



# Wine grapes market study

## Follow-up review

December 2021

## Contents

Executive summary.....	2
1. Introduction .....	6
1.1. Australia’s wine grapes sector .....	6
1.2. The ACCC’s wine grapes market study.....	8
1.3. Developments in the sector since the market study .....	8
1.4. Follow-up review.....	11
2. Progress on the ACCC’s recommendations .....	12
2.1. Improving quality assessment processes.....	12
2.2. Improving price transparency.....	14
2.3. Shortening payment times .....	17
2.4. Strengthening and expanding the voluntary code .....	19
2.5. Improving winemakers’ contracting practices.....	22
2.6. Conclusion.....	23
Attachment A – the ACCC’s recommendations.....	24

## Executive summary

The Australian Competition and Consumer Commission (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 primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure, and undertake market studies.

In 2018-19, the ACCC conducted a market study into the wine grapes sector in Australia, following feedback and complaints from sector participants.

Our market study focused on the 3 inland 'warm climate' grape growing regions: the Riverina, the Murray Valley, and the Riverland, which are located in southern New South Wales, north-western Victoria, and eastern South Australia. These regions typically account for more than two-thirds of Australian wine grape production (by volume).

Our market study examined contracting and trading practices between winemakers and wine grape growers, and found a range of concerning practices and outcomes resulting from the bargaining power imbalances and information asymmetries that exist. We made a range of recommendations across 5 key areas:

- improving quality assessment processes
- improving price transparency
- shortening payment times
- strengthening and expanding the sector's voluntary industry code, and
- improving winemakers' contracting practices.

In our final report, we committed to conducting a follow-up review to determine how the sector was progressing in implementing these recommendations. This report outlines the findings of that follow-up review. As part of this follow-up review, we consulted with a range of key stakeholders across the 3 inland warm climate regions.

The wine grapes sector is an important contributor to the Australian economy. We are very conscious of the challenges facing the wine grapes sector at the moment, and we have factored those challenges into our consideration of whether further action is needed.

### The sector has made important progress in a range of areas

In the last 2 years, the wine grapes sector has made important progress in implementing a number of the recommendations made in our September 2019 final report.

For example, Australian Grape and Wine Incorporated (AGWI) has made significant efforts to improve the coverage and strength of the voluntary industry code that major winemakers have signed up to. Many of the ACCC's recommendations have been progressed through amendments to the Code, and the Code's increasing coverage makes it a logical focus for further improvements in the future. As the Code's coverage expands and commercial norms in the inland regions continue to improve, non-signatories will find themselves increasingly out of step. The ACCC continues to encourage all winemakers to sign up to and implement the practices detailed in the Code.

Some submissions to this follow-up review argued that AGWI had prioritised adding signatories at the expense of a 'fair Code'. The ACCC agrees that there is room for improvement on some key recommendations, as discussed below. There are clear tensions

in balancing the strength of the Code and the willingness of winemakers to commit to it. There are, however, concrete opportunities in the Code review scheduled in 2022 to continue to improve key elements, most notably shortening payment times.

The ACCC has been mindful throughout this follow-up review that Code-based improvements will not directly assist those growers who deal with non-signatory winemakers. While those winemakers will have to consider the potential commercial and legal risks of falling too far out of step with commercial norms over the longer term, they may still be able to take advantage of their bargaining power imbalances over growers in the shorter term.

Further, since the Code is a voluntary industry-designed instrument, it does not have any formal mechanisms by which the ACCC can conduct audits or seek information to tell if signatories are complying. Nor does the ACCC have enforcement powers under it for dealing with any non-compliance. As such, the Code is only effective to the extent that its obligations are implemented by winemakers.

Nevertheless, the ACCC is not recommending a mandatory industry code or any similar regulation be introduced at this time. Before recommending this for the wine grapes sector, the ACCC would need to see more evidence that the current trajectory of improvements to commercial practices under the self-regulation approach has stalled. We do not consider that to be the case at this time. The sector has made significant gains over the past 2 years, and has identified concrete opportunities in the near future to continue to improve.

We will continue to monitor developments in the sector to ensure gains are realised and progress continues. For example, the ACCC understands that key quality assessment reforms will only begin to take effect from vintage 2022. While it is important to note the work undertaken so far, the benefits of that work will not be fully realised until future seasons.

In addition, the ACCC notes the improvements made in providing growers in the inland regions with practical and actionable analysis of market trends at major decision points in the production cycle. Improved market analysis and intelligence does not necessarily by itself address the negative consequences for growers of existing bargaining power imbalances, but we consider it is an important part of supporting growers in their production and risk management decisions, and in their ability to critically assess the objectivity and quality of the information given to them by winemakers.

## Payment periods and price transparency require further work

While important progress has been made in the sector, there are still important issues that require further work.

Firstly, long payment times in the sector remain a key concern for the ACCC.

Due to winemaker opposition, the sector has not embraced the 2-year transition to 30-to-60 day payment times that the ACCC recommended in our September 2019 final report, through amendments to the Code or otherwise. We understand that there have been improvements from a number of major individual winemakers, which indicates that these improvements are commercially feasible, despite the arguments advanced by winemakers to the contrary during the ACCC's earlier market study. However, we do not consider that the overall level of improvement addresses the ACCC's original concerns on this issue.

We expect to see further progress on this issue in the future. AGWI has committed to reviewing the Code's approach to payment times in 2022, and we look forward to the results of that review. We also encourage individual winemakers to take their own action to improve their payment times. Winemakers may be waiting for the development of a sector-wide approach but it is not necessary to address this problem. As commercial norms improve, the

ACCC considers that long payment times will be less and less defensible under fair trading laws. This includes the unfair contract term laws that the Government is currently in the process of strengthening. If growers consider that their grape supply agreements contain unfair terms, we encourage them to challenge the winemaker to change them and to contact the ACCC.

Secondly, price transparency also remains a key issue for the sector.

As noted above, some progress has been made on providing enhanced analysis of market trends to growers at key decision points in their production cycle.

However, insufficient progress has been made on improving market transparency in the sector. Most agricultural markets, which are characterised by asymmetrical information available to processors/traders and farmers, have systems in place whereby pricing and quality information arising from market transactions are reported, aggregated, and made publicly available. The availability of such market information is important to address the imbalance in bargaining power between processor/traders and farmers. The ACCC's recommendation in its 2019 review was for winemakers to provide their warm climate pricing information to Wine Australia, to aggregate and publish by winemaker, for each variety in each warm climate region, before the end of each financial year. This has not been implemented, nor has the sector yet come up with a satisfactory alternative approach.

The ACCC understands the challenges involved in improving price transparency in the sector. These include the limited usefulness of historic prices relative to forward-looking estimates. There are also challenges in satisfactorily taking into account the various factors that contribute to a winemaker's price paid, such as different appetites for different grape qualities, timing of sales, freight costs, and so on.

Nevertheless, the ACCC does not consider that satisfactory progress has been made by the sector on addressing this issue. The replacement of the problematic scheme of indicative pricing by the Code's requirements to announce prices for 'fair market price' contracts by particular times is an improvement, but it is not sufficient to tackle the larger issues around price transparency in the sector. The requirements do not apply to non-signatory winemakers at all, but even growers dealing with signatory winemakers will face significant challenges in independently assessing whether their winemaker's offered price actually constitutes a 'fair' price. We consider that many winemakers have a vested interest in ensuring this state of affairs continues, as it forms a major part of their bargaining power advantage over growers.

The ACCC continues to consider the recommendation in our final report to be the best way to address the broader issues of price transparency in the sector.

Looking ahead, we note the Government's \$5.4 million agricultural markets transparency grants program, instituted in response to a recommendation from the ACCC's Perishable Agricultural Goods Inquiry. The wine grapes sector has participated in the workshops held in advance of the grant guidelines being released, and so will be eligible to apply to that program for funding of market transparency initiatives. The ACCC will monitor any developments arising from that grants program, and looks forward to continuing to work with the sector to address the issue of price transparency.

## No need for a mandatory code at this time

As discussed above, there remains considerable room for improvement in the sector's approach to the issues of shortening payment times and improving price transparency.

