ACCC submission

Submission in response to the Grape and Wine Sector Regulatory Impact Analysis

October 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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Contents

Executive summary

The ACCC has previously undertaken a substantial body of work in relation to the Australian wine grape sector. The ACCC's Wine Grape Market Study (2018-19) involved extensive consultation with wine grape growers and winemakers, and identified a broad range of concerns relating to:

- quality assessments,
- price transparency in warm climate regions,
- payment periods,
- the voluntary industry-led *Code of Conduct for Australian Winegrape Purchases* (the Wine Code),
- dispute resolution, and
- unfair contract terms.

The ACCC also completed a Follow-up Review in 2021, which provided a snapshot of the industry's progress on implementing the Market Study's recommendations. The Follow-up Review highlighted ongoing concerns around price transparency, lengthy payment periods under grape supply agreements and the relatively small number of signatories to the Wine Code.

The purpose of this submission is to provide an overview of the ACCC's previous work in relation to wine grapes and highlight a number of key developments since 2021 which may be relevant to the current review of the grape and wine sectors. In particular, we draw attention to:

- the global oversupply of red wine grapes which has created major issues for both growers and winemakers,
- the industry's progress on implementing the recommendations from the ACCC's Market Study Final Report, and
- the announcement by the Australian Government that it intends to amend the Australian Consumer Law to prohibit unfair trading practices.

The ACCC notes that its work on wine grapes has primarily focused on the 'warm climate' grape growing regions of the Riverland, Murray Valley and Riverina. However, the grape and wine industries are diverse and some of the ACCC's findings may not be relevant to growers or winemakers in the cool climate regions. The ACCC is particularly mindful of the potential for unintended consequences of additional regulation on those segments of the grape and wine market beyond the warm climate regions.

It should also be noted the ACCC's Market Study and Follow-up Review did not include an in-depth analysis of the impact of concentration in Australia's liquor retailing market or on its relationship with the winemaking sector. More broadly, the ACCC has observed a number of acquisitions of independent liquor retailers by Endeavour, Australia's largest liquor retailer. The ACCC notes the potential competitive harm resulting from the removal of independent competitors from the market, including through the loss of differentiated offerings in local areas, which can negatively impact consumer choice. On 10 October 2024, the Australian Government introduced the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* to Parliament, which will introduce a new fit for purpose merger regime in Australia.

Both the ACCC's Market Study and Follow-up Review did not conclude that a mandatory code was necessary to remedy market failures in the wine grape sector.

The ACCC submits that mandatory industry codes should only be prescribed for industries in response to evidence of market failure, where the code is necessary to support the efficient operation of markets or for the welfare of consumers. There must also be evidence indicating self-regulation has failed to address the problems in the industry. Any prescribed mandatory codes would require significant additional resources to ensure the ACCC is able to undertake compliance and enforcement activities.

The ACCC stresses the importance of seeking up-to-date information from both growers and winemakers in assessing the current state of the market and considering what regulatory and non-regulatory options may be available to address industry issues.

1. Introduction

1.1. The ACCC welcomes the opportunity to respond to the Grape and Wine Sector Regulatory Impact Analysis being led by Dr Craig Emerson.

1.2. The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The ACCC's primary responsibilities are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth) and Australian Consumer Law (ACL), regulate national infrastructure, and undertake market studies and inquiries.

1.3. One of the ACCC's enduring priorities is ensuring the protections of competition and consumer laws and small business industry codes of conduct are applied to small businesses and the agriculture sector.

Overview of ACCC engagement with the wine grape sector

1.4. In 2018-19, the ACCC conducted a self-initiated market study into the Australian wine grape industry to examine competition, contracting practices, transparency and risk allocation in wine grape supply chains. The market study was initiated in response to concerns from grape growers located in warm climate grape growing regions that winemakers were inefficiently shifting risks onto growers and that there was a lack of competition between winemakers for grapes. The market study relied on information provided voluntarily by industry participants and other relevant stakeholders.

1.5. In September 2019, the ACCC published the Wine Grape Market Study Final Report. The Market Study observed that the features of the wine and grape industries are unique when compared to many other agricultural sectors:

- Across Australia's 65 grape growing regions there is considerable variation in the quality of, and prices for, wine grapes.

- There are over 2000 winemaking businesses in Australia, comprising a diverse range of business models and sizes, from family-owned boutique winemakers to publicly listed multinational companies.

- The long lead times associated with grape and wine production can limit producers' capacity to quickly respond to changing market signals.

1.6. The Market Study identified that the Australian grape and wine sectors have tended to fluctuate between prolonged periods of growth and oversupply. A report by the Winemakers' Federation of Australia (now Australian Grape and Wine) found that up to 92% of growers in warm climate regions were unprofitable in 2015.[1] The Market Study found that lengthy oversupply conditions had weakened the bargaining position of growers, reducing their ability to negotiate better supply agreement terms or engage in effective dispute resolution because growers prioritised securing a buyer for their grapes over the medium to long term.

1.7. The Market Study identified five key areas of concern in the warm climate grape growing regions:

- **Quality assessment**: Growers had limited visibility over and insight into the wine grape quality assessment process and lacked trust in the efficacy of the process. Growers were concerned that winemakers had the ability to take advantage of quality assessment processes to reduce the prices of their grapes or reject unwanted produce.

- **Price transparency**: Growers lacked access to timely, reliable and usable price information. The lack of price transparency, particularly in warm climate regions, undermined the ability for growers to make informed production decisions and respond to market conditions.

- **Contracting practices**: There was a significant imbalance of bargaining power between growers and winemakers because:

    - most growers are small businesses,
    - grapes from warm climate regions are largely viewed as homogeneous,
    - wine grapes are highly perishable, and
    - the prevalence of variable price agreements means growers lack price certainty.

  This had led to contracting practices favouring winemakers, and in some instances terms the ACCC considered were likely to be unfair contract terms under the Australian Consumer Law.

- **Competition**: There is a high degree of market concentration in each of the warm climate regions and only limited competition for grapes between different regions.

- **Voluntary code**: While the industry-led Wine Code had increased access to dispute resolution in some instances, it had not been widely adopted by winemakers. Further, the ACCC considered the Wine Code was not working as

[1] Winemakers Federation of Australia, Vintage Report (July 2015), accessed 7 October 2024.

intended to balance the interests of growers and winemakers. However, the Market Study did not find that a mandatory code was necessary at the time.

1.8. Following the conclusion of the Market Study, the ACCC engaged with a number of large winemakers to seek to address a range of potential unfair contract terms identified during the market study. In June 2020, the ACCC announced several winemakers had agreed to amend contract terms relating to grape quality assessments, terms permitting winemakers to unilaterally vary agreements, one-sided termination clauses, and lengthy payment timeframes.[2]

1.9. In December 2021, the ACCC released a Follow-up Review of the Wine Grapes Market Study assessing the sector's progress in implementing the Market Study's recommendations. The Follow-up review requested feedback from a range of key industry stakeholders regarding the implementation of the Market Study recommendations.

1.10. The Follow-up Review identified the industry had made progress on a number of the ACCC's recommendations, including by increasing the number of signatories to the Wine Code and strengthening some of the Wine Code's provisions by removing the indicative pricing regime and updating guidance on quality assessment procedures. However, the Follow-up Review concluded the industry had so far failed to address the ACCC's concerns about long payment timeframes and the lack of price transparency in warm climate regions.

1.11. Ultimately, the Follow-up Review concluded there were opportunities for further improvements on key issues in the near future and therefore the ACCC did not recommend introducing a mandatory code for the wine grape sector at that time.

1.12. These issues are discussed in detail in both the Market Study Final Report and the Follow-up Report.

Changing market conditions in the wine and grape sectors

1.13. The Market Study and Follow-up Review were published in 2019 and 2021 respectively. It is important the current inquiry seeks up-to-date feedback from industry participants and considers the issues raised by the ACCC in light of the current market conditions.

1.14. In particular, the ACCC draws attention to the following developments:

- The imposition of anti-dumping duties on Australian wines by China's Ministry of Commerce in March 2021 caused a major and immediate shock to the Australian wine industry, effectively closing access to the Chinese market. Prior to the imposition of these duties, China was Australia's most valuable wine export market. These duties were removed in March 2024 and while exports to China are resuming they remain a small fraction of historical exports to China.[3]

[2] https://www.accc.gov.au/media-release/fairer-terms-for-wine-grape-growers-but-concerns-remain-about-payment-periods

[3] Wine Australia, Export Report: 12 months to 30 June 2024, 26 July 2024, accessed 7 October 2024.

