Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses

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Abstract

The Australian Competition and Consumer Commission ('ACCC') is on the cusp of introducing a class exemption for collective bargaining for small businesses. This development is not just novel in the context of Australian competition law, it is important in terms of addressing entrenched imbalances of bargaining power in business-to-business transactions. By surveying the recent legislative history relating to collective bargaining in the commercial context, we show that the class exemption fills critical gaps in the ACCC's existing authorisation and notification processes. The article outlines key features of the proposed class exemption. Drawing on labour and industrial relations theories, the article then critically examines the class exemption through a series of dimensions, including the status, agent, level, scope and coverage of bargaining. This analysis reveals that the failure to formalise the bargaining processes and outcomes, the emphasis on voluntarism and the absence of any right to take collective boycotts, will not only lead to uncertainty, it will ultimately limit the overall effectiveness of collective bargaining in this forum.

I Introduction

The Australian Competition and Consumer Commission ('ACCC') has been developing a new class exemption for collective bargaining for small businesses.[1] Along with the existing notification and authorisation processes, a class exemption is one novel way to ensure that collective bargaining between commercial parties

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1 Australian Competition and Consumer Commission ('ACCC'), *Potential ACCC 'Class Exemption' for Collective Bargaining* (Discussion Paper, 23 August 2018) ('*ACCC Discussion Paper*'); ACCC, 'ACCC Class Exemption for Collective Bargaining — Update' (Media Release, 19 December 2018).

does not breach competition law.[2] While collective bargaining is a concept that is familiar to most labour lawyers, it is less clear how this concept will be interpreted and implemented in the context of business-to-business relationships. Will the proposed class exemption achieve the purported policy objective of permitting small businesses to work together as a group so that they can 'negotiate more efficiently with larger businesses, and achieve better terms and conditions, than they can on their own'?[3]

Section II of this article considers and compares the traditional conception and regulation of collective bargaining in labour law and in competition law respectively. This analysis highlights that labour law and competition law each have a distinct view of the potential and perils of collective action and a different view on the most effective mechanisms for addressing the perceived market failures. In labour law, collective bargaining is a core principle and a fundamental right.[4] As a consequence, the regulation of employee labour markets in Australia has been 'largely excised from competition law'.[5] In practice, this means that some degree of anti-competitive conduct by unions and employer associations is permitted (albeit it is not entirely unconstrained).[6] In contrast, competition law (and the common law more generally) views collective bargaining between two commercial parties as a restraint of trade. Collective action in this context is unacceptable and should be restricted (if not prohibited entirely). Expanding the circumstances in which collective bargaining can lawfully take place in a commercial context requires a rebalancing of these conflicting objectives and priorities. These tensions are especially pronounced in relation to self-employed workers and franchisees. These business forms resemble traditional employment in significant ways,[7] but their status as small businesses means that they have always been denied the right to lawfully engage in collective bargaining. The rise of the so-called 'gig' economy,[8] and the renewed focus on the regulatory challenges posed by the franchising model,[9] have

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2 Exemptions of this type are relatively common in overseas jurisdictions, see generally Stephen King, 'Collective Bargaining by Business: Economic and Legal Implications' (2013) 36(1) *University of New South Wales (UNSW) Law Journal* 107, 108.

3 *ACCC Discussion Paper* (n 1) 2. See also ACCC, *Small Business Collective Bargaining: Notification and Authorisation Guidelines* (Guide No 12/18_1472, December 2018) ('*ACCC Guidelines*').

4 See, eg, International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention No 87, adopted 9 July 1948, entered into force 4 July 1950) and *Right to Organise and Collective Bargaining Convention* (Convention No 98, adopted 1 July 1949, entered into force 18 July 1951).

5 Productivity Commission (Cth), *Workplace Relations Framework: Productivity Commission Inquiry Report* (Report No 76, 30 November 2015) vol 2, 948. See also Gary Banks, 'Competition Policy's Regulatory Innovations: Quo Vadis?' (Speech, ACCC Regulatory Conference, 26 July 2012 and Economists Conference Business Symposium, 12 July 2012) 8.

6 See *Competition and Consumer Act 2010* (Cth) ss 45D–45DD ('*CC Act*'), which prohibit boycotts and secondary boycotts by trade unions (and others). See also Shae McCrystal, 'Why is it so Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129.

7 See Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) ch 3.

8 See generally Department of Premier and Cabinet (Vic), *Inquiry into the Victorian On-Demand Workforce* (Background Paper, December 2018).

9 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (Report, March 2019).

reignited concerns on how best to prevent exploitation and promote fairness among these groups.[10]

In Section III, the article traces the history preceding the introduction of the class exemption. We show the regulatory steps that have gradually removed the once-formidable barriers to small business collective bargaining. The notion of allowing small businesses to engage in conduct resembling bargaining had its genesis in authorisation provisions included in the *Trade Practices Act 1974* (Cth) ('*TP Act*').[11] In 2007, the authorisation provisions were augmented by the introduction of the notification provisions.[12] Following the Harper Review of competition law and policy ('Harper Review'),[13] the *Competition and Consumer Act 2010* (Cth) ('*CC Act*') was further amended so as to allow class exemptions to be implemented by the ACCC. The current proposed collective bargaining class exemption — first floated in mid-2018 and still under consultation — is the latest instalment in this statutory evolution.

Section IV then examines the class exemption itself by outlining the key features of the exemption based on the draft legislative instrument released in mid-2019, and the accompanying materials.[14] We argue that providing small businesses access to the capacity to improve their circumstances through collective bargaining is a step in the right direction. However, a range of obstacles remain. Section V explores these obstacles by reference to the elements of bargaining structures identified within the labour law context. This analysis provides a useful lens through which to identify the shortcomings of the type of collective bargaining that could be fostered by the ACCC exemption. While the class exemption makes it easier to identify whether a group should be allowed to bargain collectively and gain immunity from competition law, it does little to clarify how the parties should bargain.[15] For example, the exemption does not permit collective boycott conduct and limits information-sharing among group members. In practice, the absence of any capacity to lawfully withdraw labour is likely to mean that collective bargaining will realistically only take place on a voluntary basis between willing participants. Another critical weakness relates to accountability and enforcement. The legal status of any collective agreement, and the possible consequences of failing to comply with its terms, are unclear. Finally, the class exemption may provide bargaining parties immunity from competition law, but it does little to address other legal risks and exposures arising under the common law. Drawing on a broader conception of

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10 See, eg, Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420.

11 *Trade Practices Act 1974* (Cth) ss 88–91 ('*TP Act*').

12 *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) sch 3. These sections became pt VII div 2 sub-div B of the *TP Act* (n 11).

13 Ian Harper et al, Parliament of Australia, *Competition Policy Review: Final Report* (Report, March 2015) ('Harper Review').

14 ACCC, *Competition and Consumer (Class Exemption — Collective Bargaining) Determination 2019* (Exposure Draft, May 2019) ('Exposure Draft Determination'). See also ACCC, *Class Exemption for Collective Bargaining: Guidance Note* (Draft for Consultation, June 2019) ('ACCC Draft Guidance Note').

15 Productivity Commission (n 5) vol 2, 955.

collective rights and their regulation, the article concludes with some suggestions about how the class exemption might be reimagined so that parties do not end up bargaining in a vacuum.

II The Contested Concept of 'Collective Bargaining'

The ACCC class exemption is designed to allow small businesses to engage in 'collective bargaining'.[16] Under the *CC Act* there is no statutory definition of the term 'collective bargaining'. Rather, there is only a reference to a 'collective bargaining notice', which is a notice given to the ACCC by a 'collective' that it intends to engage in conduct contrary to the 'restrictive trade practices' provisions of the *CC Act*.[17] These provisions encompass various types of 'anti-competitive' conduct, including contracts, arrangements or understandings that have the purpose or effect of lessening competition,[18] concerted practices, price-fixing, bid rigging, exclusive dealing, territory allocation and collective boycotts.[19] In short, collective bargaining is used in the statute in a somewhat circular sense, to refer to conduct that would otherwise breach the anti-competitive conduct provisions of the *CC Act*.

This definition of 'collective bargaining' stands in stark contrast to how this term is used in the labour law context. In Australia, the term 'collective bargaining' has historically been used to refer to the complex systems put in place at federal and state levels to govern the relationship between employee trade unions and employers. In this context, 'collective bargaining' is generally understood as

> a method or process of negotiating about wages and working conditions and other terms of employment between an employer … on the one hand, and representatives of workers and their organisations on the other, with a view to arriving at collective agreements …[20]

These differences between the labour and competition conceptions of collective bargaining stem from underlying differences in the rationales for collectivisation.

Competition regulation involves a particular economic approach, namely that 'competitive markets are efficient and so result in better welfare outcomes than markets that are not competitive'.[21] Put simply, under a competition-based approach to market regulation, individual market actors compete against each other to determine what goods and services will best serve public need, and to determine the

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16 *ACCC Discussion Paper* (n 1) 2.

17 *CC Act* (n 6) pt IV.

18 Ibid s 45.

19 Ibid ss 45AA–45AU.

20 Arthur Marsh and Edward Evans, *The Dictionary of Industrial Relations* (Hutchison, 1973) 61. Not all collective agreements made under the *Fair Work Act 2009* (Cth) ('*FW Act*') involve a trade union or entail bargaining: Shae McCrystal and Mark Bray, 'Non-union Agreement-making in Australia in Comparative and Historical Context' (2020) 41(3) *Comparative Labor Law & Policy Journal* (forthcoming).

21 Rhonda L Smith and Arlen Duke, 'Inequality and Competition Law' (2019) 27(1) *Competition and Consumer Law Journal* 1. Cf Adam Triggs and Andrew Leigh, 'A Giant Problem: The Influence of the Chicago School on Australian Competition Law, Economic Dynamism and Inequality' (2019) 47(4) *Federal Law Review* 696.

most efficient and cost-effective way to deliver those goods and services.[22] The pursuit of efficiency is driven explicitly by a standard cost-benefit economic analysis. It is generally assumed that if goods and services are produced in an economically efficient manner, consumers will benefit through reduced prices and enhanced products.

A lack of competition between market actors is said to lead to the distortion of price signals, which potentially allows these actors to obtain prices for their goods and services that are not driven by the most efficient use of their resources. This may allow firms to extract 'super profits' from transactions (profit above that which could be realised in a properly functioning competitive market),[23] which can, in turn, lead to poorer market outcomes.[24] Instead, to ensure optimal market outcomes, competitors operating in the same market must be prevented from 'colluding' or forming 'cartels' — sharing business information or making arrangements to split territory between them or to set the same prices. As King has observed, '[c]artel laws are explicit and attempts by businesses to circumvent these laws, even if for a "socially desirable" end, are likely to meet considerable resistance from regulators and the courts.'[25]

The application of these principles to labour markets would have the effect of rendering trade unions and collective bargaining 'anti-competitive', an approach that would produce unjust outcomes. Individual workers face disadvantages in the market for their labour. Labour is not storable — if insufficient wages are offered, labour cannot be kept for another day like money or goods. Workers are at a further disadvantage in negotiating contracts with larger, better resourced employers, who have greater access to information, capital and contractual power. Moreover, most employment relationships involve long-term relational contracts — where the cost of losing the employment contract is much higher to the worker than the cost to the employer of losing the worker.[26]

In addition to arguments based on the fundamental characteristics of labour markets, are arguments challenging the core assumption of competition law that collective action by 'competitors' is necessarily anti-competitive and automatically detrimental.[27] Acting collectively can be more efficient than acting solely,

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22 *Re Queensland Co-Operative Milling Association Ltd* (1976) 8 ALR 481, 515 (Woodward J, Shipton and Brunt (Members)) ('*Queensland Co-Operative Milling*'); *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR ¶41-783, 41-267 [11] (Burchett and Hely JJ).

23 The economic theories here are outlined in greater detail in: Hugh Collins, *Employment Law* (Oxford University Press, 2003) 140; Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 29.

24 See generally King (n 2) 124.

25 Ibid 115.

26 See Warren Grimes, 'The *Sherman Act*'s Unintended Bias against Lilliputians: Small Players Collective Action as a Counter to Relational Market Power' (2001) 69(1) *Antitrust Law Journal* 195.

27 See, eg, ibid; Robert H Lande and Richard O Zerbe Jr, 'Reducing Unions Monopoly Power: Costs and Benefits' (1985) 28(2) *Journal of Law & Economics* 297; Karl Klare, 'Countervailing Workers' Power as a Regulatory Strategy' in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 63; Sanjukta M Paul, 'The Enduring Ambiguities of Antitrust Liability for Worker Collective Action' (2016) 47(3) *Loyola University Chicago Law Journal* 969.

particularly in dealings with larger businesses who have been accustomed to contracting through the use of standard form, non-negotiable contracts.[28] In these scenarios, the stronger party sets all the terms and conditions, without the benefit of the views of the weaker party who may be able to identify better ways of doing things, and is able to maximise their own profit by arranging all circumstances to their benefit. Where those smaller parties can act collectively, they can influence contract terms, bringing their own experience to the table to create better contracts. They can reduce the transaction costs of each individual in entering those contracts by obtaining and sharing common legal advice and other critical information among all group members. Other benefits may include reductions in the time and cost associated with establishing supply arrangements, the creation of new marketing opportunities through combined sales or purchasing volume, or the development of supply chain efficiencies.[29] There is also the potential to enhance the public good through bargained outcomes with broader impact — for example, through improved safety in the production of goods and provision of services, enhanced environmental outcomes, increased industrial harmony, and improved grievance or dispute resolution procedures.[30] Of course, these benefits can only be realised if collective bargaining takes place, and if members of a collective have a credible basis on which to engage in collective bargaining and bring the stronger counterparty or target to the bargaining table.

Labour market failures have long been used to justify labour market exemptions under various state *Trade Union Acts*,[31] the *Fair Work Act 2009* (Cth) ('*FW Act*') and its predecessors,[32] as well as a broad exemption applied to contracts for remuneration and conditions of employment under the *CC Act*.[33] Such market failures have also been used to justify the right not just of workers to form collectives and bargain, but also to strike, based on the fact that collectivisation in itself is insufficient to gain bargaining power.[34] Given that 'labour markets are more complex than product markets and involve a significant human dimension',[35] the regulation of employee labour markets have been generally excluded from competition law through the use of broad exemptions.[36] In effect, a bright line has been drawn between those regulated generally by labour legislation — common law employees, and those regulated generally in the commercial sphere — everyone else.

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28 King (n 2) 113–15.

29 These benefits are discussed further in *ACCC Guidelines* (n 3).

30 Lande and Zerbe (n 277) 299.

31 See, eg, *Trade Unions Act 1958* (Vic) s 3(1); *Trade Unions Act 1889* (Tas) s 2(1); *Industrial Relations Act 1996* (NSW) s 304; *Fair Work Act 1994* (SA) s 137. Although there is no such protection in the State of Queensland: see Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20(1) *Australian Journal of Labour Law* 1, 15–17.

32 Currently *FW Act* (n 20) s 415.

33 *CC Act* (n 6) s 51(2)(a), discussed in Shae McCrystal and Phil Syrpis, 'Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 421, 425–6.

34 For an overview of the issues, see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) *Industrial Law Journal* 1; Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press, 2003) 5–8.

35 Banks (n 5) 8.

36 Productivity Commission (n 5).

Modern Australian labour law, in the form of the *FW Act*, involves a highly regulated system of collective bargaining, with a framework for the negotiation, registration and enforcement of collective agreements supported by access to the right to strike for both employees and employers.[37] However, the scope of these provisions remain firmly linked to the common law definition of 'employee', while the structure of labour markets and the contractual arrangements used to engage labour have fundamentally changed. The rise of the gig economy is one of the most pronounced, but not the only, manifestations of this shift.[38] These underlying structural changes have reduced the scope of the regulatory coverage of labour laws, leaving more work arrangements subject to commercial regulation that is designed for product and services markets. These shifts, combined with the development of provisions allowing for collective bargaining within the competition law framework, challenge that formerly bright line between the coverage of labour and competition laws.

III The Development of *Competition and Consumer Act 2010 (Cth)* Provisions Permitting Collective Bargaining

A *Background to the Anti-Competitive Conduct Provisions of the* Competition and Consumer Act 2010 (Cth)

The objects of the *CC Act* are 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[39] In keeping with this objective, the *CC Act* involves the application of competition theory to product and services markets in Australia. This is done through pt IV, which regulates restrictive trade practices, rendering certain anti-competitive conduct unlawful as a breach of the Act.

However, the *CC Act* also contains provisions acknowledging that the wholesale and undifferentiated application of the anti-competitive conduct provisions to all markets may produce unfair outcomes or deny potential public benefits that might otherwise arise if conduct were permitted to occur.[40] The balance is achieved through provisions that allow conduct to occur that would otherwise breach the Act. This is done primarily through three mechanisms:

(1) **Authorisations** that allow parties to apply to the ACCC and make a case for permission to engage in conduct that would otherwise breach the Act;[41]
(2) **Notifications** that allow parties to notify the ACCC that they intend to engage in conduct that would otherwise breach the Act. The conduct may

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37 See Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018).
38 Recent developments in the legal status of gig economy workers are discussed in Stewart and Stanford (n 10); Stewart and McCrystal (n 10).
39 *CC Act* (n 6) s 2.
40 Robert Officer and Phillip Williams, 'The Public Benefit Test in an Authorisation Decision' in Megan Richardson and Phillip Williams (eds), *The Law and the Market* (Federation Press, 1995) 157, 158.
41 *CC Act* (n 6) pt VII div I.

proceed free of liability under the Act provided that the ACCC does not object or revoke the notification;[42] and

(3) **Exemptions** that are provided in the Act for certain conduct (for example, the exemption for contracts regulating the remuneration and conditions of engagement of employees) or that can be granted in certain circumstances by the ACCC to a defined group for defined conduct.[43]

In respect of collective bargaining, the ACCC has gradually adopted all three forms of regulation, with the most recent being the proposed declaration of an exemption. If this exemption is implemented, it will mean that collective bargaining can occur without the need for small businesses to justify their proposed conduct. The process of getting to this position has been a lengthy one, and the history behind its development usefully illustrates the tensions at play in the regulation of markets from the perspective of competition when considering the position of small business actors with little market power.

B *The Authorisation Provisions of the* Competition and Consumer Act 2010 (Cth) — *Their Origins and Limitations*

When the *TP Act* took effect in 1974, it contained the first federal provisions expressly rendering unlawful contracts, arrangements or understandings in restraint of trade.[44] Applying competition theory, the provisions rendered unlawful 'collusive' conduct between competitors, which could potentially include a very broad range of conduct undertaken between business actors — from the sharing of information on prices and business processes through to price-fixing.

However, even in this original statutory iteration, there was a recognition that the application of competition theory might not produce optimal results in all circumstances.[45] The Explanatory Memorandum to the Trade Practices Bill 1973 (Cth) noted that the inclusion of the authorisation procedure acknowledged 'that in certain circumstances some prohibited practices may be capable of justification'.[46] While authorisation of price-fixing conduct in respect of goods was carved out of the authorisation provisions,[47] authorisation of price-fixing conduct in respect of *services* was possible under this original statutory framework. This meant that combinations seeking to control the price at which members of the group sold their

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42 Ibid pt VII div II.

