



Winemakers' Federation of Australia

For the Industry by the Industry

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Winemakers' Federation of Australia

Submission to

The Australian Consumer Law

Consultation on draft unfair contract terms provisions

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1. Introduction

This submission has been prepared by the Winemakers' Federation of Australia (WFA) on behalf of the Australian wine industry.

The Winemakers' Federation of Australia (WFA), established in 1990, is the national peak body for the wine industry, representing Australia's wineries on all national and international issues. WFA operates by voluntary membership with specific representation for small, medium and large producers. Current WFA membership collectively accounts for over 90% of wine production in Australia.

WFA provides policy leadership on the issues of business climate, social responsibility, environmental sustainability, innovation, trade, and benchmarking issues that are critical to the enduring viability of Australia's wineries. The Winemakers' Federation of Australia also works closely with Wine Grape Growers Australia (WGGA) on issues of common interest.

This submission is designed to respond specifically to the questions posed on the inclusion of business-to-business standard form contracts in the Consultation paper.

WFA would welcome the opportunity to engage in further discussion on the issues in this submission as the Review process begins to formulate its conclusions.

2. Application of 'Unfair Contract' Law to business-to-business transaction

The Consultation paper identified that the unfair contract term provisions will apply to business-to-business transactions as other key provisions of the TPA do.

The inclusion of business-to-business transactions in the unfair contract provisions would create significant business uncertainty, increase business risk, and would create cross-purpose and duplication of regulatory and legislative control over business.

Many winemakers use standard form contract to set out the terms and condition for supply of grapes by wine-growers.

Under the proposed provisions, these contracts have potential to be subject to claim under the unfair contracts provisions.

These relationships are already governed by the Trade Practices Act (TPA) under its unconscionable conduct provisions in Part IVA and the misleading and deceptive conduct provisions.

Additionally, wine producers and growers operate under the terms of agreement specified in the Australian Wine Industry Code of Conduct.

2.1 Consumer Law

It is highly concerning that business-to-business will be caught up in the unfair contract legislation considering that the "intent" of the Ministerial Council, and that of COAG has been on 'consumer' protection.

At no point and in no press release has business-to-business transaction been included in Ministerial Statements or Communiqués.

The Assistant Treasurer, The Hon Chris Bowen MP, in his address to the Monash Centre for Regulatory Studies of 17 February 2009 made it clear in the launch of the *Consultation Paper – An Australian Consumer Law: fair markets – confident consumers* that COAG's reforms were "consumer" reforms aimed at providing "consumer" protection.

In the Assistant Treasurer's most recent media release of 19 April 2009, he confirmed that "consumers" would be able to challenge unfair terms and that Australian "consumers" would have access to protection from unfair contract terms.

It is, therefore, highly concerning that in this Consultation Paper the draft provisions are presented to be inclusive of business-to-business transactions and not limited to "consumers" as defined in Section 4B of the TPA.

2.2 Australian Wine Industry Code of Conduct

Winemakers and winegrowers already have their business and transaction relationships governed by the voluntary Australian Wine Industry Code of Conduct which has been designed to afford similar protections to those provided by the Horticulture Code of Conduct and exceeds the provisions in the Horticulture Code in most aspects.

The Australian Wine Industry Code of Conduct improves the trading relationships between wine grape purchasers and growers by standardising the basic components of contracts and agreements and using a common dispute resolution procedure. Both WGGGA and WFA believe that the Code encourages openness, fairness and transparency in commercial agreements and minimises disputes over contracts.

Under the Code each agreement for wine grape purchases must contain minimum provisions including the following:

- A statement that the parties to the Agreement agree that it is governed by the Australian Wine Industry Code of Conduct
- Details and signatures of all parties and vineyard details.
- A fixed price and / or a clear statement as to how the final price will be determined
- Where required, a schedule for Indicative Regional Price offers and negotiations
 - December 15 prior to vintage for Hunter Valley, Riverina, Murray Darling/Swan Hill and Riverland
 - January 15 prior to vintage for other regions
- A transparent provision for price adjustments such as bonuses or penalties
- Clearly stated terms of payment in line with industry standards – in most cases this will be:
 - One third at the end of the month following the month of delivery
 - One third at the end of June of year of delivery
 - Balance at end of September of year of delivery
- A specification of either area-based or tonnes-based purchasing
- Any quality standards including minimum requirements for maturity, purity and condition

- Grape assessment procedures if inconsistent with the publication Wine Grape Assessment in the Vineyard & Winery.
- Process for determining harvest time
- Costs and risk associated with freight
- Details on when change of ownership occurs
- Where it is appropriate force majeure clause clearly specified
- A prominent statement that the wine grape grower should seek independent legal, financial and taxation advice.
- A dispute resolution clause consistent with the Code
- A reasonable time for consideration of the contract (normally between 7 and 15 business days)

The Australian Wine Industry Code of Conduct provides a guide to resolve disputes between the wine grape purchaser and the wine grape grower in a timely and cost efficient manner which preserves ongoing commercial relationships.

