



Australian
Competition &
Consumer
Commission

Authorisations and notifications

A summary

Australian Competition and Consumer Commission
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Important note

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

Disclaimer

The information contained in this publication is not legal advice and should not be relied on as such. All care has been taken in its preparation but readers should note that it is intended to provide a general understanding of the subject matter only. Please also note that it reflects the law and legislation as it stands at the date of publication.

Businesses should consider obtaining their own professional legal advice. Businesses intending to lodge an application for authorisation or notification are encouraged to contact the ACCC.

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Foreword

The Australian Competition and Consumer Commission (ACCC) is responsible for administering the *Competition and Consumer Act 2010*. A key objective of the Act is to prevent anti-competitive conduct, encourage competition and efficiency in business and enhance the welfare of Australians.

The primary aim of competition and consumer regulation is to create greater choice for consumers in price, quality and service.

However, in certain circumstances the ACCC can grant immunity from legal action for anti-competitive conduct. Businesses may obtain immunity by applying for an 'authorisation' or submitting a 'notification' with the ACCC.

Immunity may be granted under the authorisation and notification provisions of the Act when the public benefit from the anti-competitive conduct outweighs any public detriment.

The Adjudication Branch of the ACCC considers applications for non-merger authorisation, reviews non-merger authorisations previously granted and evaluates notifications of exclusive dealing and collective bargaining.

The ACCC has prepared this publication to help businesses and legal practitioners prepare applications for authorisation and notifications, and for interested parties to better understand and participate in both processes.

The non-merger authorisation and notification processes are outlined in further detail in the *Guide to authorisation*, *Guide to exclusive dealing notifications* and *Guide to collective bargaining notifications* available from the ACCC website at www.accc.gov.au.

Authorisation or notification?

Authorisation is a process under which the ACCC can grant immunity¹ for potential breaches of the competition provisions of the Act if it is satisfied the conduct delivers a net public benefit. Authorisation may be sought in relation to any of the competition provisions under Part IV of the Act except for misuse of market power. Authorisation applications for mergers are now considered by the Australian Competition Tribunal.

Notification of exclusive dealing conduct provides immunity for potential breaches of the exclusive dealing provisions of the Act. It differs from the authorisation process in that parties do not have to wait for a decision from the ACCC. The immunity from an exclusive dealing notification operates from the date it is validly lodged with the ACCC (or at the conclusion of a 14-day statutory period in the case of third line forcing conduct) and remains unless revoked by the ACCC.

The notification process for collective bargaining arrangements provides immunity for potential breaches of the prohibitions in the Act for certain cartel arrangements (including collective agreements as to price²), anti-competitive agreements³ and exclusionary provisions. The immunity provided by a collective bargaining notification commences at the conclusion of a 14-day statutory period. Immunity will remain in place for three years unless revoked by the ACCC.

Immunity deriving from the authorisation and notification processes protects applicants from legal action under the Act by the ACCC or any other party.

The ACCC advises parties to obtain private legal advice on whether conduct they propose to engage in might breach the Act (and therefore whether they should consider applying for authorisation or lodging a notification).

Prospective applicants and notifying parties are encouraged to discuss applications for authorisation or notifications with the ACCC before lodging.

Who can apply?

An application for authorisation can be initiated by or on behalf of the parties to the conduct.

Exclusive dealing notifications can only be lodged by the party engaging in the exclusive dealing conduct.

Collective bargaining notifications can be lodged by a nominated representative of the collective bargaining group, including a member of the collective bargaining group, on behalf of the other businesses to the collective arrangement.

¹ In this guide, the term immunity is used to describe the effect of having an authorisation or 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 authorisation or notification.

² In this guide, the term price agreement is used to describe a contract, arrangement or understanding between competitors that contains a provision that, directly or indirectly, has the purpose or effect of fixing, controlling or maintaining prices.

³ 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.

Authorisation

The ACCC may, if the relevant test is met (see p. 9), authorise conduct that might constitute:

- a cartel provision (including price agreements)
- an anti-competitive agreement
- a secondary boycott
- exclusive dealing
- resale price maintenance
- dual listed company arrangements that affect competition
- an acquisition that occurs outside Australia.

Immunity from authorisation does not commence until granted by the ACCC—the ACCC cannot authorise conduct retrospectively.

