



Australian
Competition &
Consumer
Commission

Guide to collective bargaining notifications



Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Important notice

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au.

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

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Foreword

The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency that administers the *Competition and Consumer Act 2010* (the Act). The broad objective of the Act is to benefit all Australians by promoting competition and ensuring consumers are treated fairly.

The Act encourages vigorous competition between businesses by prohibiting various forms of anti-competitive conduct. Generally, the Act requires businesses to act independently of their competitors when making decisions about pricing, other terms and conditions or who to deal with.

However, it is recognised that small businesses face many challenges when negotiating with larger businesses. At times, small businesses may feel that they have little or no bargaining power in their dealings with big business and little influence on terms and conditions, including prices.

It has been recognised that small businesses are often more likely to be heard on terms and conditions if they join with other small businesses to collectively negotiate with a larger business, rather than one-on-one. However, negotiating collectively may breach the Act.

Businesses are able to use the authorisation process to obtain immunity from legal action under the competition provisions of the Act for collective bargaining arrangements that are in the public interest. Alternatively, small businesses can obtain immunity from legal action under the Act for such arrangements by lodging a collective bargaining notification.

The aim of this guide is to provide information to small businesses, their advisers and associations on how to lodge a collective bargaining notification. It endeavours to explain how the process works, what information the ACCC will need to assess a notification and how the ACCC will assess collective bargaining notifications.

Notification allows the benefits of collective bargaining, such as effective input into contracts and transaction efficiencies, to be delivered quickly and simply. However, there are limitations on how small business can negotiate collectively. Competition between businesses remains a fundamental aspect of an efficient economy and a prosperous society. The ACCC will remain vigilant in blocking anti-competitive arrangements that are not in the public interest.

Businesses may wish to consider obtaining their own professional legal advice. Businesses intending to lodge a collective bargaining notification are encouraged to contact the ACCC.

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Aims of this guide

This guideline is targeted mainly at small businesses considering whether or not participating in collective bargaining arrangements would be of benefit to their business.

This guideline will:

- > promote awareness of the law and the collective bargaining notification process
- > help small businesses to seek immunity for collective bargaining arrangements that may be in the public interest.

The guideline will also provide relevant information to other parties who are interested in or affected by collective bargaining arrangements. It provides practical information for parties who are or will participate in collective bargaining arrangements. It also gives examples of collective bargaining arrangements and how the ACCC assesses them.

There are five main sections to this guide.

- > The first section outlines what collective bargaining is.
- > The second section describes the collective bargaining notification process.
- > The third section describes how small businesses may go about lodging a collective bargaining notification.
- > The fourth section sets out how the ACCC will assess a collective bargaining notification.
- > The fifth section provides information about the ACCC's public benefit assessment.

What is collective bargaining?

Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can include price) with a supplier or a customer. A group of businesses may sometimes appoint a representative, such as an industry association, to act on its behalf in the negotiations.

Examples of collective bargaining

A group of independent contractors who transport concrete agree to form a group to negotiate with Concrete Limited the terms and conditions, including price, at which they will transport concrete.

A number of hotels decide that as a group, they will negotiate the terms and conditions of pay-TV services acquired from Pay TV Services Limited. After further consideration the hotels decide that their industry association should participate in collective negotiations on their behalf.

What is a collective boycott?

In the context of collective bargaining, a collective boycott occurs when a group of competitors agree not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the collective bargaining group.

Example of a collective boycott

A group of independent chicken meat growers seek to collectively negotiate the terms and conditions, including price, at which they will provide their growing services to a chicken meat processor (**collective bargaining**).

The chicken meat growers also intend to collectively refuse to provide growing services to the chicken meat processor if agreement on the chicken growing contracts cannot be reached. This is a **collective boycott** because a group of competitors (the chicken meat growers) are collectively agreeing not to provide their services to the chicken meat processor.

Collective arrangements and the Competition and Consumer Act

Section 45 of the Act prohibits the making of and giving effect to arrangements that have the purpose or effect of substantially lessening competition.

To determine whether a substantial lessening of competition may or has occurred, the effect on the overall market for the particular product and its substitutes must be analysed.

The Act also prohibits agreements¹ which contain a cartel provision. Relevantly, a cartel provision is a provision relating to price fixing, restricting outputs in the production and supply chain or allocating customers, suppliers or territories.²

Both collective bargaining and collective boycotts raise serious concerns under these provisions.

The competition provisions of the Act contain a general exemption for collective bargaining and collective agreements on employment conditions. Employee/employer collective bargaining is subject to detailed regulation under industrial and workplace relations legislation.

Granting immunity for collective bargaining and collective boycotts

Collective arrangements, including in limited circumstances collective boycotts, may produce public benefits. The Act therefore allows immunity³ from legal action to be granted to parties to engage in anti-competitive conduct, including collective bargaining and collective boycotts, when in the public interest.

Authorisation

The Act has for many years provided businesses with the ability to obtain immunity from legal action to collectively bargain and to engage in collective boycotts through the authorisation process.

The ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct (other than misuse of market power) when it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

¹ In this guide, the term agreement is used to describe a contract, arrangement or understanding consistent with the meanings given to them under the Act.

² There is a fourth cartel provision which is a provision relating to bid rigging. However, notification cannot be given in relation to bid rigging provisions.

³ In this guide, the term immunity is used to describe the effect of having a notification in force—that is, that the relevant provisions of Part IV of the Act are not contravened by the conduct the subject of the notification.

The applicant for authorisation and interested parties are invited to respond to the draft determination, either by providing written submissions within a specified timeframe, or by calling a pre-decision conference. A pre-decision conference gives the applicant and interested parties an opportunity to discuss the draft decision and to put their views directly to an ACCC commissioner.

The ACCC then issues a final determination which may grant authorisation, grant authorisation subject to conditions, or deny authorisation.

The ACCC has an expedited authorisation process for collective bargaining by small businesses. Under the streamlined process, the ACCC will undertake to issue a draft determination and potentially an interim authorisation decision within 28 days of receiving an application for authorisation and issue a final determination within three months of receiving an application.

For further information about the expedited authorisation process for collective bargaining arrangements please consult the ACCC's short guide, *Streamlined collective bargaining process for small business*.

For further information about the authorisation process please consult the ACCC's *Guide to authorisation*.

Collective bargaining notification

Following the recommendations of the Dawson review the Act was amended in 2007 to provide small businesses with a new process for gaining immunity for collective bargaining arrangements under the Act. This process requires a collective bargaining notification to be lodged with the ACCC.

This process is discussed in the following chapters of this publication.

The collective bargaining notification process

What is a collective bargaining notification?

Small businesses can obtain protection from legal action under the Act for collective bargaining arrangements (including associated collective boycotts) by lodging a collective bargaining notification with the ACCC.

To obtain immunity from legal action a notification must be lodged with the ACCC setting out the full particulars of the collective bargaining arrangement in which the business or businesses propose to engage.

Who are the parties involved in a collective bargaining notification?

The applicant—the party that lodges the collective bargaining notification.