43 Ibid pt VII div III.

44 *TP Act* (n 11) s 45. Section 51(2)(a) exempted provisions of contracts

> in relation to the remuneration, conditions of employment, hours of work or working conditions of employees, or to any act done by employees or by an organisation of employees not being an act done in the course of the carrying on of a business of the employer of those employees or of a business of that organisation …

45 Ibid s 90(5).

46 Explanatory Memorandum, Trade Practices Bill 1973 (Cth) [7].

47 Contracts or combinations entered into for the purpose of fixing, controlling or maintaining prices for the supply of goods (price-fixing) were expressly excluded from the scope of any authorisation: see *TP Act* (n 11) s 88.

own labour as services could seek authorisation under the provisions. However, in practice, such authorisations were unlikely to be granted.[48]

The inclusion of the authorisation provisions in the 1974 legislation is highly significant, constituting 'the feature most at odds, at least potentially, with a view of competition law which sees the promotion of efficiency as its only proper goal'.[49] The authorisation provisions recognise that certain arrangements between businesses which would otherwise be in competition can produce benefits that outweigh any purported anti-competitive effect.

In 1976, the Swanson Review recommended various modifications to the authorisation provisions, but suggested that price-fixing in respect of goods remain outside of authorisation.[50] The 1993 Hilmer Report (which led to the National Competition Policy Reforms) recommended aligning the price-fixing provisions for goods and services by removing access to authorisations for price-fixing in respect of services.[51] However, when the various recommendations were implemented in 1995, the legislation was amended to permit authorisation of price-fixing for both goods and services — expanding the scope of the authorisation provisions, rather than restricting them.[52]

The modern authorisation provisions are found in pt VII div 1 of the *CC Act*. They enable the ACCC (or the Australian Competition Tribunal on appeal) to authorise conduct contrary to pt IV of the *CC Act* including contracts, arrangements or understandings that have the purpose or effect of lessening competition,[53] 'cartel conduct,'[54] and, since 2017, 'concerted practices' under s 45 of the *CC Act*.[55] Cartel conduct by parties that are in competition with each other is conduct relating to contracts, arrangements or understandings in the supply or acquisition of goods or services that involve price-fixing, restrictions on outputs in production or supply chains, customer or territory allocation, bid-rigging, or collective boycotts. While concerted practices are not specifically defined in the *CC Act*, the provision is 'intended to capture conduct that falls short of a contract, arrangement or understanding' where that conduct has the purpose or effect of lessening competition.[56]

The prohibitions in s 45 or the cartel provisions in pt IV div 1 are likely to be triggered in circumstances where parties that would otherwise be in competition with each other: make a collective attempt to set the price or terms on which they sell their

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48 Frederick Hilmer, Mark Rayner and Geoffery Taperall, *National Competition Policy* (Report, 25 August 1993) 38 ('Hilmer Report').

49 John Duns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 245, 266.

50 Trade Practices Act Review Committee (Cth), *Report to the Minister for Business and Consumer Affairs* (Report, 1976).

51 Hilmer Report (n 48) 38–9.

52 *Competition Policy Reform Act 1995* (Cth).

53 *CC Act* (n 6) s 45(2).

54 Ibid ss 45AA–45AU.

55 Ibid s 45(1)(c). For discussion, see Alex Bruce, *Australian Competition Law* (LexisNexis, 3rd ed, 2019) ch 7.

56 Lindsay Foster and Hanna Kaci, 'Concerted Practices: A Contravention without a Definition' (2018) 26(1) *Competition and Consumer Law Journal* 1, 9. See also Caitlin Davies and Luke Wainscoat, 'Not Quite a Cartel: Applying the New Concerted Practices Prohibition' (2017) 25(2) *Competition and Consumer Law Journal* 173, 174–9.

services; share sensitive business information; collectively withhold their labour; or collectively refuse to sign up to new contracts unless an agreement can be reached.[57]

An application for authorisation may be made by any person, which can include any business, industry association or trade union on behalf of itself and the group. Once an application for authorisation is made, the ACCC consults with relevant parties, including the applicant, and then produces a draft determination (either authorising or rejecting the application).[58] The process can be expensive, both in terms of the necessity for legal advice in preparing an application and due to the application fees.[59] It can also be time consuming, given that authorisations generally take around six months to finalise.[60] If the authorisation is granted, it only extends to the conduct set out in the application for the purposes of the *CC Act* provisions. It does not extend to conduct that is not in the application and does not protect against liability under the common law or other legislative regimes.[61]

C *The Notification Provisions of the* Competition and Consumer Act 2010 (Cth)

In 2003, concerns with the authorisation process were raised in the *Review of the Competition Provisions of the Trade Practices Act* ('Dawson Review'), particularly in respect of the impact of the anti-competitive conduct provisions on small business actors, including the self-employed and most franchisees.[62] Submissions to the Review called for the provision of a notification process that would allow small businesses to notify proposed collective bargaining conduct and proceed with the conduct unless the ACCC objected.[63] This would enable small businesses more frequently to act collectively in their dealings with larger businesses wielding a significant degree of market power.

Considering these submissions, the Dawson Review acknowledged that many small business actors lack bargaining power when dealing with larger businesses, noting that while collective bargaining may 'at one level lessen competition', at another level, 'provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business'.[64] However, the Review members were concerned that any changes to the authorisation provisions should not reverse the general expansion of competition law that had taken place in preceding years, and that any notification provisions introduced should not become a 'de facto' mechanism to allow parties to avoid the competition provisions.[65]

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57 For consideration of the application of pt IV to self-employed workers, see McCrystal (n 31).
58 See process outlined in *ACCC Guidelines* (n 3).
59 See Daryl Dawson, Jillian Segal and Curt Rendall, *Review of the Competition Provisions of the Trade Practices Act* (2003) 118 ('Dawson Review').
60 Ibid.
61 The potential for collective bargaining arrangements to attract liability outside of pt IV of the *CC Act* (n 6) is discussed in McCrystal (n 31).
62 Dawson Review (n 59) 110.
63 See, eg, The Small Business Development Corporation, Submission No 86 to The Treasury, Australian Government, *Review of the Competition Provisions of the Trade Practices Act*, 5–6.
64 Dawson Review (n 59) 115.
65 Ibid 118.

The Dawson Review also considered whether there should be a small business exemption from the competition provisions, ultimately rejecting the suggestion, which it considered would

> have the effect of removing a substantial part of the Australian economy from the operation of this aspect of competition law and would effectively reverse many of the reforms achieved over the last decade. There would be no assessment of the public interest in relation to activities undertaken within the exception. An unfettered ability to bargain collectively would allow anti-competitive and undesirable conduct.[66]

Ultimately, the Dawson Review recommended the introduction of a notification provision for small business collective bargaining. This was subsequently enacted in the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth), taking effect from 1 January 2007.[67]

The notification provisions allow for parties to notify the same range of conduct that may be authorised by the ACCC, where the conduct involves transaction values of less than $3 million.[68] Where this criterion is met, the applicant may notify the ACCC of the proposed conduct[69] and the ACCC has 14 days to object, unless the conduct involves boycott conduct, in which case the time period is 60 days.[70] If no objection is made, the notification will stand and immunity from the relevant provisions of the *CC Act* will apply unless the ACCC subsequently objects.[71] As with authorisation, protection only extends to the conduct set out in the application and not beyond, and does not protect against liability under the common law or other legislative regimes.

One provision included in the notification provisions that was not suggested by the Dawson Review is that a notification lodged on behalf of a small business by a trade union will be invalid.[72] In the Second Reading Speech accompanying the amending Bill in Federal Parliament it was suggested that this would stop the provisions being used to pursue 'employee entitlements'.[73] However, this explanation is not satisfactory given the extensive regulation of employee matters in labour law regulation. Moreover, simply stopping a union from lodging a notice would not stop employees using the provisions if they were so inclined. Further, the exclusion could have the effect, in practice, of denying groups of small business actors access to the considerable expertise and resources of the union movement who are more seasoned actors in collective forms of agreement-making.[74]

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66 Ibid.

67 See Shae McCrystal 'Collective Bargaining and the *Trade Practices Act*: The *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth)' (2007) 20(2) *Australian Journal of Labour Law* 207.

68 Regulations passed in March 2007 increased the contract price threshold in certain industries, such as petrol retailing: see *Competition and Consumer Regulations 2010* (Cth) regs 71A–71D.

69 *CC Act* (n 6) s 93AB.

70 Ibid s 93AD(1).

71 Ibid s 93AC.

72 Ibid s 93AB(9).

73 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, 17 (Christopher Pearce).

74 For example, the Transport Workers' Union actively organises self-employed owner-drivers and routinely seeks authorisations.

The passage of the notification provisions was accompanied by statements from the incumbent Coalition Government that the aim was to make it easier for small businesses to engage in collective bargaining,[75] and by the Australian Labor Party that the changes should help ensure that power imbalances between small and large businesses are redressed.[76] However, since the passage of the amendments, the uptake rate for notifications has been low, confounding the fears of the Dawson Review that they could become a de facto mechanism enabling the avoidance of the competition provisions. In the 11 years to December 2018, only 56 notifications were made to the ACCC, 49 of which were allowed to stand.[77] At an average of only five notifications per year, it is difficult to see the notification system as a success in enabling access to collective bargaining arrangements for small businesses, including self-employed workers and franchisees. It is not clear why the provisions have had such a small uptake given the absence of research identifying the causes of this problem. However, it appears that the different process for notifications has not alleviated the difficulties that small business actors face when confronted by the necessity of establishing that their proposed conduct satisfies the public benefit test.

D *The Public Benefit Test*

The statutory test applied by the ACCC in determining whether or not to grant an authorisation or object to a notification is the 'public benefit' test.[78] The ACCC must determine whether or not the proposed collective bargaining conduct produces sufficient public benefit to outweigh any public detriment that would result from permitting the conduct to occur.

The terms 'public benefit' and 'public detriment' are not defined in the *CC Act*. Public detriment is the anti-competitive effect that results from allowing the conduct to proceed.[79] The ACCC has identified a number of 'possible anti-competitive effects from collective bargaining',[80] including: reduction in competition from joint conduct; effects on competitors and competition outside the bargaining group; and increased potential for collective activity beyond the notified collective bargaining.[81]

Public benefit is more complicated. The accepted legal meaning comes from *Re Queensland Co-Operative Milling Association Ltd*,[82] where the Trade Practices Tribunal (now the Australian Competition Tribunal) adopted a wide definition of

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75 Liberal Party of Australia, *Policy Statement: Small Business, Big Future* (6 October 2004).

