



Small business collective bargaining

Notification and authorisation guidelines—draft for consultation

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Australian Competition and Consumer Commission
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1. Introduction

This guide provides information on the collective bargaining approval processes in the *Competition and Consumer Act 2010* (the Act) and outlines how the ACCC assesses the public benefits and detriments from collective bargaining. It is written primarily for small businesses, farmers and their legal advisors to assist their understanding of the notification and authorisation process for collective bargaining.

Small businesses, including farmers, can sometimes be better off negotiating with their customers or suppliers as a group (referred to as collective bargaining). Working together, you might be able to negotiate better terms and conditions with larger businesses, and create efficiencies, that you could not achieve on your own.

However, without ACCC approval prior to commencing negotiations, collective bargaining risks breaching the Act.

The Act allows businesses to obtain legal protection to engage in collective bargaining where the ACCC is satisfied that the public benefits from the conduct outweigh the public detriments. You can obtain legal protection by:

- lodging a collective bargaining notification, or
- obtaining authorisation for the conduct.

The notification process is often simpler and faster than authorisation. Changes to the Act, which took effect from November 2017, make the collective bargaining notification process more flexible.

The ACCC is available to answer questions about each process and discuss proposed arrangements with businesses who are considering lodging an application for authorisation or notification. Please direct inquiries to the General Manager, Adjudication, ACCC at adjudication@acc.gov.au or (02) 6243 1111.

2. Small business collective bargaining and boycotts

What is collective bargaining?

Collective bargaining occurs where two or more small businesses come together to negotiate with a customer or a supplier (known as the target business)¹ about terms, conditions and/or prices. The group may choose to appoint a representative, such as an agent or industry association, to negotiate on their behalf.

There can be many benefits from negotiating as a group with the target business rather than individually, including:

- reducing and/or sharing the time and the cost of putting supply arrangements in place
- creating more opportunities to negotiate terms of supply that better reflect the group's needs (as compared to just signing a standard form contract)
- gaining better access to information, for example by sharing relevant information, or sharing the costs of engaging a professional advisor
- creating new marketing opportunities when the combined volume becomes more attractive to larger or new buyers or sellers
- streamlining and coordinating ordering and delivery, creating supply chain efficiencies.

What is a collective boycott?

Collective bargaining groups sometimes want to be able to refuse to supply to, or to buy from, a particular customer or supplier, unless or until they reach agreement on terms and conditions with that customer or supplier. This is called a **collective boycott**.

In certain circumstances, a collective boycott may help the group achieve some of the efficiency benefits of collective bargaining. For example, attempts by small businesses to collectively bargain with a large customer or supplier without the ability to threaten and/or engage in a collective boycott can be ineffective where the target business refuses to negotiate with the group.

When does collective bargaining raise competition concerns?

Collective bargaining often raises concerns under the competition provisions of the Act because, in broad terms, the Act requires businesses to operate independently of their competitors when making decisions about:

- pricing
- which businesses they deal with, and
- the terms and conditions of doing business.

Therefore, competitors who act collectively in these areas may be at risk of breaching the cartel and/or other competition provisions of the Act.²

However, the ACCC recognises that collective bargaining by small businesses often results in more efficient outcomes. Under the Act, businesses can obtain protection from legal action to engage in collective bargaining and boycotts.

¹ Collective bargaining in the context of competition law does not include employee/employer collective bargaining

² Including, for example, concerted practices under s 45(1)(c) of the Act that may arise from information sharing as part of the collective bargaining conduct

3. Authorisation or notification of collective bargaining and boycott arrangements

Small businesses can obtain legal protection for collective bargaining and collective boycotts by lodging a notification or obtaining authorisation.

Authorisation or notification of collective bargaining does not mean that the ACCC will participate in the bargaining process between the parties or make rulings about specific contractual provisions such as levels of service or fees. Nor does it create an obligation for the target business to negotiate with the group. Lodging a notification or obtaining authorisation simply removes the risk that collective bargaining or boycotts will breach the competition provisions of the Act.

Before lodging a notification or application for authorisation, we encourage you to discuss your proposal, and the best process for seeking approval, with the ACCC.

Table 3.1 outlines the main similarities and differences between notification and authorisation to help you consider which process is most suitable for you.

Table 3.1: Main similarities and differences between notification and authorisation

	Notification	Authorisation
Are there limits on who can apply?	<p>Yes. Each member of the group must reasonably expect to have less than \$3 million (unless varied by regulations¹) a year in total transactions with the target business.</p> <p>A trade union is not able to apply.</p>	<p>No. Any business, industry association or trade union is able to apply for authorisation on behalf of itself and the group.</p> <p>Monetary thresholds do not apply.</p>
When does the legal protection commence?	<p>Commences automatically 14 days after the notification is validly lodged, unless the ACCC objects within this period.</p> <p>However, if the notification includes collective boycott conduct the legal protection commences automatically 60 days after the notification is validly lodged, unless the ACCC objects within this period.</p>	<p>Commences only when the ACCC grants authorisation. A final determination must be made within 6 months, unless extended. For straightforward arrangements, the ACCC is often able to issue a final determination much earlier than this.</p> <p>An interim authorisation² may be granted to enable the collective bargaining to commence before the ACCC issues a final determination.</p>
How long does the legal protection last?	<p>The legal protection will continue for three years (the default notification period) beginning on the day the notification was lodged, unless the ACCC determines that another period (up to 10 years) is appropriate, or a stop notice is issued or the notification is withdrawn or revoked.</p>	<p>The ACCC can grant authorisation for any period considered appropriate in the circumstances. Most authorisations for collective bargaining are granted for between 5 and 10 years.</p> <p>If the ACCC decides to revoke an authorisation the legal protection expires 21 days after the final determination is issued.</p>
Can the ACCC issue a stop notice for a collective boycott?³	<p>Yes. If there has been a material change of circumstances since the notification was lodged, and the ACCC reasonably believes that the boycott has or will result in serious detriment to the public.</p>	<p>No</p>

