, in the guidance materials and on the notes page of the exemption notice, as foreshadowed above.

3. Avoiding misconceptions by franchisors

- We feel there is a risk that a franchisor receiving a collective bargaining notice from a group of franchisees may misconceive its effect. Many franchisors are small businesses and may not have the capacity to obtain expert legal advice on the effect of the notice.
- We would be concerned if franchisors were misled into believing that the notice bestowed upon the franchisees a right to re-negotiate their agreements, or that the franchisor was obliged to negotiate with the group of franchisees.
- We appreciate that the ACCC guidance materials do emphasise that the class exemption is merely an immunity, not an enhancement of rights. However, franchisors receiving a collective bargaining notice won't necessarily have that context and knowledge. This may lead to franchisees manipulating the class exemption process against franchisors.
- We therefore make the following suggestions:
 - The collective bargaining notice template should contain detailed explanatory notes to alert the franchisor to the true effect of the notice and, importantly, the powers that the notice does not impart. The document should make it clear that the franchisor may make up its own mind on whether to negotiate with the group.
 - It would also be sensible for the notice to direct the franchisor to online ACCC resources which clearly explain the effect of the notice in more detail.
 - The ACCC should continue its campaign of educating the sector as to the scope of this reform and prominently inform all stakeholders as to the limited effect of the class exemption.

4. Monitoring misuse of the immunity

- The FCA support initiatives which enable and enhance positive communication between franchisees and their franchisor. However, we are conscious to avoid encouraging more adversarial and dispute-oriented franchise relationships. This, after all, undermines the essence of franchising as a collaborative business partnership.
- A combative culture within a franchise network, where disputation and litigation takes the place of communication and cooperation, is not in the best interests of any stakeholders. We would be concerned if groups of franchisees misused the collective bargaining immunity to deploy unfair negotiating tactics against franchisors.
- The ACCC should monitor whether franchisees misuse the immunity as a justification for breaching contractual provisions, such as confidentiality clauses. Whilst these may be predominantly contractual matters, the ACCC should take an interest in preventing unintended consequences of its policy initiatives, so this is within the ACCC's purview.
- We would expect the ACCC to closely monitor misuse of the collective bargaining immunity by franchisees and their advisors, including by ensuring franchisees honour their obligation to act in good faith under the Franchising Code of Conduct.

5. Protecting other franchisees

- Where subsets of franchisees form, sometimes their objectives are not aligned with the best interests of other franchisees in the network. It shouldn't be assumed that all franchisees align behind the views of a particular franchise association or negotiating group. Where this occurs, it is possible for a small group of franchisees to cause significant damage to the interests of the majority of franchisees. This can foment discontent within the network and lead to distracting and damaging factional disputes.
- The ACCC has a responsibility to protect other franchisees who might not be part of a particular collective bargaining group and may not agree with their views. We would therefore expect the ACCC to monitor the impact of the new regime to ensure it does not cause collateral damage to other franchisees.

6. Recognising the role of existing authorised bargaining groups

- The new regime may also undermine the existing dynamic in franchise networks with established franchisee associations who have invested in a collective bargaining authorisation.
- The current system requires a certain level of professionalism and corporate governance in order to seek and obtain an authorisation. This ensures that authorised organisations are properly equipped to manage many of the risks identified throughout this submission.
- In our view, opening the regime up to undefined and informally constituted groups of franchisees would make the process of negotiation very difficult, possibly unworkable, for some franchisors. The current system encourages unity and structure in franchisee associations wishing to collectively bargain, whilst the new system will encourage fragmented and disorganised negotiating blocs. In this environment it may become much harder for franchisors to reach consensus and implement network decisions.
- Rather than replacing the authorisation process with the light-touch notice process, the ACCC could offer a presumptive safe-harbour, but still require a simplified authorisation process with lower costs and less detail. This would open the regime up to more groups, yet still ensure those groups are professional and well governed. Under this model, the ACCC could continue to consult with the applicant and the target regarding the application, and approve or decline on the basis of public benefit.

7. Reasonable expectation of entering a contract

- Section 11 of the draft ACCC determination states that the immunity only applies where the respective franchisees 'reasonably expect that it will make one or more contracts' with the franchisor.
- In our experience, in most cases a group of franchisees who are collectively dealing with a franchisor will not have 'entering a contract' as their objective. It may be as simple as discussing a menu change, or debating the best use of marketing fund monies.
- Where the members of the group have no reasonable expectation of entering a contract, will they not qualify for the immunity and therefore be exposed to prosecution? We would be concerned if franchisees were vulnerable to prosecution simply by failing to meet this criteria, so we ask the ACCC to consider the effect of this requirement.

