



Australian  
Competition &  
Consumer  
Commission

# Perspectives in horticulture and viticulture

## Industry views on competition and fair trading issues

27 October 2016

## Summary

The Australian Competition and Consumer Commission (ACCC) held six workshops in regional Australia focusing on understanding competition and fair trading issues in the horticulture and viticulture industries.

This report provides an account of the issues raised with the ACCC during the workshops and its broader engagement with the industries. While this report does not reflect a comprehensive market study of each industry, it highlights the current views of industry participants on key competition and fair trading issues, and the ACCC's response to these issues.

The horticulture and viticulture industries contain a range of diverse markets across many different locations. Despite this diversity, a number of concerns were consistently raised, many of which have existed for decades. A wine grape grower in Griffith remarked that many of the issues being experienced were the same as those discussed 40 years ago. The key issues raised in the ACCC's engagement included:

1. the ineffectiveness of the Horticulture Code of Conduct – significant concerns were raised about the current Code by a range of industry participants.
2. timing of payments to growers – alleged delayed payments in horticulture and payment structures in viticulture were discussed with the ACCC.
3. imbalances in bargaining power – imbalances in bargaining power exist in both industries and are exacerbated in viticulture by the oversupply of wine grapes.
4. contracting practices – the ACCC heard about varied and often informal contracting practices.
5. the influence of major retailers – industry participants spoke about the growing influence of major retailers in both industries.
6. the voluntary Australian Wine Industry Code of Conduct – concerns were raised about the lack of uptake of the voluntary Code.
7. fears about raising complaints – many growers are hesitant to make complaints due to a fear of being blacklisted or put on a trading holiday.

## What will the ACCC do?

Based on this ACCC engagement, its key areas of focus in horticulture and viticulture in the immediate future will be:

1. continuing to advocate strongly for significant changes to the Horticulture Code of Conduct. Key changes include the inclusion of pre-December 2006 contracts and the availability of penalties for Code breaches
2. working closely with industry to develop and implement an education and compliance program to share information about the Horticulture Code, following any changes to the Code
3. considering allegations of late payments by wholesalers in horticulture
4. promoting the potential benefits of collective bargaining. Collective bargaining appears to be an underutilised tool to combat imbalances in bargaining power in both industries
5. assessing standard form contracts across horticulture and viticulture to promote compliance with the upcoming unfair contract term law. The ACCC is currently reviewing a number of contracts and is happy to speak with industry participants who have concerns about any terms

6. assessing terms in wine supply contracts relating to exclusivity and timing of the release of pricing information in the context of the new unfair contract terms law
7. based on learnings from our engagement, further considering competition issues in viticulture
8. continuing to monitor grower, wholesaler and winemaker interactions with retailers, including in terms of the obligations set out in the Food and Grocery Code
9. exploring the use of an app that will allow for the anonymous provision of information and complaints to the ACCC. This app would enable participants in the horticulture and viticulture industries to provide information to the ACCC in a secure manner.

The reasons for these areas of focus are discussed in detail below.

## The ACCC's engagement

Horticulture and viticulture are important agricultural industries that have a presence in many areas in Australia. In the 2014–15 financial year, the horticulture and viticulture industries' gross value of production was approximately \$9.47 billion (\$8.7 billion horticulture and \$765 million viticulture).<sup>1</sup> This constitutes approximately 18.5 per cent of Australia's overall agricultural production.<sup>2</sup> It is therefore critical to Australian agriculture that horticulture and viticulture markets operate efficiently.

The ACCC is the Commonwealth statutory authority responsible for enforcing laws that promote competition, fair trading and consumer protection in Australia. The ACCC administers the *Competition and Consumer Act 2010* (CCA), which includes the Australian Consumer Law (ACL). Part of this role includes enforcing compliance with the Horticulture Code of Conduct. The Code applies to transactions between growers and wholesalers and includes requirements for wholesalers to publish written terms of trade and for growers and wholesalers to enter into written agreements.

The ACCC acknowledges that a number of reports about the horticulture and viticulture industries have been released over the past decades. This report focuses on issues that fall within the scope of the ACCC's work.

The ACCC undertook widespread engagement with the horticulture and viticulture industries in order to understand the competition and fair-trading issues the industries face.

This engagement included workshops held across Australia, led by ACCC Deputy Chair Michael Schaper and Commissioner Mick Keogh. The workshops were open to all interested parties. The purpose of the workshops was to speak with industry participants about the key issues affecting them. The ACCC also provided information about its functions and the laws it administers, including those relating to collective bargaining, unfair contract terms and industry codes. Workshops were held in:

- Shepparton, 6 June 2016
- Toowoomba, 10 June 2016
- Bunbury, 1 July 2016
- Griffith, 4 July 2016
- Murray Bridge, 18 July 2016
- Devonport, 1 September 2016.

