

# Explanatory Statement

Competition and Consumer (Class Exemption—Collective Bargaining)  
Determination 2020

**Prepared by the Australian Competition and Consumer Commission**

# Explanatory Statement – Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020

## Authority

1. This *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* (the **Determination**) is made under section 95AA of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), as well as under section 95AA of the Competition Code.
2. Section 95AA(1) of the CCA provides that the Australian Competition and Consumer Commission (**ACCC**) may, by legislative instrument, determine a class exemption from specified competition provisions of Part IV if satisfied in all the circumstances that conduct of the kind specified in the determination:
  - would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
  - would result, or would be likely to result, in a net public benefit.<sup>1</sup>
3. The ACCC is satisfied that the kind of conduct specified in the Determination:
  - would not have the effect, or would not be likely to have the effect, of substantially lessening competition, and
  - would result, or would be likely to result, in a net public benefit.
4. In making a class exemption, the ACCC may specify one or more of the following limitations:
  - a limitation to persons of a specified kind
  - a limitation to circumstances of a specified kind
  - a limitation to conduct that complies with specified conditions.<sup>2</sup>
5. The ACCC must specify the period a class exemption is in force, which can be for a maximum of 10 years.<sup>3</sup> The ACCC can re-make a determination at any time, including prior to the period for which an existing class exemption is in force has elapsed. This would, in effect, extend the period for which the class exemption is in force.

## Background

6. Broadly, the class exemption for collective bargaining provides a competition law exemption to small businesses who want to collectively bargain with a target supplier or customer without applying to the ACCC for a specific exemption using the [‘authorisation’](#) or [‘notification’](#) processes.
7. The class exemption applies to:
  - businesses with less than \$10 million aggregated annual turnover in the financial year prior to the business joining the collective bargaining group. If the business joins the group when it is formed, its aggregated annual turnover must be less than \$10 million in the financial year prior to the group being formed, or

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<sup>1</sup> Section 95AA(1) CCA.

<sup>2</sup> Section 95AA(2)(a)-(c) CCA.

<sup>3</sup> Section 95AA(3) CCA.

- franchisees or fuel retailers negotiating with their franchisors or fuel wholesalers, respectively, regardless of turnover

provided that:

- a *collective bargaining class exemption notice form (Notice)* has been given to the ACCC, and
- the business is engaging in collective bargaining conduct within the parameters of the class exemption.

### ***The current framework for collective bargaining exemptions***

8. Collective bargaining occurs where two or more competitors come together as a group to negotiate with a supplier or customer (known as the **target** business)<sup>4</sup> 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.
9. Collective bargaining by businesses risks breaching competition laws because, in broad terms, competition laws require businesses to operate independently of their competitors when making decisions about:
  - the prices they charge or are willing to pay
  - which businesses they deal with, and
  - the terms and conditions on which they do business.
10. However, there can be many benefits from negotiating as a group with the target business rather than individually, including: reducing the time and cost of negotiating contracts (compared to multiple bilateral negotiations); creating opportunities to negotiate terms that better reflect the group's needs (compared to standard form contracts); and gaining better access to information (for example by sharing relevant information or sharing the costs of engaging a professional advisor). Target businesses can additionally benefit from more supply certainty due to bulk ordering and savings from aligning transport and distribution.
11. 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. Businesses can apply for legal protection for specific arrangements using the following processes:
  - Applying for **authorisation**: This requires submitting an application with supporting information (which sometimes involves obtaining legal advice), paying a lodgement fee,<sup>5</sup> and waiting for the ACCC to conduct its assessment (which can take up to six months in complex cases). Authorisation is available in respect of transactions of any size.
  - Lodging a **notification**: This involves submitting a notice with supporting information (which again, sometimes involves obtaining legal advice), paying a \$1000 lodgement fee, and waiting for legal protection to commence (generally 14 days after a notification is validly lodged, unless the ACCC objects). Each member of the group must reasonably expect to have less than

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<sup>4</sup> Collective bargaining in the context of competition law does not include employee/employer collective bargaining.

<sup>5</sup> The standard application fee for authorisation is \$7500. Applicants may request that the ACCC waive the lodgement fee in whole or in part if the fee would impose an unduly onerous burden of the applicant.

\$3 million a year in total transactions with the target business (with higher threshold applying in certain industries<sup>6</sup>).

12. The legal protection that businesses receive under authorisation and notification is limited to a specific time period determined by the ACCC.<sup>7</sup> When a bargaining group's legal protection expires, it will have to lodge a new application<sup>8</sup> to obtain legal protection afresh.

## Purpose and operation of the class exemption

13. The ability for the ACCC to determine a class exemption was a recommendation of the Competition Policy Review (**Harper Review**), because it:
- would help establish 'safe harbour' exemptions from competition law for business. That is, it may be an efficient way to deal with certain types of business conduct that are unlikely to raise competition concerns, either because of the parties engaged in the conduct or the nature of the conduct itself
  - would be an efficient means to provide certainty for businesses about the application of the CCA and conduct that is unlikely to raise significant competition problems
  - would reduce compliance costs for businesses, and
  - may also play a role in educating and informing business about the types of conduct that do not raise competition concerns and those that do.<sup>9</sup>
14. Each year the ACCC receives many applications for authorisation and notifications of collective bargaining. 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.
15. 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.
16. However, 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). Of the 215 collective bargaining authorisations and notifications considered by the ACCC between 2007 and 2019, there were only 12 matters that were denied, revoked or withdrawn, and three where substantive conditions were imposed.

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<sup>6</sup> Petrol retailing - \$15 million, new motor vehicle retailing - \$20 million, farm machinery retailing - \$10 million, primary production - \$5 million.

<sup>7</sup> The legal protection businesses receive under notification is three years, unless the ACCC determines another period (up to 10 years).

<sup>8</sup> Or alternatively, an application for revocation and substitution in the case of an authorisation.

<sup>9</sup> Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, [Competition Policy Review: Final Report](#), March 2015, pages 403, 405.

17. Franchisees, and fuel retailers who have a fuel re-selling agreement with a fuel wholesaler and operate under a system determined by the fuel wholesaler, are generally in a weaker bargaining position in negotiating with their franchisor or fuel wholesaler due to the nature of the business model. In order to achieve consistency in branding and product/service offerings across the network, franchisors and fuel wholesalers often require franchisees and fuel retailers to sign agreements whereby the franchisor or fuel wholesaler maintains significant control over the day-to-day operations of the franchisee or fuel retailer's business. The ACCC considers that, in this context, collective bargaining by franchisees or fuel retailers with their franchisor or fuel wholesaler is unlikely to raise competition issues.
18. Despite small business collective bargaining rarely raising competition issues that are of concern, businesses are still required to submit an application, pay a lodgement fee, and wait for a period before being able to begin negotiations.
19. When the ACCC consulted on its proposed class exemption for collective bargaining, numerous submissions were received supporting the view that such a class exemption could streamline the process for getting protection from the CCA to collectively bargain. Many parties perceived authorisation and notification as being time consuming, costly and uncertain, with some having considered using these processes but ultimately not doing so for these reasons.
20. The class exemption addresses these issues by providing a simple, streamlined process for small businesses to obtain automatic protection to collectively bargain within the parameters set by the class exemption.

### **How the instrument is intended to operate and its likely impact**

21. The class exemption for collective bargaining is intended to be deregulatory; it removes the need for businesses that meet the specified eligibility criteria to seek authorisation or lodge a notification with the ACCC. Eligible businesses will get automatic protection to collectively bargain without having to lodge a formal application and pay a fee under the authorisation or notification process.
22. Individuals and businesses seeking to rely on the class exemption will self-assess whether the collective bargaining conduct they are proposing to engage in falls within the class exemption:
  - If the conduct falls within the scope of the class exemption, they will have protection for that conduct from the specified provisions of Part IV (sections 45AF, 45AG, 45AJ, 45AK and 45 of Division 2), provided that the eligible business ensures that:
    - a Notice has been given to the ACCC by the group they're forming or joining. The details of the Notice will be determined by the ACCC, and are not specified in the Determination, but it is expected that it will require inclusion of details of the group, the target(s), what the group proposes to bargain about, and details for a contact person (which can be described in general terms, so that a new notice is not required as members of the group change or negotiations occur with new targets). Once this Notice has been provided to the ACCC, each business in the group that meets the eligibility criteria gets immediate, automatic protection from competition law when collectively bargaining as part of the group
    - a Notice has also been provided to any target business the group proposes to collectively bargaining with, when the group or their representative first approaches the target business.

