



## Submission to Treasury

Strengthening protections against unfair contract terms

September 2021

## Who we are

Australian Grape and Wine Incorporated (Australian Grape & Wine) is Australia's national association of winegrape and wine producers. Our activities focus on providing leadership, strategy, advocacy and support that serves Australian wine businesses now and into the future.

We represent the interests of the more than 2,500 winemakers and 6,000 winegrape growers working in Australia. Our role is to help forge a political, social and regulatory environment that enables profitable and sustainable Australian wine businesses. These businesses make a significant contribution to growing regional economies by driving growth in jobs, regional exports and food and wine tourism.

Australian Grape & Wine's voluntary membership represents over 75% of the national winegrape crush. We represent small, medium and large winemakers, and winegrape growers from across the country. We represent small, medium and large winemakers and winegrape growers from across the country. Policy decisions by the Australian Grape & Wine Board require 80% support, ensuring no single category can dominate the decision-making process and guaranteeing policy is only determined if it provides significant industry benefit. In practice, most decisions are determined by consensus.

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

## Submission

Ensuring fair and equitable business practices exist throughout the supply chain is essential for the ongoing prosperity of small businesses and indeed, the wine sector, particularly as the sector recovers from impacts of COVID-19 and the substantial loss of the China market. The principle that UCTs should not occur in contracts features in our voluntary Code of Conduct for Wine Grape Purchases where Signatories whose agreements contain any unfair terms are likely to be found to be in breach of the Code. This provides strong protection for Australia's winegrape growers selling to signatories to the Code. The wine producing sector in Australia has only a moderate level of concentration and the vast majority of producers fall under the threshold of \$10m turnover. The market for wine only the other hand, is concentrated and Australia's two largest retailers account for over 60% of sales<sup>1</sup> and have significant market power. It is important that the sector is suitably protected downstream of the supply chain against practices that lead to an imbalance in the parties' rights and obligations to the detriment of wine producers.

Australian Grape & Wine supports the intent of the proposed legislative changes that would provide courts with the power to impose a pecuniary penalty for unfair contract terms in standard form contracts. Damaging behavior such as unilateral variations to contracts has the potential to undermine the profitability of the sector. The threat of penalties will be a more effective deterrent to unfair trading practices than the current law. However, penalties should not be imposed on any business without a fair trial.

Therefore, Australian Grape & Wine supports changes that would:

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<sup>1</sup> Wine Australia (2019) Australian Wine Market Report October 2019 at <https://winewa.asn.au/wp-content/uploads/2019/10/Australian-wine-market-report-2019.-2.pdf>

- increase the small business definition threshold s- a business that employs fewer than 100 employees or has a turnover for the last income year of less than \$10,000,000.
- remove the contract value threshold (so that the regime captures an expanded class of small business standard form contracts)
- that the law now applies to both consumers and small businesses.

Australian Grape & Wine does not support that a contract term that is the same or similar in effect as a term that has been found to be unfair in another proceeding should be presumed to be unfair.

Rather, Australian Grape & Wine holds the view that singular contract terms must be considered in the context of the entire contract. Therefore, providing the courts the power to make orders or impose injunctions on any contract containing a similar term to one that has been found to be unfair by a court without that contract being put before the court, is far too broad brush an approach. Unless the entire contract is identical or substantially the same, terms should be presumed to be fair until proven otherwise.

The ACCC currently states on its website that 'The fairness of a particular term must be assessed in light of the contract as a whole, including any other terms that may offset the unfairness of the term'.<sup>2</sup> It remains possible that a provision may be unfair in some circumstances, but not in others. Conversely, if a particular term was decided by a court in one case to be fair, this does not mean it will always be fair.

A scenario in the wine sector that would be problematic under the proposed amendments is where a grape grower agrees to lengthy trading terms in return for a higher price. On its own, that provision might be found to be to the detriment of a grape grower selling grapes, and hence unfair, but if it is found that the purchase price was sufficiently compensatory then that same term could be considered quite fair and reasonable.

It is accepted that there is lack of any absolute certainty about what makes a term 'unfair' under the Australian Consumer Law. In certain circumstances, additional benefits can counterbalance a potentially unfair term. This adds to the justification to consider standard form contracts on a case-by-case basis.

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

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<sup>2</sup> ACCC *Determining whether a contract term is unfair* sourced at <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair> on 20 September 2021