

**Submission
No 53**

INQUIRY INTO WINE GRAPE MARKET AND PRICES

Organisation: Code Administration Committee,
Australian Wine Industry Code of Conduct

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**The Standing Committee on State Development
Inquiry into the wine grape market and prices**

**Submission by the
Code Administration Committee
of the
Australian Wine Industry Code of Conduct**

Purpose of Submission

The purpose of this submission is to provide information to the Standing Committee on State Development about the existing Code of Conduct in the wine industry and the role it might play in addressing the issues which are the subject of the inquiry.

This submission is made by the Code Administration Committee of the Australian Wine Industry Code of Conduct. We sincerely apologise for the delay in submitting this material to you and thank you for accepting a late submission.

It was prompted by the reported remarks (SMH 16 Oct P5) that the President of the New South Wales Wine Industry Association, Mr David Lowe was “urging the need for a voluntary code of conduct” in the wine industry.

In view of your terms of reference, we think it is most important to bring to your attention not only the existence of the code and its place in the industry but also what has happened since it came into effect and what proposals are being considered to improve both its reach and effectiveness.

We refer in particular to Terms of Reference:

- (b) The role of the Wine Grapes Marketing Board has played in facilitating the use of voluntary codes of conduct and sale contracts; and
- (c) The potential for collective bargaining and/or codes of conduct to contribute to an effective market.

We believe that the code provides a ready-made framework to deal with some of the issues which arise in these two terms of reference.

While the code is still in the very early stages, it has been comprehensively reviewed in June this year to make it a more effective force in the industry and more easily accessible for those seeking to use it.

We ask the Standing Committee to consider the Australian Wine Industry Code of Conduct – a voluntary code with national reach – as an appropriate mechanism to deal with some of the problems addressed by this inquiry.

The Code of Conduct

The Australian Wine Industry Code of Conduct has been in operation since the beginning of 2009. It was developed by the Wine Grape Growers Australia and the Winemakers Federation of Australia in the interests of a sustainable Australian wine industry. The establishment of the code followed a recommendation by an inquiry conducted by a Senate Committee in 2005.

The aim of the code is to:

- establish a common Australian wine grape supply contract framework; and
- provide a dispute resolution system to manage disagreements which exist over price or quality assessments.

As it stands at present, the code's purpose is to sign up all of the winemakers throughout Australia to bring about a national approach to trading in the wine industry. The signatories will follow the new provisions set out in the code.

While growers are not expected to become signatories to the code, they will benefit from the new forms of agreement and the dispute resolution procedures.

With major problems arising in the industry, particularly the issue of oversupply and the major restructuring of the industry, the code sets out a new system for reaching agreements between winemakers and growers.

In the past there may have been some agreements which were unfair to one of the parties. Under the code, these agreements will be phased out and replaced by those which have been designed according to the principles set out in the code.

The code sets minimum standards for agreements between grape growers and grape purchasers.

The code framers, the Government and the signatories believe that if the code can provide a clear basis for their commercial dealings and for disputes to be resolved within it, then it would be an important step towards harmonious relations within the wine industry.

The code sets out to cover all of the important areas of transaction between growers and winemakers. As a minimum, grape purchase agreements must be in writing and conform to the principles of fairness and transparency listed in the code.

Importantly the agreements must be clear and concise and in plain English.

All of the parties involved in the agreement must be included and identified as well as when the agreement starts and when it finishes. All of the agreements must contain a fixed price or a clear statement about how the final price can be determined.

Among other things, the code deals in detail with:

- terms of payment
- tonnage and vineyard details
- winegrape standards, assessment and harvest
- delivery and freight
- title in winegrapes; and
- professional advice.

Disputes

History shows that the main causes of disputes arise over the grape price, about the maturity, purity or the condition of the grapes or about rejection of the grapes.

If a dispute does arise, there are steps in place to try to deal with it quickly. While there are formal time limits for action to be taken under the code, there are shortcuts built into the code to get the matter moving.

The code is supported by The Accord Group as its secretariat. It may be that if the secretariat gets the phone call early enough, the matter can be resolved very quickly.

In other codes of conduct, an early intervention by the secretariat has been able to nip potential disputes in the bud.

However, not all disputes will be that simple. If it cannot be resolved at that stage, a Notice of Dispute or summary of it must be sent to the secretariat.

Independent Experts

If that does not happen but the parties can agree on a qualified independent expert, that person will begin to resolve the dispute.

If the parties cannot agree on a suitably qualified person, the Presiding Member of the Code Administration Committee will appoint one to deal with the dispute.

This Independent Expert will then set about resolving the dispute under the provisions of the code and make a decision which will be final and binding.

Code Administration

The Code is administered by an independent Code Administration Committee of three members and an alternate member with appropriate commercial experience, jointly appointed by the Boards of the WFA and WGGA. The members are part-time.

They are:

- **Presiding Member:** Graham ('Bert') Mowbray is a retired Federal Magistrate and former Member of the Administrative Appeal Tribunal, who holds qualifications in agriculture, agricultural economics and law. His early work experience was in agriculture, followed by a lengthy legal career, principally in public and administrative law.
- **Member:** Ian Cox, an Agribusiness Consultant with formal qualifications in agriculture, management and property valuation, has an extensive background in agriculture, management and finance. He has worked as an agribusiness specialist for many years.
- **Member:** James Omond is a lawyer and principal of Omond & Co providing specialist services to the wine industry. Mr Omond's work includes specific wine-industry operational advice and trade practices/competition experience. He is an executive member of a number of organisations associated with the wine industry.
- **Alternate Member:** John Dickie is the inaugural chairman of the Film Exhibition and Distribution Code of Conduct Administration Committee

established in 1998. Mr Dickie, who is a journalist, has had extensive experience in communications work both in public administration and private enterprise.

The Committee is supported by an independent secretariat, The Accord Group, a firm specialising in industry code administration, mediation and training in negotiation, complaints handling and mediation.

There is also a Code Management Committee. This Committee is made up of representatives of the WFA and the WGGA. This Committee financially supports the Administration Committee and the Secretariat. This Committee must also ratify any changes to the Code of Conduct before the changes become operative. The changes also require endorsement by the boards of the WFA and WGGA.

The Administration Committee

This Committee supervises the operation of the code of conduct, including reviews of the code, the facilitation of disputes over winegrape prices and vineyard downgrades and inquiry into alleged breaches of the code.

It met on eight occasions during the financial year 2009- 2010. Five of these meetings were by Skype conferencing calls and three were in person.

The Committee considered a wide range of aspects relating to the code.

These included notification to growers of their rights to dispute resolution, variations to the code to allow for informal dispute resolution by the secretariat and effective ways of promoting the code throughout the industry.

The Committee also examined the procedures for the appointment of independent experts to settle disputes, the time limits under the code and the possibility of retaliatory action to those who used the code for dispute resolution procedures.

As required under the provisions of the code, the Committee selected a reviewer for the code and discussed with him matters which might be included in the review. It also discussed a draft of his final report.

The Committee also considered a complaint by a grower of an alleged breach of the code. The complaint was later settled under the informal dispute resolutions procedures.

In its most recent report – the 2009-2010 Annual Report – the Committee set out in some detail the main matters of concern. They were:

- **Awareness and Promotion of the Code**

The Committee expressed its concern at the level of take up of the code within the industry.

At the time of the Annual Report there were only attracted six signatories to the code representing 37% of the total crush. There was one dispute under Part 3 of the code and one complaint under Part 4.

The Committee has offered to assist the industry organisations in increasing awareness of the code and has prepared and distributed a short article titled **A New Way to Do Business** to promote the code. The WFA and the WGGA have agreed to review blockages that appear to be stopping more wine companies signing up and to implement a one-on-one follow up with the 64 large and medium wine companies.

The industry bodies do not see any immediate role for the Committee in promoting the code at this stage.

The Committee is concerned at the low uptake of the code by winemakers and the apparent ignorance or fear of using it among growers. The Committee believes that it is critical to the code's success for both the WFA and the WGGA to redouble its efforts to engage signatories and to promote the importance and benefits of the code with growers. Members of the Committee stand willing and ready to assist in any way they can.

- **Inconsistency between the code and Winegrape Purchase Agreements**

On a number of occasions during the year the Committee expressed its concern over ambiguity in the code when the Code and a winegrape purchase agreement are in conflict, in particular about limitations imposed on independent experts.

The Committee is concerned that any determination made by an independent expert runs the risk of being meaningless unless they are permitted unfettered discretion under the code. Although this may only be a transitional matter involving old agreements, the Code Management Committee referred it for consideration in the review of the code.

- **Fees for Independent Experts**

At its December 2009 meeting the Committee decided to invite the Code Management Committee to consider asking independent experts to provide a fixed hourly rate/fee for the whole vintage and to agree to a capped maximum amount with appropriate sanctions. This issue was referred by the code Management Committee to the review of the code.

- **Informal Early Dispute Resolution**

Some other voluntary codes allow for early intervention by their secretariats seeking to facilitate resolution on an informal basis before resorting to the formal processes under the code.

The Committee has agreed that a similar approach should be incorporated in the wine industry procedures.

