



**Australian  
Competition &  
Consumer  
Commission**

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28 June 2005

Ms Maureen Weeks  
Committee Secretary  
Senate Rural and Regional Affairs  
and Transport References Committee (SG 62)  
Parliament House  
CANBERRA ACT 2600

Dear Ms Weeks

### **WINE INDUSTRY INQUIRY**

I refer to the letter of 16 May 2005 from your Secretariat inviting the Australian Competition and Consumer Commission (ACCC) to make a submission to the above inquiry.

Attached is the ACCC's submission. An electronic version will also be lodged (by email).

A contact officer in this matter is Nigel Ridgway, Acting General Manager of Compliance Strategies Branch at [nigel.ridgway@accc.gov.au](mailto:nigel.ridgway@accc.gov.au) or on telephone 02 6243 1223. In his absence, please contact Mark Quinane in our Small Business, Rural and Regional Unit whose contact details appear at the top of this letter.

Yours sincerely

Brian Cassidy  
Chief Executive Officer

EXECUTIVE OFFICE





**Submission to the Senate Rural and Regional Affairs and  
Transport References Committee**

*Inquiry into the wine industry*

**June 2005**

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## Introduction

The sound performance of the Australian wine industry in the last two decades encouraged mass plantings of grapevines. Farmers involved in a range of other industries planted vines in a frenzy of activity in several parts of Australia. The Federal Government offered tax incentives further increased the attractiveness of the industry bringing even more wine grape growers (growers) into the market and encouraging extra plantings.

The industry boomed as demand for Australian wine increased and prices remained at record levels. Despite the many economic advantages that the boom in the wine industry brought, many observers urged caution and expressed concerns that the number of wineries and the increasing amount of area under vine would reach unsustainable levels.

By 2001 Australian wine grape production reached record levels with a 25% increase in production of grapes from 2000 to 2001. And 2002 was the year that the market forces finally placed a check on the unfettered growth of the industry, i.e. the demand stabilised, the industry reached oversupply levels and the prices plummeted putting increasing pressure on the growers.

In an effort to address the increased challenges faced by growers and strengthen protection offered to small businesses under the *Trade Practices Act 1974* (TPA), the Australian Competition and Consumer Commission (ACCC) is committed to working closely with wine industry participants through its Small Business, Rural and Regional program. The program allows for identification and analysis of systemic small business issues and trends in the industry, recognition of educational gaps and developing materials to fill them, and targeted enforcement action when appropriate.

Consequently, the ACCC's submission focuses on areas that are relevant to the challenges currently affecting growers and considers future opportunities for the wine industry, such as:

- How the structure of the wine industry impacts on the relationship between growers and winemakers (processors)
- The potential benefits of a wine industry code of conduct that deals specifically with this relationship by setting effective industry standards, and
- The effectiveness of the TPA in dealing with wine industry issues and future amendments to the legislation that may assist small business

## **Structure of the industry and how this impacts on the relationship between growers and processors**

The ACCC understands that the structure of the wine industry involves a mixture of:

- supply that is vertically integrated (wineries own the vineyards)
- growers with long term contracts, and
- growers with no contracts who rely on the 'on the spot market'.

Due to rationalisation and the structure of the industry, there has been discord between growers and processors over the years, especially in the area of price negotiations.

ACCC enquiries show that wine grape contracts appear to have a set of common features, including:

- They are normally long term
- The price for the grapes is usually notified when both the grower and the winery are very busy preparing for harvest
- The late timing of the notification leaves growers very little scope to enter into negotiations, or alternatively to negotiate to have their grapes released from their contract and to source alternate buyers for their grapes, before they spoil on the vine
- Even when prices are announced they are often announced as a range, with the actual price to be paid for particular grapes depending on a range of considerations such as baumé, colour, how the grapes will be used, or other factors predominantly assessed by the purchaser, and
- Contracts are not always clear about how disputes over fruit quality or price should be resolved.

