

# Chapter 4

## Improving the position of growers

4.1 In view of the unsatisfactory situations described in Chapter 3, the question arises whether there should be some regulation of the business relationships between grape growers and buyers. This could be by direct regulation of terms and conditions of trade, or by establishing a code of conduct, whether voluntary or mandatory.

### Direct regulation of terms and conditions

4.2 In Chapter 2 the committee considered and rejected the possibility of directly regulating grape prices or supply. There are also precedents for regulation of business relations other than concerning price. For example, the Riverina Wine Grapes Marketing Board sets a default timetable for payment by three instalments on stated dates (14 May, 24 June, 14 October). Growers and buyers can contract out of this; but contracting out is controlled to the extent that the contract must be a ‘complying contract’: that is, it must state prices ‘or the manner in which those prices are to be calculated’; and it must state dates of instalment payments. These conditions are presumably intended as some protection to growers. Nevertheless the Board is concerned because in 2004 many growers were offered contracts which proposed a four stage payment - ‘a major departure from the industry standard’.<sup>1</sup>

4.3 Similarly, the draft Horticulture Code of Conduct now under discussion proposes that if there is no condition on timing of payments in an agreed terms of trade, a default maximum delay will apply (what the default should be is open for stakeholder comment).<sup>2</sup>

4.4 But a regulation that says ‘contracts must state the timing of payments’ is very different from a regulation that says ‘contracts must provide for payment by the following dates’. Should standard conditions on matters such as the three stage payment be compulsory for all, with no ability to contract out?

4.5 Submissions did not suggest this. It raises the prospect of unintended consequences. A risk of any regulation interfering with freedom of contract is that it might prohibit deals which both parties want. It might encourage winemakers to rely more on the spot market, which would probably not be to the advantage of growers. It might encourage winemakers to source more from their own vineyards, or to source grapes more from areas which have less regulation (supposing the transport logistics makes this possible).

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1 Submission 29, Riverina Wine Grapes Marketing Board, p.8; *Wine Grapes Marketing Board (Reconstitution) Act 2003* [NSW], s3

2 Centre for International Economics, *Horticulture Code of Conduct - a regulation impact statement*, July 2005: Draft Code, s15

**Comment**

4.6 Freedom of contract is a fundamental principle of the free enterprise economy. In the committee's view we should be extremely cautious of interfering with it.

4.7 There is of course a matter of degree. A regulation that says 'contracts must state the timing of payments', and a regulation that says 'contracts must provide for payment on the following dates', both interfere with freedom of contract to some degree. The second does so more than the first. Where is the boundary between reasonable and excessive regulation?

4.8 Arguably regulations of the first type go to ensuring that contracts include essential matters and are clear in their terms. The aim of this is to prevent disputes and to prevent the stronger party exploiting the weaker by interpreting unclear terms to their advantage or otherwise trying to move the goalposts. The committee agrees with regulation to this extent. This is the essence of mandatory codes of conduct, discussed below.

4.9 Arguably, regulations of the second type aim to influence the commercial outcome to the benefit of the weaker party. Given the importance of freedom of contract, the committee does not think there should be regulation at this level of detail. The commercial outcome depends primarily on the balance of supply and demand. Trying to affect this by regulation will not secure a sustainable industry.

4.10 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. That report considered 'unilateral variation' clauses - contract conditions which allow one of the parties to vary the contract without further negotiation or without the other party's agreement.

4.11 During that inquiry, the ACCC voiced concerns that unilateral variation clauses could be unreasonably exploited by the stronger party. The ACCC and the Senate Economics Committee recommended that unilateral variation clauses should be added to the list of matters which a Court may have regard to in deciding whether conduct is unconscionable (*Trade Practices Act 1974*, s51AC(3), s51AC(4)). The Government has agreed to this recommendation.<sup>3</sup>

4.12 The committee supports this move and encourages the government to bring forward the relevant amendment to the Trade Practices Act as a priority. This will be relevant to winegrape growers as it seems likely that there will be much renegotiation of contracts in the next few years as older contracts run out.

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3 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p.40; Government response, *Senate Hansard*, 23 June 2004, p. 24765.

## Recommendation 2

**4.13 The committee recommends that the Government should give priority to amending the *Trade Practices Act 1974* to add ‘unilateral variation’ clauses in contracts to the list of matters which a court may have regard to in deciding whether conduct is unconscionable.**

### Collective bargaining

4.14 Submissions to the committee’s inquiry argued that collective bargaining should be made easier, to reduce the problem of asymmetric information: many small growers with limited market knowledge bargaining with buyers who are large well-resourced companies.<sup>4</sup> For example, the Riverina Wine Grapes Marketing Board said:

The industry could also benefit from simpler trade practices legislation that would allow groups of various sizes of wine grape producers to form collectives and negotiate with the winery for set volumes of a determined quality of wine grapes.<sup>5</sup>

4.15 In a recent discussion paper on proposals to make collective bargaining easier, the Australian Competition and Consumer Commission (ACCC) commented:

When negotiating with big business, small businesses often feel that they have little or no bargaining power and that they are sometimes forced to accept unfavourable terms and conditions, including unfavourable prices.... The inevitable consequence of such an imbalance in bargaining positions is, generally speaking, the offering by the monopoly supplier of standard form contracts, on terms dictated by, and likely to be to the advantage of, the party offering the contract... Such contracts would generally be offered on a ‘take it or leave it’ basis, with limited, if any, scope by the acquirer to have input into the terms of the contract.<sup>6</sup>

4.16 Collective bargaining would be likely to be anti-competitive and to breach the Trade Practices Act. However the ACCC, where it is in the public interest, can permit arrangements which would otherwise be prohibited (by ‘authorisation’ under s88 of the Act). Generally, particularly in relation to small businesses collectively bargaining with a larger business, the ACCC finds that the effects of collective bargaining are fairly benign, and most applications are allowed. In recent years the ACCC has authorised collective bargaining by chicken growers, dairy farmers, sugar cane

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4 There are many small winemakers, but a few large ones dominate the market. See paragraph 2.10 above.

5 Submission 29, Riverina Wine Grapes Marketing Board, p. 11

6 Australian Competition and Consumer Commission, *Authorising and notifying collective bargaining and collective boycott issues paper*, July 2004, pp. 8 and 10

growers, lorry owner-drivers, TAB agents, hotels, newsagents and small private hospitals among others.<sup>7</sup>

4.17 However, the legal requirements of the ‘authorisation’ procedure may become an impediment to collective bargaining. The ‘Dawson review’ of the Trade Practices Act in 2003 recommended a streamlined ‘notification’ procedure to give small businesses easier access to collective bargaining.<sup>8</sup> Amendments to implement this are in the Trade Practices Legislation Amendment Bill (No. 1) 2005. The bill passed the House of Representatives on 10 March 2005 and was the subject of a Senate committee report tabled 16 March. Mr Stone of the Murray Valley Winegrowers commented:

Two years ago the Dawson review of the Trade Practices Act recommended that notification to the ACCC replace the cumbersome and expensive authorisation system. The government accepted that recommendation. Collective bargaining may provide growers with the means to legally form groups to engage wineries in genuine negotiation but, two years later, we are still waiting to see that collective bargaining.<sup>9</sup>

4.18 Use of cooperatives might also improve the position of growers. For example, the CCW Cooperative in the Riverland has 740 members and supplies most of BRL Hardy’s Riverland grapes. This results from a historical relationship between the cooperative and Hardy. CCW Chairman Jim Caddy said the arrangement is ‘probably unique’:

Hardy Wine Company has got a contract with CCW Cooperative, so Hardy Wine Company cannot go to our growers individually and, basically, cannot white-ant us. That is the situation you need.... We have returned probably 10 per cent above Riverland average to our growers over the last four or five years.<sup>10</sup>

4.19 Mr Stone of the Murray Valley Winegrowers commented that Murray Valley growers have been considering forming a similar cooperative, but ‘Hardy’s attitude to that is lukewarm at best’.<sup>11</sup>

4.20 Other possibilities for collective action by growers to improve either their productive efficiency or their bargaining power are noted at paragraph 2.82.

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7 ACCC: *Collective bargaining and collective boycotts: ACCC issues paper*, Media Release, 7 July 2004

8 Sir D. Dawson and others, *Review of the Competition Provisions of the Trade Practices Act*, 2003, p. 121

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

10 Mr J. Caddy (CCW Cooperative Ltd), *Committee Hansard*, 28 June 2005, pp. 32-33

11 Mr M. Stone (Murray Valley Winegrowers), *Committee Hansard*, 28 June 2005, p. 47

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### **Comment**

4.21 The committee considers that the bargaining position of particularly small growers would be improved by making more use of collective bargaining. The committee therefore urges the Government to give priority to passing the collective bargaining notification amendments to the Trade Practices Act, and encourages winegrape growers to use the new provision.<sup>12</sup>

### **Collective boycotts**

4.22 The Winemakers' Federation of Australia (WFA) objected to the prospect of collective boycotts (where members of the collective make a compact not to deal with the opposing party except on the conditions demanded by the collective). Collective boycotts, like collective bargaining, may breach the anti-competitive provisions of the Trade Practices Act, but can be authorised subject to the public benefit test. The WFA said:

It needs to be recognised that companies are not obligated to negotiate with such collectives. However, this does open the possibility that such a group will attempt to use the collective boycott recourse. This type of exclusionary practice is not compatible with an open and competitive market and is completely unnecessary... WFA does not support the introduction of mechanisms that will allow collective boycotts.<sup>13</sup>

### **Comment**

4.23 The committee does not agree with the WFA's apparent suggestion that collective boycotts should be banned or made more difficult.

4.24 The committee notes that the planned amendments to the Trade Practices Act do not change the public benefit test or the scope of activities that may be authorised: they merely provide a streamlined alternative to the authorisation procedure.

4.25 It is also noted that banning collective boycotts would be a significant change to the Trade Practices Act. The ACCC's collective bargaining discussion paper argued that in some situations the threat of a collective boycott may be the only thing that gives the collective any teeth. The Dawson Review considered and rejected the argument that the new notification process should not be available for collective boycotts. It said: '...collective bargaining, of its nature, may involve a collective boycott, and the committee would not favour such a restriction.'<sup>14</sup>

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12 The Senate passed the Trade Practices Legislation Amendment Bill (No. 1) 2005 on 11 October 2005, between the adoption and the publication of this report.

