



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Small business collective bargaining

**Notification and authorisation guidelines**

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

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# 1. Introduction

This guide provides information on the collective bargaining approval processes in the *Competition and Consumer Act 2010* (the Act) and outlines how the ACCC assesses the public benefits and detriments associated with collective bargaining proposals. It is written primarily for small business, agribusiness, and their legal advisors to assist their understanding of the notification and authorisation process for collective bargaining.

Small businesses, including agribusinesses, can sometimes be better off negotiating with their customers or suppliers as a group (referred to as collective bargaining). Working together, you might be able to negotiate better terms and conditions with larger businesses, and create efficiencies, that you could not achieve on your own.

However, without ACCC approval prior to commencing negotiations, collective bargaining risks breaching the Act.

The Act allows businesses to obtain legal protection for collective bargaining where the ACCC is satisfied that the public benefits outweigh the public detriments. You can obtain legal protection by:

- lodging a collective bargaining notification, or
- obtaining authorisation.

Notification is often simpler and faster than authorisation but it is not suitable for all arrangements.

The ACCC is currently considering a possible class exemption for small business collective bargaining. Once a class exemption is in place, businesses that fall within the criteria of the class exemption won't need to separately lodge a notification or authorisation, and will be able to rely on the exemption without delay or additional cost.

This class exemption power is in addition to the ACCC's existing notification and authorisation processes. Small businesses will continue to be able to use these processes to apply for exemption from competition law, particularly where proposed arrangements do not meet the criteria specified in the class exemption.

Once a class exemption for small business collective bargaining is in place, further information will be available from the ACCC's website.

The ACCC is available to answer questions about each process and discuss proposed arrangements with businesses.

Please direct inquiries to the General Manager, Competition Exemptions, ACCC at [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au).

## 2. Small business collective bargaining and boycotts

### What is collective bargaining?

**Collective bargaining** occurs when two or more businesses come together as a group to negotiate with a customer or a supplier (known as the target business)<sup>1</sup> about terms, conditions and/or prices. The group may choose to appoint a representative, such as an agent or industry association, to negotiate on their behalf.

There can be many benefits from negotiating as a group with the target business rather than individually, including:

- reducing and/or sharing the time and the cost of putting supply arrangements in place
- creating more opportunities to negotiate terms of supply that better reflect the group's needs (as compared to just signing a standard form contract)
- gaining better access to information, for example by sharing relevant information, or sharing the costs of engaging a professional advisor
- creating new marketing opportunities when the combined volume becomes more attractive to larger or new buyers or sellers
- streamlining and coordinating ordering and delivery, and hence creating supply chain efficiencies.

The target business can also benefit from:

- reduced costs due to negotiating with a single representative, or subset of the group, rather than each member separately
- more supply certainty due to bulk ordering and savings from aligning transport and distribution
- better access to information—more effective and efficient negotiations enable the transfer of more useful information between the parties.

#### **Collective bargaining is most effective when it provides mutual benefits for the group and target business**

Collective bargaining groups sometimes want to be able to refuse to supply to, or to buy from, a particular customer or supplier, unless or until they reach agreement on terms and conditions with that customer or supplier. This is called a **collective boycott**.

In certain circumstances, a collective boycott may help the group achieve some of the benefits of collective bargaining. For example, attempts by small businesses to collectively bargain with a large customer or supplier without the ability to threaten and/or engage in a collective boycott can be ineffective where the target business refuses to negotiate with the group.

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<sup>1</sup> Collective bargaining in the context of competition law does not include employee/employer collective bargaining.

## When does collective bargaining risk breaching the Act?

Collective bargaining, with or without a collective boycott, often raises concerns under the competition provisions of the Act because, in broad terms, the Act requires businesses to operate independently of their competitors when making decisions about:

- pricing<sup>2</sup>
- which businesses they deal with, and
- the terms and conditions on which they do business.

**If you act collectively with your competitors in these areas, you risk breaching the cartel and/or other competition provisions of the Act.<sup>3</sup>**

However, the ACCC recognises that collective bargaining by small businesses, with or without an associated collective boycott, often results in more efficient outcomes. Under the Act, businesses can obtain legal protection, so that they can engage in collective bargaining and boycotts without risk of breaching the Act.

The ACCC understands that businesses considering whether to form a group will need to have preliminary discussions before deciding whether to go ahead with a collective bargaining arrangement and, if so, whether to lodge a notification or seek authorisation. See appendix A for some of the questions you may wish to consider as part of the preliminary discussions.

Businesses can have preliminary discussions without breaching the Act and without the need for ACCC approval. However, during these preliminary discussions, participants should not exchange commercially sensitive information, such as information about their pricing, and should ensure that they do not reach agreements or understandings on price or other terms and conditions on which they supply or buy goods or services.

## What ACCC approval means—notification or authorisation

Small businesses can obtain legal protection under the Act for collective bargaining and collective boycotts by lodging a **notification** or obtaining **authorisation**.

ACCC approval of collective bargaining does not mean that the ACCC will participate in the bargaining process between the parties or make rulings about specific contractual provisions such as levels of service or fees.

Notification or authorisation does not create an obligation for the target business to negotiate with the group. Nor does it override any existing contractual obligations between the parties, such as confidentiality clauses.

Lodging a notification or obtaining authorisation simply removes the risk that those involved in collective bargaining, with or without a collective boycott, will breach the competition provisions of the Act.

As members of the group may be regarded as likely competitors, they should not reach an agreement or understanding on price or other terms and conditions, and should not share commercially sensitive information, until legal protection is in place.

Once legal protection is in place, the group must operate within the scope of that protection.

<sup>2</sup> Pricing may also include decisions on discounts, allowances, rebates or credits.

<sup>3</sup> Including, for example, concerted practices under s. 45(1)(c) of the Act that may arise from information sharing as part of the collective bargaining arrangement.

### 3. Notification and authorisation - quick comparison

A comparison between notification and authorisation is provided in Table 1. More information on whether notification or authorisation would be more relevant to your arrangement is provided in chapter 5 and chapter 6 respectively.