Under some long standing contracts between growers and processors, growers can lodge a notice of dispute if they are dissatisfied with the price on offer. Under this process, the parties have 14 days to agree on an expert who then has 7 days to make a binding price determination. The independent expert will determine whether the prices on offer represent a fair market value for the produce. Processors are bound by the independent expert's determination but growers are free to seek alternate buyers. Some processors have more than one contract with any given grower; there may be up to four contracts in place that deal with each stage of the growing and production process, for example, harvesting and transportation and at the time the wine is produced when quality can be more accurately ascertained.

It has also been alleged that some processors have insisted on contract amendments to long standing contracts under an implied threat that if growers do not accept they will receive lower prices or no further contracts once the current one has expired.

A number of contract growers have been advised that their contracts will not be renewed beyond 2006. This may indicate that some major processors are either seeking to vertically integrate the supply of grapes in order to manage their own wine grape production or rely on the 'on the spot market' for future supply.

The ACCC has considered complaints from growers about processors advising a price quite late in the growing season. Growers have highlighted the difficulty that this creates in terms of finding another buyer if they do not wish to accept the price. These have been assessed in

accordance with the unconscionable conduct provisions of the TPA and found not to offend those provisions.

The ACCC has also received complaints about the lack of transparency that exists in relation to produce pricing. In some instances, contractual arrangements between growers and processors allow for part payment for grapes prior to processing then final payment or bonuses that are linked to the quality of wine once processing is complete. Concerns have been raised that some processors fail to provide adequate disclosure in relation to the final price obtained for the wine in the marketplace.

This can make it difficult for growers to assess their position in the market, which in turn presents difficulties when pricing their produce. This is particularly evident where growers attempt to gauge the competitiveness of their pricing against others selling similar product. Large differences are often seen between the prices offered to growers selling what is perceived as similar quality produce, sometimes leading to confusion and allegations of unfair or unconscionable conduct.

It is likely that the majority of such price differences can be attributed to variances in transport and distribution costs associated with supplying goods to consumers. Growers are generally not aware of these differing costs, and therefore may feel that they are receiving lower prices than they should.

Most of the wine industry complaints received by the ACCC are from growers who allege that processors behaved unconscionably or deceived them. Growers have alleged that processors intentionally set quality standards that are unobtainable and unrealistic, thereby giving them a reason to pay less for produce. Others have alleged that some aspects of the way the buyer receives or handles the fruit causes a deterioration in quality after delivery and therefore allows the buyer to claim a reduction in price.

In considering these matters, the ACCC has observed that prices may be influenced by the quality of the grapes, the volume of produce in the market generally, and the volume of stock (wine) held over by processors from the previous year. The ACCC also observes that some of these details cannot be practicably negotiated until close to harvest. These terms (including those that provide for these late stage negotiations) should be resolved as early as possible. The agreement should enable processors to secure produce of the desired standard at the best price and growers the opportunity to find another buyer if they do not accept the price.

The ACCC found that in many instances growers had not effectively utilised the review and mediation provisions of their contractual agreements before lodging a complaint with the ACCC. Some growers had not read, or not fully understood how the contract worked or their rights under the contract. Further, many growers had not raised their complaint directly with the buying company or, if they had, one or other of the parties had dealt poorly with the discussion, affecting any opportunity for a positive outcome.

The ACCC also found that grower complaints over the fairness of price and quality assessments are not always completely accurate; often, other factors may be present but unknown to growers. We are aware that growers typically compare the price they receive for their fruit with the price their neighbour receives. Not surprisingly, where there is an apparent price differential for what appears to be identical quality fruit, growers perceive that they are not being treated fairly or equitably.

Quite often it is the perceptions as to what prices should be that can prejudice fair and reasonable negotiations. This makes it imperative that all parties follow transparent and consistent procedures, including providing access to mediation and independent dispute resolution.

Rationalisation for more than a decade, oversupply in certain varieties of grapes, the existing structure of the industry and how contracts are negotiated are generally the subject of complaints to the ACCC.

## **Quality benchmarks and the role of an industry-wide code of conduct**

The ACCC takes the term ‘quality benchmarks’ to mean best practice.

The ACCC believes that effective industry codes have the potential to deliver real benefits to all the participants in an industry with the lowest possible compliance cost. In turn, this benefits both consumers and the industry itself. Codes also present an opportunity to deal with situations where it is not deemed appropriate to legislate, but where scope exists to introduce quality benchmarks.

