



Australian Government

Department of Jobs and Small Business

***Potential ACCC “class exemption” for
collective bargaining***

Submission of the
Department of Jobs and Small Business

October 2018

1. INTRODUCTION

1.1 The Australian Government Department of Jobs and Small Business (the Department) welcomes the opportunity to make a written submission in response to the *Potential ACCC “class exemption” for collective bargaining – discussion paper*.

1.2 The information in this submission relates to legislation, policy and projects relevant to the proposed class exemption for collective bargaining that the Department has responsibility for. This includes the *Franchising Code of Conduct 2015*, small business policy, and deregulation policy.

1.3 The Department’s submission focusses on the questions posed in the ACCC’s discussion paper about the types of businesses that should be covered under this class exemption, obligations that should apply, and whether to allow collective bargaining by all franchisees with their franchisor.

2. KEY MESSAGES

2.1 The Department sees merit in the proposal for a class exemption for collective bargaining for small business to negotiate with customers and suppliers. The measure may assist in creating a more even ‘playing field’ for small businesses. This measure may also assist to remove red tape – removing the need for businesses to seek authorisation or lodge an application for notification or authorisation prior to engaging in conduct that may be in breach of the *Competition and Consumer Act 2010*.

2.2 The Department sees merit in a definition for eligibility that is targeted, easily understood, and allows a significant number of small businesses to benefit. The Department considers that there is merit in aligning eligibility with the threshold definition of small business for taxation concession purposes, currently set at an aggregated turnover of less than \$10 million. The measure would adopt an existing definition for small business and cover approximately 99 per cent of Australian businesses. The Department considers this to be sufficiently broad, without including entities that are so large as to not be the intended beneficiary of the exemption and may have a greater capacity to apply for an exemption.

2.3 The Department sees merit in the proposal for all franchisees, regardless of size, to be able to collectively negotiate with their franchisor, including through group mediation. Allowing franchisees to, for example, collectively negotiate the pricing of inputs, aspects of contracts and mediate collectively may assist in restoring the power imbalance between franchisors and franchisees that stakeholders have raised in submissions and during hearings of the Parliamentary Joint Inquiry into the *Operation and Effectiveness of the Franchising Code of Conduct*.

2.4 The Australian Government remains committed to improving the quality of its regulation, including minimising the burden of regulation on businesses, community organisations and individuals. It is important that any new arrangements minimise administrative burden on small business and franchisees.

3. RESPONSES TO ISSUES ACCC IS SEEKING FEEDBACK ON

3.1 Types of businesses that should be covered under this class exemption

3.1.1 Target the exemption for small businesses.

The Department sees merit in ACCC's starting point that a class exemption for collective bargaining should only be available to businesses below a certain size. The Department is supportive of a definition for eligibility that is targeted at small business and allows a significant number of small businesses to benefit, whilst not including businesses that are sufficiently large enough to be able to individually negotiate with suppliers and customers, or have resourcing available to them that may enable them to band together and lodge a notification or authorisation application.

3.1.2 Clearly define eligibility so it is easy to understand and use by small business.

From a policy perspective, the Department considers that a clearly defined and easy to understand eligibility definition will allow for self-identification, minimise the risk of the measure not being used and assist with the risk of unintentional breaches occurring.

Aligning eligibility with a small business definition already in use would reduce further complication in the number of ways governments define small business, and can allow for movement over time as small business policy measures evolve.

3.1.3 Consider aligning eligibility with the definition of small business used for some taxation concession purposes, currently set at an aggregated turnover of less than \$10 million.

The Department sees merit in aligning eligibility with the threshold definition of small business for taxation concession purposes, currently set at an aggregated turnover of less than \$10 million. Small business could self-identify, following current Australian Taxation Office guidelines of either using the previous year's turnover, estimate of current year turnover or actual current year turnover (prorated).

Of the available options for selecting the earnings period, the Department sees merit in an approach that refers to a previous financial year's performance. This is due to the fact that this is fixed and would allow small businesses the certainty for the following year that they will remain eligible for the class exemption (whereas if the final turnover value for the current year is used, eligibility may be uncertain in some cases). Whilst it is possible that the business may exceed the \$10 million threshold in the financial year that they are conducting the collective bargaining, it would be rare for growth in one year to be so rapid that the threshold would be exceeded by an amount that is so substantial as to mean that access to the class exemption would be inappropriate. An example of legislation that defines small business by reference to turnover in a previous year is the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

According to estimates by the Treasury based on data from the Australian Taxation Office, there were over 3.2 million small businesses with a turnover of less than \$10 million in 2015–16. These small businesses made up about 99 per cent of Australian businesses.

This definition:

- aligns with an existing definition of small business and can change over time as taxation policy on small business changes

- allows for easy self-identification
- allows compliance to be cross-checked with taxation records (making enforcement and compliance easier)
- covers approximately 99 per cent of Australian businesses – therefore being sufficiently broad, without including entities that are so large that they may not be the intended beneficiary of the exemption.

3.1.4 Avoid definitions for eligibility that may cause confusion and/or add to inconsistencies in how small business is defined across government.

The ACCC discussion paper suggests the option of defining eligibility as businesses with less than 20 employees.