Interim authorisation

Applicants can request interim authorisation. Applicants seeking interim authorisation usually apply at the time of lodging the application for authorisation. Interim authorisation allows an applicant to engage in the conduct proposed for authorisation as if authorisation had been granted, before the ACCC issues its final decision.

The ACCC will only grant interim authorisation in special circumstances.

How to apply for authorisation

Key steps in applying for authorisation are:

- discussing the proposed application with the ACCC before lodging it
- lodging a valid application
- paying the required fee
- providing a comprehensive submission in support of the application.

Early discussions

Before lodging an application, the ACCC encourages applicants to contact it for informal discussion and guidance. The ACCC can provide guidance on the following issues:

- whether the proposed conduct is likely to raise concerns under the competition provisions of the Act
- the type of public benefit claims that might be considered by the ACCC
- the type of detriment, including anti-competitive detriment, that might be taken into account by the ACCC
- the authorisation process.

If you would like to meet with the ACCC to discuss a potential authorisation application please contact the Adjudication Branch at adjudication@accc.gov.au.

Valid application

Applications must be made in writing using the prescribed forms and provide the information requested by the forms. The forms for lodging applications are set out in the Competition and Consumer Regulations 2010 (Regulations) and can be downloaded from the ACCC's website, www.accc.gov.au.

There are different application forms for each prohibition on anti-competitive conduct.

A checklist to help applicants prepare an application for authorisation is provided in attachment A.

Pay the correct fee

The fee for applying for non-merger authorisation is \$7500. However, a concessional fee of \$1500 (for non-merger matters) is payable for additional applications if:

- the first application and the additional application relate to conduct in the same market (or closely related markets)
- each additional application is lodged with the ACCC within 14 days of the first application.

The ACCC prefers lodgment fees to be paid by Electronic Funds Transfer (EFT). Fees can also be paid by cheque or credit card. Details of relevant fees and how to pay them are set out in Attachment D.

Fee waivers

The Act provides the ACCC with the discretion to waive, in whole or in part, the lodgment fee for applications for non-merger authorisations.

A fee of \$2500 is likely to apply should the ACCC decide to waive a lodgment fee in part.

Requests for the ACCC to waive a lodgment fee should be made in writing to the ACCC before an application for authorisation is lodged. The request must include information about the nature of the proposed application for authorisation and set out arguments supporting the waiving of fees.

The Regulations provide that the ACCC may waive a lodgment fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.

In considering the request, the ACCC will take into account all relevant information, including factors such as:

- Will the payment of the fee cause financial hardship if the applicant's income, liabilities and assets are taken into account?
- Is the prospective applicant a not-for-profit organisation?
- If the application is lodged on behalf of a number of parties, is it possible for each of these parties to make a contribution towards the fee?
- Does the applicant intend to lodge a number of applications for authorisation?

If the ACCC decides to waive a lodgment fee (in whole or in part) it will advise the applicant in writing. The applicant may rely on this advice for a period of three months.

Supporting submission

Because applicants must satisfy the ACCC that the conduct they propose to engage in delivers a net public benefit, they need to provide a comprehensive submission supporting the application.

A checklist of the type of information that applicants should consider including in supporting submissions is provided in attachment A. Matters that should be addressed in this submission are discussed in detail in chapter 5 of the Guide to authorisation.

Lodging the application

Applications, along with supporting submissions, may be lodged by mail, in person at any office of the ACCC or electronically. An electronic copy of the application and supporting submission should be provided along with a hard copy.

Addresses are given in the contacts page at the back of this publication. The ACCC encourages applicants to lodge applications at its Canberra office:

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Applications may also be lodged by email to adjudication@accc.gov.au or faxed to (02) 6243 1211.

Applications lodged by email or fax should be accompanied by a covering letter that includes details of how and when the application fee will be paid or that it has been waived. Applications will not be considered validly lodged until the relevant fee has been paid.

The authorisation process

The authorisation process begins once a valid application and supporting submission have been lodged and the appropriate fees paid.

The ACCC will then:

- invite interested parties to lodge written (or oral) submissions commenting on the application and supporting submission
- meet with the applicant and interested parties as appropriate
- invite the applicant to lodge a written submission in response to interested party submissions
- conduct its own market inquiries and research while consulting with interested parties
- issue a draft determination
- invite written submissions in response to the draft determination, and invite the applicant or interested parties to call a conference so that oral submissions can be made directly to a Commissioner
- hold a conference, if one is called
- issue a final determination.

