

**Victorian Government
submission to the
ACCC consultation on the
proposed class exemption for
collective bargaining**

July 2019



PROPOSED ACCC CLASS EXEMPTION FOR COLLECTIVE BARGAINING

VICTORIAN GOVERNMENT SUBMISSION

June 2019

TABLE OF CONTENTS

1	Introduction	2
2	Advantages of proposed general class exemption	3
3	Franchising and fuel retailer class exemption	4
4	Administrative arrangements.....	5
5	Draft Guidance Note.....	6
6	Further questions	9

PROPOSED ACCC CLASS EXEMPTION FOR COLLECTIVE BARGAINING

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1 Introduction

The Victorian Government welcomes the opportunity to provide comments in relation to the draft class exemption for collective bargaining and the draft *Guidance Note* released by the Australian Competition and Consumer Commission (ACCC) in June 2019.

Victoria strongly supports the proposed class exemption for collective bargaining

Victoria strongly supports the proposed class exemption for collective bargaining. It is vitally important for there to be simple and low-cost mechanisms in place to assist small businesses and independent contractors in achieving fairer and more efficient outcomes in their negotiations with larger organisations. Many industries in Australia are characterised by significant disparities in bargaining power between small businesses and independent contractors on the one hand and larger entities on the other hand. These disparities often result in sub-optimal outcomes for small businesses and independent contractors in terms of the prices they are paid for goods and services and their terms of trade with these larger entities.

By addressing these disparities in bargaining power through simplified collective bargaining mechanisms, small businesses and independent contractors will be able to achieve fairer outcomes and avoid the imposition of onerous terms and conditions in their contracts.

It is vitally important for there to be simple mechanisms in place to assist small businesses achieve fairer outcomes in their negotiations with larger organisations

For example, Victoria can envisage that small businesses and independent contractors engaged in the provision of various telecommunications installation services to large telecommunications providers will be able to utilise the new class

exemption provisions to achieve more balanced contractual outcomes. Another potential use of the new class exemption would be to permit small business tenants in large shopping centres to form a collective bargaining group to negotiate terms and conditions with shopping centre owners.

2 Advantages of proposed general class exemption

Victoria believes that the proposed class exemption will be simpler, faster, cheaper and provide a longer period of protection

Victoria believes that the proposed class exemption provisions have a number of significant advantages over the existing provisions for collective action by small businesses and independent contractors, as set out in the *Competition and Consumer Act 2010* (CCA).

The proposed class exemption will be **much simpler** for small businesses to access, given that eligible businesses must only satisfy an aggregated turnover criterion of \$10 million, as opposed to the transaction threshold which currently applies under the notification provisions of the CCA. In addition, there are no turnover thresholds for franchisee or fuel retailer collective bargaining groups which are seeking to collectively bargain with their franchisors or fuel wholesalers.

Further, the proposed class exemption protection can be accessed **much more quickly** than the protections available under the existing notification and authorisation processes. The proposed class exemption can be accessed within a matter of days, subject to the requirements of lodging the relevant *Collective Bargaining class exemption notice (Notice)* with the ACCC and providing a copy of the *Notice* to the target business prior to commencing any bargaining or negotiations. By contrast the notification process takes fourteen days for a simple application and sixty days for an application which includes a collective boycott, whilst the authorisation process takes at least six months.

There are also **significant cost benefits** to small businesses which choose to take advantage of the proposed class exemption process, as compared to the notification and authorisation processes. Not only is the proposed class exemption process free in terms of fees payable to the ACCC, but the simplicity of the process means that in most cases small businesses and independent contractors will not be required to retain the services of a legal practitioner to provide legal advice.

By contrast, there is a \$1,000 lodgement fee in relation to notifications and a \$7,500 lodgement fee for authorisations. Furthermore, small businesses usually require some limited legal advice when lodging a notification application with the ACCC and quite extensive legal advice, often in the vicinity of between \$10,000 to \$15,000, if they decided to lodge an authorisation application.

The final significant benefit associated with the class exemption process is that the period of legal protection offered to small businesses and independent contractors is **substantially longer** than that provided under either the notification or authorisation processes. The class exemption process provides legal protection for up to 10 years, whilst the notification process only provides three years of legal protection whilst in most cases authorisations only provide legal protection for five years.

3 Franchising and fuel retailer class exemption

Victoria believes that the proposal not to have a turnover threshold in relation to class exemptions for collective negotiations between franchisees and fuel retailers and their respective franchisors and fuel wholesalers is appropriate

As appears to be the case from the recent final report of the Parliamentary Joint Committee on Corporations and Financial Services in relation to the operation and effectiveness of the Franchising Code of Conduct,¹ there remain significant concerns with the disparity in bargaining power between some franchisors and their franchisees. There are also valid concerns that the Oil Code has not been successful in addressing the disparities in bargaining power which exist between fuel retailers and fuel wholesalers.

Furthermore, the effectively unlimited threshold for accessing the class exemption process in relation to franchising is important given the existence of some very large turnover franchises which are dealing with much larger multinational franchisors, for example in new car retailing, and the supply of machinery and agricultural equipment.