The WFA/WGGA Code Management Committee agreed that the Committee could perform this role as the agreement with the Secretariat would cover any costs arising from it. The grower should however lodge a notice of dispute and the winemaker be given the opportunity to respond before any attempt by the Secretariat to facilitate resolution of the dispute. This matter should also be considered in the review of the code.

It is significant that the only substantive dispute or complaint under the code this year was resolved informally through Secretariat assistance.

- **Time Limits**

The Committee expressed concern about the inflexibility of time limits in the code.

It queried whether these time limits should be enforced rigorously or whether there was scope for it to use its discretion to extend the limits in compelling circumstances.

The Code Management Committee decided that it would be appropriate for the Committee only to extend the time limit where both parties agreed.

- **Notices to Growers**

In the 2009 Annual Report the Committee recommended that the Signatories include with all notifications of prices, downgrades or rejections a written statement in a prescribed form alerting the growers to the time limits under the code and the possible consequences of failing to comply with these limits.

On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for such notices.

The Code Management Committee however was of the view that it would be best to continue with grower education and for the WFA “to develop a check list and write to signatories reminding them of their obligations, including informing staff of these”.

- **Disputes over Downgrades and Rejections at the Weighbridge**

In the 2009 Annual Report the Committee recommended that the WFA and WGGA examine whether a pool of independent experts could be established for resolving weighbridge disputes.

On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for a notice which could be displayed at weighbridges advising growers of the availability of such experts.

The Code Management Committee has advised that weighbridge disputes present peculiar difficulties and this recommendation may not be feasible.

The Code Review

The most important aspect in the development of the code was the formal review carried out during the last two months of the 2009-2010 financial year.

Under the original code, the Code Administration Committee was required to commission a review of the code after the conclusion of the 2010 crush.

The Administration Committee interviewed two organisations with the necessary credentials to conduct such a review. In May it chose Mr Neill Buck of Neill Buck and Associates, a leading expert of voluntary codes.

In the course of his review Mr Buck prepared and circulated a discussion paper of what he considered the most important issues to be addressed. He consulted the stakeholders in the industry, industry associations, growers, winemakers and the Administration Committee.

He submitted his report on June 30.

We ask the Standing Committee to study the recommendations made by Mr Buck especially as many of the issues he addressed may be some of the issues before this Standing Committee.

In his report, Mr Buck made far-reaching recommendations in relation to the structure of the code, its membership, its promotion and its method of operation.

One of his most important recommendations concerned the basic structure of the code.

He recommended that the code be restructured so that winemakers were not the only signatories to the code but that growers should also be part of the code and signatories. He recommended that the primary obligation of the code should be that growers and the winemakers should treat each other on a fair and equitable basis.

This would mean that under the code there would be obligations on both major groups.

He recommended that the Administration Committee and the industry should make every effort to educate industry participants of the benefits of the code.

He singled out a paper produced by the Administration Committee titled "A New Way to do Business" and suggested that should be the basis of a campaign to encourage industry members to become signatories. A copy of this short paper, compiled before the review took place, is included as an attached to this submission.

He recommended that more growers and winemakers, particularly leaders in the industry as well as the two major associations should sit at the table when the code was being discussed as an industry. To co-ordinate the deliberations of the two Committees, he recommended that the chairman of the Administration Committee should also chair the industry group.

He also recommended that the dispute resolution procedures should be comprehensively revised; that early dispute resolution practices which had been used informally should be incorporated into the code and that the Administration Committee be given discretion to make extension to time limits if there were reasonable grounds for doing so.

To encourage more people to use the code and to remove what could be seen as a barrier to growers using the code, he recommended that the \$250 initial fee in dispute resolution be abolished.

Further he has recommended that a clause be inserted into the code to prohibit retaliation. He said that during his review, he had been told on a number of occasions that in the current economic climate if a grower were to raise a dispute with a winemaker, he may be successful but would be unlikely to sell his fruit in the future. He said:

“Given the nature of the review, I have no evidence to support this assertion but it was made to me in each of the consultation I had with growers or their representatives.

“A number of those I spoke to indicated that the industry is cyclical. I was told that because of an oversupply at the current time it is claimed the balance of power currently favours the winemakers.

“I was told that when the balance was the reverse the conduct by some growers was inappropriate. The reality appears to be that at this time at least, all parties are suffering from a flat and difficult market across the industry. Importantly this is a strong argument for a robust, fair and efficient voluntary code that increases certainty for all parties.

“Such a code enables certainty and assures that even in the tough times lines of communication are open. In fact one of the best outcomes from voluntary codes such as these is an increase in trust in the industry, the availability of circuit breakers and quick and easy dispute resolution.”

Report Implementation

Following the publication of his Report, Mr Buck met with representatives of the WFA, the WGGA and the Code Administration Committee in Adelaide in July to discuss his finding and his recommendations.

At the conclusion of that meeting there was general agreement on most of his recommendations. Where there were some areas of contention and even if there was agreement, the representatives of the two major organisations agreed to seek the views of their parent bodies and to reconvene later in the year.

In view of some of the major structural changes which had been recommended and other changes which would affect the day to day operation of the code, it was agreed that any major promotional and educational campaign should be delayed until the suggested changes to the code could be ratified by the WFA and the WGGA.

How the Code Impinges on the Terms of Reference

The code does not have the power to influence international factors nor can it alone deal effectively with issues such as over production. At present the whole industry is going through a difficult time with the growers having the worst of it.

What the code can do is to bring some equity and fair play into the supply and purchase of wine grapes and provide a proper framework for business to be done. It also provides an inexpensive way to deal with disputes quickly by independent experts.

If the industry bodies agree to the recommendation by Neill Buck that the main plank of the code should be that growers and winemakers deal with each other on a fair and equitable basis, it will provide a new spine for the code based on fair dealing. Mr Buck spells it out in his report:

"I do not think it reasonable that growers should be excluded from compliance obligations under the code.

"I suggest that the code require members of both the WGGGA and WFA to be deemed to be signatories to the code unless they specifically opt out.

"Further I suggest that there should be a new clause added to the code which requires growers and winemakers to treat each other **fairly and equitably**. This is a simple concept and provides a foundation for openness and trust. It is also only good commercial practice.

"The Australian Competition and Consumer Commission has a definition that helps understand what I have in mind:

In determining what constitutes fair and equitable dealings within the meaning of the code regard should be had to the relative strengths in the bargaining position of the relevant parties and their willingness to negotiate in good faith."

"It seemed to me that such a clause would also address some of the more difficult areas in the code such as downgrades at weighbridges."

Furthermore, if the changes are implemented, growers will be able to become signatories to the code and be able to adopt it as "their code" and not just that of the wine makers.

The revised code should make it easier for standard contracts to become more widespread and that the basis for these agreements should be based on fairness and equity.

These are not two amorphous concepts as they have already been given some definition by the Australian Competition and Consumer Commission.

Over time, therefore, with an independent Administration Committee deciding on issues of fairness and equity, there should develop an atmosphere of trust rather than suspicion.

This has been the case in other industries where voluntary codes have been introduced and although it may not happen overnight there is no reason why it should not happen in the wine industry.

An immediate spin-off may be that contracts that have been unfairly weighted in the past will come under scrutiny and more equitable arrangements put in place.

What it should be able to achieve is that growers will know what price to expect for their crop and will not be notified at the last minute that the price has been drastically reduced or that the quantity has been halved.

The task which is facing the Administration Committee and the industry itself is to promote the code among the industry to the extent that it becomes a valued set of rules that both sides agree to adhere to – based on the principles of fairness and equity.

Conclusion

In his report, Mr Buck found that the code had not achieved success in its first 18 months. It has fallen well short of its projected uptake targets and has attracted a minimum number of complaints and inquiries.

He has suggested a new series of benchmarks to determine whether or not the code can be deemed successful. Should those targets not be reached, he has recommended that the Administration Committee resigns and advise the Australian Government through the Department of Agriculture, Fisheries and Forestry that the code is not likely to be successful and that they should try a different approach to regulating the industry.

In his view, he said, it is unreasonable to create expectations that a voluntary Code of Conduct will effectively manage issues in an industry and then only have a very small number of participants signed up compared to the number of participants in the industry.

This Committee does not intend to stand idly by and let the code disappear. It intends to pursue the recommendations which are approved by the major organisations and muster whatever resources are available.

The original code was achieved after prolonged discussion between winemakers and growers. After a short stint in operation, a review has highlighted some shortcomings and these are in the course of being remedied.

The Administration Committee believes that a voluntary code with wide uptake and recognition in the industry – and based on fairness and equity – is the best chance for harmonious and productive relations in the industry.

If the Committee can assist this Standing Committee in any way with the issues it is considering – and the issues fall within its charter – it will be happy to do so.

It also seeks whatever assistance the Standing Committee is able to provide to promote the code in New South Wales for the benefit of both growers and winemakers.

I have quoted from several documents which the Committee may wish to consult more fully. These have been attached as part of the submission.

G A Mowbray
Chairman
Code Administration Committee
21 October 2010

Attachments:

Australian Wine Industry Code of Conduct
Code Administration Committee Annual Report 2009
Code Administration Committee Annual Report 2009 – 2010
Review of the Wine Industry Code of Conduct June 2010
“A New Way to do Business”

Australian Wine Industry

CODE OF **CONDUCT**

December 2008

THE AUSTRALIAN WINE INDUSTRY CODE OF CONDUCT

The Australian Wine Industry Code of Conduct was officially launched on Friday December 19, 2008.