13 Submission 4, Winemakers' Federation of Australia, p. 13

14 Australian Competition and Consumer Commission, *Authorising and notifying collective bargaining and collective boycott issues paper*, July 2004, p. 26. Sir D. Dawson and others, *Review of the Competition Provisions of the Trade Practices Act*, 2003, p. 120

## **A code of conduct for the winegrape trade?**

4.26 If there should not be direct regulation of actual terms of trade, the question arises whether there should at least be a code of conduct to regulate the types of matters that must be included in terms of trade. This might alleviate growers' problems to some degree.

### ***Background on codes of conduct***

4.27 An industry code of conduct may be recognised by regulations under the *Trade Practices Act 1974*. The regulations may define a code as voluntary or mandatory. Voluntary codes bind corporations that agree to be bound by them. Mandatory codes bind all corporations that participate in the industry. Sections 51ACA-51AE were added to the Trade Practices Act in 1998, to improve fair dealing between big and small businesses, as the government's response to a report of the House of Representatives Standing Committee on Industry, Science and Technology: *Finding a Balance - towards fair trading in Australia*, 1997.<sup>15</sup>

4.28 Under the Trade Practices Act, if a bound corporation contravenes a code it may be liable to a civil action for damages (s82) but it is not liable to a pecuniary penalty (as s76, which creates pecuniary penalties, excludes Part IVB).

4.29 There are no voluntary codes prescribed under the Trade Practices Act. There is one mandatory code: the Franchising Code of Conduct (1998). Its purpose is to 'address the imbalance of power between franchisors and franchisees' and to 'raise the standards of conduct in the franchising sector.'<sup>16</sup> It replaced a voluntary Franchising Code of Practice (1993) which was 'widely viewed as ineffective'.<sup>17</sup> A review of the Franchising Code of Conduct in 2000 found widespread support for the code.<sup>18</sup>

4.30 Industries may of course develop voluntary codes on their own initiative without reference to the Trade Practices Act. The ACCC encourages this, and has published guidelines for developing voluntary codes.<sup>19</sup> The Produce and Grocery Industry Code of Conduct is one such code that is relevant to grape growers.

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15 *Trade Practices Amendment (Fair Trading) Act 1998*

16 Trade Practices (Industry Codes - Franchising) Regulations 1998 and Explanatory Statement.

17 Department of Employment, Workplace Relations and Small Business, *Review of the Franchising Code of Conduct - report of the Franchising Policy Council*, May 2000, p. 64

18 Department of Employment, Workplace Relations and Small Business, *Review of the Franchising Code of Conduct - report of the Franchising Policy Council*, May 2000

19 Australian Competition and Consumer Commission, *Guidelines for Developing effective Voluntary Industry Codes of Conduct*, February 2005

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### ***The Produce and Grocery Industry Code of Conduct***

4.31 The Produce and Grocery Industry Code of Conduct (PGI Code) was developed as the government's response to a 1999 parliamentary committee report *Fair Market or Market Failure*.<sup>20</sup> The report considered that there was 'a significant problem... in relation to the practices of big business at the supply level... unfair business conduct continues to undermine and damage those in less powerful positions.' The report recommended a mandatory code, however the government preferred a voluntary code.<sup>21</sup> The code is not prescribed under the Trade Practices Act: it is an initiative of the Commonwealth at administrative level in consultation with peak organisations.

4.32 From 16 July 2001, the government also appointed and funded a Retail Grocery Industry Ombudsman (now Produce and Grocery Industry Ombudsman), to provide a dispute resolution service.

4.33 Provisions of the code relevant to the problems of winegrape growers discussed in Chapter 3 are:

- all relevant produce standards and specifications will be provided to suppliers before a contract is made (s5.1);
- written contracts should have a dispute resolution clause (s6.2); and
- industry participants should support a dispute resolution procedure (s10).

4.34 It appears that there has been uncertainty about whether the PGI Code was intended to cover winegrapes. The Code applies to 'industry participants' defined as:

'Those businesses involved in the production, preparation and sale of food, beverages and non-food grocery items, including (but not limited to) primary producers, manufacturers and/ or processors, wholesalers, importers and/or distributors, brokers and/ or agents and grocery retailers.'<sup>22</sup>

4.35 Winegrape growers were earlier told that the Ombudsman could not act in the wine industry, but this year the Ombudsman has dealt with complaints. It appears that this reflects a change of policy or interpretation about the coverage of the Code, not a change to the words of the Code itself.<sup>23</sup>

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20 At first it was called the Retail Grocery Industry Code of Conduct. The Code was renamed on 11 February 2005.

21 Joint Select Committee on the Retailing Sector (Hon B. Baird, Chair), *Fair Market or Market Failure - a review of Australia's retailing sector*, August 1999, p. x. Government response, *Senate Hansard*, 8 June 2000, p. 14998.

