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Submission on Potential ACCC Class Exemption for Collective Bargaining

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Part I – Introduction

We are grateful for the opportunity to make this submission. As labour lawyers, we have long been interested in questions relating to collective bargaining and the competition issues and challenges raised by collective activities. At the outset, we confirm that we broadly support the proposal by the Australian Competition and Consumer Commission (ACCC) to grant a class exemption in this context. That said, we believe that the ACCC's proposal raises a host of practical and conceptual complexities that may require further consideration.

This submission is structured into three main parts:

- Part II considers some critical definitional issues relating to collective bargaining;
- Part III responds to a number of discrete questions that have been raised in the ACCC's Discussion Paper;¹
- Part IV sets out some of the reasons as to why granting a class exemption for collective bargaining is not sufficient in, and of itself, to address the imbalance in bargaining power that exists between lead firms and subordinate businesses in supply chains, franchise systems and/or subcontracting arrangements.

For the purposes of this submission, we focus on the potential for 'collective bargaining' in relation to two specific types of businesses, namely self-employed workers and franchisees.

In relation to the first category, we note that 'self-employed workers' are those who are legally classified as independent contractors at common law. This may include a diverse group of workers, including artists, family daycare workers, freelance journalists, owner-driver truck drivers, subcontractors working in telecommunication or postal services and workers in the 'gig economy'.² Generally-speaking, this category will not include any business where the owner employs others to preform services in that business. The second relevant category relates to franchisees (including self-employed franchisees, sub-franchisees and multi-unit franchisees).

¹ Australian Competition and Consumer Commission, *Potential ACCC 'Class Exemption' for Collective Bargaining – Discussion Paper* (23 August 2018) (**ACCC Discussion Paper**).

² The majority of workers in the 'gig economy' have been characterised by the relevant platforms as independent contractors. We note, however, that this characterisation has been challenged in a number of instances. For example, there have been several cases where Uber drivers have asserted that they are, in fact, employees at common law (see, eg, *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (11 May 2018); *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (21 December 2017)). The correct legal classification of various gig workers (including delivery riders and drivers) is still very much unsettled. For discussion, see 'Foodora riders employee, says ATO', *Workplace Express*, 28 August 2018; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the options?' (2017) 28 *Economic and Labour Relations Review* 420.

We note, however, that many of our observations may be relevant to other types of businesses in contracting relationships characterised by unequal bargaining power.

Part II – Key Concepts and Definitions

The Discussion Paper suggests that the ACCC is contemplating a class exemption³ that would ‘allow eligible businesses to *collectively bargain* with the customers they sell to or the suppliers they buy from.’⁴

There is no statutory definition of what it means to engage in ‘collective bargaining’ in the context of the *Competition and Consumer Act 2010* (Cth) (**CC Act**). The notification provisions of the CC Act suggest that collective bargaining only relates to contracts, arrangements or understandings which might otherwise breach the cartel⁵ and competition⁶ provisions of the Act. It is not clear from the Discussion Paper as to whether the ACCC is considering granting a class exemption on similar terms, or whether it might be broader in scope – that is, it relates to collective bargaining which may raise other types of anti-competitive conduct, including resale price maintenance and/or exclusive dealing. We note that, under the CC Act, the ACCC is empowered to grant a class exemption in relation to any Part IV conduct.⁷

In any event, the Discussion Paper does not expressly refer to the existing provisions of the CC Act which deal with collective bargaining notifications. Rather, the Discussion Paper describes collective bargaining as ‘an arrangement where two or more competitors come together to negotiate with a supplier or customer (the target) about terms, conditions and/or prices.’⁸ In our view, there are several issues raised by this definition of ‘collective bargaining’ that require further examination and possible review.

