

## Chapter 3

### Problems in relations between grapegrowers and winemakers

3.1 During the inquiry the committee received evidence of exploitative business relations between winegrape growers and winemakers, as winemakers take advantage of their stronger bargaining power in the present oversupply of grapes. This chapter outlines these concerns.

3.2 The evidence was provided to the committee in the stories of individual growers and in summary comments by their representative organisations. Growers of the Riverina and Murray Valley regions submitted 435 form letters of which 115 attached personal comments. A sample of these comments is at Appendix 4. They give a clear picture of the grievances of growers. Those grievances go beyond matters of price.

3.3 The committee also notes comments made by grower organisations to the effect that many growers hesitate to complain for fear that it will count against them in future dealings with wineries.<sup>1</sup>

3.4 The committee was not trying to collect detailed evidence of particular cases, and has no basis for passing judgement on individual cases or individual winemakers. There was no evidence on whether bigger winemakers are any more exploitative than smaller ones. There was evidence to suggest that some winemakers have very sound relationships with growers, and others do not; and that it is not necessarily the case that ‘the bigger the uglier’.<sup>2</sup> The ACCC, which has dealt with complaints about alleged unconscionable conduct, noted that it is not the case that any one winemaker is the focus of many complaints.<sup>3</sup>

3.5 Growers emphasised that their complaints about the way business is done are quite distinct from their regret that prices are currently low:

While some of the issues impacting on grape growers are cyclical or caused by outside influences and may or may not be overcome through changing conditions over the effluxion of time, the root cause of much of the current crisis is not cyclic but rather, unsatisfactory terms and conditions by which grapes are sold, prices are set and payments are made.<sup>4</sup>

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1 For example, Riverina Wine Grapes Marketing Board, p. 6

2 Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2008, p. 9

3 Mr M. Pearson (Australian Competition and Consumer Commission), *Committee Hansard*, 10 August 2005, p. 17

4 Submission 30, Wine Grape Growers Australia Inc., p. 6

## **Growers' complaints**

3.6 The types of concerns expressed by growers included:

- contracts offered on a 'take it or leave it' basis, with no genuine negotiation;
- contracts not being renewed, often after growers have been encouraged by winemakers to invest in improvements;
- prices notified late in the season, leaving growers little chance of negotiating alternative buyers;
- lack of objective, transparent standards for assessing the quality of grapes; and
- contracts are often unclear about how disputes over price or fruit quality should be resolved.

### ***Negotiation of contracts***

3.7 Growers complained that contracts are offered, or offered for renewal, on a 'take it or leave it' basis, with no real negotiation. For example:

Whilst the majority of King Valley growers have written contracts in place, there is a large variation in the terms and conditions of such contracts. In recent years some wineries have honoured their contracts while others have either dishonoured the contract or have enforced several amendments benefiting the winery and not the grower.<sup>5</sup>

As an individual, whether large or small, it is an absolute lost cause to try and negotiate a fair and reasonable outcome for your product when you are dealing with a large corporate entity which will say, 'Take it or leave it.'<sup>6</sup>

### ***Contracts not being renewed contrary to reasonable expectations***

3.8 Growers complained that contracts are not being renewed as winemakers find it advantageous to rely more on the spot market. For example, the South Australian Farmers Federation reflected this in its concerns.<sup>7</sup> Mr Joe Gropler told the committee that:

Growers that had previously had contracts with wineries are now being told that their contracts won't be renewed and that they must find a new outlet for their grapes (impossible during a glut).<sup>8</sup>

3.9 Of course, whatever the expectation, there is no breach of contract if a party simply acts according to the termination clause in the contract. There should be no expectation that a contract will run forever, if that is not in the contract. However,

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5 Submission 20, King Valley Vignerons, p. 3

6 Mr M. De Palma (Murray Valley Winegrowers), *Committee Hansard*, 28 June 2005, p. 4

7 Submission 3, South Australian Farmers' Federation, p. 6

8 Submission 16, Mr J. Gropler, p. 1.

when the behaviour rejects a long-standing relationship which the grower (it is implied) took on trust, the concern has an additional dimension:

[In 2002] the Board helped to place approximately 6,000 tonnes of wine grapes that were ejected from wineries. Many of these growers had been in long standing supply arrangements with wineries (some in excess of 30 years) were simply advised immediately prior to harvest that the winery did not require nor had the capacity to purchase their product.<sup>9</sup>

3.10 In addition, growers suggested that winemakers had encouraged them to invest, with the implication that they would take the product, but this has not been honoured:

Anecdotal evidence suggests that winery staff were providing planting advice to producers based on their own perceptions of the market place without any fiduciary commitment that the fruit would be purchased by the wine company.... it is wineries that are giving growers false confidence that the wine grapes planted will return a profitable margin once in full production.<sup>10</sup>

Producers encouraged vine planting, recommended specific varieties and offered attractive contracts, then constrained acceptance of these grapes and terminated contracts when supply exceeded their needs and/or expectations.<sup>11</sup>

One example of inequity includes a number of instances where winemakers have demanded certain developments (eg replanting to different or in some cases the same variety, or changes in irrigation systems) to be implemented by grape growers as a condition of the supply contract, only to then refuse delivery.<sup>12</sup>

3.11 The Winemakers' Federation denied that winemakers have encouraged unwise investment:

In 2000 we released a document called *The Marketing Decade*. That document was a recognition of the rate of plantings that had gone into the industry.... It put out some quite significant warning bells about what would potentially happen if we were not able to achieve the sales growth that we, as an industry, coveted. I have to say that in hindsight it has proven to be very accurate. But we did do that, and that is an example of how we were addressing those issues as we went through.<sup>13</sup>

3.12 This comment was supported by Mr Victor Patrick of Fosters Wine Estates:

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9 Submission 29, Riverina Wine Grapes Marketing Board, p. 4

10 Submission 29, Riverina Wine Grapes Marketing Board, p. 4

11 Submission 28, Weeks Consulting Pty Ltd, p. 1

12 Submission 3, South Australian Farmers' Federation, p. 7

13 Mr S. Strachan (Winemakers' Federation of Australia), *Committee Hansard*, Adelaide, 27 June 2005, p. 9

There were certainly a number of articles published to say that the production growth was starting to look as though it was growing at a faster rate than the export growth... the major companies certainly were communicating with their grower base regularly about these sorts of themes... In a lot of cases, our organisation made it perfectly clear that we had our future supply in place and we did not need extra.<sup>14</sup>

### ***Timing of offers and payments***

3.13 Growers complained that the timing of offers has gradually got later in the season. They implied that this has been a deliberate tactic by winemakers to make it harder for growers to shop around for a better offer before harvest (assuming their contract allows that). For example, King Valley Vignerons indicated that:

Throughout the 1990's it was a standard business practice for wineries purchasing grapes from our region to issue prices in mid to late January each year. However, since 2000 the price issue date has got later and it is now common for all wineries to issue prices in mid March... [This] means that some growers are delivering grapes (early ripening varieties) to wineries with no idea of the price they will receive for their product... We see no reason why grape prices cannot be issued in December when growers undertake crop estimations.<sup>15</sup>

3.14 Similarly, the Riverland Winegrape Growers Association said:

In many cases this year, growers were picking grapes before they had had a final offer. You cannot slow down the grapes; they are a perishable product...<sup>16</sup>

3.15 Growers also expressed concern that some winemakers are moving away from the standard three instalment payment for grapes. The Riverina Wine Grapes Marketing Board advised that 'Winery X' is offering contracts with four instalments, the last being on 15 December. The Board argued that this is effectively 'using growers as credit facilities'.<sup>17</sup> Growers thought it was particularly oppressive for winemakers to insist on the three instalment delayed payment even when paying extremely low prices on the spot market. It was said that the first instalment would not even cover transport costs.

3.16 Growers also made the following claims in relation to price setting:

- there is no realistic negotiation on price;

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14 Mr V. Patrick (Fosters Wine Estates), *Committee Hansard*, Adelaide, 27 June 2005, p. 8

15 Submission 20, King Valley Vignerons, p. 2

16 Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2005, p. 18

17 Submission 29, Riverina Wine Grapes Marketing Board, p. 9. Similarly, Submission 20, King Valley Vignerons, p. 3

- there is no transparency about how prices are set; and
- there are problems with assessing the quality of grapes.