76 Australian Labor Party, *Small Business and Contractors Platform* (April 2007).

77 Where conduct has already been notified, it can be 're-notified' once the time period for the original notification has passed. Therefore, a re-notification covers the same conduct as in the original notification. If re-notifications are excluded, only 40 distinct collective bargaining notifications were allowed to stand.

78 *CC Act* (n 6) ss 90, 93AC(1). With respect to contracts, arrangements or understandings that could have the effect of substantially lessening competition, the ACCC must also be satisfied that the proposed conduct would actually have the effect of substantially lessening competition before it may object: *CC Act* (n 6) ss 90, 93AC(2).

79 *ACCC Guidelines* (n 3) 8.

80 Ibid.

81 See also King (n 2) 137.

82 *Queensland Co-Operative Milling* (n 22).

public benefit including 'anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements … the achievement of the economic goals of efficiency and progress'.[83] This definition embraces a broad range of tangible and intangible benefits which can flow from permitting collective bargaining to occur. The claimed benefits must be direct by-products of the bargaining process.[84]

The public benefit test involves an assessment of the efficiencies gained through collective bargaining and how those efficiencies produce a 'benefit' to the public through 'the best use of society's resources'.[85] As noted above in Section II, in this process 'efficiency' is used in its economic sense — the test is focused on ensuring that any collective bargaining will produce the most economically efficient outcome. Efficiencies include: allocative efficiency, where resources are allocated to their most efficient use; production efficiency to minimise cost, waste and duplication; and dynamic efficiency involving investment in innovation to improve existing products or develop new products.[86] Improvements in the amount and quality of relevant information available to less informed parties has also been identified as a common public benefit.[87] These benefits must be such as to outweigh the detrimental impact on competition that collusion would entail. The test is broad enough to encompass a range of other benefits, but a more expansive approach has not been taken by the ACCC. In particular, the ACCC has been generally unwilling to accept benefits that flow to the members of the bargaining group (such as increased remuneration or decreased business tensions) as 'public' benefits, preferring benefits that flow through to consumers in the form of increased choice or reduced cost.[88] The goal here is not a 'fair' or 'equal' distribution of any resultant surplus between members of a bargaining group and the target of bargaining. An efficient outcome does not depend on who shares the spoils. The goal is the production of goods and services at the most optimally efficient cost, with price and product benefits flowing to consumers.

Similarly, the ACCC does not view any transfer in bargaining power as a public benefit, rather its focus remains fixed on benefits flowing from improved efficiency in the contracting process.[89] Rebalancing of bargaining power through a process of meaningful collective bargaining is not considered to be a public benefit in and of itself. As such, it is not perceived as a legitimate object of competition regulation and is not explicitly acknowledged as a relevant goal by the ACCC. As noted above in Section II, this is a critical departure from the way in which collective bargaining is conceived and applied in the labour law context.

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83 Ibid 508.

84 Ibid. See also Rhonda Smith, 'Authorisation and the Trade Practices Act: More about Public Benefit' (2003) 11(1) *Competition and Consumer Law Journal* 21.

85 *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357, 42,677.

86 Ibid.

87 *ACCC Guidelines* (n 3).

88 Shae McCrystal, 'Is There a "Public Benefit" in Improving Working Conditions for Independent Contractors? Collective Bargaining and the *Trade Practices Act 1974* (Cth)' (2009) 37(2) *Federal Law Review* 263, 278–9.

89 King (n 2) 127.

In applying the public benefit test, the ACCC quantifies the public benefit and public detriment for the purpose of determining if there is 'net' public benefit. In this equation, aspects of proposed bargaining that will keep public detriment low include low density in the bargaining group (where the group is only a small proportion of potential participants), low levels of existing negotiation between members of the group and the target of bargaining, and a limitation on the extent to which any eventual agreement restricts competition between members of the group.[90] Paradoxically, of course, the presence of these features in collective bargaining may ultimately weaken the chances of any effective agreement being reached by curbing the power of the collective. Further, any suggestion that a proposed contractual arrangement between the parties will be binding will be likely to produce a high degree of public detriment, overcoming any proposed public benefits. Parties to proposed bargaining generally have to demonstrate voluntariness in respect of membership of the bargaining group, participation in negotiations and the eventual agreement — that is, neither the target not the members of the group will be required to abide by its terms.[91] In other words, *voluntariness* is generally the key to ensuring that public detriment remains low enough for conduct to be permitted — but, if everything is entirely voluntary, the identified benefits themselves may never actually occur.

This point was put to the ACCC in a case involving self-employed journalists seeking authorisation to engage in collective bargaining over the terms of their contracts with large media outlets.[92] The journalists in this case were seeking to bargain with powerful multinational corporations because they were routinely subject to oppressive standard form contract arrangements that placed considerable limits on their future earning capacity. In opposing the authorisation, the media outlets expressly indicated to the ACCC that they would refuse to bargain if the authorisation was granted, and asserted that, as no public benefit would follow, the authorisation should not be made. In the event, the ACCC did grant the authorisation, but refused to permit any mechanism within the proposed collective action that was not wholly voluntary in nature for all parties concerned, either in terms of the membership of the group, binding contractual outcomes or a collective boycott.[93] 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. The potential for a collective boycott in this case that might have brought those media outlets to the table was not countenanced. However, 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.

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90 *ACCC Guidelines* (n 3) 9.

91 McCrystal (n 88) 281; Joe Isaac, 'Collective Bargaining under Trade Practices Law' (2008) 19(1) *The Economic and Labour Relations Review* 39, 54.

92 ACCC, *Application for Authorisation lodged by Media Entertainment and Arts Alliance in respect of Collective Negotiations of the Terms of Engagement of Freelance Journalists by Fairfax Media Limited, ACP Magazines Ltd, News Limited and Pacific Magazines* (Determination, Authorisation No A91204, 26 May 2010).

93 Ibid.

The decision of the ACCC in this case highlights the inherent tension in the ACCC approach to public benefit where economic efficiency is prioritised over other forms of public good. In authorising the proposed conduct, the ACCC effectively acknowledged that the extant contracting practices of those media outlets were not producing the most economically efficient outcomes. However, by refusing effectively to deal with the underlying issues of power imbalance between the parties, and insisting on a form of bargaining that focused only on economic efficiencies in the pure sense, the ACCC left the journalists with very few options. How this outcome is the most 'efficient' in the circumstances is unclear.

E *The 2015 Harper Review and the Introduction of Class Exemptions*

The limitations of the authorisation and notification provisions were acknowledged by the ACCC in its submissions to the Harper Review of competition law and policy (which reported in 2015).[94] In addition to seeking greater flexibility in how the notification provisions operated, the ACCC sought the inclusion of a power in the *CC Act* to enable the ACCC to make an exemption for collective bargaining conduct that would provide a 'safe harbour' from competition laws for relevant conduct within that exemption.[95] The ACCC sought the power to make a block exemption in circumstances where conduct is unlikely to substantially lessen competition or that results in a net public benefit.[96] The Harper Review recommended the inclusion of such an exemption power in the *CC Act* 'in order to reduce compliance and administration costs and increase certainty'.[97] The ACCC was given the power to determine such class exemptions in 2017 in new pt VII div 3, s 95AA.[98] This change recognised that providing expanded access to collective bargaining was critical. The Explanatory Memorandum to the amending Bill stated that: 'By negotiating as a collective, small business may be able to negotiate with bargaining power equal to a larger firm, and achieve a more efficient and pro-competitive outcome.'[99]

Under the new class exemption power, the ACCC may determine that identified provisions in pt IV will not apply to certain conduct where it is satisfied that the conduct would not substantially lessen competition and would be likely to result in a public benefit that would outweigh any public detriment.[100] The ACCC has the power to set conditions and limitations, and to revoke a class exemption once made.[101] An exemption can apply for up to 10 years, unless revoked earlier.[102] After extensive consultation, the ACCC announced its intention to make a class exemption

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94 ACCC, *Reinvigorating Australia's Competition Policy*: *Australian Competition & Consumer Commission Submission to the Competition Policy Review* (25 June 2014) 94–6, 108.

95 Harper Review (n 13) 404.

96 Ibid.

97 Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) [9.9].

98 Introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

99 Explanatory Memorandum (n 97) [9.11].

100 *CC Act* (n 6) s 95AA.

101 Ibid s 95AA(2).

102 Ibid s 95AA(3).

for small business collective bargaining.[103] While this exemption is yet to take effect, its enactment appears imminent. The substance of the exemption is discussed in Section IV below.

F *The Australian Competition and Consumer Commission's Shifting Position on Collective Boycotts*

A final issue relevant to the issue of collective bargaining in the commercial context is boycott conduct. One of the more significant recommendations of the Dawson Review regarding the competition provisions of the *TP Act* was its acknowledgement that a 'collective bargaining agreement between buyers to refuse to buy from a supplier in the absence of a satisfactorily negotiated price' (ie a boycott) can be considered 'to be an integral part' of collective bargaining agreements.[104] Rejecting a suggestion from the ACCC that notification of collective bargaining should not extend to collective boycotts, the Dawson Review observed that 'collective bargaining, of its nature, may involve a collective boycott' and it would not favour such a restriction.[105]

In keeping with this view, the *CC Act* allows for the authorisation, and (since 2007) the notification, of cartel conduct that includes a collective boycott of a target by a bargaining group.[106] However, in practice, collective boycotts are not approved.[107] This approach can be traced to a decision of the ACCC in 2005 involving an application for authorisation of collective bargaining that included proposed collective boycott conduct.[108] The case involved agricultural producers of chicken meat, who were at the bottom of complex supply chains and experiencing intense downward pressure on prices. At first instance, the ACCC authorised the proposed boycott noting that the bargaining group had no negotiating power as individuals and whose sunk investment costs made it very difficult for them to walk away from their businesses once established. This meant that they were price-takers and likely to remain so without the capacity to exercise some form of bargaining power.[109] However, on this first foray into authorising substantive collective boycott conduct, the ACCC was overturned on appeal to the Competition Tribunal.[110] It found that the potential for anti-competitive detriment to arise from a collective

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103 ACCC, 'Feedback Sought on Collective Bargaining Plan for Small Business' (Media Release, 6 June 2019); ACCC Draft Guidance Note (n 14).