First, it is quite possible that collective bargaining may take place between two or more separate businesses that are not, in fact, competitors. For example, franchisees may be designated ‘exclusive territories’ under the relevant franchise agreement. In practical terms, these franchisees are not likely to be competitors given that they are operating in different markets. Similarly, Uber drivers or Deliveroo riders are unlikely to be competitors given that they are able to log on to the app at any time without restriction and thus do not compete to contract with those platforms.⁹ While there is no competition between some of these businesses in the relevant market, both franchisees and some gig workers (such as Uber drivers) may benefit from the capacity to engage in collective bargaining with the relevant target. In comparison, self-employed workers who source ‘gigs’ through other platforms, such as AirTasker or Find a Babysitter, may be competing on price for contracts with consumers and therefore may be more likely to benefit from a class exemption of the type proposed.

Second, the form of ‘collective bargaining’ that is contemplated by the Discussion Paper is unduly narrow. Collective bargaining may not only be directed at the terms, conditions and prices which regulate the supply or acquisition of goods or services between the relevant businesses and the identified target. Rather, in a franchising context, it is quite possible that franchisees would seek to

³ See *Competition and Consumer Act 2010* (Cth), Part VII, Div 3 (‘CC Act’).

⁴ ACCC Discussion Paper, above n 1, 1 [emphasis added].

⁵ CC Act, s 93AB(1A).

⁶ CC Act, s 93AB(1).

⁷ CC Act, s 95AA.

⁸ ACCC Discussion Paper, above n 1, 2.

⁹ Although notably this same factor would be likely to suggest that these workers are in fact employees and thus exempt from Part IV of the CC Act under ss 51(2)(a),(aa).

negotiate the terms of a business model or strategy with the franchisor (which is typically neither a customer or a supplier).

Third, collective forms of negotiation may be a useful device in the context of dispute resolution, including mediation. The Discussion Paper contemplates that group mediation is especially relevant in the franchising context.¹⁰ Indeed, a number of submissions put before the current Parliamentary Inquiry into the Franchising Code of Conduct (*Franchising Inquiry*) have identified the capacity to engage in collective forms of negotiation in the context of disputes as vital to addressing the power disparity which generally exists between franchisees and their franchisor.¹¹ For example, the Submission of the Caltex National Franchise Council¹² stated as follows:

Franchisees that have joined a group of franchisees to collectively negotiate with Caltex have had more success in those negotiations because their bargaining position has been strengthened through the collective bargaining approach. Recent experiences of the [Caltex Franchisee Transition Group] have demonstrated Caltex actively resisting a collective bargaining approach to negotiations. Caltex has instead sought to separate and isolate franchisees with a view to negotiating with them individually. Despite Caltex being aware that the CFTG members are legally represented by Lander & Rogers for negotiations with Caltex, Caltex instead issued its Regional Managers with a template email to send to individual franchisees seeking to engage them in individual negotiations with Caltex.¹³

Fourth, and by way of a related point, it is quite possible that two or more businesses may wish to share information for commercial purposes. This can be especially critical where there is no identifiable target. For example, freelance writers – operating on an independent and autonomous basis – may have a mutual interest in sharing information about the terms, conditions and prices that they have been able to negotiate with various publishers. This will particularly be the case where such contracts are not an everyday occurrence, meaning that the self-employed worker lacks experience of negotiating such contracts, their common terms and an understanding of relevant market conditions. In the franchising context, some franchisees have indicated that they have sought to ‘connect or engage in discussion’ with other franchisees.¹⁴ Under the Franchising Code of Conduct, franchisors are expressly prohibited from engaging in conduct that would restrict or impair: a franchisee’s freedom to form an association; or the ability of a franchisee to associate with other

¹⁰ ACCC Discussion Paper, above n 1, 8.

¹¹ See, eg, Derek Sutherland, Submission No 53 to the Parliamentary Committee on Corporations and Financial Services, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, 4 May 2018; and Hendrik Grebe, Submission No 200 to the Parliamentary Committee on Corporations and Financial Services, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, 2018.