### *No realistic negotiations on price*

3.17 Growers complained that there are often no realistic negotiations on price. For example, according to the Riverina Wine Grapes Marketing Board, ‘most contracts... are supply agreements that bind the grower to the winery for a set duration of time (years) but offer no minimum price for the grower to have a level of financial comfort. The offer price is posted each year at the commencement of harvest and the grower, via the supply agreement has to deliver with no formal offer, negotiation and agreement occurring.’<sup>18</sup>

Under these contracts a winery could nominate an unrealistic price, having no obligation to offer a market price. There needs to be a mechanism that can be employed by growers that allows for negotiation to occur. These types of contracts only serve to provide a fertile ground for litigation.<sup>19</sup>

3.18 Similarly Murray Valley Winegrowers indicated:

There are no formal provisions that allow for meaningful price negotiations. And if no dispute resolution process is available, and the grower is under contract to supply fruit, what choice is there but to ‘accept’ the price?<sup>20</sup>

3.19 It was sometimes unclear whether these complaints alleged breach of contract, or merely unfair pressure. The Riverina Wine Grapes Marketing Board argued that ‘growers can be asked to amend the contract by wineries, with fear that if the amendment is not entered into the grower will not be considered “on side” with the winery in the future’:

[Winery Y] has begun the process of communicating to all contracted producers that it wishes to amend the contract, for the next two years to reduce the level of Chardonnay that they have agreed to purchase, by 25%. Growers are in no position to seek amendments in their favour. Growers for the [Winery Y] feel that by not agreeing to the amended terms they may possibly suffer ill treatment by the company in terms of the business relationship deteriorating and possible price reductions to their wine grapes by the subjective quality assessment process employed by the company.<sup>21</sup>

3.20 Similarly from the Riverland Winegrape Growers Association:

I cannot say the example you gave of a winery saying, ‘Here is a contract, but now we are not going to buy the grapes’ has not happened, but it is not a common occurrence. It is more common—there are two wineries where

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18 Submission 29, Riverina Wine Grapes Marketing Board, p. 8

19 Riverina Wine Grapes Marketing Board, News Release, 17 February 2004

20 Submission 7, Murray Valley Winegrowers, p. 2

21 Submission 29, Riverina Wine Grapes Marketing Board, p. 8

this has occurred very recently—for growers to receive letters from the winery saying, ‘We are buying your grapes, but we cannot afford to pay the price that was in the contract, so we are going to offer you something less.’ I guess the growers in most cases feel, ‘I have no option because I don’t have any bargaining power.’<sup>22</sup>

### ***No transparency on how prices are set***

3.21 A closely related matter is the lack of clarity about how prices are set. A ‘take it or leave it’ approach to a price offer might be more acceptable if it was clear that the offer was based on some objective, transparent, industry accepted, procedure. It appears that this is often not the case. For example, witnesses said:

The huge variation in prices paid by different wineries for what is essentially the same product has left growers totally bewildered as to how the ‘market price’ is determined.<sup>23</sup>

The pricing is set by the buyer and no correspondence is entered into. The price paid is totally based on the field personnel’s assessment which is a very subjective taste test. It is wholly exposed to abuse in the interest of corporate profitability.<sup>24</sup>

...our final payments are determined by the final selling price of the resulting wine (a market-based contract). As growers we are not privy to any of the sale details, ie price, buyers, quality etc. We simply take their word for it.... It seems wrong that they can give a market-based contract yet divulge none of the details of that market.<sup>25</sup>

3.22 In contracts which set a price with reference to the average price for the region, it may be unclear how this figure is reached:

If you are to arrive at a regional average that implies that you have got to know what everyone in the region is paid. So if someone is going to wait until everyone else is paid and then pay the average it is a bit screwy. I guess the way it was used was considered to be fair because there would still be consideration included in the offer, therefore making it a contract. There would be a price. The mention of the district weighted average price would be in the sense of saying, ‘We will pay you this price, which is our offer price, or the district weighted average, whichever is the greater.’ So there was reasonable opportunity there for growers to measure the risk. But, increasingly, the opportunity for wineries to know what the district weighted average was was blurred because they are not allowed to know