22 Produce and Grocery Industry Code of Conduct, s.4.1

23 Mr M. Stone (Murray Valley Winegrowers Inc.), *Committee Hansard*, 28 June 2005, p. 16 and Mr P. Chesworth (Department of Industry, Tourism and Resources), *Committee Hansard*, 10 August 2005, p. 10.

4.36 When the Code was reviewed in 2003, it was concluded that:

- there was a significant lack of awareness of the code;
- there was significant dissatisfaction in relationships between retailers and growers;
- coverage (ie the number of voluntary signatories) was low; and
- take up of the code has been limited and there are no sanctions for non-compliance.<sup>24</sup>

4.37 The review recommended a mandatory code under the Trade Practices Act. The government in its response (1 July 2004) preferred to keep the PGI Code voluntary, and promised to ‘work with industry to develop a code education and promotion campaign to increase industry awareness of the Code and its dispute resolution provisions.’ The government promised to review the code in three years.<sup>25</sup>

### ***Draft Horticulture Code of Conduct***

4.38 The government promised as a 2004 election commitment to make a mandatory horticulture code of conduct to ‘give producers a fairer deal on their terms of trade and on resolving disputes with produce buyers.’<sup>26</sup> A draft code was released on 22 July 2005 for public comment. According to the accompanying Regulation Impact Statement the code responds to many years of concerns about how business is conducted in the wholesale fruit and vegetable market; including:

- lack of transparency about prices;
- often, lack of clarity about whether the wholesaler is buyer or an agent of the grower; and
- disputes where traders and growers have different views about the quality of produce.

4.39 The coverage of the code is open for discussion. Options include:

- full coverage of ‘all persons and entities that trade in horticultural produce with growers’; or
- coverage only of market sectors where most problems exist, thus excluding supermarkets, processors, packers and exporters.<sup>27</sup>

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24 N. Buck, *Report of the Review of the Retail Grocery Industry Code of Conduct*, December 2003, p. 6ff

25 *Review of the Retail Grocery Industry Code of Conduct - Government Response to the Buck Report*, 1 July 2004, p. 3

26 Hon. J. Anderson, *Fruit and Vegetable Industry Code of Conduct*, Media Release, 1 October 2004.

27 Centre for International Economics, *Horticulture Code of Conduct - a regulation impact statement*, July 2005, pp. ix and xv



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***Possible relevance of the horticulture code to winegrape growers***

4.40 The draft horticulture code applies to ‘horticultural produce’, defined as ‘fresh, unprocessed fruit and vegetables... for human consumption’ (s3). It is unclear on the face of it whether this is intended to include winegrapes. According to the regulation impact statement ‘Australian Government Ministers stated that it would apply to the grower/wholesale sector of the fruit and vegetable supply chain for fresh domestic consumption.’ This would appear to exclude winegrapes. On the other hand, the growers’ proposal is for the code to cover ‘all persons and entities that trade in horticultural produce with growers, except for consumers’. The regulation impact statement leaves open for discussion whether the code should exclude transactions with ‘processors’ - implying that it could include them.<sup>28</sup>

4.41 The Committee understands that the coverage of the code in this regard is under consideration. The following discussion assumes, with the submissions to this inquiry, that a winegrape code would be separate from a horticulture code.

4.42 Some provisions of the horticulture code which would be relevant to the problems of winegrape growers are:

- If it is a merchant relationship (as opposed to an agency relationship), the wholesaler must pay the grower a price which is agreed before delivery (s26).<sup>29</sup>
- There are provisions for dispute resolution, including:
  - a party may ask a ‘horticultural inspector’ to report on the matter of dispute. This report is not intended to be legally binding but is intended to facilitate mediation;
  - a party may request mediation; and
  - horticultural inspectors and mediators would be appointed by a Code Management Committee (s36ff).

4.43 The mediation provision, though it does not lead to any legally binding outcome, does allow an aggrieved party to cause the other party some expense in complying with the procedure. This may exert some discipline on parties to avoid dispute situations.

4.44 Some other provisions of the code answer problems which are probably not relevant in the wine industry (for example, lack of clarity about whether it is a

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28 Centre for International Economics, *Horticulture Code of Conduct - a regulation impact statement*, July 2005, p.xiv,34,54.

29 ‘Merchant relationship’: where the wholesaler buys the goods from the grower at a price agreed before sale. ‘Agency relationship’: where the wholesaler acts as the agent in a sale between the grower and a third party. Draft Horticulture Code, s3, definitions.

merchant or agency relationship; need for clear information about price at onsale where there is an agency relationship; growers delivering unsolicited produce).

### ***Submissions on a possible code of conduct for the winegrape trade***

4.45 Submissions supported clearer contractual relations between growers and winemakers, whether through a formal code of conduct or by other industry initiatives. Not surprisingly, grape growers were more likely to argue for a mandatory code.

