



## Submission to Unfair Trading Practices consultation

Australian Grape & Wine  
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## Submission

Australian Grape and Wine Incorporated (Australian Grape & Wine) appreciates the opportunity to comment on the Unfair Trading Practices consultation on the design of proposed general and specific prohibitions.

Consistent with the feedback provided to the Unfair Trading Practices - Consultation Regulation Impact Statement (RIS) 2023, Australian Grape & Wine supports the prohibition of unfair trading practices along with a range of remedies being available for any breach of a specific or general unfair trading practice prohibition, including civil pecuniary penalties.

Australian Grape & Wine agrees with the suggested approach to add:

- a general prohibition that is principles-based; and
- specific prohibitions targeting certain unfair practices.

Contingent on this support is that protections are extended to business-to-business transactions. The consultation paper highlights the impact of increased market concentration, a situation that is prevalent in the liquor retail markets where consolidation has substantially changed the operating environment for many wine producers. Many of the wine retailers grow and make wine themselves and then bottle what is referred to as a "buyers' own brand". They can alternatively purchase wine in bulk for the same purpose or they can carry private label products exclusively available at their stores. Retailers have been able to substantially grow their own branded segment, which means that for many winemakers, the retailers are now both their major customer and major competitor. This has not only impacted the ability of businesses to exert market power to the detriment of consumers, but to the detriment of business, and particularly SMEs. This is discussed in further detail in the Australian Grape & Wine submission to the [Grape and Wine Regulatory Impact Inquiry](#) pages 13-14.

Whilst it is accepted that in some agriculture sectors, industry specific concerns are addressed through existing ACL protections, including industry Codes, the grape and wine sector does not currently have the protection of an industry-specific Code. Certain practices could be deterred through the proposed amendments. These include, but are not limited to:

- lengthy payment terms, particularly in the winegrape market;
- 'hand-shake' agreements, not in writing, that may be ambiguous or vague;
- information asymmetries that provide retailers an unfair advantage relating to market information and consumer insights;
- retailer ability to influence consumers towards their own products through various forms of choice editing. In wine retail markets, this has allowed them to significantly increase their market share in a short space of time, to the potential detriment of consumer choice;
- short notice product de-listings, unforeseen requirement for retail spends and unnecessary and damaging production or logistical processes; and
- opacity in the market - consumers are currently ill-informed when they make purchasing decisions as they cannot easily identify private label or buyer own branded products from products owned by winemaking businesses.

In the Australian Grape & Wine submission to the Unfair Trading Practices RIS 2023, it was stated that policy options relating to unfair trading practices such as a general prohibition on unfair trading practices would be supported. Although not seen as a silver bullet fix, a general prohibition, along with the threat of civil penalties, will likely serve as a deterrent to businesses whose practices may be harmful but fail to meet the definition of unconscionable under current Australian Consumer Law.

The wine industry is currently the subject of a Grape and Wine Sector Regulatory Impact Analysis, led by Dr Craig Emerson, looking at both the grape and wine markets. In parallel to that analysis, the Senate has referred the voluntary Code of Conduct for Australian Winegrape Purchases to the Rural and Regional Affairs and Transport References Committee for an inquiry into the adequacy of that Code.

Australian Grape & Wine has put a position to Government via submissions to both inquiries stating that, along with strengthening of unfair contract terms and the potential for Government to reform unfair trading practices laws, that a voluntary Code, with strong uptake, can be an effective tool for managing the winegrape market without the need for further regulatory intervention. However, members of Australian Grape & Wine are also amenable to an industry Code on the proviso that it covers the entire grape and wine supply chain, including the major liquor retailers. It is noted by Australian Grape & Wine and its members that regulation is costly to both Governments and industries and many of the problems could be addressed through this new law.

The ACCC submitted that the unfair contract terms provisions listed in section 25 of the ACL could serve as a guide to businesses and consumers about the types of conduct which would be likely to be considered an unfair trading practice. It outlines examples of the kinds of terms relevant to both the consumer and small businesses. The inclusion of small businesses should therefore be reflected in the proposed reform and, for clarity, in the short title of the regulation.

*Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?*

No, it is not made sufficiently clear if or when the proposed protections would extend to business-to-business conduct.

*Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections?*

A list of potentially unfair practices is provided on the previous page of this submission. Many of these relate to business-to-business transactions.

*What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices?*

With regulation comes a risk that business confidence will be impacted. It can also reduce flexibility to respond to innovation. To avoid such risk, it will be important that sufficient clarity is provided around compliance obligations and that small businesses at the very least are afforded the same protections as consumers. The benefits of these greater protections will also only accrue to businesses if there is an appropriate level of enforcement to serve as a deterrent against unfair trading practices.

Additionally, businesses should be provided guidance materials about how to avoid contraventions to the new legislation and also towards understanding any protections they have in their own business-to-business transactions.

*Do you have views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings?*

It is not clear why a general prohibition would not apply to all unfair trading practices, and so by default, would apply to business-to-business dealings. It should be clearly noted that there are issues relating to retail market concentration that have enhanced the ability of businesses to exert market power in a way that could be found to be unfair. This is not just harming consumers but businesses that transact in heavily concentrated markets.

## About Australian Grape & Wine

Australian Grape & Wine is Australia's national association of winegrape and wine producers with the role to help forge a political, social and regulatory environment - in Australia and overseas - that enables profitable and sustainable Australian Grape & Wine businesses. To do this, activities focus upon the objective of providing leadership, strategy, advocacy, and practical support. Australian Grape & Wine represents small, medium and large winemakers and winegrape growers.

The grape and wine businesses that Australian Grape & Wine supports are unique in agriculture as a value-added product with regional exports and food and wine tourism, making a significant contribution to Australia's rural and regional economies and driving economic growth. There are over two thousand producers and approximately six thousand grape growers, a vast majority based in regional Australia. These businesses support employment of over 160,000 people in winegrape growing and production.

Australian Grape & Wine is recognised as the representative organisation for winegrape and wine producers under the *Wine Australia Act 2013* and is incorporated under the *SA Associations Incorporation Act 1985*. Australian Grape & Wine has a history working with the Australian Government to develop and implement policy that is in the best interests of winegrape growers and winemakers across Australia.

## Contact

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