



Competition and Consumer (Class Exemption— Collective Bargaining) Determination 2019

The Australian Competition and Consumer Commission makes the following determination.

Dated

EXPOSURE DRAFT

MAY 2019

DRAFT ONLY—NOT FOR SIGNATURE

The Australian Competition and Consumer Commission

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Part 1—Preliminary

1 Name

This instrument is the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2019*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|------------------------------|--|--------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| The whole of this instrument | A single day to be fixed by the Commission by notifiable instrument. However, if the provisions do not commence within the period of 12 months beginning on the day this instrument is registered, they commence on the day after the end of that period. | |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under section 95AA of the *Competition and Consumer Act 2010*.

4 Period for which determination is in force

For subsection 95AA(3) of the Act, this determination is in force for the period that:

- (a) begins on the commencement date referred to in section 2; and
- (b) ends on 30 June 2029.

Note: Despite this section, this determination could be revoked sooner than the end of this period. See subparagraph 95AA(4)(b)(i) of the Act.

5 Definitions

Note: A number of expressions used in this instrument are defined in section 4 of the Act, including the following:

- acquire;
- authorisation;
- Commission;
- contract;
- corporation;
- give effect to;
- goods;
- party;
- services;
- supply;
- Tribunal.

In this determination:

Act means the *Competition and Consumer Act 2010*.

aggregated turnover, of a corporation, means the corporation's aggregated turnover as calculated in accordance with section 328-115 of the *Income Tax Assessment Act 1997*.

collective bargaining class exemption notice has the meaning given by section 9.

collective bargaining notice has the meaning given by section 93AA of the Act.

contract means a contract, arrangement or understanding.

contracting parties has the meaning given by section 6.

eligible corporation: a corporation is an *eligible corporation* in a particular financial year if it reasonably believes that, in the previous financial year, its aggregated turnover was less than \$10 million.

Note 1: In the circumstances provided for in the Act, a reference in this instrument to a corporation includes a reference to a person that is not a corporation: see section 6 of the Act and paragraph 13(1)(b) of the *Legislation Act 2003*.

Note 2: For the purposes of the Competition Code (see Part XIA of the Act), a reference in this instrument to a corporation will also include a reference to a person that is not a corporation: see subsection 150C(2) of the Act.

franchise agreement has the meaning given by the Franchising Code.

franchisee has a meaning affected by the Franchising Code.

Franchising Code means Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*, as in force from time to time.

franchisor has a meaning affected by the Franchising Code.

fuel re-selling agreement has the meaning given by the Oil Code.

fuel retailer means person who is a retailer under a fuel re-selling agreement.

Note: This definition covers paragraph (b) of the definition of “retailer” in the Oil Code. It does not cover paragraph (a) or paragraph (c) of that definition.

fuel wholesaler means a supplier within the meaning of the Oil Code.

initial contract has the meaning given by section 6.

objection notice has the meaning given by section 93AA of the Act.

Oil Code means Schedule 1 to the *Competition and Consumer (Industry Codes—Oil) Regulations 2017*, as in force from time to time.

related fuel retailers: two fuel retailers are ***related fuel retailers*** if:

- (a) both have a fuel re-selling agreement with the same fuel wholesaler; and
- (b) those elements of the system or marketing plan under which they offer, supply or distribute motor fuel in Australia that were determined, controlled or suggested by the fuel wholesaler or an associate of the fuel wholesaler are the same.

target has the meaning given by section 6.

trade union has the meaning given by subsection 93AB(11) of the Act.

6 Meaning of *initial contract*, *contracting parties* and *target*

- (1) For this determination, a contract or a proposed contract between a corporation and 1 or more other persons (the ***contracting parties***) is an ***initial contract*** if:
 - (a) it is about:
 - (i) the supply of particular goods or services to; or
 - (ii) the acquisition of particular goods or services from;one or more other persons (the ***target*** or ***targets***) by the corporation and the contracting parties; and
 - (b) the corporation and the contracting parties made the contract for the purpose of collectively negotiating one or more contracts with the target or targets.

Note: See section 4F of the Act for the interpretation of references to “purpose”.

- (2) However, a contract or a proposed contract is not an ***initial contract*** if it is about the supply of goods or services to a target or targets for personal, domestic or household use by the target or targets.

Part 2—Class exemption—collective bargaining

Division 1—Class exemption

7 Class exemption—collective bargaining

- (1) Subject to the limitations specified in Division 2, sections 45AF, 45AG, 45AJ, 45AK and 45 of the Act do not apply to a corporation engaging in:
 - (a) eligible corporation collective bargaining conduct; or
 - (b) franchisee collective bargaining conduct; or
 - (c) fuel retailer collective bargaining conduct.

Note: Sections 45AF, 45AG, 45AJ and 45AK of the Act are offence and civil penalty provisions that deal with making a contract containing a cartel provision, and with giving effect to a cartel provision. Section 45 of the Act deals with contracts that restrict dealings or affect competition.