- There has been a return to oversupply conditions, particularly in markets for red wine grapes. This has led to a significant decrease in red grape prices with growers in certain regions receiving less than their costs of production. In response, the red grape crush has decreased in both the warm and cool climate regions.[4] A report commissioned from Charles Sturt University for Wine Australia identified that currently, the production of wine grapes is not a viable business for many growers in the warm climate grape growing regions such as the Riverina.[5]

- Global wine consumption trends have shifted, with consumers drinking less wine overall while also moving away from 'commercial' wines in favour of more premium wines.[6]

- Several large winemakers in Australia are looking to consolidate or divest their portfolios, for example:

    - On 6 August 2024, Treasury Wine Estates (Australia's third largest winemaker by grape intake) announced its intention to divest its commercial wine brands.[7]

    - On 4 September 2024, the ACCC commenced an informal review of Accolade's proposed acquisition of Pernod Ricard's Australian wine businesses.[8]

- In April 2024, Accolade Wines engaged in negotiations with the CCW Co-operative (a large grower co-operative based in the Riverland), offering a voluntary buyout to CCW members wishing to exit the industry.[9] This offer was rejected by the vast majority of CCW members.[10]

- In October 2023, Wine Australia released is Grape Price Indicators dashboard.[11] The Dashboard is intended to improve price transparency by providing information on key indicators affecting wine grape prices in the warm climate regions.

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[4] Wine Australia, State of the Wine Market: August 2024, 13 August 2024, accessed 7 October 2024.

[5] Charles Sturt University, Profitability Project report to Wine Australia, 31 March 2024, accessed 7 October 2024.

[6] Wine Australia, State of the Wine Market: August 2024, 13 August 2024, accessed 7 October 2024.

[7] Treasury Wine Estates, ASX Announcement: Treasury Premium Brands impairment, intention to divest Commercial brand portfolio and F24 Group EBITS, 6 August 2024, accessed 7 October 2024.

[8] ACCC, Public informal merger reviews register – Australian Wine HoldCo Limited – Pernod Ricard Winemakers Pty Ltd, accessed 7 October 2024.

[9] Accolade Wines, https://sustainableriverlandwine.com.au/, accessed 7 October 2024.

[10] ABC Rural, Riverland wine growers united in rejecting contract buy-out amid industry uncertainty, 23 May 2024, accessed 7 October 2024.

[11] Wine Australia, Grape Price Indicators Dashboard, accessed 7 October 2024.

2. Warm and cool climate grape regions

2.1. There are 65 wine grape growing regions in Australia.[12] The ACCC's analysis of the wine grape sector has focused primarily on the 'warm climate' grape regions of the Riverland, the Murray Valley and the Riverina. The remainder of Australia's growing regions are collectively referred to as the 'cool climate' regions.

2.2. It is important to note that parts of the ACCC's Market Study were focused on addressing issues in the warm climate regions, and certain recommendations were only intended to apply to the purchase of wine grapes from those regions.

2.3. The focus on the warm climate regions was primarily because complaints and concerns raised with the ACCC have generally related to issues in the warm climate regions. However, there are various features of the warm climate regions that the ACCC considers makes them more susceptible to bargaining power imbalances between growers and winemakers:

- Markets for warm climate wine grapes are highly concentrated and there are significant bargaining power imbalances between growers and winemakers. There also appears to be limited competition for grapes.
- Warm climate grapes are generally used for 'commercial' or bulk wine products destined for export markets. Warm climate grapes are generally viewed by winemakers as a homogeneous product and grapes from these regions tend to lack strong geographical branding.

2.4. In contrast, in the cool climate regions there is a much greater focus on the attributes and quality of wine grapes as these grapes are used for more premium wines. Cool climate growers are better able to compete on the differentiated characteristics of their grapes, and generally receive much higher prices per tonne than their warm climate counterparts. Winemakers may work more closely with cool climate growers to ensure grapes are of the expected quality. Lastly, there are a greater number of smaller winemakers operating in these regions. These factors lead to some growers having more bargaining power in the cool climate regions.

2.5. The ACCC submits that it is important for the current review to take note of and account for potential differences between distinct markets for wine grapes to ensure that potential industry-wide regulation does not have unintended consequences for the market, particularly for smaller winemakers located in the cool-climate regions. The ACCC considers a detailed competition analysis may be required to account for the different market dynamics for warm and cool climate grapes, export and domestic markets for wine, and differences between large and small winemakers in dealings with grape growers or liquor retailers.

[12] Wine Australia, Australian wine regions and varieties, accessed 7 October 2024.

3. Contracting practices between winemakers and grape growers

3.1. As set out in the consultation paper, growers have previously raised concerns about:

- quality assessment processes,
- prices and a lack of price transparency,
- long payment times, and
- unfair contract terms.

