

# Legal Alert

Wine

October 2019

## Might your growers be bargaining collectively in Vintage 2020 and beyond?

### The ACCC's Perspective

In the ACCC's Final Report resulting from its Wine Grapes Market Study ([discussed here](#)), the ACCC observed low levels of competition for winegrapes, which it attributed to the high degree of "market concentration" amongst major wineries, among other things.

This market concentration, which, according to the ACCC, is particularly prevalent in the Riverland and Riverina, gives rise to an imbalance in bargaining power between growers and winemakers, and means the majority of growers are unable to significantly influence contract terms.

The Deputy Chair of the ACCC, Mick Keogh, said in a speech to the Australian Wine Industry Technical Conference in Adelaide on 22 July 2019: "*the imbalance in bargaining power results in growers accepting contracts with sub-optimal terms, with limited ability to resolve disputes, and having to wait sometimes up to nine months for payment for their grapes*".

According to the ACCC's Report, collective bargaining may enable growers to mitigate the impact of bargaining power imbalances, allowing them to negotiate more balanced terms. It could involve a number of growers joining together to negotiate with a winemaker on prices or supply arrangements.

### What is Collective Bargaining?

Generally, Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**) requires businesses to act independently of their competitors when making decisions about pricing, who they do business with and the terms and conditions of doing business. Competitors who act collectively in these areas are at risk of breaching the law.

Collective bargaining is an arrangement where, after obtaining ACCC approval, two or more competitors come together to negotiate with a supplier or a customer over terms, conditions or prices.

### The Current Processes

Currently, there are two ways that businesses can obtain an exemption from the competition provisions of the CCA for collective arrangements:

- (i) notification; and
- (ii) authorisation.

Current options	
Notification	Authorisation
<ul style="list-style-type: none"> <li>• Typically a simpler, quicker process than authorisation;</li> <li>• Can only be used where members of the collective bargaining group reasonably expect the value of their transactions with the target business will be less than \$3 million per annum per member (or \$5 million per annum per member for primary producers);</li> <li>• Applications are placed on the ACCC's website together with any public submissions that are received; and</li> <li>• A \$1,000 lodgement fee applies to a small business collective bargaining notification application</li> </ul>	<ul style="list-style-type: none"> <li>• Can take longer to come into effect than a notification;</li> <li>• No value threshold;</li> <li>• Applications are placed on the ACCC's website together with any public submissions that are received; and</li> <li>• A \$7,500 lodgement fee applies to an application for authorisation (non-merger).</li> </ul>

### Proposed Reform: Class Exemption

The current approval process has been criticised as unduly complex.

The ACCC is currently developing a class exemption for collective bargaining, which will allow eligible businesses, including grape growers, to form collective bargaining groups without risk of breaching the specified provisions of the CCA.

Under the ACCC's proposal (and its draft legislative instrument), it is intended that businesses would not need to seek ACCC approval to collectively bargain, provided each business in the group had less than \$10 million aggregated turnover in the previous year.

Once a class exemption is in place, businesses that fall within the criteria of the class exemption will not need to separately lodge a notification or authorisation, and will be able to rely on the exemption without delay or additional cost.

Businesses would self-assess their eligibility and lodge a prescribed form with the ACCC, indicating their intention to take advantage of the class exemption. These forms will be placed on the ACCC's public register.

The class exemption will operate alongside the existing authorisation and notification processes, which could still be used by a business that falls outside the class exemption to seek legal protection on a case-by-case basis.

An unopposed notification, an authorisation or a class exemption will simply permit the collective bargaining group to collectively negotiate with the target without breaching the CCA. The "target business" is free to decide whether to deal with the group, collectively; or to continue to negotiate with each member individually.

## Watch This Space

The ACCC's Survey Results (collected as part of its Market Study) found that very few growers had formed 'collective bargaining groups' to negotiate grape supply agreements with winemakers, and that the industry's knowledge of collective bargaining and its potential benefits appeared to be low.

Growers that responded to the Market Study's Survey expressed interest in participating in collective bargaining in the future.

As has occurred in other areas of the agriculture sector, collective bargaining may play an increased role in grower-winemaker dealings moving forward.

## Finlaysons Wine Roadshow 27

The Finlaysons Wine Roadshow travels to ten leading Australian viticultural regions annually, to give legal and commercial advice to winemakers on topical industry issues relevant to their businesses. This year, Wine Roadshow 27 will focus on the impact of the ACCC's Market Study. Collective bargaining will be discussed. The CEOs of Wine Australia and Australian Grape & Wine will also be attending

to provide updates on their respective agendas. [Click here for details or to register.](#)

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## Contact details

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