**Table 1: Quick comparison between notification and authorisation**

	<b>Notification</b>	<b>Authorisation</b>
<b>Are there limits on who can apply?</b>	Yes. Each member of the group must reasonably expect to have less than \$3 million (unless varied by regulations) <sup>4</sup> a year in total transactions with the target business.  A trade union is not able to apply.	No. Any business, industry association or trade union is able to apply for authorisation on behalf of itself and the group.  Monetary thresholds do not apply.
<b>When does the legal protection commence?</b>	Commences automatically 14 days after the notification is validly lodged, unless the ACCC objects within this period.  However, if the notification includes a collective boycott the legal protection commences automatically 60 days after the notification is validly lodged, unless the ACCC objects within this period.	Commences only when the ACCC grants authorisation. A final determination must be made within 6 months, unless extended. For straightforward arrangements, the ACCC is often able to issue a final determination much earlier than this.  An interim authorisation <sup>5</sup> may be granted to enable the collective bargaining to commence before the ACCC issues a final determination.
<b>How long does the legal protection last?</b>	The legal protection will continue for three years (the default notification period) beginning on the day the notification was lodged, unless the ACCC determines that another period (up to 10 years) is appropriate, or a stop notice is issued or the notification is withdrawn or revoked.	The ACCC can grant authorisation for any period considered appropriate in the circumstances. Most authorisations for collective bargaining are granted for between 5 and 10 years.  If the ACCC decides to revoke an authorisation the legal protection expires 21 days after the final determination is issued.
<b>Can the ACCC issue a stop notice for a collective boycott?<sup>6</sup></b>	Yes. If there has been a material change of circumstances since the notification was lodged, and the ACCC reasonably believes that the boycott has or will result in serious detriment to the public.	No
<b>Can the ACCC's approval be subject to conditions?</b>	Yes, but only if the notification involves a collective boycott.	Yes
<b>Can the arrangements include a boycott?</b>	Yes	Yes
<b>Can the ACCC compel the target business to bargain with the collective bargaining group?</b>	No	No

<sup>4</sup> Higher thresholds apply in certain industries, see page 12 of this Guideline.

<sup>5</sup> For further information on interim authorisation see the ACCC's [Guidelines for Authorisation of Conduct \(non-merger\)](#).

<sup>6</sup> A stop notice temporarily suspends the legal protection provided for collective boycott conduct under the notification while the ACCC considers whether to revoke the notification or impose conditions, see page 18 of this Guideline.

	<b>Notification</b>	<b>Authorisation</b>
<b>Does the ACCC participate in the process or arbitrate?</b>	No	No
<b>Does the ACCC's approval override existing contractual obligations between the parties?</b>	No	No
<b>What is the lodgement fee?</b>	\$1000—the ACCC is not permitted to waive the notification lodgement fee.	\$7500—the ACCC can waive the authorisation lodgement fee in whole or part if the fee is unduly onerous.

## 4. Assessing public benefits and detriments<sup>7</sup>

The concepts of **public benefit** and **public detriment** are central to the ACCC's assessment of both notifications and applications for authorisation.

Public benefit and public detriment are not defined in the Act and they are interpreted broadly.

The public benefit and detriment must result from the collective bargaining arrangements rather than other effects that would occur in any event.

### Role of market definition

The ACCC looks at the areas of competition that may be impacted by the collective bargaining. This identifies the range of buyers and sellers that could be affected and the nature of the competitive environment in which the collective bargaining or boycott may occur.

### Public benefits from collective bargaining

The ACCC accepts that collective bargaining can be an effective way to improve contracting between members of the bargaining group and the target business and can result in contracts that are more reflective of the group's circumstances and more complete, in that they deal with more contingencies.

**Any public benefits that are likely to result from the collective bargaining can be taken into account by the ACCC. In many cases, the public benefits accepted by the ACCC result from improvements to efficiency from the bargaining arrangement, but it is not necessary to frame your application in this way.**

The concept of efficiency has a number of elements. Improvements in efficiency could mean that you are able better able to allocate your resources (or inputs) to make products of most value to your customers and to make more of those products with the resources (or inputs) that you have and at the lowest possible cost. Improvements in efficiency might also come from more timely innovations or new products.

The public benefits generally accepted by the ACCC as likely to arise from collective bargaining are set out in Table 2. As part of your application, you should tell us how your proposed arrangement will result in any, or all, of these outcomes, or any other public benefits that you can identify. You are not required to quantify the size of the likely public benefits, but the ACCC must be satisfied that they are likely to occur and that they result from the collective bargaining arrangement.

<sup>7</sup> Detailed information about how the ACCC generally assesses public benefits, detriments and the impact of conduct on competition is in the ACCC's [Guidelines for authorisation of conduct non-merger](#).

**Table 2: Common public benefits from collective bargaining**

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<b>Increased input into contracts</b>	<p>Small businesses are often at a disadvantage when negotiating with larger businesses due to fewer resources, access to information and less negotiating experience.</p> <p>In some cases, target businesses may present individual small businesses with standard form contracts which often provide little, or no, opportunity to negotiate variations that could result in a more efficient and effective contract overall.</p> <p>Collective bargaining may enable individual members of the group to become more informed and engaged participants in negotiations and improve their input into contracts. This may lead to terms of supply that are more comprehensive and that better reflect the circumstances of the group and the target business, resulting in more efficient outcomes.</p> <p>Increasing the bargaining power of the group is not in itself a public benefit if it simply results in the transfer of benefit from the target business to the group. However, improvements in bargaining power can generate public benefits if it would be likely to result in contracts that enable more of the gains from trade to be realised.</p>
<b>Transaction cost savings</b>	<p>Transaction costs are the costs associated with negotiating contracts. They need not be monetary costs, but they accrue to both sides of the negotiations and include the costs of:</p> <ul style="list-style-type: none"><li>■ expert advice</li><li>■ the time and resources needed to negotiate and reach agreement on the contractual terms and conditions</li><li>■ monitoring and enforcing contracts.</li></ul> <p>Collective bargaining can reduce transaction costs by enabling a single negotiation process, or a small number of negotiation processes, relative to a situation where multiple individual negotiations occur. Collective bargaining also enables members of the group to share the costs associated with any negotiations.</p>
<b>Improvements in information</b>	<p>In situations where some parties to the negotiations are likely to be less well informed about market conditions or the preferences of other parties, they may accept (or offer) lesser terms than they would if they had more information. Collective bargaining may improve the amount and quality of relevant information available to the less informed parties and enable more efficient terms and conditions to be negotiated.</p>

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## ► Case study – Manning Valley dairy farmers

Following the introduction of \$1/L milk in 2011, a group of seven dairy farmers located in the Manning Valley, NSW approached Woolworths with a proposal to promote local, quality milk in Woolworths' stores.