104 Dawson Review (n 59).

105 Ibid.

106 *CC Act* (n 6) ss 88, 90.

107 An anomalous case is ACCC, *Application for Authorisation Lodged by St Vincent's Health Australia Ltd* (Determination, Authorisations Nos A91295–A91297, 12 September 2012) (revoked and substituted in Revocation and Substitution pursuant to ACCC *Application for Revocation of Authorisation A91126 and Substitution with A91425 Lodged by Lottery Agents Association of Victoria* (Determination, Authorisation No A91425, 10 September 2014)). This case involved a small group of private hospitals that were unable to form a single corporate entity due to trust rules. The boycott conduct was permitted in this case in no small part because if not for the trust instruments, the hospitals would otherwise have been able to act as a single economic entity.

108 ACCC, *Applications for Authorisation Lodged by the Victorian Farmers Federation on behalf of its Member Chicken Meat Growers* (Determination, Authorisation Nos A40093 and A90931, 2 March 2005).

109 Ibid 34. See also Isaac (n 91).

110 *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120.

boycott was too high and there was no guarantee that the collective boycott would only be used by the chicken growers to develop more 'efficient outcomes'.[111]

It has been suggested that the Competition Tribunal in this case set a standard of proof for authorisation of boycott conduct 'with which it is quite literally, impossible for any applicant to comply'.[112] Such a standard of proof cannot legally be correct given that Parliament has provided that it is possible to authorise and (since 2007) notify boycott conduct. However, subsequent to the decision, ACCC official publications suggested that authorisation of a collective boycott would be virtually impossible to obtain. For example, the ACCC's 2008 *Guide to Collective Bargaining Notifications* stated 'given that the ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements, it is unlikely to allow protection from legal action to such conduct in most cases'.[113] This approach contradicts the plain intention of Parliament to allow such conduct in appropriate circumstances.[114]

Since 2008, and in light of the fact that it must be possible to notify or authorise boycott conduct, the ACCC has softened its approach to boycotts in its official publications. In the 2011 *Guide to Collective Bargaining Notifications*, the ACCC confirms that it 'expects that strong justification would be provided to support an application for immunity for proposed collective boycott activity'.[115] However, this approach continued to intimate that proposed collective boycotts raise the presumption that any public benefits to be gained by collective bargaining would come at too high an anti-competitive cost if an associated boycott were to be permitted.

By 2014, there was a significant shift in approach by the ACCC. In their submissions to the Harper Review, the ACCC observed that collective bargaining involving collective boycott activity could be 'efficiency enhancing',[116] and noted that 'there may be a perception among small businesses and their advisers that a collective bargaining arrangement that includes the prospect of a collective boycott would not be approved'.[117] It advocated for clearer statutory provisions 'to make collective boycott proposals more likely to be approved'.[118] This included providing a longer timeframe to assess notifications involving proposed boycott conduct and the provision of a 'stop power' to allow the ACCC to terminate a collective boycott in the event of imminent serious detriment to the public.[119] The ACCC also noted that it would amend its public information to 'help address the perception that collective boycotts are unlikely to be approved'.[120]

111 Ibid [451].
112 Warren Pengilley, 'The Competition Tribunal and Chicken Meat: Do Exclusionary Provisions Have Any Future Hope of Authorisation?' (2006) 14(2) *Competition and Consumer Law Journal* 196.
113 ACCC, *Guide to Collective Bargaining Notifications* (2008) 33.
114 Pengilley (n 112) 199.
115 ACCC, *Guide to Collective Bargaining Notifications* (2011) 32.
116 Harper Review (n 13) 400.
117 Ibid.
118 Ibid 401.
119 Ibid.
120 Ibid.

The changes sought by the ACCC were included in the *CC Act* in amendments in 2017.[121] The ACCC's main publication relating to collective boycotts have also been significantly updated.[122] These Guidelines — released in 2018 — now state that '[a] collective boycott can be a useful negotiating tool to bring the target business to the table or restart stalled negotiations.'[123] Factors identified as relevant to the assessment of proposed boycott conduct include the size of the target business, the strength of competition in downstream markets, the potential and likely duration of harm to third parties, outcomes of previous collective bargaining, and limitations on boycott activity.[124] The approach taken within the 2018 *ACCC Guidelines* is more in line with the clear intention of Parliament as expressed in the *CC Act*. This signals an increased willingness on the part of the ACCC to genuinely consider proposed bargaining arrangements including boycotts. However, it is notable that the ACCC has not included any form of boycott conduct in the proposed exemption for small business collective bargaining. This means that the pre-existing authorisation and notification provisions (and the barriers embedded in these provisions) will continue to apply to any proposed boycott activity taken by the bargaining group.

IV The Proposed Small Business Collective Bargaining Exemption: A Summary

The new class exemption proposed by the ACCC will provide a 'safe harbour' for three categories of 'eligible' businesses to engage in specific forms of collective bargaining without fear of breaching key provisions of the *CC Act*.[125] The Exposure Draft Determination, provides that:

> (1) A corporation with an aggregated turnover of less than $10 million in the preceding financial year can form or join a collective bargaining group to negotiate with suppliers or customers about the supply or acquisition of goods or services.[126]

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121 *CC Act* (n 6) ss 93ACA, 93AG, introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth). Section 93AG enables the ACCC to make a 'stop notice' where there has been a material change of circumstances since the conduct was notified or authorised and where the ACCC reasonably believes that serious public detriment is imminent or has occurred. This power is similar in nature to that currently possessed by the Fair Work Commission, under s 424 of the *FW Act* (n 20), to suspend or terminate protected industrial action threatening to endanger the life, health, safety or welfare of the population, or part of it, or the economy.

122 *ACCC Guidelines* (n 3) 33.

123 Ibid 10.

124 Ibid.

125 Immunity is granted in respect of ss 45AF, 45AG, 45AJ, 45AK (offence and civil penalty provisions that deal with making a contract containing a cartel provision) and s 45 (contracts that restrict dealings or affect competition, including concerted practices).

126 Exposure Draft Determination (n 14) s 7(2).

(2) Franchisees who have franchise agreements with the same franchisor[127] can collectively bargain with their franchisor regardless of their size or other characteristics.[128]

(3) Fuel retailers who have fuel re-selling agreements with the same fuel wholesaler[129] can collectively bargain with their fuel wholesaler regardless of their size or other characteristics.[130]

Each member of the group must undertake a self-assessment as to whether they meet the eligibility criteria.[131] So long as a business is eligible to rely on the class exemption, there is no limit on the size of the bargaining group. Similarly, if the business falls within the relevant categories set out above, and complies with the notification procedure noted below, they can seek to collectively bargain with any target business (regardless of the size/turnover of the target business). However, in practice, no business can be compelled to join the bargaining group or engage in collective bargaining — which presents a significant structural barrier to effective bargaining (as we discuss in more detail in Section V below).[132]

The Exposure Draft Determination does not define 'collective bargaining'. Instead, it describes collective bargaining conduct as: the making of an 'initial contract'; engaging with one or more persons 'in a concerted practice' in relation to an initial contract; or giving effect to an initial contract.[133] An 'initial contract' is defined as being a contract (or proposed contract) that is between a corporation and one or more other persons and that is about the supply of goods or services to, or acquisition of goods or services from, the target (or targets).[134]

While the scope of the collective bargaining conduct is potentially quite broad, there are a number of express limitations on the class exemption for collective bargaining set out in the Exposure Draft Determination.[135]

First, any contract struck between the group and the target cannot contain a 'prohibited boycott provision' — that is, a provision that has the direct or indirect

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127 Key terms such as 'franchisee', 'franchise agreement' and 'franchisor' are defined by reference to the *Franchising Code* (set out in sch 1 of the *Competition and Consumer (Industry Codes — Franchising) Regulation 2014*). See also Exposure Draft Determination (n 14) s 5.

128 Exposure Draft Determination (n 14) s 7(3).

129 Key terms such as 'fuel retailer', 'fuel re-selling agreement' and 'fuel wholesaler' are defined by reference to the Oil Code (set out in sch 1 of the *Competition and Consumer (Industry Codes — Oil) Regulation 2017*). See also Exposure Draft Determination (n 14) s 5.

130 Exposure Draft Determination (n 14) s 7(4). If a group of franchisees or fuel retailers wish to collectively bargain with a target business (that is not the franchisor or fuel wholesaler respectively), then the class exemption will only apply if the franchisee/fuel retailer meets the general definition of 'small business' (ie it has an aggregated turnover of less than $10 million).

131 There has been disquiet expressed about the capacity of small businesses to undertake this self-assessment without the benefit of legal advice and in light of the more expansive prohibition on 'concerted practices': see, eg, Institute of Public Accountants-Deakin SME Research Centre, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (21 September 2018) 10 ('*Institute of Public Accountants-Deakin SME Research Centre Submission*').

132 ACCC Draft Guidance Note (n 14) 5.

133 Exposure Draft Determination (n 14) s 7(2).

134 Ibid s 6.

135 Ibid div 2.

purpose of preventing, restricting, or limiting the supply of goods and services to, or acquisition of goods and services from, the target(s).[136] The ACCC Draft Guidance Note to the class exemption acknowledges that a collective boycott may help the group achieve some of the benefits of collective bargaining, especially when they are dealing with an unwilling target, but also notes the ACCC's oft-repeated view that 'collective boycotts can be costly and damage a wide range of market participants, including the group that is engaging in the boycott'.[137] It also makes it clear that the class exemption does not provide, and is not intended to provide, any protection for collective boycotts. We will return to this issue in Section V below.

