



Determination

Application for authorisation AA1000401

lodged by

Taylors Wines Pty Ltd

in respect of

proposed joint marketing and promotions
with third party wine suppliers in relation to
supply through Deliveroo Australia Pty Ltd

Date: 7 December 2017

Authorisation number: AA1000401

Commissioners: Sims
Rickard
Schaper
Court
Featherston

Summary

The ACCC has decided to grant authorisation to Taylors Wines Pty Ltd for joint marketing and promotional arrangements in connection with the supply of wine products to Deliveroo Australia Pty Ltd's customers via its website and/or other social media platforms.

The ACCC has decided to grant authorisation for five years until 31 December 2022.

The application for authorisation

1. On 13 October 2017, Taylors Wines Pty Ltd (the **Applicant**) lodged an application for authorisation¹ (AA1000401) with the ACCC to enter into commercial discussions with third party wine suppliers to coordinate joint marketing and promotional arrangements pertaining to a supply arrangement between the Applicant and Deliveroo Australia Pty Ltd (Deliveroo).
2. Authorisation has been sought for five years.
3. The Applicant also requested interim authorisation to enable it to engage in the proposed conduct while the ACCC is considering the substantive application. Interim authorisation was granted on 26 October 2017.
4. On 26 October 2017 the ACCC issued a draft determination proposing to grant authorisation for five years. A conference was not requested following the draft determination.

The proposed conduct

5. The Applicant proposes to invite third party wine suppliers including, but not limited to, Brown Brothers Milawa Vineyard Pty Ltd, McWilliam's Wines Group Ltd and Samuel Smith and Sons (together with the Applicant and potential future members, 'the Wine Group') to take part in joint marketing and promotional arrangements in relation to a supply arrangement between Taylors Wines and Deliveroo for the purpose of supplying wine products to Deliveroo's customers by way of its website and/or other social media platforms (the Platforms).
6. The Applicant also seeks authorisation for the Wine Group to invite Deliveroo to take part in joint marketing and promotional arrangements in relation to certain promotions that the Wine Group intends to offer Deliveroo's customers on the Platforms.
7. Authorisation is also sought for the making of and/or giving effect to any contract, arrangement or understanding to implement the joint marketing and promotional arrangements set out in paragraphs 5 and 6 above.

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct (or, for certain conduct, that it would not be likely to substantially lessen competition). Detailed information about the authorisation process is available in the ACCC's **Authorisation Guidelines**.

8. The Applicant seeks Authorisation for a period of five years.
9. The Applicant notes that participation in the arrangements is voluntary for members of the Wine Group and that authorisation is not sought for any exclusivity provisions.
10. The Applicant has requested authorisation to cover future participants in the Wine Group as membership may vary over time. The Applicant has specified that members must be 'smaller wine producers and merchants' and proposed advising the ACCC in writing every six months should the membership of the Wine Group vary from those suppliers identified in the application for authorisation.
11. The proposed conduct may include 'percentage off' sales. However, the price points of the wines to be sold through the Deliveroo sales channel will be determined by Deliveroo and the relevant liquor retailers and not determined by Taylors Wines or the Wine Group.²

Rationale for the proposed conduct

12. The Applicant submits that the proposed conduct will drive incremental sales and create a strong brand association between Deliveroo, Taylors wines and the Wine Group. The Applicant submits that the proposed conduct will enhance economies of scale and scope, giving the Wine Group a depth of product offering sought by Deliveroo's customer base.
13. The Applicant also submits that without the joint marketing and promotional arrangement, Deliveroo would not opt to enter into a commercial contract with Taylors Wines and that the sales would be captured by a large wine producer competing for the Deliveroo contract.

About the Applicant and other parties

Taylors Wines

14. Taylors Wines is a family owned winery (producer and wine merchant) located in the Clare Valley of South Australia. It has six different ranges/brand labels, all of which represent different wine varieties and blends. Taylors Wines' products are available at the cellar door, on-line, at retail liquor outlets and at restaurants, hotels and venues.

