



INSTITUTE OF
**PUBLIC
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**Response to ACCC
Small Business
Collective
Bargaining -
Notification and
Authorisation
Guidelines**

23 FEBRUARY 2018

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the Small business collective bargaining – Notification and authorisation guidelines which were issued for consultation in December 2017.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The ability to collectively bargain is of great benefit to the small business community. The IPA welcomes the amendments introduced by the Harper Reforms which will hopefully result in a greater uptake of the collective bargaining notification procedure.

The IPA's submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou at vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours sincerely



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23 February 2018

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The ability to collectively bargain is of great benefit to the small business community.

“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.” [Explanatory Memorandum to *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, para 9.11]

The IPA welcomes the amendments introduced by the Harper Reforms which will hopefully result in a greater uptake of the collective bargaining notification procedure.

The IPA does not have any specific comments on the *Small business collective bargaining – Notification and authorisation guidelines – draft for consultation (Collective bargaining guidelines)*. However, the recent changes to competition law in Australia warrant consideration in the context of collective bargaining.

Collective bargaining and concerted practices

The introduction of the prohibition against concerted practices marks a significant widening of Australia’s competition law. The IPA has already provided a submission to the ACCC in response to its consultation on the *Interim Guidelines on concerted practices* (IPA Submission, 24 November 2017). The concerted practices prohibition is also relevant in this context.

Information shared to negotiate a collective bargaining agreement could potentially lead to a concerted practice. This is recognised by the ACCC in footnote 2 of the *Collective bargaining guidelines* (page 2). Although a successful authorisation or notification will exempt the parties from the application of section 45(1)(c), it is not clear what the position will be if a group of small businesses lodge an application for a collective bargaining authorisation or notification but subsequently fail. Alternatively, it is possible that a proposed collective bargaining arrangement does not proceed for commercial reasons.

Prior to seeking authorisation or notifying the ACCC, a certain amount of information about pricing, which businesses will be dealt with and the terms and conditions of doing business will be shared amongst the small businesses. This information may also have been discussed with the target business (as suggested in the *Collective bargaining guidelines* (p 11)). Information once known is not able to be ‘un-known’.

The *Collective bargaining guidelines* state that “the majority of collective bargaining notifications received by the ACCC have been allowed to stand” (page 14), so it is possible that this risk is relatively low. However, it cannot be ignored.

The benefits for small business of collective bargaining are obvious – economies of scale (with resulting costs savings and consumer benefits) can be achieved in a way that is not possible for the businesses individually. The Harper Review recognised the significance of the

collective bargaining notification process for small business and thought that it could be more widely used. To achieve that, it recommended the reforms set out in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (see Explanatory Memorandum, para 9.12). This objective will be defeated if small businesses are reluctant to consider collective bargaining because of a nervousness about breaching the concerted practices provision.

In *theory*, this risk could be avoided by an independent party (such as a trade or industry association or other representative), discussing the potential for a collective bargain with each of the proposed members and the potential target/s, individually. The representative could participate in pre-lodgement discussions with the ACCC and then lodge the authorisation application or notification. In this way, the individual members do not receive or share any sensitive information with other members until after the authorisation is granted or the notification lodged.

Although this presents a theoretical solution, it is likely to deter cooperation in practice. The representative will have the unenviable responsibility of ensuring that commercially sensitive information is not shared. It also excludes the very people designed to benefit from the collective bargain. The best result will be achieved if these people are part of the design of the collective bargain.

The way forward?

The IPA would be grateful for guidance from the ACCC as to how its members should proceed in these circumstances. Specifically, what information should or shouldn't be shared in the context of a collective bargain 'negotiation' to avoid liability under the concerted practices prohibition.

In addition, it is clear that guidance is needed for small businesses on concerted practices generally, particularly in relation to what information can, and cannot, be shared or discussed so as to avoid liability under section 45(1)(c). This point was raised by the IPA in its 24 November 2017 Submission.

Greater awareness

The IPA notes the withdrawal of the ACCC guidance for *Industry associations, competition and consumers*. In its 24 November 2017 Submission, the IPA called for the Industry Association guidance to be updated (or specific guidance produced) following the introduction of the prohibition against concerted practices given the real risk to industry, trade and professional associations of infringing this new provision (recognised by the ACCC in paragraph 2.3 of the ACCC *Interim Guidance on concerted practices*). The IPA repeats that request now.

In the context of collective bargaining, small businesses are likely to need a champion or representative to facilitate negotiation of collective bargaining agreements. Industry and trade associations are obvious candidates to fill that role. However, given the introduction of the prohibition against concerted practices, this facilitation role will not be without risk. If the ACCC wishes to encourage applications, clear guidance will be needed for trade and industry associations to allow them to navigate this terrain.

Associations can then be encouraged to make collective bargaining applications on behalf of their members.