



## UNFAIR TRADING PRACTICES - Consultation Regulation Impact Statement

November 2023

## Summary

Ensuring fair and equitable business practices exist throughout the supply chain is essential for the ongoing prosperity of all small and medium sized businesses. In Australia there are over 2000 small and medium wine producers and approximately 6000 grape growers, a vast majority based in regional parts of the country. Although there are several large players in the market, most wine and winegrape producers fall under \$10m turnover and the sector is considered moderately concentrated. Downstream of the supply chain, the level of concentration is substantially higher. In financial year 2022, one major liquor retailer, the Endeavour Group, accounted for over 45 percent of Australia's online alcohol retail market and the second largest, the Coles Group, just over 16 percent.<sup>1</sup> Together with Metcash Limited and Aldi, the four largest retailers are thought to have approximately 70 percent of the liquor retail market.<sup>2</sup> Like many other agricultural industries, this structure often gives rise to commercial negotiations between small businesses and larger businesses downstream of the supply chain. These negotiations occur between winegrape growers and wine producers and between producers and retailers.

A particular challenge for many agricultural businesses and especially those in the wine sector is that businesses must make production and sales decisions well in advance of entering the market. Capital assets are often owned and operated for a length of time before becoming profitable for the investor. Where a processor makes a significant capital investment to manufacture a product, they are often doing so without future pricing information nor a guaranteed return on the investment. The same may apply in processor-producer relationships where the producer needs to make similarly significant capital investments well in advance of gaining a return. This often requires that they have a long-term sales contract in place.<sup>3</sup> The ACCC's Perishable Agricultural Good Inquiry report highlights problems within agricultural supply chains, discussing the issues above in the context of information failures.

As the wine sector continues to suffer the economic shock that came from losing the substantial China export market, many businesses throughout the supply chain are under unprecedented levels of financial stress. These conditions have put significant downward pressure on pricing throughout the supply chain. Low profits fuel a perception, held by some in the sector, that risk is being unfairly allocated upstream. Associated hard bargaining - not necessarily a sign of market failure - exacerbates economic hardship and discontent. Many businesses struggle to differentiate unfair practices from healthy competition and the correct identification of harmful and anti-competitive trading practices is challenging. With this lack of clarity, many businesses avoid litigation due to a combination of lack of confidence, power imbalances, the prohibitive costs and risks involved and fear of retribution.

But not all wine producers operate in such a low profit environment. Unlike typical agricultural commodities, wines and the grapes they are made from are highly differentiated products that can command significantly different prices. Many of the characteristics that make certain grapes and wines superior to others are quite subjective. These less quantifiable characteristics encompass wine's diversity, arguably its most important attribute, and what makes it so highly sought after by consumers. It is this same attribute that can lead to challenges when making wine or undertaking grape quality assessments for the purpose of affecting price. Some degree of pricing ambiguity is broadly accepted in the ultra-premium wine market, where growers trust buyers to assign prices based on winemaker grades of the vineyard or the resulting wines. The ability for producers to achieve significant profits from producing superior quality promotes innovation and generates healthy competition. However, at the lower price 'commodity end' of the market or when grades are assigned in conjunction with a 'fair market price' pricing mechanism, the grading process is more likely to be questioned.

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<sup>1</sup> Statista Research Department (2022)

<sup>2</sup> IBISWorld, Industry Report: Liquor retailing in Australia, IBISWorld, 2023-24

<sup>3</sup> ACCC (2020) [Perishable Agricultural Goods Inquiry Report](#) p10

## **Support for strengthened legislation**

Australian Grape & Wine supports the intent of the proposed legislative changes to provide greater levels of protection against unfair trading practices to both consumers and businesses. We believe that the threat of civil penalties will serve as a deterrent to businesses whose practices may be harmful but fail to meet the definition of unconscionable under current Australian Consumer Law. Individual businesses, and particularly small businesses, face inhibitory challenges when it comes to accessing affordable and reliable remedies for unlawful practices. At present, where there are industry wide complaints or suspicions of anti-competitive or unfair trading conduct, it can be difficult to satisfy the evidentiary requirements of the courts to determine a contravention to the Competition and Consumer Act 2010. Strengthening legislation will improve this situation. This submission does not provide a position on the optimal policy option but serves to highlight the potential benefits and risks to the wine sector, along with issues to be considered if this legislative reform is further refined.

In agriculture, a one-size fits all approach is not always appropriate as innovation requires a degree of flexibility in how we trade, particularly when it comes to assessing and rewarding quality. Compliance requirements should be as clear as possible to businesses but at the same time allow for judgements relating to fairness to take account of broader benefits and the unique characteristics of certain industries. To reduce confusion, the definition of unfair should be complementary to the recent unfair contract terms amendment under section 24 of the Australian Consumer Law. To varying degrees, the options presented are liable to introduce ambiguity as to how 'unfairness' is determined. An associated risk is that business confidence will be impacted by concerns that unfair penalties may be unduly applied. This risk is likely to impact smaller business confidence disproportionately. Therefore, clear guidance and education aimed at retaining healthy competition and innovation is imperative and any legislative change should be accompanied by investment by the Government to support businesses to understand their rights and obligations.

