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PUBLIC  
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**Response to ACCC  
Class Exemption  
for Collective  
Bargaining –  
Guidance Note and  
Related Documents**

3 JULY 2019

## Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the ACCC Class Exemption for Collective Bargaining Guidance Note – Draft for Consultation, and related documents.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The IPA-Deakin SME Research Centre submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA-Deakin SME Research Centre Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou at \_\_\_\_\_ or on \_\_\_\_\_.

Yours sincerely



Vicki Stylianou  
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3 July 2019

The Chairman  
Australian Competition and Consumer Commission  
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## **Collective Bargaining Class Exemption – Guidance Note Draft for consultation**

The IPA-Deakin SME Research Centre welcomes the opportunity to comment on the Draft Guidance Note (and related documents) issued by the ACCC for consultation in the context of the proposed Collective Bargaining Class Exemption.

### **A. The Guidance Note – Draft for Consultation**

The draft Guidance Note is a welcome explanation of how the proposed Class Exemption will work in practice. From a small business perspective, there are a few points that we consider need further clarification:

1. **Where members of the group do not meet the eligibility requirements.** The Guidance states that “if some members of your proposed bargaining group do not meet the requirements (for example, if their turnover is too high), they may still be able to seek legal protection to collectively bargain by using the ACCC’s authorisation or notification processes” (page 1). This gives rise to two issues:
  - a. If the non-eligible member does wish to seek authorisation or notification, what does this mean for the bargaining group as a whole? Can it proceed with negotiations without the non-eligible member, pending the outcome of the authorisation or notification or does it need to await the authorisation or notification decision? Does the ineligible member become eligible (and part of the larger group) once authorisation is obtained or does it negotiate separately?
  - b. Who bears the responsibility of determining whether all members of the group are eligible? If members join the group that are ineligible from the outset, what impact does this have on the remaining members of the group (if any)?
2. **Where members of the group share commercially sensitive information.** It seems highly likely that in order to benefit from a collective bargain, the terms and conditions under which the members of the group normally contract will need to be disclosed, so as to ensure those terms and conditions are improved.

Whilst we acknowledge this is not an issue for the ACCC specifically, the risk for small businesses of breaching confidentiality clauses in supply contracts must therefore be quite high. Small business will need to understand that many of the terms of their current supply contracts cannot be disclosed without breaching their confidentiality obligations. This may expose small business to unexpected legal risk. Small business may be able to get a waiver to allow disclosure of key terms and conditions without

breaching confidentiality, but they will need to be aware of the need to do so. Those negotiating the collective bargain on behalf of the group's members may need to take additional responsibilities to help small business understand what can and cannot be disclosed.

3. **The Guidance Note states that members of the group must not share commercially sensitive information beyond that necessary to facilitate the collective bargaining process.** This also applies to preliminary discussions (page 7). The IPA-Deakin SME Research Centre agrees that this is a necessary requirement for application of the Class Exemption. However, it is a requirement that small business may find hard to understand without further guidance or advice. Examples of information that would be necessary in particular scenarios versus information that goes beyond what is necessary would be helpful.
4. **The Guidance Note may benefit from a checklist.** The Guidance Note helpfully identifies the steps that need to be followed and/or complied with in order for a small business to benefit from the Class Exemption. The IPA-Deakin SME Research Centre believes that small business would benefit from a one page checklist of the steps that need to be followed (for example, Step 1 – Confirm eligibility of all members of group; Step 2 – Complete Notice; Step 3 – Lodge Notice with ACCC within 14 days; Step 4 – Share copy of Notice with any target with whom the group wishes to collectively bargain). This could be supported by a flowchart. Many small businesses will not have the time to read the entire 11-page document and are at risk of missing key steps.
5. **Risk of Substantial Lessening of Competition.** The Guidance Note confirms that there is no limit on the size of the bargaining group that can be formed (page 5). The IPA-Deakin SME Research Centre remain concerned that, even with the \$10million aggregate turnover threshold, a substantial lessening of competition could arise where a large group of small businesses collectively bargain. For example, if all of the dairy farmers in Victoria formed a group to collectively bargain with dairy producers (assuming they each had a turnover of less than \$10million), the effect of the collective bargain may be to substantially lessen competition for the supply of milk in Victoria. The notice required to be given to the ACCC may not disclose sufficient details of the members of the group to give visibility of this potential issue. How will the ACCC monitor this risk?
6. **Information about collective bargaining agreements.** In order to properly monitor the effect of the exempt collective bargaining agreements on competition, the ACCC should require the collective bargaining group 'contact' to maintain a copy of any agreements reached under the Class Exemption and to maintain records including:
  - The number of businesses in each collective bargaining group;
  - Duration of the agreement affected by the collective bargain;
  - Value of the agreement/s affected by the collective bargain;
  - Industry(ies) affected by the collective bargain;
  - Dates of the collective bargain.

This data will be of great assistance to the ACCC in its planned 2028 review.

7. **Role of Trade or Industry Associations.** In the context of collective bargaining, small businesses are likely to need a champion or representative to facilitate negotiation of collective bargaining agreements and assist with the application of the Class

Exemption. Industry and trade associations are obvious candidates to fill this role and this is acknowledged in the Guidance Note (page 6).

The Guidance Note states “If the bargaining representative is not a member of the collective bargaining group, they do not need to meet the eligibility criteria”. This results in the bargaining representative not benefiting from the exemption from competition law. Is this what is intended? Although the risk of breaching competition law should be low in most cases, there may be some risk of a concerted practice, especially if the representative acts on behalf of more than one bargaining group. Clarification of the position in the Guidance Note would be helpful.

## **B. The Collective Bargaining Class Exemption Notice – Draft for Consultation**

Many small businesses wishing to benefit from the Class Exemption may only read the instructions for the Collective Bargaining Class Exemption Notice and not the longer Guidance Note. With this in mind, the IPA-Deakin SME Research Centre suggests:

1. The Notice makes it clear that collective boycott is not covered.
2. The Notice explains what needs to be done if one of the proposed members of the collective bargaining group does not meet the ‘eligibility requirements’ (see paragraph A(1) above).
3. Clarification is given around the issue of who bears the responsibility for determining whether eligibility requirements are met.
4. The Notice clearly states the obligation to lodge the Notice with the ACCC within 14 days.

Further changes to the Class Exemption Notice may be required to reflect suggested changes to the Guidance Note outlined above.

## **C. The Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2019 – Exposure Draft**

Changes to the Exposure Draft may be required to reflect suggested changes to the Guidance Note and Notice outlined above.

### **General Comment about Self-Assessment**

Although the objective of the Class Exemption is to simplify (or even remove) the administrative burden for small businesses in notifying or seeking authorisation of collective bargaining conduct, it is unlikely that small business will be able to navigate the Class Exemption without some legal assistance. In the UK and Europe, the block exemptions create legal certainty for those businesses who benefit from them, but the complexity of the exemptions mean that legal advice is commonly required before this legal certainty can be obtained.

Given the introduction of the new prohibition against concerted practices, small businesses may be especially reluctant to rely on the Class Exemption without advice confirming it is applicable. In the absence of legal advice, small business may need to rely on advice from the ACCC.