- If the conduct falls outside the scope of the class exemption, they will not have the protection of the class exemption when engaging in that conduct and will need to consider whether to apply to the ACCC via authorisation or notification,<sup>10</sup> or amend their conduct.
23. An aggregated turnover threshold of \$10 million means that the class exemption would capture around 98.5 percent of businesses in Australia.
  24. Businesses that are eligible to rely on the class exemption can appoint a representative to negotiate on their behalf. Where the bargaining representative is not a member of the group, they will not come within the scope of the class exemption and therefore will not need to meet the eligibility criteria. Consistent with the existing collective bargaining notification process provisions, trade unions cannot give notice on behalf of a group, but can represent groups in negotiations with the target business.
  25. The class exemption will remain in place until 30 June 2030. Prior to this, the ACCC will undertake a review to decide whether to make a new Determination, which will involve consulting with collective bargaining groups currently using the class exemption as well as other stakeholders.
  26. The ACCC considers that overall, the likely impact of the class exemption for collective bargaining will be to:
    - make it simpler and quicker for eligible businesses wishing to collectively bargain to obtain the necessary legal protection to address the risk of breaching competition laws, and
    - increase levels of awareness among businesses about the potential benefits of collective bargaining which, along with providing a simpler process to obtain legal protection from competition laws to collectively bargain, may encourage more businesses to collectively bargain.

## Documents incorporated by reference

27. The Determination relies on definitions of terms from some other Commonwealth Acts and disallowable legislative instruments as in force from time to time. The Determination does not incorporate any other documents by reference.

## Consultation

28. The ACCC conducted a comprehensive consultation process on whether to issue a class exemption for collective bargaining and what scope it should include. The process involved three main phases.
29. In the first phase, commencing in **April 2018**, the ACCC met with members of the ACCC's Small Business and Franchising Consultative Committee and Agriculture Consultative Committee. This forum was selected because the Committees represent small businesses, franchisees and agricultural businesses, which are the groups most likely to benefit from a class exemption for collective bargaining. This round of consultation sought early feedback on a proposed class exemption generally and canvassed specific issues, including who should be eligible for the class exemption, potential limitations on the size and representation of groups, and how the ACCC's further consultation process should be structured. The feedback was highly positive and assisted the ACCC in framing its further consultation.

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<sup>10</sup> Notification includes the expanded small business collective bargaining process, also introduced in late 2017 to increase the flexibility and attractiveness of the process for small businesses.

30. In the second phase, commencing in **August 2018**, the ACCC released a [discussion paper](#) seeking feedback on a range of issues related to the possible scope and operation of the class exemption. The main issues that the ACCC sought feedback on included:
- which businesses should come within the scope of the collective bargaining class exemption, including whether limits on each business's turnover, employee numbers, contract value or market share were appropriate
  - whether there should be limits on the size of the bargaining group (such as a market share cap) or the target
  - the extent to which information sharing should be permitted
  - whether a group should be required to notify the target and/or ACCC of its formation, and
  - whether a class exemption should permit franchisees to collectively bargain with their franchisor regardless of their size or other characteristics.
31. This discussion paper was distributed to an extensive list of stakeholders<sup>11</sup> and published on the ACCC's website. The ACCC received 41 submissions in response, the vast majority of which supported a collective bargaining class exemption.
32. In both the first and second phases of consultation, stakeholders expressed a range of views about the form the class exemption should take. Many suggested that the class exemption should be structured to accommodate the characteristics of their particular industry, while some supported limitations on the size of bargaining groups that could be formed. However, in deciding to adopt the \$10 million aggregated turnover threshold (as discussed further below), the ACCC sought to ensure that the criteria adhered to broader objectives: that the class exemption apply broadly to be useful for businesses, while only covering conduct that poses very little risk to competition and/or leads to overall public benefits, and remaining practical enough for businesses to self-assess against.
33. After reviewing this feedback, in **December 2018** the ACCC sent a [short update](#) to a subset of stakeholders, outlining its initial position on each of the issues canvassed in the discussion paper. Parties were advised that they would have another opportunity to provide their views when the draft version of the class exemption was released for consultation.
34. During the third phase of consultation, commencing in **June 2019**, the ACCC released a draft version of the legislative instrument, the proposed Notice that groups would be required to complete and the accompanying Guidance Note. The ACCC received 35 submissions in response. The majority of submissions supported the proposal. Some suggested changes that would help improve the drafting, clarity and user-friendliness of the draft documents (many of which were then incorporated into the finalised versions). A few submissions included suggestions for more fundamental changes to the eligibility criteria to adapt them to particular industries (such as increasing the turnover threshold) or capping group size.
35. Throughout the consultation periods, the ACCC staff also conducted nine one-on-one meetings with external stakeholders and provided updates and/or answered

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<sup>11</sup> Including existing groups who had previously lodged applications for authorisation or notifications for collective bargaining conduct; targets of collective bargaining arrangements previously authorised or notified; members of the ACCC's Small Business and Franchising Consultative Committee, Small Business Information Network and Franchising Information Network; members of the ACCC's Agriculture Consultative Committee and Agriculture Information Network; and those on the Small Business and Agriculture stakeholder lists, including government and industry bodies.

stakeholder questions at multiple meetings of the ACCC's Small Business and Franchising Consultative Committee and Agriculture Consultative Committee.