With the exception of Part 2 (Wine Grape Purchase Agreements), this Code takes effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new Agreements entered into after 1 January 2009 in relation to the supply of wine grapes for vintage 2010 onward. With respect to existing Agreements, each Signatory agrees to offer to its winegrape growers to:

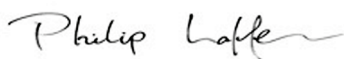
- apply the Code (with the exception of Part 2) with effect from 1 January 2009; and
- bring existing Agreements in line with the provisions of Part 2 of the Code at the time of any Material Variation to the Agreement or Associated Documents (as defined in the Code definitions).

This Code does not, by itself constitute, amend or replace any Agreement.

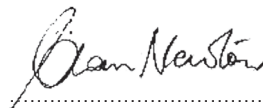
The aim of the voluntary Code is two-fold: firstly to establish a common Australian wine grape supply contract framework and secondly, to provide a dispute resolution system to manage disagreements which exist over price or quality assessments.

The Code has been developed by Wine Grape Growers Australia (WGGA) and the Winemakers' Federation of Australia (WFA) in the interests of a sustainable Australian wine industry and follows a recommendation by a Federal Senate enquiry in 2005. The research and development of the Code has been supported by the Federal Government's Department of Agriculture, Fisheries and Forestry.

Signed in Agreement on the 19th day of December 2008



Philip Laffer
President
Winemakers' Federation of Australia



Alan Newton
Chairman
Wine Grape Growers Australia



Mr Stephen Strachan,
CEO
Winemakers' Federation of Australia



Mr Mark McKenzie
Executive Director
Wine Grape Growers Australia

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LEGISLATION

All references to legislation are current at the date of the Code's release.

Capitalized words used in this Code have the meaning assigned to them in Appendix 1.

WINE CODE SECRETARIAT

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Part 1 — Preliminary

Title and Commencement of the Code

This Code is to be titled the **Australian Wine Industry Code of Conduct**. This is a non-prescribed, industry voluntary Code. Winegrape purchasers who elect to become Signatories will be governed by the Code in their commercial dealings with winegrape growers.

This Code has been developed for the Australian wine industry by the Wine Industry Relations Committee (WIRC), as a joint committee of the WFA and WGGA. The Executive Councils of WFA and WGGA have endorsed the Code.

With the exception of Part 2 (Wine Grape Purchase Agreements), this Code takes effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new Agreements entered into after 1 January 2009 in relation to the supply of wine grapes for vintage 2010 onward. With respect to existing Agreements, each Signatory agrees to offer to its winegrape growers to:

- apply the Code (with the exception of Part 2) with effect from 1 January 2009; and
- bring existing Agreements in line with the provisions of Part 2 of the Code at the time of any Material Variation to the Agreement or Associated Documents (as defined in the Code definitions).

Except as expressly set out in this Code, the provisions of this Code are subject to all applicable Commonwealth, State and Territory laws and common law rights and obligations.

Intention

The intention of this Code is to set minimum standards for Agreements between winegrape growers and winegrape purchasers. The Signatories acknowledge that providing a clear basis for their commercial relations and an impartial, cost effective Dispute resolution scheme is important for harmonious relations between winegrape growers and winegrape purchasers.

Signatories to this Code acknowledge their existing legal obligations (for example, under the Trade Practices Act) not to engage in misleading or deceptive behaviour or unconscionable conduct.

Industry Endorsement

Signatories agree to be bound by the provisions of the Code in their commercial dealings with winegrape growers. Signatories commit to adopt the principles set out in the Code in their dealings with winegrape growers, and to provide the winegrape grower with a copy of the Code whenever a winegrape grower signs a new Agreement.

The register of Signatories will be maintained and available on the WFA and WGGA websites.

www.wfa.org.au

www.wgga.com.au

Signatories also commit to promoting the adoption of the Code.

WGGA and WFA agree to publicise and promote the Code and its Dispute resolution procedures, and to work to maximize its adoption within the industry.

Signatories to the Code

A winegrape purchaser may become a Signatory to this Code by providing a written notice to the Committee.

A winegrape purchaser may cease to be a Signatory by lodging a written notice advising the Committee they no longer wish to be a Signatory. In these circumstances, the winegrape purchaser will cease to be a Signatory on the date that their notice is received by the Committee, however, they remain bound by the provisions of Agreements entered into before that date which incorporate the Code either expressly or by reference.

Signatories to this Code agree that the Committee may publish their names as Signatories and may also publish the details of any Code breaches which the Committee has found applies to that Signatory at the time of the publication of the annual report and which have not been resolved by the Signatory. Signatories agree to release the Committee and each member of the Committee from any liability to the Signatory as a result of the publication of these details, provided all published information is accurate. However, details relating to any Dispute between a Signatory and a winegrape grower(s) which are notified to the Committee in accordance with Part 3 of this Code will remain confidential and may only be disclosed by the Committee in aggregate form (without the parties being named or specific details of the Dispute being disclosed).

Horticulture Code of Conduct

Some transactions in the winegrape supply industry are subject to the mandatory Trade Practices (Horticulture Code of Conduct) Regulations 2006. When Signatories to this Code participate in a transaction covered by the Horticulture Code of Conduct, the Horticulture Code of Conduct will prevail over this Code to the extent of any inconsistency.

Administration of Code

The Code will be managed by a Code Administration Committee (the Committee), comprising independent members jointly appointed by WFA and WGGGA, in accordance with Part 5.

Review

A formal review of the Code will be conducted by the Committee after vintage 2010 by a suitably qualified person/s appointed by the Committee and thereafter the Committee will review the operations of the Code not less than every three years.

The objectives of the review of the Code shall be to:

- (i) Assess the extent to which the Code has reduced Disputes;
- (ii) Assess the effectiveness of the Dispute resolution system;
- (iii) Assess the performance of the industry against the performance targets contained in the Code, and recommend new performance targets as required; and
- (iv) Recommend any amendments to the Code required to address any problems or issues identified during the review process.

It is intended that this review will be completed by 30 June in the relevant year.

Performance Targets

Performance will be measured by the total numbers of Signatories, and the percentage of the national annual winegrape harvest purchased by those Signatories. The percentage-of-crush performance targets are:

- 75% of the purchased crush in first vintage after implementation
- 85% of the purchased crush in the second vintage after implementation

Code performance will be reported annually on a regional basis including number of Signatories, percentage of crush represented by the Signatories, the number of Disputes notified to the Committee and resolved under the provisions of the Code, as well as the number of breaches of the Code reported and resolved under the provisions of the Code.

Part 2 — Winegrape Purchase Agreements

As a minimum, all Agreements must:

- 1 be in writing, contain the elements set out in clauses 2.1 to 2.15. and be entered into and, if applicable, varied in accordance with clauses 2.16 and 2.17.
- 2 appropriately refer to any other important elements of the Agreement; and
- 3 be clear and concise and in plain English.

Minimum terms and conditions to be contained in an Agreement

2.1 Application of Code.

- 2.1.1 Each Agreement must contain a statement that the parties to the Agreement agree that it is governed by the Code and that, in the event of any inconsistency, the provisions of the Code in force on the date that the Agreement was entered into will prevail and will apply as if they formed part of the Agreement. If there is a change to the Code, each Signatory must make an offer to its winegrape growers to amend existing Agreements to reflect that change within three months of the date of endorsement of the change in accordance with clause 5.1.7.

2.2 Parties to an Agreement and Term of the Agreement

- 2.2.1 All parties involved in the winegrape purchase arrangements are to be identified in the Agreement including the winegrape purchaser, the winegrape grower and any landowner or lessee (if applicable).

All Agreements must specify the duration of the Agreement including commencement date and expiry date, or the termination mechanism (including applicable notice periods) where there is no fixed expiry date.

2.3 Pricing Methods

- 2.3.1 All Agreements must contain a fixed price and/or a clear statement as to how the final price payable will be determined.

2.4 Price Notification

- 2.4.1 Where the Agreement requires a price offer or a negotiation as part of the calculation of the price for the winegrapes, the winegrape purchaser must, unless prevented due to unforeseen and extraordinary reasons:

2.4.1.1 by 15 December each year - provide to its winegrape growers in the Hunter Valley, Riverina, Murray Darling/Swan Hill and Riverland regions Indicative Regional Prices for each variety of winegrape.

2.4.1.2 By 15 January each year – use its best reasonable endeavours to provide to its winegrape growers in all other regions Indicative Regional Prices for each variety of winegrape.

If an Agreement does not exist on the relevant date but is subsequently entered into prior to the vintage period (for example, an Agreement entered into in February), then the winegrape purchaser must provide the Indicative Regional Prices referred to above to the winegrape grower at the time the Agreement is entered into, unless the actual price offer is made at that time.

- 2.4.2 Notwithstanding clause 2.4.1, in all regions where the relevant Agreement requires the price to be agreed between the parties, any winegrape price offer required under the Agreement must be made:
- (a) if the winegrape purchaser undertakes a pre-vintage vineyard inspection prior to making a final winegrape price offer - as soon as practicable and, at the latest, prior to the anticipated harvest date for those winegrapes; and
 - (b) in all other cases – at least 10 Business Days prior to the anticipated harvest date for those winegrapes.

