



## Potential ACCC “class exemption” for collective bargaining – discussion paper

23 August 2018

### Introduction – what is a class exemption?

The ACCC now has the power to make ‘class exemptions’. This is a way for the ACCC to grant businesses an exemption from competition law for certain ‘classes of conduct’ that may otherwise carry a risk of breaching competition laws, but:

- do not substantially lessen competition, and/or
- are likely to result in overall public benefits.

A class exemption will effectively provide a ‘safe harbour’, so businesses can engage in the conduct specified by the class exemption without breaching the competition law.

This new power is in addition to the ACCC’s existing ‘[authorisation](#)’ and ‘[notification](#)’ processes. Businesses will continue to be able to use those processes to apply for exemption from competition law. The main difference is that businesses that fall within the scope of a class exemption get *automatic* exemption; they will not need to apply to the ACCC, as they do with authorisations and notifications.

### ***Seeking your feedback on a class exemption for collective bargaining***

The ACCC invites your comments on a possible class exemption that would allow eligible businesses to collectively bargain with the customers they sell to or the suppliers they buy from. For example, for a group of farmers to bargain with a processor to whom they supply their produce, or with an energy company from which they purchase gas.

Information about how to lodge your comments or a submission is provided at the end of this paper.

The main issues on which we are seeking your views are:

- which businesses should come within the scope of the collective bargaining class exemption, and
- whether a class exemption should permit franchisees to collectively bargain with their franchisor regardless of their size or other characteristics.

We would welcome your views on either or both of these questions. You are also welcome to provide views on any other relevant issues.

## Background

### ***What is collective bargaining?***

Collective bargaining is an arrangement where two or more competitors come together to negotiate with a supplier or customer (**the target**) about terms, conditions and/or prices. A group of businesses may sometimes appoint a representative, such as an industry association, to act on their behalf in negotiations.

Small businesses, including farmers, can sometimes be better off negotiating with their customers or suppliers as a group. Working together, they may be able to negotiate more efficiently with larger businesses, and achieve better terms and conditions, than they can on their own.

### ***Why do I need an exemption for collective bargaining?***

Collective bargaining involves an agreement between businesses that would otherwise be competitors. This means that without legal protection, the agreement may breach competition laws.

### ***How does the ACCC currently deal with collective bargaining?***

Businesses are able to seek legal protection from the ACCC to engage in collective bargaining without breaching competition law if the collective bargaining will result in overall public benefits. This can be done through the authorisation and notification processes.

Each year the ACCC receives many applications for authorisation and notification of collective bargaining.<sup>1</sup> In the majority of cases, particularly those involving groups of primary producers or groups of small businesses proposing to collectively bargain with a larger target, the ACCC concludes that such arrangements are benign in their effect on competition and would be likely to result in a net public benefit.

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<sup>1</sup> In the period of 1 January 2007 – 31 December 2017, the ACCC received 160 authorisation and notification applications for collective bargaining and:

- granted or took no further action in relation to 147 of these
- only two authorisations were denied by the ACCC, while two were withdrawn by the applicant after the ACCC raised concerns
- only two notifications were revoked by the ACCC, while three were withdrawn by the applicant after the ACCC issued a draft objection notice, and
- four applications were withdrawn for other reasons.

For example, the ACCC has allowed collective bargaining by:

- newsagents or other retailers negotiating with their suppliers
- lottery agents negotiating with lottery operators
- primary producers, such as dairy farmers, chicken growers and vegetable growers, negotiating with processors they supply
- truck owner-drivers negotiating with transport companies, and
- post office owners negotiating with Australia Post.

The authorisation and notification processes will still be the best option for many businesses wanting to start collectively bargaining, as they can be more flexible than a general class exemption; can allow for case by case consideration of all the circumstances; and can include the option of a collective boycott where appropriate.

However, businesses seeking authorisation or notification are required to submit an application with supporting information and pay a lodgement fee, and in complex cases, the process can take up to six months.