There has been an ongoing debate over the role and effectiveness of industry codes of conduct, and, in particular, the Produce and Grocery Industry Code of Conduct (PGIC), as another means of preventing and resolving disputes in the wine grape industry.

The PGIC has been in operation for over three years as a voluntary industry code designed to promote fairness and transparency in the retail grocery sector. The PGIC sets out aspirations for produce standards and specifications, contracts, labelling, packaging and preparation, acquisitions, and dispute resolution. The PGIC aims to provide clarity for all supply chain participants from growers, processors, wholesalers and retailers in their contractual arrangements and puts in place an equitable procedure for dispute resolution.

As PGIC is voluntary, industry participants are free to decide whether to support the Code. This voluntary framework also allows industry bodies to develop their own codes, should they choose to.

The ACCC is aware that the Department of Agriculture, Fisheries and Forestry (DAFF) is currently in the process of developing a draft mandatory code of conduct that deals with the sale of fresh fruit and vegetables in the wholesale market. To the extent that wine grapes may be sold through fresh fruit and vegetable markets, the proposed code may have some impact on the sale of wine grapes in this market.

The ACCC has followed with interest the development of some wine industry bodies aimed at assisting processors and growers achieve greater transparency and fairness in their commercial dealings. The publication “*Winegrape Assessment in the Vineyard and at the Winery*”, jointly produced by the Winemakers Federation of Australia and the (now dissolved) Winegrape Growers Council of Australia, who have formed the Wine Industry Relations Committee, outlines one such code, laying out a framework and guidelines for the evaluation of fruit prior to, and during harvest. The ACCC believes it would be prudent to consider such guidelines as a basis for setting reasonable benchmarks for an industry-wide code of conduct as the information contained in the publication appears to be a compromise between growers and processors on what standards and processes are considered reasonable for all parties concerned.

The ACCC has worked with the wine industry to encourage fairness and transparency in contractual negotiations and agreements between participants, and is prepared to continue this work, whether under the framework of the *Trade Practices Act 1974* (TPA), through a voluntary industry code or a combination of both. The ACCC encourages any efforts by industry to develop effective codes of conduct, and is always willing to assist where appropriate.



### ***Proposed wine grape industry code of conduct***

In June 2001 the ACCC was asked by the Murray Valley Winegrape Industry Advisory Council (MVWIAC) to consider a proposed Industry Code of Conduct. The proposed code did not receive wide support from industry participants as it was considered unnecessary and undesirable. Processors and growers met to discuss the issues raised in the proposed code and agreed that resolution should be pursued through discussion rather than a proscriptive code.

From the ACCC's perspective a voluntary industry code of conduct dealing with market information, contract negotiations, wine grape valuations and contractual relationships could be of benefit to the wine grape industry in providing a structured and equitable framework for dealings between growers and processors.

It is the ACCC's experience that a voluntary industry code of conduct can play a significant role in addressing market problems provided there is a commitment by industry participants to making the code work. The ACCC also recognises that self-regulation schemes can play an important role in encouraging competition and creating a mutually beneficial climate for efficiency and growth. Importantly, they also avoid the need for possible Government regulation, which, in this case, may provide less flexibility in industry arrangements.

Key elements for a successful voluntary code of conduct are contained in two publications: an ACCC publication titled *Guidelines for developing effective voluntary industry codes of conduct* and the *Codes of conduct policy framework* released by the Department of Industry Science and Tourism.

Some features of a voluntary industry code might include:

#### Transparency of terms and applications

- It should be clear to whom the code applies
- Provisions that do not breach the law i.e. no disclaimers alleging immunity from the TPA unless there is an authorisation or notification in place (with the time period for the authorisation or notification specified).

#### Action based terms of trade

- It should be clear what action(s) corporations must take within the code so as to be clear on what constitutes a breach of the code
- It should address the key issues that have been identified by the industry as being instrumental in causing disputes.

#### Dispute resolution

- The dispute resolution procedure should encourage participation and transparency by parties in order to first resolve the dispute.

#### Mediation

- Could be set up under a 'trigger' arrangement whereby if a dispute cannot be resolved and both parties agree, a procedure can commence.