The collective bargaining group—businesses that have decided to collectively bargain the terms and conditions under which goods and services are supplied or acquired from the target.

The target—the business with whom the collective bargaining group wants to collectively bargain.

Who can notify?

Any business in the collective bargaining group can lodge a notification.

The notification process allows a business within the collective bargaining group to lodge a notification on behalf of other businesses to the collective arrangement. If a notification is lodged on behalf of several businesses, the name and address of each business must be clearly identified and proof of their consent to the notification must also be provided to the ACCC.

Example

A group of independent wine grape growers propose to collectively negotiate the terms and conditions, including price, with a wine manufacturer to which they will supply their grapes for processing.

One of the wine grape growers could lodge a collective bargaining notification on behalf of the others. The grower lodging the collective bargaining notification must:

- > obtain consent from each wine grape grower to lodge the collective bargaining notification on their behalf
- > provide proof of consent from each wine grape grower when lodging the collective bargaining notification
- > provide the name and address of each wine grape grower when lodging the notification.

Collective bargaining notifications may also be lodged by a nominated representative who is not a member of the collective bargaining group. For example, an industry association may lodge a notification on behalf of its members. If a notification is lodged by a third party, such as an industry representative body on behalf of its members, the lodgment form requires that the names and addresses of all members to the collective arrangement be set out and that the association provide proof of their consent to the notification being lodged on their behalf.

Example

The Apple Growers' Association represents apple growers. A group of independent apple growers propose to collectively negotiate with a fruit processor the terms and conditions, including price, under which they will supply their fruit. The Apple Growers' Association could lodge the collective bargaining notification on behalf of the apple growers who would participate in the collective bargaining.

The Apple Growers' Association is required to obtain consent from each apple grower before it can lodge the notification on their behalf. It must also provide proof of the consent of each apple grower when lodging the notification and provide the names and addresses of all parties proposing to participate in the collective bargaining.

To lodge a collective bargaining notification, each party named in the notice as a member of the collective bargaining group must reasonably expect that:

- > the value of the transactions it will conduct with the target
- > under the collective bargaining arrangement
- > in any 12-month period

will not exceed \$3 million.

It is open to Government to increase the \$3 million threshold via the Competition and Consumer Regulations 2010.

In March 2007 the government made regulations increasing the thresholds for the following industries:

- > petrol retailing (\$15 million)
- > new motor vehicle retailing (\$20 million)
- > farm machinery retailing (\$10 million)
- > primary production (\$5 million).

Businesses can use information such as details of past dealings with the target or information of past dealings with other suppliers or acquirers relating to similar goods or services to assist with determining whether they meet the \$3 million threshold.

Example

Franchisees operating bakeries have individually been negotiating with the franchisor the terms and conditions (including the franchising fee) of their franchise agreement.

The franchisees decide not to negotiate individually but to form a group to collectively negotiate with the franchisor. Each franchisee could use the franchising fee paid to the franchisor in the previous 12-month period as a guide to determine if they would be eligible to lodge a collective bargaining notification.

If one party doesn't have this expectation, then the notice would not be valid for the entire collective bargaining group.

A business cannot lodge a collective bargaining notification if it has already applied for authorisation of the collective bargaining arrangement and the ACCC has made a determination denying the application.

A trade union, an officer of a trade union or a person acting on the direction of a trade union cannot lodge a collective bargaining notification.

Multiple targets

If a group want to bargain with more than one target, a notification is required for each target, however, procedurally, a single Form GA can be lodged with a number of targets listed, but answers to the questions on the Form must provide the required information with respect to each target.

What conduct cannot be notified?

The collective bargaining notification process is not available for broadly described groups whose members are not specifically identified.

Examples

A group of independent vegetable growers propose to collectively negotiate with a supermarket on the terms and conditions of supply of fresh vegetables. In this example, it would be open for the group of vegetable growers to lodge a collective bargaining notification for its negotiations with the supermarket.

The Independent Vegetable Growers Association (IVGA) proposes to negotiate on behalf of its current and future members the terms and conditions of supply of fresh vegetables with supermarkets. The notification must identify each member of the group. It is not possible to use broad descriptions such as 'the current and future members of the IVGA'. The IVGA could however consider seeking an authorisation.

What does a notification do?

A collective bargaining notification provides immunity from legal action under the Competition and Consumer Act for the arrangements notified.

Protection is afforded to:

- > the applicant and any other business named in the notification on whose behalf the notification was made
- > any third party representing the bargaining group named in the notification
- > the target business.

Provided the collective bargaining notification is valid, immunity from legal action for the notified collective arrangement begins at the conclusion of a 14-day statutory period.

The immunity from a collective bargaining notification lasts for three years from the date it was validly lodged.

Businesses participating in the collective arrangement can lodge a new notification before the three-year period expires. This may be required if the group negotiates contracts that extend beyond a three-year period or it wants to continue negotiations or re-negotiate beyond the three-year period.

The ACCC is able to remove the protection from legal action, if it is satisfied that the proposed collective bargaining arrangement is not in the public interest.

Should I lodge a notification or apply for authorisation?

There are some circumstances in which proposed collective bargaining arrangements cannot be notified through a single notification. However, immunity from legal action for proposed collective arrangements may be granted through the authorisation process. Businesses may wish to consider using the authorisation process if:

- > immunity is sought for more than three years
- > the value of the contract that any party proposes to enter into with a target in any 12-month period under the collective arrangements exceeds \$3 million
- > immunity is sought for 'umbrella' type arrangements, for example, when immunity is sought by a single bargaining group for negotiations with a number of targets or when immunity is sought for arrangements covering several bargaining groups
- > immunity is sought for future unidentified businesses—for example, when immunity is sought for members of an industry association, where membership may vary over time, rather than specifically identified businesses.

While the authorisation process can take longer, it does have benefits. In particular, the authorisation process provides businesses with flexibility. There is a six-month time limit to consider authorisation applications. The ACCC is able to waive or reduce lodgment fees for applications for authorisation in certain circumstances. Applicants may also request that the ACCC consider their collective bargaining proposal under the three-month streamlined authorisation process – including having a draft determination and potentially interim authorisation decision within 28 days.

Checklist—should I lodge a collective bargaining notification or apply for authorisation?

	YES	NO
Can all members of the collective bargaining group be identified to the ACCC?	Can lodge a notification or authorisation application	Consider authorisation
Are you seeking immunity from legal action under the Competition and Consumer Act for more than three years for the proposed collective bargaining arrangement?	Consider authorisation	Can lodge a notification or authorisation application
Does each business party to the collective bargaining arrangement expect that its transactions with the target under the collective bargaining arrangement in any 12-month period will not exceed \$3 million?	Can lodge a notification or authorisation application	Consider authorisation

How to lodge a collective bargaining notification

Preliminary discussions with the collective bargaining group, the target and the ACCC

Before lodging a collective bargaining notification the collective bargaining group should discuss the form of the collective bargaining arrangement. This may include discussing the types of terms and conditions the group wants to collectively negotiate and how the negotiations will be conducted with the target. The collective bargaining group must obtain immunity from the Act before commencing the bargaining process.