2.5 Price Adjustment

- 2.5.1 Any provision for price adjustment must be clearly spelt out and specify in a transparent manner any bonuses or penalties and the mechanism(s) used to determine bonuses/penalties.

2.6 Terms of Payment

- 2.6.1 The terms of payment are to be clearly stated and, unless otherwise agreed by the parties to the Agreement, shall be consistent with the industry standard of:
- 2.6.1.1 1/3 at the end of the month following the month of delivery;
 - 2.6.1.2 1/3 at the end of June; and
 - 2.6.1.3 balance at the end of September of the year that the first payment commenced.
- 2.6.2 The payment terms for any price adjustment or payments based on wine assessment shall be specified in the Agreement.
- 2.6.3 Any penalties for late payments shall be stipulated in the Agreement.

2.7 Tonnage and Vineyard Details

- 2.7.1 The Agreement must state whether the amount of winegrapes to be purchased is "area-based" or "specified tonnes" and must stipulate the area and/or the tonnes as the case may be.
- 2.7.2 The Agreement must clearly describe the winegrapes to be purchased.
- 2.7.3 Where relevant, the Agreement must specify the vineyard details such as patch/block number identification, identification of clones and rootstocks when required, or a vineyard map showing vineyard details for the vines to which the Agreement pertains.

2.8 Winegrape Standards, Assessment and Harvest

- 2.8.1 The Agreement must state any quality standards which apply to the winegrapes being purchased, including specifying any minimum requirements for maturity, purity and condition, relevant to the region and variety.
- 2.8.2 The Agreement must describe any assessment method for vineyard or weighbridge winegrape assessment which will apply under the terms of that Agreement if that method is directly inconsistent with the methods described in "Winegrape Assessment in the Vineyard and the Winery" (as amended from time to time and endorsed by WGGGA and WFA).
- 2.8.3 The Agreement must specify the process for determining the harvest time(s) for the winegrapes.

2.9 Delivery and Freight

- 2.9.1 The Agreement must state the delivery point for the winegrapes and identify which party bears the costs and associated risks of freight.

2.10 Title in Winegrapes

- 2.10.1 The Agreement must state when title in the winegrapes passes from the winegrape grower to the winegrape purchaser. The Agreement must also specify the point at which the winegrape purchaser accepts or rejects the winegrapes.

2.11 Force Majeure

- 2.11.1 If there is a force majeure clause in the Agreement, it must be clearly specified.

2.12 Assignment and Sale of Vineyard

- 2.12.1 The Agreement must clearly specify any restrictions imposed by the winegrape purchaser on the rights to transfer possession or ownership of the relevant vineyard.
- 2.12.2 The Agreement must clearly specify any obligations on the winegrape grower upon the sale or disposal of possession of the relevant vineyard.

2.13 Professional Advice

- 2.13.1 An Agreement must contain a prominent statement that the winegrape grower signing the Agreement should seek independent legal, financial and taxation advice. This statement must appear just above the winegrape grower's signing provisions.

2.14 Dispute Resolution Clause

- 2.14.1 The Agreement must include a Dispute resolution clause that is consistent with Part 3 of this Code.

2.15 Reasonable Time

- 2.15.1 A Signatory may only enter into an Agreement with a winegrape grower after providing the Agreement and any Associated Documents to that winegrape grower and allowing the winegrape grower a reasonable period to read and understand the document and obtain independent advice before entering into the Agreement. For an Agreement which incorporates an obligation to buy and sell winegrapes from more than one vintage, a “reasonable period” is 15 Business Days from the date of receipt by the winegrape grower. For all other Agreements other than Spot Market Purchases, a “reasonable period” is 7 Business Days from the date of receipt by the winegrape grower. For Spot Market Purchases, a “reasonable period” will depend on the circumstances and may be a relatively short period (for example, less than one Business Day if harvest is imminent).

2.16 Variations

- 2.16.1 It is recognised that variations to Agreements from time to time may need to be negotiated. Any variation to an Agreement must be:
- 2.16.1.1 clearly specified, and
 - 2.16.1.2 agreed, confirmed in writing and signed by all parties to the Agreement.

Agreements must not contain a provision which allows one party to unilaterally amend the Agreement without the other parties’ written consent to the specific amendment.

- 2.16.2 A Signatory may only vary an Agreement by providing that variation to the winegrape grower in writing and allowing the winegrape grower a reasonable period to read and understand the variation and obtain independent advice before signing their acceptance of the variation. For an Agreement which incorporates an obligation to buy and sell winegrapes from more than one vintage, a “reasonable period” is 15 Business Days from the date of receipt by the winegrape grower. For all other Agreements other than Spot Market Purchases, a “reasonable period” is 7 Business Days from the date of receipt by the winegrape grower. For Spot Market Purchases, a “reasonable period” will depend on the circumstances and may be a relatively short period (for example, less than one Business Day if harvest is imminent).

2.17 Failure to Comply

- 2.17.1 Failure to comply with clauses 2.1 through to 2.17, where applicable, will amount to a breach of the Code and may be referred to the Committee for disciplinary action.

Part 3 - Dispute Resolution

Purpose

Disputes in the main occur over the perceived inadequacy of the winegrape price, or over an apparent failure to comply with specifications for winegrape maturity, purity or condition resulting in either price adjustments or rejection of the winegrapes.

This section is intended to help resolve Disputes between the winegrape purchaser and the winegrape grower in a timely and cost efficient manner to preserve the ongoing commercial relationship.

The Code requires both parties to participate in the Dispute resolution procedure and to assist the Independent Expert by providing any information requested. Any Disputing Party who invokes the Dispute resolution process is agreeing to be bound by the Code in relation to the conduct of the Dispute, in particular, the clauses relating to defamation and to cost recovery.

The existence of a Dispute does not relieve any party of their obligations under the Agreement.

Powers of Independent Expert

Notwithstanding clause 2.1.1, the appointed Independent Expert will determine the Dispute by applying the terms of the Agreement and, where necessary, by applying the Independent Expert's own procedures, in the resolution of the Dispute, but only to the extent that the Independent Expert's resolution procedures are not inconsistent with the terms of the Agreement.

Subject to compliance with this Code, the decision of the Independent Expert is final and binding on all parties and cannot be appealed or challenged except in the case of a manifest error or proven misconduct.

Failure by a Signatory to comply with the determination of the Independent Expert will amount to a breach of this Code and the matter may be referred to the Committee for disciplinary action.

Information provided to the Independent Expert

All communications brought into existence in relation to the Dispute and provided to the Independent Expert shall be in confidence and without prejudice.

No documents brought into existence by a disputant for the purpose of consideration by the Independent Expert may be tendered in evidence by a party other than that disputant in any litigation of the Dispute.

3.1 Disputes over Winegrape Price

When a Dispute arises over a price offer made by a winegrape purchaser under clause 2.4.2 or, where no price offer is required to be made under clause 2.4.2, in relation to the calculation of the price in accordance with the Agreement, the parties agree to follow these resolution procedures:

- 3.1.1 Within 7 Business Days of:
 - 3.1.1.1 the determination of the price in accordance with the Agreement being notified to the winegrape grower (but only where no price offer is required to be made under clause 2.4.2); or
 - 3.1.1.2 the date of the price offer being made by the applicable party under clause 2.4.2;

the Disputing Party will inform the other party in writing of the background to the Dispute, the issue(s) in dispute and the outcome desired. This notice will be known as the **Notice of Dispute**. A summary of the Dispute (notifying the parties, the category of Dispute, tonnage and region) is to be supplied to the Committee by the Disputing Party at the same time.
- 3.1.2 Within 7 Business Days of receiving the Notice of Dispute, the other party will respond in writing, indicating whether the desired outcome is agreed, and, if it is not, whether that party wishes to offer another outcome, and inform the Committee in writing that a response has been provided.
- 3.1.3 The Disputing Party and the winegrape purchaser have 14 Business Days from the issue of the Notice of Dispute to negotiate a mutually agreed outcome. If these parties have not resolved the Dispute within this 14 Business Day period, they must jointly appoint an Independent Expert to make a determination of price. The Disputing Party and the winegrape purchaser must be satisfied that the Independent Expert is impartial and qualified to rule on the matter(s) under dispute.
- 3.1.4 If the Disputing Party and the winegrape purchaser cannot agree on the selection of an Independent Expert within 21 Business Days of the issue of the Notice of Dispute, the Presiding Member of the Committee (or other Committee Member appointed to preside in the event that the Presiding Member is unavailable) will appoint an appropriate Independent Expert from the panel of experts endorsed by the Committee upon application from either party, such application to be made within 28 Business Days of the issue of the Notice of Dispute.
- 3.1.5 The appointed Independent Expert will deliver a determination within 14 Business Days of the date of his or her appointment or, if the matter requires extensive research, submissions from the parties and/or investigation, will provide a reasonable timeframe in which to complete the task.
- 3.1.6 The Disputing Party and the winegrape purchaser agree to be bound by the determination of the Independent Expert in the absence of manifest error or misconduct and to share costs equally.
- 3.1.7 The Independent Expert will be engaged under their normal terms of engagement and in any event will be indemnified by the parties as to their costs and expenses.

