



Australian  
Competition &  
Consumer  
Commission

# Senate Inquiry into anti-competitive conduct in the retail wine industry and the ACCC's role

Australian Competition and Consumer Commission's Submission

April 2016

# 1. Introduction

The ACCC is the Commonwealth statutory authority responsible for enforcing laws that promote competition, consumer protection and fair-trading in Australia. The ACCC is responsible for administering the *Competition and Consumer Act 2010* (CCA). This Act contains a number of provisions which give the ACCC scope for addressing anti-competitive or unfair trading conduct issues, not only in the wine industry, but in all industries in Australia. The ACCC has received a number of allegations of anti-competitive or unfair trading issues in the broader wine industry and this submission will outline the relevant laws administered by the ACCC, as well as its approach to investigating and enforcing these key provisions.

The remainder of this submission proceeds in three main parts.

First, we outline the ACCC's role in addressing anti-competitive and unfair trading practices under the CCA. This includes the ACCC's role in administering the Australian Consumer Law (ACL), the Horticulture Code and the collective bargaining provisions of the CCA. Each of these mechanisms is designed to increase the bargaining power of smaller businesses operating in the industry and improve competitive outcomes.

Second, we outline the interaction that the ACCC has had in recent years with various sectors of the Australian wine supply chain. This interaction includes complaints received and investigated in relation to anti-competitive or unfair trading conduct. We consider that the nature of the issues that are commonly brought to the attention of the ACCC are a function of the structure and characteristics of the supply chain for the production, processing, distribution and retail supply of wine in Australia.

The final part of this submission addresses the third term of reference of this inquiry and outlines some of the challenges associated with investigating and taking legal action in relation to competition and fair trading issues within the industry.

## 2. Role of the ACCC

As noted above, the ACCC is responsible for administering the CCA. Accordingly, a key function of the ACCC is to investigate potential breaches of the CCA and, where appropriate, take enforcement action to remedy any harm.

The range of provisions that prohibit anti-competitive conduct are contained in Part IV of the CCA. These provisions prohibit unlawful anti-competitive conduct across all sectors of the economy.

The anti-competitive conduct provisions in Part IV of the CCA cover:

- cartel conduct, including price fixing, bid rigging and market sharing
- primary and secondary boycotts
- the misuse of market power
- agreements that substantially lessen competition
- resale price maintenance
- exclusive dealing, including third line forcing.

Taking action against unlawful anti-competitive conduct, such as cartel conduct, anti-competitive agreements and practices, and the misuse of market power, is an enduring priority for the ACCC. This is because this type of conduct is highly detrimental to the competitive process and consumer welfare.

As well as administering anti-competitive conduct under the CCA, the ACCC is also responsible for administering the ACL. The ACL is contained at Schedule 2 of the CCA and contains a range of fair trading and consumer protection provisions, such as those prohibiting misleading or deceptive conduct and unconscionable conduct. In many cases, conduct that breaches the ACL can also damage the competitive process. For example, a false country of origin claim will both mislead consumers and allow a business to obtain an unfair competitive advantage over traders that make accurate claims. Some provisions of the ACL, such as those prohibiting unconscionable conduct, apply in relation to business-to-business conduct as well as to protect consumers.

In addition to its work with the CCA and the ACL, the ACCC also administers a number of industry codes. These include the Horticulture Code of Conduct and the Food and Grocery Code of Conduct. The Horticulture Code is a mandatory industry code which growers and traders must comply with. Its purpose is to regulate trade in produce between growers and traders to ensure transparency and clarity of transactions. The Horticulture Code does not apply to retailers or processors and therefore does not apply to the wine industry. The Food and Grocery Code is a voluntary code which governs certain conduct by grocery retailers and wholesalers in their dealings with suppliers. In particular, the code requires both parties to act lawfully and in good faith and prevents certain types of conduct without reasonable grounds. However, the Food and Grocery Code does not apply to alcohol and thus is unlikely to cover relationships between growers, wholesalers and retailers in the wine industry.