## Appeals

- Provision for an appeals process where the terms are clearly stipulated.

The ACCC has played a major role in developing equitable voluntary industry codes, via the authorisation process. Industry codes may raise concerns under section 45 of the TPA (agreements lessening competition) if it is likely that enforcing the code would have the effect of substantially lessening competition. If there is a risk that an industry code breaches the TPA an application for authorisation should be lodged with the ACCC (to be discussed further below).

Alternatively, codes can be mandated under Part IVB of the TPA. This requires proscription by the minister and becomes binding on everybody in the industry. Section 51AD provides that a party must not contravene prescribed provisions of an applicable industry code that has been declared under section 51AE. Sanctions available in the TPA can be invoked if a mandatory code is breached.

## **Adequacy of the Trade Practices Act 1974 in relation to wine grape growing industry**

The types of issues raised by wine industry participants generally fall under misuse of market power, unconscionable conduct, misleading and deceptive conduct, authorisation and notification provisions of the TPA.

### ***Misuse of market power***

Misuse of market power provisions deal with situations where a firm has substantial market power, and uses that power to damage its competitors or to prevent new firms from competing with it.

Due to the number of large wine processors in the Australian wine industry, it might be difficult to establish whether one particular company has a substantial degree of market power in order to invoke the misuse of market power provisions of the TPA.

It is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business. Normal, even aggressive competition is not on its own a misuse of market power. It would need to be demonstrated that the conduct of the larger business is intended to damage particular competitors. There are other provisions in the TPA concerning unconscionable conduct which may be more relevant to these situations.

It should be stressed that the misuse of market power provision of the TPA only applies to horizontal behaviour between competitors and does not directly affect relationships between suppliers such as growers and their customers such as processors.

### ***Unconscionable conduct***

In deciding whether a business has acted unconscionably, courts may consider various factors, including the relative bargaining power of each party, the use of undue influence or pressure, whether the stronger party imposed terms that were not necessary to protect their legitimate commercial interests, and the requirements of any relevant industry code. The courts may also look at whether the stronger party acted in good faith in its dealings with the weaker party.

The main area of complaint in this respect is that smaller operators are at a significant disadvantage when negotiating with larger more powerful processors. Consequently, those dealing with growers should be aware of the potential for some behaviour to amount to unconscionable conduct under the TPA. It is also important to note that unconscionable conduct will depend on the circumstances in each case; an imbalance of bargaining power is not of itself evidence of unconscionable conduct.

The cases that the ACCC has pursued with regard to unconscionable conduct all have an unscrupulous factor. It is more than tough negotiating. For a matter to be regarded as unconscionable by the courts a business must have crossed the line and engaged in conduct that is not tolerated in a normal commercial relationship. It is important to recognise that the law does not exist to inhibit businesses from advancing their own legitimate commercial

interests. The law will not apply to situations where a business has merely driven a hard bargain, nor does it require one business to put the interests of another party ahead of its own.

Most matters raised with the ACCC under unconscionable conduct have come after other avenues of resolution have been explored. Where the ACCC has considered there are TPA issues, it examines both sides of the argument before considering enforcement action. While there has been little in the way of direct litigation, some grower issues related to contracts with processors have been resolved administratively.

### ***Misleading and deceptive conduct***

The ACCC receives complaints about misleading and deceptive conduct in the wine industry. Under Section 52 of the TPA, companies are prohibited from engaging in conduct that is misleading or deceiving or is likely to mislead or deceive. Common examples of when processors may engage in misleading or deceptive conduct include:

- Where they create the impression that someone's produce is of a lower quality than it actually is. This has the potential to contravene sections 52: misleading or deceptive and 53(a): Misrepresentation of quality or standard of goods, or
- Where they indicate that they can achieve a lower price for similar quality produce when they have no basis for doing so. This has the potential to contravene sections 52: misleading or deceptive and 53(e): misrepresentation of price of goods.

Likewise, growers may also engage in misleading or deceptive conduct where representations are made to processors concerning the quality of their goods, where the actual quality does not match the description given (section 52: misleading or deceptive and section 53(a): misrepresentation of quality or standard of goods).