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<sup>1</sup> Australian Bureau of Statistics, 7503.0 - Value of Agricultural Commodities Produced, Australia, 2014-15

<sup>2</sup> Australian Bureau of Statistics, 7503.0 - Value of Agricultural Commodities Produced, Australia, 2014-15

The ACCC also encouraged direct contacts with its Agriculture Unit for those who were unable to attend a workshop or who wanted to raise an issue privately.

The workshops provided the ACCC with a wealth of information about market issues. In order to widen the ACCC's engagement, the ACCC also met with a range of people and attended other events, including:

- Brismark (The Queensland Chamber of Fruit and Vegetable Industries Co-operative Ltd), Fresh State and the Melbourne Market Authority
- horticulture growers in Bundaberg
- the Winemakers' Federation of Australia
- wine grape, dried fruit and citrus growers in Mildura
- speaking at the AUSVEG National Horticulture Convention
- speaking at the Tri-Nut Conference 2016
- speaking at the Victorian Certified Seed Potato Authority (ViCSPA) Conference
- the Fruit Growers Tasmania Annual Conference.

Due to the fear of raising complaints expressed by many industry participants, names of individuals and businesses that provided the ACCC with information are not used in this report.

While the ACCC's formal program of workshops has concluded, its increased engagement with the industries will continue. The ACCC thanks everybody who participated in this process for their contributions.

## Key issues

### 1. The Horticulture Code of Conduct is not operating effectively

#### What the ACCC heard

Growers, grower representatives and wholesaler representatives were very critical of the current Horticulture Code of Conduct. As examples, a grower at Murray Bridge described the Code as a 'waste of space' and a Tasmanian grower representative suggested there has been no genuine change in industry practice since the Code's introduction. The ACCC did not encounter any stakeholders who were happy with the Code in its current form.

Feedback from growers and grower representatives across the country suggested non-compliance with the Code is so common that growers do not consider it worthwhile to report a breach of the Code. Growers in many locations argued that penalties should be available for breaches of the Code so that non-compliance can be dealt with effectively.

Under the Code, growers and wholesalers may only trade with each other if they have entered into a written agreement known as a Horticulture Produce Agreement (HPA). Despite this requirement, it was noted during the workshops that transactions regularly occur without the existence of a HPA. One grower representative in NSW observed that he did not know a grower that operated with a HPA. Growers in Bundaberg further stated that even where a HPA was in place, it did not reflect the reality of the transactions that ultimately took place. A number of representatives of wholesalers said growers can be particularly poor at signing and returning HPAs. They strongly argued that both sides need to take responsibility for ensuring HPAs are in place. Conversely, Bundaberg growers argued they rarely receive a signed agreement back from wholesalers.

Of most importance, given the purpose of the Code, many growers claimed they do not know whether they are dealing with an 'agent' or a 'merchant' in a given transaction. It is widely recognised in the industry that many traders use a 'hybrid' model,<sup>3</sup> not declaring whether they are an agent or a merchant until a transaction has been finalised. This hybrid model can reduce the transparency of transactions, as growers may not know when ownership of produce transfers or when payment should occur. Grower representatives in Griffith and Bunbury suggested that wholesalers may use the hybrid arrangement to avoid GST obligations.

The Code currently applies to wholesale transactions, and does not apply to transactions involving processors, exporters and retailers. Wholesaler representatives outlined their frustrations that the Code imposes a regulatory burden on their members that is not imposed on processors and, in particular, retailers. These representatives further argued that penalties should not be available for breaches of the Code, as there is no evidence of systemic failure in the market.

A number of industry representatives commented that there is a lack of education about the Code across the entire industry.

Despite the significant negative commentary, many stakeholders expressed positive views about the proposed changes put forward as part of the 2015 independent review of the Code conducted by Mark Napper and Alan Wein.<sup>4</sup> The general view was that these changes could lead to substantial improvements in industry practice, if there is buy-in from both growers and wholesalers. The industry is currently awaiting the Government's response to the independent review of the Code.

## **ACCC response**

The ACCC considers that the Horticulture Code is necessary to address imbalances in bargaining power between growers and wholesalers and to increase transparency in central market transactions. The ACCC considers the Code has the potential to be effective, but believes the original aims of the Code are not being achieved. The ACCC therefore supports significant changes to the Code.

The effectiveness of the Code is limited by the fact that it does not cover the entire industry. The grandfathering of pre-Code contracts (i.e. agreements entered into before 15 December 2006) has resulted in up to 80 per cent of horticulture produce sales contracts not being covered by the Code. As long as these agreements are exempt from the Code, there will continue to be reluctance by traders to enter into new Code-compliant supply arrangements.

