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19/12/2018

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Dear Sir/Madam

Re: ACCC class exemption for collective bargaining – update

In August we sought your views about our proposal to introduce a class exemption that would allow eligible small businesses, agribusinesses and franchisees to negotiate collectively with their customers or suppliers, including franchisors. 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. Without some form of exemption, this kind of joint bargaining would be at risk of breaching competition laws.

Feedback indicated strong support for an exemption, but there were a range of views about the form it should take.

This note is to update you on our progress to date in developing a class exemption taking into account the feedback received, and to advise you about the timing of the next stage of public consultation, which will take place in early 2019.

Who would be eligible for the proposed class exemption?

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

- is broad enough to be useful for businesses
- only provides protection in respect of collective bargaining arrangements that pose very little risk to competition and/or lead to overall public benefits, and
- 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.

Taking this into account, the ACCC proposes a class exemption that would allow:

- any businesses, or independent contractors, provided they each had **turnover of less than \$10 million in the preceding financial year**, to form collective bargaining groups to negotiate with target businesses on the supply or acquisition of goods or services.
- **all franchisees to collectively bargain with their franchisor regardless of their size** or other characteristics.

This class exemption will apply to all industries across the Australian economy, and we have developed our proposed approach to eligibility criteria and other parameters in this context.

Next round of consultation – early 2019

The next step is for the ACCC to develop a draft version of the legislative instrument for the class exemption. Once we have done so, we will conduct a further round of public consultation. We expect this will commence in **February or March 2019**. This process will allow stakeholders to comment on both the proposed eligibility criteria and the precise details about how the legislative instrument to enact the class exemption will be framed, before we make a final decision.

In the interim, the attached **Q&A document** provides additional background about our proposal, including how eligibility for the class exemption would work. Please note, however, that the details of our current proposal might change as a result of further consideration or submissions.

Further information

Further information about the ACCC's class exemptions power, the progress of the ACCC's consideration of this 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](#). Alternatively, you can contact Miriam Kolacz on (03) 9658 6476 or Gavin Jones on (03) 9290 1475 for further information.

Yours sincerely



David Jones
General Manager
Adjudication

Q&A: How the proposed collective bargaining class exemption would work

Questions and answers about our proposed approach to defining which businesses would be eligible for the class exemption, based on their size and other factors, are outlined below.

Why are you proposing to exclude some businesses from the class exemption for collective bargaining?

Businesses are already able to apply for exemption from competition law, including for collective bargaining arrangements, using the ACCC's existing ['authorisation'](#) and ['notification'](#) processes. Businesses would continue to be able to use those processes (particularly if they don't fit within the class exemption). The main difference is that businesses within the scope of a class exemption get *automatic* protection; they would not need to apply to the ACCC, as they do with authorisations and notifications.

When considering notifications and applications for authorisation in the past, the ACCC has generally not had concerns about collective bargaining proposals involving groups of small businesses. Collective bargaining by groups of 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, the ACCC proposes to limit eligibility for the collective bargaining class exemption to businesses below a certain size. Businesses that do not meet the eligibility criteria would still be able to seek authorisation for proposed collective bargaining and such proposals would be assessed by the ACCC on a case-by-case basis, just as they are today.

What if a target doesn't want to participate in collective bargaining?

Importantly, a class exemption would not force a target to deal with a collective bargaining group if it does not want to. It would simply allow the bargaining group to collectively negotiate with the target without breaching the competition law. The target business is able to decide whether to deal with group or to continue to negotiate with each member individually.

Also, the class exemption would not apply to collective boycott conduct.¹

This means that collective bargaining under the class exemption is only likely to occur where it poses very little risk to competition and is likely to produce beneficial outcomes for the bargaining group and potentially also for the target business.

What types of businesses would be covered under the class exemption?