The Department considers this definition may be problematic because:

- the number of employees in a business may not be a good indicator of market power or capacity to negotiate with customers or suppliers, particularly with the increasing automation and digitisation of business
- it may be more likely to require review as staffing can fluctuate and quickly make a business ineligible, whilst turnover – if it is for the current year – can be projected and pro-rated

The ACCC discussion paper notes the option of the class exemption being 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. The Department sees potential problems with this option. This definition may introduce unnecessary complexity for businesses that are growing and require the collective bargaining group to continuously review their eligibility. In addition, using contract value alone to define eligibility may not be applicable to all bargaining scenarios. Some negotiations may not end in a contract. Furthermore, it may not be clear what the amount of the contract will be until bargaining commences or is somewhat advanced.

The Department sees possible issues with using a combination of factors to define eligibility, as it has the potential to increase confusion and administrative complexity.

3.2 Other issues

3.2.1 It would be difficult, and is unnecessary, to limit the exemption to groups below a certain size (number of businesses, market share, etc).

Setting meaningful limits to the size of a group may require definitions to vary between industries due to the lack of uniformity across the various industries that small businesses are members of. For example, in an industry dominated by sole traders, 15 businesses could represent 1 per cent of market share, while in other industries, 15 businesses could represent 90 per cent of market share.

In addition, a definition based on market share (a suggestion in the ACCC's paper) requires that the businesses that wish to engage in the collective bargaining have access to a full dataset of market data to be able to determine what proportion their share represents. This data may be difficult to obtain, and to do so may place a significant burden on small businesses in order for them to determine eligibility.

Further, the Department's view is that it may be unnecessary to limit the exemption to groups below a certain size given that the class exemption would not force or oblige a target to deal with the bargaining group if they do not want to (including if they felt the bargaining group had an unfair advantage due to its size or market share).

3.2.2 The measure must not place an unnecessary administrative burden on small business.

The Australian Government remains committed to improving the quality of its regulation, including minimising the burden of regulation on businesses, community organisations and individuals.

The Department does not support obligations that place an unnecessary burden on small businesses. For example, keeping written records of the composition of the group, or notifying the ACCC and target when a group is formed.

It is the Department's preference that the administrative burden that the class exemption places on the bargaining small businesses should be as minimal as possible. However, the Department considers the ACCC is best placed to inform what administration is necessary from a compliance assurance perspective.

3.2.3 The risk of a collective bargaining class exemption affecting operational business decisions is considered low.

It is unlikely that a class exemption would affect operational business decisions like the decision to grow businesses beyond the eligibility threshold. For example, a [Treasury Working Paper](#) shows there is no evidence of 'bunching' of small businesses below the business payroll tax free threshold (Ben Ralston, 2018).

Research may be required to determine if the proposed class exemption would provide an incentive for business to engage in creative accounting to remain under the eligibility threshold – and the impact of this measure separate to other small business thresholds related to benefits.

3.3 Should the class exemption allow collective bargaining by all franchisees with their franchisor, regardless of their size or other factors?

3.3.1 The Department's preference is that all groups of franchisees be eligible for a class exemption in relation to negotiations with their franchisor, including group mediation, regardless of franchisee size.

Allowing franchisees to, for example, collectively negotiate the pricing of inputs, aspects of contracts and mediate collectively may assist in restoring the power imbalance between franchisors and franchisees that stakeholders have raised in submissions and during hearings of the Parliamentary Inquiry into the *Operation and Effectiveness of the Franchising Code of Conduct* (the Inquiry).

The Department's Franchise Research Project, an ongoing user-centred design and behavioural insights approach to improving the franchising sector, provides some support for collective bargaining by franchisees with their franchisor. Research findings include:

- some stakeholders consider there to be a significant power imbalance between franchisors and franchisees around decisions about pricing, supply chain arrangements and the ability to negotiate contract terms in franchise agreements
- consultation by franchisors with franchisees about changes to business operations (such as the pricing of a new product) is perceived to be a tick and flick exercise by some franchisees, providing them little opportunity to influence the outcome.

Authorising franchisees to collectively bargain with franchisors on things like supply chain issues, pricing, and elements of franchise agreements may assist in addressing these issues.

Furthermore, the class exemption could enable franchisees to collectively mediate with their franchisor on all relevant issues. Whilst group mediation is currently available to franchisees, there is a risk that the topics of this mediation may touch on issues that may breach the *Competition and Consumer Act* (such as pricing). This may prevent group mediation from occurring or not covering all issues collectively. Numerous franchisees have submitted to the Department and the Inquiry that power imbalance between franchisees and franchisors is significant during the mediation process – the Department considers facilitating collective mediation may go towards addressing this issue.

The Department considers that allowing collective bargaining by franchisees is unlikely to substantially lessen competition. Arguably, if franchisees were able to negotiate better priced supplies and conditions (for example), this could increase competition with other businesses by allowing the franchisees to be more competitive on pricing and overall efficiency. Similarly, franchisees negotiating pricing so that they remain competitive could also be in the public interest as it may lead to lower prices for consumers.

The Department is not aware of anything in the *Franchising Code of Conduct* that would conflict with the proposed collective bargaining class exemption, including dispute resolution processes.