¹² This submission was prepared by Lander & Rogers Lawyers on behalf of: the Caltex National Franchise Council (**Caltex NFC**) (which represents franchisees that operate Caltex-branded service stations across New South Wales, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory); the Caltex Franchisee Transition Group (**CFTG**) (which is a subgroup of the Caltex NFC and represents in excess of 170 Caltex sites franchisees that operate Caltex-branded service stations across New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, and the Australian Capital Territory); and some individual current or past Caltex franchisees who have provided relevant information. See Caltex National Franchise Council, Submission No 110 to the Parliamentary Committee on Corporations and Financial Services, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, 11 May 2018.

¹³ Submission of Caltex NFC, above n 12, 19.

¹⁴ Association of Croc’s Playcentre Franchisees, Submission No 155 to the Parliamentary Committee on Corporations and Financial Services, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, May 2018.

franchisees for a lawful purpose.¹⁵ While information sharing is an essential element of an association, and expressly protected under the Franchising Code, it is also arguable that this same conduct may be taken to breach Part IV of the CC Act. It is also possible that the sharing of confidential information amongst franchisees may constitute a breach of the franchising contract (which may ultimately lead to termination of the franchising relationship).¹⁶ Risk of retaliatory action is heightened by the lack of any statutory protection from victimisation for forming associations or otherwise acting collectively (even where such conduct has been notified and/or authorised under the CC Act).¹⁷

Fourth, in our view, there is a significant difference between collective *bargaining* and collective *agreement-making*. We note that the Discussion Paper expressly rules out any consideration of a class exemption for collective boycott conduct.¹⁸ It also states, in the context of franchising, that a ‘class exemption would not force a franchisor to deal with the bargaining group if it didn’t want to.’¹⁹

This is critical omission. A fundamental element of any collective bargaining regime is the ability to pursue bargaining against unwilling targets. If negotiations can only take place on a voluntary and consensual basis, there is arguably no recognisable form of bargaining. Indeed, it is not uncommon, and not surprising, that powerful firms refuse to engage in collective negotiations with subordinate businesses (or their group representative). For example, in its submission to the Franchising Inquiry, the Motor Trades Association of Australia, observed that on ‘a number of occasions where a dealer council [an association made up of dealer representatives of a particular brand of vehicle] has suggested that the discussions take place under collective negotiation under the [CC Act], that approach, or process, has been rejected by the manufacturer franchisor.’²⁰ Similarly, it appears that, following an independent review of the Caltex franchise model, the franchisor acknowledged that, at least with respect to some sites, the model was not profitable due to external factors outside of the control of the franchisee.²¹ Notwithstanding this concession, evidence before the Franchising Inquiry suggests that the Caltex franchisor has ultimately ‘refused franchisees’ requests to renegotiate the terms of the Franchise Agreements and has also refused to provide franchisees with a copy of the “independent review”.’²² If there is no ability to take any coercive collective action (in the form of a collective boycott or otherwise) and bring an unwilling target to the bargaining table, the weaker party is unlikely to gain any benefit from the class exemption that is currently proposed. However, it is precisely these cases where collective bargaining is most valuable – that is, it can help ameliorate some of the inherent problems raised by negotiations undertaken on an individualised basis.

¹⁵ *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth), cl 33.

¹⁶ We note that the Discussion Paper expressly states that ‘neither the protection of a class exemption nor an authorisation would supplant any contractual obligations that place limits on the sharing of information.’ See ACCC Discussion Paper, above n 1, 8.

¹⁷ In the franchising context, some protection is provided by clause 33 of the Franchising Code which prohibits a franchisor from restricting or impairing the freedom of a franchisee to form an association. However, it is not clear to what extent this provision would protect a franchisee against acts of victimisation by the franchisor in circumstances where the franchisee chose to act collectively in pursuing common interests once the association was formed.

¹⁸ ACCC Discussion Paper, above n 1, 4.

¹⁹ ACCC Discussion Paper, above n 1, 9.

²⁰ Motor Trades Association of Australia Limited, Submission No 55 to the Parliamentary Committee on Corporations and Financial Services, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, 4 May 2018, 21.

²¹ Julian Segal, ‘Franchise Chains are Responsible for Fair Wages, Says Caltex Boss’, *The Age*, 21 February 2017

²² Caltex NFC Submission, above n 12, 10-11.