The ACCC would also encourage the collective bargaining group to discuss the option of collective bargaining with the target to establish whether it would be willing to participate in the arrangement.

Once discussions have taken place within the collective bargaining group and with the target, parties may wish to contact the ACCC. The ACCC is able to help businesses by:

- > meeting with them to discuss whether notification or authorisation is more appropriate for their circumstances
- > providing guidance on the notification and authorisation processes, including the relevant form, fees and public register information.

The ACCC can also assist small businesses by providing guidance on information, including the amount of information, to be provided when outlining public benefits and anti-competitive detriments.

Lodging a valid collective bargaining notification

Businesses considering lodging a collective bargaining notification must ensure they satisfy the following requirements:

1. Each business must have agreed to, or be proposing to agree to, bargain collectively with one or more businesses about particular goods or services to be supplied or acquired from the target.
2. Each business must reasonably expect that they will make at least one contract with the target.
3. Each business within the collective bargaining group must reasonably expect that the total value of the transactions it will conduct with the target under the collective bargaining arrangement in any 12-month period will not exceed the \$3 million threshold.

4. A notification must be lodged on a properly completed form GA. Businesses should ensure that they provide all relevant information asked for on form GA.
5. There must be an answer to every question on the form GA that will be placed on the public register. In some cases a 'not applicable' response to a question may be appropriate. However, the ACCC requires sufficient information on the form GA to be able to publicly consult and assess the proposed conduct.
6. No answer or part of an answer to a question on the form GA can be marked as confidential and sought to be excluded from the public register. If a notifying party wishes to provide confidential information relating to a collective bargaining notification, this information should be placed in a covering letter or separate document. Further information on this can be found in the ACCC publication *Guide to excluding information from the public register*.
7. If the collective bargaining notification is lodged on behalf of a number of businesses, the name and address of each business and proof of their consent to lodging the notification on their behalf must be provided to the ACCC.

The registered company name or the name of the entity, rather than the trading name or partnership names, should be provided when lodging a collective bargaining notification.
8. The notification must be accompanied by the correct fees or evidence that the fees have been paid. The fee payable for lodging a collective bargaining notification is \$1000. There is no fee for additional notifications where they relate to the same market or a closely related market and are lodged within 14 days of the first notification. This may apply to notifications by a bargaining group relating to multiple targets. A collective bargaining notification is not validly lodged until the correct fee is received by the ACCC.
9. Any other information or documents required by the form must be included.
10. If the collective bargaining notification is lodged on behalf of a number of businesses to the collective arrangement, then each business must also satisfy criteria 1 to 3.

Assessing the validity of a collective bargaining notification

When the ACCC receives a collective bargaining notification it will assess whether the notification is valid. If a notification is invalid, the ACCC will, within five days, write to the applicant advising that the notice is invalid and provide reasons for its decision.

If the ACCC considers that the notification is invalid it will communicate this to the party that lodged the notification, providing reasons for its decision. Where possible, the party will be provided with an opportunity to rectify the matters that resulted in invalidity

and to submit a corrected notification within the five business day period. The date of lodgement in this situation is the date the rectified or corrected notification is provided (assuming the corrected notification is valid).

If the party decides not to submit a corrected notification, the notification fees that have been paid will be refunded to the relevant party.

If the ACCC later becomes aware that:

- > the business lodging a collective bargaining notification is ineligible to lodge the notification or
- > the arrangements described in a notification are ineligible

the collective bargaining notification will not be considered valid.

A business can re-submit the collective bargaining notification to the ACCC if it is able to rectify the matters that resulted in invalidity.

Checklist to help prepare a valid notification

Businesses can use the following checklist to help prepare a valid collective bargaining notification.

Checklist to help prepare a valid notification

1. Do you expect to form a group to collectively negotiate the supply or acquisition of goods or services with a target?

Businesses should provide details of the proposed arrangements between the parties within the collective bargaining group and the status of these arrangements.

2. Do you expect to enter into one or more contracts with a target about the acquisition or supply of goods or services?

Businesses should provide details of past dealings with the target or discussions with the target about future dealings.

3. Do you expect that the total value of the transactions you will conduct with the target under the collective bargaining arrangement over a 12-month period will not exceed \$3 million?

4. If the notification is lodged on behalf of other businesses, does each business expect that the total value of the transactions it will conduct with the target under the collective bargaining arrangement over a 12-month period will not exceed \$3 million?

To answer questions 3 and 4, businesses should provide information such as past dealings with the target and/or evidence of past dealings with other suppliers or acquirers relating to the good or service to demonstrate expected transaction amounts.

5. Have you completed a collective bargaining notification form (form GA)?
6. Has the correct lodgment fee been paid?
7. If the notification is lodged on behalf of other businesses, have their names and addresses been provided? Remember, registered company names or entity names should be provided.
8. If the notification is lodged on behalf of other businesses, have you obtained their consent and have you provided proof of their consent to lodge the notification on their behalf?

- 9.** Have you provided information about the market(s) within which the collective bargaining arrangement will occur?

Businesses should provide information about significant suppliers and acquirers in the relevant market(s) affected by the collective bargaining arrangement, details of substitutes available for the relevant goods or services and details of any restriction on the supply or acquisition of the relevant goods or services (for example, geographic or legal).

- 10.** Have you outlined the public detriments likely to result from the collective bargaining arrangements or reasons why public detriments might be limited?
- 11.** Have you provided information that demonstrates how the public detriments will arise from the collective bargaining arrangements or how the public detriments will be limited?
- 12.** Have you outlined the public benefits likely to result from the collective bargaining arrangements?
- 13.** Have you provided information that demonstrates how the public benefits will flow from the arrangements?

Lodging a collective bargaining notification

Collective bargaining notifications can be lodged at any ACCC office by mail or in person. The ACCC encourages notifications to be lodged at its Canberra office addressed to:

General Manager
Adjudication Branch
Australian Competition
and Consumer Commission

GPO Box 3131
Canberra ACT 2601

Notifications can also be lodged by email to adjudication@accc.gov.au and by fax to (02) 6243 1211. Lodging in this way allows the ACCC to more quickly assess the notification for validity. The ACCC prefers lodgment fees for notifications to be paid by electronic funds transfer. Notifications lodged by email or fax should be accompanied by a covering letter that includes details of how and when the lodgment fee will be paid. A notification is not valid until the correct lodgment fee is received by the ACCC.

Payment of Fees

As set out above the fee payable for lodging a collective bargaining notification is \$1000. A concessional fee of \$0 applies to additional notifications where they relate to the same market or a closely related market and are lodged within 14 days of the first notification.

The ACCC prefers payment by electronic funds transfer (EFT). Payment by credit card (Visa and Mastercard only) or cheque will also be accepted.

Payment by EFT. The ACCC's EFT account details are:

Account Name: ACCC Administered receipts account

Bank: Westpac Banking Corporation

BSB: 032-730

Account Number: 146550

Payment narrative: <name of company> Notification Fees.