The Manning Valley group lodged notifications to collectively negotiate the terms and conditions of raw milk supply agreements with Woolworths and its agent, Milk2Market. The negotiations included the mechanisms for setting prices for the supply of raw milk; the payment terms; and obligations on the farmers to supply a certain volume, specification and quality of raw milk.

In assessing the notifications, the ACCC accepted that the collective bargaining arrangements were likely to result in public benefits by introducing a new competitor for the acquisition of raw milk and by providing increased consumer choice through the introduction of a new milk product which may also result in more efficient pricing that better reflects the quality or value of the differentiated milk product.

The ACCC also considered that the arrangements resulted in public benefits from transaction cost savings, for example the group shared the costs of obtaining legal advice; by providing dairy farmers with access to better information about the dairy market; and providing dairy farmers with greater input into contractual terms from improved bargaining power. The contracts that resulted led to more efficient commercial outcomes.

The ACCC considered that the likely public detriments were limited as participation in the collective bargaining process was voluntary for all parties, the bargaining group was small – seven dairy farmers located in the Manning Valley, and the total volume of raw milk being sold through the collective arrangement was a small proportion of the milk produced in the region. Therefore, the ACCC considered it was unlikely that collective bargaining would distort competition.

Overall, the ACCC was satisfied that the likely benefits to the public from the collective bargaining arrangement were significant and would outweigh the little or no public detriment.

## Public detriments from collective bargaining

The ACCC will take into account all public detriments that are likely to result from the proposed arrangements. However, in most collective bargaining arrangements the only identifiable detriments will be those that result from a lessening of competition, as outlined in Table 3. **As part of your application, you should identify how your proposal may affect competition and whether there are features relevant to your proposal that will limit any likely anti-competitive effects or other public detriment.**

**Table 3: Possible anti-competitive effects from collective bargaining**

<b>Reduction in competition from joint conduct</b>	In the absence of collective bargaining, members of the group operate individually in their dealings with the target business. The ACCC will therefore consider the effect of any reduction in competition between members of the group as a result of acting collectively. Relevant to this assessment is the extent to which members of the group currently compete to deal with the target business. For example, there may be limited competition between group members if they are currently offered standard form contracts with little opportunity for individual input.
<b>Effect on competitors and competition outside the bargaining group</b>	Often collective bargaining arrangements are intended to improve the bargaining power of the members of the group. However, they may impact the ability of businesses that are outside of the group to compete to also supply to, or buy from, the target business or other businesses in relevant markets.
<b>Increased potential for collective activity beyond the notified collective bargaining</b>	During collective bargaining, members of the group sometimes share information. This is frequently a necessary part of negotiating together. However, this can create an environment where businesses are more willing to cooperate than they were previously. This can lead to cooperation that goes beyond what was originally proposed and approved, and may create detriment by reducing the level of competition.

## Features that can limit the anti-competitive effects

The anti-competitive effects of collective bargaining arrangements are likely to be limited when:

- The members of the bargaining group represent a small proportion of participants in relevant markets. When the current level of competition is high and the size, composition and representation of the bargaining group is restricted, the anti-competitive effect is likely to be less because of the smaller area of trade affected by the collective arrangement and because of the competition provided by businesses outside the group.
- The current level of individual bargaining between members of the group and the target business is low, such that the difference between the level of competition with or without collective arrangements may also be low.
- The agreement does not restrict the ability of members of the bargaining group to compete in other ways, for example, on quantity, quality or service. Many collective bargaining arrangements include measures designed to maintain competitive pressures between the members of the bargaining group, for example a fee scale that pays more for higher quality products.
- Participation in the arrangements is voluntary for both the members of the group and the target business. Generally, it is more likely that public benefits will outweigh public detriments when all participants are free to choose whether to participate because it is unlikely that parties would choose to participate in collective negotiations that were expected to make them worse off.

### ► Case study – collective bargaining by newsagents

The Australian Newsagents' Federation (ANF), through its affiliates and state branches, represents almost 2000 newsagents around Australia. Newsagents are often small, family-owned and operated businesses.

The ANF was granted authorisation to enable it to collectively bargain on behalf of its current and future members with a range of suppliers, many of whom are large, well-resourced businesses.

The target businesses included suppliers of products available for retail sale in newsagencies, such as newspapers and magazines, greeting cards and confectionary. They also included suppliers of services to newsagents such as insurance, electricity, petrol and electronic sales software.

The ANF identified a list of proposed target businesses that it wished to negotiate with but it also requested authorisation to enable it to approach other businesses not named in the application but who may supply newsagents at a future date.

The ACCC accepted that there were public benefits from allowing newsagents to pool resources and undertake a more co-ordinated approach to negotiating. The ACCC considered that this would result in transaction cost savings and improve newsagents' input into contracts with a range of suppliers.

The ACCC considered that generally newsagents are likely to comprise a small proportion of total purchasers in respect of the range of goods and services proposed to be acquired, aside from magazine and newspapers acquisitions (which have previously been authorised by the ACCC).

Further, many of the proposed negotiations involved target businesses that are much larger than the bargaining group. In these circumstances, there is likely to be little risk of anti-competitive detriment if the authorisation allowed collective bargaining to occur with future target businesses.

# Assessment of collective boycotts

A collective boycott occurs when members of the group collectively agree not to buy goods or services from, or not to supply goods or services to, the target unless it accepts the terms and conditions offered by the group.

Traditionally the ACCC has received few collective bargaining proposals that include collective boycott provisions. This may be partly because, in some cases, collective boycotts can be costly and damage a wide range of market participants, including the group that is engaging in the boycott.

However, ACCC approval of collective bargaining does not require the target business to participate, or ensure that any negotiations produce an agreed outcome.

Therefore, attempts by small businesses to collectively bargain with a large customer or supplier without the ability to threaten and/or engage in a collective boycott may be ineffective. The target business could refuse to negotiate with the group or only agree to similar terms that would have been implemented without the bargaining process.

Therefore, in certain circumstances the ability for the group to collectively boycott the target business can significantly improve the effectiveness of collective bargaining and outcomes for small businesses.