4.46 The Winemakers' Federation of Australia (WFA) did not think there was any need for a mandatory code, but thought that there is 'considerable scope for grape growers and wineries to set best practice benchmarks and a role for the peak bodies to encourage adherence to these benchmarks':

WFA rejects the notion of a prescriptive Code of Conduct because of concerns that it will restrict innovation and potentially undermine competitiveness. That said, WFA does strongly support minimum inclusions in contracts (eg dispute resolution clauses) and will continue to promote such initiatives amongst its members.<sup>30</sup>

4.47 The WFA referred to the relevant initiatives of the Wine Industry Relations Committee. The committee was established in 2001 and includes representatives of growers and winemakers:

- publication of a guidelines document *Winegrape Assessment in the Vineyard and at the Winery*;
- development of a dispute resolution clause and process;
- organisation of a list of independent experts to provide advice in disputes over price or rejection of wine grapes; and
- development of an agreed list of elements that contracts should contain.

4.48 The Wine Industry Relations Committee is also working on establishing industry standards for assessment of both sugar and colour in wine grapes. The WFA commented: 'The immediate challenge is to ensure the adoption of these initiatives.'<sup>31</sup>

4.49 Murray Valley Winegrowers thought that too few wineries have acted on these best practice recommendations, and a mandatory code is necessary:

That [Wine Industry Relations] committee has endorsed the need for the inclusion of contractual provisions for things such as dispute resolution, terms of payment and the like. After four years of very good meetings, I might say, very few wineries have acted on those endorsements. In our view, therefore, it has become apparent that a mandatory code of conduct is

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30 Submission 4, Winemakers' Federation of Australia, pp. 2 and 12

31 Submission 4, Winemakers' Federation of Australia, p. 12

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required under which the sorts of provisions I have referred to can be included.<sup>32</sup>

4.50 The Riverina Wine Grapes Marketing Board urged a mandatory code including matters such as minimum terms and conditions of payment. Wine Grape Growers Australia supported a mandatory code. The Riverland Winegrape Growers Association was happy to start with a voluntary code on the understanding that it could be made mandatory if there was significant lack of compliance.<sup>33</sup>

4.51 The Australian Competition and Consumer Commission (ACCC) favoured a voluntary code as ‘providing a structured and equitable framework for dealings between growers and processors’. The ACCC has published guidelines for voluntary industry codes and says that it ‘has played a major role in developing equitable voluntary industry codes, via the authorisation process.’

It is the ACCC’s experience that a voluntary industry code of conduct can play a significant role in addressing market problems provided there is a commitment by industry participants to making the code work. The ACCC also recognises that self-regulation schemes can play an important role in encouraging competition and creating a mutually beneficial climate for efficiency and growth. Importantly, they also avoid the need for possible Government regulation, which, in this case, may provide less flexibility in industry arrangements.<sup>34</sup>

4.52 The ACCC did not favour a mandatory code:

One of the issues that we have with mandatory is that it really can be a huge compliance burden on businesses, not to mention a burden on my resources.<sup>35</sup>

4.53 DAFF commented that ‘it is not clear that a mandatory code would make any difference to prices received by grape growers.’<sup>36</sup>

### ***Comment***

4.54 The committee acknowledges that there are differences between the situation of winegrape growers and the fruit and vegetable growers who are affected by the draft horticulture code:

- there are many fruit and vegetable wholesalers, and growers have more options when searching for a buyer; for winegrape growers this is less so;

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

33 Submission 29, Riverina Wine Grapes Marketing Board, p.13; Submission 30, Wine Grape Growers Australia, p. 5 and Mr C. Byrne (Riverland Winegrape Growers Association), *Committee Hansard*, Berri, 27 June 2005, p. 4

34 Submission 11, Australian Competition and Consumer Commission, pp. 8-9

35 Mr M. Pearson (ACCC), *Committee Hansard*, 10 August 2005, p. 23

36 Submission 24, Department of Agriculture, Fisheries and Forestry, p. 9

- fruit and vegetable wholesalers' profit margins are small: their rate of return is about half that of growers; and
- for winegrapes, clear contracts appear to be more common and situations where there is no clear change of ownership are unlikely. Their situation is more comparable to that of fruit and vegetable growers who are contracted directly to supermarkets, bypassing the central markets (as is becoming more common).

4.55 However, there are also strong similarities:

- there are a large number of small growers;
- growers may lack the knowledge of market conditions to bargain well;
- their bargaining position is weakened by the fact that they grow a perishable product with a short window of opportunity to get it to market and little option to take it home again if there is a disagreement on the weighbridge;
- prices may be finalised only after the produce has left the grower's hands;
- disputes may arise over assessment of quality.

4.56 The core problem is the same in both cases: exploitation of growers as a result of their poor bargaining power because they are offering a perishable product for which there is no other use.

4.57 In the committee's view, if a code of conduct is warranted for fruit and vegetables, it is also warranted for winegrapes. Given the differences between the winegrape market and the fresh fruit and vegetable market, the committee suggests it would be most practical for this to be a freestanding code, rather than trying to roll winegrapes into the horticulture code.