Currently, the ACCC does not have the power to seek court ordered penalties or to issue infringement notices for non-compliance with the Code. The absence of meaningful penalties for Code breaches severely limits the ACCC's ability to enforce the Code and deter future non-compliance. The existence of infringement notices would allow the ACCC to take quick and low cost enforcement action in appropriate circumstances.

The ACCC therefore strongly believe the Code must:

- apply to pre-December 2006 contracts so that it has greater coverage, and meets its original purpose
- allow for penalties and infringement notices for breaches of the Code.

The ACCC also welcomes the proposal to introduce an obligation for parties to act in good faith into the Code.

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<sup>3</sup> For example, see Napper and Wein, Independent Review of the Horticulture Code of Conduct: Final Report, p.18

<sup>4</sup> See <http://www.agriculture.gov.au/ag-farm-food/hort-policy/code-of-conduct>

The lack of clarity around whether a wholesaler is operating as an agent or a merchant is an issue that has been discussed in reports dating back to the 1960s.<sup>5</sup> The ACCC believes the merchant / agent distinction is an important component of ensuring transparency in transactions with wholesalers and should be retained in the Code. This distinction provides growers with critical information about factors such as transfer of ownership and timing of payment.

While the ACCC's enforcement options are currently limited, it has taken action on twelve occasions since the Code was introduced. These consist of court proceedings in one matter and eleven court enforceable undertakings.<sup>6</sup>

### **Case study: Young Sang court enforceable undertaking**

In September 2016 the ACCC accepted a court enforceable undertaking from a Melbourne based fruit and vegetable wholesaler, Young Sang & Co. (Aust.) Pty Ltd (Young Sang) for breaches of the Horticulture Code of Conduct.<sup>7</sup>

Young Sang admitted that it breached the Code during 2015 when it traded in horticulture produce with a number of Queensland based growers without:

- HPAs, or
- preparing or making publicly available a document that set out the general terms and conditions under which it would trade with growers (Terms of Trade).

Young Sang undertook that it will not engage with growers without HPAs and Terms of Trade. Additionally, the undertaking requires Young Sang to implement a Code compliance program.

Should a new Code come into force, the ACCC will undertake widespread education and compliance activities to provide industry with information about the new Code. The ACCC will work closely with the industry, including the people it has met through the workshops, to provide clear and concise guidance about how the Code will operate. During the workshops, the ACCC heard that meaningful change would only occur if growers and wholesalers embrace the Code. The ACCC's compliance and education work will therefore be targeted at building broad industry compliance with the Code.

Following this initial compliance and education phase, the ACCC will take enforcement action in line with its Compliance and Enforcement Policy as required if breaches of the Code are identified.<sup>8</sup>

## **2. Timing of payments is a significant problem for growers**

### **What the ACCC heard**

In the horticulture industry, an issue that was consistently raised by growers was late or non-payment by wholesalers. Examples of allegations raised include:

- a grower in Shepparton indicated he did not receive payment for his produce until 3-4 months after the wholesaler took delivery
- in Bundaberg, a group of four growers were owed over \$1 million by an agent that subsequently went into administration. Several other growers also raised concerns about very significant delays in payment, including periods up to 3-4 months

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<sup>5</sup> Royal Commission report, Victoria Market, June 1960, para 54-57

<sup>6</sup> <https://www.accc.gov.au/business/industry-codes/horticulture-code-of-conduct/horticulture-code-investigations>

<sup>7</sup> <https://www.accc.gov.au/media-release/young-sang-admits-breaches-of-horticulture-code-of-conduct>

<sup>8</sup> <http://www.accc.gov.au/publications/compliance-and-enforcement-policy>

- one account at the Griffith workshop relayed the story of a grower who sent fruit to a wholesaler at the Sydney markets on three occasions but did not receive any payment.

Representatives of wholesalers argue these transactions are a very small proportion of the total number of transactions that take place and that few complaints have been raised about late payment issues through formal dispute resolution mechanisms. The growers the ACCC spoke to indicated they were hesitant to raise complaints for fear of damaging their relationship with the wholesaler or a reluctance to be seen as a troublemaker in the industry.

Representatives of wholesalers suggested some late payments by wholesalers are due to delayed payments by retailers.

The timing of payment is also an issue in the viticulture industry, but in a substantially different way. Under many wine grape supply agreements, growers only receive an initial payment some months after their grapes are delivered and it can take up to twelve months before full payment is received. Growers and grower representatives in the Riverina and Sunraysia regions raised concerns that this practice imposes substantial financial pressure on growers.