Six-month time limit

A six-month time limit applies to the ACCC's consideration of applications for non-merger authorisation.

The six-month time limit only applies to new applications for authorisation. It does not apply to applications for revocation, revocation and substitution or minor variation. However, the ACCC will endeavour to also consider these applications within six months.

A six-month time limit on the ACCC's consideration of authorisation applications imposes a discipline on all those involved in the authorisation process.

The six-month period begins on the date the ACCC receives a valid application for authorisation.

Once the six-month time period has begun, the ACCC will accept only minor amendments to an application. Consultation with interested parties will take place according to strict deadlines for the submission of information.

The six-month period can be extended by up to a further six months if:

- the ACCC has issued a draft determination and
- the applicant agrees to the extension.

When will the ACC grant authorisation?

Generally, the ACCC may grant authorisation if the public benefit outweighs any public detriment.

The tests

The Act contains different tests for authorising different types of conduct. The different tests are as follows.⁴

- **First test:** The ACCC may not grant authorisation for the making or giving effect to proposed or existing contracts, arrangements or understandings that would or might contain a cartel provision or substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all the circumstances that the agreement or conduct:
 - would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.⁵
- **Second test:** The ACCC may not grant authorisation to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing or resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct:
 - would result or be likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place.⁶

While the two tests might appear different, the ACCC believes the tests are very similar in practice.

When applying either test, the ACCC can take all public detriments likely to result from the conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Public register

The authorisation process should be as open and transparent as possible, particularly so that claims made by those supporting an application can be tested and interested parties have the opportunity to put their views.

⁴ This test also applies to applications for authorisation of proposed covenants that might substantially lessen competition.

⁵ Sections 90(5A), 90(5B), 90(6) and 90(7). This test also applies to applications for authorisation of proposed covenants that substantially lessen competition. The test for granting applications for authorisation for existing agreements also requires that public benefit and public detriment that has resulted from the agreement be taken into account.

⁶ Sections 90(8)(a), 90(8)(b) and 90(9). The test for granting applications for authorisation for existing exclusionary provisions is the same except that public benefit that has resulted from the agreement is also taken into account—see, e.g., s. 90(8)(b).

The ACCC is required to keep a public register containing documents relevant to the application for authorisation.

The ACCC website also contains copies of all publicly available applications for authorisation, submissions and decisions.

Persons wishing to obtain copies of authorisation applications and submissions should first consult the ACCC website, www.accc.gov.au.

The complete application form(s) will be placed on the public register. Applicants may request that confidential information provided in a supporting submission, or parts of it, be excluded from the ACCC's public register.

Interested parties may also request confidential information provided in submissions to the ACCC be excluded from the public register.

Guidelines for requesting confidential documents be excluded from the public register can be downloaded from the ACCC website, www.accc.gov.au.

Amending, revoking and substituting authorisations

A person may wish to vary the arrangements that received authorisation from the ACCC.

The Act provides two mechanisms for varying authorisations. Depending on the nature of the proposed variation, a person to whom an authorisation was granted (or a person on their behalf) may apply to the ACCC for:

- a minor variation to the authorisation
- revocation of the existing authorisation and substitution of a new authorisation if the variation is more significant than a minor variation.

A person to whom an authorisation was granted (or a person on their behalf) may also request that the ACCC revoke an authorisation.

In certain circumstances, the ACCC may review and possibly revoke, or revoke and substitute an authorisation on its own initiative.

When authorisations expire

The ACCC usually grants authorisation for a specified period. From the day the authorisation expires, the parties engaging in the conduct no longer have immunity from legal action under the Act.

When an authorisation is approaching expiry, the holder of the authorisation may either:

- apply for a new authorisation for the conduct or apply to revoke and substitute the existing authorisation

- stop the conduct (unless they consider that the conduct no longer risks breaching the Act).

Applicants should not expect automatic re-authorisation of the conduct. The ACCC considers applications afresh, in the light of the current market environment. It may become clear—for example from consultation with interested parties—that some or all of the public benefits expected to flow from the conduct when authorisation was originally granted did not arise or were not of the magnitude expected.

Review by the Australian Competition Tribunal

Applicants or interested parties who are dissatisfied with a final determination may ask the Australian Competition Tribunal (the Tribunal) to review the determination. Final determinations may also be appealed to the Federal Court of Australia on administrative law grounds.