A class exemption for collective bargaining would remove the need for businesses that meet the specified eligibility criteria to seek authorisation or lodge a notification. As such, they could access the exemption without delay or additional cost and realise the benefits collective bargaining can bring. In particular, we consider that a class exemption would:

- reduce the administrative and financial cost of collective bargaining for businesses that have an existing authorisation or notification in place, as they would not have to seek renewal, and
- encourage more businesses to take advantage of collective bargaining.

### ***How would a collective bargaining class exemption work?***

Once such a class exemption is in place, businesses would be able to self-assess whether their proposed conduct falls within the scope of the class exemption and:

- if so, the business, or group of businesses, can legally engage in that conduct, without a notification or authorisation, or
- if not, the class exemption will not apply, and the business or group of businesses will need to consider whether to seek authorisation or lodge a notification.

Once a class exemption is in place, if you are in doubt, we're always happy to discuss this.

Importantly, a class exemption would not force a target to deal with the bargaining group if it doesn't wish to. It simply means that the group is able to collectively

negotiate with the target on a voluntary basis without breaching the competition law.<sup>2</sup> For example, if a group of eligible farmers wishes to negotiate with the processor they supply, the processor is not obliged to deal with them as a collective and may instead elect to negotiate with each farmer individually.

The ACCC is not considering a class exemption for collective boycott conduct.<sup>3</sup>

### ***Limits on making class exemptions***

The ACCC can only make a collective bargaining class exemption if it is satisfied that the collective bargaining covered by the class exemption:

- would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
- would result in, or would be likely to result in, a benefit to the public that would outweigh any detriment.

The ACCC will therefore ensure that any class exemption it makes only applies to collective bargaining conduct that meets these requirements. In doing so, the ACCC may specify one or more of the following limitations:

- that the class exemption only applies in particular circumstances
- that the class exemption only applies to particular types of businesses
- that the class exemption is subject to other specified conditions.

The ACCC must specify the duration of the class exemption. It can make class exemptions that last for up to 10 years.

The ACCC is able to vary or revoke a class exemption once in place. It will also be able to withdraw the benefit of the class exemption from particular businesses (but not retrospectively).

The class exemption would specify who it applies to and in what circumstances, including the size of businesses that would be covered. It is important that a class exemption:

- is broad enough to be useful for businesses
- only covers collective bargaining arrangements that pose very little risk to competition and/or lead to overall public benefits, and

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<sup>2</sup> This also applies to authorisations and notifications. All three processes are limited to giving exemption from competition laws; they cannot impose obligations on target businesses.

<sup>3</sup> A collective boycott involves a group jointly agreeing to refuse to supply to, or buy from, a particular customer or supplier, unless or until they reach agreement on terms and conditions. Some collective bargaining groups apply for authorisation to include the option of moving to a collective boycott if they are unable to reach agreement with the target (or if the target refuses to negotiate at all). Collective boycotts can make collective bargaining more effective, but in some cases they can also harm competition. For this reason, boycotts need to be assessed case by case and will not be part of the proposed class exemption.

- enables businesses to confidently self-assess whether they and the arrangements they propose are covered. This will require the class exemption to be framed in simple, clear and objective terms.

## **Issues we are seeking your feedback on**

### **1. *What types of businesses should be covered under this class exemption?***

The ACCC has generally not had concerns about collective bargaining applications by groups of small businesses, but collective bargaining by larger businesses has greater potential to raise competition concerns (for example, by reducing competition and leading to consumers paying prices above competitive levels). For this reason, our starting point is that a class exemption for collective bargaining should only be available to businesses below a certain size. Larger businesses wishing to engage in collective bargaining would still be able to seek authorisation through the normal channels and be assessed case by case, just as they are today.

This raises the question of how to determine which businesses should be eligible for the class exemption, based on their size and other factors. We are considering which characteristics, or combination of characteristics, would be most suitable for defining eligibility for a collective bargaining class exemption. For example:

**a. The class exemption could be limited according to the number of employees of each business in the group.**

For example, the class exemption could be limited to apply only to businesses that employ less than a specified number of people – for example, 20 people, including casual employees employed on a regular and systematic basis.

**b. The class exemption could be limited according to the turnover of each business in the group.**

For example, the class exemption could be framed to apply only to businesses with an aggregated turnover or annual revenue of less than a specified figure, such as \$10 million or \$25 million.