**A collective boycott can be a useful negotiating tool to bring the target business to the table or restart stalled negotiations. The effectiveness and appropriateness of a collective boycott will depend on the particular circumstances.**

## Boycott assessment factors

Including the potential for a collective boycott may increase the likely benefits and detriments from collective bargaining. Thus in addition to the factors that the ACCC will consider when assessing the potential public benefits and detriments of collective bargaining (previously outlined), the ACCC will also consider the following when assessing a proposal that includes an ability to engage in a collective boycott:

- **The size of the target business**, including relative to the bargaining group. A significant difference in size between the bargaining group and the target business could mean there is a significant imbalance in bargaining power. A collective boycott may be a way to get the target business to the negotiating table so that the benefits of collective bargaining can be realised.

If both the bargaining group and the individual members of the group are small compared with the target business, then the size of the detriment arising from reduced competition or harm to third parties may be small.

- **The strength of competition in downstream markets.** A target business will generally agree to the group's negotiating position and avoid or end a boycott if the costs of doing so are less than the costs of the boycott. This will often mean that the group receives higher prices and better terms than would otherwise be the case. If the resulting prices are higher than would arise in a competitive market, it is possible that this could reduce efficiency in downstream markets. However, it is unlikely that the group or the target business would agree to terms that damage the target business' position downstream. Therefore the ACCC is likely to be less concerned about the potential for higher prices to reduce efficiency if the downstream market is competitive.
- **The potential and likely duration of harm to third parties.** Collective boycotts can harm third parties (beyond the members of the bargaining group and the target business). For example, the customers or suppliers of the target business or bargaining group may face reduced demand for their products during the boycott period. Damage to third parties because of a collective boycott may offset some of the benefits of collective bargaining.
- **Outcomes of previous collective bargaining.** The case for a collective boycott may be stronger where collective bargaining without the ability to threaten or impose a boycott has previously failed. However, it is not essential to show that collective bargaining has previously failed.
- **Limitations on collective boycott activity, including mediation and notice periods.** The potential detriment of collective boycotting may be reduced if there are clear limits on collective boycott activity. For example, the ACCC may be more likely to allow a collective boycott if the group is

required to provide adequate notice to the target business about a threatened boycott. This may allow the target business to find alternative suppliers or buyers with which to deal, or to consider the group's current offer. Notice periods can also allow the group to find alternative customers or suppliers and/or to consider the target business' position and any additional information made available to the group. This may mean that a negotiated outcome is possible during the notice period.

In addition, the chances of the parties reaching a negotiated outcome without having to engage in a boycott is more likely when mediation is required first. Mediation also makes it more likely that parties will only resort to the threat, rather than practice, of boycotting.

## 5. Notification

Often the simplest way for small businesses to collectively bargain or boycott without risk of breaching competition laws is to lodge a **notification** with the ACCC.

### Pre-lodgement discussions with the ACCC

Before you formally lodge a notification, the ACCC can provide feedback and advice on the kind of information likely to be required to assess your proposal and the process we follow. The collective bargaining group may also wish to discuss their proposal with the target business before formally lodging a notification with the ACCC.

### Who can lodge a notification?

A business that is part of the collective bargaining group can lodge a notification, or an industry association or other representative can do so on their behalf. The notification can cover current members of the group and members that join in the future, provided these future members meet the requirements for lodging a notification.

A trade union or an officer of a trade union cannot lodge a collective bargaining or boycott notification.<sup>8</sup>

To limit the notification process to small business collective bargaining arrangements, a \$3 million transaction threshold generally applies. This means that a collective bargaining notification can only be lodged if each member of the group reasonably expects that it will make a contract with the target business<sup>9</sup>, and that the value of its transactions with the target business under the collective bargaining arrangement will not exceed \$3 million in any 12-month period.<sup>10</sup> Higher thresholds apply for the following industries:

- Petrol retailing - \$15 million
- New motor vehicle retailing - \$20 million
- Farm machinery retailing - \$10 million
- Primary production - \$5 million.<sup>11</sup>

Members of the bargaining group can use details of past dealings with the target business or with other customers or suppliers of similar goods or services to determine whether they meet the transaction threshold.

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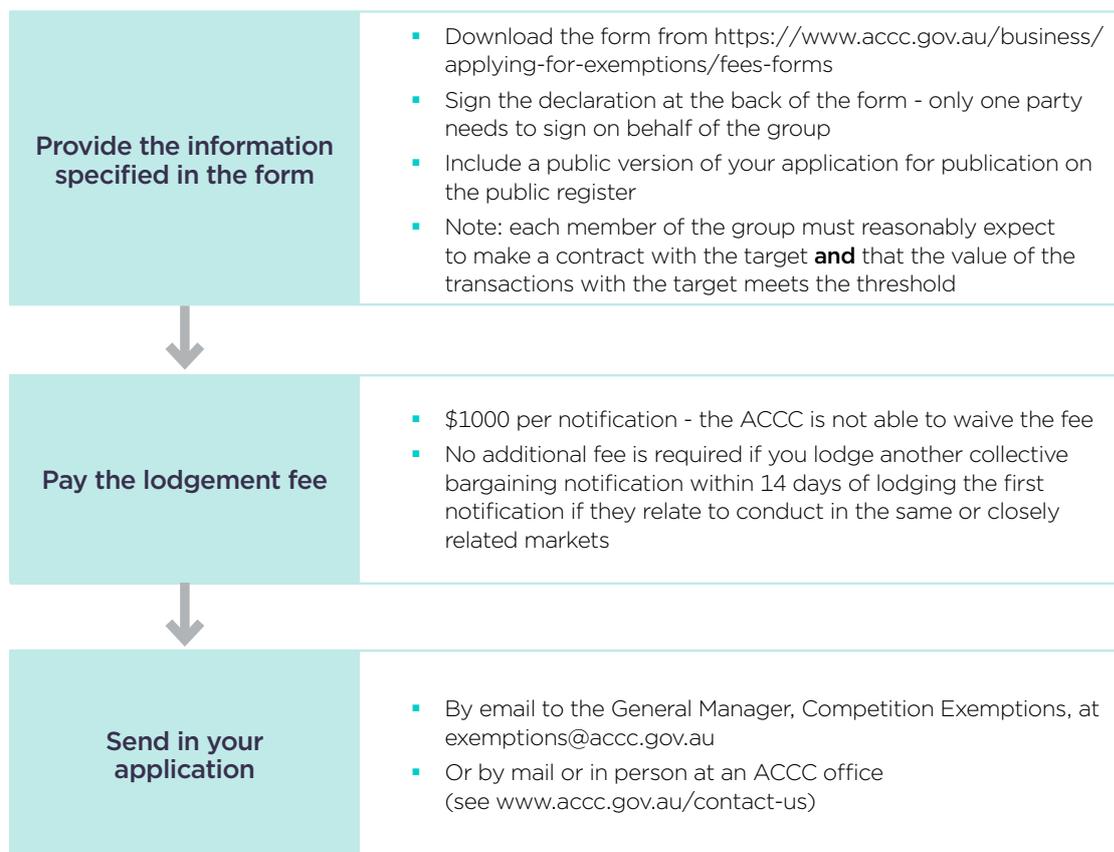
<sup>8</sup> Section 93AB(9) of the Act.