However, the ACCC is not recommending a mandatory code for the wine grapes sector at this stage. Progress has been made on a range of issues so far, and the sector has concrete opportunities to continue to improve in key areas.

We are also conscious of the challenges facing the sector at this moment, including the impact of the COVID-19 pandemic and China's recent institution of anti-dumping duties on some Australian wines. These challenges do not diminish the importance of addressing the issues identified in the ACCC's September 2019 final report, but they are important in the ACCC's consideration of whether further action is needed at this time.

This follow-up review is only a point on the journey, it is not the end of the ACCC's engagement with the sector, nor the end of the sector's efforts to address the issues we identified. However, winemakers are fast approaching their last chance to voluntarily improve price transparency and shorten payment times. Unless they make significant progress, a mandatory code or additional legislation will be considered.

# 1. Introduction

This chapter provides an overview of:

- Australia's wine grapes sector
- the ACCC's 2018-19 market study
- key developments in the sector since that market study, and
- this follow-up review.

## 1.1. Australia's wine grapes sector

### 1.1.1. Grape growers and winemakers

There are more than 6,000 wine grape growers in Australia, producing over 100 grape varieties across 65 wine regions and approximately 146,000 hectares of vines.<sup>1</sup> The vast majority of growers are small operators, many are family-owned enterprises, and many growers supplement their income with additional employment and diversified crops.

Australian winemakers comprise a diverse range of business sizes and models, from family-owned boutique winemakers to publicly listed multinational companies operating wineries and vineyards in Australia and overseas. While there are over 2,000 wineries in Australia,<sup>2</sup> the ACCC's market study found that it is a concentrated market, with the largest 1% of winemakers accounting for over 80% of wine production.<sup>3</sup>

### 1.1.2. Exports and domestic sales

Around 1.5-2.0 million tonnes of wine grapes are crushed in Australia each year, producing 1.1-1.4 billion litres of wine.<sup>4</sup> The majority of grapes go to the production of wine that is exported – wine exports account for around three-fifths of wine production by volume.<sup>5</sup>

Australian wine is exported to more than 100 countries, with the major export destinations in recent years including China, the United Kingdom, the United States, Canada, Singapore, and New Zealand.<sup>6</sup> The United Kingdom has been the most significant export destination by volume, while China had become the most valuable export market before the introduction of anti-dumping duties on Australian wine last year (see section 1.3.1).<sup>7</sup>

Domestic sales of wine are generally relatively stable at 480-500 million litres per year, with Australian wines accounting for over 80% of that.<sup>8</sup> By volume, around 10% of domestic sales are through direct channels such as cellar doors, winery websites, and wine clubs; and a

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<sup>1</sup> Wine Australia, [Market insights: Wine sector at a glance](#) [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021; Wine Australia, *National vineyard scan 2019*, Wine Australia, Adelaide, 29 January 2020, <https://www.wineaustralia.com/market-insights/national-vineyard-scan>.

<sup>2</sup> Wine Australia, *Australian wine sector at a glance*, Wine Australia, Adelaide, 20 October 2020, <https://www.wineaustralia.com/market-insights/australian-wine-sector-at-a-glance>.

<sup>3</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 28.

<sup>4</sup> Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, p 6.

<sup>5</sup> Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, p 18.

<sup>6</sup> Wine Australia, [Export dashboard](#) [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021.

<sup>7</sup> Wine Australia, [Export dashboard](#) [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021.

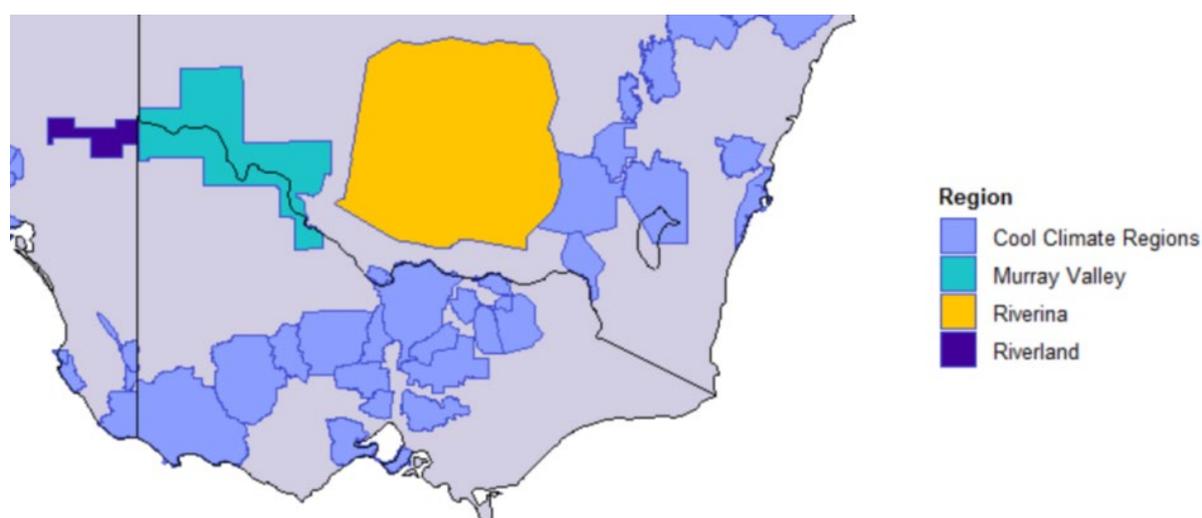
<sup>8</sup> Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, pp 11,18.

further 15–20% is typically ‘on-trade’ (e.g., restaurants, hotels, bars, pubs, and clubs).<sup>9</sup> The remaining three-quarters of domestic sales are made through the highly concentrated liquor retailing sector.<sup>10</sup>

### 1.1.3. Warm climate grape growing regions

The ACCC’s market study in 2018-19 focused on the 3 ‘warm climate’ grape growing regions: the Riverland, the Murray Valley, and the Riverina (see figure 1.1).<sup>11</sup>

**Figure 1.1: Map of warm climate grape growing regions**



Source: Wine Australia<sup>12</sup>

These regions typically account for more than two-thirds of Australian wine grape production (by volume), despite making up just over a third of national vineyard area.<sup>13</sup> Most of the grapes have been produced by growers who have written or verbal supply agreements with a winemaker, rather than being involved in wine production themselves (as is more common in the cool climate regions).<sup>14</sup> By contrast, vineyards in cool climate regions tend to operate on a smaller scale, sometimes with less mechanisation, and tend to have lower yields.<sup>15</sup>

Much of the wine production in warm climate regions is attributable to a relatively small number of large-scale winemakers,<sup>16</sup> and the majority of production is destined for export markets in the form of bulk wine.<sup>17</sup>

<sup>9</sup> Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, p 11.

<sup>10</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 31; Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, p 11.

<sup>11</sup> Warm climate regions are also known as ‘inland’ or ‘commercial’ regions, while cool climate regions are sometimes called ‘premium’ or ‘boutique’ regions. The Murray Valley warm climate region includes the Murray Darling and Swan Hill. ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 43.

<sup>12</sup> Wine Australia, *Geographical indications* [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021.

<sup>13</sup> Wine Australia, *National vintage reports* [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021.

<sup>14</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, pp 26,43.

<sup>15</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 44.

<sup>16</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, pp 28,113–114.

<sup>17</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 44.

## 1.2. The ACCC's wine grapes market study

The purpose of the ACCC's 2018-19 market study was to conduct an in-depth review of the Australian wine grape sector and to identify any market failures or issues that may prevent the functioning of competitive markets and result in detriment to market participants.

The ACCC received strong engagement from the sector throughout its market study, holding a range of meetings with stakeholders, conducting a large survey of grape growers, and receiving a large number of submissions to our issues paper (September 2018) and our interim report (June 2019).

The final report in September 2019 outlined a range of concerning practices and outcomes resulting from the bargaining power imbalances and information asymmetries in grower-winemaker relationships, including:

- Growers were largely price takers and were unable to negotiate with winemakers.
- There was a lack of transparency and certainty over pricing and grape quality assessment procedures.
- Supply agreements commonly did not provide price certainty or verifiable price benchmarks.
- There were delayed payment terms for growers, sometimes up to nine months after delivery of the grapes.
- There were imbalances in supply agreements that disproportionately allocated transactional risk to growers, allowed winemakers to act unilaterally, and had the potential to cause significant detriment to growers.
- There were typically low levels of competition between winemakers acquiring grapes in warm climate regions.