Victoria believes that the arrangements in relation to franchising will be highly beneficial for both franchisees and franchisors. Current arrangements for franchisees to form a collective group to discuss issues with their franchisor do not appear to be very effective. Where such franchisee representative bodies do exist, they are often operated on ad hoc basis and have little practical effect on the way the franchise is run. We believe that the class exemption process will provide franchisees with a much more effective means of engaging in meaningful negotiations with franchisors in relation to specific issues of concern to the franchisees.

¹ A copy of the Committee's full final report can be found at - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/Report

Franchisors will also benefit from the class exemption process by being able to limit the number of negotiations which they will need to have with franchisees. Franchisors will be able to engage in a single negotiation with the entire franchise group or particular segments of the franchise group, instead of having to undertake a number of separate negotiations. This change should significantly reduce franchisors overall operating costs by minimising transaction costs.

4 Administrative arrangements

Victoria is of the view that the administrative arrangements for accessing the class exemption are appropriate. The process is straightforward in terms of the proposed bargaining group having to notify the ACCC of the arrangement by completing and submitting the *Notice*. We believe that the *Notice* is clear in its presentation and seeks an appropriate level of information from the businesses which will be part of the collective bargaining group.

A transparent register with contact details will help to facilitate competition

We also believe the proposal to list all *Notices* received by the ACCC on an online register is a sound idea. The existence of the register will increase transparency both for small businesses and independent contractors who may wish to join an existing collective bargaining group, as well as for target entities which will be able to identify any collective bargaining groups which may apply to its business or in its industry sector.

Having said that, we note the comment in the sample *Notice* that the ACCC is proposing to redact the contact details of the representatives of the collective bargaining group when the relevant information is uploaded to the ACCC's online register. We believe that redacting this information will make it more difficult for small businesses who may wish to join an existing collective bargaining group from being able to contact the relevant representative in a timely manner. Accordingly, we think the ACCC should consider including a contact mechanism or enable bargaining groups to opt-in to have their details published with their written consent.

Victoria also believes that the requirement that the collective bargaining group provide a copy to the *Notice* to the target entity when they first approach that entity for the purposes of collective bargaining is appropriate. This approach is again simple and straightforward and avoids the potential complications associated with having specific hard deadlines for the provision of the *Notice* to the target entity.

5 Draft Guidance Note

Victoria wishes to make some comments in relation to the ACCC's Draft *Guidance Note*. We believe that the *Guidance Note* is both clear and comprehensive in its explanation of how the class exemption process will operate and sets out the main issues which users of the class exemption process will have to turn their mind to when preparing a *Notice*.

The list of examples of the types of situations where the class exemption may be used, as listed on page 2 of the *Guidance Note*, is particularly helpful.

One section of the *Guidance Note* which could be enhanced with additional narrative and further examples is the section entitled "What information can be shared between bargaining group members?" on page 7. Victoria believes that the *Guidance Note* should provide a more detailed explanation to small business users about the types of information which should not be shared between group members. In addition to the reference to pricing, the *Guidance Note* should refer to such information as customer lists, cost structures, and proprietary information. It would also be beneficial if the *Guidance Note* more clearly spelt out the risk of improperly sharing particular types of confidential information, namely the risk of the businesses contravening criminal cartel laws.

We also believe that there may be some benefit in providing small businesses with guidance as to the steps which they should take if another member of the proposed collective bargaining group seeks to share inappropriate information or engages in discussions about inappropriate topics, such as pricing. For example, small businesses should be encouraged not to participate in any such inappropriate discussions or information sharing. Ultimately, it may also be appropriate for the small business to exit the group if such conduct continues.

It is common practice in many industry associations to commence all relevant meetings with a general competition law statement. The following is an example of such a statement:

In attending these meetings all participants agree that they will not enter into any discussions, activities or conduct that may infringe competition laws. By way of example, participants will not discuss, communicate or exchange any commercially sensitive information, including information relating to prices, product strategy, costs and revenues, and commercial strategies.

We believe that it may be worthwhile to amend the *Guidance Note* to include a recommendation to small businesses and other prospective users of the class exemption processes that they consider making a competition law statement along the above lines at the commencement of all meetings at which the terms of the proposed class exemption are to be discussed.

The discussion on page 9 of the *Guidance Note* concerning “How do businesses determine if they are eligible?” provides a clear summary of eligibility rules. However, one issue which may need to be made clearer is the scope of the class exemption as it applies to franchising and fuel retailers. Franchisees and fuel retailers need to understand that the unlimited turnover thresholds only apply to collective bargaining arrangements between the franchisee and their franchisor and between the fuel retailer and their fuel wholesaler. If the franchisee or fuel retailer wish to collectively bargain with other groups, such as suppliers, the general turnover thresholds will apply. In some cases, that may mean that a new bargaining group will have to be formed, to exclude those business with an aggregated turnover of more than \$10 million.