4.58 As to whether a code should be voluntary or mandatory, the committee notes:

- the limited success of the voluntary Produce and Grocery Industry Code, as noted in the 2003 review (see paragraph 4.36);
- the evidence of exploitative behaviour and poor relations between some winemakers and grapegrowers (see Chapter 3); and

- the evidence that there has been poor uptake of the initiatives of the Wine Industry Relations Committee. This was claimed by growers and it appears that it is accepted in part by the Winemakers' Federation.<sup>37</sup>

4.59 The committee is not convinced by the ACCC's concern about compliance costs of mandatory as opposed to voluntary codes (see paragraph 4.52). Neither the review of the Produce and Grocery Industry Code nor the Regulation Impact Statement for the draft Horticulture Code saw compliance costs as a major problem. The review of the voluntary Produce and Grocery Industry Code, proposing that it should become mandatory, argued that 'those who operated as fair traders in this market would have little difficulty in complying at relatively small cost. For those who did not currently trade fairly the cost would be greater.' The Horticulture Code of Conduct Regulation Impact Statement expects that compliance costs would be 'not negligible'; on the other hand, 'additional record keeping is likely to equate with better business management practice and after an initial implementation period should be a positive benefit.'<sup>38</sup>

4.60 Compliance costs would presumably be smaller in the winegrape market because the winegrape market, compared with the fruit and vegetable market, consists of a smaller number of higher value transactions, many of which are already governed by detailed written contracts.

4.61 The committee is not persuaded by the concerns of the Winemakers' Federation that a mandatory code could 'restrict innovation and potentially undermine competitiveness'.<sup>39</sup> A code of conduct would merely prescribe certain subject matters that must be mentioned in contracts (for example: timing of payments; dispute resolution procedures). They are matters which the industry has been promoting in any case, through the Wine Industry Relations Committee. A code would not dictate the actual contract conditions on these matters. The committee does not see how this would restrict innovation in the wine industry.

4.62 The only possible inefficiency of a mandatory code, compared with a voluntary one, is that it might draw in situations where in fact there is no problem, thereby imposing unnecessary compliance costs. The Horticulture Code regulation

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37 Submission 4, WFA, p.12: 'The immediate challenge is to ensure the adoption of these initiatives.' On the other hand, the WFA rejected complaints that wineries have not adopted dispute resolution clauses in contracts: '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.' WFA, Additional Information, 23 August 2005. See also paragraphs 3.45-6.

38 N. Buck, *Report of the Review of the Retail Grocery Industry Code of Conduct*, December 2003. Centre for International Economics, *Horticulture Code of Conduct - a regulation impact statement*, July 2005, p. 67 and 78.

39 Submission 4, Winemakers' Federation of Australia, p. 13

impact statement acknowledges this, and opens for discussion whether there should be any exceptions to the code's coverage 'so it includes only those parts of the market where the problems of transparency, clarity and delivery of unsolicited fruit exist'.<sup>40</sup> A winegrape code could do the same.

4.63 The committee thinks it is unlikely that a voluntary code would be enough to protect growers with weak bargaining power. The more ethical winemakers would presumably follow the code; the less ethical would not. Given the strong evidence of poor business relations and exploitation of growers by some winemakers, the committee thinks that a mandatory code is justified.

4.64 Whether this should apply only to transactions under written contract, or should include trades on the spot market in some way, was not raised in evidence. That would be a matter for further consideration.

4.65 Whether a code should include any actual mandatory conditions, with no allowance for contracting out (for example, 'payment for the year's vintage must be completed by such-and-such date') would also be a matter for further consideration. The discussion above implies that it probably would not, but the committee has no firm view on the point. How much interference in freedom of contract is justified is a matter of judgement having regard to how serious is the mischief which the code aims to counteract.

4.66 Representing the growers' position in negotiating a code would be an obvious role for a national peak body for growers.

### **Recommendation 3**

**4.67 The committee recommends that the Government, in consultation with representative organisations for winegrape growers and winemakers, should make a mandatory code of conduct under the Trade Practices Act to regulate sale of winegrapes.**

4.68 However, it is important to realise the limitations of a code of conduct, even a mandatory one. A code of conduct regulating contracts cannot prevent buyers from turning to the spot market instead, if that suits them better. It is natural that at times of shortage buyers will try to assure future supplies through multi-year contracts, while at times of surplus they will be content to source more through the spot market. Buyers cannot be forced to offer contracts or renew contracts.<sup>41</sup>

4.69 Where a code dictates subject matters that must be addressed in a contract, without dictating the actual detailed conditions on those matters, it cannot prevent the

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40 Centre for International Economics, *Horticulture Code of Conduct - a regulation impact statement*, July 2005, p. xv

41 Subject of course to whatever conditions an existing contract may set about renewal.

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party with more bargaining power from holding out for conditions more to its advantage.

4.70 A code of conduct mandating dispute resolution provisions is unlikely to answer the concern that growers may hesitate to use these provisions for fear of being blackballed at contract renewal time. It can only be hoped that more transparent quality assessment of grapes, and more collective bargaining by growers, may prevent disputes from arising.

4.71 Furthermore, a code of conduct cannot solve the underlying problem of low prices caused by the imbalance of supply and demand. However it may help improve relations between growers and winemakers, which is surely needed to ensure the future prosperity of the industry as a whole.

4.72 A mandatory code should not be regarded as replacing or superseding cooperative action by industry groups. The committee supports the work of the Wine Industry Relations Committee on best practice guidelines, and hopes that this will continue. This work goes to promoting industry standard conditions and practices at a level of detail which a code cannot approach. To minimise disputes it is essential to promote a shared culture of how the industry should operate, and to have industry standards which both growers and winemakers have contributed to and are committed to.