Part III – Specific Issues Raised by the ACCC

3.1 What types of businesses should be covered under the class exemption?

As noted above, our main interest lies in the capacity of self-employed workers and franchisees to engage in collective bargaining free from potential liability under the CC Act. In our view, the class exemption should apply not only in respect of negotiations regarding terms, conditions and price with the target business, but also in respect of collaboration and information-sharing between self-employed workers and franchisees respectively.²³ These collective activities may potentially lead to the establishment of minimum contract pricing or common fee structures.²⁴ In our view, this should be permitted under the class exemption. There may be efficiencies of scale for self-employed workers and franchisees to pool business resources in certain circumstances. Further, the ability to undertake collective activities free from fear that the setting of common prices or fee structures could lead to liability under the CC Act will provide businesses with greater certainty and confidence.

In our view, at minimum, the proposed class exemption should automatically apply to all:

- self-employed workers who have the legal status of independent contractors and do not employ others; and
- franchisees (who fall within the scope of the Franchising Code).

In other words, in relation to both these business types (i.e. self-employed workers and franchisees) there should be no limits applied in respect of business turnover or contract value when determining whether the class exemption applies. Each of these business types should be included without further qualification.

This approach can be justified by reasons common to these two classes of businesses. First, a self-assessment approach turns on the ability of a member of the group having the capacity to make a credible assessment of the application of the criterion to their particular circumstances. This will be made more difficult by criteria which hinge on contingent factors like business turnover. This is especially challenging where business profitability varies significantly from year to year, or where income is unpredictable. Second, models which require a level of self-assessment have the potential to deter participants from collective bargaining due to uncertainty over the application of the rules. Indeed, the low take-up rate of the notification and authorisation system for collective bargaining arguably demonstrates, the way in which confusion over the complexity of competition laws has a chilling effect. For those businesses where the risks of anti-competitive conduct are exceptionally low, we would argue that eligibility criterion for the class exemption need to be kept as simple and straightforward as possible.

It is our submission that self-employed workers who do not employ others, and franchisees, represent two groups where there is a very low risk of anti-competitive detriment. In addition, there is evident public benefit gains to be realised from ensuring that access to the group exemption is provided in the simplest terms possible.

Genuinely self-employed workers, who do not engage others, are found at all levels of the labour market. Those who are highly successful and command high contract prices (for example, individual media personalities in the entertainment industry, successful best-selling novelists or artists whose

²⁴ As for example between medical practitioners operating in the same medical practice under the terms of an existing ACCC authorisation – *Australian Medical Association Limited*, A91599.

work sells for a high amount) are unlikely to need the assistance of collective bargaining, and in any case will generally already hold sufficient market power to negotiate their own contracts. However, the majority of self-employed workers will not possess such individual bargaining power, especially those labouring in the gig economy or at the margins of the labour market.

The self-employed workers for whom collective bargaining would be attractive are generally at a disadvantage in negotiations with the purchasers of their labour in terms of information asymmetry, knowledge of industry terms and conditions, and access to legal advice and representation. As with employee collective bargaining, the ability to act collectively for self-employed workers operates as a counterbalance to the capital, property and managerial power of those that hire them. In the case of self-employed workers who see multiple clients, being involved in a collective can be useful to share information on market standards, and potentially to reduce transaction costs through resource sharing. Such cost reduction measures can contribute to a lessening of the prices paid by consumers for those services where self-employed workers have been able to reduce administrative and transaction based costs.

As to franchisees, many of these same points apply. Further, collective bargaining may helpfully augment existing protections provided under the CC Act, the Australian Consumer Law and the Franchising Code, which are designed to constrain franchisor opportunism and address the inherent imbalance of bargaining power between franchisors and franchisees.²⁵ Outside of these groups, we support the development of clear, easy to apply guidelines based on the number of employees engaged by a small business, or the contract price associated with proposed collective arrangements. Any criterion developed should be simple and readily understood so as to maximise the potential for small businesses to utilise the opportunity to act collectively where it would be beneficial to do so.