### 3. ACCC engagement with the wine industry

Every year the ACCC receives a significant number of complaints and enquiries across a range of competition, fair-trading and consumer protection matters. In 2014-15 the ACCC received over 260,000 contacts. Through this engagement, the ACCC has been made aware of concerns about competition and fair trading issues in the supply chain for wine. In particular the ACCC has received complaints about the relationships between wine grape growers and winemakers, and the relationships between winemakers, wholesalers and retailers.

Since January 2011, the ACCC has received 21 complaints alleging anti-competitive conduct specifically related to the retail sector of the wine industry. Of these complaints, there is currently one active investigation into the behaviour of retailers in the industry.

In its role as a regulator and through investigating the complaints that it has received, the ACCC has developed an understanding of the market dynamics within each stage of the Australian wine supply chain:

- wine grape growers – there is significant diversity at the primary production level of the industry, driven by geographic location, local climatic conditions (cool and warm climates), size of holding, varieties grown, cost structures, relationships with winemakers and off-farm employment arrangements.
- winemakers – the profile of Australian winemakers also varies widely, from small niche-marketed products to large scale commercial enterprises that are vertically integrated from wine grape growing to wine making, distribution and retailing.
- wine wholesaling and retailing – there is also significant variation in the purchasers of Australian produced wine - more than 60 per cent of Australian wine production is exported, with the remainder sold into the domestic market through very large retail chains (for example Woolworths/Dan Murphys and Coles/Liquorland), the food service sector, smaller wine retailers (independent liquor or specialist retail outlets), cellar doors and online.

The industry structure therefore gives rise to many different commercial relationships and diverse levels of relative bargaining power between counterparties, creating potential for conduct that is anti-competitive or unfair. Some of the recent issues that have been raised with the ACCC are outlined below in the context of the relevant laws.

## 4. The Competition and Consumer Act 2010 and the wine industry

### **Allegations of anti-competitive behaviour in the wine retailing industry**

As is the case in other agricultural industries in Australia, the structure of the Australian wine industry often gives rise to commercial negotiations between small businesses and major processors and/or retailers. Accordingly, issues regularly arise between industry participants who have different levels of bargaining power and divergent commercial objectives.

The ACCC has received a small number of complaints which have alleged that certain retailers leverage their significant market share to engage in trading practices which could have the purpose or effect of limiting competition at the retail level.

The analysis of these allegations under the CCA depends on the specific circumstances of each negotiation or transaction. However, the common element to many of the complaints is that a negotiation occurs between businesses where one has much greater bargaining power than the other and may therefore be in a position to dictate terms.

Allegations of this type are often considered under:

- section 46 of the CCA, which prohibits the misuse of market power
- section 47 of the CCA, which prohibits exclusive dealing if it leads to a substantial lessening of competition.

Sections 46 and 47 are primarily focused on interactions between competitors and are commonly referred to as proscriptive provisions focused on preventing anti-competitive behaviour.

However, the CCA's prohibitions on unfair trading also provide significant scope for addressing problems arising from imbalances in bargaining power. The relevant laws in this instance include the prohibition on unconscionable conduct (section 20 of the CCA) and the soon to be enacted prohibition against business to business unfair contract terms, a new law which will protect small businesses from standard form contracts which contain unfair contract terms.<sup>1</sup>

The following section further describes the operation of the relevant sections of the CCA, and explains why some sections are more flexible than others.

### **Laws prohibiting anti-competitive conduct**

#### ***Exclusive dealing***

Section 47 of the CCA prohibits businesses from engaging in the practice of exclusive dealing. Broadly speaking, exclusive dealing occurs when one party to a transaction

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<sup>1</sup> For further information refer to the ACCC website at <http://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>

imposes conditions which restrict the other party's freedom to choose with whom, in what, or where they deal.

There are two broad categories of exclusive dealing:

i. Third line forcing:

Third line forcing occurs when a business will only supply goods or services, or give a particular price or discount, on the condition that the purchaser buys goods or services from a particular third party. If the buyer refuses to comply with this condition, the business will refuse to supply them with goods or services.

In contrast to other types of exclusive dealing, third line forcing is prohibited no matter what its effect on competition.

ii. Other types of exclusive dealing, including full line forcing:

Other types of exclusive dealing, including conduct known as full line forcing, involve a supplier refusing to supply goods or a service unless the purchaser agrees not to:

- buy goods of a particular kind or description from a competitor
- resupply goods of a particular kind or description acquired from a competitor
- resupply goods of a particular kind acquired from the company to a particular place or classes of places.

These types of exclusive dealing will only break the law when the conduct has the effect of substantially lessening competition in the relevant market.

An assessment of whether exclusive dealing results in a substantial lessening of competition involves consideration of:

- whether there has been a real effect on competition in the overall market for a particular product or service
- whether the refusal to supply or acquire the goods would substantially restrict the availability of that type of product to consumers
- whether consumers are severely restricted in their ability to buy a product or its substitutes because the business has imposed territorial restrictions as a condition of supply.

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

Section 46 of the CCA prohibits a business with a substantial degree of market power from taking advantage of this power for certain proscribed purposes.

The types of unilateral conduct that section 46 aims to prevent include refusals to supply, price-based exclusionary conduct (such as predatory pricing, loyalty rebates, bundling and price squeezes), conduct which raises the rival's costs, vertical restraints and leveraging of market power across markets. However, such conduct is only prohibited by section 46 if the firm possesses a substantial degree of market power and has taken advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of a competitor into a market; or
- deterring or preventing a competitor from engaging in competitive conduct.

Many of the allegations put to the ACCC about behaviour in the wine industry involve a complaint that there has been a misuse of market power. To determine whether there has been a misuse of market power, a court will consider three questions:

- does the company have substantial market power?
- is it taking advantage of that power?
- is it using the power for an illegal purpose?

'Market power' describes a situation where a business is insulated from competition. In determining whether or not a business has market power the ACCC must first define the market within which the business operates. Within that market, a business's market power may be determined by a combination of factors, such as how difficult it is for competitors to enter the market, the business's ability to behave with little regard to its competitors' actions, the market share of the business and the ability of the business to restrict competition.

The 'take advantage' element is critical in determining whether a contravention of section 46 is likely to have occurred, as it seeks to isolate a causal link between the firm's market power and the prohibited conduct. In determining whether a business is likely to have taken advantage of its substantial degree of power in a market, the Court may have regard to the following factors:

- whether the conduct in question was materially facilitated by the business's substantial degree of power in the market
- whether the business engaged in the conduct in reliance on its substantial degree of power in the market
- whether it is likely that the business would have engaged in the conduct if it did not have a substantial degree of power in the market
- whether the conduct is otherwise related to the business's substantial degree of power in the market.

### **Challenges with section 46**

As the ACCC submitted to the recent Review of Competition Policy ('the Harper review'), the ACCC considers that the current wording and interpretation of section 46 means that it has limited utility in prohibiting firms with substantial market power from engaging in conduct which has a detrimental impact on competition.<sup>2</sup>

The ACCC considers that the provision is deficient in two respects. First, it fails to capture unilateral conduct which has a deleterious *effect* on competition. The ACCC has long argued that the failure of section 46 to consider only the purpose of conduct by a firm with substantial market power, rather than the effect of competition, is a gap in the law.<sup>3</sup>

The second major deficiency of section 46 is the way in which the '*take advantage*' limb of the test is currently being applied. The ACCC has experienced particular difficulty in overcoming the evidentiary hurdle associated with the term 'take advantage' in successfully prosecuting cases under section 46.