The Wine Group

15. Each of the members of the Wine Group operate independently as wine producers and merchants. Their respective market shares of national still bottled wine by value are as follows:³
 - Taylors Wines – 2.6%
 - Brown Bros Pty Ltd – 3.3%

² The ACCC understands that Deliveroo delivery drivers and riders will collect wine products from retailers that have the necessary arrangements in place with Deliveroo. For clarity, Deliveroo operates a delivery and ordering service. It does not undertake conventional retailing activities such as inventory management etc. Similarly, Taylors Wines and the Wine Group are not operating as retailers in conjunction with sales through Deliveroo.

³ Applicant submission, 13 October 2017, p.12.

- McWilliams Wine – 2.5%
- Samuel Smith & Sons – 2.1%.

Deliveroo

16. Deliveroo operates an online platform providing a delivery service, as well as marketing and order taking, allowing it to deliver food to customers with orders from restaurants that do not otherwise offer a delivery service.
17. The Applicant submits that competitors to Deliveroo include UberEats, UberRush, Menulog, Foodora, EatNow and MealPal.
18. The Applicant also submits that customer feedback to Deliveroo has indicated that they would like Deliveroo's product offerings to include wine so that customers can pair wine with their food selections.

Consultation

19. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
20. The ACCC invited submissions from a range of potentially interested parties including major competitors, suppliers, customers, relevant industry associations, government and relevant regulatory bodies.⁴
21. No submissions were received.

ACCC assessment

22. On 6 November 2017, a number of amendments to the *Competition and Consumer Act 2010* (Cth) (the **CCA**) came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2) of the CCA, these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.
23. Pursuant to subsections 90(7) and 90(8) of the CCA,⁵ the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances 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 from the conduct.

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

⁵ As the proposed conduct may involve a cartel provision, the alternative test under sub-section 90(7) does not apply.

Relevant areas of competition

24. In broad terms, the ACCC considers that the proposed conduct may be relevant to a number of areas of competition including those relating to:

- pre-cooked, ready to eat food delivery services
- the supply and delivery of bottled wine.

25. However, the ACCC considers that it is not necessary to precisely define the relevant areas of competition for the purpose of assessing the likely public benefits and likely public detriments in this instance.

Future with and without the conduct

26. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

27. The ACCC understands that Deliveroo indicated to Taylors Wines that it needed a wider range of wine brands and varieties of wines to be available on its on-line platform than those Taylors Wines is able to offer on its own. The Applicant submits that in the absence of the proposed conduct, sales of its wines to Deliveroo's customer base are likely to be lost to a larger wine producer. The ACCC accepts that this is likely.

Public benefit

28. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.⁶

29. The Applicant submits that the proposed conduct is likely to result in the following public benefits:

- Deliveroo's current and future customers will be given the option to purchase wine which will increase the customer base of Taylors Wines and the Wine Group.
- The proposed conduct will ensure that economies of scale and scope can be achieved in order to cater for the tastes of Deliveroo's customers.
- The proposed conduct may encourage other small wineries to enter into similar arrangements, thereby promoting competition.
- The joint marketing and promotions will provide an opportunity to educate consumers about wine and food pairing.⁷ The Applicant also

⁶ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

⁷ The ACCC understands that Deliveroo intends to provide wine options for customers that are specifically aligned with the food options presented to customers through Deliveroo's Platforms.

submits that the superior product knowledge will enhance Deliveroo's customer service and consumer buying experiences.