For proof of payment, applicants should include a copy of the receipt of the transaction from their financial institution which includes the following details:

The receipt number

Transaction date and time

From account details

To account details

To account description

The value of the payment made in Australian dollars

Payment by credit card. If paying by credit card, please provide the following details:

Name of applicant/s

Name on the credit card

Type of card (Mastercard or Visa only)

Credit Card number

Date of expiry

3 digit security number (from back of card)

The value to be charged to the credit card in Australian dollars

Payment by cheque. Cheques should be made out to the Australian Competition and Consumer Commission.

When notifications are lodged and/or fees are paid electronically, the date of receipt of the notification will be, when lodged on a business day, that day and when lodged on a weekend or a public holiday in the Australian Capital Territory (the ACT), the next business day in the ACT.

When is a notification lodged and when does the immunity commence?

The date that a collective bargaining notification is validly lodged with the ACCC is important as the immunity for the notified conduct will automatically commence 14 days after this date, unless the ACCC issues a draft notice proposing to revoke the notification.

The 14 day period for the commencement of the immunity is calendar days. This period is counted inclusive of the date of lodgement. Therefore, a notification is lodged on day one and the ACCC has until the end of day 14 to issue a draft notice to prevent the immunity commencing on day 15.

As the 14 day period is calendar days, it is possible for the immunity to commence on a public holiday. In these cases, if the ACCC considers the conduct is not likely to result in a net public benefit, it will seek to release a draft notice before the end of the last business day (in the ACT) before the conclusion of the 14 day period.

In situations where the notifying party requires the immunity to commence by a certain time, the ACCC encourages notifications to be lodged more than 14 calendar days prior to that time. If there are validity issues with a notification, it may take a few days to resolve.

Lodging by mail or in person

Details on how to lodge by mail or in person are provided above.

On the day the ACCC receives a notification in the mail or in person at one of its offices it is date stamped by an ACCC staff member. If the notification is accompanied by a cheque for the applicable fees and assuming the notification is valid then this date stamp will become the date of lodgement.

A notification that is lodged without a cheque for the applicable fees will still be date stamped by an ACCC officer. However, the notification will not be considered validly lodged until the ACCC receives evidence that the applicable notification fees have been paid. In these cases, the date of lodgement becomes the date upon which the ACCC received the evidence from the notifying party that the fees have been paid or when the fee has been received into the relevant ACCC account.

As ACCC offices are not open on weekends or public holidays, it is only possible to lodge a notification in person or by mail on a business day.

Example

- A collective bargaining notification is mailed to the ACCC and is received and date stamped by the ACCC on 11 March. The notification has a cheque attached for the correct fees. The ACCC considers that the notification is valid and consequently the date of lodgement is 11 March. Immunity for the conduct notified will commence automatically on 25 March unless the ACCC has issued a draft notice proposing to revoke the notification by 24 March.

Lodging electronically

As noted above, the ACCC accepts lodgement of notifications electronically by email or fax.

For notifications lodged by email or by fax, the date of receipt will be, when lodged on a business day, that day and when lodged on a weekend or public holiday in the ACT, the next business day in the ACT.

As it is not possible to provide a cheque with electronic lodgement, the ACCC requires notifications lodged in this manner to be accompanied by evidence that the fees have been paid.

As with notifications lodged by mail or in person, the date of lodgement is the date upon which the ACCC has received both a completed Form GA and evidence that the correct fee has been paid.

Examples

- A collective bargaining notification is emailed to the ACCC Adjudication inbox on Sunday 14 November. The email includes an EFT receipt for the correct fee (\$1000). If the ACCC considers that the notification is valid, the date of lodgement is Monday 15 November, i.e. the next business day in the ACT.
- A collective bargaining notification is faxed to the ACCC on Friday 3 December. A cheque for \$1000 (the correct fee) is posted to the ACCC on the same day but is not delivered to the ACCC until the following Tuesday. If the ACCC considers that the notification is valid, the date of lodgement is when the cheque is received by the ACCC, in this case, Tuesday 7 December.

Can a collective bargaining notification be amended?

A collective bargaining notification cannot be amended. If an applicant wishes to amend the description of the collective bargaining arrangements or amend the parties who are named in the notification, a new collective bargaining notification must be lodged.

However, applicants can provide additional information in support of a collective bargaining notification.

Can a collective bargaining notification be withdrawn?

An applicant may withdraw a collective bargaining notification at any time, provided the ACCC has not issued a final objection notice removing the immunity from legal action provided by the notification.

If an applicant wishes to withdraw a collective bargaining notification on behalf of other businesses party to the notification, the applicant must obtain consent from each business to do so.

The Act does not provide for any refund of lodgment fees when an applicant withdraws its notification.

Public process

The process for assessing collective bargaining notifications is public. The Act requires the ACCC to maintain a public register for collective bargaining notifications. A typical public register (subject to requests to exclude information from the public register) is likely to contain the following documents:

- > the collective bargaining notification
- > correspondence between the ACCC and the applicant
- > submissions from the applicant and interested parties
- > draft objection notices—these outline the ACCC’s reasons for proposing to revoke the immunity provided by a collective bargaining notification
- > records of conferences—the notifying business, businesses on whose behalf a collective bargaining notification has been lodged and interested parties have an opportunity to request a conference to discuss a draft objection notice issued by the ACCC (a record of what was discussed at each conference held by the ACCC will be placed on the public register)
- > final objection notices—these documents outline the ACCC’s reasons for removing the immunity provided by a collective bargaining notification.

The ACCC endeavours to make all documents placed on the public register available on its website (www.accc.gov.au).

The public register is also able to be viewed at any ACCC office with a few days notice. The ACCC can, on request, provide copies of documents on the public register.

The ACCC may also issue media releases relating to its decisions on collective bargaining notifications.

Requests to exclude information from the public register

Businesses lodging collective bargaining notifications may request that confidential information in support of the notification be excluded from the public register. Interested parties making submissions about collective bargaining notifications may also request that confidential information they provide be excluded from the public register. Such confidential information may include the residential address of the party or commercially sensitive information such as trade secrets. For more information, please see the ACCC's publication, *Guidelines for excluding information from the public register*, on the ACCC's website at www.accc.gov.au.

Businesses should only request that information be excluded from the public register if it is genuinely confidential. As a general guide, the ACCC will not accept requests for the description of the notified collective bargaining arrangement to be excluded from the public register.

If applicants and interested parties want information to be excluded from the public register they must request it when submitting the information to the ACCC. They must provide reasons why the ACCC should exclude the information from the public register.

As noted in the 'Lodging a valid collective bargaining notification' section, no answer or part of an answer to a question on the Form GA can be marked as confidential and sought to be excluded from the public register. If a notifying party wishes to provide confidential information relating to a collective bargaining notification, this information should be placed in a covering letter or separate document, with reasons provided to support the request for exclusion.

Dealing with collective bargaining groups

Businesses who believe they may be a target of a collective bargaining arrangement should talk to their small business suppliers or customers to see if they are considering the possibility of engaging in collective bargaining.