<sup>9</sup> Section 93AB(9) and 93AB(11) of the Act.

<sup>10</sup> Section 93AB(4) of the Act.

<sup>11</sup> Regulation 71A-71D.

## How to lodge a valid notification



**We will contact you as soon as possible after we receive your notification, but generally within five business days if we have concerns about the validity of your notification. In most cases you will be provided with the opportunity to rectify the matters that resulted in the notification being invalid.**

## Information to include when you lodge a notification

The information the ACCC needs to assess a notification depends on the nature and complexity of the proposed arrangement and the markets affected. **The [notification form](#) sets out the information we generally require.** If you consider that some of the information listed on the form is irrelevant to your proposal or is not available to you, provide a written explanation of this, or discuss it with us.

**As part of your notification, it is important to provide:**

- ✓ a description of the proposed arrangements; this should be precise enough to allow the ACCC to consult with interested parties and assess the notification
- ✓ an outline of the areas of competition/relevant markets likely to be affected by the proposed arrangements
- ✓ an outline of the likely public benefits from the proposed arrangements
- ✓ an outline of the likely public detriments, including the effect on competition from the proposed arrangements. If you do not consider there will be any reduction in competition or other public detriments, explain why not
- ✓ the time period relevant to the arrangements
- ✓ any other information or evidence that is relevant to the ACCC's assessment.

Note that the ACCC's assessment is more efficient if you provide comprehensive information and supporting evidence.

We don't require written consent from each member of the bargaining group, but we do ask for details (name, phone number, email address) of current members. We will assume that persons identified as group members have given their consent for the notification to be lodged on their behalf (unless they advise otherwise) and that information provided as part of the notification on their behalf is accurate.

## Public consultation

When you lodge a valid notification we place it on the ACCC's [collective bargaining notifications public register](#) and provide it to the target business to seek their views. In addition, we may contact a range of interested parties including competitors, suppliers and customers, relevant industry associations or peak bodies, consumer groups and relevant regulatory bodies and invite them to make submissions.

Any submissions from the target business and interested parties will be placed on the public register, subject to any requests for confidentiality.

## Excluding confidential information from the public register

The notification and authorisation processes are public and transparent. However, in some cases applicants and interested parties may have appropriate reasons to request that the ACCC exclude from the public register some, or all, of the information they have provided.

If the ACCC agrees to exclude this information, it can still be taken into account, but this may limit our ability to test that information publicly, which may in turn limit the weight that the ACCC can give that information.

Importantly, **the fact that the notification has been lodged and a certain minimum amount of information about the proposed arrangements cannot be kept confidential.**

Parties seeking to exclude confidential information from the public register must, at the time they provide the information to the ACCC, give reasons why the information is confidential and should be excluded.

#### Checklist for requesting confidential information be excluded from the public register:

- ✓ Make the request at the time you provide the document or submission to the ACCC
- ✓ Clearly identify those sections of the document or submission that you want excluded
- ✓ Provide reasons
- ✓ Provide a public version of the document, with the confidential parts either redacted or excluded. This public version will be placed on the public register
- ✓ Provide a complete version of the document, with the confidential parts clearly identified
- ✓ For more information, see the ACCC's publication [Guidelines for excluding information from the public register for authorisation and notification processes](#)

## Legal test for assessing notifications

Broadly, the ACCC may only object to a collective bargaining notification if the benefit to the public likely to result from the notified arrangements would not outweigh the public detriment likely to result (i.e. there is no **net public benefit**).<sup>12</sup>

## When does legal protection commence?

Where the notification does not involve a collective boycott the legal protection automatically commences 14 days after the notification is validly lodged, unless the ACCC objects within this period.

If the notification relates wholly or partly to a collective boycott, the legal protection automatically commences 60 days after the notification is validly lodged, unless the ACCC objects within this period.

## How long does legal protection last?

A notification (and the legal protection it provides) will normally remain in force for three years beginning on the day the notification was validly lodged. This is the default period for a notification, which applies unless the ACCC determines that another period (up to 10 years) is appropriate, or the notification is withdrawn, revoked, or a stop notice<sup>13</sup> is issued (in the case of a collective boycott notification).

If the ACCC determines that the default period of three years is not appropriate in the circumstances, the ACCC will issue a written statement identifying an alternate period of no more than 10 years and providing reasons for the alternate period.<sup>14</sup>

## ACCC assessment process

Following the consultation process, the ACCC will assess the notification according to the net public benefit test.

### No concerns—notification allowed to stand

In most cases, the ACCC will be satisfied that the public benefit resulting from the proposed collective bargaining or boycott outweighs the public detriment and will take no further action at that time. This means the legal protection provided by the notification commences (or continues) and the bargaining group can engage in collective negotiations with the target business.

<sup>12</sup> Sections 93AC (1) and (2) of the Act.