We believe that the *Guidance Note* may also benefit from the inclusion of a flow diagram showing the steps which a small business will need to follow when seeking to establish a collective bargaining group and to access the class exemption protections. For example:

1. Identify relevant bargaining group
2. Identify needs of relevant bargaining group
3. Gauge interest of relevant group in joining collective bargaining group
4. Identify relevant target entity or entities
5. Identify and communicate information requirements to group
6. Collate relevant information
7. Identify representative for collective bargaining group
8. Prepare *Collective Bargaining class exemption notice*
9. Submit *Collective Bargaining class exemption notice* to ACCC
10. Provide copy of *Collective Bargaining class exemption notice* to the target entity or entities prior to commencing bargaining or negotiations
11. Engage in the bargaining / negotiations with the target entity or entities
12. Finalise the bargaining / negotiation outcomes with the target entity or entities
13. Document the bargaining / negotiation outcomes

It may also be beneficial to provide users with some indicative timeframes in the *Guidance Note* as to how long the entire process is likely to take. It seems to us that, depending on the size of the group and the complexity of the matters the subject of the class exemption, parties should set aside a period of at least one to two months to

complete steps (1) to (9) above. In addition, the process of bargaining/negotiation and importantly documenting the agreed outcomes (steps (1) to (13) above) is likely to take a further one to two months to complete.

We also believe that the *Guidance Note* and the *Notice* would benefit from the inclusion of more examples of the type of collective bargaining agreements which parties would be able to enter into. There appear to be a wide range of existing examples, based on previous collective bargaining applications, which could be referenced in the *Guidance Note* including collective negotiations between:

- hotels and suppliers of gaming and wagering services
- newsagents and a range of suppliers, including magazine and lottery service providers, post office licensees and Australia Post
- primary producers, such as dairy farmers, chicken growers and vegetable growers, and the processors they supply
- truck owner-drivers and transport companies.

Other potential bargaining groups may include small businesses in a particular industry negotiating with the following target entities:

- advertising companies, e.g. Google, Facebook, Sensis Yellow Pages
- shopping centre owners
- telecommunications providers
- insurance companies
- energy providers, including electricity and gas retailers
- fuel suppliers
- equipment and machinery suppliers

For the class exemption process to work, it must remain a simple and straightforward process which does not become mired in legal technicality and made inaccessible due to legal expense.

Finally, the *Guidance Note* makes it clear that the process of preparing a collective bargaining groups and preparing and submitting a *Notice* is intended to be a simple and straight-forward process and as such small businesses will not need to seek any legal advice. We agree with the ACCC's views in relation to this issue. For the class exemption process to work, it must remain a simple and straightforward process which does not become mired in legal technicality and made inaccessible due to legal expense.

However, there may be benefits in collective groups of small businesses being able to access legal advice, and the ACCC may wish to consider exploring the feasibility of implementing a similar arrangement in relation to the class exemptions as was recently implemented in relation to small business tax disputes. Under the Australian Small Business and

Family Enterprise Ombudsman Small Business Concierge Service,² (which we understand is funded by the Commonwealth Government) small business taxpayers are able to access a free one-hour consultation with an experienced small business tax lawyer to review the facts of their case and obtain advice on the viability of an appeal. A similar scheme is administered by the Fair Work Commission through its Workplace Advice Service which facilitates free legal assistance to individuals and small business owners.

We believe that a similar initiative should be considered in relation to the class exemption laws. In our view, such an initiative would not be particularly costly to fund. Furthermore, such an initiative would be likely to result in a more rapid uptake of the new class exemption laws and ultimately may result in many more businesses deciding to take advantage of the new class exemption process. This initiative is also likely to result in the ACCC having to deal with a lesser number of non-compliant *Notices*, for example, *Notices* which fail to describe the parties or the purpose of the collective bargaining activity in sufficient detail.

As mentioned in previous consultations with the Victorian Small Business Commission, Victoria considers that the class exemption also provides protections for small businesses to collectively mediate disputes. The simplified notification process will improve the efficiency of this process and provide additional protections for this activity.


Victoria notes that while the proposed mechanism might offer additional opportunities for collective mediation, it could be strengthened by offering avenues for members of collective groups to access mediation should they require it. In Victoria, small businesses are able to access low-cost mediation services through the Victorian Small Business Commission. The Victorian Small Business Commission currently provides a range of alternative dispute resolution options, including facilitated meetings and mediation. The Victorian Small Business Commission has a successful track record in mediating disputes, successfully mediating over 78 per cent of business disputes presented to the Commission in 2017-18. Victoria advocates that existing dispute resolution agencies be utilised in jurisdictions where they exist.

Victoria believes the proposed class exemption will also facilitate collective mediation and advocates the use of existing dispute resolution services such as the Victorian Small Business Commission


6 Further questions

Victoria would be pleased to discuss our submission with the ACCC, if that would be helpful.

² See <https://www.asbfeo.gov.au/assistance/concierge-service>



Please contact Barbara Cullen, Director, Small Business Victoria, Department of Jobs, Precincts and Regions on [redacted] if you require further information or clarification on the contents of this submission.



Authorised by the Hon. Adem Somyurek, Minister for Small Business
Department of Jobs, Precincts and Regions
1 Spring Street Melbourne Victoria 3000
Telephone (03) 9651 9999

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