Quality assessment processes

3.2. The Market Study identified a range of issues associated with quality assessment processes for wine grapes:

- While most grape supply agreements clearly set out quality requirements and bonuses or penalties for meeting (or failing to meet) quality specifications, there was a lack of clarity and certainty around the methods winemakers used for quality assessments. This could make it difficult for growers to dispute winemaker decisions about quality.
- Some grape supply agreements gave winemakers broad discretion to vary quality specifications in grape supply agreements, or grower manuals, either within or between seasons.
- Growers had limited visibility over the quality testing process, with samples taken at the vineyard or the weighbridge needing to be tested at the winery.
- Some quality assessment processes (such as colour, aroma, flavour, taste and mouthfeel) may rely on subjective sensory assessments rather than objective testing and sampling methods where they are available.

3.3. These issues created a lack of confidence among growers in the quality assessment process, and there were allegations that winemakers could use the quality assessment process to their advantage by reducing prices for grapes or rejecting grapes entirely. Winemakers denied they were taking advantage of quality requirements in this way.

3.4. The Market Study made four recommendations to address the concerns around quality assessment practices, including:

- encouraging the industry to work towards developing uniform national standards for testing and measurement of various quality requirements,
- adopting objective testing and sampling methods where available,

- updating industry guidance to reflect current best practice, and
- ensuring grape supply agreements clearly specifying the testing and sampling methods winemakers will use to assess grape quality.

3.5. The Follow-up Review observed that the Australian Wine Research Institute has since created Industry Endorsed Standard Procedures (IESPs) for sugar and colour assessments, which represent the current best practice measurements for each. Australian Grape and Wine and the Australian Wine Research Institute have also updated their guidance on *Winegrape Assessment in the Vineyard and at the Winery*,[13] which provides guidance on best practice for quality assessments. The Wine Code has also been updated to require all grape supply agreements to clearly outline any standards the grapes will be assessed against and requires winemakers to adopt objective quality assessment measures or Industry Endorsed Standard Procedures where available.[14]

3.6. The ACCC recommends the reviewer seek additional feedback from growers to assess whether perceptions of the quality assessment process have improved, and also consider whether there is clear evidence that winemakers have taken advantage of a lack of clarity or certainty over quality requirements to reduce prices for or reject grapes.

Price transparency

3.7. Price transparency is a key issue when considering market efficiency.

3.8. The Market Study found that grape supply agreements in the warm climate regions are most commonly variable price agreements. Under the Wine Code, these agreements require winemakers to pay growers a ‘fair market price’ for the grapes which is notified to growers prior to harvest. However, fixed price and spot market contracts are also available. Because warm climate grape prices are strongly correlated with bulk wine export prices, it is difficult for winemakers to provide price estimates or lock in prices well in advance of harvest. This means that growers commonly need to make production decisions without knowing what price they are likely to receive for their grapes.

3.9. The Market Study concluded that insufficient price transparency in the warm climate regions is likely to be distorting the competitive process, and improved transparency would be beneficial for the industry by:

- allowing growers to make more informed production decisions,
- encouraging competition through switching and promote efficiency, and
- assisting growers to dispute low prices.

3.10. In order to meet these objectives, pricing information must be forward-looking, timely and reliable.

[13] Australian Grape and Wine, Winegrape Assessment in the Vineyard and at the Winery, February 2022, accessed 7 October 2024.

[14] Australian Grape and Wine, Code of Conduct for Australian Winegrape Purchasers (version 2.4), Part 5, accessed 7 October 2024.

3.11. To address these issues, the Market Study Final Report recommended:[15]

- The 'indicative pricing' scheme should be removed from the Wine Code and all grape supply agreements.
- Warm climate grape grower representative organisations should deliver accessible, relevant and timely analysis of market trends to warm climate growers (**Recommendation 5**).
- For grapes purchased from warm climate regions, wine grape buyers should be required to provide pricing information to Wine Australia. Wine Australia should aggregate and publish this information *by winemaker* for each variety in each warm climate region before the end of the year (**Recommendation 6**).

3.12. The Follow-up Review observed that grower industry associations had undertaken work to provide growers with more market information. Further, the Wine Code was amended following the Market Study to remove the 'indicative price' announcement framework, which has been replaced by a requirement to pay a 'fair market price'. However, the industry had not implemented Recommendation 6 from the Market Study and winemakers continued to strongly oppose that requirement. The Follow-up Review noted that without winemakers providing this information, very limited reliable pricing information is available to growers and growers under variable price contracts find it difficult to assess whether they are receiving a 'fair' price.

3.13. Since the release of the Follow-up Review, Wine Australia has developed the Grape Price Indicator dashboard, which was partially funded by the Department of Agriculture, Fisheries and Forestry under the *Improving market transparency in perishable agricultural goods industries* grant program.[16] The Dashboard is intended to provide a current summary of the key drivers of inland winegrape prices in Australia and provide an indication of the forecast direction for grape prices ahead of the next vintage. ABARES has also included forecasts for wine grapes in its quarterly Agricultural Commodities Report.[17]

3.14. To date, the industry has not adopted Recommendation 6 from the Market Study.

3.15. The ACCC recommends the review seek feedback from wine grape growers located in warm climate regions to consider whether price transparency in the wine grape industry has markedly improved in light of more recent developments.