Second, the legal protection afforded under the class exemption only applies where the relevant notification procedure has been followed. While there is some suggestion that businesses which meet the eligibility criteria of the class exemption will gain 'automatic protection',[138] this is not strictly correct. Instead, to be covered by the exemption, it is necessary for eligible businesses, or their nominated representative, to provide notice to the ACCC in the requisite form[139] and set out all relevant information, including: the bargaining group;[140] the relevant target(s) or type of target business(es);[141] the subject on which the group wishes to bargain; and contact details for the group (which may be any member of the group or a nominated representative). This notice must be provided to the ACCC within 14 days of the date on which the group commenced collective negotiations.[142] There is no fee for lodging the notice, but once received, the notice will be placed on a public register maintained by the ACCC. A copy of the notice must also be provided to the target business when the group or their representative first approaches the target business.[143]

The Draft Exemption Notice prepared by the ACCC is designed to be completed and filed without legal advice. The use of generalised terms is intended to allow a level of flexibility so that future (and possibly unforeseen) changes in the bargaining group and/or target business(es) may be accommodated.[144] But the lack of categorical descriptions of these groups, combined with the blurred boundaries of many new or forming business associations, may lead to uncertainty about who falls

136 Ibid s 8.
137 ACCC Draft Guidance Note (n 14) 2–3.
138 ACCC, *Collective Bargaining Class Exemption Notice: Draft for Consultation* (June 2019) ('Draft Exemption Notice').
139 Ibid.
140 The Draft Exemption Notice states that if there is a small group that is unlikely to change, the names of all members may be listed. Alternatively, 'a general description of the members of the group' may be provided in the Notice. See ibid item 1.
141 The Draft Exemption Notice states that if there is one particular target business or a small number of known target businesses, the names of each target business may be listed. However, it is sufficient to include 'a general description of the type of target businesses the group intends to collectively bargain with'. See ibid item 2.
142 Exposure Draft Determination (n 14) s 9.
143 Ibid s 10.
144 Australian Chamber of Commerce and Industry, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (12 July 2019) 1 ('*Australian Chamber of Commerce and Industry Submission*').

within the scope of the class exemption notice and who is able to rely on the legal immunity this provides.[145]

Third, the class exemption only applies to collective bargaining conduct undertaken by eligible corporations[146] if they reasonably expect to make one or more *contracts* with one or more targets about the supply or acquisition of goods or services. This is somewhat confusing given that the Draft Guidance Note also suggests that joint tendering, a joint response to a tender and group mediation[147] are all covered by the class exemption.[148] Individual businesses may seek to form an association in order to further their interests, but this may not necessarily involve creating any common law contract. For example, the Franchise Council of Australia noted that 'in most cases a group of franchisees who are collectively dealing with a franchisor will not have "entering a contract" as their objective'.[149] Instead, they may seek only 'ongoing consultation on network changes'.[150] In a similar vein, the Australian Government Department of Jobs and Small Business (as it was then known)[151] submitted that allowing 'franchisees to, for example, collectively negotiate the pricing of inputs, aspects of contracts and mediate collectively may assist in restoring the power imbalance between franchisors and franchisees'.[152] However, in circumstances where parties do not reasonably expect to, or intend to, make a contract, it is not clear whether the collective activity will fall within the scope of the class exemption and how the relevant subject matter should be articulated in the class exemption notice.

In addition, there are a number of implicit limitations on the way in which the class exemption is intended to operate in practice.

Information-sharing is only permitted under the Exposure Draft Determination when it is 'necessary' to facilitate the collective bargaining process.[153] If group members intend to share or use information that goes outside the collective bargaining negotiations, the class exemption will not apply and separate authorisation or notification will be required.[154] Further, the class exemption does

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145 Franchise Council of Australia, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (3 July 2019) 5 ('*Franchise Council of Australia Submission*').

146 The requirement set out in s 11 of the Exposure Draft Determination (n 14) appears only to apply to eligible corporations seeking to rely on s 7(2) and does not refer to franchisees or fuel retailers who are granted immunity under s 7(3) and s 7(4), respectively.

147 Group mediation is only expressly mentioned with respect to franchisees and fuel retailers. It is not clear from the Draft Guidance Note whether group mediation is also contemplated for eligible corporations outside of franchise networks or fuel retail arrangements: see ACCC Draft Guidance Note (n 14) 4.

148 Ibid 4–5.

149 *Franchise Council of Australia Submission* (n 145) point 7.

150 Ibid point 8.

151 From May 2019, this Department is now known as the Department of Employment, Skills, Small and Family Business.

152 Department of Jobs and Small Business (Cth), Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (October 2018) 2.

153 ACCC Draft Guidance Note (n 14) 7.

154 Ibid (n 14) 7.

not 'override any existing legal or contractual obligations between the parties, such as confidentiality clauses'.[155]

Finally, in the Draft Guidance Note, there is a suggestion that the ACCC will retain the power to withdraw the benefit of the class exemption from particular businesses if the ACCC is satisfied that the business is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits.[156] This places businesses in a precarious position. Despite the existence of the exemption, they will still have to remain vigilant to ensure that any collective bargaining conduct does not lead to outcomes that the ACCC might consider to have become anti-competitive in effect. Until the exemption is in place and operational, when such a line might be crossed will be a matter entirely of speculation.

V Analysis: Problems with the Proposed Class Exemption

A *Benefits of the Class Exemption*

The introduction of a class exemption for collective bargaining is a good step in providing a simple and meaningful mechanism for accessing collective bargaining by small business. It will relieve pressure on the flagging notification and authorisation processes and provide a greater degree of certainty in the form of clearer, binding rules for eligible businesses.[157] The class exemption will also be free of cost,[158] much quicker in affording legal protection for collective bargaining conduct and provide for longer term protection.[159] While the class exemption is a welcome development, ultimately the class exemption 'is merely an immunity, not an enhancement of rights'.[160] In our view, the exemption does not go far enough to ensure that the purported benefits of collective bargaining can be realised in practice.

B *Conflicting Rationales for the Class Exemption*

The intention behind the class exemption is to provide small businesses with immunity from the *CC Act* for collective bargaining conduct — an immunity that is already enjoyed by employees engaging in collective activities. However, the rationale for creating this 'safe harbour' is distinct in the competition law context, as compared to labour law. We argue that misplaced assumptions about the utility of collective bargaining in the absence of other collective rights — such as the right

155 Ibid.
156 *CC Act* (n 6) s 95AA(1).
157 Brent Fisse, 'Australian Cartel Law: Biopsies' (Speech, Competition Law Conference, 5 May 2018) 32.
158 In comparison, there is a lodgement fee of $1,000 in relation to notifications and $7,500 in relation to authorisations (albeit the ACCC can waive the authorisation lodgement fee in whole or part if the fee is unduly onerous). See *ACCC Guidelines* (n 3) 5.
159 The proposed class exemption provides legal protection for up to 10 years, whereas the notification process currently provides three years of legal protection and authorisation processes generally provide legal protection for a period between five to 10 years. See ibid.
160 *Franchise Council of Australia Submission* (n 145) point 3.

to strike or engage in boycott activity — has significant flow-on effects for businesses seeking to engage in effective collective action.

The ACCC's stated rationale for the class exemption is to increase market efficiencies and reduce transaction costs, rather than rebalance bargaining power.[161] This is in line with the traditional policy justifications used in competition law and surveyed in Section III above. This approach was echoed by the Franchise Council of Australia:

> 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.[162]

In contrast, other submissions made to the ACCC during the consultation period perceived collective bargaining through a conceptual lens more aligned with labour law, namely that collective bargaining is a key mechanism for reducing possible bargaining power imbalances.[163] For example, the Victorian Government stated that:

> Many industries in Australia are characterised by significant disparities in bargaining power between small businesses and independent contractors on the one hand and larger entities on the other hand. These disparities often result in sub-optimal outcomes for small businesses and independent contractors in terms of the prices they are paid for goods and services and their terms of trade with these larger entities. By addressing these disparities in bargaining power through simplified collective bargaining mechanisms, small businesses and independent contractors will be able to achieve fairer outcomes and avoid the imposition of onerous terms and conditions in their contracts.[164]

These arguments are particularly pertinent when considering self-employed workers and franchisees, who may experience a high degree of dependency in their working arrangements. The New South Wales ('NSW') Small Business Commissioner highlighted, in particular, the inequality in bargaining power experienced by workers in the gig economy — who are generally treated by labour engagers as 'micro businesses', but experience significant vulnerability and inequality with those same engagers.[165]

However, we believe that any rebalancing of bargaining power through collective bargaining (or otherwise) is unlikely to occur without addressing a

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161 *ACCC Discussion Paper* (n 1).

162 *Franchise Council of Australia Submission* (n 145) point 10.

163 Federal Chamber of Automotive Industries, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (3 July 2019) 1.

164 Victorian Government, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (10 June 2019) 2 ('*Victorian Government Submission*'). See also New South Wales ('NSW') Small Business Commissioner, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (3 July 2019) 3 ('*NSW Small Business Commissioner Submission*').

165 *NSW Small Business Commissioner Submission* (n 164) 51–9.

multitude of structural barriers that small businesses face in their dealings with larger businesses. Regulatory structures adopted for labour laws provide a context through which these challenges can be considered.

C *Residual Structural Barriers to Effective Collective Bargaining*

The concept of 'bargaining structures' is derived from various comparative and historical studies of collective bargaining arrangements (predominantly in the labour law context).[166] While there are some differences between these studies, scholars have generally sought to examine, compare and critique bargaining structures through a conceptual taxonomy consisting of five 'dimensions'; namely, the status, agent, level, scope and coverage of bargaining.[167] In this section, we provide a short explanation of each of the five dimensions before considering where the current proposed class exemption sits within this analytical framework.