The benefits of greater protection will accrue to business if there is an appropriate level of enforcement to serve as a deterrent against unfair trading practices, and even more so if remedies are available for businesses found to have been treated unfairly. Lack of enforcement could fail to deliver the desired improvements, a common complaint attached to certain industry codes. A balanced and appropriately resourced approach is key to achieving an outcome. There is insufficient information in the Regulatory Impact Statement relating to how complaints would be prosecuted. For example, the statement is silent as to whether individual complainants would be entitled to litigate against unfair practices or whether enforcement would be confined to Federal and state government agencies. Opening access to private litigators could increase the degree of business uncertainty arising from a policy change, particularly where judicial precedent remains under-developed.

## **The winegrape market**

Through the Code of Conduct for Australian Wine Grape Purchases many winegrape growers are offered protection on matters unique to the wine sector that are not covered under Australian Consumer Law. Our Code remains voluntary and being industry led, does not provide for penalties. When the ACCC conducted its Winegrape Market Study in 2019, the two representative bodies under the Wine Australia Act were Wine Grape Growers Australia (trading as Australian Vignerons) and Winemakers' Federation of Australia. Both agreed that there was scope to strengthen the Code and improve its coverage. At that time, there was a lack of evidence of industry-wide support for further regulation through a mandatory code due to the often-restrictive nature of mandatory codes and concerns that excessive regulation would deter wine producers from entering into supply contracts with growers. Winemakers' Federation of Australia highlighted challenges in treating winegrapes similarly to other agricultural commodities (such as those protected under the Food and Grocery Code or the Dairy Code) noting that winegrapes are not homogenous goods. Since the two former peak bodies came together in 2019 to form Australian Grape & Wine there have been significant amendments to the Code resulting in some improvements in the winegrape market. For example, the Code now requires the use of Industry Endorsed Standard Procedures for certain quality

assessments, there are stricter requirements for determining price and an expanded dispute resolution procedure. As a result of these improvements, the ACCC in its 2021 follow up report, acknowledged progress made since the 2019 report, noting that many potential Unfair Contract Terms had been removed from supply agreements. However, at that time there remained a need for further progress with respect to price transparency and shortening payment terms. In 2022 the Federal Government announced a grant program for Improving Market Transparency in Perishable Agricultural Goods Industries. Wine Australia, Australian Grape & Wine and the Inland Wine Regions Alliance were successful in securing funding undertaking a project to improve winegrape market price transparency through forecasting and a recently launched price indicator platform. We are currently working to address pricing data gaps in the domestic retail market.

Whilst we believe that our work has had a very positive impact on the winegrape market and that harmful practices are the exception rather than the norm, we have ongoing concerns that if issues do arise, seeking recourse is costly and risky and a major deterrent to small businesses from taking legal action against offending businesses. This risk is common to any industry where there are bargaining power imbalances, including those covered by industry codes. The industry expects to see further improvements with the introduction of new unfair contract term legislation in November 2023. Additional legislation covering trading practices more broadly will close out any outstanding loopholes and provide protection to spot market traders without contracts.

### **The Wine Retail Market**

Domestic winemakers compete in a crowded wholesale market. They not only compete with one another, but with the large retailers' private label wines and imports. Contraction of the wine export market following the loss of exports to China has exacerbated the reliance of wine producers on the domestic market and their exposure to domestic market risk. Like grape growers, wine producers suffer significant lead times and decisions regarding production occur months and often years before the product is sold. The ACCC in its Winegrape Market Study (2019) acknowledged the significant risk that winemakers bear in their dealings with buyers due to lack of certainty regarding volumes and pricing, particularly where they suffer the risk of products being de-listed at short notice.

The high concentration level in the wine retail sector has been facilitated by the ability under Australian Consumer Law for liquor retailers to vertically integrate into wine production and vineyard ownership, storage, packaging and bottling facilities. Consolidation of wine retail over the last two decades has changed and continues to change the operating environment for many wine producers. Retailers have been able to substantially grow their own 'home brand' segment, which means that for many winemakers, the retailers are now both their major customer and major competitor. This is thought to suppress retail and wholesale pricing, and any downward pricing pressure on wine also hits the winegrape market. Although low pricing alone is not considered unfair, when combined with lack of certainty about the market, businesses become more vulnerable. Any additional protection that would improve pricing information and certainty has the potential to afford some benefits.

We would be happy to discuss this submission further if required.

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