Payment timeframes

3.16. Both the Market Study and Follow-up Review highlighted the ACCC's significant concerns around the lengthy payment timeframes that were prevalent in grape supply agreements. Many growers will not receive full payment for their grapes for up to 9 months following delivery of the grapes.

[15] ACCC. Wine Grapes Market Study Final Report, pp 10-11, accessed 7 October 2024.

[16] DAFF, Improving market transparency in perishable agricultural goods industries, accessed 7 October 2024.

[17] ABARES, Agricultural Commodities Reports, accessed 8 October 2024.

3.17. Under the *Wine Grapes Industry Act 1991* (SA), the South Australian Minister for Agriculture has set the following mandatory payment timeframes:[18]

For grapes delivered	First payment	Second payment	Third payment
Before 1 April	1/3rd by the end of the month following the month of delivery	1/3rd by 30 June	1/3rd by 30 September
1 April to 1 May	1/3rd by 31 May	1/3rd by 30 June	1/3rd by 30 September
After 1 May	2/3rds by 30 June	1/3rd by 30 September	

3.18. The Wine Code has adopted the South Australian requirements as a minimum payment timeframe, but signatories are free to enter into agreements containing shorter payment timeframes.[19] In response to the Follow-up Review, Australian Grape and Wine advised it is encouraging winemakers to revise their payment practices and the Wine Code Committee has encouraged winemakers to adopt shorter payment times.

3.19. The Follow-up Review also noted there is some evidence that large winemakers are adopting shorter payment timeframes in contracts with growers, notwithstanding the longer payment timeframes set out in the Wine Code.

3.20. The ACCC maintains that, outside of South Australia, such lengthy payment terms may constitute unfair contract terms under the ACL (discussed below).

3.21. The ACCC strongly supports reducing the payment timeframes for wine grape supply agreements under the *Wine Grapes Industry Act 1991* (SA) and the Wine Code. The ACCC maintains that all large winemakers should be required to pay for grapes in full within 30 to 60 days of the final delivery of grapes, as set out in Recommendations 7 and 8 from the Market Study.

Unfair contract terms

3.22. The Market Study identified a range of terms in grape supply agreements that may constitute unfair contract terms (UCTs) under the Australian Consumer Law, including:

- first right of refusal clauses that require growers to sell excess grapes to a winemaker or enter a new supply agreement without requiring the winemaker to match competitors' offers,
- clauses giving winemakers a broad, unilateral right to vary quality specifications or unfettered discretion to set prices without reference to any objective standards or benchmarks,

[18] Wine Grape Industry Act 1991 (SA), s. 6(1); South Australian Government, [Wine Grapes Industry Act 1991 order by Minister](), The South Australian Government Gazette, 18 March 2004, p. 819, cls. (1)(a)–(c), accessed 7 October 2024.
[19] Australian Grape and Wine, Code of Conduct for Australian Winegrape Purchasers (version 2.4), section 4.2.

- clauses giving winemakers the right to terminate agreements with growers when grapes become surplus to requirements, for any reason and at short notice, and
- lengthy payment periods.

3.23. As noted above at paragraph 1.8, some winemakers agreed to amend their grape supply agreements following engagement with the ACCC. However, winemakers were generally unwilling to reduce lengthy payment periods.

3.24. While it is likely that grape supply agreements have improved since the Market Study, the ACCC has relatively limited visibility over the terms of grape supply agreements. For example, the Follow-up Review did not seek copies of winemakers' contracts and winemakers do not publish their agreements.

3.25. On 9 November 2023, new laws came into effect prohibiting businesses from including or relying on unfair contract terms in standard form small business and consumer contracts. Businesses can be subject to significant pecuniary penalties for breaching these laws. While these laws are likely to have broad application in the wine grape sector, particularly in the warm climate regions, they only apply to contracts entered into or amended on or after 9 November 2023.

3.26. We would strongly encourage growers who are concerned their grape supply agreement may include UCTs to lodge a confidential complaint with the ACCC.

