

Commercial Insights

How small businesses can utilise the ACCC's new collective bargaining class exemption

Small and medium businesses will have the ability to collectively bargain with their suppliers once the first ever class exemption granted by the ACCC commences this month.

Background and the ACCC's class exemption power

Since November 2017, the ACCC has had the power to make class exemptions for certain types of conduct which may otherwise have breached Part IV of the *Competition and Consumer Act 2010* (Cth) (**the CCA**). Such exemptions allow businesses to engage in the specified conduct without the need to apply for an authorisation or notification.

Class exemptions may be granted if the ACCC is satisfied that the conduct, in all circumstances:

- 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 benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from the conduct.

In granting a class exemption, the ACCC may also impose limitations on the persons, circumstances and conduct that the class exemption will apply to.

The ACCC also has the power to withdraw the benefit of a class exemption from particular businesses if it believes that the conduct in that case would be likely to substantially lessen competition or would be likely to result in a benefit to the public that does not outweigh the detriment to the public.

The collective bargaining class exemption

Following a consultation period, the ACCC announced in October 2020 that a class exemption would be granted to certain businesses to allow them to collectively negotiate with suppliers, wholesalers and franchisors.

The class exemption will apply to businesses and independent contractors who form, or are members of, a bargaining group, and who each had an aggregated turnover of less than \$10 million in the financial year before the bargaining group was formed. This will apply to more than 98% of Australian businesses.

Further, all franchisees and fuel retailers governed by the Franchising or Oil Codes of Conduct, regardless of turnover, will be able to collectively negotiate with their franchisors.

Bargaining groups subject to the exemption will only need to fill out a one-page form in order to be granted protection from the CCA. Prior to this, small businesses wishing to engage in collective bargaining would have required authorisation in order to do so without breaching the CCA. The ACCC has recently stated that in its experience, collective bargaining by small businesses often does not harm competition and can actually, in some circumstances, produce public benefits.

The determination enacting the exemption is currently subject to the parliamentary disallowance process which will end in February, bringing the exemption into effect.

Further information

The ACCC's press release on the new class exemption can be found at <https://www.accc.gov.au/media-release/class-exemption-will-enable-small-businesses-to-collectively-bargain>.

General information on the class exemption power can be found at <https://www.accc.gov.au/business/exemptions/class-exemptions>.

Further information, including guidance for businesses seeking to form a collective bargaining group, will be made available by the ACCC once the exemption commences.

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