30. Having regard to the submissions of the Applicant, the ACCC considers that the proposed conduct is likely to result in some public benefits including enhancing competition by allowing the Applicant to compete against another large wine producer to supply Deliveroo, and achieving greater efficiency through the Wine Group sharing promotional costs. This will likely mean that total promotional costs will be lower than if the Wine Group members each separately promoted their products.
31. The ACCC notes that the proposed conduct has come about in response to the request by Deliveroo for a wider menu of wines than Taylors Wines could provide on its own. If the proposed conduct leads to an increase in Taylors Wines total sales, there would likely be some efficiencies from incremental economies of scale and scope.
32. The ACCC acknowledges the possibility that the proposed conduct could also result in increased competition as a result of other small wineries entering into similar arrangements with other delivery services. However, the ACCC does not expect that such an increase in competition directly attributable to the proposed conduct would be significant.
33. While some consumers may appreciate access to advice with respect to food and wine pairing, the ACCC expects that in the absence of the proposed conduct customers would receive similar services through the alternative arrangements that Deliveroo would enter into with another large wine producer. In addition, the ACCC notes that the proposed conduct is not required to provide food and wine pairing advice to consumers and that there are many other ways that such services could be provided.
34. In summary, the ACCC considers that the proposed conduct is likely to result in some public benefits including enhancing competition for delivery services of pre-cooked food and the supply of bottled wine and achieving greater efficiency through economies of scale and scope in the marketing and promotion of wine through the Deliveroo channel.

Public detriment

35. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁸

36. The Applicant submits that there are no observable public detriments associated with the proposed conduct because it is limited in application. The Applicant also submits that Taylors Wines and the Wine Group will establish a code of conduct to ensure that discussions are limited to the joint marketing and promotional arrangements and not competition in any other market.

⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

37. The ACCC considers that the proposed conduct is unlikely to result in any significant public detriment. In reaching this view, the ACCC has had regard to the following mitigating factors:
- **No exclusivity** – authorisation has not been sought for any exclusive arrangements. That is, the proposed conduct would not enable Deliveroo to prevent any member of the Wine Group from entering into similar arrangements with competitors of Deliveroo. Similarly, the proposed conduct would not enable the Wine Group to require Deliveroo not to enter into arrangements with other wine suppliers.
 - **Market share of the Wine Group** – The ACCC notes that the Wine Group has a combined market share of around 10 percent and that there are many competing wine suppliers and brands.
 - **Retailers will continue to set prices** – while the authorisation would enable the Wine Group to agree to jointly participate in promotions that may include ‘percentage-off’ sales, the underlying price to consumers will continue to be set by relevant liquor retailers who will not be involved in agreeing the terms of any pricing promotions.
 - **Voluntary arrangements** - each member of the wine group is able to elect whether to participate in promotions on a case by case basis.
38. When competitors have the protection afforded by authorisation to meet and discuss particular issues, there is the risk that discussions may extend beyond the scope of the authorisation and affect competition between the parties. However, the ACCC notes that the Applicant is aware of this issue and appears to be taking reasonable steps to mitigate these risks. Further, as noted above these suppliers will continue to face competition from the other wineries that supply approximately 90 per cent of bottled wine in Australia. This will limit the scope for and impact of any anticompetitive arrangements.
39. The ACCC also considered two other possible sources of public detriment, namely whether the proposed conduct is likely to increase the rate of, or community harm from, problem drinking, and whether carrying bottled wine would likely constitute a safety risk for delivery drivers and other road users. The ACCC invited submissions on these points but received none. The ACCC remains of the view that public detriments arising from either of these sources is unlikely given:
- Deliveroo drivers are required to comply with relevant liquor licensing laws including Responsible Service of Alcohol
 - in the absence of the proposed conduct, the Deliveroo’s wine delivery service is likely to proceed via another supplier.
40. Authorisation has been sought for future members of the Wine Group to cover possible changes to the group over time. The Applicant submits that future participants would also be smaller wine producers and merchants. The Applicant has proposed writing to the ACCC on a six-monthly basis should there be any changes to the membership of the Wine Group. The ACCC considers that the membership of the group could be a significant factor in determining the extent to which the proposed conduct is likely to result in public detriments. Accordingly, the ACCC expects the Applicant to provide a written notice to the ACCC within 14 days of any new wine supplier joining the group. The ACCC proposes that any such notices be placed on the public register during the term of the authorisation.