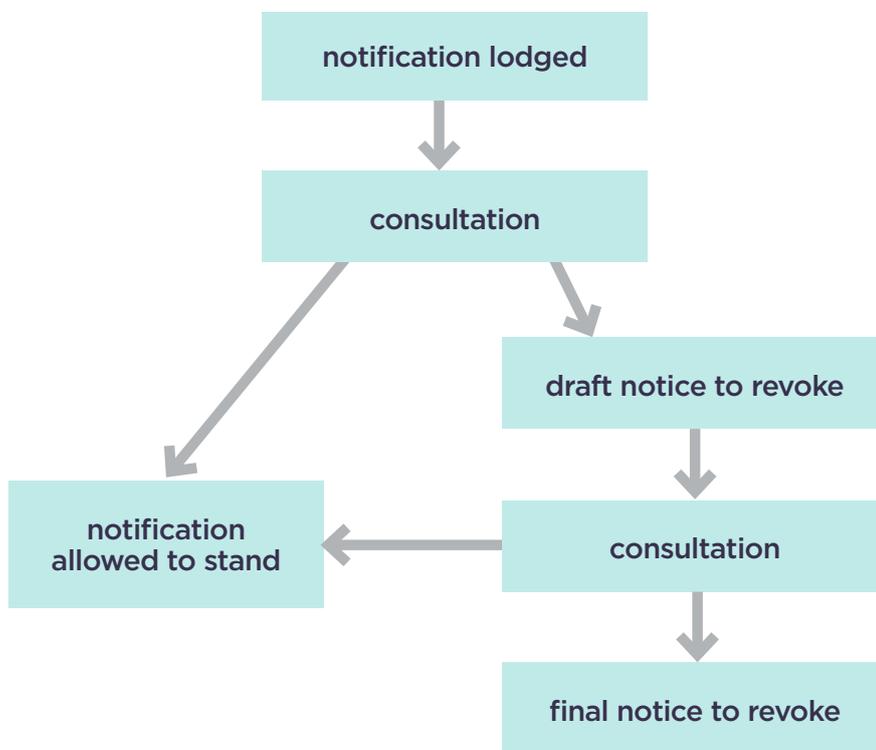
<sup>13</sup> See page 18 of this Guideline.

<sup>14</sup> Section 93AD(5) of the Act.

The ACCC may review a notification at any time if circumstances change, or the ACCC receives further information, that leads it to consider that the public benefits from the notified arrangements may no longer outweigh the public detriments.

In cases where the ACCC is not satisfied that the proposed arrangements are likely to result in a net public benefit, the ACCC may take steps to revoke the notification.

#### Steps in notification assessment process



### Revoking a notification

If the ACCC considers that the proposed arrangement does not result in a net public benefit it may issue a written notice revoking the notification. Before the ACCC does so, it must:

- issue a draft objection notice outlining the reasons why the ACCC proposes to revoke the notification
- seek submissions from the bargaining group and interested parties in response to the draft objection notice, and
- hold a conference, if requested.

The ACCC must follow the same steps once it issues a stop notice in relation to a collective boycott notification (see page 18 and appendix B).

#### Draft objection notice and consultation

Before removing the legal protection provided by a collective bargaining notification, the ACCC must issue a draft objection notice that outlines why the ACCC proposes to remove the legal protection provided by the notification.<sup>15</sup>

The ACCC will send the draft objection notice to the bargaining group, the target business and other interested parties to seek their views, and place a copy on the public register. Parties can make written or oral submissions in response to the draft objection notice.

<sup>15</sup> Sections 93A(1) and 93A(3) of the Act.

## Opportunity for a conference

When the ACCC issues a draft objection notice, the bargaining group, the target business and other interested parties are able to request that a conference be held to discuss the draft objection notice. The conference is a meeting that provides another opportunity for the bargaining group, the target business and other interested parties to give their views about the draft objection notice. If a conference is called, it is chaired by an ACCC Commissioner.

## Final objection notice

The ACCC will consider any submissions received within the specified period after the draft objection notice, including at the conference (if held), and will decide whether to issue a final objection notice:

- If the ACCC issues a final objection notice before the legal protection commences, the legal protection will not commence.<sup>16</sup>
- If legal protection has already commenced, the legal protection ceases 31 days after the final notice is given.<sup>17</sup>

The ACCC will place a copy of the final objection notice on the public register and will inform the bargaining group, the target business and other interested parties that the collective bargaining notification has been revoked.

Once a notification is revoked and legal protection is no longer in force, the collective bargaining arrangements must cease or the members of the bargaining group may be at risk of legal action for a breach of the Act.

Alternatively, the ACCC may decide not to proceed with the revocation of the notification. If this is the case, the legal protection provided by the notification will commence or continue.

## Amending or withdrawing notifications

Notifications cannot be amended after they are lodged with the ACCC. If there are changes to the collective bargaining arrangements, the parties must lodge a new notification, including payment of the lodgement fee.

A notification can be withdrawn by writing to the ACCC at any time, provided the ACCC has not already issued a final objection notice revoking the notification.<sup>18</sup> Lodgement fees cannot be refunded when a notification is withdrawn.

## Tribunal review

The Australian Competition Tribunal can review the ACCC's decision to issue a:

- final objection notice revoking a notification
- conditions notice
- notice determining the expiry of a notification or
- notice to extend the period for which a stop notice is in force.

A person seeking review must lodge an application with the Tribunal within 21 days of the ACCC giving the notice.

The Tribunal cannot review a decision by the ACCC to allow a notification to stand.

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<sup>16</sup> Section 93AD(2)(b) of the Act.

<sup>17</sup> Section 93AD(3)(b) of the Act.

<sup>18</sup> Section 93AB(2) of the Act.

# Additional ACCC powers where collective boycott notifications raise concerns

The ACCC is able to impose conditions on a boycott notification and issue a stop notice once a boycott notification is in force. **Having these additional powers available gives the ACCC greater flexibility in assessing a boycott notification and makes it more likely that the ACCC will allow a collective boycott notification to stand.**

## Imposing conditions

The ACCC may impose conditions on a collective boycott notification only if:

- the ACCC considers it has grounds for issuing an objection notice to revoke the notification; and
- the ACCC reasonably believes that conditions would remove those grounds to issue an objection notice.<sup>19</sup>

In these circumstances, the ACCC may issue a **conditions notice** which sets out the particular conditions and the reasons for imposing them.

If the conditions are not complied with, the ACCC may take steps to revoke the notification.<sup>20</sup>

## Stop notice

The ACCC may issue a **stop notice** requiring notified collective boycott conduct to immediately cease where:

- there has been a material change of circumstances since the collective bargaining notification came into force or since the ACCC previously considered the conduct and
- the ACCC reasonably believes that:
  - the collective boycott conduct has resulted in serious detriment to the public, or
  - serious detriment to the public is imminent as a result of the collective boycott conduct.<sup>21</sup>

The effect of a stop notice is to temporarily suspend the legal protection provided for collective boycott conduct under the notification while the ACCC considers whether to revoke the notification or impose conditions on the notification.