The specific formulation of section 46 prohibits the use of market power for the purpose of harming actual or potential rivals. As the very objective of the competitive process is to win business at the expense of rivals, the 'take advantage' element should work as the key filter

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<sup>2</sup> The ACCC submission to the Harper Review, ACCC, Reinvigorating Australia's Competition Policy, *ACCC's Submission to the Competition Policy Review*, 25 June 2014, pg 76

<sup>3</sup> See, for example, the ACCC submission to the Dawson Review. ACCC, *Submission to the Trade Practices Act Review* (2002) at <http://tpareview.treasury.gov.au/submissions.asp>.

that distinguishes conduct that is pro-competitive from anti-competitive. However, in recent years, the courts have interpreted the 'taking advantage' element to mean that section 46 does not prohibit conduct which could have been engaged in by a firm without market power. In some recent cases this has culminated in the Court finding that a firm had not engaged in conduct in contravention of section 46, despite the Court finding that the firm had significant market power, that it engaged in the conduct for an anti-competitive purpose and that the conduct was likely to have the effect of substantially lessening competition.<sup>4</sup>

As discussed in the conclusion of this submission, the Government proposes to change section 46 to help address some of the difficulties faced. The ACCC supports this proposed change. The reasons for its support are discussed in more detail in the conclusion.

## **Laws prohibiting unfair trading conduct**

### ***Unconscionable conduct***

Businesses are prohibited from acting in an unconscionable manner in dealing with their customers or other businesses. Certain conduct may be unconscionable if it is particularly harsh or oppressive or where one party knowingly exploits the special disadvantage of another. Unconscionable conduct is distinguished from tough commercial bargaining in that it is conduct which is found to be against conscience as judged against the norms of society. The law sets out a list of factors that courts may consider when deciding whether conduct is unconscionable, including:

- the relative bargaining strengths of the parties
- whether the stronger party used undue influence, pressure or unfair tactics
- the extent to which the parties acted in good faith.

The case study below ('Coles') provides an example of where the unconscionable conduct provisions of the ACL have enabled the ACCC to successfully take action against a major retailer in the supermarket sector. This action would not necessarily have been possible if the ACCC had relied only on competition laws (as distinct from consumer protection provisions) to respond to the alleged conduct.

#### **Case study: Coles Active Retail Collaboration program found to be unconscionable**

In legal proceedings commenced in two separate matters in 2014, the ACCC alleged that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct toward approximately 200 of its smaller suppliers.

The ACCC alleged that, in 2011, Coles had developed the Active Retail Collaboration (ARC) program as a strategy to improve its earnings by gaining better trading terms from its suppliers. One part of the strategy was to ask its suppliers to pay ongoing rebates for the program.

Coles' target was to obtain \$16 million in rebates from smaller suppliers and ultimately an ongoing rebate in the form of a percentage of the price it paid for the suppliers' grocery products.

The ACCC alleged that this was unconscionable because, amongst other things, Coles had:

- provided misleading information to suppliers about the savings and value to them

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<sup>4</sup> ACCC v Cement Australia Pty Ltd [2013] FCA 909.

from the ARC program

- used undue influence and unfair tactics against suppliers to obtain their agreement to pay the rebate
- taken advantage of its superior bargaining position by, among other things, seeking payments from suppliers when it had no legitimate basis for seeking them
- required the suppliers to agree to the ongoing rebate without giving them sufficient time to assess the value, if any, of the purported benefits of the program
- requested responses from suppliers in short time periods, and threatened commercial consequences if the suppliers did not agree.