The ACCC proposes that the class exemption would apply to any business, regardless of its structure (for example, a corporation, sole trader, partnership), with an aggregated turnover of less than \$10 million in the preceding financial year. This is consistent with

¹ 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 may wish to include the option of 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.

the Australia Tax Office definition of a 'small business entity'.² This will mean that around 98.5 percent of businesses in Australia would be covered by the class exemption should they wish to form a collective bargaining group.

The ACCC considered other ways for determining which businesses would be eligible for the class exemption such as the number of employees of each business, the value of the contract that each member of the group expects to enter into with the target they are proposing to collectively bargain with, or a combination of these factors.

The ACCC considers that any of these criteria would be suitable to ensure the class exemption only covers collective bargaining arrangements that pose very little risk to competition and/or lead to overall public benefits. However, the ACCC considers that a turnover threshold is the most suitable way of ensuring the class exemption is both broad enough to be useful for businesses and is simple, clear and objective to enable businesses to confidently self-assess whether they and the arrangements they propose are covered.

What about franchising arrangements?

The ACCC also proposes that all groups of franchisees and fuel retailers governed by either the Franchising Code of Conduct or Oil Code of Conduct would be eligible for the class exemption in relation to negotiations with their franchisor or fuel supplier, including group mediation, regardless of franchisee size and without any other limitations on membership of the bargaining group.

Many, but not all, franchisees would have annual turnover of less than \$10 million. However, allowing all franchisees to collectively bargain with their franchisor or fuel supplier regardless of their size would provide certainty that all franchisees who have contracts with the same franchisor or fuel supplier are able to form a single group, with no franchisees excluded.

This proposed approach would only apply to negotiations between franchisees and their franchisor. If a group of franchisees wished to collectively bargain with any other target, such as a supplier of inputs into their business, and they wished to rely on the collective bargaining class exemption, they would be subject to the same \$10 million turnover eligibility criteria as any other non-franchisee business.

Should the class exemption apply to all businesses, regardless of size, if they can show that the target of the collective bargaining supports their inclusion in the bargaining group?

No. The ACCC considers that this would add additional complexity and uncertainty to the eligibility criteria.

It could result in a situation where some businesses would be automatically eligible while others would need to obtain the consent of the target business. Those businesses relying on the consent of the target would not be able to rely on the class exemption to participate in any discussions that were not specific to a particular target. They would

² The Australian Tax Office defines a 'small business entity' as a business with an aggregated turnover (annual turnover – all ordinary income earned in the ordinary course of business for the income year – plus annual turnover of any affiliated or connected businesses) of less than \$10 million dollars. The \$10 million turnover threshold applies in determining eligibility for a range of small business concessions and deductions.

also not be able to rely on the class exemption to participate in any joint procurement that involved approaching the market rather than a specific target, for example through an expression of interest or request for tender process.

Further, with respect to target-specific negotiations, a business could lose their eligibility if the target withdrew its consent.

There would also be a risk that very large businesses could use this provision to form a bargaining group, sharing competitively sensitive information. This could harm competition more broadly even if it does not raise concerns for the particular target that consents to bargain with the group.

Having regard to the additional risks, complexities and uncertainty that would result, the fact that 98.5 percent of Australian businesses have turnover of less than \$10 million, and the availability of the authorisation and notification processes for businesses that do not qualify for the class exemption, the ACCC does not propose the class exemption to provide protection for businesses with annual turnover above \$10 million, even where the target consents.

Should the class exemption be limited only to collective bargaining with target businesses that are above a certain size?

No. The ACCC does not propose to limit the class exemption only to collective bargaining with target businesses that are above a certain size.

The ACCC does not consider that the absolute size of the target is necessarily an important determinant of where bargaining power lies in all cases.

In the context of a class exemption with broad application across all industries, the ACCC considers that it would be very difficult to establish criteria about the size of businesses that groups can bargain with.

Such a limit may also have the perverse effect of meaning that small businesses who wish to compete to supply (or buy from) a bargaining group would be unable to do so, and would therefore be disadvantaged compared to their larger competitors.

In any event, the class exemption would not force or oblige a target, large or small, to deal with the bargaining group if they don't want to.

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?

No. The ACCC does not propose to limit the class exemption to collective bargaining groups below a certain size, determined by combined market share or otherwise.

In the context of a class exemption that is limited to businesses with annual turnover of less than \$10 million, the ACCC considers that there would be practical difficulties in limiting the size of bargaining groups by reference to their combined market share. Market shares are often difficult to calculate, are subject to divergent views, and can change over time.

A cap on the combined market share of the members of a bargaining group would require the group to define the relevant market, and then access information about both their own and their competitors' turnover in order to calculate market shares. In the context of a self-assessment regime with broad application to small businesses, such an assessment would often be subjective, difficult or impossible.

The ACCC considers that limiting the class exemption to businesses with annual turnover of less than \$10 million, with the target business being in the position to decide whether to deal with group members as a collective or continue to negotiate with each group member individually, is sufficient to address any concerns that about the size of bargaining groups that may be formed.

The ACCC has, for example, authorised a number of collective bargaining arrangements in the past involving groups that include many or all of the suppliers contracted to a particular business, concluding that these arrangements would be likely to result overall public benefits.

Moreover, the ACCC has the power to withdraw the benefit of the class exemption from particular businesses if it is satisfied that the businesses engaging in collective bargaining substantially lessens competition and is not likely to result in overall public benefits.

Should the class exemption preclude common representation across collective bargaining groups?

No. The ACCC proposes that the class exemption would allow individuals or representative bodies – such as industry associations, cooperatives and professional bodies – to represent bargaining groups in negotiations.

The ACCC considered the possibility that 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.

However, representative bodies are an effective way for bargaining groups to pool resources and obtain expert and skilled representation. Often an entire industry is represented by a single or small number of representative bodies. Limits on the groups that such industry bodies could represent would mean only a small subset of their members would be able to avail themselves of the bargaining expertise that representative bodies are able to offer.

Further, where a bargaining representative is engaged:

- autonomy over any decision making remains with the bargaining group, not the representative, and
- a target business does not have to negotiate with a bargaining group if it has concerns about common representation across groups.

Having regard to these considerations the ACCC does not propose exclude application of the class exemption where different bargaining groups are represented by the same representative.

Consistent with the provisions that apply to collective bargaining notifications, the ACCC proposes that the class exemption not apply to groups of businesses represented in negotiations by a trade union. The proposed class exemption for collective bargaining is not intended to be used to pursue matters affecting employment relationships. Employment relationships are the subject of detailed regulation under industrial relations legislation.

What kinds of information sharing or other arrangements between members of the group would be permitted?

Businesses need to share some information in order to collectively bargain. For example, businesses in an electricity buying group may need to share information about their energy demand in order to solicit offers. However, other forms of information sharing can reduce competition between members of the group if it facilitates a common understanding between businesses about how they will operate.

The ACCC does not propose to allow information sharing beyond the minimum necessary to engage in collective bargaining. This will vary depending on the nature of the group and the bargaining proposed. Businesses wishing to engage in broader sharing of information would still be able to apply for authorisation for that conduct if they believe it would result in a public benefit.

Further, the protection conferred by the class exemption from competition laws would not override any contractual obligations that place limits on the sharing of information, such as confidentiality provisions in contracts.

Should eligibility to rely on a class exemption only apply where the bargaining group notifies the target and/or the ACCC when a group is formed?

Informing the ACCC

The ACCC proposes that bargaining groups be required to inform the ACCC when the group is formed. The ACCC proposes to develop a simple, one page, pro-forma notification form that bargaining group can fill out to inform the ACCC that a group has been formed. The form will only require bargaining groups to provide basic details about the composition of the group, the industry they operate in and the types of businesses they are seeking to negotiate with. Groups will not be required to identify every member of the group or every potential target they may seek to negotiate with. Accordingly, we do not consider that having to advise the ACCC when a bargaining group is formed will impose any significant burden on the group.