The Code requires both parties to participate in the dispute resolution procedure and outlines a systemised way to manage the communication around the dispute. It also allows for the appointment of a mediator or Independent Expert who has final binding say over the outcome.

The Code outlines a procedure for when the Code is breached, providing guidelines about the process of complaint, reporting to the Administration Committee, timing of notification and response, judgement and how to remedy the breach. Penalties are also outlined and may include de-listing from the Code.

2.3 Business remedy to unfair contracts already in TPA

Business-to-business contracts are already governed by the Trade Practices Act (TPA) under its unconscionable conduct provisions in Part IVA and the misleading and deceptive conduct provisions.

The Victorian model, which has been heavily borrowed by the Ministerial Council and COAG limits the unfair contract provision to “consumers” and does not extend to all parties of any kind.

This was the intent of the Ministers and of COAG.

The WFA therefore submits that the unfair contract provisions being proposed should be limited to “consumers” as defined under Section 4B of the TPA.

2.4 Certainty of Contract

Wine production has less flexibility and higher risk than most manufacturing business and needs a strong “certainty of contract” to manage its risk and product price accordingly.

The lack of flexibility and higher risk is due to the following factors:

- grape growing is hostage to seasonal weather fluctuations
- only one grape harvest per year (inventory costs), 3 to 4 year supply lag
- very limited scope to substitute between grape colour, grape types or to vary alcohol levels
- full utilisation of the grape supply resource and achievement of economies of scale and scope requires production of cask wine as the destination for the lowest ranked wine quality
- capital intensive long life assets
- high inventory with slow stock turn
- high working capital requirements
- global competition in a quasi-commodity marketplace

These factors result in higher vulnerability to risk.

Including business-to-business transactions in the unfair contract law would have a significant and proportionally larger disruptive impact on the wine industry.

2.5 Vexatious Claimants

Wine production has less flexibility and higher risk than most manufacturing business and needs a strong “certainty of contract” to manage its risk and product price accordingly.

The wine industry is presently going through a significantly challenging period.

The 2009 vintage marks the start of what most in the Australian wine industry believe will be the toughest year for at least two decades.

A range of factors has contributed to the rapid deterioration of domestic and export markets, requiring widespread industry restructuring to facilitate a return to sustainable margins.

Over the past year sales have declined in nine out of our top 10 markets, with total exports down by 18% (volume). The domestic market, which accounts for 40% of sales, dropped for the first time in 15 years.

This reduced demand coincides with more than a decade of unprecedented change in wine trading conditions, greater environmental responsibilities (exacerbated by climate change), and several key factors that are putting pressure on wine businesses:

- **Drought**
 - Water availability and cost
- **Exchange rates**
 - Loss of competitiveness against competitors since 2002, refer to AUD exchange rate graphs that follow
- **Retail market power**
 - Our 2 largest markets are Australia and the UK
 - 2 major retailers in the Australian market control 70% off premise and they account for more brand ownership than any single Australian winery. Likewise the UK market exhibits a high degree of retail market power.
- **Global Financial Crisis impact on export sales**
 - Australian wine's largest markets UK and the USA are the worst affected
- **Global Financial Crisis impact on funding for high working capital requirements**
- **Oversupply**
 - Speculative vineyard plantings have created excess capacity
 - *Oversupply has dogged the Australian wine industry since the record harvests of 2004, 2005 and 2006. While the sustainability of the current status quo is being hotly debated by the industry, the underlying problem is becoming increasingly acute as Australian wine demand falters. We believe the industry needs to remove at least 25% of bearing vineyards to balance supply with existing demand." (Citigroup Industry Focus, 8 January 2009)*

The structural difficulties in the wine sector may lead to participants seeking to utilise the proposed unfair contract provisions for vexatious claims in response to legitimate contractual outcomes arising from the deterioration of business conditions.

This analysis could be born across any industry or any company that is seeking a 'way-out' from agreed contract terms and are willing to test it on a member of the judiciary.

3. Conclusion

The preceding analysis strongly supports the WFA's submission that the proposed unfair contract provisions are strictly limited to consumers as defined in Section 4B of the Trade Practices Act.

The current system of regulation, in partnership with the Australian Wine Industry Code of Conduct adequately covers and protects business.

The existing protections for buyer and grower relationships/transactions are appropriate, effective and well understood and should not be changed.

The key points in our submission are that:

- The intent of the Ministerial Council and COAG was to limit the unfair contract laws to "consumer" protection.
- Business-to-business relationships are already governed by the Trade Practices Act (TPA) under its unconscionable conduct provisions in Part IVA and the misleading and deceptive conduct provisions.
- Wine producers and growers operate under the terms of agreement specified in the Australian Wine Industry Code of Conduct.
- Wine production has less flexibility and higher risk than most manufacturing business and needs a strong "certainty of contract" to manage its risk and product price accordingly.
- The structural difficulties in the wine sector may lead to participants seeking to utilise the proposed unfair contract provisions for "vexatious" claims in response to legitimate contractual outcomes arising from the deterioration of business conditions.