



**Submissions to the
Australian Consumer &
Competition Commission
on Behalf of
Globe Wines Pty Ltd**

Presented to the ACCC 4 June 2004
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**SUBMISSIONS TO THE
AUSTRALIAN CONSUMER & COMPETITION COMMISSION
ON BEHALF OF GLOBE WINES PTY LTD**

1. On 13 January 2003 Globe Wines Pty Ltd ("Globe") made a written complaint to the Australian Consumer & Competition Commission ("ACCC") in respect of certain practices adopted by Orlando Wyndham Group Pty Limited ("Orlando"). That Complaint raised unfair practices in the negotiation and price determination of grapes used in premium quality wine by Orlando. In short Globe say that the use by Orlando of finished wine assessments to determine the quality, and thus the price, is unfair because it permits external factors such as transport and processing to reduce the price. Globe further says that Orlando's conduct in expert determination procedures adopted by the parties was misleading and resulted in detrimental price determinations contrary to the Trade Practices Act 1974.
2. A meeting took place to discuss Globe's complaint at the ACCC Sydney office on the 30 January 2003. Present at this meeting for the ACCC was Nigel Ridgway, Geoff Williams and via video from the Canberra office, Robert Antich representing Brian Cassidy. Globe was represented by Diane Dewar, Andrew Dibley and Chris Geraghty.
3. We now understand that the ACCC has declined to take further action, although no reasons have been provided for this decision. Globe now make the following submissions and ask that the ACCC reconsider it's decision and investigate further. If the ACCC were to investigate further they would be comfortably satisfied that there have been breaches of the Act which impact on how grape prices are determined which warrant closer scrutiny.
4. These issues, whilst important to Globe, also have industry wide implications concerning the use of finish wine assessments, which necessarily advantage the larger producer to the detriment of small growers. Small growers have their

prices effected by factors during transportation and production over which they have no control.

BACKGROUND

5. Between 1993 and 1998 Orlando purchased grapes from Globe pursuant to the 1993 Growers Agreement. That agreement provides that the price of Globe's crop is to be determined by reference to infield pre harvest quality assessments, baume at the weighbridge and "fair market prices" determined by reference to a defined region. No reference is made to the use of finished wine assessments and the procedure contemplated is quality assessment of the fruit, not final wine, on Globe's vineyard. This procedure provided for a fair method of assessing fruit quality as no external factors would effect quality.
6. In the event of any dispute the contract provided for the price of Globe's crop to be determined by an independent expert agreed by both Globe and Orlando, whose decision would be "final and binding on the parties".
7. From 1994 through to 1998 the price of Globe's crop was agreed as premium by Orlando. (for comparison for copies of industry reports showing reported prices for lowest, average weighted and highest price paid for years 1995 to 2000 at Tab 1).

Premium Price agreed at 12.5 baume

1994	1995	1996	1997	1998
\$1,575	\$1,650	\$1,730	\$1,730	\$1,730

8. Disputes arose in 1999, 2000 and 2001 in respect of the quality of crops produced by Globe and the price to be paid for those crops. Each year Orlando asserted that the quality of Globe's crop was merely commercial, and thus sought to reduce the agreed price by the maximum amount permitted under the grower's agreement of 15%. The successive reductions were purportedly justified by Orlando on the

basis of finished wine assessments (see page 2 last paragraph of the copy of the ACCC 28 October 2003 letter to Globe, at Tab 2).

9. To the contrary Globe say that its crop was always of substantially premium quality, as is demonstrated by independent vineyard assessments conducted by winemakers Nick Paterson and Mark Turnbull, copies of which are enclosed at Tab 3. But more importantly, Orlando at all time knew Globe's crop was of premium quality.
10. Globe was however forced to accept a conditional price for its crop in 1999, 2000 and 2001 and in accordance with the 1993 Growers Agreement the disputes were referred to an expert for determination.
11. In 2001 Globe commenced proceedings in the Supreme Court of NSW in respect of the 1993 Grower's Agreement. The Proceedings were ultimately settled whereby Globe and Orlando entered into a new growers agreement which is deemed to commence 1 September 1997 and continues to 2007.
12. During the course of the Supreme Court proceedings, documents were produced on discovery by Orlando which indicate that it was common ground that Globe's crop was not exclusively of commercial quality. Whilst Globe is not permitted to provide these to the ACCC, except under compulsion of law, Globe says that these documents will prove that Orlando knew that substantial proportions of Globe's crop was not commercial but premium and semi-premium quality. However, Orlando continually represented to the expert wine determiners by reference to finished wine assessments that Globe's crop was of inferior quality.
13. For example, in respect of the 2000 vintage Orlando represented to both Mr Stuart McGrath-Kerr and Mr Charles Drew (the expert determiners) that Globe's crop was 100% commercial quality. Whereas Orlando knew the quality of the crop to be 20% premium, 32% semi-premium and only 48% commercial quality. So much has been admitted to the ACCC in relation to the meeting on 28 February 2000 between Mr Lester and Ms Dewar referred to in Mr Williams' letter of 28 October 2003 (See Tab 2). This assessment, albeit based on finished wine

assessment, exemplifies the extent Orlando have manipulated prices by the use of finished wine assessment.