The ACCC understands that, where used, this payment structure is typically explicitly written into supply agreements. Representatives of winemakers indicated this practice is based on historical practices. The winemaking process can be lengthy, and this can place a significant financial burden on winemakers. Representatives of winemakers also noted this payment structure is set as a minimum standard in the South Australian *Wine Grapes Industry Act 1991* and the voluntary Australian Wine Industry Code of Conduct.

## **ACCC response**

Cash flow is critical for farmers, and small businesses in general, and delays in payment can cause significant financial stress. The Australian Small Business and Family Enterprise Ombudsman has recently outlined the harm that late payments can cause to small businesses and is proposing to hold a formal inquiry into the issue.<sup>9</sup> This inquiry would involve consulting with stakeholders more broadly on the key issues surrounding payment times. The ACCC will liaise with the Australian Small Business and Family Enterprise Ombudsman in relation to any late payment issues relevant to the Ombudsman's inquiry.

While the ACCC acknowledges the complaints about late payments in the horticulture industry are only allegations, the regularity with which this issue was raised suggests it is a wider problem. A failure to make payment within a specified timeframe can breach the CCA. The Horticulture Code contains requirements that a HPA must set a timeframe within which payment will occur and that payment must occur within this timeframe. The provisions of the ACL that prohibit misleading or deceptive conduct or unconscionable conduct may also be applicable.

The ACCC is assessing allegations of late payments to growers to determine whether the alleged conduct raises concerns under the Horticulture Code or the broader provisions of the ACL. The ACCC also plans to maintain a close watch on this issue, particularly in the context of any updated Horticulture Code.

The issue of the timing of payment in viticulture is more complex. The delayed payment structures in use for many contracts are ingrained within the industry.

<sup>9</sup> <http://www.asbfeo.gov.au/media-release-late-payments-vic-sb-festival>



The South Australian *Wine Grapes Industry Act 1991* sets out the below minimum requirements for payment timing.<sup>10</sup> This legislation is particularly significant as South Australia accounts for over 50 per cent of national wine grape production.<sup>11</sup>

Grapes delivered:	First payment	Second payment	Third payment
Before 1 April	One third by the end of the month following delivery	One third by 30 June	One third by 30 September
1 April to 1 May	One third by 31 May	One third by 30 June	One third by 30 September
After 1 May	Two thirds by 30 June	One third by 30 September	

Furthermore, the voluntary Australian Wine Industry Code of Conduct, which was agreed to by Wine Grape Growers Australia and the Winemakers' Federation of Australia, states that unless otherwise agreed, payment should occur in instalments of:

- one-third at the end of the month following the month of delivery
- one-third at the end of June
- the balance at the end of September.

The delayed payment structure used in many contracts in the wine industry unquestionably spreads the financial burden of delays in the winemaking process on to the grower. This continues to occur despite major winemakers being large corporations. However, as noted above, this payment structure is entrenched in the industry and changes to South Australian legislation and the voluntary Code would likely be required to bring about any change to this practice.

### 3. Significant imbalances in bargaining power exist across supply chains

#### What the ACCC heard

Imbalances in bargaining power underpin many of the concerns that were raised with the ACCC in horticulture and viticulture. The ACCC heard about significant imbalances in bargaining power between growers and wholesalers, growers and retailers, wholesalers and retailers, growers and winemakers and winemakers and retailers. Many growers noted they are price takers and have very little scope to negotiate with larger players in the supply chain.

In viticulture, there is a well-documented oversupply of wine grapes.<sup>12</sup> While this report does not focus on the oversupply issue, it continues to underpin the market dynamics in the industry. This further weakens the bargaining position of wine grape growers and may provide scope for opportunistic behaviour which takes advantage of this power imbalance.

Throughout the workshops, growers argued they carry significant risk in many transactions, with very little certainty in terms of returns. Growers suggest this lack of certainty comes from both environmental factors, such as the weather, and market practices, such as

<sup>10</sup> [http://wgcsa.com.au/wp-content/uploads/Guide-to-negotiating-the-sale-of-wine-grapes\\_Nov2013\\_v4.pdf](http://wgcsa.com.au/wp-content/uploads/Guide-to-negotiating-the-sale-of-wine-grapes_Nov2013_v4.pdf)

<sup>11</sup> Australian Bureau of Statistics, 7503.0 - Value of Agricultural Commodities Produced, Australia, 2014-15

<sup>12</sup> See for example The Senate, Rural and Regional Affairs and Transport References Committee, Australian Grape and Wine Industry, Final Report, February 2016



contracting arrangements. Growers pointed to a lack of notification about prices, delays in payments and a lack of forward contracts as examples of this uncertainty.

