

2 July 2019

The Project Manager  
Collective Bargaining – Small Business  
Class Exemption  
Adjudications Branch  
Australian Competition and Consumer Commission

By email to: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

## Collective bargaining class exemption – submission

### About WorkAccord

WorkAccord is an Australian workforce and employment relations firm that uses integrative and collaborative approaches to help clients charter their workforce & employment relationships and keep them running smoothly and productively.

We undertake:

- ✓ Workforce & value chain mapping
- ✓ Strategic review, planning & implementation for accord making
- ✓ Registry support including chartering of outcomes, solutions, follow-up, and action plans
- ✓ Training.

### The eligibility criteria

The eligibility criteria are clear and easy to apply. They are sufficient for most purposes. However, there is a case to consider whether it would be useful to add further criteria to provide more flexibility in situations where turnover in excess of the \$10 million threshold does not indicate that a business is other than a “small business”.

In our submission, the turnover criterion is problematic where the aggregated turnover of a business which seeks protection exceeds the threshold because of either:

- the high value of its goods and services; or
- the high labour cost component of its services and the low margin on which it operates.

In either case, the business seeking protection might be quite a small business when assessed according to other criteria.

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For example, a labour hire (on-hire) firm will typically have high labour and regulatory costs but will operate on low margins and limited budgets. Whilst it may have a sizeable pool of on-hire workers, it might have quite a small internal staff and very limited market power. It may, in fact, be little more than a small family operation.

It may additionally be the target of its own independent contractor workers (and, indeed, a target under *Fair Work* bargaining models) but unable to join with other similar firms under protection of the class exemption in order to negotiate favourable terms with its host clients as the end users of the services which it supplies.

The inability to negotiate favourable terms with host clients is likely to pass down the chain with the result that the capacity of the on-hire firms to meet the collective bargaining demands of their own workers, regardless of whether they are employees or independent contractors, is restricted.

The result, ultimately, is that the bargaining power of the workers is diluted because their agency is left as the “weak link” in the chain. By “weak”, we simply mean that it is not left with the protections afforded by the class exemption.

These dynamics are not so very different from what was observed in relation to the franchise model and various sub-contracting models in the course of recent vulnerable worker inquiries, of which the Commission would most certainly be aware.

One solution, of course, would be for small labour-hire firms that exceed the turnover cap to rely on the notification process. However, the \$3 million threshold applicable to notifications would be an impediment for many firms.

The other option is the more formal, expensive, and lengthy process of authorisation. That process may not be attractive for many firms simply because of the time involved and the need to respond to supply and tender opportunities within much shorter commercial timeframes.

For these reasons, we submit that there is a case for consideration as to whether:

1. the threshold might be increased for firms of the type we have described, where the firm (or the bargaining group in which it hopes to participate) can satisfy that Commission that there are good grounds to increase it; **and/or**
2. the firm employs *internally*, less than 20 people, including casual employees employed on a regular and systematic basis.

The two conditions might be used together. The Commission will immediately recognise that the second criterion is adapted from the small business definition used for the purpose of the unfair terms provisions of the ACL.

### The one-page notice

The notice is easy to use. It is to be commended in that it does not seek unnecessary or invasive information. The directions are clear.

We wonder, however, whether the Commission might find it useful to be advised of the identity of any bargaining agent insofar as that information may be relevant to decisions which the Commission may make about whether an objection notice is warranted.

## The plain English guidance note

Subject to some observations that we make in respect of the Draft Legislative Instrument, the Plain English Guidance Note appears clear and sufficient for purpose.

## The draft legislative instrument

Once the concept of an "initial contract" is grasped, the draft legislative instrument is mostly clear and sufficient for purpose. There are, however, some interactions between its provisions that may benefit from further consideration and elaboration.

There is possibly also an issue of the interaction between the provisions of the class exemption expressed as applying to *corporations* and the Schedule version of Part IV of the Act in its application to individuals and unincorporated entities under the provisions of the Competition Codes of the States and Territories.

We wonder, therefore, whether those interactions could be usefully addressed either in the Plain English Guidance Note or in the Instrument itself.

### *Section 7(1)*

Section 7(1) makes it clear that certain provision of the Act do not apply to corporations.

Some concern may be raised about whether the protection of a class exemption extends to unincorporated legal entities or entities that are not constitutional corporations.

It would be of assistance, in our submission, if a note were inserted to cover possibly important interactions between the class exemption and the *Competition Codes* of the States and Territories in their application to unincorporated bodies and incorporated bodies that are not constitutional corporations.

### *Section 7(2)(a)(ii)*

The limits to s. 7(2)(a)(ii) conduct could be made clearer - given that "*in relation to*" may be construed broadly, blurring the distinction made, in sub-paragraph (b), with "*giving effect to*".

We submit that it is important to preserve that distinction - most especially in relation to s. 9 (*timing of notice*) - if no unfair advantage is to be conferred on a bargaining group against a target by operation of s. 9.

The distinction is also important with regard to s. 10, which contemplates that notice should be given to the target prior to "*giving effect to*" an initial contract (i.e. s. 7(2)(b) conduct), but is not specific with regard to "*engaging in a concerted practice in relation to an initial contract*" i.e. (s. 7(2)(a)(ii) conduct).

### *Section 9(3)(b)*

The section appears to contemplate that actual bargaining conduct (i.e. giving effect to an initial contract (s. 7(2)(b))) can be engaged in with immunity for up to 14 days before the giving of the notice.

The effect would be that bargaining groups could gain a significant head start on a target before the Commission hears about it.

Whilst there would be good reason to allow bargaining groups to organise themselves under the protection of s. 7 to the extent of engaging in s. 7(2)(a)(i) conduct, there may be significant

detriments if the group is able to launch bargaining initiatives against a target under protection of s. 7(2)(a)(ii) (or s. 7(2)(b)) before notice is given to the Commission; and, if s. 10 is limited in its operation to s. 7(2)(b) conduct, even before notice is given to the target.

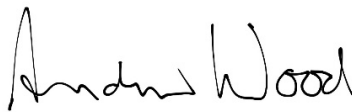
### *Section 10*

The section might be expanded to extend to s. 7(2)(a)(ii) conduct to the extent to which it is directed against a target.

### Contact

WorkAccord appreciates the opportunity to make this submission. We would be happy to respond to any further questions the Commission may have.

Yours faithfully



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