



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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4 February 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au


Dear Treasurer,

Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 [F2020L01334]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Modification of primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 (the instrument) provides a class exemption for small businesses to allow them to engage in collective bargaining, by exempting eligible businesses from the operation of sections 45AF, 45AG, 45AJ, 45AK and 45 of the *Competition and Consumer Act 2010* (the Act). The exemptions from the Act apply to businesses with less than \$10 million annual turnover who are part of the collective bargaining group, as well as franchisees or fuel retailers negotiating with their respective franchisors or fuel wholesalers, regardless of their annual turnover. The instrument will cease on 30 June 2030 and is exempt from sunseting by subsection 54(1) of the *Legislation Act 2003*.

Provisions that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation unless a sound justification is provided for the use of delegated legislation. In

this instance, the explanatory statement to the instrument does not justify why it is necessary and appropriate for these exemptions to be set out in delegated legislation.

The committee is also concerned that these measures appear to be intended to remain in force for 10 years, until the instrument self-ceases on 30 June 2030. The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that it ceases to operate three years after commencement. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

The committee would therefore appreciate your advice as to:

- **why it is considered necessary and appropriate for the exemptions set out in the instrument to be provided for in delegated legislation rather than primary legislation; and**
- **whether the instrument could be amended to specify that it ceases to operate three years after commencement, or if not, why not.**

Independent merits review

Senate standing order 23(3)(i) requires the committee to examine each legislative instrument as to whether it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

Section 12 of the instrument provides that the Australian Competition and Consumer Commission (the ACCC) may determine whether the class exemption applies in relation to certain initial contracts. However, while the explanatory statement makes references to the 'Tribunal' it is unclear from the explanatory materials whether decisions made under the instrument, including those made under section 12, are subject to independent merits review.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

The committee would therefore appreciate your advice as to:

- **whether any decisions made under the instrument, including under section 12, are subject to independent merits review;**
- **if so, the scope of independent merits review provided for decision made under the instrument; and**
- **if no independent merits review is available for decisions made under the instrument, why not.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 15 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **18 February 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000468

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* (the Determination).

In that letter, you sought my advice as to:

- why it is considered necessary and appropriate for the exemptions set out in the instrument to be provided for in delegated legislation rather than primary legislation;
- whether the instrument could be amended to specify that it ceases to operate three years after commencement, or if not, why not;
- whether any decisions made under the instrument, including under section 12, are subject to independent merits review;
 - if so, the scope of merits review provided for decision made under the instrument; and
 - if no independent merits review is available for decision made under this instrument, why not.

By way of background, the Australian Competition and Consumer Commission (ACCC) has the power to grant businesses with legal protection for arrangements which may otherwise risk breaching the *Competition and Consumer Act 2010* (Cth) (the Act) but are not harmful to competition and/or are likely to result in a net public benefit.

Ordinarily, situations where competitors come together to collectively bargain against a target business can raise competition issues under the Act. The ACCC is able to grant individual exemptions for such conduct on a case-by-case basis through the authorisation and notification processes set out in Part VII of the Act.

In addition, in 2017 as part of the Harper Competition Review amendments, the ACCC was given the power to grant class exemptions for this conduct. The purpose is to provide a more efficient and streamlined process for businesses to obtain exemptions for conduct that could otherwise be permitted on an individual basis via authorisation or notification.

The collective bargaining class exemption is a beneficial deregulatory measure for small businesses as it reduces small business compliance costs (by removing the need to lodge a formal application

to the ACCC and pay a fee) and provides legal certainty for the ability to collectively bargain. The collective bargaining class exemption is expected to be particularly beneficial to franchisees negotiating with a common franchisor, as well as to farmers who have made extensive use of the collective bargaining notification process in order to be able to collectively negotiate contracts with the processors they supply.

While the proposal to introduce a class exemption for collective bargaining conduct is new, the ACCC's other power to exempt such arrangements has been in place since the *Trade Practices Act 1974* (Cth) and has been often exercised. Taking this into account together with the 2017 amendments to specifically permit the ACCC to determine to grant class exemptions, it is wholly consistent and appropriate for a class exemption for collective bargaining to be provided for in delegated legislation rather than primary legislation. Further, providing this kind of bespoke exemption through primary legislation would be cumbersome and run counter to the policy objectives of providing a simple and more streamlined process for small businesses.

In relation to whether the instrument could be amended to specify that it ceases to operate three years after commencement, for the reasons set out below, I consider that a 10 year sunset period remains appropriate for the Determination.