Can the ACCC's approval be subject to conditions?	Yes, but only if the notification involves collective boycott conduct.	Yes
Can the arrangements include a boycott?	Yes	Yes
Can the ACCC compel the target business to bargain with the collective bargaining group?	No	No
Does the ACCC participate in the process or arbitrate?	No	No
Does the ACCC's approval override existing contractual obligations between the parties?	No	No
What is the lodgement fee?	\$1000—the ACCC is not permitted to waive the notification lodgement fee.	\$7500—the ACCC can waive the authorisation lodgement fee in whole or part if the fee is unduly onerous.



4. Assessing public benefits and detriments

The legal tests applied by the ACCC to assess a collective bargaining notification or application for authorisation involve an assessment of whether the likely public benefit will outweigh the likely public detriment (i.e. there is a **net public benefit** likely to result from the conduct). The terms **public benefit** and **public detriment** are not defined in the Act and they are interpreted broadly.

In order to assess the effect of the proposed collective negotiations and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and compares the likely future with and without the proposed conduct.

Detailed information about how the ACCC applies the authorisation test and generally assesses public benefits, detriments and the impact of conduct on competition is in the ACCC's [Guidelines for Authorisation of Conduct \(non-merger\)](#).

Future with and without

In assessing the likely public benefits and detriments from proposed conduct, the ACCC compares the likely future with the proposed conduct to the likely future without the proposed conduct. This approach enables the ACCC to focus on the benefits to and detriments arising from the conduct rather than other effects that would occur in any event.

The ACCC determines the likely 'future with and without' position on a case-by-case basis. In identifying what is likely, the ACCC does not take into account mere possibilities or speculation. There must be a real chance that the future with and without will happen, but it is not necessary to show certainty, or that a particular scenario is 'more probable than not'.

Role of market definition

In addition, as a preliminary step in its assessment of collective bargaining arrangements the ACCC identifies the areas of competition that may be impacted. Defining the relevant areas of competition identifies the range of buyers and sellers that could be affected by the conduct and the nature of the competitive environment in which the conduct will occur. This assists in identifying the likely competitive effects, benefits and detriments.

Public benefits from collective bargaining

The ACCC accepts that collective bargaining can be an effective way to improve contracting between members of the bargaining group and the target business and can result in contracts that are more reflective of the group's circumstances and more complete, in that they deal with more contingencies.

Collective bargaining can improve contractual outcomes and generally result in a public benefit by:

- providing the opportunity for increased input into contracts
- reducing transaction costs and/or
- improving the level of information available to the negotiating parties.

There may also be other public benefits that are specific to the proposed conduct.

Increased input into contracts

Small businesses are often at a disadvantage when negotiating with larger businesses due to fewer resources, access to information and less negotiating experience. Collective bargaining can help to overcome some of these disadvantages and allow members of the group to have greater input into contracts than they would otherwise have.

One of the main reasons that small businesses want to form collective bargaining groups is to improve their bargaining power. This often means that the group is able to negotiate higher prices and better terms than members could achieve on their own. Increasing the bargaining power of the group is not in itself a public benefit if it simply results in a transfer of benefit from the target business to the group. However, improvements in bargaining power can generate public benefits if it results in contracts that are more effective and complete, or improves the incentives for mutually beneficial investments.

Collective bargaining can also give the group better access to information. This may enable them to collectively identify and deal with common contractual issues in a more streamlined manner.

In this way, collective bargaining may enable individual members to become more informed and engaged participants in negotiations and improve their input into contracts. This may lead to terms of supply that better reflect the circumstances of the group and the target business, resulting in more efficient outcomes.

Transaction cost savings

Transaction costs are the costs associated with negotiating contracts. They accrue to parties on both sides of the negotiations. Transaction costs need not be monetary costs, but they may include the costs of:

- expert advice
- the time taken to negotiate and reach agreement on the contractual terms and conditions
- monitoring and enforcing breaches of contracts.

Without collective bargaining arrangements, individual small businesses are often presented with standard form contracts as a way to reduce the transaction costs of the usually larger target business. This is particularly likely if the target business would otherwise be required to negotiate with many small counterparties. However, standard form contracts often provide little, or no, opportunity to negotiate variations that could result in a more efficient and effective contract overall.

Collective bargaining can reduce transaction costs by enabling a single negotiation process, or a small number of negotiation processes, relative to a situation where individual negotiations occur, and enables members of the group to share the expenses.

By reducing the transaction costs associated with negotiations, it is likely that collective bargaining will result in more contractual issues being addressed as each party can obtain the benefit from negotiating at less cost to itself, resulting in more comprehensive and efficient contracts.

Improvements in information

Small businesses are often at an information disadvantage compared with the large businesses that they deal with. This can result in them accepting different terms and conditions than they would if they were better informed. Collective bargaining may improve the amount and quality of relevant information available and enable better terms and conditions to be negotiated.