The Tribunal is separate from and independent of the ACCC. It is located within the Federal Court of Australia.

A review by the Tribunal is a re-hearing of the matter. Applicants must satisfy the Tribunal that authorisation should be granted in the same way that they must satisfy the ACCC.

The Tribunal conducts a public hearing and is not bound by the rules of evidence.

Applying for a review

The review application form must be lodged with the Office of the Registrar of the Tribunal within 21 days of the date of the ACCC's determination.

Notification

Three notification processes exist under the Act—one for third line forcing conduct, one for exclusive dealing conduct that is not third line forcing and one for collective bargaining.

Exclusive dealing

Exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom, or in what, or where it deals. In some cases, exclusive dealing is prohibited outright (for example third line forcing), in other cases, only where it substantially lessens competition.

Notification of exclusive dealing provides immunity from legal action for potential breaches of the exclusive dealing provisions of the Act.

Immunity operates from the date a notification is lodged (or 14 days after in the case of third line forcing) and remains unless revoked by the ACCC.

What is third line forcing conduct?

Third line forcing involves the supply of goods or services on condition that the buyer acquires other goods or services from a particular third party, or a refusal to supply because the buyer will not agree to that condition.

Third line forcing is prohibited per se, meaning that it breaches the Act regardless of whether the conduct has the purpose, effect or likely effect of substantially lessening competition.

For third line forcing notifications, immunity will start 14 days after the notification is validly lodged, provided the ACCC does not formally object.

Other forms of exclusive dealing

The Act prohibits a number of other forms of exclusive dealing conduct which, for example, include the supply of goods or services on condition that the buyer:

- will not acquire, or will limit the acquisition of goods or services from a competitor of the supplier
- will not resupply, or will resupply only to a limited extent, goods or services to a particular person, class of person or particular place(s).

Exclusive dealing conduct (other than third line forcing) will only raise concerns under the Act if it substantially lessens competition.

Conditions placed on the acquisition of goods or services may also amount to exclusive dealing conduct—for example, the acquisition of a good or service on condition that the seller not supply goods or services to others. Again, such conduct is prohibited when it substantially lessens competition.

Who can lodge a notification?

A notification can be lodged by an individual or company.

Notifications must be lodged by a legal entity. The registered company name or the name of the entity, rather than the trading name or partnership name should be provided.

Notifications can only be lodged by the party engaging in exclusive dealing conduct.

For example it is the business providing the discount, or forcing a consumer to buy goods from a nominated supplier, that is the party engaging in exclusive dealing conduct.

Separate notifications must be lodged by each individual or company engaging in exclusive dealing conduct if they each wish to obtain immunity from the Act.

How to lodge an exclusive dealing notification

Before lodging an exclusive dealing notification, parties may wish to contact the ACCC.

The ACCC can discuss whether a notification may be appropriate and provide guidance on the notification process.

However, the ACCC is unable to provide legal advice. The assessment of risk and whether it is necessary to lodge a notification ultimately lies with the party considering engaging in the conduct.

Valid notification

The protection from legal action provided by an exclusive dealing notification will only commence (in the case of third line forcing, 14 days after the notification is lodged) if the notification:

- is lodged on form G in the Regulations and contains all the information required by that form
- has an answer to every question on the form G that will be placed on the public register. In some cases a 'not applicable' response may be appropriate. However, the ACCC requires sufficient information on the form G to conduct an assessment or in some cases public consultation on the proposed conduct. In particular, the party notifying should outline its consideration of the public benefits, public detriments and market definition of the notified arrangements.
- is accompanied by the appropriate fee
- includes any other information or documents required by form G.

A checklist to help notifying parties prepare an exclusive dealing notification is provided in attachment B.

Form G

Form G can be downloaded from the ACCC's website, www.accc.gov.au.

Form G must be signed by an appropriate representative of the party lodging the notification.

The fee

An exclusive dealing notification will not be validly lodged until the correct fee is received by the ACCC.

The lodgment fee for a third line forcing notification is \$100.

The fee payable for lodging a notification which involves exclusive dealing conduct other than third line forcing is \$2500. A concessional fee of \$500 is payable for each related notification.

A notification is considered to be related if it concerns conduct in the same market (or closely related markets) as a notification lodged not more than 14 days earlier.