The ACCC made 10 recommendations to address the following issues:

- improving quality assessment processes
- improving price transparency
- shortening payment times
- strengthening and expanding the sector's voluntary industry code, and
- improving winemakers' contracting practices.

The full list of the ACCC's recommendations is in **Attachment A** to this report.

## 1.3. Developments in the sector since the market study

There has been a range of developments in the sector during the 2 years since the ACCC's final report that we have factored into our consideration of the sector's progress.

### 1.3.1. China's anti-dumping duties

On 26 March 2021, the Chinese Ministry of Commerce (MOFCOM) announced anti-dumping duties would apply to imports of certain Australian wines for 5 years starting 28 March 2021.<sup>18</sup> Duties of between 116.2% and 218.4% currently apply to imports of Australian wine

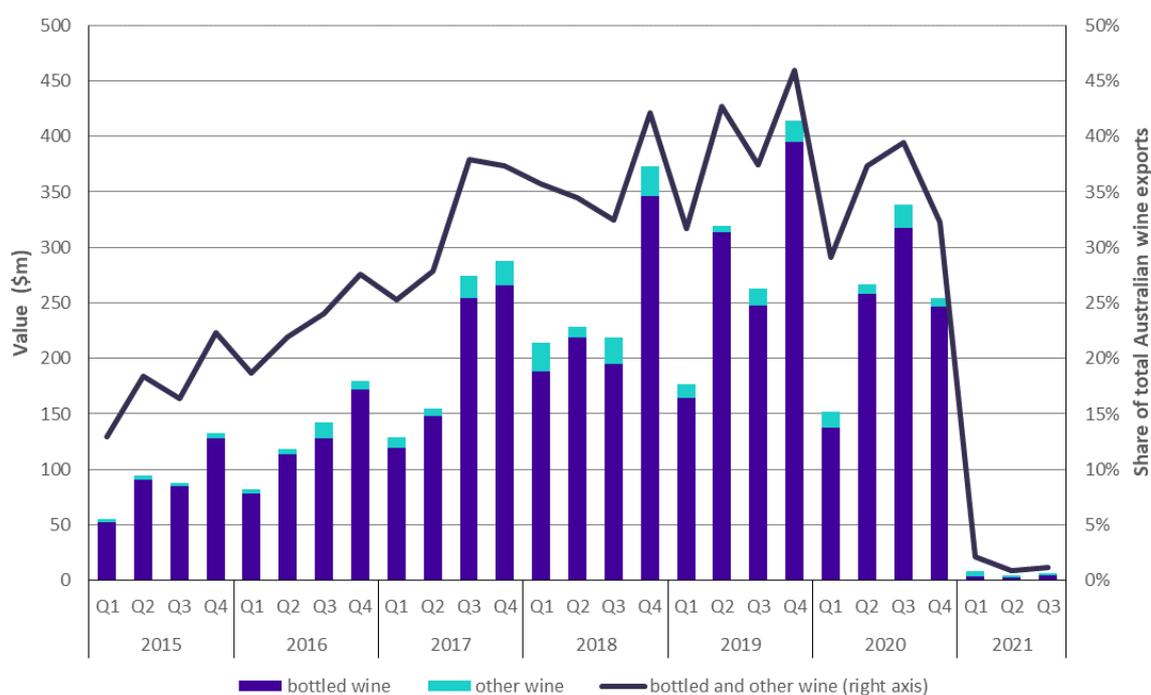
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<sup>18</sup> Ministry of Commerce of the People's Republic of China (MOFCOM), *MOFCOM issues final determinations in antidumping duty and countervailing duty investigations on wine from Australia* [media release], MOFCOM, Beijing, China, 26 March

in containers of 2 litres or less (excluding sparkling and fortified wine), with the rate depending on the exporting company.<sup>19</sup> Shipments of bulk wine are not subject to the duties.

China had become the most valuable market for Australian wine exports over recent years, reflecting growing demand for Australian wine in China, supported by phased reductions in tariffs on Australian wine starting from December 2015, with the commencement of the China–Australia Free Trade Agreement. In particular, there was rapid growth in the value of shipments of bottled wine (mostly red wine) (see figure 1.2).

**Figure 1.2: Australian wine exports to China**



Source: Wine Australia<sup>20</sup>

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) published an analysis in July 2021,<sup>21</sup> finding that the imposition of duties had immediately limited Australian wine exports to China, rendering the market unviable in the near term, while altered production and diversion to other markets will lessen the impact over the medium term.

The ABARES modelling estimated the negative impact to the gross value of wine production in 2025 to be \$480 million, due to reduced production and a lower expected average price.

2021, accessed 15 November 2021, <http://english.mofcom.gov.cn/article/newsrelease/significantnews/202104/20210403049082.shtml>.

<sup>19</sup> The duties were imposed following the anti-dumping and countervailing duties investigations that MOFCOM commenced in August 2020 (with provisional security deposits having been applied from 28 November 2020). On 19 June 2021, the Australian Government announced the commencement of dispute settlement proceedings at the World Trade Organization. Ministry of Commerce of the People's Republic of China (MOFCOM), *MOFCOM Publishes Preliminary Ruling of Anti-Dumping Investigation on certain imported wines originating from Australia* [media release], MOFCOM, Beijing, China, 28 November 2021, accessed 15 November 2021, <http://english.mofcom.gov.cn/article/newsrelease/significantnews/202012/20201203019743.shtml>; Minister for Trade, Tourism and Investment and Minister for Agriculture, Drought and Emergency Management, *WTO action to defend Australia's wine makers* [media release], Australian Government, 19 June 2021, accessed 15 November 2021, <https://www.trademinister.gov.au/minister/dan-tehan/media-release/wto-action-defend-australias-wine-makers>.

<sup>20</sup> Wine Australia, [Export dashboard](#) [website], Wine Australia, Adelaide, n.d., accessed 15 November 2021.

<sup>21</sup> T Gleeson, D Addai and L Cao, *Australian wine in China: Impact of China's anti-dumping duties*, ABARES research report 21.10, Australian Bureau of Agricultural and Resource Economics and Science (ABARES), Canberra, 27 July 2021, <https://doi.org/10.25814/kkq0-3242>.

The resulting cost to growers was estimated at around \$67 million (equivalent to a loss of almost 7% of the gross value of wine grape production), noting that this cost will not necessarily be shared equally amongst growers of all varieties and in all regions.<sup>22</sup>

### 1.3.2. COVID-19 pandemic

#### *Impact on wine demand and consumption patterns*

Decreased levels of economic activity, increased economic uncertainty, lockdown policies, and travel restrictions have all adversely affected the global demand for wine during the COVID-19 pandemic. Global wine consumption in 2020 is estimated to have dropped 13%, leading to the greatest gap between supply and demand levels for at least the last 10 years.<sup>23</sup>

The COVID-19 pandemic has seen shifting patterns of consumption, in Australia and globally, towards retail channels and online sales, and away from the hospitality sector and winery-based consumption (including through decreased tourism).<sup>24</sup> Social distancing and self-isolation have severely affected the hospitality sector, while travel restrictions have reduced winery visits (only partially offset by increased online sales). In certain narrow respects, shifting consumption may have actually benefited the Australian wine sector, such as the boost to exports from the shift towards retail trade in the United States and United Kingdom.<sup>25</sup>

However, the overall impact of the COVID-19 pandemic has clearly been negative and significant for Australian wine grape growers and wine producers. The net negative effect on wineries in Australia has been estimated to be 7–8% of earnings for 2020–21,<sup>26</sup> with some businesses and regions having been more severely affected than others.

#### *Impact on freight costs and availability*

The pandemic has also destabilised the global container freight supply chain, leading to delayed shipments and rapidly rising freight rates.<sup>27</sup> While some longer term trends have contributed to freight difficulties, the COVID-19 pandemic has exacerbated the situation.<sup>28</sup>

Wine grape sector stakeholders have reported increased costs and reduced availability and reliability of freight services, complicating the international movement of wine and rendering some transactions no longer commercially viable. In addition, supply chain complications

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<sup>22</sup> The warm climate regions are not as dependent on China as is the case for many cold region wine producers. Inland Wine Regions Alliance (IWRA), *It's not all doom and gloom for the Australian wine sector*, IWRA, South Australia, 11 December 2020, <https://riverinawinegrapes.com.au/wp-content/uploads/2020/12/201211-IWRA-Media-Release-Its-not-all-doom-and-gloom.pdf>.

<sup>23</sup> Wine Australia, *Australian wine: Production, sales and inventory 2019–20*, Wine Australia, Adelaide, 30 March 2021, <https://www.wineaustralia.com/market-insights/australian-wine-production-sales-and-inventory>, p 15.

<sup>24</sup> Wine Australia, *How COVID-19 is changing Australia's domestic wine market*, Market bulletin 202, Wine Australia, Adelaide, 19 May 2020, <https://www.wineaustralia.com/news/market-bulletin/issue-202>; Wine Australia, *Global consumer trends in the short term*, Market bulletin 207, Wine Australia, Adelaide, 23 June 2020, <https://www.wineaustralia.com/news/market-bulletin/issue-207>; G Wittwer and K Anderson, 'COVID-19's impact on Australian wine markets and regions', *The Australian Journal of Agriculture and Resource Economics*, 9 August 2021, 65(4):822–847, <https://doi.org/10.1111/1467-8489.12447>.

<sup>25</sup> Wine Australia, *Export market report: 12 months to September 2021*, Wine Australia, Adelaide, 19 October 2021, <https://www.wineaustralia.com/market-insights/australian-wine-export-report>.

<sup>26</sup> G Wittwer and K Anderson, 'COVID-19's impact on Australian wine markets and regions', *The Australian Journal of Agriculture and Resource Economics*, 9 August 2021, 65(4):822–847, <https://doi.org/10.1111/1467-8489.12447>.

<sup>27</sup> ACCC, *Container stevedoring monitoring report 2020–21*, ACCC, November 2021, <https://www.accc.gov.au/publications/container-stevedoring-monitoring-report/container-stevedoring-monitoring-report-2020-21>.

<sup>28</sup> ACCC, *Container stevedoring monitoring report 2020–21*, ACCC, November 2021, <https://www.accc.gov.au/publications/container-stevedoring-monitoring-report/container-stevedoring-monitoring-report-2020-21>.

have also made it difficult for many grape growers and winemakers to obtain the materials they need ahead of the coming vintage (e.g. fertiliser, chemicals, and machinery and equipment).

### ***Impact on business operations and labour availability***

Wine business activities, including grape growing, were classified as 'essential' by the Australian Government in early 2020,<sup>29</sup> allowing operations to continue throughout the pandemic.

However, significant business disruptions have been reported because of the reduced availability of labour, particularly in relation to migrant workers. While some growers in warm climate regions may not have been as significantly affected as other growers given the greater prevalence of mechanical harvesting in those regions,<sup>30</sup> labour availability issues continue to be a major concern for the whole of the sector.

## **1.4. Follow-up review**

The purpose of this follow-up review was to provide an update on the progress made by the sector in addressing the issues identified in the ACCC's September 2019 final report, either by implementing the recommendations, or by other means.

This follow-up review has been conducted in a targeted manner. The ACCC stated on its website that it was conducting this follow-up review. The ACCC also wrote directly to those stakeholders who from our experience would be able to provide an update on the progress towards addressing issues. This included grape grower and winemaker representative bodies, and organisations to whom a recommendation was directed, such as Wine Australia and the Australian Wine Research Institute. Stakeholders were asked to provide a response addressing the following:

- whether progress has been made in the sector towards implementing the recommendation, and/or any reasons for any lack of progress
- if relevant, any alternative means by which the sector is working towards addressing the issue that the recommendation was intended to address, and
- changes in the sector since 2018-19 market study that the stakeholder believed the ACCC should consider when assessing whether further action is needed in the sector.

Stakeholders were not required to provide a response. As with the 2018-19 market study, this has been a voluntary process, dependent on engagement from the sector. The ACCC is grateful to those stakeholders who participated in the consultation process.

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<sup>29</sup> Minister for Agriculture, Drought and Emergency Management, *Agriculture jobs essential to Australia*, [media release], Australian Government, 25 March 2020, accessed 15 November 2021, <https://minister.awe.gov.au/littleproud/media-releases/agriculture-jobs-essential>.

<sup>30</sup> Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), *Agricultural commodities: December quarter 2020*, ABARES, Canberra, 7 December 2020, <https://doi.org/10.25814/vtqw-gm43>.

## 2. Progress on the ACCC's recommendations

This chapter provides an overview of the progress made by the sector towards implementing each of the ACCC's original recommendations, or otherwise addressing the issues identified in the ACCC's September 2019 final report.

This section discusses the ACCC's recommendations in 5 categories:

- improving quality assessment processes
- improving price transparency
- shortening payment times
- strengthening and expanding the sector's voluntary industry code, and
- improving winemakers' contracting practices.

For each category, this section discusses:

- the key issues identified in the ACCC's final report
- the sector's views on what progress has been made, and
- the ACCC's assessment of the sector's progress.

### 2.1. Improving quality assessment processes<sup>31</sup>

#### 2.1.1. Summary of issues identified in report

Wine grape quality assessments are conducted in the vineyards and at the weighbridge to ensure grapes are suitable for winemakers' product lines. The quality assessment of grapes is crucial, as it is used to determine whether a winemaker will accept or reject the grapes, how much a supplier will be paid, and the timing of harvest.

During its original market study, the ACCC heard concerns from growers about the quality assessment process, including that it was not a transparent process, it differed depending on the winemaker, and inconsistent or unexpected testing results sometimes occurred when the same grapes were tested by different winemakers. As a result, growers did not have confidence in quality assessment processes.

The ACCC made 4 recommendations to address the grower concerns with the quality assessment process. The recommendations were made with the intention to standardise the quality testing process across the sector and ensure it is well-documented and rigorous. This would reduce the variability of subjective quality assessment measures across the sector and therefore increase grower confidence in the process.

#### 2.1.2. Sector update on progress towards addressing issues

The ACCC's quality assessment recommendations were widely supported by the sector.

Stakeholders have indicated that the sector has made significant improvements to quality assessment processes, and has taken steps towards implementing all 4 ACCC recommendations that relate to quality assessment.

Australian Wine Research Institute (AWRI) submitted that it has created Industry Endorsed Standard Procedures (IESPs) for sugar (Brix) and colour (Anthocyanin) which represent the

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<sup>31</sup> Recommendations 1 to 4 from the ACCC's September 2019 final report.

current best practice for the measurements of each. These documents are publicly available on AWRI's and AGWI's websites. AWRI stated these standards have been developed in conjunction with peak bodies and reference groups.

AWRI's response outlined that the IESPs are being promoted across the sector in a series of workshops, and that these methods are being reviewed by the National Measurement Institute (NMI) to develop national guidelines.

As well as the updated IESPs, the reference document *Winegrape assessment in the vineyard and the winery* has been reviewed and updated by AWRI, AGWI and reference groups to reflect the current best practice and assist the sector understand and use the IESPs.

AGWI said the Code now requires signatories to use IESPs where they exist, and requires supply agreements to outline grading parameters and methods of assessing maturity, purity, and condition standards, amongst other things.

However, some grower representative groups have stated that despite the IESPs being created, many winemakers that are not signatories to the Code may not be using these standardised procedures. These stakeholder submissions also said it is difficult to determine whether both signatory and non-signatory winemakers are outlining the testing and sampling methods used, which was recommended in the report, because it is difficult to obtain updated supply agreements from growers or winemakers.

### **2.1.3. ACCC assessment of sector progress**

The creation of the IESPs and guidance documents are significant steps towards addressing the key quality assessment issues the recommendations intended to address. Further, Code signatories are now required to use these standard procedures. Provided winemakers comply with the Code, this should provide more clarity and confidence to growers that standard procedures are being used.