8. Comments on proposed 'class exemption notice' procedure

- *Defining the bargaining group*
 - We are concerned that the description of the collective bargaining group, which appears in the class exemption notice, will lead to uncertainty as to who is protected by the immunity.
 - Not all franchisee groups are formalised associations with official memberships and governance. Indeed, the majority would be informal and hard to accurately define. A poorly worded class description may exclude certain franchisees and give them false comfort that they are protected by the immunity.
 - The ACCC should provide detailed guidance to applicants on the class description, and endeavour to prevent faulty applications.
- *Defining the subject matter*
 - As noted above, there is often no easily defined objective for a franchisee association or other franchisee collective. The objective may simply be ongoing consultation on network changes. We query how this would be reflected in a notice and whether franchisees would have difficulty defining this in the exemption notice.
 - Given the scope of the immunity is linked back to the objective stated in the notice, franchisees might stray outside the boundaries of the immunity and expose themselves, or might need to regularly file new notices to update the scope of their immunity. Either scenario is unpalatable and inconsistent with the ACCCs objectives for this initiative, so should be reviewed.

- *Verification and objections by the ACCC*
 - Subsection 12(3) of the proposed ACCC determination contemplates the ACCC assessing class exemption notices and filing an objection notice. We are unclear on the circumstances in which the ACCC would be entitled to, or inclined to, reject a class exemption notice.
 - Would this an objection be pursued where the ACCC had concerns over the public interest test, or that the arrangement would substantially lessen competition in the market? This seems to contradict the presumption the ACCC has made in this regard by granting the blanket exemption. It would also seem to impose a similar standard to the authorisation process, albeit on an exceptions basis.
 - We would ask that the ACCC clarify its policy on reviewing these exemption notices, on what grounds it would be empowered to object to a notice, and whether in this context a franchisor would have the right to file its own objection with the ACCC.

9. Querying the utility of the notice requirement

- In light of the issues outlined above with the notice process, we query the purpose and necessity of the notice requirement.
- If the objective is to simplify the current system and remove impediments to franchisees collectively negotiating, in our view the proposed system simply creates a new bureaucratic process in place of the existing authorisation process (albeit a theoretically simpler one). If the intention is for franchisees to obtain presumptive immunity, without the need for ACCC review, and to provide comfort for franchisees against prosecution, we question the benefit of the notice process.
- We therefore query whether the ACCC should dispense with the notification process altogether for the franchising class exemption. The class exemption could simply exist as a legislative safe harbour for any groups of franchisees wishing to collectively bargain with their franchisor. Safe-harbour provisions in other legislative regimes operate in this manner successfully, without the need for a notification process.
- This would relieve the ACCC from the administrative burden of reviewing exemption notices and remove the hurdle completely for franchisees. It would also help alleviate many of the concerns raised above regarding the mechanics of the notice process and the defining bargaining groups. We are pleased to provide further input into this option if the ACCC saw fit to explore it further.

10. Assessing the public benefit

- The ACCC is empowered to implement class exemptions for certain 'classes of conduct' that may otherwise carry a risk of breaching competition laws, but:
 - do not substantially lessen competition; and/or
 - are likely to result in overall public benefits.
- The ACCC should carefully consider the second element before committing to this policy. We query whether this initiative would in fact deliver a net public benefit in most cases.
- The primary motive for franchisees participating in collective bargaining is to advocate for an improvement in their own circumstances and to further their own business interests. In most cases that would not give rise to a wider public benefit.
- Indeed, in some cases there may be a significant cost to the public as a consequence of the franchisees' collective bargaining initiative, in the form of higher prices or reduction of service to end customers. This downside needs to be considered.
- We simply note that the not all cases of collective bargaining will result in better public outcomes, so the ACCC should not presume this to be the case. This is the advantage of the existing regime which allows the ACCC to assess each case on its merits and balance the net public benefit.

11. Addressing competition law concerns as a reason for not negotiating

- The discussion paper from the ACCC notes that this reform responds to the concern that “some franchisors use competition law concerns as a reason not to negotiate with their franchisees as a group”.
- We would be interested in receiving details of any specific examples that support of this concern. Our members advise that they regularly consult with franchisees, and of course the Franchising Code of Conduct prohibits a franchisor from restricting or impairing franchisee association for a lawful purpose.
- We suspect the concern raised by franchisors relates not to the competition risk of franchisees combining as a group, but to the very high risk of breaching competition law in the midst of the discussions themselves. In some cases, franchisors may be competitors of their franchisees, either through corporate-owned stores or online and other distribution channels. There is also a legitimate concern, expressed by franchisors and indeed franchisees, that group communication channels or Franchisee Advisory Councils are not undermined or used to air individual grievances.
- In addition, as expressed elsewhere in this submission, franchisors are concerned not to create unrealistic expectations in relation to any group discussions, noting that in most cases the set commercial terms of the franchise agreement are not usually open for “negotiation”.

The FCA would be pleased to further discuss this submission with you, and can be reached for further information via

Yours sincerely



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