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22 Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2005, p. 11

23 Submission 20, King Valley Vignerons, p. 2

24 Submission 18, Creeks Edge Vineyard and Winery Pty Ltd, p. 3

25 Mr R. Gebert, *Committee Hansard*, Mildura, 28 June 2005, p. 42

what other wineries are paying and so they cannot possibly estimate what the district weighted average is going to be.<sup>26</sup>

### ***Problems with assessing grape quality***

3.23 Growers complained that assessment of grape quality is not transparent. For example, Mr Stone of Murray Valley Winegrowers said:

None of the equipment used is subject to third party checks, no legal procedures are in place to protect the integrity of the results and results are provided to growers after harvest—sometimes long after harvest—without any means for them to be challenged. Instruments of trade in other industries have to conform to the National Measurement Act but not as yet in the Australian wine industry.<sup>27</sup>

3.24 Growers particularly claimed that assessment of colour and flavour is erratic:

In the Riverina over the past 3 seasons there has been a major shift toward the use of colour in red wine grapes as a determinant of price. This has led to producers not being able to either meet the requirements to obtain a high price or understand the basis behind these decisions, they are not told why except for comment that this is what the consumer is seeking. The sampling and testing processes for colour is highly variable and is not regulated by any industry body.<sup>28</sup>

We still have companies that just chew and we have other companies that just sip and that is the extent of their testing.<sup>29</sup>

3.25 Evidence provided in submissions also indicated that wineries' quality standards often change over time without apparent reason:

Within the Riverina some wineries work with producers to strive to achieve a quality product that best suits the wine styles for their market. Other wineries tend to approach quality in an ad-hoc manner, the case of "shifting goal posts" annually is a constant bane to wine grape producers.<sup>30</sup>

Quality criteria change from season to season... which inhibits the ability and opportunity for growers to manage vines for optimum quality.<sup>31</sup>

3.26 If so, this is not only a problem of fairness to growers, but also a cause of inefficiency for the industry as a whole.

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26 Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2005, p. 18

27 Mr M. Stone (Murray Valley Winegrowers), *Committee Hansard*, 28 June 2005, p. 3

28 Submission 29, Riverina Wine Grapes Marketing Board, p. 7. See also Appendix 4.

29 Mr P. Englefield (Robinvale Wine Grape Growers Association), *Committee Hansard*, 28 June 2005, p. 10

30 Submission 29, Riverina Wine Grapes Marketing Board, p. 9

31 Submission 28, Weeks Consulting Pty Ltd, p. 5

3.27 The Riverina Wine Grapes Marketing Board claimed that grapes are often assessed by insufficiently qualified people:

The current industry standard is for winery staff members (often seasonally employed) that may have not had any industry formally recognised training, to make assessments of grading on growers wine grape deliveries. It should be the case that the industry has better processes that are tangible in terms of educational requirements for its employees that are tasked with making financial assessments on grower's production.<sup>32</sup>

3.28 The committee also received evidence that claimed that a lack of transparent standards of assessment can lead to unscrupulous behaviour:

This industry lacks truth and transparency.... Wineries are often cited as having paid lower prices when the fruit has actually ended up in a higher end use than its graded and priced value.<sup>33</sup>

3.29 It was argued that it is unfair that growers should pay for the results of the winemaker's actions - for example, when quality is downgraded because of deterioration caused by the winemaker demanding delayed harvest or extra transport.<sup>34</sup> The same argument applies to payments based on finished wine quality, over which the grower may have little control:

There are mistakes in the winemaking process that, I would suggest, the growers carry at the end of the day.<sup>35</sup>

3.30 On the other hand, the Winemakers' Federation argued that payment based on finished wine quality rewards growers who produce better grapes.<sup>36</sup>

3.31 The South Australian Farmers' Federation noted concerns about:

- apparent undue weight attributed to previous years' quality assessments for a particular vineyard or block;
- grapes assessed at the quality suitable for the current run, rather than the inherent quality of the delivered grapes; and
- dissatisfaction 'when the field assessment before the harvest was good, but after the wine was processed some months later, the quality assessment of the grapes was downgraded.'<sup>37</sup>

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32 Submission 29, Riverina Wine Grapes Marketing Board, p. 10

33 Submission 29, Riverina Wine Grapes Marketing Board, p. 10

34 For example, Submission 1, Globe Wines Pty Ltd; Submission 3, South Australian Farmers Federation, p. 7 and Submission 28, Weeks Consulting Pty Ltd, p. 4.