1 *Status of Bargaining*

The first dimension, and possibly the most important, refers to the status of bargaining, which is broadly understood as: the degree of formality in collective agreement-making procedures, including regulation of bargaining tactics; and the enforceability of the bargains struck between the parties.[168]

(a) *Degree of Formality in Agreement-Making and Bargaining Tactics*

There are arguably two critical questions when it comes to the agreement-making process itself:

(1) Are any rules imposed on the behaviour of parties who seek to engage in collective bargaining?
(2) To what extent can parties take lawful industrial action (or collective boycotts) in aid of bargaining?

We deal with each of these questions in turn.

First, neither the *CC Act* nor the class exemption set out any rules or processes governing agreement-making or bargaining tactics once immunity from the *CC Act* is granted. Unlike the complex regulations that exist in the *FW Act* regulating

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166 See, eg, Keith Sisson, *The Management of Collective Bargaining: An International Comparison* (Blackwell, 1987); Hugh Clegg, *Trade Unionism under Collective Bargaining* (Blackwell, 1976); Mark Bray and Peter Waring, 'The Rhetoric and Reality of Bargaining Structures under the Howard Government' (1998) 9(2) *Labour and Industry* 61; Robert Macklin, Miles Goodwin and Jim Docherty, 'Workplace Bargaining Structures and Processes in Australia' in David Peetz, Alison Preston and Jim Docherty (eds), *Workplace Bargaining in the International Context* (Department of Industrial Relations (Cth) Research Monograph No 2, 1993).

167 These dimensions are taken from Mark Bray et al, *Employment Relations: Theory and Practice* (McGraw Hill Australia, 4th ed, 2018) 382.

168 According to Bray et al, the status of bargaining also encompasses the recognition of employee representatives for bargaining purposes: ibid. However, here, we discuss this issue in the context of the second dimension of bargaining agents.

collective bargaining by employees,[169] the *CC Act* leaves both the processes and outcomes of any associated collective bargaining to regulation under the general commercial law. There are no formalities for the process of making contracts, there are no rules governing the conduct of the parties, and there is no express regulation of bargaining tactics.

This absence of regulation may have significant repercussions. Parties with no experience or understanding of bargaining processes may struggle to understand how they should go about engaging in negotiations without any guiding framework, something that undermines the cost reductions purportedly associated with the exemption. Further, 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 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 longstanding and high-performing dealerships.[170] Similarly, in July 2018, a Foodora delivery rider claimed that he had been dismissed from the Foodora platform for publicly talking about his terms and conditions.[171] If the right to collective bargaining under the *CC Act* is to be meaningful, there must be protection in respect of the exercise of those rights.[172] The NSW Small Business Commissioner has argued that where target businesses hold superior bargaining power, they are

> also likely to possess the capacity and resources to take retributive action against the members of a collective. This may subvert the collective bargaining process; indeed, the spectre of retribution may disincentive a potential collective from forming at all.[173]

The NSW Small Business Commissioner recommends that the exemption 'include provisions affording members of a collective protection against retributive action undertaken by a target', protections which are supported by penalty provisions and enforcement oversight.[174] The importance of such protections in the labour law context is very well understood and we agree that the inclusion of appropriate provisions is critically important to protect the interests of members of any bargaining group.

The second critical question in relation to the agreement-making process is the extent to which parties can take lawful industrial action. As already discussed,

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169 See, eg, McCrystal, Creighton and Forsyth (n 37).

170 Motor Trades Association of Australia, Submission to the Senate, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (4 May 2018) 21.

171 David Marchese, 'Foodora Rider Fights Dismissal from Food Delivery Service in Australian First', *ABC News* (online, 3 July 2018) <https://www.abc.net.au/news/2018-07-03/foodora-rider-fights-dismissal-from-food-delivery-service/9934138>.

172 Independent contractors are protected in the exercise of workplace rights by s 340 of the *FW Act* (n 20). This includes the exercise of rights arising under a workplace law. However, the relevant definition of 'workplace law' in *FW Act* (n 20) s 12 does not appear to encompass the *CC Act* (n 6).

173 *NSW Small Business Commissioner Submission* (n 164).

174 Ibid.

the ACCC has restricted the class exemption to conduct short of a collective boycott.[175] There remains a tension about how to resolve the perceived public benefit and detriment in respect of proposed boycott conduct.

The *CC Act* permits authorisation and notification of proposed collective boycott conduct, and the class exemption provision could encompass collective boycott conduct.[176] Instead the status quo has been maintained whereby, in practice, there seems to be almost no circumstances when such conduct will be authorised. Without the realistic ability to threaten, or take, a collective boycott, groups of small businesses and self-employed workers have no way to press their claims if target businesses refuse to deal collectively. As noted above in Section IIID, this was one of the substantial obstacles that faced freelance journalists when they sought to bring media outlets to the bargaining table and one of the major reasons why the collective bargaining bid ultimately failed to make significant gains.

This concern has been ventilated in submissions to the ACCC in respect of the class exemption. The Australian Automotive Dealer Association observed that franchisors have the right to ignore any collective bargaining notice and that this

> will severely limit the utility of the class exemption in negotiations between franchisor and franchisees. While it may be that such behaviour could be curbed by the judicious use of public and media pressure, it remains a likely tactic for the less ethical franchisors, particularly when such decisions are made in corporate headquarters overseas.[177]

Similar concerns have been raised in relation to workers in the gig economy. In particular, it was submitted that the proposed class exemption

> is likely to be ineffective in assisting these microbusinesses to address the bargaining power disparity that they face. A core attribute of the draft exemption is that it would not compel a target to engage with a collective. Given the totality of bargaining power held by a principal, it is most unlikely to have any incentive to engage with any contractors' collective.[178]

What remains unclear is whether the ACCC will, in the future, move significantly in its approach to dealing with authorisations or notifications that include proposed collective boycott conduct. As discussed above, in its submissions to the Harper Review, the ACCC expressed frustration that applicants for authorisations and notifications were not proposing collective boycott activity, which, it observed, could be 'efficiency enhancing' in some circumstances.[179] While recent ACCC publications signal a more expansive approach to collective boycotts,[180] there has not yet been a significant shift in practice.

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175 *ACCC Discussion Paper* (n 1) 4.
176 *CC Act* (n 6) ss 88(1), 93AB(1A), 95AA(1).
177 Australian Automotive Dealer Association, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (4 July 2019).
178 *NSW Small Business Commissioner Submission* (n 164) 9–10.
179 Harper Review (n 13) 400.
180 *ACCC Guidelines* (n 3); see above n 122–4 and accompanying text.

(b) *Enforceability of Bargains*

As noted above in Section III, 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. The class exemption is framed on the premise of common law principles relating to binary contracts and does not directly contemplate the way in which multi-party agreements are made, implemented or enforced. Under the current proposed model, it appears that any arrangements produced through collective bargaining 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.[181] 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*.[182] 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 agreements enforceable and by enabling oversight of agreements once created.[183]

One feature of ACCC authorisations, and of permitted notifications 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. Binding agreements between the members of the collective or between the collective and the target are characterised 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 made possible through collective bargaining will only follow if the parties are able to create some form of binding agreement.

2 *Bargaining Agent*

The agents of collective bargaining refer to the individual or organisation that represents the bargaining group and/or the target business. In industrial relations, the bargaining agent has historically been the relevant trade union, but in more recent years in Australia it has extended to include non-union actors.[184] The role of the

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[181] See, eg, *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235, discussed in McCrystal (n 31).

[182] *FW Act* (n 20) pt 2-4.

[183] A range of different models and some potential solutions in respect of potential collective bargaining by self-employed workers are explored in Shae McCrystal 'Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada' (2014) 30(2) *International Journal of Comparative Labour Law and Industrial Relations* 217 and Shae McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37(3) *Melbourne University Law Review* 662.

[184] Under the *FW Act* (n 20) s 176, an employee bargaining representative can be a trade union or any person appointed in writing by a relevant employee: see Rosalind Read, 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?' in Shae

bargaining agent is to act on behalf of the group, enabling the pooling of resources and expertise, and allowing the group to act with one voice. In the labour law context, there is an emphasis on the importance of the independence of the bargaining representative, and the ability of the agent to act for the collective without being undermined in that representative role.[185]

The Exposure Draft Determination provides that the collective bargaining class exemption notice may be made by a member of the bargaining group itself, or an outside representative of the group, such as an industry association, cooperative, professional body or private consultant,[186] but not by a trade union[187] (albeit a trade union is permitted to represent groups in their negotiations).[188] The Draft Guidance Note observes that this is consistent with the notification provisions of the *CC Act*. This is true. However, exclusion of trade unions from making a class exemption notice is not aligned with the authorisation provisions (which permit a trade union to lodge authorisations).

The exclusion of unions from creating a class exemption notice is unnecessarily restrictive, especially when it comes to self-employed workers who have frequently had the benefit of trade union representation, such as owner-drivers and freelance journalists. It also appears to unjustifiably privilege advocates or groups that operate outside of the registered organisations regime, and may have the effect of leading groups to mistakenly assume that they cannot have the benefit of assistance from a relevant trade union in acting collectively. This would be unfortunate, given that trade unions have critical expertise in bargaining — expertise that is not widely available elsewhere. Further, the independence of trade unions is well established, and their use in this context may assist in ensuring the independence and integrity of bargaining agent representation.

3 *Level of Bargaining*

The level of bargaining refers to where bargaining takes place: with a single target business or multiple target businesses; across an industry or business network; and/or across enterprises in a particular locality, region or state/territory. The manner in which this is approached in labour law contexts varies markedly in different bargaining regimes (and the stringent regulation therein). In Australia, the *FW Act* allows for bargaining to take place at both single-enterprise and multi-enterprise (industry) level, but presently only permits coercive conduct in the form of strike action to take place in the context of single-enterprise collective bargaining. This reflects a policy preference for single-enterprise bargaining.[189]

McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 69.