► Case study—Manning Valley dairy farmers

Following the introduction of \$1/L milk in 2011 and the concern this caused for the dairy industry, a group of seven dairy farmers located in the Manning Valley, NSW approached Woolworths with a proposal to promote local, quality milk in Woolworths' stores.

The Manning Valley group lodged notifications to collectively negotiate the terms and conditions of raw milk supply agreements with Woolworths and its agent, Milk2Market.

A competition lawyer was engaged to assist with the process and the negotiations were conducted by one of the farmers in the group directly with Woolworths. The terms and conditions that were negotiated included the mechanisms for setting prices for the supply of raw milk; the payment terms; and obligations on the farmers to supply a certain volume, specification and quality of raw milk.

In assessing the notifications, the ACCC accepted that the collective bargaining arrangements were likely to result in public benefits by introducing a new competitor for the acquisition of raw milk and by providing increased consumer choice through the introduction of a new milk product which may also result in more efficient pricing that better reflects the quality or value of the differentiated milk product.

The ACCC also considered that the arrangements resulted in public benefits from transaction cost savings, for example the group shared the costs of obtaining legal advice; by providing dairy farmers with access to better information about the dairy market; and providing dairy farmers with greater input into contractual terms from improved bargaining power. The contracts that resulted led to more efficient commercial outcomes.

The ACCC considered that the likely public detriments were limited as participation in the collective bargaining process was voluntary for all parties, the bargaining group was small – seven dairy farmers located in the Manning Valley, and the total volume of raw milk being sold was a small proportion of the milk produced in the region, therefore it was unlikely that collective bargaining would distort competition.

Overall, the ACCC was satisfied that the likely benefits to the public from the collective bargaining arrangement were significant and would outweigh the little or no public detriment.

Public detriments from collective bargaining

The ACCC will take into account all public detriments that are likely to result from the proposed conduct. However, in most collective bargaining cases the only identifiable detriments will be those that result from a lessening of competition.

Reduction in competition from joint conduct

In the absence of collective bargaining, members of the group operate individually in their dealings with the target business. The ACCC will therefore consider the effect of any reduction in competition between members of the group as a result of acting collectively. Relevant to this assessment is the extent to which members of the group currently compete to deal with the target business. For example, there may be limited competition between group members if they are currently offered standard form contracts with little opportunity for individual input.

Effect on competitors and competition outside the bargaining group

Collective bargaining arrangements are intended to improve the bargaining power of the members of the group. However, they may impact the ability of businesses that are outside of the group to compete to also supply or buy from the target business or other businesses in relevant markets.

Increased potential for collective activity beyond the notified collective bargaining

During collective bargaining, members of the group sometimes share information. This is frequently a necessary part of negotiating together. However, this can create an environment where businesses are more willing to cooperate than they were previously. This can lead to cooperation that goes beyond what was originally proposed and approved, such as anti-competitive agreements, and may create detriment by reducing the level of competition.

Features that can limit the anti-competitive effects

The anti-competitive effects of collective bargaining arrangements are likely to be limited when:

- The members of the bargaining group represent a small proportion of participants in relevant markets. When the size, composition and representation of the bargaining group is restricted, the anti-competitive effect is likely to be less because of the smaller area of trade affected by the collective arrangement and because of the competition provided by businesses outside the group.
- The current level of individual bargaining between members of the group and the target business is low, such that the difference between the level of competition with or without collective arrangements may also be low.
- The agreement does not restrict the ability of the members of the bargaining group to compete in other ways, for example, on quantity, quality or service. Many collective bargaining arrangements include measures designed to maintain competitive pressures between the members of the bargaining group, for example a fee scale that pays more for higher quality products.
- Participation in the arrangements is voluntary for both the members of the group and the target business. Generally, it is more likely that public benefits will outweigh public detriments when all participants are free to choose whether to participate because it is unlikely that parties would choose to participate in collective negotiations that were expected to make them worse off.

► Case study—collective bargaining by newsagents

The Australian Newsagents' Federation (ANF), through its affiliates and state branches, represents almost 2000 newsagents around Australia. Newsagents are often small, family-owned and operated businesses.

The ANF was granted authorisation to enable it to collectively bargain on behalf of its current and future members with a range of suppliers, many of whom are large, well-resourced businesses.

The target businesses included suppliers of products available for retail sale in newsagencies, such as newspapers and magazines, greeting cards and confectionary. They also included suppliers of services to newsagents such as insurance, electricity, petrol and electronic sales software.

The ANF identified a list of proposed target businesses that it wished to negotiate with but it also requested authorisation to enable it to approach other businesses not named in the application but who may supply newsagents at a future date.

The ACCC accepted that there were public benefits from allowing newsagents to pool resources and undertake a more co-ordinated approach to negotiating. The ACCC considered that this would result in transaction cost savings and improve newsagents' input into contracts.

The ACCC considered that generally newsagents are likely to comprise a small proportion of total purchasers in respect of the range of goods and services proposed to be acquired, aside from magazine and newspapers acquisitions (which have previously been authorised by the ACCC).

Further, many of the proposed negotiations involved target businesses that are much larger than the bargaining group. In these circumstances, there is likely to be little risk of anti-competitive detriment if the authorisation allowed collective bargaining to occur with future target businesses.

Collective boycotts

Traditionally the ACCC has received few collective bargaining proposals that include collective boycott activity. This may be partly because collective boycotts can be costly and damage a wide range of market participants, including the group that is engaging in the boycott.

