

# ACCC Collective Bargaining Class Exemption

Submission — July 2019

## Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) appreciates the opportunity to comment on the Australian Competition and Consumer Commission's (ACCC's) draft Collective Bargaining Class Exemption.

The draft Collective Bargaining Class Exemption provides much needed protection to small businesses participating in collective bargaining arrangements from the risk of breaching the Competition and Consumer Act 2010 (CCA) and is likely to encourage more small businesses to collectively bargain with a large business.

The Australian Chamber welcomes the clear and simple approach the ACCC has taken. This minimises the red-tape involved for a group to apply for a collective bargaining class exemption. We appreciate the flexibility the ACCC has shown, with a single-page form providing an exemption for all group members, self-assessment of member's eligibility for group, and generalised identification of the group and the target business. This makes it relatively easy to apply for a class exemption, and lessens the need to reapply each time the group members change, or whenever the group approaches a different target.

## Benefits to Both Parties

Small businesses lack power to influence negotiations on the purchase or sale of goods and services with larger businesses. In addition, small businesses typically lack the time, resources and expertise to negotiate with a larger business, and the cost of gaining the necessary accounting and/or legal advice can be prohibitive. As a result, small businesses are often forced to accept contracts on a take-it or leave-it basis, or offered pro-forma contracts, which are not tailored to their business needs. Allowing small businesses to collectively bargain with larger businesses enables them to share the costs and resources of negotiating a contract, which is likely to lead to a better outcome for members of the small business bargaining group.

There can also be benefits and efficiencies for large businesses in dealing collectively with the small businesses for the supply or sale of goods and services, as they are only required to negotiate with one, rather than multiple parties. For larger businesses, it can be costly and time consuming to negotiate individual contracts with a large number of small suppliers or customers. They often prepare generic contracts, which do not always provide the best deal either party. Allowing small businesses a collective bargaining class exemption will hopefully encourage larger businesses to better engage with their small business customers and develop contracts specific to a class of supplier or customer.

## Business size

The Australian Chamber supports the Collective Bargaining Class Exemptions process and see significant benefits to small businesses from collective bargaining without fear of breaching the CCA. However, we question why the ACCC has limited the Collective Bargaining Class Exemptions to only small business and has chosen to define small business as a business with a turnover of less than \$10 million.

There are several definition of small business, which can be confusing. We question why the ACCC has applied the small business definition from the *Income Tax Assessment Act 1997*.

We consider that it may be more appropriate for the ACCC to apply the *Competition and Consumer Act 2010* definition of small business, as it applies to unfair contract terms — *a business that employs fewer than 20 persons*.<sup>1</sup> This relates more closely to competition law, which the Collective Bargaining Class Exemptions is seeking to address.

Further, we consider the Collective Bargaining Class Exemptions should not necessarily be restricted to small business, but could extend to include medium sized businesses. Medium sized businesses face similar difficulties in terms of the time, resources and expertise required to negotiate contracts with larger businesses. Similarly, it is costly and time consuming for larger businesses to negotiate with a large number of small and medium sized enterprises (SMEs), particularly when the transactions with the SMEs is a small share of their overall trade.

Restricting the collective bargaining class exemptions only to small businesses greatly limits the efficiencies of the collective bargaining for small and large businesses. If the objective is to ensure more balanced negotiations and increase the efficiency of the negotiation process, then the Australian Chamber believes greater benefit could be gained by including a mix of both small and medium-sized business in the collective bargaining group.

If there are concerns that including small and medium sized businesses in the bargaining group may reduce competition or have undue influence on negotiations, the process already has safeguards in place to prevent this, as discussed in the next section.

We appreciate the Collective Bargaining Class Exemptions process is well advanced. Therefore, we propose the ACCC treat the next two years, enabling small business access to the class exemption, as a trial period, with a detailed review of the Collective Bargaining Class Exemptions to be undertaken at the end of 2021. The review should not be limited to determining the success of the Collective Bargaining Class Exemptions for small business, but should also assess the potential benefit of extending the class exemption to medium sized businesses.

## Safeguards

Any concerns that may arise from the size of the business involved in the bargaining group, be it small and/or medium sized businesses, are already addressed through safeguards embedded in the class exemption process.

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<sup>1</sup> CCA Schedule 2 Part 2-3, 23(4)(b)

Participation is voluntary. The target business is not compelled to deal with the bargaining group, and no business is obliged to join the group. This ensures the target business is not forced to deal with the collective group if it is concerned that it lessens competition between its suppliers or customers, or that it would be disadvantaged by the negotiations.

The Collective Bargaining Class Exemption process also includes legal protections for the target (large) business, as collective boycotts are not protected by the class exemption.

## Appointing a representative

We welcome the decision to allow the group to appoint a representative. This enables industry specific associations, including many of our members, to act on behalf of their members. It also enables the bargaining group to engage a third-party representative, i.e. lawyers, accountants, private consultants, etc., to act on their behalf in negotiating with the target business. The group can then share the costs across its members.

## Sharing of information

The Guidance Note identifies that the Collective Bargaining Class Exemptions do not protect businesses sharing commercially sensitive information beyond that necessary to facilitate the collective bargaining process. However, what is 'necessary' to facilitate the collective bargaining process is not clearly defined. Further to this, the Guidance Note goes on to state that what is necessary will vary dependent on the nature of the group.

This is a grey area that presents significant risk to members participating in collective bargaining group. Some sharing of sensitive information is required to support negotiations. If the types of information that can and cannot be shared is not clearly defined, then members participating in a bargaining group risk prosecution under competition law.

To provide some assurance to members of a bargaining group that they are not at risk of breaching competition law, greater clarity on the information that can and cannot be shared between members of a group should be included in the Guidance Note. This could include a number of examples of different businesses groups that are applying for a collective bargaining class exemption and what information that they can and cannot share in preparing their application, and also during the collective bargaining process.

## Summary

The Australian Chamber supports the draft Collective Bargaining Class Exemptions proposed by the ACCC. We see substantial benefit for both small and large businesses participating in collective bargaining negotiations for goods and services.

The approach taken by the ACCC minimises the red-tape and makes it very easy for a bargaining group to apply for a class exemption.

To enhance the proposed approach, the Australian Chamber recommends, after appropriate implementing and review, extending the Collective Bargaining Class Exemptions to enable medium sized businesses to be included in bargaining groups. This is likely to provide greater benefit to all parties involved in collective bargaining negotiations.

Given that participation is voluntary, with target business not compelled to deal with the bargaining group and no business obliged to join the group, we consider that the necessary safeguards are in place to prevent the bargaining group with medium sized businesses from reducing competition or having undue influence on negotiations.

While some sharing of commercially sensitive information between members of a bargaining group is necessary, the Collective Bargaining Class Exemptions Notice does not clearly define what is 'necessary' to facilitate the collective bargaining process. The Australian Chamber would like to see greater clarity on the information that can and cannot be shared between members of a group.



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### About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian Businesses at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

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