Businesses that are approached about the possibility of entering into a collective bargaining arrangement should explore with the collective bargaining group whether the proposal would achieve positive outcomes for all parties.

Businesses who believe they may be described as the target in a collective bargaining notification can:

- > check the ACCC's website for a list of the collective bargaining notifications the ACCC has received and find out the status of a collective bargaining notification
- > contact the ACCC to find out whether a collective bargaining notification has been lodged.

The ACCC as a priority will advise businesses identified as a target in a collective bargaining notification as soon as practicable. In most cases this will be within the first few days of the ACCC receiving a valid notification.

Businesses identified as targets will have the opportunity to provide a submission on the proposed collective bargaining arrangements outlined in a collective bargaining notification. Businesses should be prepared to respond either positively or negatively to a collective bargaining proposal. They can help the ACCC by quickly providing their views on a collective bargaining notification and providing other relevant information to assist the ACCC's assessment.

Businesses that are the target in a collective bargaining arrangement may wish to keep information about how the collective bargaining process is operating. For the ACCC to review a collective bargaining notification, it will need information, for example, on why the collective bargaining arrangement is having a detrimental effect on competition or why the collective bargaining arrangement is not generating the public benefits claimed. Targets requesting the ACCC to review a collective bargaining notification would be expected to provide this information as part of any ACCC assessment.

How will the ACCC assess a collective bargaining notification?

The diagrams on pages 23 and 25 outline the steps the ACCC will take in assessing a collective bargaining notification.

Public consultation process

When the ACCC receives a collective bargaining notification it will contact interested parties, including the target, and invite submissions on the proposed collective bargaining arrangements.

Interested parties are those parties who are affected by or have an interest in the proposed collective bargaining arrangement. The types of parties the ACCC may consult include:

- > the target, who will be advised as soon as possible
- > businesses that are party to the collective bargaining arrangement
- > competing businesses that will not be a party to the proposed collective bargaining arrangement
- > consumer groups
- > businesses up and down the supply chain, such as retailers, wholesalers or distributors
- > industry associations
- > government bodies
- > any other person who may have an interest in the matter.

The ACCC may write to interested parties seeking submissions or contact interested parties by telephone. All submissions (whether verbal or written) will be made publicly available on the ACCC's public register, subject to any requests for information to be excluded from the public register.

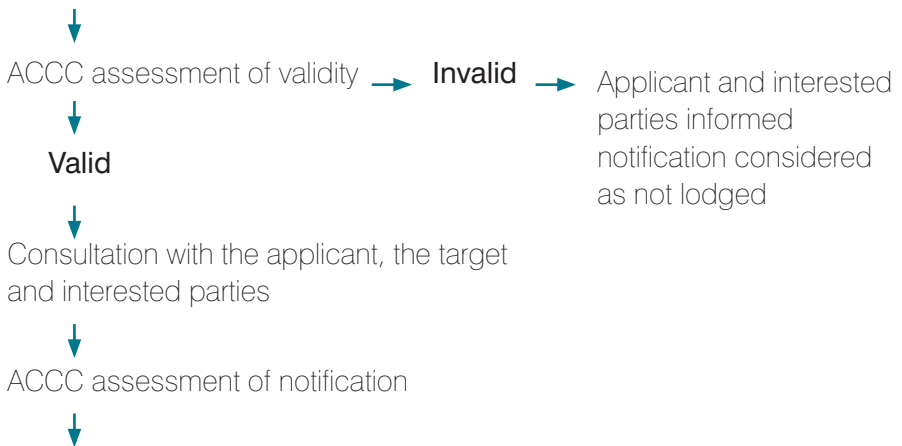
Consultation with interested parties will take place according to tight deadlines for the submission of information. The ACCC will be limited in its ability to take into account information provided to it after the established deadline for consultation.

The ACCC generally prefers to obtain its information through cooperation but may exercise its information-gathering powers under s. 155 of the Act, where appropriate.

The collective bargaining notification process

Preliminary discussions with the ACCC

Days 1-5 Notification received with lodgment fee by the ACCC



Day 14 When ACCC has not issued draft objection notice in 14 days, protection from legal action is automatically provided by the notification

Assessing the collective bargaining arrangement—applying the public benefit test

Once the ACCC has consulted with interested parties it will assess the proposed collective bargaining arrangement. The ACCC will assess collective bargaining notifications by applying the relevant public benefit tests outlined below.

Collective arrangements that involve price fixing or collective boycott (exclusionary arrangements)

For notifications that involve collective boycott, conduct within the meaning of s. 45(2)(a) (i) or (b)(i) of the Act, or conduct within the meaning of section 44ZZRD(2) or 44ZZRD(3) (a) or (b), the ACCC may object to the notification at any time if it is satisfied:

- > that the benefit to the public that would result, or is likely to result
- > does not outweigh the detriment to the public.

Collective arrangements that do not involve price fixing or exclusionary conduct

For notifications that do not involve collective boycotts (or other exclusionary provisions) or price fixing but involve conduct that may otherwise substantially lessen competition within the meaning of s. 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to the notification at any time if it is satisfied:

- > that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition and
- > the conduct has not resulted or is not likely to result in a benefit to the public or
- > the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

Preventing or removing immunity provided by a collective bargaining notification

In most cases, if the ACCC concludes that the public benefits likely to result from the collective bargaining arrangement will not outweigh the anti-competitive detriments, the ACCC can remove the immunity provided by the notification by issuing an objection notice.

Draft objection notice

To revoke a collective bargaining notification the ACCC must first issue a draft objection notice which outlines the reasons why the ACCC proposes to remove the immunity provided by the notification.

If the ACCC issues a draft objection notice **before** the expiration of the statutory period (that is, within 14 days), the applicant and the other parties on whose behalf notice was given, do not have protection from legal action under the Act for the proposed collective bargaining arrangement.

If the ACCC issues a draft objection notice after the expiration of the statutory period (that is, after 14 days), the applicant and other contracting parties on whose behalf the notice was given, will continue to have protection from legal action for the proposed collective bargaining arrangement until the revocation process is completed.

Revocation process for a collective bargaining notification



Draft objection notice*

ACCC issues draft objection notice proposing to remove immunity provided by the notification



Conference

Applicant, interested parties and the target have 14 days to request a pre-decision conference



Final objection notice

ACCC will issue a final objection notice if it is satisfied the collective bargaining arrangements are not in the public interest
This removes the immunity provided by a notification



Review

ACCC's decision to remove immunity provided by a notification is reviewable by the Australian Competition Tribunal

* When a draft objection notice is issued within the 14 days, the collective bargaining notification provides no immunity from legal action.

When a draft objection notice is issued after the expiration of the statutory period, the collective bargaining notification will provide immunity under the Competition and Consumer Act until such time as the ACCC revokes the immunity by issuing a final objection notice.

Opportunity for a conference

When the ACCC issues a draft objection notice it will provide the applicant and interested parties with an opportunity to request a conference. A conference provides the applicant and interested parties with an opportunity to put forward oral submissions on the draft objection notice. Parties will have 14 days from a date nominated by the ACCC to advise if they want the ACCC to convene a conference. If a conference is called, the conference will be held no later than 30 days after the expiration of the 14-day period.