However, in certain circumstances the ability for the group to collectively boycott the target business can significantly improve the outcomes from collective bargaining for small businesses. This is because ACCC approval of collective bargaining does not require the target business to participate or ensure that any negotiations produce an agreed outcome.

Therefore, attempts by small businesses to collectively bargain with a large customer or supplier without the ability to threaten and/or engage in a collective boycott may be ineffective. The target business could refuse to negotiate with the group or only agree to similar terms to those that would have been implemented without the bargaining process. A collective boycott can be a useful negotiating tool to bring the target business to the table or restart stalled negotiations. The effectiveness and appropriateness of a collective boycott will depend on the particular circumstances.

Boycott assessment factors

A boycott provision has the potential to increase the likely benefits and detriments from collective negotiations. Thus in addition to the factors that the ACCC will consider when assessing the potential public detriments and detriments of collective bargaining (previously outlined), the ACCC will also consider the following when assessing a notification that includes an ability to engage in a collective boycott:

- The size of the target business, including relative to the bargaining group. A significant difference in size between the bargaining group and the target business could mean there is a significant imbalance in bargaining power. A collective boycott may be a way to get the target business to the negotiating table so that the benefits of collective bargaining can be realised.
- If both the bargaining group and the individual members of the group are small compared with the target business, then the size of the detriment arising from reduced competition or harm to third parties is likely to be small.
- A target business will generally agree to the group's negotiating position and avoid or end a boycott if the costs of doing so are less than the costs of the boycott. This will often mean that the group receives higher prices and better terms than would otherwise be the case. If the resulting prices are higher than would arise in a competitive market, it is possible that this could reduce efficiency in downstream markets. However, it is unlikely that the group or the target business would agree to terms that damage the target business' position downstream. Therefore the ACCC is likely to be less concerned about the potential for higher prices to reduce efficiency if the downstream market is competitive.
- The potential and likely duration of harm to third parties. Collective boycott conduct can harm third parties (beyond the members of the bargaining group and the target businesses). For example, the customers or suppliers of the target business or bargaining group may face reduced demand for their products during the boycott period. Damage to third parties because of collective boycotting may offset some of the benefits of collective bargaining.
- Outcomes of previous collective bargaining. The case for a collective boycott may be stronger where collective bargaining without the ability to threaten or impose a boycott has previously failed. However, it is not essential to show that collective bargaining has previously failed.
- Limitations on collective boycott activity, including mediation and notice periods. The potential detriment of collective boycotting may be reduced if there are clear limits on collective boycott activity. For example, the ACCC may be more likely to allow collective boycott if the group provides adequate notice to the target business about a threatened boycott. This may allow the target business to find alternative suppliers or buyers with which to deal, or to consider the group's current offer. Notice periods can also allow the group to find alternative customers or suppliers and/or to consider the target business' position and any additional information made available to the group. This may mean that a negotiated outcome is possible during the notice period.

In addition, the chances of the parties reaching a negotiated outcome without having to engage in a boycott is more likely when mediation is required first. Mediation also makes it more likely that parties will only resort to the threat, rather than practice, of boycotting.



5. Notification

Often the simplest way for small businesses to collectively bargain or boycott without risk of breaching competition laws is to lodge a **notification** with the ACCC.

Pre-lodgement discussions

Before you formally lodge a notification, the ACCC can provide feedback and advice on the type of information likely to be required to assess your proposal and the process we follow. The collective bargaining group may also wish to discuss their proposal with the target business before formally lodging a notification with the ACCC.

Who can lodge a notification?

A business that is part of the collective bargaining group or an industry association or other representative can lodge a notification. The notification can be lodged to cover current members of the group and members that join in the future provided these future members meet the requirements for lodging a notification.

As collective bargaining in the context of competition law does not include employee/employer arrangements a trade union or an officer of a trade union cannot lodge a collective bargaining or boycott notification.³

To limit the notification process to small business collective bargaining arrangements, a \$3 million transaction threshold generally applies. This means that a collective bargaining notification can only be lodged if each member of the group reasonably expects that it will make a contract with the target business⁴, and that the value of its transactions with the target business under the collective bargaining

³ Section 93AB(9) of the Act

⁴ Sections 93AB(2) and 93AB(3) of the Act

arrangement will not exceed \$3 million in any 12-month period.⁵ Higher thresholds apply for the following industries:

- Petrol retailing - \$15 million
- New motor vehicle retailing - \$20 million
- Farm machinery retailing - \$10 million
- Primary production - \$5 million⁶

Members of the bargaining group can use details of past dealings with the target business or with other customers or suppliers of similar goods or services to determine whether they meet the transaction threshold.

How to lodge a notification

To lodge a valid notification you must provide the information specified in the form www.accc.gov.au/business/applying-for-exemptions/fees-forms and pay the lodgement fee of \$1000 per notification. The ACCC is not permitted to waive this fee.

However, if you lodge another collective bargaining notification within 14 days of lodging the first notification and the notifications relate to conduct in the same or closely related markets, no additional fee is required.⁷

The ACCC prefers notifications to be lodged by email to the General Manager, Adjudication, at adjudication@acc.gov.au. Notifications can also be lodged by mail or in person at an ACCC office (see www.accc.gov.au/contact-us).

