

**Submission
No 46**

INQUIRY INTO WINE GRAPE MARKET AND PRICES

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I am a Solicitor working in the Murrumbidgee Irrigation Area. I am engaged by the Wine Grapes Marketing Board and from Growers time to time in relation to dealings with the wineries in the area. I wish to make a number of comments in relation to the matters pursuant to the Terms of Reference but I cannot canvass all matters.

Significant changes commenced in the regulatory framework in the area since 1995. At the time the various legislative bodies were looking at deregulating the economy including the wine industry in this area. The industry was going through a dynamic period with prices buoyant.

There are many views expressed on the desirability or not of deregulation. That is a matter where reasonable persons would validly hold divergent views. However, one view that was expressed, that deregulation would foster a closer relationship between winery and grower which would cater to long term contractual relationships dealing with the particular needs of the winery and grower more effectively. In my view, that has not been the case. It has been the opposite. What has developed are one-sided contractual relationships that effectively are adverse to the growers from a legal and practical point of view. This occurs through a number of mechanisms but I highlight the following:

- a) Most contracts do not clearly specify a fixed price. The contracts at best use phrases like "market prices" while legally valid, do not assist the grower a great deal in determining a likely return. I can understand that type of costing mechanism being used in long term contracts but most of the contracts are short term for the coming vintage only. The contracts at worst stipulate an artificially low price (less than the cost of production) or the price on the weighbridge at the time of delivery, whichever is the highest. This means that the grower has no idea what will be the return except that he is obliged to deliver fruit at less than cost.

- b) Prices can be varied according to objective and subjective criteria. Baume or sugar content is a common criteria which most industry participants would acknowledge is valid. However more controversial is other criteria such as colour testing which is undertaken post harvest in most cases. The subjective nature of such criteria is obvious. Further colour can be affected by the processing of the grapes (which is outside the growers' control) and by the fact that the grapes crushed from each individual growers are rarely stored or processed separately. Generally speaking, that leads to diminution of price because the colour test standards are rarely reached to the satisfaction of the winery and those that do, are downgraded because of the mixing with other growers.
- c) Caps on the production imposed by contract or by other means. Most contracts have a limit on the tonnage that can be delivered by the individual grower. This is understandable if there is a concern about storage and processing capacity but the wineries often accept the fruit over the cap at throw away prices. It is very cheap fruit. In that instance, there is no problem with storage or processing capacity. The wineries do argue that this is allowable under the contract and the price is a reflection of demand. What the wineries do not say at that stage in the vintage (i.e. at harvest), it is virtually impossible for the grower to source other outlets. Grapes are a perishable produce and has to be harvested and processed. They cannot be harvested and stored by the grower waiting for the market to improve. The other means of reducing tonnage, which in my view has less merit, is for the winery to request the grower to delay the harvest of grapes past the optimum time for harvest. The grapes do shrink as does the tonnage and "the price". Interestingly, depending upon the nature of the contract, the grower can be asked to harvest early to prevent baume standards being reached and therefore bonuses. The growers can't win.

- d) If the price is declining mid harvest, wineries have requested that the growers agree to a lesser price or the winery will not accept the balance of the fruit. With a perishable item, this places the grower in a difficult position. Sometimes this request is valid within the terms of the contract but sometimes it is a breach of the contract.
- e) Growers are told to grow certain varieties because that is what is currently in demand. However, these varieties do not come into production for a period of three years and demand can and does change by that time. Why would a winery commit themselves to a contract with that possibility in mind. From the winery's point of view, it is better to let the grower bear the risk of changes in the market.

The above instances are the reasons why I believe long term contracts have not been common. In some of these instances there is legal redress under contract and to a lesser extent under legislation such as the Trade Practices Act. However from my experience, growers are reluctant to take action. Growers can be "out costed" by the winery in litigation, even if there is a reasonable case. More pervasive is the reluctance by a grower who wishes to find a "home" for his grapes in the years to come with that winery or other wineries. The grower knows that by exercising such rights, the chances of finding a home for future crops, diminishes. I concede that reality is to some part a reflection of supply and demand but with a perishable crop, the growers' disadvantage is exacerbated. I know the Board, as early as 1998, indicated an oversupply was likely on current plantings and that growers should not plant without a contract. However growers were encouraged to do so by the wineries, notwithstanding the lack of contracts. The short term experience was that this was justified with reasonable returns being available up to the mid 2000's. Some growers are still being encouraged to plant.

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At the moment, growers are being asked to deliver at prices regularly less than the cost of production and notwithstanding any over supply that is an indication of "market failure" in this area. The wineries are the "price takers" in this context and the growers' lack of bargaining power and the current circumstances, reflect this.

What is particularly galling to some growers is that in the past where prices were buoyant, wineries dissuaded growers from chasing the best available price by representing that the winery would "look after them" when there would be an inevitable downturn. Contrary to expectations and to the chagrin of growers, this has not occurred.

I do not propose that the industry be returned to the regulation of the past. That is not politically or practically viable. I do propose that collective bargaining be allowed and a Code of Conduct be imposed. I do not believe that would be inconsistent with competition principles and law. In this area, even previously under vesting, the prices were always set in consultation. At the end of the day, the growers could not force the wineries to take the crop. The virtue is that there was some negotiation in a collective bargaining situation rather than what is occurring now which has the grower faced with a "take it or leave it" scenario. The long term viability of the industry is affected if the grower is being paid less than the cost of production and subject to capricious conduct on behalf of some of the wineries.

A Code of Conduct would ameliorate this situation. However it has to be in my view, a compulsory Code. A voluntary Code of Contact does not work. Many years ago in this state, there was a voluntary Code of Conduct for retail leases which did not work. The Retail Lease Act was introduced in response to that failure. I would submit that there has been a like failure in this instance. At this time I do not propose anything as sweeping as the Retail Leases Act as a response

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but a mandatory Code of Conduct should be at least considered to reduce the gap in the bargaining power between the wineries and the grower. A similar approach has been adopted with Franchises. Neither the Retail Lease Act of the Franchising Code of Conduct has been criticized or objected to on the grounds of competition policy. I do not see why it should be objected to in this case.

I have not addressed the role of Board in this submission. I do so because I am the Board's Solicitor. I am supportive of the Board's role but obviously I am not impartial in this regard and that is why I have not made any comments or submissions in that regard. However I would stress that I should not be taken to be critical of the Board. I am not. It is simply not my place to make comment in this context. My submissions are made as a long term observer of matters relevant to the Terms of Reference and my experience as a Solicitor practicing in this area and dealing with these issues on a regular basis.