## **ACCC response**

The ACCC acknowledges that imbalances in bargaining power exist in horticulture and viticulture supply chains. Given the variance in size of participants in both industries, these imbalances will always exist to an extent; but more so in times of oversupply. Mechanisms that can reduce these imbalances are therefore important.

From a grower perspective, one potential option is collective bargaining. Collective bargaining is an arrangement where two or more producers can come together to negotiate with a buyer over terms, conditions and prices. The ACCC can approve collective bargaining when there are public benefits that would outweigh the detriments to competition. A group of businesses may sometimes appoint a representative, such as an industry association, to act on its behalf in negotiations.<sup>13</sup> Collective bargaining allows growers to collectively negotiate in circumstances where it may otherwise raise concerns under competition laws.

Collective bargaining could be a viable option for many growers in both horticulture and viticulture, and the ACCC is happy to have discussions with grower groups that have an interest. However, it should be noted that collective bargaining will only be effective where both parties agree to participate in negotiations.

Authorisation can also be sought for collective boycotts. A collective boycott occurs when a group of competitors agree not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group.

### **Case study: Collective bargaining by vegetable growers in Tasmania**

At the Devonport workshop, growers noted a collective bargaining arrangement through which the Tasmanian Farmers and Graziers Association (TFGA) negotiates with vegetable processor Simplot on behalf of growers is working well. While negotiations still present challenges, this arrangement has offered benefit due to the willingness of Simplot to negotiate with the group in good faith and the ability of the TFGA to effectively represent vegetable growers.

The ACCC granted authorisation to the TFGA in 2015 to allow them to continue to collectively negotiate the terms and conditions of growing contracts with vegetable processors in Tasmania.<sup>14</sup> The ACCC granted authorisation until March 2025 and TFGA members have been authorised by the ACCC to collectively bargain since 2004.

## ***Business to business unfair contract term protections***

From 12 November 2016 a new law will protect growers and small businesses from unfair terms in standard form contracts.<sup>15</sup> The law aims to address some of the power imbalances existing in business-to-business transactions where a small business has had limited or no opportunity to negotiate the terms of the arrangement. A contract term may be unfair if it causes significant imbalance, is not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and would cause harm to the other party if it were relied on. For example, a term that enable a wholesale or retailer to unilaterally vary quality requirements after an agreement has been made may be an unfair term.

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<sup>13</sup> See <https://www.accc.gov.au/publications/the-benefits-of-working-with-other-small-businesses-collective-bargaining-and-collective-boycotts>

<sup>14</sup> <http://registers.accc.gov.au/content/index.phtml/itemId/1182698/fromItemId/278039>

<sup>15</sup> <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>

The law applies to standard form contracts where at least one of the businesses involved employs less than 20 people, and the price payable under the contract is no more than \$300 000, or \$1 million if the contract is for more than 12 months.

The ACCC is considering standard form horticulture and viticulture contracts ahead of the new law coming into force.

## **4. There is substantial contractual uncertainty across horticulture and viticulture**

### **What the ACCC heard**

A key issue raised by wine grape growers, particularly in the Riverina and Sunraysia regions, was the notification of prices to growers by winemakers. Based on the information provided by growers and grower representatives, the ACCC understands the current process for many growers in warm climate areas is as follows:

- growers begin pruning in June and irrigating in August of each year
- from approximately August to September, winemakers begin contacting growers seeking to sign them up to supply agreements. These agreements generally do not contain any information about the price paid to growers
- winemakers provide growers with an indicative price no earlier than December each year
- growers do not receive a final price until after the produce has been delivered, with payment made over the subsequent year.

Growers state that 60-80 per cent of the growing process and expenditure takes place before they receive an indicative price in December. In Griffith, Murray Bridge and Mildura, growers and grower representatives raised concerns that this arrangement, where prices are not known at the time of signing the agreement, requires growers to carry almost all of the risk, without having any certainty on price. In Mildura, a grower argued that this practice ensures there is no competition among winemakers. Growers argue that a base price should be available in July-August to ensure they can accurately assess the profitability of their operations for the coming year.

Representatives of wholesalers said setting an indicative price will not work, as any indicative price will be inaccurate and will distort the market. They suggested there are too many variables that factor into the ultimate price, including international prices.

Growers also raised the use of exclusive supply provisions in contracts. In some instances, such contracts can prevent a grower from selling surplus grapes to other buyers, even after the volume requirements in the contract have been met. In these situations, growers may be forced to dispose of sellable grapes, reducing their potential income.

The ACCC heard the wine industry is trending towards the use of 'spot contracts', rather than long term agreements. In these contracts, growers are offered a certain price for a certain quantity in a one-off transaction. This largely mirrors the arrangements that winemakers have with retailers. Representatives of winemakers stated there are no long-term contracts with retailers for wine. Retailers will provide singular requests for a particular quantity and type of wine. While many of these relationships are ongoing, there is no certainty in the form of a long-term contract.