185 See further Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining under the *Fair Work Act 2009*' (2012) 25(2) *Australian Journal of Labour Law* 130.

186 Exposure Draft Determination (n 14) s 9(2)(b). If a representative is acting on behalf of the bargaining group, they do not need to meet the $10 million turnover threshold: ACCC Draft Guidance Note (n 14) 6.

187 Exposure Draft Determination (n 14) s 9(2)(c).

188 ACCC Draft Guidance Note (n 14) 6.

189 *FW Act* (n 20) s 413(2).

In the competition context, the level at which bargaining takes place encompasses the markets within which the participants operate and the degree of market share represented by the bargaining group or the target. While the class exemption implicitly reflects general contractual principles, it is clear that anything beyond single-enterprise bargaining will displace these assumptions. The proposed class exemption currently imposes no limit on the size or composition of the bargaining group. Nor are there any caps on the number of target business(es) that may be approached. While this contrasts markedly with the *FW Act*, it is arguable that the restrictions on collective boycott activity means that it is relatively unlikely that a bargaining group would have sufficient organising capacity or bargaining power to strike an industry-wide or nation-wide agreement. Moreover, given that the ACCC has reserved the power to withdraw the benefit of the class exemption if it finds that a business (or group of businesses) is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits, it is likely that bargaining exceeding certain limits may be subject the ACCC intervention.[190]

4 *Scope of Bargaining*

Bargaining scope refers to those issues that may be the legitimate subject of bargaining. In industrial relations, especially in the past 20 years, the scope of collective agreements has been the source of much debate, especially in relation to provisions protecting trade union rights. In comparison, the current proposed class exemption is largely silent as to the permitted scope of bargaining — with the notable exception that any provision relating to, or permitting, a collective boycott is prohibited.[191]

On the one hand, this means that the possible scope of bargaining may be quite broad. However, as noted above in Section IV, the class exemption imposes some express and implied limitations on the bargaining scope.

First, as already discussed, the class exemption (much like the existing notification and authorisation provisions) protects individuals from liability under the *CC Act*, but not further. The exemption has the effect of removing *CC Act* impediments to collective bargaining, but there are no regulatory provisions governing what might happen next. This may create substantial legal and practical problems for participants in collective bargaining. The Franchise Council of Australia highlighted the limits of the class exemption, submitting 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

[190] *CC Act* (n 6) s 95AA(1).
[191] Exposure Draft Determination (n 14) s 8.

- override statutory obligations, including the duty of good faith under the Franchising Code of Conduct.[192]

Another critical issue that goes to the scope of bargaining relates to the extent to which information-sharing is permitted (or not) under the class exemption. There is a lack of clarity with respect to this issue and this may present substantial risk to group members seeking to engage in collective bargaining. This uncertainty partly stems from the fact that 'what is "necessary" to facilitate the collective bargaining process is not clearly defined'.[193] Moreover, the draft guidance material suggests that what is 'necessary' may depend on the nature of the relevant bargaining group and the scope and subject of the proposed bargaining.[194] In practice, sharing information around contract terms between group members may be required in order to agitate for improved terms and conditions via collective bargaining. However, such information is often classed as commercially sensitive, if not confidential. Sharing this information may be permitted under the proposed class exemption, but place group members in breach of contract.[195]

In some circumstances, information-sharing may constitute a breach of the prohibition on concerted practices or the criminal cartel provisions.[196] For example, in relation to franchise relationships, the 'vague'[197] boundaries of the immunity provided by the class exemption — particularly with respect to information-sharing — may place franchisees at risk of breaching competition laws. For example, if franchisees share information about issues outside the direct subject of collective bargaining (for example, around divisions of markets, setting prices, cost structures, customer lists and/or proprietary information), this arguably lies beyond the scope of the class exemption.[198] There is also uncertainty about the legal position of group members, and the status of collective bargaining more generally, where one member has sought to inappropriately share information with the group, or where information has been shared during negotiations, but no collective agreement is ultimately reached.[199]

5 *Coverage of Bargaining*

This final dimension of bargaining structures is intended to direct attention towards who is covered by the bargained outcomes. The *FW Act* has detailed provisions relating to the application and coverage of enterprise agreements. There is a noticeable lack of detail on this issue with respect to collective agreements made under the auspices of the proposed class exemption. The ambiguous legal status of the agreements, combined with the loose definition of who falls within the relevant

192 *Franchise Council of Australia Submission* (n 145) point 1.
193 *Australian Chamber of Commerce and Industry Submission* (n 144) 3.
194 ACCC Draft Guidance Note (n 14) 7.
195 *Institute of Public Accountants-Deakin SME Research Centre Submission* (n 131) 4.
196 *Franchise Council of Australia Submission* (n 145) 3. See also *Victorian Government Submission* (n 164) 6.
197 *Franchise Council of Australia Submission* (n 145) point 2.
198 Ibid. See also *Victorian Government Submission* (n 164) 6.
199 *Victorian Government Submission* (n 164) 6. See also *Institute of Public Accountants-Deakin SME Research Centre Submission* (n 131) 10–11.

bargaining group and/or who is the target business(es), means the question of who is ultimately covered by the collective agreement is a complex one.

This issue is likely to become further complicated where one member of the bargaining group has made an incorrect self-assessment about their eligibility to engage in collective bargaining. The Draft Guidance Note suggests that ongoing negotiations will not fall foul of *CC Act* in these circumstances and that all other eligible members of the bargaining group remain unaffected and retain their legal protection. However, there continues to be a lack of clarity about whether this has any effect on the legal status and coverage of the concluded agreement.

VI Conclusion

The introduction of a class exemption for collective bargaining for small businesses is a positive step, and one that is long overdue. In labour law, collective bargaining is considered an essential tool for correcting inherent imbalances of bargaining power. Traditionally, this rationale has not been widely accepted in the realm of competition law. Rather, collective bargaining — as perceived through an economic lens — is a mechanism for addressing market failure, improving contractual efficiencies, and correcting information asymmetries.

This article has traced the history of collective bargaining in the commercial context. Our detailed survey shows that policymakers have softened their stance towards collective bargaining over the course of the last 50 years — from an outright prohibition on restrictive trade practices, to reluctant acceptance of collective bargaining where a public benefit can be clearly evidenced. The proposed class exemption represents not just the most recent development, but the most progressive step in this regard. Our review of ACCC materials — in relation to the class exemption specifically and collective boycotts more generally — shows that the regulator is increasingly comfortable with the notion that collective bargaining produces public benefit and that collective boycotts can produce economic efficiencies. However, we argue that while the class exemption is being introduced as a reaction to the failures of the earlier authorisation and exemption processes to produce meaningful collective bargaining for small businesses, it repeats many of the failings of those models. Had the exercise been approached from the perspective of designing a more permissive model of bargaining that would actively promote collective agreement-making, lessons learned in the labour law context might have been drawn upon to assist in minimising those failings.

By applying the dimensional analysis developed by industrial relations theorists, and by examining key elements such as status, level and coverage of bargaining, we show that there are limited structural supports in place to encourage and facilitate effective collective bargaining. Indeed, the ACCC has promulgated remarkably few rules regarding the context, content and level of lawful collective bargaining. Instead, the proposed class exemption appears to establish a bargaining regime where the parties themselves are free to determine the processes and outcomes of bargaining, so long as it remains non-coercive throughout.

However, it is this very lack of regulatory context that may inhibit the development of meaningful bargaining. The Exposure Draft Determination, as well as the Draft Guidance Note and other materials, are noticeably silent on how to fruitfully engage in collective bargaining, especially when dealing with a reluctant target. There is also limited information about who is covered by the concluded agreement and how one might enforce its terms. While the class exemption creates immunity from competition law breaches, it does very little to create a functional collective bargaining system.

Although this assessment may be disheartening, we also recognise that there are highly-developed and well-structured systems of collective bargaining already in operation (albeit they have been established in the context of employment relationships, rather than business-to-business relationships). Nonetheless, we believe that there is value in looking across the regulatory aisle, so to speak, in seeking to reimagine collective bargaining under the *CC Act*. In designing a functional collective bargaining system for the commercial context, it is important to consider how each of the five critical bargaining dimensions — that is, the status, agent, level, scope and coverage of bargaining — will be addressed. In our view, an important starting point would be to enhance the binding and enforceable nature of any concluded collective agreement. Rather than rely on common law contractual principles that are ill-suited to multi-party agreements, finalised collective agreements should be given statutory force. A second critical step is to protect bargaining parties from any form of retribution, retaliation or victimisation. Protecting the right of freedom of association is a longstanding principle in the labour law sphere and remains an essential feature of the current collective bargaining framework under the *FW Act*. The right to withdraw labour, or engage in a collective boycott, is another crucial, albeit far more controversial, element. In our view, all of these issues need to be given more detailed consideration if policymakers are serious about promoting small business collective bargaining, protecting the parties involved, and producing viable and valuable outcomes.

POSTSCRIPT

After more than two years of public consultations, the ACCC announced in October 2020 that it had finalised the small business collective bargaining class exemption and expects that the exemption will be available for use by small businesses in early 2021. The *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* is on much the same terms as the Exposure Draft Determination released in June 2019 and referred to extensively in this article. One notable change relates to the information-sharing provisions. The Determination makes clear that the class exemption will only apply if the information is shared or used by the corporation to engage in collective bargaining and the corporation believes that it is 'reasonably necessary' to share or use that information for that purpose. In short, whether information-sharing is covered by the class exemption will be assessed on an objective, not subjective, basis. Before the Determination can take effect, it and the accompanying Explanatory Statement must be lodged for registration on the Federal Register of Legislation and tabled in Parliament. It will then be subject to a parliamentary disallowance period of 15 sitting days, after which the ACCC will set a commencement date for the class exemption.