Information to include when you lodge a notification

The information the ACCC needs to assess a notification depends on the nature and complexity of the proposed conduct and the markets affected. The notification form sets out the information we generally require. If you consider that some of the information listed on the form is irrelevant to your proposal or is not available to you, provide a written explanation of this, or discuss it with us.

As part of your notification, it is important to provide:

- ✓ a description of the proposed conduct; this should be precise enough to allow the ACCC to consult with interested parties and assess the notification
- ✓ an outline of the areas of competition/relevant markets likely to be affected by the proposed conduct
- ✓ an outline of the likely public benefits from the proposed conduct
- ✓ an outline of the likely public detriments, including the effect on competition from the proposed conduct. If you do not consider there will be any reduction in competition or other public detriments, explain why not
- ✓ the time period relevant to the conduct
- ✓ any other information or evidence that is relevant to the ACCC's assessment.

Note that the ACCC's assessment is more efficient if you provide comprehensive information and evidence.

⁵ Section 93AB(4) of the Act

⁶ Regulation 71A-71D

⁷ Regulation 28(9)

Public consultation

When a valid notification is lodged it is placed on the ACCC's [collective bargaining notifications public register](#) and provided to the target business to seek their views. In addition, the ACCC may contact a range of interested parties including competitors, suppliers and customers, relevant industry associations or peak bodies, consumer groups and relevant regulatory bodies to invite them to make submissions.

Submissions received from the target business and interested parties will be placed on the public register, subject to any requests for confidentiality.

Excluding confidential information from the public register

The notification and authorisation processes are public and transparent. However, in some cases applicants and interested parties may have appropriate reasons to request that the ACCC exclude from the public register some or all of the information they have provided (although the fact that the notification has been lodged and a certain minimum amount of information about the proposed conduct cannot be kept confidential). If the ACCC agrees to exclude this information, it can still be taken into account, but this may limit our ability to test that information publicly, which may in turn limit the weight that the ACCC can give that information.

Parties seeking to exclude confidential information from the public register must provide reasons why the information is confidential and should be excluded at the time they provide the information to the ACCC.

Checklist for requesting confidential information be excluded from the public register:

- ✓ Make the request at the time you provide the document or submission to the ACCC
- ✓ Clearly identify those sections of the document or submission that you want excluded
- ✓ Provide reasons
- ✓ Provide a public version of the document, with the confidential parts either redacted or excluded. This public version will be placed on the public register
- ✓ Provide a complete version of the document, with the confidential parts clearly identified

For more information, see the ACCC's publication [Guidelines for excluding public information from the public register, on the ACCC's website at: \[www.accc.gov.au/publications/guidelines-for-excluding-information-from-the-public-register-for-authorisation-and-notification-processes\]\(http://www.accc.gov.au/publications/guidelines-for-excluding-information-from-the-public-register-for-authorisation-and-notification-processes\)](#)

Legal test for assessing notifications

Broadly speaking, the ACCC may only object to a collective bargaining notification if the benefit to the public likely to result from the notified conduct would not outweigh the public detriment likely to result (i.e. there is no net public benefit).⁸

When does legal protection commence?

Where the notification does not involve collective boycott conduct the legal protection automatically commences 14 days after the notification is validly lodged, unless the ACCC objects within this period.

If the notification relates wholly or partly to collective boycott conduct, the legal protection automatically commences 60 days after the notification is validly lodged, unless the ACCC objects within this period.

How long does legal protection last?

A notification (and the legal protection it provides) will normally remain in force for three years beginning on the day the notification was validly lodged. This is the default period for a notification, which applies unless the ACCC determines that another period (up to 10 years) is appropriate, or the notification is withdrawn, revoked, or a stop notice⁹ is issued (in the case of a collective boycott notification).

If the ACCC determines that the default period of three years is not appropriate in the circumstances, the ACCC will issue a written statement identifying an alternate period of no more than 10 years and providing reasons for the alternate period.¹⁰

ACCC assessment process

Following the consultation process, the ACCC will assess the notification according to the net public benefit test.

No concerns—notification allowed to stand

In most cases, the ACCC will be satisfied that the public benefit resulting from the proposed collective bargaining or boycott outweighs the public detriment and will take no further action at that time. This means the legal protection provided by the notification commences (or continues) and the bargaining group can commence their collective negotiations with the target business. The majority of collective bargaining notifications received by the ACCC have been allowed to stand.

The ACCC may review a notification at any time if circumstances change or the ACCC receives further information, such that it is satisfied that the public benefits from the notified conduct no longer outweigh the public detriments.