Information the ACCC received suggests highly varied and often informal contracting practices are used across horticulture. Growers indicated the use of oral contracts is still commonplace and that many relationships continue to rely on trust, rather than written agreements. Some growers appeared happy to continue with these historical approaches to

contracting, while others suggested this approach is outdated and provides no protection for growers when things go wrong. As noted, feedback indicates wholesale markets transactions are commonly taking place without a written agreement in the form of a HPA. One industry participant argued there is a strong resistance to paperwork in the industry.

The diversity of agreements was demonstrated by the ACCC's conversations with growers that supply processors. One fruit grower that supplies a processor had no written agreement for a particular year and relied on historical arrangements. The processor could therefore decline to purchase the grower's fruit at any time without any likely legal ramifications. Alternatively, growers in Tasmania and dried fruit growers in the Sunraysia region had detailed written contracts in place with processors.

Representatives of wholesalers stated that growers will often send unsolicited batches of produce to a wholesaler without any prior agreement.

Growers indicated that major retailers do not offer forward contracts. Growers will have an overarching agreement with the retailer and will then receive weekly or fortnightly communications setting out price and volume information for a particular order. The ACCC has spoken with growers who supply over 50 per cent of their produce to a single retailer under these types of arrangements. These agreements worked well for a number of growers the ACCC spoke with, but the lack of future certainty and heavy reliance on a single buyer does seemingly pose a risk for the grower.

There also appears to be varying practices in terms of the price information sought and received in transactions. For example, a grower at the Shepparton workshop stated that he would commonly send fruit to a wholesaler without having any information about what price he would receive for those goods. In contrast, a large grower in Toowoomba stated that nothing would leave his farm unless he had clear information about price.

## **ACCC response**

The ACCC acknowledges the historical arrangements in the wine industry and the market dynamics caused by the oversupply of wine grapes. However, the reported instances of growers being locked into contracts approximately three months before they receive any indicative price information is concerning. This process ensures that growers are required to commit to contracts, often for multiple years, without having critical information about likely returns. Importantly, this also ensures that winemakers are not competing on price at the time of signing growers, therefore potentially reducing competition between winemakers. If a grower's contract includes exclusivity clauses, they also have no opportunity to switch between winemakers if they do not like the price they are offered. However, the ACCC recognises that the voluntary Australian Wine Industry Code of Conduct provides that price notification must only occur by 15 December each year.

This practice appears to require growers to assume significant risk, without any indication about likely returns. Some growers remarked that if they had an upfront indicative price in July/August, they might even choose to not go through the full growing process if it would be unprofitable for that year. The ACCC is considering these arrangements further to determine whether they may raise concerns under the upcoming unfair contract term protections. The ACCC is also considering the use of exclusive supply provisions in this context.

The ACCC's initial engagement with the viticulture industry has led it to conclude that further examination of competition issues in the industry, including those relating to contracting practices, is required.

In horticulture, amendments to the Horticulture Code may assist to improve contracting practices in some instances. If pre-December 2006 contracts are covered by the Code, a far higher proportion of the industry will be required to operate with a HPA. This will formalise

many of the oral agreements that are currently in place. The absence of written agreements can leave parties to contracts vulnerable, particularly in circumstances where disputes arise. Should the merchant / agent distinction be retained in the Code, wholesalers will also be required to disclose whether they are a merchant or an agent in a far greater number of transactions. This will serve to improve the transparency of contracts.

A key issue in both industries appears to be a lack of future certainty. In many cases, market participants have very little information about prices or do not have forward contracts. For example, consider a fruit grower that does not have a written contract with a processor, or a winemaker that has no ongoing agreements with a retailer. In both instances, it is likely the processor and retailer could end the arrangements at any time without legal ramifications. This lack of certainty is likely to make investment unappealing or inefficient, and to reduce the future growth of the industries.

## **5. The influence of major retailers is significant in both industries**

### **What the ACCC heard**

In horticulture, commentary during the workshops in relation to dealing with major retailers was varied. A number of growers said they have very positive direct relationships. Other growers and grower representatives indicated that major retailers are difficult to deal with.

Growers and industry representatives noted a trend towards growers dealing directly with major retailers, rather than through wholesale markets. For example, it was suggested that independent greengrocers are the biggest buyers at the Melbourne markets, with major supermarkets using the markets to a varying degree, including to top up stock. At a number of workshops it was argued that retailers are now a key factor in terms of influencing prices that are available at wholesale markets.