Concerns around potential retribution

3.27. The Market Study identified that growers have significant concerns about damaging their relationships with winemakers in two key ways:

- Firstly, winemakers may have the ability to use quality assessment processes to downgrade or reject grapes that are surplus to requirements or for the purposes of retribution. As set out in Figure 7.3 in the Market Study, a significant proportion of growers considered that engaging in dispute resolution would be likely to harm future dealings with winemakers.
- Secondly, grape growers in certain regions, particularly the Riverina, had concerns about switching winemakers or supplying more than one winemaker out of concern that they would be viewed as 'disloyal'. They were concerned that if the industry returned to oversupply conditions they may find it more difficult to secure a buyer for their grapes.

3.28. The ACCC notes that concerns about the potential for retribution may have a negative effect on growers' ability or willingness to negotiate terms or enforce their rights even in the absence of specific instances of retribution.

3.29. There was a spike in the number of disputes between growers and winemakers in 2017-18 and 2018-19, with 84 disputes raised under the Wine Code. However, since 2019-20, the number of disputes under the Wine Code has averaged around 5 per year, suggesting growers may not feel confident to raise disputes.[20]

[20] Australian Grape and Wine Code Committee, Annual Reports on the Code of Conduct for Australian Winegrape Purchases, accessed 8 October 2024.

3.30. The ACCC considers that the return to oversupply conditions, particularly with respect to the red wine grape market, is likely to exacerbate concerns about and the potential for retribution against wine growers.

4. Regulation of the wine grape sector

4.1. At the time of the Market Study in 2019 and the Follow-up Review in 2021, the ACCC did not find that a mandatory code was necessary to address any market failure in the wine grape sector.

4.2. Since the Follow-up Review, an additional 17 winemakers have signed the voluntary Wine Code, bringing the total number of signatories to 84. While the number of signatories represents a small proportion of the estimated 2150 winemakers in Australia,[21] it includes around twelve of Australia's 20 largest winemakers.[22] Therefore, the Code is likely to apply to a significant proportion of Australia's overall grape crush. However, coverage of the Wine Code is likely to vary considerably by region.

4.3. The ACCC considers there are likely to be significant tensions between encouraging more winemakers to sign up to the Wine Code while also working to strengthen the terms of the Code. In general, the more onerous the Code (for example, by requiring shorter payment timeframes or more onerous quality assessment procedures), the less likely more winemakers are to become signatories.

4.4. The ACCC has observed that the progress in attracting new signatories to the Code appears to have stalled. A challenge with all voluntary codes is that the more prescriptive they are, the more costly they are to comply with and the less likely it is that businesses sign up. This is a significant shortcoming of voluntary codes, and likely to undermine further attempts to strengthen the existing voluntary Code. The ACCC notes that since the conclusion of the Follow-up Review, there have only been two relatively minor amendments to the dispute resolution provisions under the Code:[23]

[21] Wine Australia, Australian Wine Sector at a glance, 23 January 2024, accessed 8 October 2024.

[22] Winetitles, Table 18: Australia's largest wine companies by winegrape intake, accessed 8 October 2024.

[23] [23] Australian Grape and Wine, Code of Conduct for Australian Winegrape Purchasers (version 2.4), p 3, accessed 8 October 2024.

REVISION HISTORY

Version	Date Issued	Section	Changes
2.0	3 September 2020		Full review of entire document
2.1	22 December 2020	6.1 (b) 3.3 (a)	Addition of the words 'unless it is required for urgent interlocutory relief' Insertion of the words 'entered into from 1 July 2021'
2.2	22 September 2021	1.6 1.6	Insertion of the word 'alleged' Referral of a Code breach requires approval by the Board of Australian Grape & Wine prior to referral.
2.3	9 December 2022	1.6	Insertion of the words 'after a Dispute Resolution process has failed to resolve the Dispute'. Revocation of previous change regarding requirement for Board approval for referring a breach.
2.4	29 January 2024	Appendix 1&2	Simplification of the actions required during the dispute resolution process.

4.5. However, it should also be noted that the true impact of the Wine Code is difficult to assess due to the lack of visibility over terms in grape supply agreements. In particular, while:

- the Code sets minimum standards for winemakers to adhere to, winemakers are free to and in fact do adopt terms that are more favourable to growers, and
- non-signatories are not bound to implement the Code they may still be acting in a manner that is broadly consistent with the Code.

Prescribed industry codes under the CCA

4.6. The ACCC notes the purpose of this review is to assess the costs and benefits of a range of potential regulatory and non-regulatory responses to issues in the grape and wine sectors.

4.7. Unlike with voluntary industry codes, industry participants can be required to comply with a prescribed mandatory code without opting in and this can facilitate the code containing stronger obligations than a voluntary code. However, obligations and the associated regulatory burden should only be imposed through a mandatory code where this is absolutely necessary to support the efficient operation of the market.