The guidelines that are being created by the NMI along with the updated *Winegrape assessment in the vineyard and the winery* guidance material will inform growers and winemakers about the current best practice for quality assessment methods and increase grower confidence in their understanding of the appropriateness of particular quality assessment techniques.

The sector has proactively worked towards addressing quality assessment issues raised in the final report through creating the IESPs and the Code requirement that signatories must use these standardised procedures. The effects of these changes are likely to flow through to growers in the coming seasons.

The concerns raised by some submissions that some winemakers may not be using the IESPs or documenting testing and sampling methods, could be addressed by these winemakers becoming signatories to the Code, and implementing its requirements. Therefore, we continue to strongly encourage all winemakers in the sector to commit to the Code.

## 2.2. Improving price transparency<sup>32</sup>

### 2.2.1. Summary of issues identified in report

The ACCC's final report found that, within warm climate regions, there is insufficient objective market analysis and price transparency, and this is likely to impact the competitive process, impede efficient and responsive grape and wine production, and result in a misallocation of resources.<sup>33</sup> Market analysis is an important tool to allow growers to make decisions regarding risk management and help them adapt to changing market conditions, and access to transparent pricing information can allow growers to compare prices offered by different winemakers in the region and make a decision to whom they wish to supply grapes.

#### **Market analysis**

Australian warm climate grape prices are strongly correlated to wine export prices and growers have access to current and past prices in global wine markets. However, questions remain over the usefulness of historic prices to growers looking to make forward-looking strategic decisions. Grape prices are dependent on expected future wine market conditions, which in turn depend on a broad range of factors including global wine inventory levels and movements in consumer trends. The ACCC heard that it was difficult for individual growers to assess these factors as they lack the resources and visibility over sales channels to determine how these factors will influence future prices and therefore, prices they will receive for their grapes.<sup>34</sup>

To address this issue, the ACCC recommended that grape grower representatives deliver accessible, relevant and timely analysis of market trends, and engage with Wine Australia who would be able to provide technical guidance and support. Grower representatives have already been providing information to members directly and this recommendation was intended to extend these activities to be more regular and widely distributed.<sup>35</sup>

#### **Access to transparent pricing information**

The ACCC's September 2019 final report found that the pricing data produced by the sector, such as the National Vintage Report and Price Dispersion Report, had some limitations for growers making decisions regarding who to supply. This was in part because the prices were aggregated, which meant growers could not distinguish prices paid by individual winemakers, and therefore growers had limited means of comparing past performance of particular winemakers, which could indicate future performance.<sup>36</sup>

To improve price transparency, the ACCC recommended that, for grapes purchased in warm climate regions, buyers be required to provide the pricing information to Wine Australia, which would then publish the information for each variety in each warm climate region before the end of the financial year. Buyers would be identified in the pricing information.

The ACCC also identified issues with the indicative pricing scheme that used to exist in the sector. Code signatories used to release an indicative price by 15 December in warm climate regions, and a final price was set closer to harvest. The ACCC recommended that indicative pricing be removed from the Code and all grape supply agreements.

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<sup>32</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, recommendations 5 and 6..

<sup>33</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 85.

<sup>34</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 89.

<sup>35</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 89.

<sup>36</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 87.

This was a result of extensive consultation with the sector, which resulted in the ACCC concluding that these prices were made available too late in the season to significantly influence growers' production decisions. Growers could not swap winemakers based on indicative prices as they would need to have already committed to supply a winemaker, and releasing the indicative prices any earlier in the season would make them less accurate.<sup>37</sup>

## **2.2.2. Sector update on progress towards addressing issues**

### ***Market analysis***

Stakeholders have indicated that there has been an improvement in the market analysis and information provided by Wine Australia. Wine Australia has been proactive in developing the market insights section on their website and worked with sector stakeholders to improve the market information available. They are also continuing to engage with stakeholders to determine what other information is needed, and how it should be presented. Wine Australia has provided 'guided virtual tours' to demonstrate how to access and use the information on its website.

Some stakeholders say the data provided is an improvement, but more data such as domestic sale, pricing and consumption and timely inventory statistics would be useful to include. Stakeholders have said that data currently provided to Wine Australia is provided on a voluntary basis, and winemakers who grow their own grapes are not reporting their volumes produced. Stakeholders said this was a particular issue in the Riverina, where they said around 35 to 40% of grape production fell into this category, and argued therefore that the data provided by Wine Australia is incomplete. This has flow-on effects for the market analysis information that can be provided to growers.

### ***Access to transparent pricing information***

One stakeholder said that since the removal of the indicative pricing scheme from the Code, the 'secrecy' surrounding pricing is worse, and it is difficult for representative groups to report average prices for the regions, which they have historically produced. The stakeholder described the price transparency issue as worse than it was prior to the ACCC inquiry and said that some winemakers were not disclosing price offers until extremely late in the season, sometimes on the verge of harvest.

AGWI said that the Code Management Committee did not support the recommendation that grape buyers be required to provide pricing information to Wine Australia because winemakers were not supportive of having their prices made publicly available. The Committee also did not support the recommendation that growers be allowed to lodge a price dispute up to 3 weeks after Wine Australia publishes price information. This was because the Committee believes it is more appropriate to negotiate a price closer to harvest when there is more certainty for both parties. Therefore, the Committee sought other ways to address the issue of price transparency.

The Code currently provides winemakers with the ability to offer contracts which do not have a specific price, but which offer a 'fair market price' for grapes, with the 'fair market price' to be specified at a specific future time. The winemaker's estimate of the fair market price is then offered to growers in either December or January, depending on the region the winemaker is in. AGWI said that this allows time for contract negotiations to occur prior to harvest and/or for an independent pricing expert to make a price determination. The Code also includes an expedited procedure for dispute resolutions to resolve 'time-sensitive' disputes to ensure a fair market price can be settled in a timely manner.

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<sup>37</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 7.

AGWI said the Code Committee will continue to review the fair market price clause and ensure it is understood and supported by users.

Another stakeholder stated that despite the new arrangement of the fair market price, non-signatory winemakers continue to wait until they see the prices Code signatories are offering and adjust their prices to reflect what is already offered.

### **2.2.3. ACCC assessment of sector progress**

#### ***Market analysis***

There have been positive steps taken towards improving the information available to growers. Collaboration between Wine Australia and grape grower representatives helps to ensure the reports published by Wine Australia are suitable for the needs of the growers.

Some stakeholders say more data is needed such as consumption and inventory statistics. The ACCC considers there is significant value in the sector working collaboratively to ensure the published reports include the information that these growers need to see to make informed business decisions where it is available.

#### ***Access to transparent pricing information***

A lack of price transparency leads to risks at 2 key points of a grower's business cycle:

- *Making choices about future business strategies* – for example, a lack of price transparency hinders a grower's ability to make efficient and informed decisions about contract renewals or switching to a new winemaker or grape variety.
- *Enforcing contractual rights* – for example, a lack of price transparency hinders a grower from fairly being able to make up their own mind about whether a price offered by a winemaker is a 'fair market price', and therefore whether they would like to seek a better offer.

The ACCC considers that further work by the sector is needed to satisfactorily address our concerns, and we continue to consider that the best way to resolve the problems would be to fully implement recommendation 6 from our September 2019 final report in the manner laid out in sections 4.6.5 and 4.6.6 of that report. In the absence of such an approach, very limited reliable price information is available to growers.

No progress, however, has been made towards implementing this recommendation about gathering, aggregating, and publishing pricing data by winemaker, for each variety in each warm climate region, before the end of each financial year. This recommendation was strongly opposed by winemakers at the time, and the submissions to this follow-up review indicated that that opposition remains.

Nor has the sector yet proposed a satisfactory alternative method for addressing the price transparency issues identified in the ACCC's September 2019 final report. However, we recognise that DAWE's transparency grants program, implemented in response to the ACCC's Perishable Agricultural Goods Inquiry final report, provides a concrete opportunity for the wine grapes sector to improve price transparency.