The ACCC prefers lodgment fees to be paid by EFT. Fees can also be paid by cheque or credit card. Details of relevant fees and how to pay them are set out in Attachment D.

Describing exclusive dealing conduct

It is important to clearly identify and describe the proposed conduct when lodging an exclusive dealing notification. Suggested formulas for describing third line forcing and some other forms of exclusive dealing conduct are outlined below.

Describing third line forcing conduct

[Supplier] will supply [good/service] on condition that the [purchaser] acquires [good/service] from [third party].

[Supplier] will offer a [discount/allowance/rebate] on [good/service] on condition that the [purchaser] acquires [good/service] from [third party].

[Supplier] will not supply [good/service] unless [purchaser] acquires [good/service] from [third party].

[Supplier] will not offer a [discount/allowance/rebate] on [good/service] unless [purchaser] acquires [good/service] from [third party].

Describing other forms of exclusive dealing conduct

[Supplier] will supply [good/service] on condition [purchaser] will not acquire [good/service] from [competitor of supplier].

[Supplier] will not supply [good/service] unless [purchaser] will not acquire [good/service] from [competitor of supplier].

[Supplier] will supply [good/service] at a discount on condition [purchaser] will not acquire [good/service] from [competitor of supplier].

[Supplier] will not supply [good/service] at a discount unless [purchaser] will not acquire [good/service] from [competitor of supplier].

[Supplier] will supply [good/service] on condition [purchaser] will not resupply [good/service] acquired from [competitor of supplier].

[Supplier] will not supply [good/service] unless [purchaser] will not resupply [good/service] acquired from [competitor of supplier].

[Supplier] will supply [good/service] at a discount on condition [purchaser] will not resupply [good/service] acquired from [competitor of supplier].

[Supplier] will not supply [good/service] at a discount unless [purchaser] will not resupply [good/service] acquired from [competitor of supplier].

[Supplier] will supply [good/service] on condition [purchaser] will not resupply [good/service] to [particular persons/classes of persons/in particular places].

[Supplier] will not supply [good/service] unless [purchaser] will not resupply [good/service] to [particular persons/classes of persons/in particular places].

[Supplier] will supply [good/service] at a discount on condition [purchaser] will not resupply the [good/service] to [particular persons/classes of persons/in particular places].

[Supplier] will not supply [good/service] at a discount unless [purchaser] will not resupply [good/service] to [particular persons/classes of persons/in particular places].

[Buyer] will acquire [good/service] on condition [supplier] will not supply [good/service] to [particular persons/classes of persons/in particular places].

[Buyer] will not acquire [good/service] unless [supplier] will not supply [good/service] to [particular persons/classes of persons/in particular places].

Lodging a notification

Exclusive dealing notifications can be lodged at any ACCC office by mail or in person.

However, the ACCC encourages notifications to be lodged at its national office in Canberra, 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. Notifications lodged this way should be accompanied by a covering letter that includes an EFT receipt from the relevant financial institution or details of how and when the fee will be paid.

The notification process

To assist its consideration of a notification, the ACCC may contact interested parties inviting submissions on proposed exclusive dealing conduct.

The ACCC may also seek further information from the notifying party. The ACCC generally prefers to obtain its information through cooperation but where appropriate it may exercise its mandatory information gathering powers under s. 155 of the Act.

Like the authorisation process, the ACCC assesses exclusive dealing notifications by applying a net public benefit test. The ACCC may revoke a notification at any time if it is satisfied that the relevant revocation test is met.

Removing immunity provided by a third line forcing notification

The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public will not outweigh the likely detriment to the public from the conduct.

Removing immunity for conduct other than third line forcing

The ACCC may revoke a notification for exclusive dealing conduct other than third line forcing if it is satisfied that:

- the conduct would have the purpose, or is likely to have the effect, of substantially lessening competition and:
 - the conduct has **not** resulted or is not likely to result in a benefit to the public, or
 - any benefit to the public that has resulted or is likely to result from the conduct, would **not** outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

Process to revoke an exclusive dealing notification

Before revoking the immunity provided by a notification the ACCC will:

- issue a draft notice outlining the reason why it proposes to revoke the notification
- invite the applicant and interested parties to request a conference or lodge a written submission on the draft notice
- issue a final notice to revoke if it is satisfied the exclusive dealing conduct is not in the public benefit.

If the ACCC issues a draft notice within 14 days of a third line forcing notification being lodged, immunity provided by the notification does not commence unless the ACCC decides not to give the corporation a final notice.