4.8. In considering whether a prescribed mandatory code is required for the grape or wine sectors, the ACCC recommends the review adopt the framework set out in the Treasury's *Industry Codes of Conduct Policy Framework* (2017).[24] Relevantly, this Framework provides that:

- The Government will only prescribe mandatory or voluntary codes in very limited circumstances, where it is absolutely necessary for supporting the efficient operation of markets or the welfare of consumers.

[24] Treasury, Industry Codes of Conduct Policy Framework, 2017, accessed 7 October 2024.

- Prescribed codes will only be considered where there is strong evidence of market failure which is negatively affecting industry participants or consumers, and that the market cannot or will not overcome these market failures.
- Identifying market failures does not automatically mean a prescribed code is required. A full range of policy responses must be considered to identify the appropriate response to specific issues.

4.9. The ACCC observes that, where an industry code is warranted, it must be tailored to the industry and problems they are seeking to address.

4.10. The Treasury Framework defines a market failure as problems with the operation of a market that prevents it from producing optimal outcomes. This harms industry participants and consumers because resources cannot flow to their best use. It is important to note that an imbalance in bargaining power does not, in and of itself, constitute market failure.

4.11. The ACCC's Market Study and Follow-up Review have not indicated that a prescribed mandatory code has been necessary to remedy market failures in the wine grape sector to date. As noted above in Section 1, there have been several developments affecting the industry since the ACCC's last in-depth assessment which may ameliorate or exacerbate previously identified issues.

4.12. Should the reviewer recommend the introduction of a mandatory code, the ACCC notes the importance of ensuring:

- any obligations under a mandatory code are clearly enforceable,
- the code includes appropriate compliance and enforcement mechanisms, and
- any bodies responsible for the administration of the code are adequately resourced to perform the associated functions.

4.13. The ACCC currently administers and enforces nine prescribed mandatory codes, each of which requires significant resourcing. The ACCC submits that an effective prescribed mandatory code for the grape and/or wine sectors would each require significant additional resources to ensure the ACCC is able to support the implementation of the code and undertake compliance and enforcement activities as appropriate.

4.14. The ACCC considers that in order to be effective, any code for the grape and wine sectors would need to be uniquely tailored to the industry and account for the significant diversity of wine grape and winemakers business models, including but not limited to differences between:

- warm and cool climate regions
- small, medium and large winemakers
- domestic and export markets for wine.

4.15. Given there are more than 2000 winemakers in Australia, and the diversity of business models employed by winemakers in different segments of the market, the ACCC submits a mandatory code for wine grape purchases is likely to be significantly more complex to implement and enforce than other mandatory codes administered by the ACCC.

4.16. Further, the ACCC notes the complexities inherent to grape and wine production means the introduction of a mandatory code presents a heightened risk of adverse or unintended consequences. Accordingly, the ACCC submits that if the review recommends the introduction of a mandatory code, a working group consisting of industry and government stakeholders should be established to support the code development process, ensure the terms of any code are fit for purpose and do not have unintended consequences for different parts of the industry.

Unfair trading practices reforms

4.17. On 16 October 2024, the Government announced it would seek to amend the Australian Consumer Law to ban unfair trading practices impacting both consumers and suppliers. The Treasury will undertake further consultation on the design before seeking to legislate a general prohibition on unfair trading practices. The Government intends that the legislation will also prohibit a number of specific unfair trading practices.[25]

4.18. Depending on how the prohibition on unfair trading practices is ultimately framed, these reforms may also provide an avenue to address certain practices that are prevalent in the wine and grape sectors which may be unfair.

4.19. As set out in the ACCC's submission to the Treasury's Consultation Regulation Impact Statement on *Protecting consumers from unfair trading practices* released on 31 August 2023,[26] the ACCC considers that the introduction of an unfair trading practices prohibition will set improved standards for business behaviour, promote competition, and support greater efficiency, innovation and productivity. This could prevent a range of unfair business practices that may cause harm to small businesses, including:[27]

- large businesses using threats of commercial retaliation in order to dissuade smaller businesses from raising complaints or exercising their legal rights, and
- large businesses using their stronger bargaining power to pressure smaller suppliers into amending contract provisions that results in worse outcomes for the smaller supplier.

[25] The Hon Anthony Albanese MP, Prime Minister of Australia, *Albanese Government to stop the rip offs from unfair trading practices*, 16 October 2024.

[26] The Treasury, Protecting consumers from unfair trading practices (CRIS), 31 August 2023, accessed 7 October 2024.

[27] ACCC, Submission to Treasury Consultation Regulation Impact Statement on unfair trading practices, November 2023.