35 Mr P. Englefield (Robinvale Wine Grape Growers Association), *Committee Hansard*, 28 June 2005, p. 11. Similarly, Mr J. Caddy (CCW Cooperative Ltd), *Committee Hansard* 28, June 2005, p. 41.

36 Mr V. Patrick (Fosters Wine Estates), *Committee Hansard*, Adelaide, 27 June 2005, p. 13

37 Submission 3, South Australian Farmers' Federation, pp. 7-8



3.32 Weeks Consulting suggested that quality parameters should be reliably measurable by ‘calibrated, reproducible and legally recognised methods (similar to the provisions of the Weights and Measures Act)’<sup>38</sup>

3.33 There have been initiatives to improve the situation. In evidence, the Winemakers’ Federation referred to *Winegrape Assessment in the Vineyard and at the Winery*, published in 2003 at the initiative of the Wine Industry Relations Committee (which has representatives of both growers and winemakers). The ACCC suggested that this publication could be the basis of a code of conduct on assessing quality. However Mr Byrne of the Riverland Winegrape Growers Association said, ‘we have failed to have it implemented, because there is no compelling reason at this time to have it implemented in such a way that it would compel parties to comply.’<sup>39</sup> The Wine Industry Relations Committee is also working on establishing industry standards for assessing sugar and colour.

3.34 ‘Flavour and character’ are particularly hard to objectify. *Winegrape Assessment in the Vineyard and at the Winery* notes that ‘in situations where grape pricing will be influenced by flavour and character, wineries need to take particular measures to ensure growers can have faith in the process of assessment and assignment of these parameters...’

The special measures wineries take could include:

- Ensuring growers appreciate product portfolios, possibly through structured tastings;
- Giving growers clear and realistic wine end-use expectations with reference to variety, region and vineyard;
- Having assessment and assignment protocols that are specified and adhered to with internal consistency; and
- Communication to growers of end-use outcomes.<sup>40</sup>

### ***Research on objective quality assessment***

3.35 The committee notes that there has been a strong research focus on developing better and quicker assessment of grape quality. Dr Hardie of the Cooperative Research Centre for Viticulture said that ‘this has been a whole of industry objective since about 1990’:

The best example I could give you would be the measure of red colour for wine grapes. The initial method that was introduced there was a very time-consuming method of punching little segments or disks of skin and extracting the colour from those over quite a lengthy period. The work of the cooperative research centre has been to try and speed up that test

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38 Submission 28, Weeks Consulting Pty Ltd, p. 7

39 Submission 4, Winemakers’ Federation of Australia, p.12; Submission 11, Australian Competition and Consumer Commission, p. 7 and Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2005, p. 3

40 W. Allan, *Winegrape Assessment in the Vineyard and at the Winery*, p. 3

through the use of NIR spectroscopy. That has rapidly been adopted by the industry.<sup>41</sup>

3.36 However advances in testing colour have not removed complaints from growers about claimed variability in the results (see paragraph 3.24 above<sup>42</sup>). As well, flavour is still hard to measure:

There are hundreds of flavour compounds in the fruit and many more are generated in the fermentation process... The technology is beyond us at this point in time because it is so complex. There are many grape attributes that go into determining the style of the product. We are trying to identify at least the key ones.<sup>43</sup>

### ***Comment***

3.37 In the committee's view it is hardly satisfactory that grape prices may not be settled until long after delivery, and may reflect quality factors that cannot be described objectively and appear to be at the buyer's discretion. Continued research effort is essential in the attempt to make assessment of grape quality more objective, and continued effort is needed to encourage winemakers to adopt more objective measures. The aim should be to have price settled at the time of delivery as far as possible, based on criteria which are clearly known in advance.

3.38 The committee has not investigated wine industry research and development generally and does not comment on whether the total research effort is appropriate in proportion to the size of the industry and the potential payoffs. That is a matter for the industry to work out with government and the various research bodies.

3.39 The committee also notes that recommending research priorities from the growers' perspective would be an obvious role for a national growers' body.

3.40 However, the committee does not believe that more research will solve all problems. For example, it appears there is no likelihood of objectifying 'flavour' any time soon. If it suits the parties to have a payment for something like finished wine quality, that is a matter for agreement under contract, and there is no reason why it should be prevented. If it suits a winemaker to impose such a condition on an unwilling grower, then we are back to the fundamental problem of uneven bargaining power, and this is not solved by a quality assessment standard.

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41 Dr J. Hardie (Cooperative Research Centre for Viticulture), *Committee Hansard*, 28 June 2005, pp. 22-3

42 See also comments in Appendix 4.

43 Dr J. Hardie (Cooperative Research Centre for Viticulture), *Committee Hansard*, 28 June 2005, pp. 24-25

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### ***Problems with dispute resolution***

3.41 The difficulty of assessing grape quality objectively, as this affects the price paid, makes it all the more important to have orderly ways of resolving disagreements.

3.42 Contracts may or may not have dispute resolution provisions. The Wine Industry Relations Committee's recommended best practice contract elements include a dispute resolution clause. The key elements of it are:

- prompt, written communication;
- where the dispute is over quality or price: the parties agree to refer the matter to an independent expert and abide by the expert's decision; and
- the parties share equally the costs of the independent expert.<sup>44</sup>

3.43 For example, DAFF reported that in 2004 and 2005, 'Using the dispute resolution process provisions in their contracts... 172 Riverland and Sunraysia growers referred the prices [offered by McGuigan Simeon] to an independent expert. The expert made a binding decision that increased the price, but not to the level sought by growers.'<sup>45</sup>

3.44 However, grower groups argued that dispute resolution conditions are not used enough. In the Riverland, according to Mr Byrne, 'there are some wineries that are encouraging us all the way in the work that we are doing here with standards of contract, with dispute resolution clauses and the like. There are others who do not have the faintest interest in going down that path with us.' In the Murray Valley, according to Mr Stone, 'very few arrangements and agreements for the sale of wine grapes... contain provisions that enable growers to involve an independent third party should a conflict arise over price or fruit quality assessment.' The Riverina Wine Grapes Marketing Board said that 'the adoption of these industry agreed best practices has been minimal to almost non-existent within the Riverina':

The region's two largest wine grape purchasers... have no adequate consideration of dispute resolutions in terms of wine grape quality assessments, leaving the growers with no recourse. This type of "take it or leave it" approach in the industry is not conducive to the development of sound business practices or sustainable industry development.<sup>46</sup>

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44 Submission 4, Winemakers' Federation of Australia, Attachment. Murray Valley Winegrowers, Additional Information, 5 August 2005.

45 Submission 24, Department of Agriculture, Fisheries and Forestry, p. 9. See also Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri 27 June 2005, pp. 3 and 10.

46 Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2008, p. 9; Mr M. Stone (Murray Valley Winegrowers), *Committee Hansard*, 28 June 2005, p. 2 and Submission 29, Riverina Wine Grapes Marketing Board, p. 11.

3.45 The Winemakers' Federation of Australia argued that it is not true to say that wineries do not use dispute resolution provisions:

For example, the Hardy Wine Company has dispute resolution clauses in all its cool area contracts, and over half of its warm inland area grape supply. McGuigan Simeon has clauses in all of its contracts, and these were used effectively by growers in 2005 to dispute the price offered. Orlando Wyndham also has a dispute resolution clause which has been used in all contracts since 2003.<sup>47</sup>

