



# Draft Determination and interim authorisation

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: 26 October 2017

Authorisation number: AA1000401

Commissioners: Sims  
Rickard  
Schaper  
Court  
Featherston

## Summary

**The ACCC proposes 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 proposes to grant authorisation for five years.**

**The ACCC has decided to grant interim authorisation for the same conduct.**

**The ACCC invites submissions in response to this draft determination before making its final decision.**

## The application for authorisation

1. On 13 October 2017, Taylors Wines Pty Ltd (the **Applicant**) lodged an application for authorisation<sup>1</sup> (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. The ACCC's assessment of the request for interim authorisation is set out at paragraph 57.

## The proposed conduct

4. 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).
5. 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.
6. 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 4 and 5 above.

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<sup>1</sup> 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. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

7. The Applicant seeks Authorisation for a period of five years.
8. 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.
9. 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.
10. 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.<sup>2</sup>

### **Rationale for the proposed conduct**

11. 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.
12. 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**

13. 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**

14. 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:<sup>3</sup>
  - Taylors Wines – 2.6%
  - Brown Bros Pty Ltd – 3.3%

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<sup>2</sup> 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.

<sup>3</sup> Applicant submission, 13 October 2017, p.12.

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

## **Deliveroo**

15. 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.
16. The Applicant submits that competitors to Deliveroo include UberEats, UberRush, Menulog, Foodora, EatNow and MealPal.
17. 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.

## **ACCC assessment**

18. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests<sup>4</sup> contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). The ACCC may grant authorisation if it is satisfied that the proposed conduct/arrangement would be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.

## **Relevant areas of competition**

19. 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.
20. 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**

21. 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.
22. 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.

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<sup>4</sup> Subsections 90(5A), 90(5B), 90(6) and 90(7).

## Public benefit

23. 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.<sup>5</sup>

24. 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.<sup>6</sup> The Applicant also submits that the superior product knowledge will enhance Deliveroo's customer service and consumer buying experiences.

25. 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.

26. 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.

27. 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.

28. 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

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<sup>5</sup> *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.

<sup>6</sup> 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.

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.

29. 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

30. 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.<sup>7</sup>

31. 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.
32. 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.
33. 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

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<sup>7</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

90 per cent of bottled wine in Australia. This will limit the scope for and impact of any anticompetitive arrangements.

34. 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's initial view is that public detriments arising from either of these sources appears 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.

35. The ACCC invites submissions from interested parties on these matters.

36. 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 proposes that the Applicant provide a written notice 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**

37. In general, the ACCC may grant authorisation if 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.

38. 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.

39. 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.

40. For the reasons outlined in this draft determination the ACCC is satisfied that the proposed conduct is likely result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.

41. Accordingly, the ACCC proposes to grant authorisation.

## **Length of authorisation**

42. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>8</sup> 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.
43. In this instance, the Applicant seeks authorisation for five years.
44. Given the ACCC's assessment of the lack of significant public detriments, it proposes to grant authorisation for a period of five years.

## **Draft determination**

### **The application**

45. Application AA1000401 was made using a Form B, under subsection 88(1) and (1A) of the CCA. Authorisation is sought to make and give effect to commercial arrangements between Taylor Wines and third party wine suppliers to coordinate joint marketing and promotional arrangements pertaining to a supply arrangement between Taylor Wines and Deliveroo.
46. 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 a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
47. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### **The net public benefit test**

48. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.

### **Conduct which the ACCC proposes to authorise**

49. The ACCC proposes to grant authorisation AA1000401 to Taylor 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

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<sup>8</sup> Subsection 91(1).

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.

50. This draft determination is based on the Applicant advising that participation in the arrangements is voluntary for members of the Wine Group.

51. 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.

52. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future parties to the proposed conduct. As discussed in paragraph 36, the ACCC proposes that the Applicant notify the ACCC in writing within 14 days of any future parties joining the Wine Group.

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

54. This draft determination is made on 26 October 2017.

## **Conduct which the ACCC proposes not to authorise**

55. The proposed authorisation does not extend to Taylor 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 draft determination.

56. In addition, authorisation is not proposed to be 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**

57. At the time of lodging the application, Taylor Wines requested interim authorisation to commence the proposed conduct.

58. The Applicant submits that it is essential that Taylors Wines and the Wine Group be granted interim authorisation in order to commence discussions about the proposed launch of the new customer service offering and that the proposed conduct is highly unlikely to result in any significant competitive harm.

59. Given the ACCC's assessment that the proposed conduct is likely to result in a net public benefit, the ACCC has decided to grant interim authorisation for the proposed conduct. The ACCC also notes that interim authorisation will not result in any changes to the competitive landscape that would be difficult to unwind should the ACCC ultimately decide not to grant authorisation in its final determination.

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. The ACCC can review its decision to grant interim authorisation at any time.

## **Next steps**

61. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

## Attachment A - Public benefit tests in CCA

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.