14. To the contrary Globe says the 2000 vintage was 100 % Premium prior to vintage specific quality defects listed in the Quality Standards, Appendix 2 & 4, 2001 grower agreement. Vintage 2000 was only affected by baume price adjustments, which are typical, with the end result of baume Bonuses and deductions equalling a \$37,852 baume bonus overall. No vintage specific quality defects (disease, bunch rot etc) were applied to the crop (see copies of Orlando Vintage 2000 payment summary that shows no deductions, other than baume, for quality defects and Globe's summary of Appendix 2 deductions and bonuses applicable to Globe's chardonnay crop for years 1994 to 2001 at Tab 4).

15. Further price disputes again arose in 2002 and 2003. These disputes centred on Orlando's assertion that the price of Globe's crop should be reduced each year by the maximum 15% permitted under the 2001 Growers Agreement due to inferior quality. Again the asserted justification for the price reduction was finished wine assessment.

16. The information in the following table was sourced from Orlando's submission to the independent expert. The table shows Orlando's assessment of the finished wine

Actual Quality Grade Allocated by Orlando Wyndham						
Block	1997	1998	1999	2000	2001	2002
88 Grafts	Commercial	Commercial	N/A	Commercial	N/A	Commercial
93 Grafts	Semi Premium	Commercial	Commercial	Commercial	N/A	Bulk
Ken	Commercial	Premium	Commercial	Commercial	Bulk	Commercial
Marie	Semi Premium	Premium	Commercial	Commercial	N/A	Commercial
NE1	N/A	Commercial	Commercial	Commercial	N/A	N/A
NE2	Semi Premium	Premium	Commercial	Commercial	N/A	N/A
NE3	Semi Premium	Premium	Bulk	Commercial	N/A	Bulk
P1	Semi Premium	Premium	Premium	Commercial	N/A	Commercial
P2	Semi Premium	Premium	Commercial	Commercial	N/A	N/A
P3	Premium	Premium	Commercial	Commercial	N/A	Commercial
R1	Premium	Commercial	Commercial	Commercial	N/A	Bulk

R2	Premium	Commercial	Commercial	Commercial	N/A	N/A
R3	Premium	Premium	Commercial	Commercial	N/A	Bulk

Unconscionable Conduct

17. Globe says that Orlando's conduct in the price determination procedures was unconscionable in that:

- (a) Orlando adopted a finished wine assessment procedure contrary to the terms of the Growers Agreement;
- (b) Orlando represented to the independent expert nominated under the Growers Agreement that one of the factors for establishing the quality of the product (and therefore establishing the fair market price) includes the finished wine produced from Globe's crop, irrespective of the influence of transport and production by Orlando;
- (c) Orlando's adoption of the finished wine assessment procedure in order to assess the quality of Globe's crop ignores factors beyond Globe's control. These external factors include deterioration in quality during transportation and prior to processing whilst the crop is within Orlando's control. For example in 1998, 1999 & 2000 Globe's crops were no longer processed in the Hunter Valley, as had been the case for vintages 1995, 1996 & 1997, but instead transported to Mudgee, which takes approximately 3-4 hours, and then further delays were experienced at the weighbridge and during processing. These delays were well in excess of the accepted period for best practice premium chardonnay processing, which is under 3 hours, after which the crop deteriorates. Yet notwithstanding these delays Orlando assessed the quality of Globe's crop as a finished product and without allowance for damage caused by it during transportation and processing. (see annexed copy of Orlando's newsletter and Globe's graphs of processing delays for 2000 - information sourced from Orlando's vintage records at Tab 5)
- (d) The finished wine assessment method is also susceptible to influence from winemaker errors such as contamination of quality occasioned by

simultaneously processing multiple crops; deterioration of quality caused by blending errors, incorrect addition of additives, oxidation, poor temperature control during fermentation, poor yeast selection, excessive malo-lactic fermentation or too little malo-lactic fermentation, quality of barrelling; and deterioration of quality caused by poor preparation of samples.