3.2 Disputes over Downgrades and Rejections in the Vineyard

A Dispute may arise if a winegrape grower disagrees with an assessment by the winegrape purchaser that the winegrapes have failed to meet agreed specifications contained in the Agreement and a financial penalty is imposed or some or all of the winegrapes are rejected.

If a Dispute in relation to a field assessment occurs, the matter needs to be resolved quickly, ideally before the expected date of harvest, and may in some cases need to be resolved within a few days to avoid deterioration of the winegrapes.

A winegrape grower will advise the winegrape purchaser within a reasonable time prior to harvest, of any change in the condition of the fruit that could result in a downgrade or rejection of the winegrapes under the terms of the relevant Agreement. The winegrape purchaser will notify the winegrape grower of any decision by the winegrape purchaser to impose a financial penalty and/or reject the winegrapes in accordance with the terms of the Agreement.

When a Dispute arises in relation to the imposition of a financial penalty and/or rejection of the winegrapes as a result of a failure to meet agreed specifications contained in the Agreement, the parties agree to follow these resolution procedures:

- 3.2.1 The Disputing Party will, as soon as practicable, notify the winegrape purchaser in writing of the issue(s) in dispute and the outcome desired. This notice will be known as the **Notice of Dispute**. A summary of the Dispute (notifying the parties, the category of Dispute, tonnage and region) is to be supplied to the Committee by the winegrape grower at the same time.
- 3.2.2 The winegrape purchaser will respond in writing to the Disputing Party within 48 hours from the time of issue of the Notice of Dispute, indicating whether the desired outcome is agreed, and, if it is not, whether the winegrape purchaser wishes to offer another outcome, and inform the Committee in writing that a response has been provided.
- 3.2.3 If after 72 hours from the time of issue of the Notice of Dispute the Disputing Party and the winegrape purchaser have been unable to resolve the Dispute, the matter will be settled by an Independent Expert jointly appointed by them. They must be satisfied that the Independent Expert is impartial and qualified to rule on the matter(s) under dispute.
- 3.2.4 If the Disputing Party and the winegrape purchaser cannot agree on the selection of an Independent Expert within 96 hours from the time of issue of the Notice of Dispute, the Presiding Member of the Committee (or other Committee Member appointed to preside in the event that the Presiding Member is unavailable) will appoint an Independent Expert from the panel of experts endorsed by the Committee upon application from either party, such application to be made within 120 hours of the time of issue of the Notice of Dispute.
- 3.2.5 The appointed Independent Expert will deliver a determination within 48 hours of being appointed or, if the matter requires extensive research, submissions from the parties and/or investigation, will set a reasonable timeframe in which to complete the task.
- 3.2.6 The Disputing Party and the winegrape purchaser agree to be bound by the determination of the Independent Expert in the absence of manifest error or misconduct and to share costs equally.
- 3.2.7 The Independent Expert will be engaged by Disputing Party and the winegrape purchaser under their normal terms of engagement and in any event will be indemnified by the parties as to their costs and expenses.

3.3 Disputes over Downgrades and Rejections at the Weighbridge

Winegrape purchasers (or their agents/representatives) are encouraged to inspect the condition of winegrapes in the vineyard prior to harvest as a means of minimizing Disputes at the weighbridge.

A Dispute can arise at the weighbridge if winegrapes are downgraded (resulting in a financial penalty) or rejected if, in the opinion of the winegrape purchaser, they have failed to meet stipulated specifications. The matter needs to be resolved quickly, ideally within 12 hours of delivery of the winegrapes. The winegrape grower will be notified as soon as practicable of a downgrade or rejection of their winegrapes. The winegrape grower or the winegrape grower's agent/representative (in the event of winegrapes processed at a distance from the vineyard) should be given the opportunity where practical to inspect the rejected or downgraded winegrapes (within a reasonable time of delivery) and to try and reach agreement with the winegrape purchaser on the nature and extent of the downgrade and any resulting price adjustment to allow the continued processing of the winegrapes or the rejection of the winegrapes.

For the avoidance of any doubt but without limiting the other obligations set out in this clause, the Code does not require an Independent Expert to resolve disputes over downgrades and rejections at the weighbridge.

3.4 Legal Proceedings

The parties agree not to institute legal proceedings (except to obtain urgent interlocutory relief) or make any complaint to a regulatory authority in relation to a Dispute covered by Part 3 of the Code until all avenues open to them under Part 3 of the Code have been implemented and, where relevant, a determination made. The parties may institute legal proceedings (or take any other action that they consider appropriate) in relation to any other type of Dispute. Nothing in this clause affects or limits the operation of clause 3 relating to the powers of the Independent Expert.

Part 4 — Breaches of the Code

4.1 Complaints

- 4.1.1 A complaint of a breach of the Code by a Signatory must be referred to the Committee in writing.
- 4.1.2 Either a winegrape grower or a winegrape grower's association may lodge a complaint with the Committee.
- 4.1.3 A Signatory cannot lodge a complaint against another Signatory, unless the complaint relates to conduct that will bring the wine industry into disrepute.
- 4.1.4 The complaint must:
 - 4.1.4.1 State the name of the Signatory and the party bringing the complaint.
 - 4.1.4.2 Provide details as to the nature of the complaint by reference to this Code.
 - 4.1.4.3 Specify what outcome the Complainant believes will resolve the issue.
- 4.1.5 If a complaint alleging a breach of the Code is reported to the Committee, the Committee must take the following action prior to making a determination:
 - 4.1.5.1 notify the Signatory within 7 Business Days that a complaint has been lodged with the Committee;
 - 4.1.5.2 provide to the Signatory the details of the complaint and Complainant and the outcome the Complainant requires to resolve the complaint;
 - 4.1.5.3 allow the Signatory 21 Business Days to respond to the complaint in writing;
 - 4.1.5.4 provide the Signatory's written response to the Complainant; and
 - 4.1.5.5 in the event that the Complainant is not satisfied with the Signatory's response, allow the Complainant 14 Business Days to respond to the Committee.
- 4.1.6 If the matter has not been resolved in accordance with the procedure set out in clause 4.1.5, the Committee must sit and make a determination on the complaint.
- 4.1.7 A meeting of the Committee to rule on a complaint must occur within 30 Business Days from the date of the Complainant's final response.
- 4.1.8 If the Committee determines that no breach of the Code has occurred, the Committee is to write to the Complainant and the Signatory and provide its determination and reasons within 7 Business Days.
- 4.1.9 If the Committee determines that a breach of the Code has occurred then the Committee must write within 7 Business Days to the Signatory and provide the determination, reasons and remedy or penalty, if applicable.

- 4.1.10 If the Committee determines that a breach has occurred, the Committee may do any or all of the following:
- 4.1.10.1 notify the Signatory what steps it would be required to take to remedy the breach.
 - 4.1.10.2 warn the Signatory that they may be removed as a Signatory to the Code if they do not remedy the breach within a reasonable period (which must be specified in the notice) and/or if they commit future breaches of the Code; and/or
 - 4.1.10.3 subject to clause 4.2, remove the Signatory from the list of Signatories to the Code.
- 4.1.11 If, subsequent to a finding that a Signatory has breached the Code, that Signatory rectifies the breach in accordance with the Committee's instructions, then the Committee must write to the Complainant within 7 Business Days and advise the Complainant that the Committee considers that the Signatory is no longer in breach of the Code.
- 4.1.12 In all cases, the Committee's determination may only be challenged in the case of manifest error or proven misconduct.

4.2 Removing a Signatory from the Code

- 4.2.1 In determining whether to remove a Signatory from the Code, the Committee must take into consideration the following:
- 4.2.1.1 the nature of the complaint;
 - 4.2.1.2 the conduct of the Signatory and the Complainant;
 - 4.2.1.3 the conduct of the Signatory in responding to the Committee;
 - 4.2.1.4 the systemic nature (if any) of the complaint;
 - 4.2.1.5 the number of complaints referred to the Committee against the Signatory;
 - 4.2.1.6 whether the complaints made against the Signatory are the same or otherwise;
 - 4.2.1.7 any previous breaches of the Code by the Signatory;
 - 4.2.1.8 whether the conduct brings the wine industry into disrepute; and
 - 4.2.1.9 any other matter that the Committee considers relevant.

4.3 Cost Recovery

- 4.3.1 If the Committee determines a breach of the Code has occurred, the Committee may recover from the party in breach reasonable costs incurred by the Committee in determining the complaint.
- 4.3.2 Should a grapegrower or grapegrower association make a complaint alleging a breach that is subsequently found to be invalid then the Committee may recover from the grapegrower or grapegrower association reasonable costs incurred by the Committee in determining the complaint.