# ATTACHMENT 1

## DETAILS OF THE *COMPETITION AND CONSUMER (CLASS EXEMPTION—COLLECTIVE BARGAINING) DETERMINATION 2020*

### **Part 1—Preliminary**

#### **1. Name of Determination**

This section provides that the title of the Determination is the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020*.

#### **2. Commencement**

This section specifies that the Determination commences on a single day to be fixed by the ACCC by notifiable instrument. It also provides that if the provisions of the Determination do not commence within 12 months of the day the instrument is registered, they will automatically commence one day after the end of that 12-month period.

The delayed commencement is to increase the likelihood that the period for Parliamentary disallowance of the Determination will elapse before the Determination enters into force.

If the Determination were to enter into force and then be disallowed, this could greatly inconvenience parties who relied on it during the period that it was in force prior to its disallowance. For example, a party might have entered into an initial contract with other contracting parties and begun giving effect to the initial contract by entering into contracts with target suppliers or customers on the basis of the initial contract. Upon disallowance, the party would not be able to continue to engage in this conduct, as to do so might breach various provisions of the CCA. Rather, the party would need to individually re-negotiate contracts with the target suppliers or customers,<sup>12</sup> without reliance on the initial contract and surrounding negotiations.

Delaying commencement until after the disallowance period has elapsed overcomes this problem.

It is envisaged that the ACCC would fix a commencement day as soon as the Parliamentary disallowance period has elapsed, and would give a public notification of the commencement of the Determination.

However, to provide greater certainty for affected parties in relation to the commencement of the Determination, section 2 provides that the Determination will commence at the latest 12 months following registration.

#### **3. Authority**

This section provides that the Determination is made under the authority of section 95AA of the CCA, as well as under section 95AA of the Competition Code. As such, the Determination is made under section 95AA of the Competition Code of all of the participating jurisdictions (that is, all States and self-governing Territories) (see section 150I of the CCA for interpretation of references in instruments to the Competition Code).

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<sup>12</sup> Or alternatively, lodge an application for authorisation or collective bargaining notification to engage in the conduct.

The Competition Code is essentially a cooperative scheme implemented by the Commonwealth, the States and the Territories, under which States and Territories have implemented the Schedule version of the competition provisions (Part IV) of the CCA and associated provisions as State or Territory law. The Competition Code provides national coverage to the competition provisions of the CCA.

Making the Determination under section 95AA of the Competition Code as well as section 95AA of the CCA ensures that the class exemption applies in the same manner to the Competition Code as it applies to the CCA itself, and maximises the benefits of the class exemption that the Determination provides.

The States and Territories have applied the Competition Code as a law of their jurisdiction through laws referred to as 'application laws' (CCA, section 150A). Section 95AA is itself part of the Competition Code (CCA, section 150A and section 150C), and has thus been applied as a State or Territory law. Through their application laws, the States and Territories have also conferred on the ACCC the power to make class exemptions under their Competition Codes. The Commonwealth has consented to this conferral, and the making of the Determination is in accordance with agreements between the Commonwealth and each State and Territory (CCA, subsections 150F(1) and (3)).

#### **4. Period for which Determination is in force**

This section provides that the Determination enters into force on the commencement date and will cease to be in force on 30 June 2030, unless revoked before that date.

#### **5. Definitions and meaning of specified terms**

Section 5 contains defined expressions used in the Determination.

A number of expressions used in the Determination have the meaning defined in section 4 or other sections of the CCA. Other definitions are specific to the Determination.

A key concept underlying the Determination is that of a 'corporation'. This is defined in section 4 of the CCA. The term 'corporation' has the same meaning in the Determination as it has under the CCA: *Legislation Act 2003*, s 13.

The provisions of the CCA to which the Determination applies – sections 45AF, 45AG, 45AJ, 45AK and 45 – are expressed as prohibiting 'corporations' from engaging in certain conduct specified in those provisions. Because of that, this Determination is expressed as exempting certain 'corporations', in certain circumstances, from those provisions of the CCA.

Under the CCA, and subject to the CCA, a reference to a 'corporation' includes a reference to a person that is not a corporation: CCA, s 6 and s 150C. Because of that, the provisions of the CCA to which the Determination applies also prohibit persons who are not corporations from engaging in the relevant conduct, and the Determination also exempts persons who are not corporations, in those circumstances, from those provisions of the CCA.

Expressions of particular importance in the Determination are:

##### ***Eligible corporation***

A corporation will be an '***eligible corporation***' in a particular financial year where it reasonably believes that its aggregated turnover was less than \$10 million in the previous financial year. This definition is intended to capture smaller businesses, and the \$10 million aggregated turnover is consistent with the threshold used by the Australian Tax Office to determine if a business is a 'small business entity' for tax concession purposes. As such, a corporation must calculate its 'aggregated turnover' in accordance with the *Income Tax Assessment Act 1997 (ITAA)*.

The notion of an 'eligible corporation' is relevant only in relation to corporations that wish to engage in 'eligible corporation collective bargaining conduct' under section 7(2) of the Determination. This notion is not relevant to franchisees that wish to engage in 'franchisee collective bargaining conduct' or fuel retailers that wish to engage in 'fuel retailer collective bargaining conduct'.

A corporation will be an eligible corporation where it has this reasonable belief, notwithstanding that it may not have yet confirmed its annual turnover and/or aggregated turnover under the ITAA.

### **Aggregated turnover**

A business (Business A) must calculate its **aggregated turnover** according to section 328-115 of the ITAA, which defines aggregated turnover as the sum of:

- Business A's annual turnover (being all ordinary income earned in the ordinary course of running a business for the income year<sup>13</sup>). If a business starts or ceases running part way through an income year, it must make a reasonable estimate of what its annual turnover would have been if it had carried on the business for the entire income year,<sup>14</sup> and
- the annual turnover of any business 'connected to' or 'affiliated with' Business A, whether based in Australia or overseas.<sup>15</sup> Broadly, an entity is 'connected' with Business A if either entity controls the other (for example, Business A has shares entitling it to 40 per cent of the voting power in Business B), or both entities are controlled by the same third entity.<sup>16</sup> An 'affiliate' is any individual or company that, in relation to their business affairs, acts or could reasonably be expected to act according to Business A's directions or wishes, or in concert with Business A.<sup>17</sup>

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

The meanings of key terms '**initial contract**', '**contracting parties**' and '**target**' are set out in section 6.

An **initial contract** is the contract, arrangement or understanding or proposed contract, arrangement or understanding made by a corporation and one or more other **contracting parties** for the purpose of collectively negotiating one or more future contracts with a target or targets. A note under subsection 6(1) draws the reader's attention to section 4F of the CCA, which, among other things, deals with references to 'purpose' in the CCA. The term 'purpose' will have same meaning in the Determination: *Legislation Act 2003*, section 13. As a result of section 4F of the CCA, the purpose referred to in section 6 of the Determination need only be a *substantial* purpose for the contract to be an 'initial contract'.

An **initial contract** can be about either the supply of particular goods or services to, or the acquisition of particular goods or services from, one or more other persons (**target** or **targets**) by the corporation and the contracting parties. However, a contract, arrangement or understanding will not be an **initial contract** if it is about the supply of goods or services to end consumers where the goods or services would be for personal, domestic or household use by the target or targets.

<sup>13</sup> *Income Tax Assessment Act 1997* section 328.120(1).

<sup>14</sup> Australian Taxation Office, '[Aggregation](#)' (15 September 2017); *Income Tax Assessment Act 1997 (Cth)* section 328-120(5).

<sup>15</sup> *Income Tax Assessment Act 1997 (Cth)* section 328-115(2)(b)-(c).

<sup>16</sup> Australian Taxation Office, '[Connected with you](#)' (22 May 2017). See section 328-125 *Income Tax Assessment Act 1997 (Cth)*.

<sup>17</sup> Australian Taxation Office, '[Affiliates](#)' (22 May 2017). See section 328-130 *Income Tax Assessment Act 1997 (Cth)*.

## **Part 2—Class exemption—collective bargaining**

### **Division 1 – Class exemption**

#### **7. Section 7: Class exemption – collective bargaining**

This section provides that, subject to specified limitations, the prohibitions in sections 45AF, 45AG, 45AJ, 45AK and 45 of the CCA do not apply to a corporation engaging in any of the three specified kinds of collective bargaining conduct.