DAWE has been delivering workshops with perishable agricultural industry stakeholders (including the wine grapes sector) to understand price and market transparency issues,

opportunities, and requirements. Following these workshops, stakeholders will be able to apply for grants to implement mechanisms to improve price and market transparency.<sup>38</sup>

The ACCC is following this DAWE grants process closely. While the ACCC is still of the view that winemakers providing prices to Wine Australia to publish is the best way to address the price transparency issue in the sector that has been identified to date, the DAWE grants process will give the sector an opportunity to work towards alternative methods to address this issue.

## 2.3. Shortening payment times<sup>39</sup>

### 2.3.1. Summary of issues identified in report

The ACCC's final report outlined its concern that lengthy payment periods were prevalent across the sector, with some growers being on delayed payment terms and only receiving full payment up to nine months after the delivery of grapes. The report stated that these lengthy payment terms may be unfair contract terms (UCTs) and should be phased out of supply agreements.

The Code sets out the minimum payment terms required of signatories:<sup>40</sup>

- 1/3 by the end of the month following the month during which the grapes were delivered
- 1/3 by the end of June, and
- 1/3 by the end of September.

These terms largely codified the sector's practice that had arisen and which was legislated in South Australia by the *Wine Grapes Industry Act 1991 (SA)* (WGI Act). The WGI Act allows the SA Minister for Agriculture, Food and Fisheries to set out timeframes for payment for SA grapes by winemakers. In 2004, the Minister set out the following minimum timeframes:<sup>41</sup>

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

While these payment terms are intended to be the minimum, winemakers in SA and regions where there is significant participation in the Code have adopted the terms as the sector standard. The ACCC's report found that in areas where there are few or no Code signatories, payment terms can be even longer.

<sup>38</sup> Department of Agriculture, Water and the Environment, *Improving Market Transparency in Perishable Agricultural Goods Industries*, 2021, <https://www.awe.gov.au/agriculture-land/farm-food-drought/food/perishable-ag-goods-industries>.

<sup>39</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, recommendations 7 and 8.

<sup>40</sup> Australian Grape and Wine Incorporated, *Code of Conduct for Australian Winegrape Purchases*, 23 September 2021, cl 4.2.

<sup>41</sup> *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).

The ACCC's concern was that these lengthy payment terms are offered by well-resourced large winemakers, who are usually in a better financial position to bear the cost of holding inventory than growers and that they typically have greater financial assets and ability to service debt than the average grower.<sup>42</sup> Further, our report found that many growers financed their operations via overdrafts, incurring interest at between 6 to 12%. The ACCC's view is that large winemakers have greater financial assets and ability to service debt than the average grower and would face significantly lower funding costs, and therefore, in a competitive market, should incur the expenses of storing the grapes.<sup>43</sup> Further, a competitive market should expect to see shorter payment terms offered by some winemakers in an attempt to secure grapes from growers.

To address the lengthy payment term issues, the ACCC recommended that long payment terms be phased out of standard form contracts and a best practice standard of payment 30 days after final grape delivery should be adopted by all winemakers with processing capacity over 10,000 tonnes.

### **2.3.2. Sector update on progress towards addressing issues**

Feedback from the sector regarding the progress of addressing this issue was varied.

Some stakeholders outlined that there has been some positive changes and some winemakers are moving towards shorter payment times, particularly in the Riverina region and that anecdotally, it appears many larger winemakers have improved payment terms.

One grower association said growers in their region had become interested in understanding what payment terms were offered by winemakers and on some occasions, were able to negotiate payment terms that were different to the standard offered.

However, other stakeholders said there has not been widespread changes to payment terms in contracts. One response from a grower representative stated that some renewed contracts were 'completely dismissive' of the ACCC final report, and delayed payment terms continued.

AGWI said they are encouraging winemakers to change their payment practices and that the Code Committee has encouraged adoption of shorter payment times amongst winemakers. AGWI stated the minimum standard payment terms set out in the Code are an interim measure, and will be reviewed in 2022.

### **2.3.3. ACCC assessment of sector progress**

As a result of follow-up engagement with the sector post-market study, the ACCC is aware of a number of major winemakers that have significantly shortened their payment times.<sup>44</sup>

However, the ACCC does not consider that the sector has made sufficient progress on this issue. Submissions indicate that the sector has not adopted the recommended default payment terms of 30 days. Further, the minimum payment terms remain the same in the Code as they were before the ACCC review.

The wine grapes sector's lengthy payment terms are an outlier compared to other agriculture commodities. Industries with similarly extensive delays before products are processed and sold contain shorter payment periods than in the wine grapes sector. For example, while it

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<sup>42</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 9, p 103.

<sup>43</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 103.

<sup>44</sup> ACCC, *Fairer terms for wine grape growers but concerns remain about payment periods*, ACCC, June 2020, <https://www.accc.gov.au/media-release/fairer-terms-for-wine-grape-growers-but-concerns-remain-about-payment-periods>

can take 2 years for raw wool to be converted into consumer products, farmers in that sector are commonly paid within 7 days of the sale of their wool.<sup>45</sup>

The ACCC considers that the minimum payment terms set out in the Code should be shortened as part of the Code review in 2022.

If there is not a substantial shift towards shorter payment periods in supply agreements, the ACCC will consider what action is required to address this issue, including reopening our investigation into potential unfair contract terms in grape supply agreements. The Government has committed to strengthening the UCT protections within the Australian Consumer Law, and has recently consulted on a range of enhancements, including providing for penalties to be imposed for the inclusion of UCTs in standard form contracts.<sup>46</sup> Under such a regime, a court might find that lengthy payment terms constitute unfair contract terms, exposing winemakers to significant penalties.

On balance, the ACCC does not recommend a mandatory code at this time. Some clear progress has been made, including through voluntary improvements to payment terms by major winemakers in the warm climate regions. In addition, the ACCC notes AGWI's commitment that the Code's approach to payment times will be reviewed in 2022. The ACCC will closely monitor the outcome of that review, and encourages all parties to commit to shorter payment timeframes.

Whilst the sector is currently facing a challenging environment, many major winemakers have already moved to shorter payment terms. We see this as an indication that the minimum payment terms previously adopted in the sector can be shortened. We encourage the remaining winemakers to follow suit as soon as possible.

## 2.4. Strengthening and expanding the voluntary code<sup>47</sup>

### 2.4.1. Summary of issues identified in report

The wine grape sector has had a voluntary code for over a decade.<sup>48</sup> During the ACCC's market study, AGWI convened a new Code Management Committee with both grower and winemaker representation to review the 2008 code. After our market study concluded, the current Code of Conduct for Australian Winegrape Purchases (Code) was released.

The Code sets out minimum standards for important aspects of a supply agreements such as quality standards, pricing methods and dispute resolution mechanisms. Growers dealing with Code signatories should expect to have more protections and may be in a better bargaining position than those dealing with non-signatories. Therefore, the ACCC recommended that all winemakers that purchase grapes from growers become signatories to the Code.

However, the ACCC's final report found that the Code had not been widely adopted by winemakers, with Code signatories accounting for less than half of all wine grapes purchased from both warm and cool climate regions.<sup>49</sup> The number of signatories varied between regions. The Riverina had no major winemakers as signatories to the Code.

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<sup>45</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 102.

<sup>46</sup> Treasury, *Treasury Laws Amendments (Measures for a later sitting) Bill 2021: Unfair contract terms reforms*, Treasury, Canberra, 2021, [https://treasury.gov.au/sites/default/files/2021-08/c2021-201582\\_edl.pdf](https://treasury.gov.au/sites/default/files/2021-08/c2021-201582_edl.pdf).

<sup>47</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, recommendation 9.

<sup>48</sup> The Australian Wine Industry Code of Conduct was established in 2008 and updated in 2014. It was then replaced by the current Code of Conduct for Australian Winegrape Purchases following the ACCC's market study.

<sup>49</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 123.

As well as the lack of signatories to the Code, the ACCC's report outlined that the Code needed to be substantially strengthened to address bargaining power imbalances. The report found that improvements needed to be made to the dispute resolution process including the ability to resolve time sensitive disputes - such as price paid for grapes or the rejection of grapes - in an expedited manner and that it did not seem to adequately assist parties with a dispute arising out of quality assessments conducted at the weighbridge.<sup>50</sup> The ACCC also recommended the dispute resolution procedures be expanded to include non-price contractual disputes.