During the public consultation process about the draft legislative instrument in February/March 2019 there will be an opportunity to provide feedback about the proposed reporting requirements before the ACCC makes a final decision. Once implemented, we will provide guidance for bargaining groups about how to notify the ACCC and the information required to be provided. We will also be available to provide feedback to groups and answer any potential questions they have.

We consider that notifying the ACCC when bargaining groups are formed is important to providing transparency about the type of bargaining groups that form under the class

exemption. This information will also be valuable in monitoring and evaluating the effectiveness of the class exemption, including its usefulness for small businesses.

Having to engage with the ACCC will also play an important educative role in assisting businesses to understand how they are able to work together under the safe harbour provided by the collective bargaining class exemption without risking breaching competition laws.

Informing the target

The ACCC does not propose to require bargaining groups to inform the target when the group is formed. Whether or not the target is informed when a group is formed, no negotiations can take place without the target's agreement in any event. Further, a requirement to inform the target when a group is formed would introduce additional red tape when forming a group.

It would be difficult to be prescriptive about at what stage in the process of forming a group the target must be informed. In many cases, informing the target about the formation of a group would not be possible (in particular, where a bargaining group is contemplating collectively bargaining with a range of targets, including unidentified targets). For example:

- A group of wine grape growers agreeing to sell their wine grapes together, who propose to offer their wine grapes to any potential purchaser rather than having a particular purchaser or purchasers in mind.
- A group of agri-businesses agreeing to run a collective tender process for the supply of electricity to group members.

While it would be difficult to be prescriptive about requirements for informing the target that a bargaining group has been formed, anything less than a prescriptive approach would risk not providing businesses with certainty to confidently self-assess whether they have met any reporting requirements and therefore whether they, and the arrangements they propose, are covered by the class exemption.

For these reasons, the ACCC does not propose that bargaining groups be required to inform the target when a group is formed.

What happens if a business' turnover goes above \$10 million after the negotiations take place?

The ACCC proposes that the class exemption would apply if a businesses' turnover was less than \$10 million in the financial year before they entered into the contract with the target business. They would be able to continue to give effect to the contract negotiated even if their turnover in subsequent financial years is more than \$10 million. However, the business would not be able to participate in future collective bargaining, whether renegotiating an existing contract or negotiating a new contract, if their turnover is greater than \$10 million in the financial year preceding those subsequent negotiations taking place.

If one member of the group is ineligible how are other members affected?

If a member of the bargaining group with turnover of more than \$10 million in the preceding financial year did participate in collective bargaining, the class exemption would not provide that individual business with protection from competition law. However, the ACCC would frame the class exemption so that the fact that one or more members of a collective bargaining group do not meet the eligibility criteria would not, of itself, preclude other members of the bargaining group whose annual turnover was less than \$10 million being able to rely on the class exemption to protect them from competition law.

Period for which the class exemption would be in force

The ACCC proposes to put the class exemption in place for an initial period of ten years.

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

Attachment A: Background – collective bargaining and class exemptions

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.

What is a class exemption?

The ACCC now has the power to make ‘class exemptions’ from competition law for certain ‘classes of conduct’ that may otherwise carry a risk of breaching competition laws, but:

- would not be likely to substantially lessen competition, and/or
- is likely to result in overall public benefits.

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

The class exemption power is in addition to the ACCC’s existing ‘[authorisation](#)’ and ‘[notification](#)’ processes. Businesses would continue to be able to use those processes to apply for exemption from competition law, including for collective bargaining arrangements (particularly if they don’t fit within the class exemption). The main difference is that businesses within the scope of a class exemption get *automatic* protection; they would not need to apply to the ACCC, as they do with authorisations and notifications.

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 either the authorisation or notification process.

Each year the ACCC receives many applications for authorisation and notification of collective bargaining.³ 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.

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 would have protection from competition laws when collectively bargaining, 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.

³ 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.

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 the risk of breaching the competition law.⁴ 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.

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).

⁴ 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.