### **A national winegrape growers' body**

4.73 Submissions to the inquiry argued strongly that there should be a national body for winegrape growers. At present growers are represented by regional bodies.

4.74 A former peak winegrape growers' body, the Wine Grape Growers Council of Australia, was wound up in 2004 because of concerns that it did not effectively represent the interests of growers outside the warm inland regions. However, there was wide consensus that an alternative national organisation should be formed. The three inland regions then incorporated Wine Grape Growers Australia Inc. (WGGA), with the aim of promoting a new national body. With assistance from DAFF's Industry Partnerships Program, WGGA has conducted workshops for growers around the country and drafted a business plan for the proposed national body, tentatively called the Australian Winegrape Growers' Council (AWGC).<sup>42</sup>

4.75 A national workshop on 30 May 2005 agreed to form a national growers' body, with individual membership open to all growers, funded 'primarily through voluntary membership fees'.<sup>43</sup> The proposed functions of the new body are:

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42 Submission 7, Murray Valley Winegrowers Inc, p. 3; Submission 24, Department of Agriculture, Fisheries and Forestry, p. 8; and Centre for International Economics, *A national wine grape growers' organisation - a discussion paper*, December 2004, p. 4.

43 Submission 24, Department of Agriculture, Fisheries and Forestry, p. 8

- to represent growers to government: for example, to influence policy, to be represented on government committees or bodies and to gain access to government program funding;
- to represent growers in dealing with other sectors of the wine industry: for example, to be involved in industry planning, to improve relations between growers and winemakers by means such as codes of practice and best practice recommendations; and
- to provide services to members, such as market information, professional development, and advice on their rights under contracts.<sup>44</sup>

4.76 The business plan for the proposed AWGC suggests that it ‘cannot get involved in individual commercial arrangements but does have a role in the establishment of a code of conduct for trading relationships between winemakers and growers.’<sup>45</sup>

4.77 Submissions to this inquiry echoed the points made in the report of growers’ workshops. Suggested roles for the growers’ body include:

- to maintain a national register of vineyards;<sup>46</sup>
- to negotiate a code of conduct;<sup>47</sup>
- to disseminate market information to improve growers’ bargaining position;<sup>48</sup>
- to act on behalf of a grower in grievance situation to maintain the grower’s anonymity; and<sup>49</sup>
- to suggest research priorities.<sup>50</sup>

4.78 The Winemakers’ Federation supported a national growers’ body, providing membership is voluntary and it ‘does not address commercial matters’. The WFA also supported establishing a single national body for grape growers and winemakers.<sup>51</sup>

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44 Centre for International Economics, *Draft business plan for a national winegrape growers’ organisation - and establishment of Wine Industry Australia*, May 2005, p. 5ff

45 Centre for International Economics, *Draft business plan for a national winegrape growers’ organisation - and establishment of Wine Industry Australia*, May 2005, p. 5ff

46 Submission 29, Riverina Wine Grapes Marketing Board, p. 13

47 Submission 29, Riverina Wine Grapes Marketing Board, p. 13

48 Mr J. Caddy (CCW Cooperative Ltd), *Committee Hansard*, 28 June 2005, p. 33

49 Submission 29, Riverina Wine Grapes Marketing Board, p. 9. Note that this would be inconsistent with the proposal that the national growers’ body would ‘not get involved in individual commercial arrangements’ - see paragraph 4.76.

50 Centre for International Economics, *Draft business plan for a national winegrape growers’ organisation - and establishment of Wine Industry Australia*, May 2005, p. 29

51 Submission 4, Winemakers’ Federation of Australia, p. 14



### ***Funding of a national growers' body***

4.79 It is proposed that the national growers' body be funded by voluntary subscription. The business plan notes that in the warm inland areas fees could easily be collected by grower groups in conjunction with already existing levies under state law. In other regions, collecting membership fees may be 'more challenging'.<sup>52</sup>

4.80 Submissions to this inquiry included varying opinions about whether a body should be funded by voluntary subscription or by compulsory levy. Some thought that voluntary subscription would not be enough and there should be a compulsory levy.<sup>53</sup> Most agreed with voluntary subscription and opposed a compulsory levy. For example, the Wine Industry Association WA argued that all current representative bodies operate by subscription, 'which ensures they are answerable to their membership'. It was also argued that:

Wine producers who grow grapes as well would not accept a levy raised on the grape crop for a growers organisation.<sup>54</sup>

4.81 DAFF advised that 'the Government's levy guidelines prevent statutory levies from being used to fund agri-political organisations'.