Our report also noted that the Code Management Committee was skewed towards winemakers due to the structure of the AGWI board and the way Committee members were appointed. Therefore, the ACCC recommended the Code be amended to guarantee equal representation of growers (including grower representative bodies) and winemakers.<sup>51</sup>

## **2.4.2. Sector update on progress towards addressing issues**

In its submission, AGWI said that following the publication of the final report, a comprehensive review of the Code was undertaken with a view to strengthen it and increase the number of signatories.

### ***Increasing the number of Code signatories***

AGWI have said their primary objective has been to increase the number of Code signatories and that they will look towards addressing key aspects of the Code once there are more signatories. Some grape grower representatives disagreed with this approach.

A grower representative group stated that while some winemakers in their region became Code signatories, they were not advising their growers that they had become Code signatories. As such, when a dispute arose regarding price, these growers did not know they could use the dispute resolution methods outlined in the Code.

### ***Strengthening the Code***

AGWI said the Code review addressed issues raised by the ACCC regarding quality assessments, pricing, and contracting practices.

AGWI also noted that there have been amendments to the Code regarding the dispute resolution process, which now includes an expedited dispute resolution process for time sensitive disputes such as price deductions or rejection of grapes.<sup>52</sup> The Code also now includes dispute resolution procedures which must be incorporated into grower agreements, unless they choose an alternative procedure.<sup>53</sup> The quality assessment process now involves the use of IESPs and in the event of a dispute, the standard procedures set out in the Code (or procedures at least as rigorous) are to be followed.

AGWI also noted that the Committee now has equal representation of winemakers and grape growers as was recommended in the final report.<sup>54</sup>

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<sup>50</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 130.

<sup>51</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 125.

<sup>52</sup> Australian Grape and Wine Incorporated, *Code of Conduct for Australian Winegrape Purchases*, 23 September 2021, Appendix 1.

<sup>53</sup> Australian Grape and Wine Incorporated, *Code of Conduct for Australian Winegrape Purchases*, 23 September 2021, cl 6.1.

<sup>54</sup> Australian Grape and Wine Incorporated, *Code of Conduct for Australian Winegrape Purchases*, 23 September 2021, background; Australian Grape and Wine Incorporated, *Code Management Committee Annual Report 2020-2021*, September 2021, p 5.

Not all the feedback from submissions was positive, however. In particular, one grower representative group said the penalty for signatories breaching the Code is not enough. The current penalty is expulsion decided by the Code committee. This would leave the growers dealing with that winemaker with even less protection.

### **2.4.3. ACCC assessment of sector progress**

#### ***Increase in number of code signatories***

Since the September 2019 final report, there has been a significant increase in the number of signatories to the Code. There were 67 signatories to the Code as at 30 November 2021, compared with 43 at the time of the ACCC market study.<sup>55</sup> Particular noteworthy have been the recent additions of several large winemakers in the Riverina (where less than 1% of wine grape purchases were previously covered by the Code).<sup>56</sup> Based on an update of ACCC analysis from the market study, it appears that Code signatories now account for around half of wine grape purchases in the Riverina and around two-thirds of wine grape purchases in the Riverland and the Murray Valley.

This is of direct benefit to those growers dealing with signatories. Increasing Code coverage may also help to shift commercial norms, and may even provide a competitive advantage to signatories, as growers with a choice of winemakers may look to deal more with signatories and limit their exposure to non-signatories.

However, the limits of this approach should be recognised. Improvements to the Code are still of limited value to growers who are currently dealing with non-signatories, particularly ones who may not be interested in keeping up with evolving commercial norms. In addition, some growers may have few, if any, other options than to deal with a non-signatory, further limiting the benefits of the Code.

Further, since the Code is a voluntary industry-designed measure, it does not have any formal mechanisms by which it can be enforced by the ACCC or another body. As such, the Code is only effective to the extent that is followed by winemakers.

However, the Code has improved some industry practices and we continue to advocate for all winemakers that purchase grapes from growers to become signatories to the Code.

#### ***Strengthening of the Code***

On one hand, some important progress has been made in the strength of the Code. Our recommendation that winemakers and growers be represented equally on the Code Committee has been implemented. In addition, AGWI and the Code Committee have made progress towards improving the dispute resolution process in the Code. Those processes now include a structured independent expert determination and conciliation process, and an expedited process for time sensitive disputes.

On the other hand, not enough action has been taken to address some key issues, such as shortening the minimum payment terms set out in the Code, and improving price transparency in the sector.

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<sup>55</sup> Australian Grape and Wine Incorporated (AGWI), [The Code of Conduct for Australian Winegrape Purchases](#) [website], n.d., accessed 30 November 2021; ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 134.

<sup>56</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 135.

## ***The need for a mandatory code has not been demonstrated***

At this time, the ACCC does not recommend that the Government consider a mandatory industry code for the wine grapes sector.

While further improvements are needed to strengthen the Code, we are yet to see any evidence that the sector's attempts to rectify the issues have stalled or failed.<sup>57</sup> In addition, there are concrete opportunities for stakeholders to further address the key issues.

At this time we consider that instead of a mandatory code, AGWI and the Code Committee should continue to look for opportunities to increase the coverage and strength of the Code. We will continue to closely monitor developments on this front.

## **2.5. Improving winemakers' contracting practices<sup>58</sup>**

### **2.5.1. Summary of issues identified in report**

During the original market study, the ACCC identified a number of clauses in grape supply agreements that were potentially UCTs, including:<sup>59</sup>

- certain first right of refusal clauses
- terms that give winemakers broad rights to unilaterally vary terms of the agreement
- terms that provide for a lengthy period of time before growers receive final payment (as discussed above)
- terms that give winemakers broad rights to terminate agreements, and
- terms that give winemakers broad scope to make unilateral and detrimental quality determinations, or reject grapes.

In the final report, the ACCC stated it would consider taking enforcement action against winemakers that did not remove UCTs.

### **2.5.2. Sector update on progress towards addressing issues**

Following the publication of the final report, there has been positive progress made and many potential UCTs have been removed from supply agreements.

AGWI said that in 2020, they partnered with a law firm and conducted educational workshops within 10 wine regions to educate industry participants and improve contracting practices. Additionally, the 2020 Wine Law Association Conference included a session which covered UCTs and considerations to promote fair dealings within the sector. Both of these sessions were closely aligned to the ACCC's final report findings.

AGWI said that following these sessions, sector participants have a greater level of awareness of what is likely to be considered a UCT.

Other responses stated they were not aware of much change in the contracting practices, but were aware that some winemakers updated their contracts following interactions with the ACCC.

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<sup>57</sup> Treasury, *Industry Codes of Conduct Policy Framework*, Treasury, Canberra, 2017, <https://treasury.gov.au/sites/default/files/2019-03/p2017-t184652-5.pdf>.

<sup>58</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, recommendation 10.

<sup>59</sup> ACCC, *Wine grape market study: Final report*, ACCC, September 2019, p 99.

These interactions between winemakers and the ACCC occurred in early 2020, when the ACCC conducted an investigation into potential UCTs in grape supply agreements between wine grape growers and winemakers/grape purchasers.

Following the investigation, several winemakers agreed to change terms relating to contractual disputes, wine grape quality assessments, and unilateral changes to supply contracts, including one-sided termination rights.

### **2.5.3. ACCC assessment of sector progress**

The sector has made positive progress in addressing and removing some potential UCTs. AGWI has conducted education sessions to promote awareness and understanding of UCTs and fair dealings in the contracting process. The ACCC encourages AGWI and other stakeholders to continue to actively promote and educate sector participants about fair contract practices.

In addition, the ACCC welcomed the level of engagement and cooperation shown by the winemakers during the UCT investigation. This resulted in some positive outcomes, with several winemakers agreeing to change contract terms covering contractual disputes with growers, terms relating to the grape quality assessments, and one-sided termination rights.

However, while most potential UCTs were removed from supply agreements, the terms that provide for long payment times remain. The ACCC is considering what action may be necessary to address this issue.