The ACCC cannot issue a stop notice in respect of collective bargaining notifications that do not involve a collective boycott or threat of collective boycott.

Further information about the stop notice process is available at **appendix B**.

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<sup>19</sup> Section 93ACA of the Act.

<sup>20</sup> Section 93AC(2A) of the Act.

<sup>21</sup> Section 93AG of the Act .

## 6. Authorisation

Legal protection under the Act for collective bargaining arrangements is also available as a result of the ACCC granting an **authorisation**.

Some features and requirements of the authorisation process are similar to the notification process, such as:

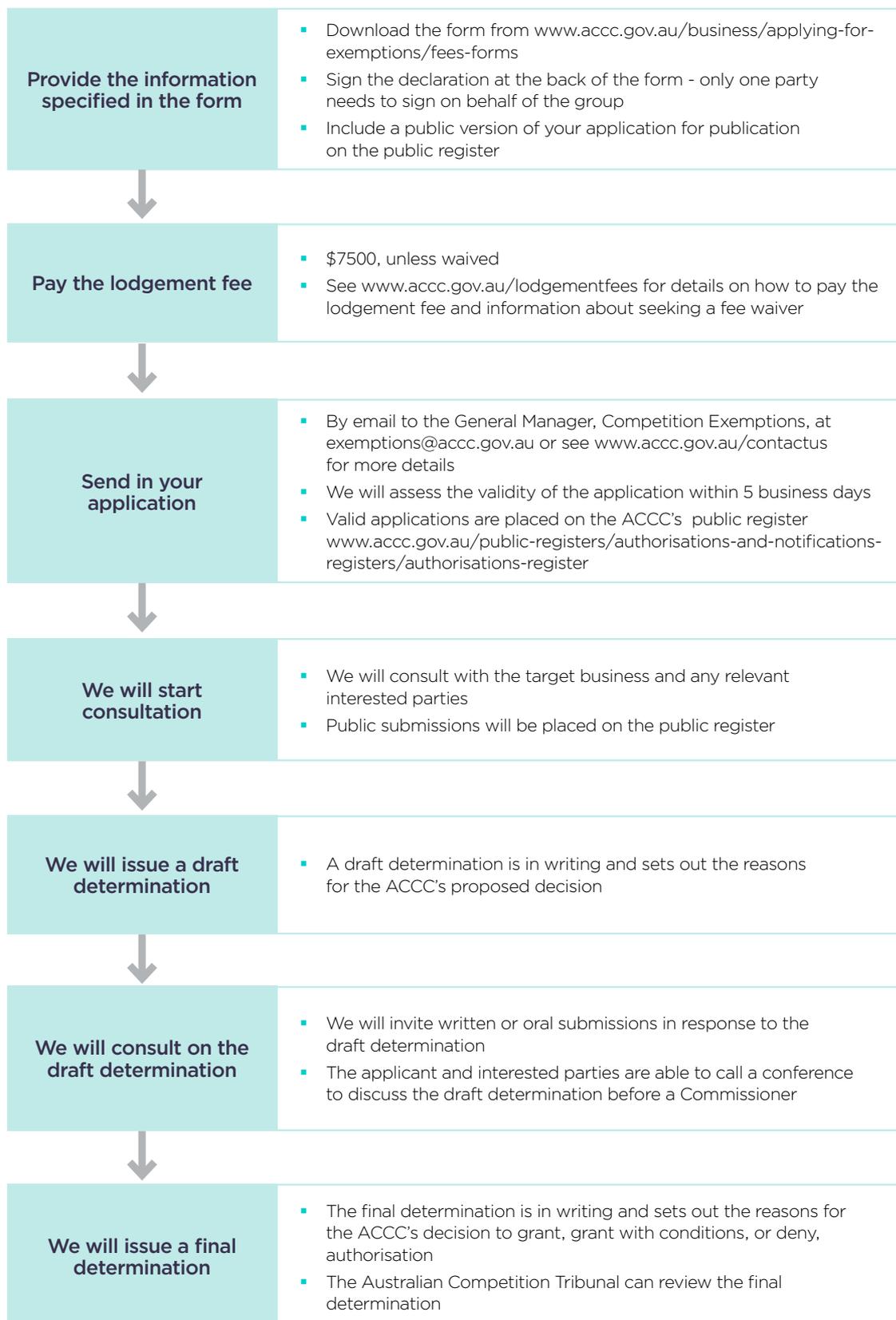
- the opportunity to have pre-lodgement discussions with the ACCC before you formally lodge an application (page 12)
- the kind of information to include with your application (pages 13-14), and
- the need for public consultation and the use of a public register (page 14).

### Who can apply?

Unlike collective bargaining notifications, anyone can seek authorisation. It is not limited to small businesses.

Any member of the bargaining group can lodge an application for authorisation on behalf of itself and the other members of the group, including future members. An application for authorisation can be lodged on behalf of other businesses, meaning an industry or professional association can lodge on behalf of its members. A trade union is able to lodge an application for authorisation on behalf of its members that are subject to the Act, such as independent contractors (but not for employer/employee collective bargaining).

## Steps in the authorisation process



For more information about the authorisation process, see the [Conduct authorisation guidelines](#).

## Legal test for authorisation

The ACCC may grant authorisation for collective bargaining or boycott arrangements where it is satisfied that the arrangements would result, or be likely to result, in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result.<sup>22</sup>

## When does legal protection commence?

The legal protection provided by an authorisation, if granted, commences on the day specified in the ACCC's final determination, which must not be earlier than 21 days after the final determination is issued.

The ACCC must make a final determination within 6 months of the application being validly lodged, unless extended.<sup>23</sup>

For straightforward collective bargaining applications, the ACCC is often able to issue a final determination much sooner – typically within 3 to 4 months of the application being lodged.

In some cases, the ACCC may grant interim authorisation, which enables the parties to engage in some, or all, elements of the proposed arrangement before the ACCC issues a final determination.<sup>24</sup>

## When does an authorisation expire?

The ACCC considers the duration of an authorisation on a case-by-case basis. In most cases where authorisation is granted, it is for five years. The ACCC is likely to grant authorisation for longer periods if the applicants are seeking re-authorisation (because the existing authorisation is about to expire) and the arrangements have been operating effectively without complaint.