Multiple growers and grower representatives suggested the major retailers will only use a small number of suppliers to source produce and may have exclusive supply arrangements in some instances. It was noted that in most cases medium-large scale growing enterprises would have the direct supply agreements with the retailers. A Tasmanian grower suggested the number of growers and agents is shrinking due to the dominance of big growers and the supermarkets.

Concerns raised by growers and wholesalers in horticulture about retailers included:

- difficulties raising and resolving disputes with retailers, including in relation to damage to pallets
- retailers imposing stringent quality standards and being quick to reject produce.

Winemaker representatives stated that retailer behaviours have significantly improved since recent ACCC court actions, although disputes do arise from time-to-time. These disputes largely refer to price issues. A prominent grower representative argued that retailers are extracting the greater margins in the supply chain, at the expense of growers supplying the domestic market.

Representatives of winemakers noted they would like to see alcohol products brought under the Food and Grocery Code when it is reviewed.

### **ACCC response**

The ACCC continues to closely monitor the relationships between suppliers and retailers, including through administering the Food and Grocery Code. As the Horticulture Code does not cover transactions with retailers, the Food and Grocery Code is an increasingly significant Code for the horticulture industry. The Code governs certain conduct by grocery

retailers and wholesalers in their dealings with suppliers.<sup>16</sup> Signatories to the Code include major retailers Aldi, Coles and Woolworths. Since it commenced, the ACCC has witnessed improved levels of compliance with the Code, but continues to monitor the Code closely. In this context, in August 2016 the ACCC publicly called for information from suppliers about any concerns they have with the conduct of the supermarkets and reinforced that complaints can be made on a confidential basis.<sup>17</sup>

#### **Case study: Woolworths ‘Mind the gap’ litigation**

In December 2015 the ACCC instituted proceedings in the Federal Court against Woolworths Limited, alleging it engaged in unconscionable conduct in dealings with a large number of its supermarket suppliers, in contravention of the ACL.

The ACCC alleged that in December 2014, Woolworths developed a strategy, approved by senior management, to urgently reduce Woolworths’ expected significant half-year gross profit shortfall. It is alleged that one of the ways Woolworths sought to reduce its expected profit shortfall was to design a scheme, referred to as “Mind the Gap”. It is alleged that under the scheme, Woolworths systematically sought to obtain payments from a group of 821 “Tier B” suppliers to its supermarket business.

This matter is still before the Court.

The Food and Grocery Code does not cover relationships concerning the supply and retail sale of alcohol. The review of the Food and Grocery Code will consider the products that should be covered by the Code. The ACCC considers this an appropriate time to consider whether alcohol transactions should be brought under the Code.

## **6. There is significant concern that the voluntary Wine Industry Code of Conduct is not effective**

### **What the ACCC heard**

Some growers and grower representatives were concerned about the lack of uptake of the Australian Wine Industry Code of Conduct. In Griffith, it was stated there has been no take-up of the voluntary Code by winemakers in the Riverina region.

Representatives of winemakers noted that while the majority of major winemakers have adopted the voluntary Code, they would still like to see an increased number of signatories. They suggested the major concern raised with the Code is the issue of indicative pricing, as growers consider indicative pricing information is provided too late, and some winemakers do not think they should be required to provide this information at all.

In Griffith, growers raised the issue of a possible prescribed or mandatory Code as administered by the ACCC. It was suggested this might afford some additional protections to growers. Wine industry representatives in Murray Bridge also suggested the voluntary code is not having a material impact on the industry and a mandatory code should be considered. Representatives of winemakers did not support a mandatory code. They suggested a mandatory code would come at significant cost to the industry and would not solve the problems the industry is facing.

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<sup>16</sup> <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

<sup>17</sup> <https://www.accc.gov.au/media-release/accc-reminds-suppliers-of-their-rights-under-food-and-grocery-code>



## ACCC response

The Australian Wine Industry Code of Conduct is a voluntary code that is not administered by the ACCC.<sup>18</sup> Peak industry groups Wine Grape Growers Australia and the Winemakers' Federation of Australia developed the Code.

The Code contains a number of highly valuable elements, such as dispute resolution mechanisms and minimum requirements for agreements. However, some growers have been critical of elements of the Code, such as its provision on the timing of indicative pricing information. Despite this, the ACCC considers that greater take-up of the Code would benefit the industry, including through ensuring greater consistency of practice.

The February 2016 report by the Senate Standing Committee on Rural and Regional Affairs and Transport recommended that if targets for increase uptake of the Australian Wine Industry Code of Conduct are not met, the Government, in consultation with representative organisations for growers and winemakers, should reconsider the development of a mandatory code before the end of 2017.<sup>19</sup> The Government is yet to respond to this report.