The ACCC will also invite written submissions on its draft objection notice.

If the ACCC receives a request to hold a conference it will advise all relevant parties of the date, time and place. Conferences are chaired by an ACCC commissioner, conducted informally and generally take a few hours. Attendees may have other persons (for example, legal advisers) present to assist, but they are not entitled to participate in the conference. A record of the conference will be prepared by ACCC staff, outlining the main points raised during the conference. Copies of the record of the conference and any written submissions provided will be placed on the public register.

Final objection notice

Once the ACCC has the relevant information it will decide whether to remove the immunity provided by the notification. If it decides to issue a final objection notice, any immunity that was provided by the notification is removed 31 days after the date of the objection notice or on a later day specified by the ACCC. The ACCC will inform the applicant and all interested parties that the collective bargaining notification has been removed.

When immunity is removed, a fresh notification for the same or similar conduct cannot be lodged. Decisions made by the ACCC to remove immunity can be reviewed by the Australian Competition Tribunal. If a decision by the ACCC to remove the immunity provided by a collective bargaining notification is reviewed by the tribunal, any immunity that might have been in place continues until the review process concludes.

When will the ACCC object to a collective bargaining notice?

The ACCC will only object to and take steps to remove the immunity provided by a collective bargaining notice when it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notices that do not concern price fixing or exclusionary conduct).

If the ACCC is not so satisfied, it will take no further action at that stage and the applicant and all interested parties (including the target) will be advised. In these circumstances, the applicant, and any other business that has been named as a party to the proposed collective arrangement in the notification (including the target), will have immunity from legal action under the Act to engage in the collective arrangement 14 days after the notification is lodged.

Immunity from legal action for the collective arrangement lasts for three years from the date the collective bargaining notification was lodged.

The Act does not provide for the tribunal to review any ACCC decision not to take action on a collective bargaining notification. The ACCC may review a collective bargaining notification at any time. Triggers for review may be complaints from persons affected by the collective bargaining arrangement, a change in the market conditions or further information coming to light.

The ACCC's public benefit assessment

In assessing collective bargaining notifications the ACCC will weigh the public benefits likely to result from the proposed collective arrangement against the anti-competitive detriments likely to result in the relevant market.

The ACCC can assist small businesses by providing guidance on the information, including the amount of information, to be provided when outlining public benefits and anti-competitive detriments.

What effect will collective bargaining arrangements have on competition?

There are four main circumstances under which collective bargaining may have an anti-competitive effect:

1 Reduction in competition resulting from collusion

The ACCC will consider how the relevant market will be affected by the proposed collective bargaining arrangement.

In the absence of collective bargaining, competition between buyers and sellers leads to the most efficient outcome. When buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.

2 Effect on competitors and competition outside the bargaining group

The ACCC will consider how competitors outside the bargaining group are affected by the proposed collective bargaining arrangements and whether the arrangements will damage competition.

3 Reduced scope for new market entry

The ACCC will consider how entry into the relevant market by new businesses is affected by the proposed collective bargaining arrangements.

4 Increased potential for collective activity beyond that notified

The ACCC will consider if there is scope for parties to engage in collective activity beyond the collective arrangements described in the notification.

What features of collective bargaining arrangements are likely to limit the anti-competitive effects?

Where proposed collective bargaining arrangements involve only a small proportion of participants in relevant markets, there is likely to be little risk of anti-competitive detriment. Where this is not the case, the ACCC considers the anti-competitive effects of collective bargaining arrangements are likely to be limited when:

- > The current level of individual bargaining between members of the group and the target is low, such that the difference between the level of competition with or without collective arrangements may also be low.

Example

A group of chicken meat growers propose to collectively negotiate terms and conditions (including price) with a chicken meat processor to which they provide their growing services.

Without collective bargaining the chicken growers are each offered a standard contract with limited capacity for individual chicken growers to vary the terms of the contract. In this example, the level of individual bargaining between the chicken growers and the chicken meat processor is low. Therefore the difference between the level of competition with or without collective bargaining is likely to be small.

- > The agreement does not restrict the ability of parties to compete in other ways, for example, on quantity or service. Many collective bargaining arrangements include productivity measures designed to maintain competitive pressures between the members of the bargaining group.

Example

A group of independent contractors who transport concrete propose to collectively bargain with Concrete Limited on the terms and conditions, including price, at which they will transport concrete.

Under the proposed arrangement Concrete Limited proposes to offer financial incentives for contractors to increase the volume of concrete they can carry. The use of these financial incentives is likely to reduce the cost of the supply of concrete to customers allowing Concrete Limited to be more competitive and will also encourage investment by the contractors.

- > There is voluntary participation in the arrangements.

Collective bargaining is voluntary when, for example, members of the collective bargaining group are free to choose not to participate in the collective negotiations if they prefer to negotiate individually, and when the target is also able to choose whether or not to participate. Generally there will be more benefits and less detriment when all participants are willing to participate.

Example

The Apple Growers' Association drafts a proposal on behalf of its members for independent apple growers to collectively negotiate with a fruit processor on the terms and conditions under which they supply their fruit. The proposal does not include a collective boycott.

The proposal allows for members of the Apple Growers' Association not to participate in the collective negotiations should they prefer to negotiate individually with the fruit processor. This allows individual apple growers to either participate in the proposed collective bargaining or negotiate individual contracts should they choose. The proposal also allows apple growers to stop engaging in collective negotiations with the fruit processor at any time in the process should they choose to.

Those apple growers who consider that they will be able to individually negotiate a more commercially attractive arrangement have the option to do so. Consequently, incentives for growers to compete on price, to innovate or improve their quality of services, to the extent that they exist, will not be reduced by the proposed arrangements.

As the proposal does not involve a collective boycott the fruit processor has discretion to decide whether to enter into collective bargaining with the apple growers and the ability to decide what terms and conditions it is willing to accept.

- > There are restrictions on the coverage, composition and representation of the bargaining group.

When the size, composition and representation of bargaining groups are restricted, the anti-competitive effect is likely to be smaller because of the smaller area of trade affected by the collective arrangement and because of the competition provided by those businesses outside the group.

Example

Coverage, size and composition

Consider the previous example of apple growers seeking to collectively bargain with a fruit processor. If the proposal was for all apple growers in Australia to form a single bargaining group to collectively negotiate with the fruit processor, this collective bargaining arrangement would be likely to generate a significant anti-competitive effect. This proposal could substantially distort the market, introduce inefficiencies and would be likely to allow apple growers to extract a higher price from the fruit processor—with higher prices being passed onto consumers of apple products.

However, the anti-competitive effect is likely to be reduced if the proposal provided for collective bargaining groups to be limited in size, composition and representation. For example, the formation of collective bargaining groups on the basis of geographical areas is one possible restriction.