Part 5 — Administration of the Code

- 5.1.1 The Code will be administered by the Committee.
- 5.1.2 The Committee will comprise 3 independent members –including a Presiding Member and 2 other Members with appropriate commercial experience. All 3 Members will be jointly agreed by the Boards of both the WGGGA and WFA.
- 5.1.3 The Committee will be supported by an independent secretariat jointly funded by WGGGA and WFA.
- 5.1.4 All 3 Members will be appointed by a joint WGGGA and WFA selection committee using selection criteria agreed by the Boards of both bodies.
- 5.1.5 A quorum shall comprise the Presiding Member and all other Members.
- 5.1.6 All decisions of the Committee must be made by way of simple majority.
- 5.1.7 Any recommendation to amend the Code must be unanimously agreed by all Members of the Committee and endorsed in writing by the Boards of WGGGA and WFA. Any change to the Code which is endorsed between 1 January and 31 July in any year will take effect on 1 November in the same year. Any change endorsed between 1 August and 31 December in any year take effect on 1 November of the following year.
- 5.1.8 The Committee shall undertake the following roles:
 - 5.1.8.1 administer the Code, including the setting of reasonable fees to support the Dispute resolution system;
 - 5.1.8.2 manage the business operations of the Code including ensuring that suitable insurance arrangements are in place;
 - 5.1.8.3 produce an annual report to be published by 30 September each year, containing:
 - (i) a description of the nature and number of Disputes received and any other comments it wishes to make about conduct or trends in the industry; and
 - (ii) a report to the industry on the operations of the Code and the Committee and any matters requiring consideration by the industry arising from the activities of the Committee including the names of any parties removed from the Code;
 - 5.1.8.4 at the discretion of the Committee, maintain and publish a list of Code Signatories found to be in breach of the Code; and
 - 5.1.8.5 monitor the operation of the Code and, as appropriate, recommend any amendments to the Code that may assist in its operation, and consult with WGGGA and WFA on any proposed amendments to the Code.

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APPENDIX 1

Definitions

“Agreement” means an Agreement between a winegrape grower and a Signatory for the supply of winegrapes.

“Associated Documents” means all documents that are incorporated by reference in or which form part or purport to form part of an Agreement.

“Business Day” means a day other than a Saturday, Sunday, public holiday or bank holiday in the State in which the vineyard to which the Agreement applies is situated.

“Code” means this Code.

“Committee” means the Code Administration Committee established to manage the operation of this Code in accordance with Part 5 – Administration Of The Code.

“Complainant” means, as applicable, a person, corporation or other body corporate:

- raising a Dispute for determination under the Dispute resolution procedures of this Code; or
- making a complaint to the Committee in accordance with Part 4 – Breaches of the Code.

“Dispute” means any disagreement between a Disputing Party and a Signatory which:

- may be referred by the Disputing Party for resolution in accordance with Part 3 of the Code; and
- is in relation to a matter which is permitted under the terms of the relevant Agreement to be disputed by the Disputing Party.

“Disputing Party” means a winegrape grower who initiates a Dispute resolution process under clauses 3.1 or 3.2 of this Code and/or any other party who is authorized or permitted under the terms of the relevant Agreement to do so on behalf of or in association with the winegrape grower.

“Independent Expert” means an independent, qualified person/s appointed by the parties to a Dispute or by the Committee to make a determination on Disputes notified to them under the terms of this Code.

“Indicative Regional Price” means, in relation to a variety of winegrapes, an indicative fair market price for that variety of winegrapes from that region for the next vintage which:

- is not winegrape grower or vineyard specific;
- is set by the winegrape purchaser acting reasonably;
- is not an offer capable of being accepted by a winegrape grower or binding on the winegrape purchaser; and
- is not a guarantee of the final price that will be offered to the winegrape grower.

“Material Variation” means any variation to an Agreement or Associated Documents whether as a unilateral variation permitted by the Agreement or by consent between the parties, other than a variation of the price or winegrape assessment methods already provided for in the Agreement. A Material Variation includes but is not limited to any variation of:

- The term of the Agreement including extensions;
- Terms of payment;
- Price adjustment criteria;
- Winegrape assessments including winegrape standards (other than as provided for in the Agreement);
- Specification of blocks, varieties and tonnages including production caps or quotas;
- Delivery and freight arrangements; and
- Dispute resolution procedures;

“Notice Of Dispute” means a formal written notification between the parties to a Dispute.

“Presiding Member” means the Independent Chair of the Committee.

“Signatory” means a winegrape purchaser who has notified the Committee that it will be bound by the Code.

“Spot Market Purchase” means an Agreement for the sale and purchase of winegrapes which is entered into between the parties less than 10 Business Days prior to the expected harvest date for those winegrapes (or, if there are more than one expected harvest date applicable to the Agreement, 10 Business Days prior to the earliest of these dates).

“WFA” means Winemakers Federation Of Australia.

“WGGA” means Wine Grape Growers Australia.

AUSTRALIAN WINE INDUSTRY CODE OF CONDUCT
CODE ADMINISTRATION COMMITTEE
ANNUAL REPORT 2009 – 2010

SECRETARIAT

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INTRODUCTION

This is the second Annual Report of the Code Administration Committee established under the Australian Wine Industry Code of Conduct. It covers the period from 1 July 2009 to 30 June 2010.

The Australian Wine Industry Code of Conduct

The Australian Wine Industry Code of Conduct¹ which was signed by representatives of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) on 19 December 2008 has two main aims

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between winegrape growers and winegrape purchasers
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

Winegrape purchasers who are Signatories to the Code agree to be bound by the principles set out in the Code in their commercial dealings with winegrape growers. They also undertake to provide a winegrape grower with a copy of the Code whenever that grower signs a new Agreement.

With the exception of Part 2 (Winegrape Purchase Agreements), the Code took effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new agreements for the supply of winegrapes for the 2010 vintage onward. With existing agreements, each Signatory agrees to offer to its winegrape growers to

- apply the Code (with the exception of Part 2) with effect from 1 January 2009
- bring existing agreements in line with the provisions of Part 2 of the Code at the time of any material variation to the agreement.

Signatories also commit to promoting the adoption of the Code. The WFA and WGGA have agreed to publicize and promote the Code and its dispute resolution procedures, and to work to maximize its adoption within the industry.

Signatories to the Code

A winegrape purchaser may become a signatory to the Code which is not compulsory by providing a written notice to the Committee. A register of signatories is

¹ The Australian Wine Industry Code of Conduct can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Downloads.html>

maintained and available on the WFA, WGGA and the Code Administration Committee websites.²

The Wine Industry Code Administration Committee

The Code is overseen and administered by an independent Code Administration Committee of three members and an alternate member with appropriate commercial experience, jointly appointed by the Boards of the WFA and WGGA.³ The members are part-time. The current members with terms until 30 September 2010 are

- **Presiding Member:** Graham ('Bert') Mowbray, retired Federal Magistrate and former Member of the Administrative Appeals Tribunal, holds qualifications in agriculture, agricultural economics and law. His early work experience was in agriculture, followed by a lengthy legal career, principally in public and administrative law.
- **Member:** Ian Cox, an Agribusiness Consultant with formal qualifications in agriculture, management and property valuation, has an extensive background in agriculture, management and finance. He has worked as an agribusiness specialist for many years.
- **Member:** James Omond is a lawyer and principal of Omond & Co providing specialist services to the wine industry. Mr Omond's work includes specific wine-industry operational advice and trade practices/competition experience. He is an executive member of a number of organisations associated with the wine industry.
- **Alternate Member:** John Dickie is the inaugural chairman of the Film Exhibition and Distribution Code of Conduct Administration Committee established in 1998. Mr Dickie, who is a journalist, has had extensive experience in communications work both in public administration and private enterprise.⁴

The Committee is supported by an independent secretariat, The Accord Group, a firm specializing in industry code administration, mediation and training in negotiation, complaints handling and mediation.

The Committee's responsibilities include facilitating resolution of disputes over winegrape prices and vineyard downgrades and rejections, and inquiring into alleged breaches of the Code. It is to produce an annual report to be published by 30 September each year containing

- a description of the nature and number of disputes received
- any comments it wishes to make about conduct or trends in the industry
- a report on the operations of the Code, including the names of any parties removed from the Code.

² <http://www.wfa.org.au>, <http://www.wgga.com.au>, and <http://www.wineindustrycode.org>

³ Part 5 of the Code

⁴ Fuller details on members can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Committee.html>

In monitoring the Code, the Committee may recommend any amendments that may assist in the operation of the Code.

OPERATION OF THE CODE 2009 – 2010

This is the first annual report covering a full year, 1 July 2009 to 30 June 2010.

Committee Operations

The Committee met on eight occasions during the year – 10 August 2009, 15 October 2009, 9 December 2009, 10 February 2010, 7 April 2010, 22 April 2010, 5 May 2010 and 23 June 2010. Five of these meetings were by Skype conferencing calls and three were in person.

The range of issues considered by the Committee included

- Procedures for appointment of independent experts⁵
- Operational procedures for independent experts
- Preparation of lists of independent experts
- Application and independent expert fees
- Informal early dispute resolution by the secretariat
- Notification to growers of their rights to dispute resolution
- Disputes arising at the weighbridge
- Time limits under the Code
- Conflicts between the Code and winegrape purchase agreements
- Retention of title clauses
- Promotion of the Code
- Possibility of retaliatory action for those who use the Code dispute resolution procedures
- The independent review of the Code, including selection of reviewer and discussion with the reviewer of his draft report
- A complaint by a grower of an alleged breach of the Code.

On 2 December 2009 the Presiding Member, Bert Mowbray, met with the Executive of the WGGGA and members of the WFA/WGGGA Code Management Committee to discuss the recommendations made by the Committee in its 2009 Annual Report and in a later e-mail of 5 November 2009. Mr Mowbray also addressed the Annual General Meeting of the WFA and the WGGGA Executive on the Committee's activities and the opportunities presented by the Code.