## 7. There is a fear of raising complaints in the industries

### What the ACCC heard

A fear of raising complaints, both to businesses with greater bargaining power and to regulators such as the ACCC, was raised consistently during the workshops. In one workshop, the wine industry was described as a 'retribution state', in which complaints from growers would be met with harsh consequences by winemakers.

Growers have spoken of threats of being blacklisted or placed on a 'trading holiday' (i.e. the wholesaler or retailer ceasing to trade with them either permanently or for a set period). In Bundaberg, a number of growers said they had been put on a trading holiday by a wholesaler in retaliation for raising a complaint. A citrus grower in NSW stated that he would not dare raise a complaint with a major retailer.

The fear of raising complaints has also been a barrier to the ACCC's engagement work. For example, a number of large growers in Western Australia indicated they would have liked to attend the Bunbury workshop, but did not due to concerns about being seen to be speaking with the ACCC.

Representatives of wholesalers suggested that low complaint levels and the lack of use of mediation services were illustrative of the horticulture industry operating effectively. They argued that growers should use existing dispute resolution mechanisms in a timely manner if they want to raise disputes.

Some growers also raised a fear of changing agents. In Bunbury, multiple growers stated that they did not feel comfortable changing agents, as this may be seen as causing trouble. Representatives of wholesalers said if growers do not trust their wholesaler they should switch to another and suggested there is a culture of not wanting to change agents in the industry. Another wholesaler representative suggested 80 per cent of growers are locked into long-term arrangements with wholesalers and the remaining 20 per cent will switch between wholesalers.

A grower representative at the Murray Bridge workshop said whistle-blowing protections need to be reviewed so growers can raise issues without fear of retribution.

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<sup>18</sup> [http://www.wineindustrycode.org/online\\_code.html](http://www.wineindustrycode.org/online_code.html)

<sup>19</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Rural\\_and\\_Regional\\_Affairs\\_and\\_Transport/Australian\\_wine\\_industry/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Australian_wine_industry/Report)

## ACCC response

The extent of blacklisting and trading holidays in horticulture and viticulture is not clear, due to a lack of available evidence about such alleged conduct. The issue of retribution against growers was raised at almost every workshop, but the ACCC has not been provided with specific examples. However, what is clear is that growers believe this type of activity occurs on a regular basis and the threat of such conduct prevents growers from raising disputes. Based on this fear of retribution, the ACCC does not believe a lack of reported complaints is conclusive evidence there are no fair trading issues in the industries.

Concerns about the possible repercussions arising from raising disputes are not only a significant problem for industry participants; they also hinder the ACCC's ability to obtain information about issues in the industries. Since the ACCC can generally only enforce the law through the courts, it needs evidence in order to take action for a potential breach of the CCA.

The ACCC is happy to accept complaints on a confidential basis. While this can make pursuing enforcement actions challenging, the ACCC has options that can allow it to obtain information without revealing the identity of complainants. This is exemplified by the ACCC's successful action against Coles for unconscionable conduct against its suppliers.

### **Case study: Coles unconscionable conduct**

In 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 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 Federal Court found that Coles had engaged in unconscionable conduct and ordered Coles to pay combined pecuniary penalties of \$10 million and costs. Coles was also ultimately required to refund a further \$12 million to suppliers.

As part of the ACCC's investigative strategy, it accepted complaints from suppliers on a confidential basis. The ACCC then used the information obtained confidentially, to make information requests using the mandatory information gathering powers available under the CCA. This enabled the ACCC to obtain information from a range of sources, rather than just from suppliers that made a complaint.

The ACCC also has powers under section 51ADD of the CCA that enable it to request information or documents from a trader that they are required to keep, generate or publish under an industry code, such as the Horticulture Code. This power can enable the ACCC to obtain information and documents without having to disclose the identity of the complainant.

Further, the ACCC is exploring the use of an app that will allow for the anonymous provision of information and complaints to the ACCC. This app would enable participants in the horticulture and viticulture industries to provide information to the ACCC in a secure manner.

Some horticulture growers suggested they are hesitant to switch between agents for fear of being seen as a troublemaker. However, it is not clear if this is a commonly held view as other growers indicated they had sold to different agents. Competition between wholesalers is critical to the efficient operation of horticulture markets, as it ensures growers have multiple sales options at the markets and provides options for buyers. Broadly speaking, there appears to be a significant number of different agents and merchants operating out of



central markets. As an example, the Sydney Produce Market indicates it is home to over 123 fresh produce wholesalers.<sup>20</sup>

## Next steps

The ACCC will undertake further work on the issues identified in this report as part of its focus on competition and fair trading issues in the agriculture sector.

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<sup>20</sup> <http://www.sydneymarkets.com.au/markets/produce-market/product-market-overview.html>