Representation

If the Apple Growers' Association sought to negotiate on behalf of any group of apple growers that asked it to do so, this could also result in a significant anti-competitive detriment. Allowing the Apple Growers' Association to negotiate on behalf of any group of apple growers means it could participate in a number of different negotiations with different parties. If the Apple Growers' Association is permitted to represent any or all apple growers in contract negotiations across the industry, negotiations could result in a set of identical prescribed contracts. Industry-wide representation also increases the potential for an industry-wide price fixing arrangement.

- > There is no boycott involved.

Collective boycotts can have significant anti-competitive effects. In collective negotiation, the right to impose a collective boycott could enable a collective bargaining group to inflict significant commercial damage on those that it negotiates with. The ACCC expects that strong justification would be provided to support an application for immunity for proposed collective boycott activity.

Example

A group of independent contractors who transport concrete propose to collectively bargain with Concrete Limited on the terms and conditions, including the price, at which they will transport concrete. The contractors also propose to collectively refuse to transport concrete for Concrete Limited should it decide not to participate in the collective bargaining.

The proposal to engage in a collective boycott by the independent contractors is likely to generate significant anti-competitive detriment because:

- > Concrete Limited has less discretion on whether to participate in the collective bargaining arrangements.
- > Concrete Limited has less choice over the terms and conditions it is willing to accept. This is because Concrete Limited, faced with the threat of withdrawal of the supply of concrete transport services from the contractors, may be under increased pressure to accept the terms and conditions offered by the independent contractors.
- > the collective boycott has the potential to cause significant disruption to the business of Concrete Limited and other businesses that are relying on Concrete Limited to supply them concrete.

What public benefits could result from collective bargaining arrangements?

Outlined next are examples of public benefits that the ACCC has considered in the past when it has assessed collective bargaining arrangements in the authorisation process. It should be noted that these examples are not exhaustive, nor will they apply universally to all collective bargaining arrangements.

Businesses lodging collective bargaining notifications should explain how any claimed public benefit will flow from the collective bargaining arrangements.

Increased input into contracts

Arguments based on increasing bargaining power relate to a change in the power relativities of the parties to the proposed collective agreement. A mere change in the amount of bargaining power is not in itself a public benefit. Rather, the ACCC will consider the likely outcomes resulting from the change in bargaining position arising from the proposed collective bargaining arrangement.

Competition between buyers and sellers on terms and conditions of supply or acquisition, through the process of negotiation, is likely to lead to an efficient outcome. If buyers or sellers are constrained in their ability to provide input into those terms and conditions, the most efficient outcome may not be achieved.

Collective bargaining may help businesses by providing a mechanism through which they can provide greater input into contracts and be more commercially efficient.

Example

A group of chicken meat growers seeking to collectively negotiate with a chicken meat processor the terms and conditions, including price, at which they provide their growing services.

The chicken meat growers submit that they are in a weak bargaining position when dealing with the chicken meat processor because of their significant capital investment which prevents them from switching production to a different product and they rely on the chicken processor as their sole source of income.

This bargaining imbalance could result in the chicken meat processor offering standard form contracts to the chicken growers with limited scope for growers to seek variation of terms and conditions.

The proposed collective bargaining arrangements could improve the growers' bargaining position in negotiations with the chicken meat processor and provide a greater opportunity for growers to have more effective input into contract terms and conditions.

This outcome would give rise to a public benefit if growers have a real and improved input into their growing contracts and if it leads to an efficiency gain.

Transaction cost savings

Transaction costs may be lower in implementing a collective bargaining agreement for a single negotiating process, or a small number of negotiating processes, than when the target must negotiate and implement agreements with every business with which it deals. The ACCC considers that all efficiency savings, such as transaction costs will constitute a public benefit. However, the ACCC may place greater weight on transaction cost savings as public benefits, where they accrue broadly or are of value to the community generally.

Example

A group of vegetable growers seek to collectively negotiate with a supermarket on the terms and conditions (including price) for the supply of fresh vegetables.

The extent to which transaction cost savings will be generated by this arrangement depends on the manner in which contracts are agreed to in the absence of collective bargaining.

If, without the collective bargaining arrangement, the supermarket would be offering standard form contracts, with limited capacity for individual negotiation to vary those standard terms, collective negotiations would be unlikely to lead to significant transaction cost savings.

If, without collective bargaining, each vegetable grower negotiates with the supermarket the terms and conditions of the supply of vegetables, then transaction costs savings are likely to result from collective negotiations. Transaction cost savings could include reduced legal, accounting and financial fees incurred by each vegetable grower relative to fees incurred if they were required to negotiate on an individual basis. To the extent that these savings do arise a public benefit would result. If these savings were passed onto consumers in the form of cost savings, the ACCC is likely to place greater weight on this public benefit claim.

Improvements in information

Collective bargaining arrangements are often proposed as a way to address instances of information asymmetry. In this context, information asymmetry occurs when one party to an exchange has access to information that is not available to the other party and when that information would improve the commercial decisions of the uninformed party.

When a collective bargaining arrangement reduces information asymmetry it is likely to improve efficiency, for example by facilitating informed decision making, and constitute a public benefit.

Example

A group of independent franchisees who operate bakery outlets propose to collectively bargain with the franchisor the terms and conditions, including the franchising fee, of their franchise agreement.

The independent franchisees claim the proposed collective bargaining arrangement will make the components of the franchising fee more transparent. They claim that this will provide them with an understanding of how the franchising fee is calculated and would allow them to anticipate increases in the franchising fee.

The franchisor has stated that it is willing to clarify issues relating to how the franchising fee is calculated which suggests that this information is available to the franchisees. As a result, the proposed collective bargaining arrangement is unlikely to result in improved access to information. Therefore, the ACCC would not place any weight on this claimed public benefit.

Facilitation of market dynamics

When a collective bargaining arrangement increases the ability of the collective bargaining group to supply new areas or increase competition in their existing market, the ACCC is likely to accept that this results in a public benefit.

Example

Consider the previous example of vegetable growers seeking to collectively bargain with an individual supermarket.

The proposed collective bargaining arrangement allows the growers to supply to a supermarket from which they have previously been excluded due to the high cost and logistics of individual growers transporting relatively small amounts of vegetables. To the extent that the collective bargaining arrangement provides an opportunity for the growers to compete in a new market and potentially improve competition in that market, this outcome would result in a public benefit.

Increased fairness

Many applicants in the authorisation process claim that collective bargaining arrangements will lead to increased fairness. It is difficult for the ACCC to accept claims of increased fairness in the absence of examples of extreme or unconscionable conduct in past negotiations. It may be more relevant for applicants to argue that collective bargaining arrangements can increase input into contracts leading to better outcomes for all.

Industrial harmony

The ACCC has previously accepted claims that collective bargaining will improve relations between small business and the target leading to a reduced number of industrial disputes. Again, it is difficult for the ACCC to accept claims of improved industrial harmony in the absence of recent examples of industrial disputes. Even when there is a history of industrial disputes it is difficult for the ACCC to determine whether the disputes are isolated or not. Again, it may be more relevant for applicants to argue that collective bargaining arrangements can increase input into contracts leading to better outcomes for all.