## Tribunal review

A final determination by the ACCC to grant or deny authorisation may be reviewed by the Australian Competition Tribunal. A request for review must be lodged with the Tribunal within 21 days of the ACCC's final determination.

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22 Section 90(7) and 90(8) of the Act. If the collective bargaining arrangement does not involve pricing agreements and/or other cartel provisions the ACCC may also grant authorisation if it is satisfied that the arrangements would not have, or would not be likely to have, the effect of substantially lessening competition.

23 Section 90(10A) of the Act.

24 Section 91(2) of the Act.

## 7. ACCC contacts and further information

### Contact us

You can seek guidance from us if you want to discuss the options and processes before deciding to lodge a notification or an application for authorisation or if you are uncertain about the information to include, or the various steps in the ACCC's assessment process. We can provide comments on a draft notification or application for authorisation before it is formally lodged.

Inquiries should be directed to the General Manager, Competition Exemptions at [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au).

### Related publications

- [Guidelines for Authorisation of conduct \(non-merger\)](#)
- [Guidelines for excluding information from the public register for authorisation and notification processes](#)
- [Forms and fees](#)
- [Guidelines on concerted practices](#)

# Appendix A: Tips for forming a bargaining group

You can set up a collective bargaining group in the way that best suits your circumstances. A collective bargaining group can be as small as two businesses or as large as all members of an industry association. Any type of business can be involved—sole traders, home based businesses, manufacturers, retailers, agribusinesses and service providers. You may wish to organise the group amongst yourselves, ask your industry association for help, or engage a lawyer or other professional advisor to assist.

The ACCC has approved many types of collective bargaining arrangements in various industries. Some examples are included in this guide. You can find more on the ACCC's authorisation and notification public register at: [www.accc.gov.au/public-registers](http://www.accc.gov.au/public-registers).

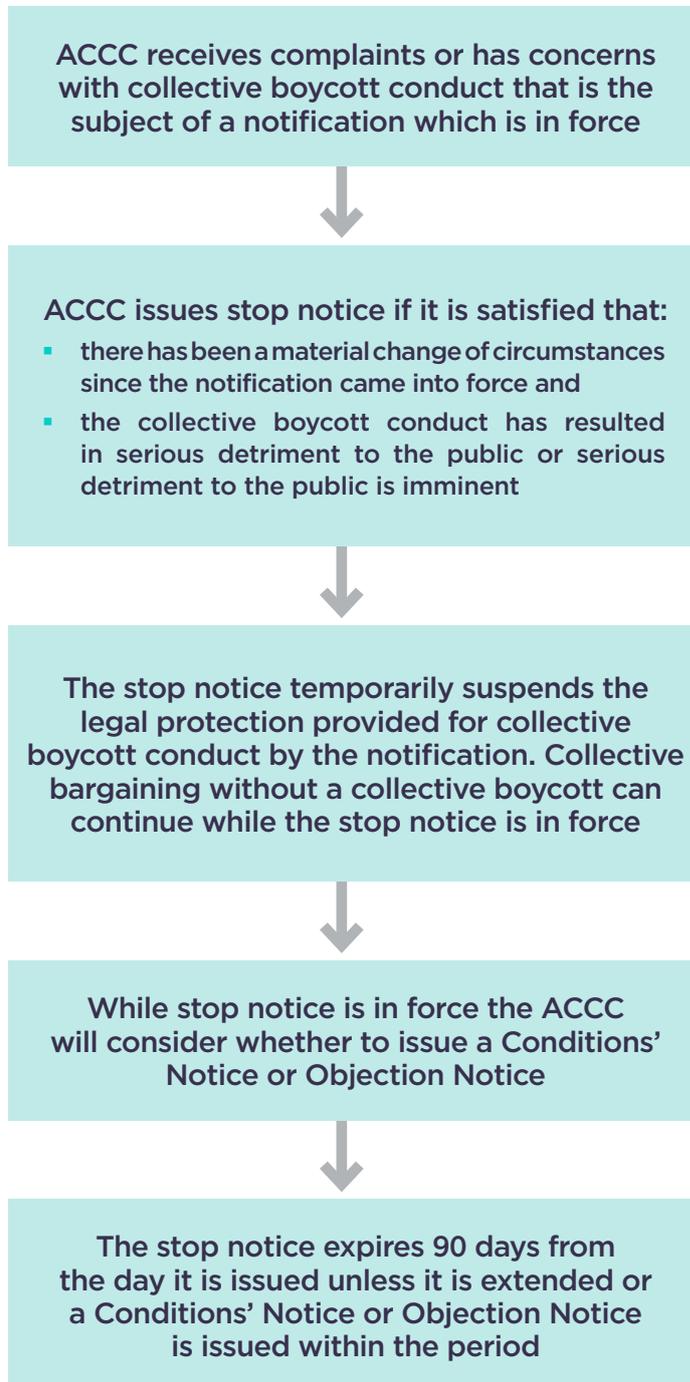
You may find it useful to consider the following questions when forming a bargaining group:

- Who can join the group?
- Will membership change over time or remain stable? Will membership be voluntary?
- What is the product the group intends to sell or buy? Is it all goods or services supplied or bought by the group or just a subset (for example goods with a particular characteristic or quality)?
- What terms and conditions does the group propose to negotiate? What are the objectives of the group?
- Who does the group propose to negotiate with (i.e. the target business)? Will the target business change over time? Does getting together open up new market opportunities with customers or suppliers that are more prepared to deal with the group because of the increased volumes?
- How will the group operate or be structured? Will an agent negotiate on behalf of the group or will members of the group conduct the negotiations themselves?
- Does the group propose to collectively boycott the target business if negotiations fail? if so, how will a collective boycott be triggered?
- What are the benefits that the bargaining group expects to achieve? Will there be benefits for the target business?

## **Collective bargaining is more likely to be successful where:**

- ✓ members of the group have common objectives and requirements
- ✓ the group is adequately resourced
- ✓ there is an effective leader, or leadership subgroup, who has the time and skills needed to canvass the views of the group, to keep them informed, and to negotiate and deal with the target business
- ✓ there is open communication between members of the group and the leader/negotiator, and with the target business
- ✓ the target business is willing to deal with the group, particularly because there are mutual benefits.

# Appendix B: Stop notice flow chart





AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