The Determination is made under a specifically delegated power which is set out in primary law. The delegated power is intended to complement the requirements or objectives in the primary law. This is evidenced by section 95AA(4) of the Act which provides that a determination made under this section may remain in force for a period of up to 10 years.

Whilst the 10 year period provided for under the Act is a maximum, the use of the maximum period in the Determination is necessary and appropriate in these circumstances to enable the benefits of the class exemption to be realised. This is because very few bargaining groups are likely to see utility in relying on a class exemption that is limited to three years on the basis that it provides insufficient time in which to organise a group, negotiate with the target, sign contracts and give effect to those contracts; in many cases the contract itself would exceed three years, meaning that a class exemption limited to three years would not provide legal protection for the duration of the contract.

For small businesses, such as groups of farmers, a longer period of legal protection is more efficient and provides them with greater certainty. An insufficient exemption period may significantly reduce the benefits to be realised from any collective bargaining, as well as undermining targets' incentives and willingness to engage with collective bargaining groups. It could also result in small business groups continuing to incur the burden of seeking authorisation for specific collective bargaining conduct or lodging notifications in order to obtain the longer exemption period available under those processes.

The ACCC considered 25 collective bargaining notifications over the three years to 31 December 2020. Of these, 21 groups sought, and were granted, case-by-case exemptions for more than three years and 17 were provided exemptions for 10 years.

Prior to making the class exemption, the ACCC considered over 10 years of data about collective bargaining arrangements entered into by small businesses relying on exemptions provided on a case-by-case basis through the authorisation and notification processes. The ACCC also engaged in extensive public consultation over 17 months to ensure the appropriate formulation of the instrument. The making of a collective bargaining class exemption has widespread support from farming and small business groups, as well as State and Territory Governments.

There are safeguards in place to address any unintended consequences that may arise before the end of the sunset period. These include:

- the ACCC's ability to disapply the class exemption for a specific collective bargaining in particular cases, if it considers that conduct, when engaged in by a particular person, would

not give rise (or no longer gives rise) to a net public benefit and is likely to substantially lessen competition;

- the ACCC's ability to vary or revoke the class exemption as a whole if it is concerned that it is not operating as intended; and
- the ACCC's ability to review the operation of the class exemption at any stage.

It should also be noted that the exemption does not impose any legal obligation for the target business to negotiate with the collective bargaining group if it chooses not to (and the class exemption does not apply to arrangements that include collective boycott conduct to force the target to negotiate), minimising any public detriment from such arrangements.

Notwithstanding the above, as noted in my previous correspondence there will be broader good faith discussions in relation to the sunset periods for legislative instruments in the Treasury portfolio following the tabling of the Committee's final report into the *Exemption of delegated legislation from parliamentary oversight*.

In relation to the Committee's queries on whether decisions made under the instrument are subject to independent merits review, I note that as the class exemption is a legislative instrument, it is subject to disallowance by Parliament. The ACCC's decision to determine the class exemption is not subject to merits review by the Australian Competition Tribunal (the Tribunal). However, a decision by the ACCC to withdraw the benefit of a class exemption in a particular case is reviewable by the Tribunal (in accordance with section 102(5G) of the Act).

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

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/2021



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; chris.reside@treasury.gov.au

Dear Treasurer,

Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 [F2020L01334]

Thank you for your response of 15 March 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 13 April 2021.

Modification of primary legislation

Parliamentary oversight

The committee notes the further advice you have provided in relation to why it is considered necessary and appropriate for the matters prescribed by the instrument to be set out in delegated legislation. However, the committee remains concerned that these measures which modify the operation of primary law are intended to remain in force for ten years.

As you are aware, the committee continues to have significant scrutiny concerns relating to instruments which modify the operation of primary legislation. You have previously undertaken to engage with the committee to seek a resolution to its systemic scrutiny concerns about the duration of instruments in your portfolio which provide for exemptions to or modifications from primary legislation.

The committee seeks to consider this instrument as part of this ongoing engagement. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week. In the meantime, the committee has resolved to retain the disallowance notice currently in place on the instrument.

Independent merits review

The committee has concluded its consideration of this matter on the basis of your advice that a decision by the ACCC to withdraw the benefit of a class exemption in a particular case is reviewable by the Tribunal in accordance with subsection 102(5G) of the Act.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

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13 May 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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Dear Treasurer,

Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 [F2020L01334]

Further to my letter of 14 April 2021 in relation to the above instrument, I write to advise that, on the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation