



**BUSINESS COUNCIL**  
OF CO-OPERATIVES AND MUTUALS

Submission in response to ACCC Discussion Paper – Collective Bargaining Class Exemption, August 2018

September 2018

Australian Competition and Consumer Commission  
Via email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

21 September 2018

Dear Sir/Madam

### **Collective Bargaining Class Exemption – submission**

The Business Council of Co-operatives and Mutuals (BCCM) is pleased to provide comment in response to the ACCC's Discussion Paper about the introduction of a Collective Bargaining Class Exemption for small businesses, agribusiness and franchisees.

Co-operative and Mutual Enterprises (CMEs) have been a part of the fabric of Australian life and business since the mid 1800s. More than 170,000 Australian businesses, including many small and family-owned businesses, enhance their efficiency and competitiveness through membership of an enterprise co-operative. Enterprise co-operatives add diversity and business model competition to markets, offering business consumers more choice.

Formed in 2013 following the United Nations International Year of the Co-operative, the BCCM aims to educate, inform and advocate for recognition of the CME sector in all industries. The need for government action to include CMEs in regulatory and policy development is evident from the findings and recommendations of the [Senate Economics References Committee Inquiry into Cooperative, mutual and member-owned firms](#), and the Hammond Review into [Access to Capital for CMEs](#).

The BCCM stresses that co-operatives, mutuals and industry associations (all member-based organisations) must be able to represent their small business members in collective bargaining arrangements and be afforded the protection offered by the collective bargaining class exemption, despite not being a small business in their own right. Representation of members is an important part of what CMEs do. Failing to include them in the class exemption would largely defeat the purpose of the class exemption. Indeed, the [Harper Review into Competition Policy Final Report](#) found that increased awareness and uptake of co-operative models would 'potentially strengthen the bargaining position of small businesses dealing with large businesses.'

The BCCM notes that broader competition policy would not otherwise be changed. Collective boycott provisions are not otherwise changed and therefore if there were any competitive impacts beyond negotiation, this would remain subject to requirements of not substantially lessening competition.

The BCCM is pleased to provide comments in response to the following questions from the Discussion Paper:

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

**Examples a-d.**

The BCCM supports using a combination of factors, as envisaged in example d.

The BCCM further suggests that a particular business should be considered a small business in negotiating with the target as part of a broader collective, if the contract value represents that of a

small business despite the scheme and size of the overall business.

**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.**

The BCCM agrees that the exemption should apply to businesses that are otherwise not eligible if the target consents.

**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 BCCM does not agree with limiting the class exemption by size of target business. The introduction of a class exemption should meet the purpose of reducing the approaches to the ACCC under the authorisation regime. The onus should be on the target to demonstrate a collective bargaining group is not exempt in relation to the target. This is less likely because the target still has protection beyond the negotiation phase.

## **2. Other issues**

**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?**

The BCCM does not support limiting the class exemption to collective bargaining groups below a certain size.

There is debate about the definition of markets and the market share of market participants in competition law. Limiting the class exemption by size or combined market share of a collective bargaining group would introduce uncertainty into the application of the class exemption. This would likely undermine the policy objective of reducing the approaches under the ACCC's authorisation regime.

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

The BCCM does not support the exemption only applying where there is not common representation across collective bargaining groups.

**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)?**

The BCCM agrees that the exemption should apply to a collective bargaining group both in joint supply and joint procurement negotiations.

**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?**

The BCCM agrees the exemption should not apply beyond the necessary arrangements and sharing of information for collective bargaining with a target.

**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

The BCCM does not support these requirements because they would undermine the advantages of the class exemption – namely, lower administrative and regulatory burden in undertaking collective bargaining.

- notifies the target when the group is formed?

The BCCM agrees that this could be an obligation for collective bargaining groups in relation to the class exemption.

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

We refer to our response to examples 1a-d above. A business should be considered a small business in negotiating with the target as part of a broader collective, if the contract value represents that of a small business. Otherwise if it does not meet a multi-dimension test as referred to in 1a-d and this paragraph then the exemption appropriately does not apply.

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

The BCCM suggests this is another reason why a multi-element definition, as provided in response to 1a-d above, is important.

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

The BCCM supports the granting of a class exemption for franchisees bargaining with franchisors as proposed.

The BCCM is happy to provide further information or comment on any aspect of this submission.

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