## **2.6. Conclusion**

The ACCC does not recommend a mandatory code in the wine grapes sector at this time. Important progress has been made since the ACCC's September 2019 final report, and there are concrete opportunities for further improvements on key issues in the near future.

However, the ACCC will continue to monitor developments in the sector, particularly in relation to AGWI's commitment to review the Code's approach to payment times in 2022, and in relation to the sector's opportunity to participate in DAWE's upcoming price and market transparency grants process.

Winemakers are fast approaching their last chance to improve price transparency or shorten payment times. Unless significant progress is made, the ACCC will take further action, including considering its enforcement options or recommending a mandatory code or additional legislation.

We thank the sector for their participation in this follow-up review, and look forward to continuing to work with them.

## Attachment A – the ACCC’s recommendations

The following text is extracted from the ACCC’s September 2019 final report.

### Quality assessments

The ACCC considers that the quality assessment recommendations (1–4) are applicable across warm and cool climate regions.

- 1. The ACCC recommends the Australian Wine Research Institute (AWRI) work with the National Measurement Institute (NMI) and the industry to develop uniform national standards for testing and measuring grape sugar levels and colour.**

This recommendation is designed to increase grower confidence in testing by establishing clear standards for testing methods, and the calibration and use of equipment.

The ACCC considers the AWRI and industry should establish a working group and set clear timeframe targets for developing standards, such as a commitment to developing draft standards for consultation within 12 months.

- 2. The ACCC recommends that winemakers should use well-documented and objective testing and sampling methods for quality assessments in the vineyard and at the winery.**

Despite some limitations of objective measures, and the importance of sensory assessment, the ACCC considers that winemakers should rely on objective measures to determine payment amounts wherever possible, and should adopt standardised sampling practices in the vineyard and at wineries.

- 3. The ACCC recommends that the AWRI, in consultation with industry stakeholders, review current industry guidance on quality assessment standards, and amend the guidance to clearly reflect current best practice and to provide detailed information on standards for sampling in the vineyard and at the weighbridge.**

This will inform all growers and winemakers about current best practice quality assessment methods. It will increase growers’ confidence in their understanding of the appropriateness of particular quality assessment techniques, and provide them with a basis for disputing inappropriate testing or sampling methods.

- 4. The ACCC recommends that supply agreements should clearly outline the testing and sampling methods that winemakers will use to assess grape quality.**

This will increase the transparency regarding quality testing methods, allowing growers to make more informed decisions when entering into agreements. The information about testing and sampling methods should be accompanied by clear and precise information about quality thresholds and the effect, if any, of failing to reach a particular threshold.

### Price transparency

Following the consideration of feedback received after the release of the Interim Report, the ACCC considers there is not sufficient evidence to establish that indicative pricing is beneficial to the industry. The ACCC has therefore removed the interim recommendation on indicative pricing and recommends that the indicative pricing scheme be removed from the Code and all grape supply agreements.

**5. The ACCC recommends that warm climate grape grower representative organisations deliver accessible, relevant and timely analysis of market trends to warm climate growers.**

The information should indicate short to medium term price trends relating to commonly grown varieties in each warm climate region. The information should inform growers' production and risk management decisions and help them adapt to changing market conditions. The information should be in an accessible form, and provided regularly at key decision points in the grape growing process.

The ACCC also recommends that Wine Australia actively engage with the grower representative organisations to provide technical guidance and support, and, if necessary, develop alternative publications tailored for a grower representative organisation's specific needs.

**6. The ACCC recommends that, for grapes purchased from warm climate regions, wine grape buyers 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 each financial year.**

The ACCC recommends that Wine Australia be given legislative powers to compel winemakers to provide price information, and to allow the information to be audited. This will increase the participation rate and increase trust in the information provided.

Winemakers should be identified in the pricing information. This is essential to enable growers to identify which winemakers offer the most competitive prices over time. Growers can then identify and contact these winemakers to understand their supply requirements.

The ACCC recommends that there be amendments to the Code and to all variable price supply agreements, to allow growers to lodge a price dispute up to 3 weeks after Wine Australia publishes this price information, to assist with dispute resolution in relation to variable 'fair market' price terms.

The ACCC will monitor the effects of the implementation of these recommendations to mitigate the risk of unintended consequences.

## Payment periods

**7. The ACCC recommends that long term payment periods should be phased out of standard form contracts.**

The current long payment terms that are imposed by winemakers on growers mean that growers effectively fund winemakers' inventory holding costs, and the lack of competition between winemakers means that growers are not compensated for these costs.

The ACCC considers an argument can be made that the current industry standard payment terms when applied to grapes produced outside of SA are unfair under the unfair contract term protections. Payment terms consistent with the WGI Act that relate to grapes produced within SA are expressly permitted by a law of a State and so are exempted from the application of the unfair contract term protections.<sup>8</sup>

If a court were to declare the terms in a standard form small business contract were unfair then the term would be void. Contracts offered to growers by larger winemakers are more likely to be considered standard form contracts as they will generally have greater bargaining power than growers.<sup>9</sup> This exposes lengthy payment terms in large winemakers' contracts to a higher risk of being declared void by a court.

The ACCC will consider taking enforcement action against winemakers that do not remove long payment terms from contracts to which the unfair contract term law applies. The ACCC also encourages a review of the WGI Act to ensure this legislation does not permit the use of long payment terms to the detriment of SA growers.

**8. The ACCC recommends that a best practice standard of payment within 30 days of the final grape delivery should be adopted for all winemakers in Australia with total processing capacity across all wineries, including subsidiaries, of over 10,000 tonnes.**

The ACCC considers that an appropriate means of introducing this change is through amending the requirements of the Code.

The ACCC acknowledges that it may be appropriate to enable some flexibility of payment terms in the Code, given that a variety of payment term lengths currently exist across the supply chain. However, the ACCC considers this flexibility should not extend to payment terms beyond 60 days.

The ACCC considers that a transition period of 2 years is appropriate to introduce best practice payment terms. However, winemakers should review their existing payment terms as soon as possible given the risk that the current industry standard payment terms may contain unfair contract terms.

The ACCC will also have regard to the payment period ultimately adopted in the Code when assessing whether to recommend to Government that a mandatory code be introduced.

## The Voluntary Code of Conduct

**9. The ACCC recommends that the Code be substantially strengthened, and that all winemakers that purchase grapes from growers become signatories to the Code.**

The Code should be amended to:

- provide a structured process for the review of adverse quality assessment decisions made at the winery (including at the weighbridge), including by requiring taking, holding and testing retention samples if a winemaker downgrades or rejects a delivery of grapes in order to assist dispute resolution
- improve the processes and timeframes for dispute resolution under the Code
- provide a structured process for arbitration of contractual disputes, as well as other types of disputes that may arise out of supply agreements. This will improve access to impartial dispute resolution procedures and help address the power imbalance between the 2 parties
- guarantee equal representation of growers (including grower representative bodies) and winemakers on the Code Management Committee.

A full list of the ACCC's proposed amendments to the Code are at Appendix A.

*[NB: this list is not reproduced in this follow-up report, but is available for reference on p.138 of the ACCC's September 2019 final report.]*

The ACCC will review the progress of the industry in adopting the final recommendations 12–18 months after the release of the Final Report. If winemakers do not sign up to the Code, and the upcoming Code review does not address matters raised in this report

regarding quality assessments (see chapter 3), pricing (see chapter 4), payment terms (see chapter 5) and dispute resolution (see chapter 7), the ACCC will consider recommending to Government that a mandatory code be introduced.

The ACCC expects all large winemakers to sign the Code.

## Contracting practices

### **10. The ACCC recommends that winemakers review their standard form contracts and remove any unfair contract terms.**

The ACCC has identified a number of potential unfair contract terms in supply agreements and may take enforcement action against winemakers who retain unfair terms in standard form contracts to which the unfair contract term protection applies.

A careful review of contract terms by winemakers is likely to reduce the number of unfair contract terms in supply agreements.

This recommendation applies to all winemakers with contracts to which the UCT law applies. It is not dependant on a winemaker's size or region.