### ***Authorisations/notifications and collective bargaining***

#### Collective bargaining

Collective bargaining involves an arrangement where multiple competitors in an industry come together, either directly or through the appointment of a representative, to negotiate the terms and conditions of supply with another, usually larger, business. This can also involve collective boycotts, where competitors collectively agreed not to supply or acquire goods or services from another business.

Many growers have suggested that they could get better terms for their produce if they bargained as a group. However, by acting collectively, growers may be placing themselves at risk of contravening the TPA.

Section 45 of the TPA prohibits anti-competitive agreements, including:

- price fixing, which is agreeing with your competitors to sell produce at a fixed price
- market sharing which involves agreeing with your competitors about what products you will sell, where you will sell them or who you will sell them to, and
- boycotts which involve getting together with other businesses to decide which person or business you will not sell to or not buy from.

A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price to be paid to the group. Arrangements that have the purpose or likely effect of fixing, controlling or maintaining the price of goods supplied or acquired are deemed by the TPA to substantially lessen competition. Generally, collective bargaining arrangements that set the terms (including price) on which services are acquired or provided are likely to lessen competition relative to a situation where the acquirers or providers individually negotiate their own terms.

### Authorising collective bargaining

The TPA recognises that not all anticompetitive arrangements are undesirable; in some cases, conduct that may breach the TPA could also result in benefits to the public. For example, collective bargaining may be an effective strategy for businesses seeking to address information deficiencies – correcting these deficiencies may assist parties in achieving more efficient commercial outcomes to the benefit of the broader community.

To ensure that these public benefits are not lost, the TPA allows the ACCC to grant immunity through a process of ‘authorisation’.

Before granting authorisation, the ACCC is required by law to be satisfied that the conduct being authorised is in the public interest. This assessment is made on a case by case basis. In deciding whether an authorisation is in the public interest, the ACCC must determine both the public benefit and anticompetitive detriment that would result from the proposed conduct.

In general, the ACCC must be satisfied that the benefit to the public of the conduct in question would outweigh the possible detriment. It is up to an applicant for authorisation to demonstrate that the proposed authorisation will result in a net benefit to the public.

Once in place, an authorisation may be reviewed to ensure that the public benefit still outweighs any detriment as a result of the authorisation. The ACCC generally grants authorisation for a specified period to facilitate this review mechanism.

Examples of collective bargaining arrangements authorised by the ACCC in recent years include arrangements allowing chicken growers to collectively bargain with chicken processors, TAB agents with the TAB, and newsagents with newspaper publishers.

### Notifying collective bargaining

The authorisation process has sometimes been criticised by small businesses as being cumbersome and complex. A simpler, more streamlined process for obtaining immunity for collective bargaining arrangements – known as ‘notification’ - is likely to be introduced later this year.

The notification regime will provide small businesses with the same ability to collectively bargain as currently provided for by the authorisation regime. However, immunity will be obtained sooner and more cheaply, being automatically granted after a relatively short period.

Under the proposed notification regime, collective bargaining arrangements will still need to be in the public interest in order to obtain immunity. Seriously anti-competitive arrangements

will not receive immunity under the notification process without significant benefits being demonstrated that outweigh the detriment.

### Public information and guidelines

The ACCC will prepare guidelines to assist parties seeking to notify collective bargaining arrangements; it will also be conducting information and education sessions for interested parties. It is intended that these guidelines will be published and available to the public once the legislation for the collective bargaining notification process has been enacted.

The ACCC has been actively talking to a range of grape growers and winemakers about the foreshadowed changes to the notification and collective bargaining process, and what this might mean for their industry.

Further information on the proposed collective bargaining notification process is set out in an issues paper available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au)

### **Conclusion**

It is the ACCC view that the TPA framework provides adequate ground rules for fair trading between participants in the wine industry. It may be the case that the TPA framework could be further enhanced by impending changes to the collective bargaining and authorisation/notification processes. As with certain other industry sectors, a voluntary code dealing with market information, contract negotiations and valuations would assist in providing increased transparency in commercial dealings between growers and processors. The ACCC believes wine industry participants would benefit from such a code.