Sections 45AF, 45AG, 45AJ, 45AK prohibit corporations from making contracts, arrangements or understandings that contain cartel provisions, and giving effect to such provisions. Section 45 prohibits conduct in relation to contracts, arrangements or understandings that restrict dealings or affect competition, including engaging in concerted practices.

The three specified kinds of collective bargaining conduct to which section 7(1) applies are ‘eligible corporation collective bargaining conduct’, ‘franchisee collective bargaining conduct’ and ‘fuel retailer collective bargaining conduct’.

#### ***Eligible corporation collective bargaining conduct:***

A corporation engages in eligible corporation collective bargaining conduct if:

- while it is an eligible corporation as defined in section 5, it makes an initial contract (section 7(2)(a)(i)) or engages with others in a concerted practice in relation to an initial contract (section 7(2)(a)(ii)), or
- it gives effect to an initial contract that it made while it was an eligible corporation.

By virtue of section 7(2)(b), the exemption in section 7(1) will apply to all conduct of a corporation in giving effect to an initial contract, provided that the corporation was an eligible corporation at the time it made the initial contract. This is the case even if, at the time of the giving effect conduct, the corporation is no longer an eligible corporation because its aggregated turnover in the relevant financial year exceeded \$10 million.

#### ***Franchisee collective bargaining conduct:***

A corporation will engage in franchisee collective bargaining conduct if the corporation is a franchisee of a particular franchisor and:

- it makes an initial contract with other franchisees of that franchisor in respect of supplies or acquisitions to or from that franchisor (section 7(3)(a))
- it engages with one or more such franchisees in a concerted practice in connection with making such an initial contract (section 7(3)(b)), or
- it gives effect to such an initial contract (section 7(3)(c)).

Section 7(3) makes the class exemption available to a corporation when collectively negotiating with franchisees who are part of the same franchise network or ‘brand’ where the target is the common franchisor, regardless of whether the corporation satisfies the ‘eligible corporation’ threshold. Section 7(3) does not preclude the operation of section 7(2) where a franchisee is also an eligible corporation.

Collective bargaining conduct by a franchisee directed at any person other than its franchisor or with contracting parties other than franchisees who have a franchise agreement with that franchisor will not be franchisee collective bargaining conduct. A franchisee engaging in such conduct will only have the protection of the section 7 class exemption if the conduct constitutes eligible corporation collective bargaining conduct under section 7(2).

### ***Fuel retailer collective bargaining conduct:***

A corporation will engage in fuel retailer collective bargaining conduct if it has a fuel re-selling agreement with a particular fuel wholesaler and:

- makes an initial contract with related fuel retailers, where the target is the common fuel wholesaler (section 7(4)(a))
- engages with one or more related fuel retailers in concerted practices in connection with making such an initial contract (section 7(4)(b)), or
- gives effect to such an initial contract.

In order for conduct to be fuel retailer collective bargaining conduct, all of the parties to the initial contract must be related fuel retailers and the target of the conduct must be the relevant fuel wholesaler (section 7(4)).

As defined in section 5, for the purposes of section 7(4), fuel retailers will be 'related fuel retailers' only where:

- they have a fuel re-selling agreement with that fuel wholesaler, and
- 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.

Fuel retailers operating under different systems or marketing plans collectively negotiating with a fuel wholesaler will not be related fuel retailers. Accordingly, their conduct in doing so will not be fuel retailer collective bargaining conduct.

Section 7(4) makes the class exemption available to a corporation when collectively negotiating with other fuel retailers, where their common fuel wholesaler is the target, regardless of whether the corporation satisfies the 'eligible corporation' threshold. It does not preclude the operation of section 7(2) where a fuel retailer is also an eligible corporation.

Collective bargaining conduct by a fuel retailer directed at any person other than its fuel wholesaler or with contracting parties other than fuel retailers who have a fuel re-selling agreement with that fuel wholesaler will not be fuel retailer collective bargaining conduct. A fuel retailer engaging in such conduct will only have the protection of the section 7 class exemption if the conduct constitutes eligible corporation collective bargaining conduct under section 7(2).

## **Division 2 – Limitations**

### **8. Exemption does not apply to collectively refusing to contract with target**

The exemption in section 7 does not apply to collective boycott conduct.

Accordingly, the class exemption will not apply to conduct by which a corporation makes an initial contract containing a prohibited boycott provision or gives effect to a prohibited boycott provision, regardless of whether the conduct would otherwise meet the criteria in section 7(2) to (4).