If the ACCC issues a draft notice after the expiration of the 14-day period, immunity continues until the revocation process is complete. If the ACCC issues a final notice, the immunity provided by the notification ceases on the 31st day after the final notice is issued, or on a later date specified by the ACCC.

In the case of notifications for exclusive dealing conduct other than third line forcing, immunity continues until the revocation process is complete. If the ACCC issues a final notice, the immunity provided by the notification ceases on the 31st day after the final notice is issued, or on a later date specified by the ACCC.

Public register

The notification process is open and transparent so that claims made by those supporting a notification can be tested and interested parties have the opportunity to put their views to the ACCC.

The ACCC is required to keep a public register containing documents relevant to the notification.

The ACCC website will contain all exclusive dealing notifications and the notifying party's supporting submission. Correspondence between the ACCC and the notifying party,

including ACCC advice that it does not intend to revoke the notification at this time, are also placed on the website.

Any submissions made by interested parties, records of conferences and draft or final notices to revoke, will be available if applicable.

Anyone wishing to obtain copies of notifications and submissions should first consult the ACCC's website, www.accc.gov.au.

The complete form G will be placed on the public register. Notifying parties may request that confidential information provided in a supporting submission, or parts of it, be excluded from the ACCC's public register. Interested parties may also request that confidential information provided in submissions to the ACCC be excluded from the public register.

Guidelines for requesting that confidential documents be excluded from the public register can be downloaded from the ACCC's website, www.accc.gov.au.

Review by the Australian Competition Tribunal

The ACCC's decision to remove immunity provided by an exclusive dealing notification can be reviewed by the Tribunal.

The Tribunal is separate from and independent of the ACCC. It is located within the Federal Court of Australia.

Applying for a review

The notifying party or interested parties must lodge the application for review at the Office of the Registrar of the Tribunal. This application must be lodged within 21 days of the date of the ACCC's final notice.

If an application for review is made to the Tribunal, any immunity provided by the notification continues until the review process concludes.

Can I amend a notification?

Under the Act, an exclusive dealing notification cannot be amended after it is lodged. If the notifying party wishes to amend the exclusive dealing conduct, it is necessary to lodge a new exclusive dealing notification accompanied by payment of the relevant fee.

Can I assign a notification to another entity?

A notification cannot be assigned to another entity after it is lodged. The party wishing to obtain the immunity provided by the notification must lodge a new notification and pay a new fee.

Collective bargaining

A notification process is available to small businesses for collective bargaining arrangements. Notification of collective bargaining arrangements provides immunity for potential breaches of the prohibitions in the Act for certain cartel provisions (including collective agreement as to price), anti-competitive agreements, and exclusionary provisions.

The immunity provided by a collective bargaining notification commences 14 days after the notification is validly lodged with the ACCC and remains in place for three years unless revoked by the ACCC.

Collective bargaining is 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. The supplier or customer is known as the target.

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 group.

Both collective bargaining and collective boycotts may raise serious concerns under the competition provisions of the Act; for example, cartel provisions (including collective agreement as to price), anti-competitive arrangements and agreements between competitors to limit dealings with a particular supplier or customer.

Who can lodge a notification?

Any party to a collective bargaining arrangement can lodge a notification on behalf of other businesses that will be a party to the arrangement. 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.

When a notification is lodged on behalf of other businesses who are party to the collective bargaining arrangement, the notification must clearly identify all of the businesses involved and show that they all consent to the lodging of the notification on their behalf.

To lodge a collective bargaining notification each party to the collective arrangement must expect that the total value of the transactions it will conduct with the target over a 12-month period under the arrangement will not be greater than \$3 million (or higher amounts as set out in the Regulations).

A separate notification must be lodged for each entity that the collective bargaining group propose to bargain with. 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 proposed target.

How to lodge a collective bargaining notification

Before lodging a collective bargaining notification, parties may wish to contact the ACCC.

The ACCC can discuss whether a notification may be appropriate and provide guidance on the notification process.

However, the ACCC is unable to provide legal advice. The assessment of risk and whether it is necessary to lodge a notification ultimately lies with the party considering engaging in the conduct.

Valid notification

The protection from legal action provided by a collective bargaining notification will only commence 14 days after the notification is lodged if the notification satisfies the following requirements:

- it is lodged on form GA in the Regulations and contains all the information required by that form
- it is accompanied by the appropriate fee
- it includes any other information or documents required by form GA.