18. The use of this finished wine assessment procedure is unconscionable in all the circumstances and in contravention of s.51AC of the Trade Practices Act 1974. Its use exploits the grower's vulnerability to external factors and Globe's relatively weak bargaining position in the determination process. It is by its very definition inequitable because the grower is penalised for quality defects caused by Orlando.
19. Orlando's unilateral adoption and reliance on a finished wine assessment procedure exploits Orlando's significant market power against a small producer to gain a reduction in crop price. Such commercial practices and inequality of bargaining power warrants further investigation and action by the ACCC.
20. Further, Globe says finished wine assessment is unfair and unreasonable because it disregards the intention of the parties as specified in the 2001 Growers Agreement and does not take into consideration factors that are beyond the control of Globe. Orlando has automatically applied the maximum 15% reduction to the price of the product for each successive year since 1999 in reliance upon clause 4.3 of the 2001 Growers Agreement (2.1.3 of the 1993 Growers Agreement). This has been entirely without taking into account wider market conditions, including the availability of other crop. Orlando has also failed to take into account price movements for Chardonnay grapes in the relevant region and the effect of the 2002/2003 drought.
21. It is unfair and unreasonable for Orlando to fail to consider these factors, as they are essential in determining the fair market price. The failure to agree to a fair market price since 1999 has devalued Globe's crop without a proper basis and has caused a decrease in the price of Globe's crop that is irreconcilable with what is

reasonable in all the circumstances. But most importantly the method of doing so, in reliance on finished wine assessment in an expert determination, is inherently unfair, as it will always favour the large producer irrespective of a grower's individual crop quality.

Misleading and Deceptive Conduct

22. Globe alleges that Orlando's conduct in the expert determination process was misleading and deceptive in that Orlando has falsely represented the quality of Globe's crop since at least 1999.

23. This conduct is most clearly identified by the ACCC's letter to Globe 28 October 2003. That letter paraphrased a response offered by Orlando concerning a conversation between Ms Dewar (Globe) and Mr Lester (Orlando) on 28 February 2000. That response read in part:

"...Mr Lester denies that during the conversation he said words to the effect to you that 'according to Mr McKinnon, the majority of Globe's vintage was premium'. According to Mr Lester, he says that he stated to you that about 20% of the blocks were likely to be "W2" (premium), 32% were probably semi-premium and 48% would probably be classified as commercial grade."

24. Whilst the substance of that meeting on 28 February 2004 is still disputed, there can be no doubt that that statement is inconsistent with Orlando's representations to the independent expert determiner that 100% of the 2000 crop was of commercial quality.

25. The independent expert relied on Orlando's 100% commercial wine assessment representation for the 1999 and 2000 crops to determine the historical quality of Globe's crop determining the price for 2002. That reliance has resulted in an erroneous reduction in price for 2002 of 20%. This reduction was the product of clearly misleading statements about the quality of Globe's crop, in addition to reliance on finished wine assessments referred to above.

Investigation by the ACCC

26. Whilst the ACCC have now undertaken some preliminary investigations, those investigations have not considered all of the relevant material.
27. Globe understands that the ACCC's investigations consisted of written enquiries in April 2003 raising Globe's objections and seeking Orlando's reply. We understand Orlando replied to the ACCC, although that reply has not been made available to Globe, except as summarised in correspondence.
28. On 23 June 2003 Mr Williams advised Globe that the investigation was complete and the matter had been referred to the ACCC's lawyer for advice. Following this correspondence Globe raised the existence of documents obtained in the 2001 litigation which are inconsistent with Orlando reply.
29. A request for Orlando to provide the discovered document to the ACCC was made in August 2003, which request was apparently consented to by Orlando: see Geoff Williams' letter of 28 October 2003. In that letter Mr Williams innumrated the documents produced by Orlando. Orlando have however refused to permit Globe to inspect any of the documents it has produced to the ACCC.
30. On 24 November 2003 Globe advised the ACCC that only one of the relevant discovered documents has been produced by Orlando to the ACCC. Notwithstanding this, no further action has been taken by the ACCC to review all of the documents relevant to Globe's complaint.
31. It is in these circumstances clear that the ACCC knows it does not have all of the documents. It is also clear that Orlando has not produced documents in response to the ACCC's request that Globe received previously. In the absence of all the documents referred to in Globe's letter to the ACCC of 24 November 2003 the ACCC cannot with respect be in a position to finally consider the complaint and make a decision regarding whether to investigate further.
32. Unfortunately Globe is not entitled to provide copies of the documents to the ACCC unless required to do so under statutory compulsion, as the documents

were obtained during discovery and are thus subject to an implied undertaking that they not be used for a collateral purpose.

33. The ACCC has a power to compel production of these documents concurrently from both Globe and Orlando pursuant to s.155 (1) of the *Trade Practices Act* which provides:

“Subject to subsection 2(A), if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of this Act”.

34. Globe submits that on the evidence already in its possession the ACCC must conclude that Orlando has been involved in conduct that may constitute a contravention of the *Trade practices Act* 1974 and that there are documents in the possession of Globe and Orlando which may clearly establish those breaches. Thus, to the extent there is any doubt about Orlando’s conduct, the ACCC ought exercise its power to compel production of the documents prior to making any final decision.

Date: May 2004