In declaring that Coles had engaged in unconscionable conduct, the Federal Court (Justice Gordon) held that the law did not only apply to conduct against vulnerable consumers, but that it also applied to vulnerable suppliers who suffered a substantial disadvantage relative to the bargaining power of Coles.<sup>5</sup>

Gordon J said Coles' conduct was "**serious, deliberate and repeated**", and that Coles misused its substantial bargaining power to engage in conduct that was "**not done in good conscience**".<sup>6</sup> (Emphasis added)

Gordon J also described the conduct as "**inconsistent with acceptable business practice**", "**not respectful of the suppliers' needs for full and timely transparency**", and did not "**properly respect the responsibility attached to Coles' bargaining power**."<sup>7</sup> (Emphasis added)

The court ordered Coles to pay combined pecuniary penalties of \$10 million and costs.

Coles also entered into a court enforceable undertaking to establish a formal process to provide options for redress for over 200 suppliers referred to in the ACCC proceedings. To fulfil this undertaking Coles appointed the Hon. Jeff Kennett AC as independent arbiter. Mr Kennett instructed Coles to refund over \$12 million to suppliers and also allowed suppliers to exit the ARC program without penalty or have their ARC contribution rebates reviewed.

The Federal Court judgment in *Coles* is important as it clarifies that the unconscionable conduct law:

- applies to vulnerable businesses as well as vulnerable consumers
- prohibits business dealings that are against conscience by reference to the norms of society and which are inconsistent with acceptable business practice
- attaches a responsibility and expectations about the proper use of bargaining power in business-to-business dealings.

The case shows that the unconscionable conduct provisions – in particular the emphasis on the proper use of bargaining power, provide the ACCC with the flexibility to respond to allegations of the improper use of bargaining power. The general provisions relating to unconscionable conduct also allow the ACCC to be creative when considering the appropriate action to take, and allow the Court to address harmful conduct in different ways.

The ACCC also considers that the *Coles* case has the potential to provide a greater degree of confidence to smaller businesses in approaching the ACCC about concerns they might have about unjust or unfair trading terms or conduct.

<sup>5</sup> ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 (22 December 2014) 102.

<sup>6</sup> Ibid, 104.

<sup>7</sup> Ibid, 105.

One shortfall in the current unconscionable conduct provisions is that they do not provide protection for public companies. This appears inequitable given the fact that a company that is publicly-listed may not always be a good reflection of its size, level of resourcing or its ability to withstand unconscionable conduct.

## **Allegations of misconduct in the wine retailing industry**

The following section provides specific details about the complaints that the ACCC has received about behaviour in the wine retailing industry. Along with each complaint is a short explanation of the action the ACCC has taken in each instance and the applicable sections of the CCA.

However, it is important to note at the outset that low prices are usually good for consumers. Accordingly, when investigating complaints such as those outlined below, the ACCC is concerned with determining whether conduct which manifests as 'low' prices is simply a form of strong competition, or whether it is conduct which is likely to exclude other competitors from participating in the market, to the detriment of consumers in the longer term.

### ***Category 1***

The first category of complaint involves the supply of wine to large retailers by wine producers. Large retailers often focus on running high-volume, low-margin businesses, and may have the capacity to heavily discount the price of wine or to apply a 'lowest price guarantee'. Such guarantees offer assurance to consumers that the large retailer's price will be lowered to beat that of any competitors. In addition, the ACCC understands that some large retailers retail wine on behalf of wine producers under an agency agreement. It has been claimed that wine producers marketing their product through such agreements retain ownership of the product up until the point of purchase by a consumer. However the large retailer retains the final say on the retail price of the wine. In essence suppliers may bear the risk that the application of the lowest price guarantee will result in suppliers receiving a smaller return than they had budgeted for or, in some cases, a return that is less than the cost of production. This may create an incentive for wine suppliers to require that other retailers and distributors do not sell their products for less than the larger retailer's price.

The ACCC's assessment of complaints of this kind has primarily focused on the misuse of market power provision. However, to date, the ACCC's investigations have not found evidence that would sustain allegations that there has been a contravention of section 46 of the CCA. Some of the legal challenges of establishing a contravention of this kind have been outlined above. The unconscionable conduct provisions provide an alternative legal option, but in these matters to date the information provided by complainants has not substantiated a contravention of the law.