Form GA can be downloaded from the ACCC's website, www.accc.gov.au.

The fee

A collective bargaining notification will not be validly lodged until the correct fee is received by the ACCC.

The lodgment fee for a collective bargaining notification is \$1000.

A lodgment fee does not apply to additional related notifications. A notification is considered to be related if it concerns conduct in the same market (or closely related markets) as a notification lodged not more than 14 days earlier.

The ACCC prefers lodgment fees to be paid by EFT. Fees can also be paid by cheque or credit card. Details of relevant fees and how to pay them are set out in Attachment D.

Lodging a notification

Collective bargaining notifications can be lodged at any ACCC office by mail or in person. However, the ACCC encourages notifications to be lodged at its national office in Canberra, 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 or by fax to (02) 6243 1211. Lodging in this way allows the ACCC to more quickly assess the notification for validity. Notifications lodged this way should be accompanied by a covering letter that includes an EFT receipt from the relevant financial institution or details of how and when the fee will be paid.

The notification process

To assist its consideration of a notification, the ACCC may contact interested parties inviting submissions on the proposed collective bargaining arrangements.

The ACCC may also seek further information from the notifying party. The ACCC generally prefers to obtain its information through cooperation but where appropriate it may exercise its mandatory information gathering powers under s. 155 of the Act.

Like the authorisation and exclusive dealing notification processes, the ACCC assesses collective bargaining notifications by applying a net public benefit test. The ACCC may revoke a notification **at any time** if it is satisfied that the relevant revocation test is met.

Removing immunity provided by a collective bargaining notification

If the ACCC concludes that the public benefits likely to result from the collective bargaining arrangement will **not** outweigh the likely anti-competitive detriments the ACCC can remove the immunity provided by the notification. Different tests will apply for different arrangements.

Process to revoke a collective bargaining notification

Before revoking the immunity provided by a notification the ACCC will:

- issue a draft objection notice outlining the reasons why it proposes to revoke the notification
- invite the notifying party and interested parties to request a conference or lodge a written submission on the draft objection notice

- issue a final objection notice to revoke if it is satisfied the collective bargaining arrangements do not meet the public benefit test.

If the ACCC issues a draft objection within 14 days of a notification being lodged, immunity provided by the notification does not commence unless the ACCC decides not to give the corporation a final notice.

If the ACCC issues a draft objection notice after the expiration of the 14-day period, immunity continues until the revocation process is complete. If the ACCC issues a final notice, the immunity provided by the notification ceases on the 31st day after the final notice is issued, or on a later date specified by the ACCC.

Public register

The notification process is open and transparent so that claims supporting a notification can be tested and interested parties have the opportunity to put their views to the ACCC.

The ACCC is required to keep a public register containing documents relevant to the notification. The ACCC website will contain all collective bargaining notifications and the notifying party's supporting submission. Correspondence between the ACCC and the notifying party, including ACCC advice that it does not intend to revoke the notification at this time, is also placed on the website.

Any submissions made by interested parties, records of conferences and draft or final objection notices will be available if applicable.

Anyone wishing to obtain copies of notifications and submissions should first consult the ACCC's website, www.accc.gov.au.

The complete form GA will be placed on the public register. Notifying parties may request that confidential information provided in a supporting submission, or parts of it, be excluded from the ACCC's public register.

Interested parties may also request that confidential information provided in submissions to the ACCC be excluded from the public register.

Guidelines for requesting that confidential documents be excluded from the public register can be downloaded from the ACCC's website, www.accc.gov.au.

Review by the Australian Competition Tribunal

The ACCC's decision to remove immunity provided by a collective bargaining notification can be reviewed by the Tribunal.

The Tribunal is separate from and independent of the ACCC. It is located within the Federal Court of Australia.

Applying for a review

The notifying party or interested parties must lodge the application for review at the Office of the Registrar of the Tribunal. This application must be lodged within 21 days of the date of the ACCC's final objection notice.

If an application for review is made to the Tribunal, any immunity provided by the notification continues until the review process concludes.

Can I amend a notification?

A collective bargaining notification cannot be amended after it is lodged. If the notifying party wishes to amend the collective bargaining conduct, it is necessary to lodge a new notification accompanied by payment of the relevant fee.