**c. The class exemption could be limited according to the value of the contract that each member of the group expects to enter with the target they are proposing to collectively bargain with.**

For example, the class exemption could be limited to apply only where the businesses each expect to make a contract with the target(s) under the collective bargaining arrangement that will not exceed a specified amount, such as \$3 million in any 12-month period.

**d. The class exemption could be limited using a combination of these factors.**

For example, the class exemption could apply provided that at least 2 out of these 3 factors are met (i.e. employee numbers, turnover, or contract value).

**e. The class exemption could apply to businesses that are otherwise not eligible if they can show that the target of the collective bargaining supports their proposal.**

In the past, the ACCC has authorised groups to collectively bargain regardless of whether the target business(es) supports their application, but this is assessed case by case through the authorisation and notification processes.

Our starting position is that eligibility for the class exemption should not depend on getting consent from the business that is the target of the collective bargaining. However, we are considering whether businesses which do not otherwise meet the criteria to be eligible for the class exemption (for example, because their turnover is too high) should nevertheless be allowed to access the exemption if they can show that the target has consented.

**f. Should the class exemption be limited only to collective bargaining with target businesses that are above a certain size? If so, which characteristics, or combination of characteristics, would be most suitable for defining the size of target businesses that eligible businesses are able to collectively bargain with?**

The size of the target business, including relative to the bargaining group, can be an indication of where the bargaining power lies. In many cases the businesses in the bargaining group will be smaller relative to the target businesses (and this is why they can be better off negotiating collectively), but in some cases the overall size of the bargaining group may make them larger than the target.

The class exemption could be limited to collective bargaining with targets that employ more than a specified number of people, or with an aggregated turnover or annual revenue of more than a specified figure. Or, the class exemption could be limited to collective bargaining with targets by reference to the size of the target relative to the size of the businesses in the proposed bargaining group.

Alternatively, it may not be as important to limit the size of a target business given that the class exemption would not force or oblige a target to deal with the bargaining group if they don't want to.

**Feedback requested:**

- whether any of these approaches to defining eligibility (or a combination of them) would be appropriate and workable

- any alternative approaches to defining eligibility.

## **2. Other issues**

The ACCC is also considering other issues, such as:

- a. Should the class exemption only be available to collective bargaining groups below a certain size? For example, should it specify a limit on the number of businesses in any group, or their combined market share?**

For example, if a collective bargaining group includes all or nearly all of the suppliers in a market, this may increase the risk that allowing the group to collectively bargain would reduce competition.

We note however that market shares are often difficult to calculate and subject to divergent views, and can also change over time.

- b. Should the class exemption apply only where there is not common representation across collective bargaining groups?**

For example, if a number of collective bargaining groups negotiating with the same target are represented by one representative body this might allow that body to influence negotiations across a substantial segment of the market, and therefore increase the risk that collective bargaining would reduce competition.

- c. Should the class exemption allow the bargaining group to negotiate with both customers they sell to (joint supply) and with suppliers they buy from (joint procurement)?**

Many collective bargaining arrangements considered by the ACCC involve groups negotiating with the target businesses they sell goods or services to. Other arrangements involve groups negotiating with suppliers they purchase goods or services from. Our starting position is that the class exemption should cover collective bargaining with both customers and suppliers.

- d. Should the class exemption exclude sharing of information or arrangements between members of the group that are not necessary to collectively bargain with a target?**

While businesses need to share information in order to collectively bargain, information sharing also has the potential to reduce competition between members of the group if it facilitates common understanding between businesses about how they will operate.

Our starting position is that information sharing beyond that necessary to engage in collective bargaining should not be allowed under any class

exemption. Businesses wishing to engage in broader sharing of information would still be able to apply for authorisation for that conduct.

Further, neither the protection of a class exemption nor an authorisation would supplant any contractual obligations that place limits on the sharing of information.

**e. Should other obligations apply? For example, should a class exemption only apply where the bargaining group does one or more of the following:**

- keeps written records of the composition of the group
- notifies the ACCC when the group is formed
- notifies the target when the group is formed?

**f. What would be the effect of a collective bargaining class exemption on businesses which fall outside it?**

For example, if a group of businesses was able to collectively bargain but some businesses were excluded from the group because of their size, those businesses could miss out on receiving the same benefits or savings as those within the bargaining group and may therefore be competitively disadvantaged.

**g. What would be the effect of a collective bargaining class exemption on the operational business decisions for potential group members?**

For example, would a class exemption that applied only to businesses with less than a defined employee number or turnover impede the growth of businesses that wished to rely on it, but were close to these size thresholds?

**3. *Should a class exemption allow collective bargaining by all franchisees with their franchisor, regardless of their size or other factors?***

One specific type of business that is likely to benefit from being able to collectively bargain is franchisees negotiating with their franchisor, including group mediation.

Franchisees are generally in a weaker bargaining position in negotiating with their franchisor due to the nature of the franchising business model. In order to achieve consistency in branding and product/service offerings across a franchise network, franchisors often require their franchisees to sign agreements whereby the franchisor maintains significant control over day-to-day operations of the franchisee's business.

Many, but not all, groups of franchisees would fit within the type of eligibility criteria that might apply to a general collective bargaining class exemption. However, the ACCC is considering whether to specifically allow any group of franchisees to collectively bargain with their franchisor, regardless of their size or whether they satisfy any other eligibility criteria. This would include franchisees and fuel resellers

whose businesses and contracts (with franchisors or wholesalers respectively) are governed by either the Franchising Code of Conduct or Oil Code of Conduct.

This would provide certainty that all franchisees who have contracts with the same franchisor or wholesaler would be able to form a single group, with no franchisees excluded.

This proposed approach, if adopted, would only apply to negotiations between franchisees and their franchisor. If a group of franchisees wished to collectively bargain with any other target, for example a supplier, and they wished to rely on the collective bargaining class exemption, they would be subject to the same eligibility criteria as any other collective bargaining group (for example, size or turnover limits).

Additionally, a class exemption would not force a franchisor to deal with the bargaining group if it didn't want to. It would simply allow the franchisee group to collectively negotiate with the franchisor without breaching the competition law. The franchisor would then decide whether to deal with franchisees as a collective or continue to negotiate with each franchisee individually.

If you have an interest in franchisees collectively bargaining with franchisors, please provide your views about the following questions:

- a. Should all groups of franchisees be eligible for a class exemption in relation to negotiations with their franchisor, including group mediation, regardless of franchisee size and without any other limitations on membership of the bargaining group?**
- b. If not, what characteristics should determine whether a group of franchisees is able to use the collective bargaining class exemption to negotiate with their franchisor?**
- c. What other issues specific to collective bargaining by franchisees with their franchisor should be considered in developing the class exemption?**

## **Making a submission**

You are invited to comment on the issues raised in this discussion paper or any other matter you consider relevant to the ACCC's consideration of developing a collective bargaining class exemption.

Submissions should be lodged by **21 September 2018**. Submissions should be emailed to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au) with the subject "Collective bargaining class exemption – submission".

Alternatively, if you would like to provide comments orally, please contact Miriam Kolacz on (03) 9658 6476 or Gavin Jones on (03) 9290 1475 to organise a suitable time.

Submissions may be placed on the ACCC's website, or otherwise made available to other interested parties, subject to consideration of any request that a submission, or part of a submission, not be made publicly available.

If the ACCC decides to proceed with a class exemption for collective bargaining, we will engage in a second round of public consultation about the form we are proposing that the class exemption will take, including how we are proposing to define eligibility for the class exemption, before making a final decision.

Please advise if you do not wish to make a submission at this time, but would like to be informed of the progress of the ACCC's consideration of a collective bargaining class exemption. If you are able to, please provide a nominated contact email address for future correspondence.

You can also forward this discussion paper to any other party who may wish to make a submission to the ACCC.

### **Further information about class exemptions**

Further information about the ACCC's class exemptions power, the progress of the ACCC's consideration of this possible class exemption for collective bargaining and details about proposed public consultation, and the process for issuing any future class exemptions is available on the [ACCC website](#).