Mr Mowbray and Ms Nathalie Birt from the Committee's Secretariat participated in a telephone conference with members of the Code Management Committee on 16 February 2010 to help settle procedures for the appointment of independent experts and for their operational procedures.

On 22 March 2010 Mr Mowbray and Mr Omond attended a meeting with the Code Management Committee to consider various issues raised by the Committee including those covered in the 2009 Annual Report.

In March 2010 the Committee produced a short article entitled **A New Way to Do Business** to promote the Code. This was provided to both the WFA and WGGGA for use in various industry newsletters and publications. It is also on the Committee's website.⁶

Signatories to the Code

A winegrape purchaser may become a signatory to the Code by providing a written notice to the Committee. Signatories at 30 June 2010 were

- Balnaves Vineyard Services Pty Ltd t/as Balnaves of Coonawarra
- Constellation Australia Ltd
- Foster's Group
- Henry Holmes Wines Pty Ltd
- Orlando Wines, a division of Pernod Ricard Pacific Pty Ltd
- Tyrrell's Vineyards Pty Ltd

The percentage of total crush represented by these Signatories for the 2010 vintage was approximately 37%.

Disputes

No dispute under Part 3 of the Code was notified to the Committee during the reporting period.

Breaches of the Code

One complaint alleging breach of the Code was notified to the Committee during the reporting period. This alleged a breach by a Signatory of the price notification requirements of the winegrape purchase agreement provisions of Part 2 of the Code. The grower asserted that as a consequence he was significantly underpaid for his crop.

This complaint was initially made orally to the Committee's Secretariat which assisted the complainant to present his concerns in a form consistent with the Code and suitable for consideration by the Signatory. The written complaint when received was referred to the Signatory which then sought advice from the Secretariat on the

⁶ <http://www.wineindustrycode.org/Downloads.html>

process. Both parties contacted the Secretariat on a number of occasions to assist. On 7 July 2010 the complainant advised the Secretariat he had reached an agreement with the Signatory and he therefore wished to withdraw his complaint.

This matter demonstrates the clear benefit of incorporating informal early dispute resolution mechanisms into a code such as the wine industry one. This complaint was able to be resolved without resort to the more formal requirements of the Code through active early consultation by the Secretariat with both parties. In this particular case because of deficiencies in the transitional provisions in the Code an agreement may not have been reached without the Secretariat involvement. The Secretariat in addition played a significant educational role.

This case reinforces the Committee's views on informal early dispute resolution in the 2009 Annual Report.⁷

REVIEW OF THE CODE

The Code provides for a formal review after the 2010 vintage by suitably qualified persons appointed by the Committee.⁸ It is also proposed that thereafter the Committee will review the operations of the Code not less than every three years.

The objectives of each review include assessing the extent to which the Code has reduced disputes and the effectiveness of the dispute resolution system. The review is to recommend any amendments to the Code required to address any issues identified during the review process and is to be completed by 30 June in the relevant year.

Following consideration of a number of possible reviewers the Committee appointed Mr Neill Buck of Neill Buck and Associates to conduct the first review. Over the past 20 years Mr Buck has undertaken a large number of independent reviews, including examination of self regulatory and related arrangements. On 17 May 2010 the Committee issued a press release announcing the review and Mr Buck's appointment.

Mr Buck prepared a discussion paper, followed by consultations with small, medium and large winemakers, a number of grape growers from various wine growing regions and their representatives, and other stakeholders and interested parties. The Committee met with Mr Buck on 5 May 2010 prior to his selection as reviewer and on 23 June 2010 to discuss a draft of his report.

The report was received on 29 June 2010 and forwarded to both the WFA and the WGA. It can be found on the Committee's website at <http://www.wineindustrycode.org/Downloads.html> and its recommendations are at Appendix A to this report.⁹

ISSUES UNDER THE CODE

Awareness and Promotion of the Code

⁷ See recommendation 8 in the Buck review referred to in the next section, at Appendix A.

⁸ See Part 1 of the Code

⁹ These recommendations were considered by a joint meeting of the Committee with the WFA/WGA Code Management Committee on 28 July 2010.

Although the Code has now been operating for some 18 months, it has only attracted six Signatories representing 37% of the total crush. There has been one dispute under Part 3 of the Code and one complaint under Part 4.

The Committee has offered to assist the industry organisations in increasing awareness of the Code and has prepared and distributed a short article **A New Way to Do Business** to promote the Code. The WFA and the WGGGA have agreed to review blockages that appear to be stopping more wine companies signing up and to implement a one-on-one follow up with the 64 large and medium wine companies. They however do not see any immediate role for the Committee in promoting the Code.

The Committee is concerned at the low take up of the Code by winemakers and the apparent ignorance or fear of using it among growers. The Committee believes that it is critical to the Code's success for both the WFA and the WGGGA to redouble its efforts to engage signatories and to promote the importance and benefits of the Code with growers. Members of the Committee stand willing and ready to assist in any way they can.¹⁰

Inconsistency between the Code and Winegrape Purchase Agreements

On a number of occasions during the year the Committee expressed its concern over ambiguity in the Code when the Code and a winegrape purchase agreement are in conflict, in particular about limitations imposed on independent experts. The Committee is concerned that any determination made by an independent expert runs the risk of being meaningless unless they are permitted unfettered discretion under the Code. Although this may only be a transitional matter involving old agreements, the Code Management Committee referred it for consideration in the review of the Code.

Fees for Independent Experts

At its December 2009 meeting the Committee decided to invite the Code Management Committee to consider asking independent experts to provide a fixed hourly rate/fee for the whole vintage and to agree to a capped maximum amount with appropriate sanctions. This issue was referred by the Code Management Committee to the review of the Code.

RESPONSE TO PREVIOUS RECOMMENDATIONS

In its 2009 Annual Report the Committee raised various issues for consideration by the WFA and WGGGA and made a number of recommendations to them. It is appropriate to report on the responses on these matters.

Informal Early Dispute Resolution

Some other voluntary codes allow for early intervention by their secretariats seeking to facilitate resolution on an informal basis before resorting to the formal processes under the code. The Committee has agreed that a similar approach should be incorporated in the wine industry procedures.

¹⁰ The Committee notes that the Buck review recommended changed targets with the Committee resigning if those targets are not met.

The WFA/WGGA Code Management Committee agreed that the Committee could perform this role as the agreement with the Secretariat would cover any costs arising from it. The grower should however lodge a notice of dispute and the winemaker be given the opportunity to respond before any attempt by the Secretariat to facilitate resolution of the dispute. This matter should also be considered in the review of the Code.

It is significant that the only substantive dispute or complaint under the Code this year was resolved informally through Secretariat assistance.¹¹

Time Limits

The Committee expressed concern about the inflexibility of time limits in the Code. It queried whether these time limits should be enforced rigorously or whether there was scope for it to use its discretion to extend the limits in compelling circumstances.

The Code Management Committee decided that it would be appropriate for the Committee only to extend the time limit where both parties agreed.

Notices to Growers

In the 2009 Annual Report the Committee recommended that the Signatories include with all notifications of prices, downgrades or rejections a written statement in a prescribed form alerting the growers to the time limits under the Code and the possible consequences of failing to comply with these limits. On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for such notices.

The Code Management Committee however was of the view that it would be best to continue with grower education and for the WFA “to develop a check list and write to signatories reminding them of their obligations, including informing staff of these.”

Disputes over Downgrades and Rejections at the Weighbridge

In the 2009 Annual Report the Committee recommended that the WFA and WGGA examine whether a pool of independent experts could be established for resolving weighbridge disputes. On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for a notice which could be displayed at weighbridges advising growers of the availability of such experts.

The Code Management Committee has advised that weighbridge disputes present peculiar difficulties and this recommendation may not be feasible.

Retention of Title Clauses

The Committee recommended that the WFA and WGGA give consideration to whether Retention of Title Clauses may assist in cases of failure by larger wineries, and if so, whether they should be a standard clause in winegrape purchase agreements and included in Part 2 of the Code.

¹¹ See **Breaches of the Code** at page 7 above. It is also worth noting that in his review Mr Buck placed considerable emphasis on the importance of the Secretariat having more discretion to informally address disputes.

The Code Management Committee decided that this matter should be considered in the review of the Code.

Promotion of the Code

The Committee encouraged the WFA and the WGGGA to undertake further promotion among their members about the importance and benefits from participation in the Code. This matter is considered at page 9 above.

Alternate Committee Members

The Code Management Committee accepted the Committee recommendation that Part 5 of the Code be amended at an appropriate time to allow for an Alternate Committee Member.

Quorum for the Committee

The Code provides that a quorum shall comprise “the Presiding Member and all other Members”.¹² The Committee recommended that the Code be amended to set a quorum of any two members, or any three members where one of the members present is the Alternate Member.

The Code Management Committee decided that the quorum should be any three of the Presiding Member, the other two Members and the Alternate Member.

Appointment of an Acting Presiding Member

The Code is currently silent on whether the Presiding Member can appoint a Member to preside when the Presiding Member is absent. The Code Management Committee agrees with the Committee that it would be desirable to make express provision for this in the Code.

ACKNOWLEDGEMENTS

The Committee Members are grateful to the WFA and WGGGA and their officers for their assistance and cooperation during the year.