Attachment A:

Checklist for lodging an application for authorisation and supporting submission

- ☐ If in doubt, have you contacted the ACCC before lodging the application for authorisation?
- ☐ Have you used the correct form to lodge the application for authorisation?
- ☐ Have you provided an answer to every question on the form(s) that can be placed on the public register, including a clear and complete description of the arrangement or conduct for which authorisation is being sought?
- ☐ Has the application form been signed?
- ☐ Is the application accompanied by the correct fees or evidence that the fees have been paid (or waived)?
- ☐ If the application is lodged on behalf of a party engaging in the conduct, have you noted this in a covering letter with evidence of consent provided by that party?
- ☐ Have you provided contact details for the relevant representative of the applicant?
- ☐ Have you clearly marked any additional information provided which you wish to be excluded from the public register and provided reasons in support of your claim?

Submissions in support of an application for authorisation should be comprehensive and include discussion on:

- ☐ relevant market characteristics
- ☐ market shares of various market participants
- ☐ the parties engaging in the conduct for which authorisation is sought and other relevant stakeholders in the market
- ☐ how the conduct operates or is likely to operate in practice
- ☐ market and/or other relevant circumstances that would develop with, and without, the conduct
- ☐ how the conduct affects the ability of the parties engaging in the conduct and others in the market to behave competitively
- ☐ how the conduct has been framed to minimise the public detriment
- ☐ the public benefits which result or are likely to result from the proposed conduct
- ☐ who are the beneficiaries of the conduct and how are the benefits distributed
- ☐ the period for which authorisation is sought
- ☐ why the requested period of authorisation is considered to be appropriate
- ☐ any prospective need for changes to the detail of the conduct.

Attachment B:

Checklist for lodging an exclusive dealing notification

- ☐ If in doubt, have you contacted the ACCC before lodging the exclusive dealing notification?
- ☐ Are you, or your business, the party proposing to engage in the exclusive dealing conduct?
- ☐ Have you used form G to lodge the notification?
- ☐ Have you answered every question on form G in a manner that can be placed on the public register and signed the form?
- ☐ Have you paid the correct notification fee?
- ☐ Have you clearly marked any information provided in a supporting submission which you wish to be excluded from the public register and provided reasons in support of your claim?
- ☐ Have you outlined the public benefits and public detriments likely to result from the exclusive dealing conduct?
- ☐ Have you provided evidence on how the public benefits will flow from the proposed conduct?

Attachment C:

Checklist to help prepare a valid collective bargaining 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?

Attachment D:

Schedule of non-merger authorisation fees

Application for non-merger authorisation of: <ul style="list-style-type: none">• exclusionary provisions and associated cartel provisions (primary boycotts) (form A)• agreements affecting competition or incorporating related cartel provisions (form B)• covenants affecting competition (form C)• secondary boycotts (form D and form DA)• exclusive dealing conduct (form E)• resale price maintenance (form EA)• Dual listed company arrangements that affect competition	\$7500
Additional related authorisation applications: <ul style="list-style-type: none">• concerning conduct which is in the same market, or a closely related market to the first application• lodged within 14 days of the date of the first application• do not concern a merger.	\$1500
Application for minor variation (form FA).	\$0
Application for revocation (form FB).	\$0
Application for revocation and substitution (form FC).	\$2500

Schedule of exclusive dealing notification fees

Third line forcing notification (form G).	\$100
Exclusive dealing notification involving conduct other than third line forcing (form G).	\$2500
Additional related exclusive dealing notifications involving conduct other than third line forcing when: <ul style="list-style-type: none">• the notification concerns conduct which is in the same market, or a closely related market, to the first notice• the notification is lodged within 14 days of the date of the first notice being lodged.	\$500

Schedule of collective bargaining notification fees

Collective bargaining notification (form GA)	\$1000
Additional related collective bargaining notifications when: <ul style="list-style-type: none"> the notification concerns conduct which is in the same market, or a closely related market, to the first notice the notification is lodged within 14 days of the date of the first notice being lodged. 	\$0

Payment of fees

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> <Authorisation/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 applications are lodged and/or fees are paid electronically, the date of receipt of the application 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.

ACCC contacts

Infocentre: 1300 302 502

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**

Voice-only (speak and listen) users—phone 1300 555 727 and ask for 1300 302 502

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
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Canberra ACT 2601

GPO Box 3131
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