### ***Category 2***

The second category of complaint is that larger retailers leverage their strong bargaining position relative to wholesalers in order to dampen price competition from smaller retailers. Complainants allege that the larger retailers threaten to cease acquiring alcohol from the wholesaler/supplier in question unless they require the smaller retailer customers to increase their prices above a minimum level. In effect the larger retailer is ensuring that price competition at the retail level is limited.

Another similar allegation is that large retailers leverage their purchasing power and threaten to cease purchasing from wholesalers unless the wholesalers agree not to supply certain other retailers.

These complaints are likely to be considered under competition law (either section 46, section 47) or unconscionable conduct laws. However, the ACCC has been unable to find sufficient evidence to support an action at this stage. A number of complaints have been withdrawn at an early stage of ACCC assessment or complainants have been unwilling to provide the ACCC with specific details, due to the fear of ongoing consequences for their business. The reluctance of witnesses to provide details of their complaints is discussed further below.

### **Category 3**

The ACCC is also aware that some smaller retailers have alleged that larger retailers are selling wine to consumers at prices which are below cost. These smaller retailers argue that this restricts their ability to effectively compete with the larger retailers. Broadly speaking, the allegation refers to predatory pricing.

Predatory pricing is a type of misuse of market power and, as is the case with the conduct referred to above, it is also governed by section 46 of the CCA. Predatory pricing occurs when a company with substantial market power or share of a market sets its prices at a low level with the purpose of damaging a competitor or forcing a competitor to withdraw from the market. The four elements required to establish a breach of the predatory pricing laws:<sup>8</sup>

- the company accused of predatory pricing must have a substantial share of the market
- the company must have offered the particular goods or services in question for a sustained period at a low price
- that low price must be less than the cost to the company of supplying the goods or services
- the company must have offered or sold goods at the low cost for the purpose of eliminating or substantially damaging a competitor, to prevent a competitor entering the market or to deter a person from acting competitively.

Proving that a business has engaged in predatory pricing is difficult because there is often no clear evidence of an anti-competitive purpose that the ACCC can use to uphold an allegation. Price cutting, or underselling competitors, is not necessarily predatory pricing and in many cases lowering prices is pro-competitive. Under current law, it is the presence of sustained very low pricing together with an anti-competitive purpose that determines whether price cutting by a business with substantial market power amounts to predatory pricing.

The ACCC has considered complaints of this nature in the wine industry. However, the ACCC has ultimately determined in these cases that on the information available, the ACCC was not likely to be able to substantiate an allegation of a breach of the legislation. Often the complaints have referred to instances where smaller retailers are unable to acquire products at a similar low wholesale price to larger competitors. However, as outlined above, the acquisition of products at a low wholesale price due to volume discounts and the passing on of these discounts to consumers is not enough to substantiate an allegation of predatory pricing.

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<sup>8</sup> <http://www.accc.gov.au/business/anti-competitive-behaviour/misuse-of-market-power>

## **Other opportunities for the ACCC to assist the wine industry**

### ***Business to business unfair contract terms***

From 12 November 2016, a new law will protect small businesses from unfair terms in standard form contracts. The law will apply to standard form contracts entered into or renewed on or after 12 November 2016, where:

- it is for the supply of goods or services or the sale or grant of an interest in land
- at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis)
- the upfront price payable under the contract is no more than \$300,000 or \$1 million if the contract is for more than 12 months.

The new law sets out examples of terms that may be unfair, including:

- terms that enable one party (but not the other) to avoid or limit their obligations under the contract
- terms that enable one party (but not the other) to terminate the contract
- terms that penalise one party (but not the other) for breaching or terminating the contract
- terms that enable one party (but not the other) to vary the terms of the contract.