5. Retail markets for finished wine

5.1. The ACCC's Market Study did not conduct a detailed analysis of markets for finished wines or the impact of private label wine brands, except to the extent that these issues are relevant to markets for wine grapes.

5.2. Relevantly, the Market Study and Follow-up Review observed that:

- the majority of Australia's wine production is exported,
- around 40% of Australia's wine production is sold in the domestic retail market,
- around 15-20% of Australian wine is sold 'on-trade' (e.g. to restaurants, bars and clubs), and
- around 10% of Australian wine is sold through direct channels (e.g. cellar doors, winery websites and wine clubs).

5.3. The Market Study highlighted that the domestic liquor retailing market is highly concentrated, with the four largest retailers or their affiliates accounting for around 84% of the market. The high degree of concentration may act as a significant constraint on the wholesale price of wine, which in turn is also likely to constrain the prices winemakers offer to growers. Industry research referred to in the Market Study also indicated that the growth in private label wines had contributed to downward pressure on wine grapes.

5.4. More broadly, at the retail level the ACCC has considered several acquisitions of independent liquor retailers by Endeavour, the largest liquor retailer in Australia. Across several merger reviews, the ACCC has observed potential competitive harm by the removal of independent competition, including the loss of differentiated offerings in local areas, such as premium or local range, pricing and promotions and other differentiating offers that are important for consumer choice. In addition to local market concerns, the ACCC has also observed a serial acquisition pattern by Endeavour whereby the combination of acquisitions over time could have adverse competitive impacts on a regional or broader geographic level.[28] Serial acquisitions are a key challenge with existing merger laws in Australia where there are limitations on the ability to consider them before market power has been accumulated and challenges in assessing the combined effect on competition.[29]

5.5. Relevant to these issues, on 10 October 2024 the Australian Government introduced the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (Bill) into Parliament which will introduce a new fit for purpose merger regime in Australia. Subject to the passage of the legislation, the new regime will introduce mandatory notification thresholds and will include an aggregation mechanism to ensure serial

[28] ACCC, Statement of Issues, Endeavour Group Limited – proposed acquisition of the Prince Consort Hotel, 14 December 2023, p 15.

[29] ACCC, Submission to Treasury Competition Taskforce, Consultation paper on merger reform, 31 January 2024, p 9.

acquisitions are adequately notified to the ACCC.[30] In introducing the Bill, the Treasurer also announced the Government will consider designation requirements for certain sectors, including liquor retailing, meaning additional notification requirements within liquor retailing may be put in place in future.[31] The Bill also introduces the ability for the ACCC to consider the cumulative effect of a series of serial acquisitions when considering whether a notified acquisition may have the effect of substantially lessening competition.[32]

5.6. The ACCC notes the Food and Grocery Code was subject to a review earlier in 2024. In response to that review, some wine industry stakeholders submitted that the Food and Grocery Code should cover wine and liquor products. In particular, Australian Grape and Wine submitted that:[33]

> *The provisions in the Code line up very neatly with a vast majority of the issues raised by wine producers such as how products are delisted, the funding of promotions, quality specifications, changes to supply chain procedures, product ranging, shelf space allocation and range reviews, intellectual property rights, confidential information, and timeframes for acceptance of price increases. These types of protections would induce significant improvements to supply agreements between wine producers and liquor retailers.*

5.7. Ultimately, the Food and Grocery Code review did not recommend the extension of that code to liquor retailers.

5.8. Since the conclusion of the Food and Grocery Code review, the Senate Economics Reference Committee has established an inquiry into 'Big box' retailer price setting. A 'big box' retailer refers to a retail store that occupies a large physical footprint and offers a variety of products and broad product mix to its customers.[34] The Senate Inquiry may also consider issues analogous to those considered in the Food and Grocery Code review and the current grape and wine review.

5.9. While the question of whether the Food and Grocery Code should be extended to cover a broader range of retailers, or other specific regulations are required for different sections of the retail market (such as the winemaker/retailer relationship) is ultimately a matter for Government, the ACCC submits the reviewer should consider options that rely on general provisions of the competition and consumer law and not on industry-specific regulation.

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[30] Treasury, Merger reform for a more competitive economy: Government response to consultation, 10 October 2024, p 2.

[31] Commonwealth, Parliamentary Debates, House of Representatives, Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 second reading speech, 10 October 2024, p 2.

[32] Commonwealth, Explanatory Memorandum: Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, p 56.

[33] Dr Emerson, Independent Review of the Food and Grocery Code of Conduct Final Report, June 2024, p 32, accessed 7 October 2024.

[34] Senate Economics References Committee, 'Big Box' Retailer Price Setting inquiry, accessed 7 October 2024.