Finally, the suggestion that exemption may be restricted where a number of collective bargaining groups are represented by a common representative body because of the potential for market power²⁶ is both counter-productive and potentially unworkable. Representative bodies are the best opportunity available for small business operators to pool their resources and develop the skills necessary to engage with large target businesses on a collective basis. The knowledge, expertise and skills necessary to navigate the laws in this area and pursue collective agreements are not easily or cheaply acquired. A restriction of this kind would also lead to difficult questions of definition in respect of which organisations are targeted, and in identifying the degree of market share that would disqualify them from acting. This would work counter to the suggestion in this submission that the qualifying criterion be simple and straightforward to apply.

Part IV - Why the Class Exemption is Not Enough

The introduction of a class exemption for collective bargaining for self-employed workers, small businesses and franchisees will be a good step in providing a meaningful mechanism for these groups to negotiate more efficient contracts which produce net public benefit. However, the proposed class exemption does not go far enough to ensure that the public benefits can be realised in practice.

²⁵ See generally, Alan Wein, *Review of the Franchising Code of Conduct* (Inquiry Report, 30 April 2013); Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity not Opportunism: Improving Conduct in Australian Franchising* (December 2008).

²⁶ ACCC Discussion Paper, above n 1, p 7.

We take issue with the decision of the ACCC to restrict the class exemption to conduct short of a collective boycott.²⁷ No detailed reasons are provided for this limitation on the proposed exemption, but it is likely to relate to the fact that the ACCC has almost always found that the weight of public detriment outweighs any likely public benefits in respect of proposed boycott conduct in authorisation applications.

The CC Act permits authorisation of proposed collective boycott conduct, and the class exemption provision can encompass collective boycott conduct.²⁸ However, there appears to be almost no circumstances when such conduct will be authorised in practice, which undermines the purpose and legislative intent of the provisions. Without the ability to threaten, or take, a collective boycott, groups of small businesses and self-employed workers facing take-it or leave-it standard form contract arrangements. Further, as noted above, without the capacity to engage in any form of collective boycott small businesses have no way to press their claims if the target business has refused to deal collectively. The clearest example of this is found in the ACCC decision to authorise proposed collective bargaining by freelance journalists against large media outlets who were unwilling to bargain and had opposed the authorisation on that basis.²⁹ In its decision, the ACCC acknowledged that the public benefits that potentially could flow from collective bargaining would not ensue, unless the targets were willing to engage collectively with the journalists. In effect, the authorisation was pointless in practice. The potential for a collective boycott in this case could have brought those media outlets to the table – but without it, nothing was likely to happen. No public benefits were obtained and the expense, effort and energy expended by the Media Entertainment and Arts Alliance in obtaining the authorisation was effectively wasted. While there would have been no guarantee that an agreement would have been reached if boycott conduct had been permitted in this case, at very least it would have provided the freelance journalists with a degree of market power necessary to press their claims.

In addition, the statutory provisions in respect of notification, authorisations and class exemptions protect individuals from liability under the CC Act, but not further. The CC Act impediments to collective bargaining are removed but there are no regulatory provisions governing what might happen next, and this may create substantial legal and practical problems for participants in collective bargaining.

This is of concern for a number of reasons.

First, if boycott conduct were authorised, difficulties may arise for participants who engage in a boycott in breach of their existing contract. Such conduct may constitute a breach of contract at common law, and when conducted in concert with others, constitute the commission of an economic tort.³⁰ While the proposed class exemption does not cover boycott conduct, as the CC Act permits such conduct to be notified, authorised or the subject of a class exemption, the CC Act

²⁷ ACCC Discussion Paper, above n 1, p 4.

²⁸ CC Act s 88(1), 93AB(1A), 95AA(1).

²⁹ *Determination, Application for Authorisation lodged by Media Entertainment and Arts Alliance in respect of collective negotiation of the terms of engagement of freelance journalists by Fairfax Media Limited, ACP Magazines Ltd, News Limited and Pacific Magazines*, Australian Competition and Consumer Commission, Authorisation No. A91204, 26 May 2010.