- (2) A corporation engages in *eligible corporation collective bargaining conduct* if:
 - (a) while it is an eligible corporation, it:
 - (i) makes an initial contract; or
 - (ii) engages with one or more persons in a concerted practice in relation to an initial contract; or
 - (b) it gives effect to an initial contract that it made while it was an eligible corporation.
- (3) A corporation engages in *franchisee collective bargaining conduct* if the corporation is a franchisee of a particular franchisor and:
 - (a) it makes an initial contract in which the target is that franchisor and the other contracting parties are franchisees who have a franchise agreement with that franchisor; or
 - (b) it engages with one or more such franchisees in a concerted practice in connection with making such an initial contract; or
 - (c) it gives effect to such an initial contract.
- (4) A corporation engages in *fuel retailer collective bargaining conduct* if it has a fuel re-selling agreement with a particular fuel wholesaler and:
 - (a) it makes an initial contract in which the target is the fuel wholesaler and the other contracting parties are related fuel retailers; or
 - (b) it engages with one or more related fuel retailers in a concerted practice in connection with making such an initial contract; or
 - (c) it gives effect to such an initial contract.

Division 2—Limitations

8 Exemption does not apply to collectively refusing to contract with target

- (1) Section 7 does not apply in respect of an initial contract that contains a prohibited boycott provision.
- (2) For this section, a *prohibited boycott provision* of an initial contract is a provision that has the purpose of preventing, restricting or limiting, directly or indirectly:
 - (a) the supply of goods or services to a target or targets; or
 - (b) the acquisition of goods or services from a target or targets; by the corporation or one or more contracting parties.

Note: See section 4F of the Act for the interpretation of references to “purpose”.

9 Collective bargaining class exemption notice must be given to the Commission within 14 days

- (1) Section 7 applies in relation to a particular initial contract only if a notice (a *collective bargaining class exemption notice*) relating to that initial contract has been given to the Commission in accordance with this section.
- (2) The collective bargaining class exemption notice:
 - (a) must be in the form approved by the Commission and contain all of the information that is required by that form; and
 - (b) may be given to the Commission by, or on behalf of, the corporation or any of the other contracting parties; and
 - (c) must not be given to the Commission on behalf of any of those persons by:
 - (i) a trade union; or
 - (ii) an officer of a trade union; or
 - (iii) a person acting on the direction of a trade union.
- (3) Section 7 applies to conduct specified in that section in relation to that initial contract only if the conduct was engaged in:
 - (a) on or after the date the notice was given to the Commission; or
 - (b) no more than 14 days before that date.

10 Copy of collective bargaining class exemption notice must be given to target

Section 7 applies to giving effect to an initial contract by:

- (a) negotiating a contract with 1 or more targets; or
- (b) making such a contract; or
- (c) giving effect to such a contract;

only if a copy of the collective bargaining class exemption notice that relates to the initial contract has been given to the target or those targets.

Note: The copy of the collective bargaining class exemption notice could be given to the target by the corporation or by any of the other contracting parties.

11 Corporation must have reasonable expectation of contracting with target

Subsection 7(2) applies to a corporation only if, when engaging in the kind of conduct specified in that subsection, it reasonably expects that it will make 1 or more contracts with 1 or more of the targets, about:

- (a) the supply to that target or those targets of 1 or more of the goods or services to which the initial contract relates; or
- (b) the acquisition from that target or those targets of 1 or more of those goods or services.

12 Class exemption does not apply in relation to certain initial contracts

- (1) If any of subsections (2), (3) or (4) applies to an initial contract, section 7 does not apply to engaging in the conduct specified in that section in relation to the initial contract.
- (2) This subsection applies to an initial contract if:
 - (a) a person has applied for an authorisation in relation to the initial contract; and
 - (b) the Commission has made a determination:
 - (i) dismissing the application; or
 - (ii) revoking the authorisation; and
 - (c) either:
 - (i) the Tribunal has made a determination affirming or varying (but not setting aside) the Commission's determination; or
 - (ii) the time for making an application for review of the Commission's determination has ended without the making of an application.

Note: Applications for authorisations are made under Division 1 of Part VII of the Act. For dismissal of applications, see section 90 of the Act. For revocation of authorisations, see section 91B of the Act. For review of determinations of the Commission, see Part IX of the Act.

- (3) This subsection applies to an initial contract if:
 - (a) a corporation has given the Commission a collective bargaining notice in relation to the initial contract; and
 - (b) the Commission has given an objection notice in relation to the collective bargaining notice; and
 - (c) either:
 - (i) the Tribunal has made a determination affirming the objection notice; or
 - (ii) the time for making an application for review of the objection notice has ended without the making of an application.

Note: Collective bargaining notices are given under Division 2 of Part VII of the Act. For objection notices, see section 93AC of the Act. For review of objection notices, see Part IX of the Act.

- (4) This subsection applies to an initial contract if:
- (a) a corporation has given the Commission a collective bargaining notice in relation to the initial contract; and
 - (b) the collective bargaining notice is taken to have been withdrawn.

Note: Collective bargaining notices are given under Division 2 of Part VII of the Act. For deemed withdrawal, see section 93AE of the Act.

13 Sharing of information permitted only when necessary

Section 7 applies to a corporation sharing information with, or using information that has been shared by, other contracting parties only if:

- (a) the information is shared or used by the corporation to engage in the conduct specified in section 7; and
- (b) the corporation reasonably believes that it would not be able to engage in that conduct if the information were not so shared or used.