A ***prohibited boycott provision*** is a provision that has a substantial purpose of directly or indirectly preventing, restricting or limiting the supply of goods or services to a target or targets or the acquisition of goods or services from a target or targets by the corporation or one or more contracting parties.

For example, a provision in an initial contract made by a group of growers that one or more of them will refuse to supply a target in the event that they cannot agree satisfactory terms with the target would be a prohibited boycott provision. The eligible

corporation collective bargaining conduct exemption would not apply to a corporation's conduct in making the initial contract containing the provision or in giving effect to the provision.

#### **9. Collective bargaining class exemption notice must be given to the ACCC within 14 days**

Section 7 will only apply in relation to collective bargaining conduct upon a Notice in the form approved by the ACCC and containing all the information required by that form being given to the ACCC. Section 7 will only apply to conduct that was engaged in on or after the Notice being given or engaged in no more than 14 days before that date.

The ACCC will make the form of the Notice required available on its website. The information required to be included in the Notice will include information about the composition of the proposed collective bargaining group, the targets, or types of target businesses the group proposes to collectively bargain with, the matters the group proposes to collectively bargain about and contact details for the group.

The Notice may be given by the corporation or any other contracting party, or on their behalf by a representative body.

The ACCC will place a copy of all validly lodged Notices on its public register.

Section 9(2)(c) provides that the Notice cannot be given by a trade union, officer of a trade union or person acting at the direction of a trade union. Trade unions can, however, represent groups in their negotiations. This is consistent with section 93AB(9) of the CCA.

Once a Notice has been given to the ACCC, the exemptions in section 7 can apply to relevant collective bargaining conduct engaged in by eligible members of that group:

- after the Notice was given, and
- no more than 14 days prior to Notice being given. This is consistent with section 45(9)(b) of the CCA, which provides legal protection for the 'making of' an initial contract provided a corporation applies for authorisation within 14 days of the contract being made.

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

It is important that a target be aware of proposed collective bargaining, including so that it can make an informed decision about whether or not to engage with a collective bargaining group.

Accordingly, the class exemption will only apply to steps taken to engage with a target collectively, where the target is on notice of the collective bargaining. For this reason, protection under section 7 will only apply to collective bargaining conduct with a target, or giving effect to a contract made with a target, upon a copy of the Notice given to the ACCC also being given to the target(s).

#### **11. Corporation must have reasonable expectation of contracting with target**

The section 7(2) eligible corporation collective bargaining conduct exemption will only apply to an eligible corporation that reasonably expects that it will make at least one contract with the target(s) in respect of the acquisition or supply of the goods or services to which the initial contract relates. This is consistent with section 93AB(3) of the CCA.

While a corporation must have a reasonable expectation of making such a contract with the target, the exemption will apply regardless of whether such a contract is ultimately made. Further, it is sufficient that a corporation have a reasonable expectation of itself making a contract with the target. The corporation does not need to have a reasonable expectation of making a contract with the target as a result of collective negotiations,

given that a corporation cannot know at the time of making an initial contract whether a target will be willing to collectively negotiate or whether any collective negotiations will ultimately be successful. However, the corporation must at least have a reasonable expectation that it will individually make a contract with the target.

Nor is it necessary, in the case of multiple targets or a class of targets, that a corporation have a reasonable expectation of making a contract with each and every one of those targets. Consider for example, a collective bargaining group that has given a Notice to the ACCC which describes the target business(es) as 'dairy processing companies' and the terms and conditions the group proposes to collectively bargain about are described as the 'supply of raw milk.' A corporation that is part of this collective bargaining group does not need to have a reasonable expectation that it will enter into a contract, as part of the group or individually, with each or any of the dairy processing companies with whom the group is negotiating. However, the corporation must have a reasonable expectation that it will enter into an agreement with a dairy processing company for the supply of raw milk.

However, if the target business is described on the Notice given to the ACCC as 'dairy processing company A', the corporation must have a reasonable expectation that it will enter into a contract, as part of the group or individually, with that dairy processing company.

The reasonable expectation requirement is to ensure that collective bargaining groups are confined to members who have a legitimate, shared interest in collectively bargaining with the same target(s).