³⁰ See S. McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20(1) *Australian Journal of Labour Law* 1.

should accord immunity from common law liability to conduct taken subject to such notification, authorisation or class exemption.³¹

Second, as identified above, the CC Act does not appear to contain any provisions to protect members of a collective bargaining group from victimisation or prejudicial treatment on the basis of their claims to bargain collectively. In the franchising context, there is evidence that suggests franchisors have engaged in retaliatory behaviour after franchisees have sought to negotiate terms in their favour or otherwise 'speak out'. For example, the Motor Trades Association of Australia has noted that in response to dealers seeking to challenge the terms of dealer agreements on an individual or collective basis, the franchisor has not renewed long-standing and high-performing dealerships.³² Similarly, the Association of Croc's Playcentre Franchisees have reported that the franchisor has taken steps 'to alienate and admonish franchisees who seek to connect or engage in discussion with others.'³³ Similarly, in July a Foodora delivery rider claimed that he had been dismissed from the Foodora platform for publicly talking about his terms and conditions.³⁴ If the ability to seek to bargain collectively free of liability under the CC Act is to be meaningful for these groups, there needs to be protection in the Act in respect of the exercise of those rights.³⁵

Third, because the exemption process will only have the effect of removing potential liability under the CC Act for parties who engage in collective bargaining, it does not overcome any difficulties that the parties themselves may have in producing binding outcomes from their negotiations. Any resultant arrangements will either have to be completely voluntary or the parties will have to navigate the difficulties that arise when attempting to create multi-party contracts at common law. While this can be achieved, it can be difficult in practice, and is almost impossible to do where the members of the collective may change over time.³⁶ In the labour law context, this problem has been solved through the creation of statutory collective agreements, given force and effect by virtue of the FW Act.³⁷ The introduction of some form of scheme to register collective agreements negotiated by parties subject to the class exemption could have particular benefits by providing a mechanism to make such agreements enforceable, and to provide oversight of agreements once created, if there were ongoing concerns about the potential anti-competitive impact of agreements negotiated in the context of the exemption.³⁸

³¹ FW Act s 415 could provide a useful template for enacting such immunity.

³² MTAA Submission, above n 20, 21.

³³ Association of Croc's Playcentre Franchisees, above n 14, 10.

³⁴ David Marchese, 'Foodora rider fights dismissal from food delivery service in Australian first', 3 July 2018, ABC news online.

³⁵ Independent contractors are protected under the FW Act in the exercise of workplace rights by s 340. This includes the exercise of rights arising under a workplace law. However, the definition of 'workplace law' for this purpose in FW Act s 12 does not appear to encompass the CC Act; and if it did, it is not clear that seeking to act collectively with the benefit of an exemption under the CC Act constitutes the exercise of a 'right' given that the CC Act does not in fact provide any rights to act collectively.

³⁶ See eg *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235; discussed in McCrystal, above n 30.

³⁷ FW Act Part 2-4.

³⁸ A range of different models and some potential solutions in respect of potential collective bargaining by self-employed workers are explored in S. McCrystal 'Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons From Australia and Canada', (2014) 30(21) *The International Journal of Comparative Labour Law and Industrial Relations*, pp 217-242 and S. McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis', (2014) 37(3) *Melbourne University Law Review*, pp 662-698.

It is acknowledged that one feature of ACCC authorisations of proposed collective bargaining conduct across time is that the ACCC consistently finds that anti-competitive detriment is kept low through ensuring that the outcome of collective bargaining remains strictly voluntary on all parties. This approach reflects the characterisation of any binding agreement between the members of the collective or between the collective and the target as necessarily anti-competitive and likely to produce a level of detriment high enough to outweigh any potential public benefits. However, it is possible that the public benefits that may be achieved through collective bargaining for some small businesses will only follow if the parties are permitted and able to create some form of binding agreement.