Checklist to help you lodge an informed collective bargaining notification

Businesses can use the following checklist to ensure the collective bargaining notification they lodge contains the information the ACCC needs to make an assessment.

Information about the collective bargaining arrangements

Have you clearly identified the arrangements for which you are seeking protection from legal action under the Competition and Consumer Act?

Have you outlined the current situation in the market without the collective bargaining proposal?

Anti-competitive detriments

Have you provided details on:

- > the current level of individual bargaining between the members of the bargaining group and the target
- > how the agreement encourages members of the bargaining group to compete in other ways, if the agreement includes arrangements that aim to enhance productivity
- > whether there is voluntary participation in the arrangements and/or any restrictions that may be imposed on participants
- > the coverage, composition, size and representation of the bargaining group
- > whether the collective bargaining arrangements will involve collective boycott activity (if yes, see checklist below)

Public benefits

Have you provided information that explains the benefits likely to result from the proposed collective bargaining arrangements?

Have you provided details that explain the efficiencies likely to arise from the arrangements?

When will collective boycotts be considered?

Collective boycotts can remove the discretion of the target to participate in the collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.

Collective boycotts could also significantly disrupt downstream and upstream businesses.

The ACCC considers that to be in the public interest collective bargaining arrangements should produce benefits both for the businesses involved in the collective bargaining group and the target.

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.

Collective boycotts are more likely to be appropriate when there is significant disparity in bargaining power between the collective bargaining group and the target, that is, the bargaining power of the target means it is less willing to participate in collective bargaining arrangements. The case for a collective boycott would be contingent on it being clear that a failure to collectively negotiate would result in inefficiencies.

Generally, the anti-competitive effects of collective boycott activity associated with collective bargaining arrangements are likely to be more limited when:

- > businesses of the collective bargaining group are free to choose not to participate in any boycott activity contemplated
- > there are limits on the size, scope and coverage of the collective bargaining group
- > there is a mediation period before a collective boycott can be adopted
- > there are restrictions on the application of the collective boycott—for example, the collective bargaining group is required to supply the target with a notice of intention to collectively boycott or restrictions on the length of time a collective boycott can be engaged in.

Importantly, any collective bargaining notification that provides immunity for businesses to engage in a collective boycott does not provide immunity for breaches of contractual obligations.

Businesses may also wish to consider the following options if they are considering seeking protection from legal action to engage in collective boycott activity.

- > Initially, businesses may wish to consider lodging a collective bargaining notification to engage only in collective bargaining. Provided the collective bargaining arrangement is in the public interest, the collective bargaining group could begin to engage in collective bargaining with the target. If it becomes apparent that the collective bargaining arrangement was not producing the desired public benefits, the collective bargaining group could consider lodging a further notification with the ACCC to engage in collective boycott conduct.
- > If businesses wish to seek immunity for collective bargaining and collective boycott conduct they could also consider lodging two separate notifications for each type of conduct. This would allow businesses to engage in the collective bargaining conduct provided it is in the public interest, when the ACCC is not satisfied that the collective boycott activity is not in the public interest.

Example: application for authorisation lodged by the Victorian Farmers Federation (VFF)

The VFF sought authorisation on behalf of its member Victorian chicken meat growers to allow members of each VFF Chicken Meat Group to collectively negotiate the terms and conditions, including grower fees of chicken growing contracts, with chicken meat processors. The VFF also sought authorisation for each VFF Chicken Meat Group to collectively boycott supply of chickens by their processors if agreement could not be reached on a growing contract after a prescribed process.

The ACCC granted authorisation subject to several conditions for the VFF member chicken meat growers to engage in collective bargaining and collective boycott activity.

The ACCC considered that the processors held significantly more bargaining power than the chicken growers. The ACCC considered that the extent of the bargaining imbalance supported the argument that, without the threat of collective boycott activity, the processors would be less likely to participate in the collective bargaining arrangements. Or, if the processors did participate, they would be less likely to agree to terms and conditions different from those they would have achieved without the collective bargaining agreement.

In considering the detriments that could arise from collective boycott activity, the ACCC noted the following features of the proposed arrangements and relevant markets that were likely to lessen any such detriment:

- > the potential damage to growers' businesses and the poor relations that might arise with processors, meant that growers were likely to be restrained in adopting boycotts and use them only as a last resort

- > growers were only permitted to engage in collective boycotts when negotiating new contracts and only after complying with certain conditions
- > the chicken meat production process is sufficiently flexible to allow, to a large extent, for alternative shedding and production arrangements to be made by processors
- > the relative effect on the national market for the supply of chicken meat as a result of boycott activity was likely to be limited.

Having noted these features the ACCC still maintained the view that the use of collective boycotts without further limitations would be likely to result in significant public detriments. To lessen the detriment, the ACCC imposed several conditions for grower groups to comply with before having protection under the Competition and Consumer Act to engage in collective boycotts. The conditions included that:

- > the grower group must contact their processor and advise them that they wish to begin collectively bargaining new chicken growing contracts
- > no sooner than six months after complying with this requirement, the grower group must, before they will have protection under the Act to engage in a collective boycott, invite their processor to participate in mediation with a suitably qualified and independent mediator
- > the grower groups must, before they will have protection under the Act to engage in a collective boycott, provide a notice (notice of intention to boycott) in writing to their processor a minimum of 21 calendar days before any grower in that grower group refuses to receive the supply of day-old chickens from that processor.

The ACCC's decision to grant authorisation subject to conditions to the collective boycott conduct was appealed to the Australian Competition Tribunal.

In April 2006 the tribunal overturned the ACCC's decision. While it recognised the significant bargaining advantage that the large chicken meat processors have over the farmers who provide chicken growing services, the tribunal concluded that the outcome of a collective boycott, given its potential to inflict harm, was just too uncertain. The tribunal decision made it clear that parties seeking immunity for a collective boycott bear a heavy onus.

Checklist for businesses seeking immunity to engage in a collective boycott

Collective boycotts

If you are proposing to seek protection from legal action under the Act to engage in collective boycott activity ask yourself the following:

- > Have you tried to engage in collective bargaining without engaging in collective boycott activity?
- > Have you provided details outlining why you need protection from legal action to engage in collective boycott activity?
- > Have you considered lodging two notifications separating the collective bargaining conduct from the collective boycott conduct?
- > Does the arrangement allow members of the collective bargaining group to voluntarily participate in the collective boycott activity?
- > Does the arrangement provide a restriction on the length of time a collective boycott can be engaged in?
- > Do you propose to engage in the collective boycott activity at the end of a specified bargaining period?
- > Does the arrangement provide for a mediation period before collective boycott activity will commence?
- > Does the arrangement provide for a written notice and notice period to be given to the target before any collective boycott activity starts?
- > Have you identified any alternate providers who can supply the target?
- > Are there any switching barriers restricting the target from seeking the supply of goods or services from those alternate providers?

ACCC contacts

Infocentre: 1300 302 502

Small Business Helpline: 1300 302 021

Website: www.accc.gov.au

For all other business information go to www.business.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service **www.relayservice.com.au**

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