The reasonable expectation requirement does not apply to franchisees and fuel retailers negotiating with their franchisor or fuel wholesaler. Given the nature of their relationship with the target, and that the type of agreement they will be collectively negotiating is foundational to their business (a franchise agreement or a fuel reselling agreement), a reasonable expectation of contracting with the target franchisor or fuel wholesaler is assumed. However, franchisees and fuel retailers that would be relying on the exception for eligible corporation collective bargaining conduct, for example, because they are negotiating with a target other than their common franchisor or fuel wholesaler, will need to satisfy the reasonable expectation test in section 11.

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

This section provides that the class exemption does not provide legal protection to a corporation engaging in collective bargaining conduct where the ACCC has previously considered a notification or authorisation, and the ACCC either revoked, denied or proposed to deny legal protection in respect of that particular collective bargaining. This requirement is consistent with section 93AB(9).

In particular, the class exemption will not apply in respect of collective bargaining conduct where a person has previously applied for **authorisation** in relation to the relevant initial contract and:

- the ACCC has made a determination denying the application or revoking the authorisation, and the applicant did not apply for Tribunal review or did apply for Tribunal review but the Tribunal affirmed or varied (without setting aside) the ACCC's decision (section 12(2)), or
- the ACCC has issued a draft determination proposing to deny the application and the applicant has subsequently withdrawn the application (section 12(3)).

The class exemption will also not apply to collective bargaining conduct where an applicant has previously lodged a collective bargaining **notification** in relation to the relevant initial contract and:

- the ACCC has given an objection notice in relation to the notification, and the applicant did not apply for Tribunal review or did apply for Tribunal review but the Tribunal affirmed the objection notice (section 12(4)), or
- the notification has been withdrawn under section 93AE of the CCA (section 12(5)).

### **13. Only sharing of certain information permitted**

This section provides that legal protection conferred by section 7 extends to a corporation sharing with other contracting parties, or using information so shared, if any information that it shares with other contracting parties, and any information that it uses which has been shared by contracting parties:

- is shared or used to engage in the collective bargaining conduct specified in section 7, and
- the corporation believes that it is reasonably necessary to share or use that information in order to facilitate it engaging in that conduct .

The class exemption does not extend to conduct by a corporation in sharing commercially sensitive information beyond that which it believes is reasonably necessary to facilitate the collective bargaining the subject of the Notice provided to the ACCC.

For example, it is unlikely that members of an energy buying group would believe that it would be reasonably necessary for them to share information with each other about the prices they intend to charge their customers for the goods they sell, in order to facilitate the collective bargaining process.

Businesses proposing to engage in information sharing beyond that which they believe is reasonably necessary to facilitate collective bargaining may wish to apply for authorisation of that conduct.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020**

This Disallowable Legislative is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Disallowable Legislative Instrument**

This Disallowable Legislative Instrument permits certain corporations to engage in certain kinds of collective bargaining conduct that would otherwise contravene certain competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **CCA**). The conduct that is covered by the Instrument would not have the effect, or would not be likely to have the effect, of substantially lessening competition.

Corporations can currently seek to rely on other mechanisms under Division 1 or Division 2 of Part VII of the CCA in order to engage in the conduct that is covered by this Instrument without contravening the CCA. The Instrument provides for a more streamlined mechanism for permitting corporations to engage in the conduct covered by the Instrument without contravening the CCA.

#### **Human rights implications**

The Determination engages Article 8 of the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5. Under this Article, the States Parties undertake to ensure, among other things:

- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

Paragraph 9(2)(c) of the Determination provides that the collective bargaining class exemption notice must not be given to the ACCC by or on behalf of a trade union, or an officer, or a person acting on the direction, of a trade union.

Trade unions can, however, represent groups in their negotiations. This is consistent with the notification provisions in section 93AB(9) of the CCA, which renders a collective bargaining notification given by a trade union, an officer of a trade union or a person acting on the direction of a trade union invalid, and the policy behind it. The Explanatory Memorandum to the Trade Practices Legislation Amendment Bill (No.1) 2005 notes that:

... in line with the clear demarcation, acknowledged and supported by the Dawson Review,<sup>18</sup> between the regulation of business relationships and employment

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<sup>18</sup> The Review of the Competition Provisions of the Trade Practices Act, April 2003.

relationships, it is not envisaged that the collective bargaining provisions would be used to pursue matters affecting employment relationships.<sup>19</sup>

This Determination does not engage any other of the applicable rights or freedoms.

### **Conclusion**

This Determination is compatible with human rights as it does not raise any human rights issues.

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<sup>19</sup> [Explanatory Memorandum to the Trade Practices Legislation Amendment Bill \(No. 1\) 2005](#), page 56.