If a court or tribunal finds that one of the terms of the contract is unfair, the term will be void. This new law may assist small businesses in the wine industry when dealing with larger businesses and should minimise the presence of unfair contract terms in the sector. The ACCC will be sharing information about these mechanisms with the viticulture industry during the horticulture and viticulture workshops it will hold in the coming months across Australia (see further below).

### ***Collective bargaining***

The CCA generally requires businesses to act independently of their competitors when making decisions about pricing, which firms they do business with, and the terms and conditions of doing business. Competitors that act collectively in these areas are at risk of breaching the competition provisions of the CCA.

However, there are circumstances in which collective agreements may be in the public interest. Small businesses in the wine industry may face challenges when negotiating with large wine makers or retailers and the outcomes of these negotiations may not be the most efficient or optimal. By working collectively, these small businesses may have a better opportunity to ensure that negotiations result in a more balanced outcome. The CCA therefore allows protection from legal action to be granted to parties to engage in what could otherwise be seen as anti-competitive behaviour, including collective bargaining, when the public benefits outweigh the detriments to competition. The ACCC is working to raise awareness of these opportunities in agricultural industries and encourages businesses interested in these mechanisms to contact the ACCC.

### ***Viticulture and horticulture workshops***

The ACCC, through its recently formed Agriculture Enforcement and Engagement Unit, is holding a series of workshops in regional Australia focusing on the horticulture and viticulture

industries.<sup>9</sup> These workshops will allow the ACCC to hear directly from horticulture and viticulture industry participants about the key competition and fair trading issues that affect them. The ACCC will also provide information to attendees about its functions, including the protections and obligations contained in the CCA.

There is a viticulture presence in many of the regions in which the workshops will be held. Industry participants who are unable to attend a workshop, or who wish to raise an issue privately, can contact the ACCC at [agricultureworkshops@acc.gov.au](mailto:agricultureworkshops@acc.gov.au). The ACCC can accept complaints or information on a confidential basis.

## 5. Conclusion

The ACCC takes seriously complaints about anti-competitive behaviour and unfair trading. The ACCC has received a number of complaints about conduct in the wine industry and has carefully assessed those complaints against the relevant provisions of the CCA. To date, the ACCC has not brought a case for anti-competitive or unfair trading conduct in the wine industry.

As with any sector, the ACCC faces some challenges in bringing legal action in this area. These challenges include obtaining and producing evidence to the standards required by the courts to substantiate claims that exclusive dealing has occurred or that a firm has misused its market power for a prohibited purpose.

In addition to the challenges associated with pursuing cases under the anticompetitive conduct provisions, the ACCC generally faces difficulty in obtaining sufficient evidence from witnesses for use in court proceedings. Understandably, many businesses and suppliers are concerned about their businesses and the potential for retribution if they were to come forward as witnesses or provide information against their commercial partners. The ACCC has had some success in managing these concerns in the past and has developed a system for enabling anonymous complaints which lead to evidence that could be presented in court. Despite these challenges, the ACCC notes significant developments in relation to these matters:

- the extension of unfair trading provisions, such as unconscionable conduct and unfair contract terms to business-to-business dealings where there is a significant imbalance of bargaining power between counterparties; and
- the government's announcement on 16 March 2016 that it intends to implement the recommendation of the Harper Review for the amendment of section 46 of the CCA. The Harper Review recommended that section 46 be replaced with a new provision that removes the 'take advantage' element, and extends the provision to cover conduct which has, or is likely to have, an anti-competitive effect as well as purpose. The proposed amendment therefore would prevent firms with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.

The ACCC welcomes the proposed changes to section 46 and considers that these will significantly enhance the effectiveness of the provision. In combination with the advancement of laws prohibiting unfair trading conduct, the ACCC considers these developments are likely to improve the ACCC's ability to pursue allegations of anticompetitive and unfair trading conduct in the future.

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<sup>9</sup> <http://www.acc.gov.au/media-release/acc-to-hold-horticulture-and-viticulture-regional-workshops>