However, the Grape and Wine Research and Development Corporation and the AWBC could provide funding to a grape grower body for activities consistent with their legislated objectives.<sup>55</sup>

### ***Relationship of a growers' body with an umbrella wine industry body***

4.82 It is also proposed to establish 'Wine Industry Australia' (WIA) as an umbrella peak body for both growers and winemakers. A discussion paper prepared by the Centre for International Economics argues that this 'would force all stakeholders to focus on delivering outcomes for the betterment of the industry as a whole.' The draft business plan for the proposed body notes that 'without exception growers who attended the meetings in January and February expressed strong support for WIA as a united peak body representing the whole wine industry.'<sup>56</sup>

4.83 On the other hand, there were differing views about how it should be structured, and 'some strong views were expressed in several workshops about the

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52 Centre for International Economics, *Draft business plan for a national winegrape growers' organisation - and establishment of Wine Industry Australia*, May 2005, p. 9

53 For example, Submission 2, Yarra Valley Winegrowers Association; Submission 20, King Valley Vignerons, p. 3 and Submission 29, Riverina Wine Grapes Marketing Board, p. 14

54 Submission 9, Wine Industry Association Western Australia (Inc.), p. 2

55 Submission 24, Department of Agriculture, Fisheries and Forestry, p. 8

56 Centre for International Economics, *A national wine grape growers' organisation - a discussion paper*, December 2004, p. 5 and *Draft business plan for a national winegrape growers' organisation - and establishment of Wine Industry Australia*, May 2005, p. 27.

need for AWGC to be independent and to have the ability to make independent public statements despite being part of WIA.<sup>57</sup>

4.84 The obvious concern is that the voice of growers should not be drowned out on matters where their interests differ from winemakers. Submissions to this inquiry voiced this concern:

The issue to be addressed is development of a mechanism that facilitates more effective lobbying by grape growers regarding matters where their interests diverge from the interests of winemakers.<sup>58</sup>

A united national body is not effective in handling growers' issues that relate to commercial arrangements.<sup>59</sup>

### ***Comment***

4.85 The committee supports the current moves to establish a national winegrape growers' body.

4.86 The committee also supports moves to establish a national wine industry body, with both growers and winemakers, to progress matters where they have shared interests. However the different roles of the two bodies must be clear. The umbrella wine industry body cannot speak for growers on matters where growers and winemakers have different interests. It cannot even speak for the industry as a whole on matters where growers and winemakers have different interests. Its role should be to progress matters where there is consensus, not to put forward the appearance of consensus where it does not exist. This implies a need to identify different interests clearly and ensure that the umbrella body does not represent one side's position on them.

4.87 This still allows a role for the wine industry body to improve communication between the sides on matters of disagreement, as DAFF suggested.<sup>60</sup> Sometimes conflict might become consensus after discussion. The point is that the wine industry body should not take a position if consensus is not reached.

4.88 It appears that this approach already exists at regional level. Some regional wine industry development bodies, formed of growers and winemakers, told the committee that they would not make submissions to this inquiry because they realised

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57 Centre for International Economics, *A national wine grape growers' organisation - a discussion paper*, December 2004, p. 5; *Draft business plan for a national winegrape growers' organisation - and establishment of Wine Industry Australia*, May 2005, p. 27 and *Business plan for a national wine grape growers' organisation - report on grower workshops*, February 2005, p. 2

58 Submission 3, South Australian Farmers Federation, p. 10

59 Mr M. Stone (Murray Valley Winegrowers) *Committee Hansard*, 28 June 2005, p. 17

60 Submission 24, Department of Agriculture, Fisheries and Forestry, p. 9

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that growers and winemakers would have different positions. They preferred to leave the argument to growers and winemakers, and allow them to speak for themselves.

4.89 Accordingly, the committee is concerned by the apparent assumption that the umbrella wine industry body would simultaneously be the winemakers' body:

One option is that a new Wine Industry Association (WIA) could be formed comprising the current WFA and the new AWGC.<sup>61</sup>

[The AWGC] will be the peak industry body representing the interests of all wine grape growers in Australia. Part of the proposal involves this body being an electoral college of a new wine industry organisation called Wine Industry Australia (WIA). Three other electoral colleges would represent the interests of small, medium and large wine makers.<sup>62</sup>

4.90 This immediately creates an asymmetric situation: there is a wine industry body, a growers' body, but no winemakers' body. It invites the suspicion that winemakers would have favoured status within the wine industry body. It could lead to conflicts of interest.

4.91 The committee does not think that this concern is answered by proposing voting arrangements that would effectively force consensus. This has been suggested:

Decisions in the WFA require 80 per cent majority to get through. This forces the groups, where views differ, to caucus the issues and finally arrive at a common position.... [with this arrangement] within WIA, the AWGC would be a key linchpin, as decisions on policy would not get through without the support of AWGC.<sup>63</sup>

4.92 That would work on consensus issues. But the problem remains, that if there is no separate winemakers' representative body, and growers have a power of veto in the wine industry body, who would speak for winemakers on matters of disagreement?

4.93 The committee does not think this would be a satisfactory situation. The three different interests involved - winemakers', growers' and mutual interests - must be clearly distinguished and separately represented.

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61 Centre for International Economics, *A national wine grape growers' organisation - a discussion paper*, December 2004, p. 20

62 Centre for International Economics, *Business plan for a national wine grape growers' organisation - report on grower workshops*, February 2005, p. 1

63 Centre for International Economics, *Draft business plan for a national winegrape growers' organisation - and establishment of Wine Industry Australia*, May 2005, p. 16

**Recommendation 4**

**4.94 The committee recommends that any national wine industry body should be separate from a winemakers' representative body.**

**Senator Andrew Murray  
Chair**