3.46 Murray Valley Winegrowers commented on this:

The cool areas, where, it is said, Hardy has dispute resolution clauses in all contracts, account for less than 20% of the company's annual intake. In the Murray Valley NONE of the 400 growers under contract to Hardy has the benefit of dispute resolution provisions... Apart from McGuigan Simeon (which has announced its intention not to renew existing contracts after 2007) and Orlando, both of which currently have dispute resolution provisions, the other major (now largest) grape buyer in Australia is Southcorp, taken over recently by Foster's. Legal advice suggests that the dispute resolution provision in the warm-climate Southcorp contracts is meaningless, given that it's overtaken by a later "sole winemakers' discretion" clause.<sup>48</sup>

3.47 Growers also argued that even when contracts have dispute resolution provisions, at a time of over-supply, growers hesitate to use them for fear of being discriminated against at contract renewal time.<sup>49</sup>

3.48 The harmful interaction between lack of transparency on price-setting, lack of reliable quality assessment, and lack of dispute resolution procedures, is shown in the summary comment of the Wine Grape Growers Association:

Growers are concerned that these parameters which determine the price they will eventually receive for their produce are subjective and out of their control and/or lack transparency. Where instruments are used to measure quality the measuring equipment is not required to be subject to periodical, third party checks to ensure the integrity of the process. Results are provided to growers after the fruit has left the farm gate (often some considerable time after harvest) without any means for them to be challenged.<sup>50</sup>

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47 Winemakers' Federation of Australia, Additional Information, 23 August 2005

48 Murray Valley Winegrowers, Additional Information, 13 September 2005, p. 2

49 For example, Submission 29, Riverina Wine Grapes Marketing Board, pp. 6 and 11

50 Submission 30, Wine Grape Growers Australia Inc., p. 6

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**Comment**

3.49 In the concerns summarised above it was often unclear whether growers were alleging breach of contract or simply ‘unfair’ behaviour under contract. In relation to price-setting and quality assessment, it was often unclear whether growers were claiming dishonesty by wineries, or whether they were simply dissatisfied because they do not trust the winery’s honesty and have no way of checking it. Some submissions explicitly claimed breach of contract or fraudulent behaviour by wineries, but there is no indication of how widespread this is.

3.50 Either way, it is clear that there is a serious problem of poor relations between growers and winemakers. This cannot be good for the industry as a whole, which depends on cooperative industry development to secure its future against growing international competition.

This industry needs to be developed in concert, wineries and producers willingly cooperating and acting together to ensure that the consumer is offered a quality, value for money product. Within such a relationship there needs to be trust and accountability. This in reality is a far cry from the majority of transactions that occur.<sup>51</sup>

3.51 The current oversupply of grapes has allowed exploitative behaviour by some winemakers and given more urgency to the problems. But the problems are underlying. It is not the case that winemakers have more bargaining power at times of glut, but growers have more power at times of shortage, with implication that over time things even out. Growers are price takers, and are at risk of being exploited, at all times, because they grow a perishable product which has no other use.

3.52 Problems such as non-transparent price-setting procedures and subjective, changeable quality parameters should be cause for concern regardless of whether this year’s prices are high or low.

**Legal remedies**

3.53 If winemakers have been breaching contracts, as submissions occasionally claimed and sometimes implied, legal remedies should be available. The Winemakers’ Federation, in context of arguing that a mandatory code of conduct is unnecessary, said that ‘Australia has a legal system that provides significant and adequate recourse to parties that are in dispute over existing contracts (or supply arrangements).’<sup>52</sup>

3.54 On the other hand, growers argued that taking legal action is expensive, stressful, and generally impractical for growers:

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51 Submission 29, Riverina Wine Grapes Marketing Board, p. 6

52 Submission 4, Winemakers’ Federation of Australia, p. 12

Contracts within the industry are not secure and are at best only made workable by legal intervention, which is cost prohibitive for individual producers.<sup>53</sup>

There is no realistic avenue for appeal or dispute resolution. Civil litigation, with its punitive costs, clearly is not a feasible option for growers though it is an option for, and has been used by, producers.<sup>54</sup>

3.55 Apart from breach of contract, it is also possible that exploitative behaviour is ‘unconscionable conduct’ within the meaning of the *Trade Practices Act 1974*. This could allow the aggrieved party to take action for damages or to seek an injunction to stop the conduct (Trade Practices Act, s82). The ACCC may also initiate an action.