Balance of public benefit and detriment

41. Broadly, the ACCC may not grant authorisation unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
42. The ACCC considers that the proposed conduct is likely to result in some public benefits including enhancing competition for delivery services of pre-cooked food and the supply of bottled wine and achieving greater efficiency through economies of scale and scope in the marketing and promotion of wine through the Deliveroo channel.
43. The ACCC considers that the proposed conduct is unlikely to result in any significant public detriment, in part due to the presence of mitigating factors including the absence of exclusivity, the limited market share of the Wine Group and that Deliveroo will continue to set prices as it sees fit.
44. For the reasons outlined in this determination the ACCC is satisfied that the proposed conduct is likely result in a public benefit that would outweigh any likely public detriment, including any detriment constituted by any lessening of competition that would be likely to result.
45. Accordingly, the ACCC has decided to grant authorisation.

Length of authorisation

46. The CCA allows the ACCC to grant authorisation for a limited period of time.⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
47. In this instance, the Applicant seeks authorisation for five years.
48. Given the ACCC's assessment of the lack of significant public detriments, it has decided to grant authorisation for a period of five years.

Determination

The application

49. Application AA1000401 was made using a Form B, under subsection 88(1) and (1A) of the CCA.¹⁰ Authorisation is sought to make and give effect to commercial arrangements between Taylors Wines and third party wine suppliers to coordinate

⁹ Subsection 91(1).

¹⁰ As noted in paragraph 22, changes to the authorisation provisions of the CCA came into effect on 6 November 2017 that apply to applications for authorisation under consideration at or after that date. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as an applications for authorisation under subsection 88(1) of the CCA as amended.

joint marketing and promotional arrangements pertaining to a supply arrangement between Taylors Wines and Deliveroo.

50. Authorisation is sought as the proposed conduct may involve the making or giving effect to a contract, arrangement or understanding that contains a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.¹¹

The net public benefit test

51. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsection 90(7) and 90(8) of the CCA, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a benefit to the public and that benefit would outweigh any detriment to the public that would result or be likely to result from the proposed conduct.

Conduct authorised

52. The ACCC has decided to grant authorisation AA1000401 to Taylors Wines (and the Wine Group):
- a. to invite third party wine suppliers including, but not limited to Brown Brothers Milawa Vineyard Pty Ltd, McWilliam's Wines Group Ltd and Samuel Smith and Sons (together with the Applicant and potential future members, the Wine Group) to take part in joint marketing and promotional arrangements in relation to a supply arrangement between Taylors Wines and Deliveroo for the purpose of supplying wine products to Deliveroo's customers by way of its website and/or other social media platforms (the Platforms).
 - b. to invite Deliveroo to take part in joint marketing and promotional arrangements in relation to certain promotions that the Wine Group intends to offer Deliveroo's customers on the Platforms.
 - c. for the making and/or giving effect to any contract, arrangement or understanding to implement the joint marketing and promotional arrangements set out in paragraphs a. and b. above.
53. This determination is based on the Applicant advising that participation in the arrangements is voluntary for members of the Wine Group.
54. The proposed conduct may include 'percentage off' sales. However, the price points of the wines to be sold through the Deliveroo sales channel will be determined by Deliveroo and the selected liquor retailers and not determined by Taylors Wines or the Wine Group.
55. Under section 88(2)(c) of the CCA, the ACCC proposes to extend the authorisation to future parties to the proposed conduct. As discussed in paragraph 40, the ACCC expects the Applicant to notify the ACCC in writing within 14 days of any future parties joining the Wine Group.

¹¹ The reference to "within the meaning of section 45 of the CCA" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition.

56. The ACCC proposes to grant authorisation AA1000401 for five years.

Conduct not authorised

57. Authorisation does not extend to Taylors Wines or any other member of the Wine Group discussing their business strategies and decisions (including but not limited to marketing, promotional activity and pricing etc) for any supply channel other than the arrangements with Deliveroo as set out in this determination.

58. In addition, authorisation is not granted for any exclusivity provisions, whether in respect of the formation of the Wine Group or arrangements between the Wine Group and Deliveroo.

Interim authorisation

59. At the time of lodging the application, Taylors Wines requested interim authorisation to commence the proposed conduct, which the ACCC granted on 26 October 2017.

60. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

61. This determination is made on 7 December 2017. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 29 December 2017.