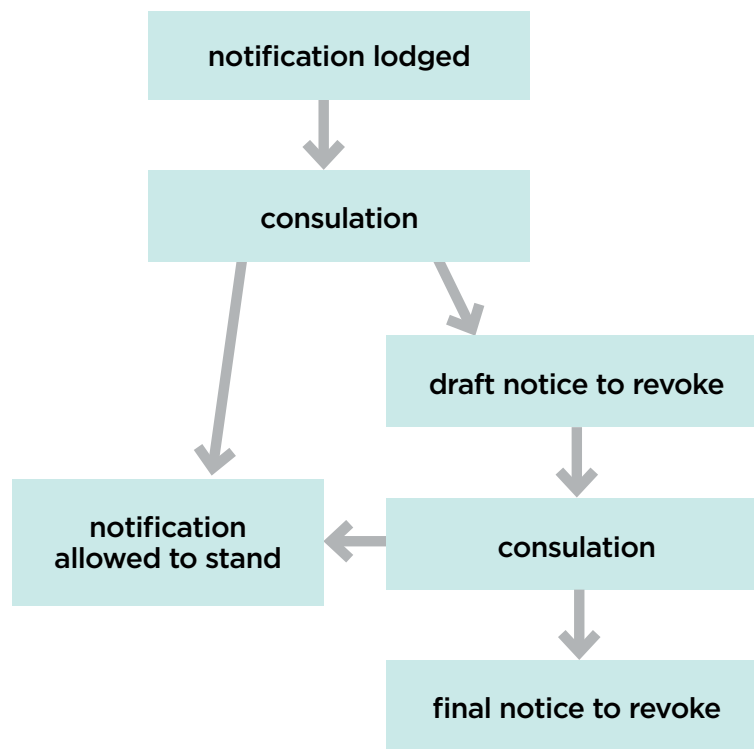
In cases where the ACCC is not satisfied that the proposed conduct is likely to result in a net public benefit, the ACCC may take steps to revoke the notification.

⁸ Sections 93AC (1) and (2) of the Act

⁹ See page 17 of this Guideline

¹⁰ Section 93AD(5) of the Act

Steps in notification assessment process



Revoking a notification

If the ACCC considers that the proposed conduct does not result in a net public benefit it may issue a written notice revoking the notification. Before the ACCC does so, it must:

- issue a draft objection notice outlining the reasons why the ACCC proposes to revoke the notification
- seek submissions from the bargaining group and interested parties in response to the draft objection notice, and
- hold a conference, if requested.

The ACCC must follow the same steps once it issues a stop notice in relation to a collective boycott notification (see page 17 and Appendix B).

Draft objection notice and consultation

Before removing the legal protection provided by a collective bargaining notification, the ACCC must issue a draft objection notice that outlines why the ACCC proposes to remove the legal protection provided by the notification.¹¹

The ACCC will send the draft objection notice to the bargaining group, the target business and other interested parties to seek their views, and place a copy on the public register. Parties can make written or oral submissions in response to the draft objection notice.

Opportunity for a conference

When the ACCC issues a draft objection notice, the bargaining group, the target business and other interested parties are able to request that a conference be held to discuss the draft objection notice. The conference is a meeting that provides another opportunity for the bargaining group, the target business and other interested parties to give their views about the draft objection notice. If a conference is called, it is chaired by an ACCC Commissioner.

¹¹ Sections 93A(1) and 93A(3) of the Act

Final objection notice

The ACCC will consider any submissions received within the specified period after the draft objection notice, including at the conference (if held), and will decide whether to issue a final objection notice.

- If the ACCC issues a final objection notice before the legal protection commences, the legal protection will not commence.¹²
- If legal protection has already commenced, the legal protection ceases 31 days after the final notice is given.¹³

The ACCC will place a copy of the final objection notice on the public register and will inform the bargaining group, the target business and other interested parties that the collective bargaining notification has been revoked.

Once a notification is revoked and legal protection is no longer in force, the collective bargaining conduct must cease or the members of the bargaining group may be at risk of legal action for a breach of the Act.

Alternatively, the ACCC may decide not to proceed with the revocation of the notification. If this is the case, the legal protection provided by the notification will commence or continue.

Amending or withdrawing notifications

Notifications cannot be amended after they are lodged with the ACCC. If there are changes to the collective bargaining arrangements the parties must lodge a new notification.

A notification can be withdrawn by writing to the ACCC at any time, provided the ACCC has not already issued a final objection notice revoking the notification.¹⁴ Lodgement fees cannot be refunded when a notification is withdrawn.

Tribunal review

The Australian Competition Tribunal can review the ACCC's decision to issue a

- final objection notice revoking a notification
- conditions notice
- notice determining the expiry of a notification or
- notice to extend the period for which a stop notice is in force.

A person seeking review must lodge an application with the Tribunal within 21 days of the ACCC giving the notice.

The Tribunal cannot review a decision by the ACCC to allow a notification to stand.

¹² Section 93AD(2)(b) of the Act

¹³ Section 93AD(3)(b) of the Act

¹⁴ Section 93AB(2) of the Act

Additional ACCC powers where collective boycott notifications raise concerns

The ACCC is able to impose conditions on a boycott notification and issue a stop notice once a boycott notification is in force. These additional powers provide the ACCC with greater flexibility in assessing a boycott notification and are designed to make it more likely that the ACCC will allow a collective boycott notification.

Imposing conditions

The ACCC may impose conditions on a collective boycott notification only if:

- the ACCC considers it has grounds for issuing an objection notice to revoke the notification; and
- the ACCC reasonably believes that conditions would remove those grounds to issue an objection notice.¹⁵

In these circumstances, the ACCC will issue a **conditions notice** which sets out the particular conditions and the reasons for imposing them.

If the conditions are not complied with, the ACCC may take steps to revoke the notification.¹⁶

Stop notice

The ACCC may issue a **stop notice** requiring notified collective boycott conduct to immediately cease where:

- there has been a material change of circumstances since the collective bargaining notification came into force or since the ACCC previously considered the conduct and
- the ACCC reasonably believes that:
 - the collective boycott conduct has resulted in serious detriment to the public, or
 - serious detriment to the public is imminent as a result of the collective boycott conduct.¹⁷

The effect of a stop notice is to temporarily suspend the legal protection provided for collective boycott conduct under the notification while the ACCC considers whether to revoke the notification or impose conditions on it.