3.56 Many submissions from growers obviously felt that the behaviour they complained of ought to be called ‘unconscionable’. However the ACCC stressed that in defining ‘unconscionable conduct’ within the meaning of the Act, the bar is set high. Driving a hard bargain is not unconscionable conduct:

The cases that the ACCC has pursued with regard to unconscionable conduct all have an unscrupulous factor. It is more than tough negotiating... The law will not apply to situations where a business has merely driven a hard bargain.<sup>55</sup>

There is generally some sense of picking out an individual and not being fair to that individual. So if it is an industry wide activity, if you like—if that is the process industry-wide and it is reasonably well-known or understood—it would be highly unlikely that that alone would be unconscionable.<sup>56</sup>

3.57 The ACCC has investigated complaints by winegrape growers, but found that they fall short of unconscionable conduct. The ACCC also commented that ‘grower complaints over the fairness of price and quality assessments are not always completely accurate; often, other factors may be present but unknown to growers’:

We are aware that growers typically compare the price they receive for their fruit with the price their neighbour receives. Not surprisingly, where there is an apparent price differential for what appears to be identical quality fruit, growers perceive that they are not being treated fairly or equitably.<sup>57</sup>

3.58 The ACCC also said in many cases growers had not effectively used review or mediation provisions in their contracts before approaching the ACCC.<sup>58</sup>

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53 Submission 8, form letters submitted by Riverina growers.

54 Submission 28, Weeks Consulting Pty Ltd, p. 4

55 Submission 11, Australian Competition and Consumer Commission, p. 11

56 Mr M. Pearson (Australian Competition and Consumer Commission), *Committee Hansard*, 10 August 2005, p. 18

57 Submission 11, Australian Competition and Consumer Commission, pp. 4-5

58 Submission 11, Australian Competition and Consumer Commission, pp. 4-5

3.59 Provisions in the Trade Practices Act about ‘misuse of market power’ apply only to ‘horizontal’ behaviour among competitors, not to relationships between suppliers and their customers.<sup>59</sup>

3.60 The committee notes the discussion of unconscionable conduct in the Senate Economics Committee’s 2004 report on the effectiveness of the Trade Practices Act in protecting small business.<sup>60</sup> Relevantly, the Economics Committee did not support banning standard form ‘take it or leave it’ contracts, and it did not support adding an ‘unfair contracts’ provision to the present unconscionable conduct provisions. It did support amending the Act to clarify that the presence of a ‘unilateral variation’ contract condition is a matter that a court may have regard to in deciding whether conduct is unconscionable - see paragraph 4.10 below.

### ***Comment***

3.61 The committee accepts that the behaviour described above may not be ‘unconscionable conduct’ within the meaning of the Trade Practices Act. However, it is still cause for concern.

3.62 The committee agrees with growers that it is not realistic to suggest that the remedy to exploitative behaviour is legal action. Legal action is expensive and stressful for individual growers. It is inhibited by the fear that it will lead to payback in future contract negotiations. In any case, it appears that most of the behaviour of concern probably falls short of being breach of contract.

3.63 All the problems above arise fundamentally from the imbalance of bargaining power. This flows through to contract conditions just as it does to the price offered:

I guess the market at the time of signing determines the terms by which those contracts are more favourable either for the grower or for the winemaker. In a position where the market is very short, winemakers will agree to terms that perhaps they will not agree to when the market is long.<sup>61</sup>

3.64 It could be argued that offering a contract renewal with later dates of payment (for example) is no different ethically from offering a price lower than last year’s. Obviously many growers do not see it that way. They accept that prices depend fundamentally on the balance of supply and demand, but still feel aggrieved when what they regard as oppressive contract conditions come on top of that.

3.65 Chapter 4 considers possibilities for improving the situation of growers.

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59 Submission 11, Australian Competition and Consumer Commission, p. 10

60 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 30ff

61 Mr B. Moularadellis (Riverland Winemakers Association), *Committee Hansard*, Berri, 27 June 2005, p. 24. Similarly Mr M. Stone (Murray Valley Winegrowers), *Committee Hansard* 28 June 2005, p. 5.