The ACCC cannot issue a stop notice in respect of collective bargaining notifications that do not involve a collective boycott or threat of collective boycott.

Further information about the stop notice process is available at **Appendix B**.

¹⁵ Section 93ACA of the Act

¹⁶ Section 93AC(2A) of the Act

¹⁷ Section 93AG of the Act



6. Authorisation

Legal protection for collective bargaining arrangements is also available by an **authorisation** granted by the ACCC. Some features and requirements of the authorisation process are similar to the notification process, such as:

- the opportunity to have pre-lodgement discussions with the ACCC before you formally lodge an application
- the type of information to include with your application, and
- the need for public consultation and the use of a public register.

Who can apply?

Unlike collective bargaining notifications, anyone can seek authorisation. It is not limited to small business arrangements.

Any member of the bargaining group can lodge an application for authorisation on behalf of the other members of the group, including future members.

An application for authorisation can be lodged on behalf of other businesses, meaning an industry or professional association can lodge on behalf of its members. A trade union is able to lodge an application for authorisation on behalf of its members that are subject to the Act, such as independent contractors (but not for employer / employee collective bargaining).

How to apply for authorisation

A valid application for authorisation must:

- be in the form required by the ACCC (www.accc.gov.au/business/exemptions/fees-forms)
- include a public version of your application for publication on the public register
- include payment of the lodgement fee of \$7500 unless a fee waiver applies. The ACCC may waive, in whole or in part, the lodgement fee for authorisation if the fee would be unduly onerous on the applicant. Requests for a fee waiver must be made before the application is lodged. See www.accc.gov.au/lodgementfees for details on how to pay the lodgement fee and information about fee waivers.

The ACCC prefers applications for authorisation to be lodged by email to the General Manager, Adjudication at adjudication@acc.gov.au. Applications can also be lodged by mail or in person at an ACCC office (see www.accc.gov.au/contact-us).

Steps in the authorisation process

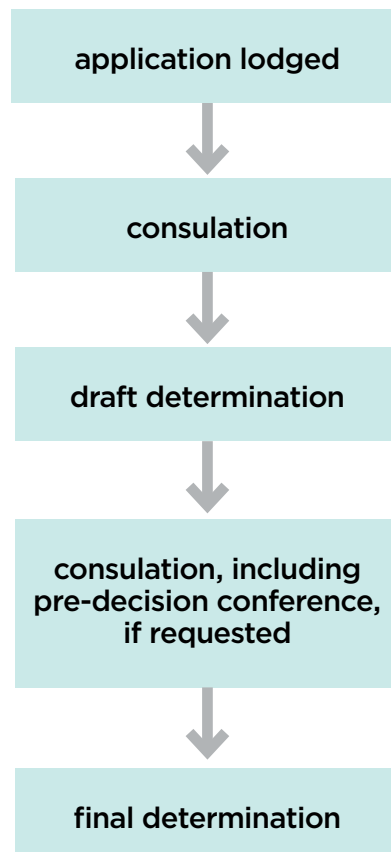
Once the ACCC assesses the application as validly lodged, it will be placed on the ACCC public register www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register and provided to the target business.

The main steps in the authorisation process involve the ACCC:

- inviting interested parties to lodge written (or oral) submissions commenting on the application and supporting submission
- meeting with the applicant and interested parties as appropriate
- inviting the applicant to lodge a written submission in response to interested party submissions
- conducting its own market inquiries and research while consulting with interested parties
- issuing a draft determination, explaining why the ACCC proposes to grant, grant subject to conditions, or deny authorisation
- inviting written submissions in response to the draft determination and in some cases meeting with the applicants and/or interested parties
- providing the opportunity for the applicant and interested parties to call a conference so that oral submissions can be made to a Commissioner
- holding a conference(if requested) and inviting the applicant and interested parties to lodge a written submission in response to issues raised at the conference
- issuing a final determination explaining why the ACCC has granted, granted with conditions, or denied authorisation

For more information about the authorisation process, see the Conduct Authorisation Guidelines: www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger

Steps in the authorisation assessment process



Legal test for authorisation

The ACCC may grant authorisation to collective bargaining or boycott conduct where it is satisfied that the conduct would result, or be likely to result, in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result.¹⁸

When does legal protection commence?

The legal protection provided by an authorisation, if granted, commences on the day specified in the ACCC's final determination, which must not be earlier than 21 days after the final determination is issued.

The ACCC must make a final determination within 6 months of the application being validly lodged, unless extended.¹⁹

For straightforward collective bargaining applications, the ACCC is often able to issue a final determination much sooner – typically within 3 to 4 months of the application being lodged.

In some cases, the ACCC may grant interim authorisation, which enables the parties to engage in some or all elements of the proposed conduct before the ACCC issues a final determination.²⁰

¹⁸ Section 90(7)(b). If the conduct does not involve pricing agreements and/or other cartel provisions the ACCC may also grant authorisation if it is satisfied that the conduct would not have, or would not be likely to have, the effect of substantially lessening competition (s 90(7)(a) of the Act)

¹⁹ Section 90(10A) of the Act

²⁰ Section 91(2) of the Act

When does an authorisation expire?

The ACCC considers the duration of an authorisation on a case-by-case basis. In most cases where authorisation is granted, it is for five years. The ACCC is likely to be more inclined to grant authorisation for longer periods if the applicants are seeking re-authorisation (because the existing authorisation is about to expire) and the conduct has been operating effectively without complaint.

Tribunal review

A final determination by the ACCC to grant or deny authorisation may be reviewed by the Australian Competition Tribunal. A request for review must be lodged with the Tribunal within 21 days of the ACCC's final determination.

7. ACCC contacts and further information

Contact us

You can seek guidance from us if you want to discuss the options and processes before deciding to lodge a notification or an application for authorisation or if you are uncertain about the information to include, or the various steps in the ACCC's assessment process. We can provide comments on a draft notification or application for authorisation before it is formally lodged.

Inquiries should be directed to the General Manager, Adjudication at adjudication@acc.gov.au or (02) 6243 1111.

Related publications

- [Guidelines for Authorisation of conduct \(non-merger\)](#)
- [Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes](#)
- [Forms and fees](#)

Appendix A: Tips for forming a bargaining group

You can set up a collective bargaining group in the way that best suits your circumstances. A collective bargaining group can be as small as two businesses or as large as all members of an industry association. Any type of business can be involved—sole traders, home based businesses, manufacturers, retailers, farmers and service providers.

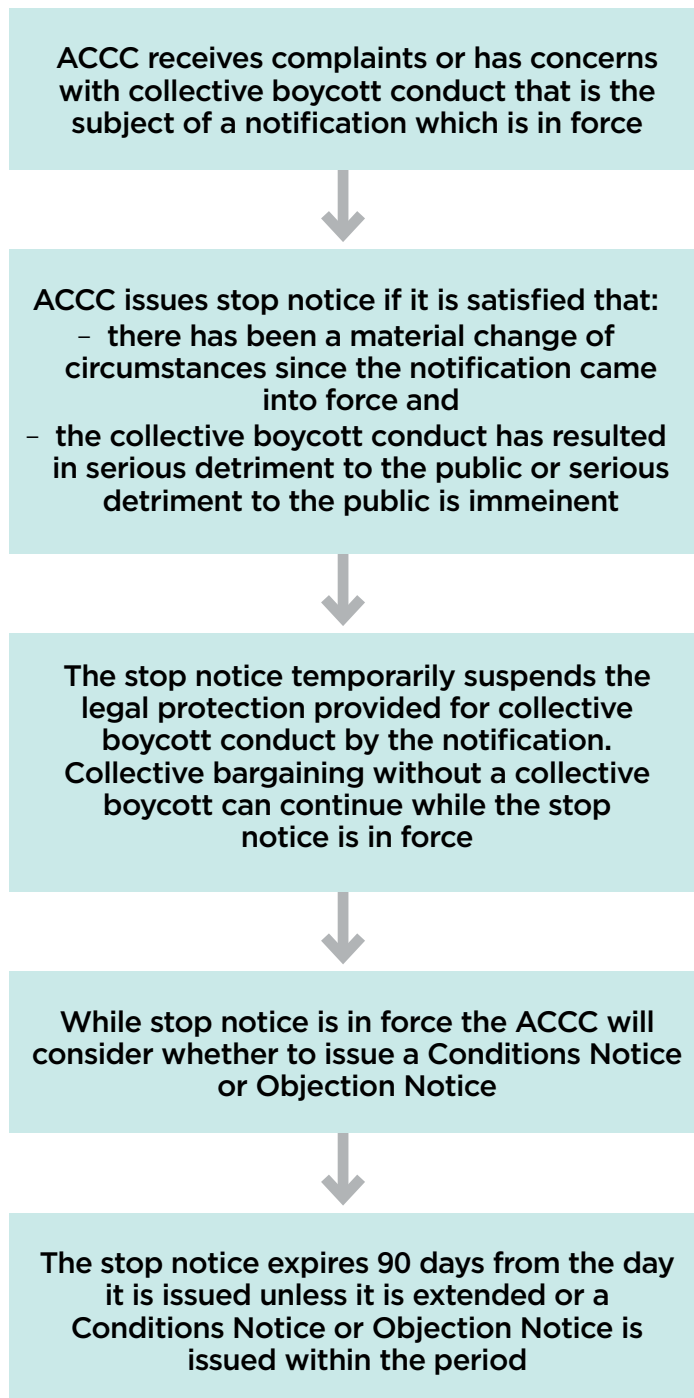
You may find it useful to consider the following questions when forming a bargaining group:

- Who can join the group?
- Will membership change over time or remain stable?
- What is the product the group intends to sell or buy? Is it all goods or services supplied or bought by the group or just a subset (for example goods with a particular characteristic or quality)?
- What terms and conditions does the group propose to negotiate?
- Who does the group propose to negotiate with (i.e. the target business)? Will the target business change over time? Does getting together open up new market opportunities with customers or suppliers that are more prepared to deal with the group because of the increased volumes?
- How will the group operate or be structured? Will an agent negotiate on behalf of the group or will members of the group conduct the negotiations themselves?
- Does the group propose to collectively boycott the target business if negotiations fail? if so, how will a collective boycott be triggered?

Collective bargaining is more likely to be successful where:

- ✓ members of the group have common objectives and requirements
- ✓ the group is adequately resourced
- ✓ there is an effective leader, or leadership subgroup, who has the time and skills needed to canvass the views of the group, to keep them informed, and to negotiate and deal with the target business
- ✓ there is open communication between members of the group and the leader/negotiator, and with the target business
- ✓ the target business is willing to deal with the group

Appendix B: Stop notice flow chart





AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