The Committee extends its especial appreciation to its Secretariat, The Accord Group, in particular Ms Nathalie Birt, for their ready and professional support throughout the year.

30 September 2010

¹² Clause 5.1.5

APPENDIX A

Report of a Review of the Wine Industry Code of Conduct – June 2010

Recommendations

1. That the Code Administration Committee and in turn the industry should make every effort to educate industry participants of the benefits of this Code. With this in mind the Code Administration Committee should seek funds to conduct an industry awareness program regarding the Code.

- I would anticipate that the industry associations and as appropriate government agencies providing funds to the Committee charged with administering the Code to promote the Code.
- I mentioned in my report the ‘New Way to Do Business’ publication which could form the basis of this campaign.
- I understand that the government currently funds business education in the sector and including information on the Code in this program would be an excellent way to increase understanding.
- Another useful area for education would be in University and College courses for winemakers to ensure that those entering the sector are also aware of the Code.

2. That the indicator of success for this Code be changed to be signatories including 50% of winemakers who crush over 100 tonnes.

- It seems to me that this is a more realistic indicator. On my count this would mean some 700 wine makers would be eligible to sign. The current model could demonstrate success with as few as 10 wine makers as signatories. Also I have recommended that growers be able to become signatories to the Code.

3. That the Code Administration Committee set a realistic target for progress to the 50% target at the end of 2011 season say 25%. If that target is not reached they should resign and advise the stakeholders and government that a voluntary Code in this sector does not work.

4. That membership by a winemaker or a grower of the two industry peak associations WFA and WGGA be taken to mean that the member is deemed to be a signatory unless they specifically opt out.

- This type of commitment would indicate to all stakeholders that the industry remains committed to the Code.

5. That the Code Administration Committee prepare a simple sample disclosure statement to be attached to all contracts between wine makers and growers who are signatories to the Code. Disclosure of this information ie that the party is a signatory to the Code and what to do if there is a dispute including the Code contact details should be a requirement of all code signatories.

- In my experience once the parties get past the concern that someone may actually complain and accept that this is just good business practice then this requirement will not be seen as a challenge.

6. That the Code Administration Committee prepare a simple document that is to be provided to the parties to a dispute that describes in simple terms what happens when a dispute arises and who does what - including in particular the option for informal resolution using the Code Secretariat.

- It is clear that most people who might like to invoke the Code would have little idea what happens in such an arrangement. On the basis of my enquiries people are nervous about this. Issuing such a document at the time that a dispute arises would give assurance to both parties.
- I would expect the party being complained about to be accountable for providing the document as soon as the other party raises an issue of dispute that cannot easily be resolved internally.

7. That the industry participants seek the involvement of other participants in the supply chain to apply the principles of corporate social responsibility in regard to this Code. This includes seeking agreement from downstream customers such as retailers and distributors, where they have the choice, to only deal with companies that are signatories to the Code of Conduct in the industry.

- In some industries signing up to the Code has been seen as a badge of honour and an indicator that the party is likely to be a fair and equitable trader.

8. That the dispute resolution process be made simpler in the following ways:

- **By promoting the already existing informal dispute resolution process;**
- **By producing a simple one page flow chart of how the dispute resolution process operates;**
- **By allowing the Code Committee and in turn the Secretariat the discretion to vary the time limits and other procedures to quickly resolve disputes;**
- **By reducing the charge for submitting a dispute;**

9. That the independent expert process be more widely used and that senior members of the sector be asked as appropriate to step up to take a role as learned parties in informally resolving disputes as a supplement to the existing process.

10. That the Code be amended to allow disputes involving more than one party and that the method for doing so involve hearing one matter and assuming similar facts deeming that resolution to apply to all the affected parties.

11. That Clause 3.4 be amended to remove the prohibition on a signatory or any party from going to the ACCC at their discretion.

12. That Clause 4.3. be reviewed.

While it may arguably be reasonable to seek some recompense from a party to a dispute it would appear to be a major disincentive to complain if after it is over and your complaint is not made out you would receive a bill in addition to the application fee and other costs you have incurred. In my experience this type of clause is of little consequence to a large player but of great concern to a small player.

13. That the Code be revisited to ensure that the following requirements are clear to all parties:

- **That a signatory to the Code should actually pay for grapes they purchase;**
- **That it be clear in any agreement when title passes for product;**
- **That it be made clear in all contracts when the seller will actually be paid and that this information be provided by the purchaser in advance of handing over the product; and**
- **That such agreements cannot be unilaterally changed.**

14. That the Code be amended to place obligations on growers and winemakers and that the primary obligation on both parties is to treat each other in a fair and equitable manner.

- The Code is not the law and as such the Code Committee should be able to use its discretion in light of the ACCC's definition to adjudicate on such matters.
- This is also an important step to ensure that wine makers do not think that they are the only ones with obligations under the Code.

15. That the administration of the Code be revisited and the current Chair of the Code Administration Committee be also made independent Chair of the Industry Code Committee ie the committee where representatives of the parties meet to discuss Code issues and further that the ACCC and Commonwealth Government be invited to attend as observers of that committee when it meets.

- This is an important forum where decisions about the Code are made and it is important that it is able to quickly resolve procedural issues.
- The industry should consider appointing 3 growers and 3 winemakers to that committee as well as one member from each of the peak bodies. The parties may wish to seek out opinion leaders from across the industry for such a

committee and where travel is involved consider some recompense for individual members.

- Over time it may be that that committee could take over the role of the Code
- Management Committee but at this formative stage that is not appropriate.

16. That the Code include a paragraph on retaliation along the following lines;

“No grower or winemaker signatory may engage in retaliatory conduct against a grower or winemaker because they have invoked the provisions of this Code.”

AUSTRALIAN WINE INDUSTRY CODE OF CONDUCT
CODE ADMINISTRATION COMMITTEE
ANNUAL REPORT – 2009

SECRETARIAT

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INTRODUCTION

This is the first Annual Report of the Code Administration Committee established under the Australian Wine Industry Code of Conduct. It covers the period from the appointment of Committee members on 25 February 2009 to 30 June 2009.

The Australian Wine Industry Code of Conduct

The Australian Wine Industry Code of Conduct¹ was signed by representatives of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) on 19 December 2008.

The Code was developed for the Australian wine industry by the Wine Industry Relations Committee, a joint committee of the WFA and WGGA, following a recommendation by an Australian Senate enquiry in 2005. The Executive Councils of the WFA and WGGA have endorsed the Code and it is supported by the Federal Government's Department of Agriculture, Fisheries and Forestry.

The voluntary Code has two main aims

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between winegrape growers and winegrape purchasers
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

Winegrape purchasers who are Signatories to the Code agree to be bound by the Code in their commercial dealings with winegrape growers. Signatories commit to adopt the principles set out in the Code in their dealings with winegrape growers, and to provide the winegrape grower with a copy of the Code whenever a winegrape grower signs a new Agreement.

With the exception of Part 2 (Winegrape Purchase Agreements), the Code took effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new agreements entered into after 1 January 2009 in relation to the supply of winegrapes for the 2010 vintage onward. With respect to existing agreements, each Signatory agrees to offer to its winegrape growers to

- apply the Code (with the exception of Part 2) with effect from 1 January 2009
- bring existing agreements in line with the provisions of Part 2 of the Code at the time of any material variation to the agreement.

Signatories also commit to promoting the adoption of the Code. The WFA and

¹ The Australian Wine Industry Code of Conduct can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Downloads.html>

WGGA have agreed to publicize and promote the Code and its dispute resolution procedures, and to work to maximize its adoption within the industry.

Signatories to the Code

A winegrape purchaser may become a signatory to the Code by providing a written notice to the Committee. The Code is not compulsory within the industry, but the WFA and WGGA expect that the Code will achieve a high level of acceptance.

The register of signatories will be maintained and available on the WFA, WGGA and the Code Administration Committee websites.²

The Wine Industry Code Administration Committee

The Code is overseen and administered by an independent three person Code Administration Committee with appropriate commercial experience, jointly appointed by the Boards of the WFA and WGGA.³ The members are part-time. The current members appointed on 25 February 2009 until 30 September 2010 are

- **Presiding Member:** Graham ('Bert') Mowbray, retired Federal Magistrate and former Member of the Administrative Appeal Tribunal who holds qualifications in agriculture, agricultural economics and law. His early work experience was in agriculture, followed by a lengthy legal career, principally in public and administrative law.
- **Member:** Ian Cox, an Agribusiness Consultant with formal qualifications in agriculture, management and property valuation. Mr Cox has an extensive background in agriculture, management and finance, and previously worked as an agribusiness specialist for many years.
- **Member:** James Omond, a lawyer and principal of Omond & Co providing specialist services to the wine industry. Mr Omond's work includes specific wine-industry operational advice and trade practices/competition experience. He is an executive member of a number of organisations associated with the wine industry.⁴

The Committee is supported by an independent secretariat, The Accord Group, jointly funded by the WFA and WGGA. The Accord Group is a firm specializing in industry code administration, mediation and training in negotiation, complaints handling and mediation.

The Committee's responsibilities include facilitating resolution of disputes over winegrape prices and vineyard downgrades and rejections. In addition it has the power to inquire into alleged breaches of the Code and to expel non-complying

Signatories. It may publish the names of non-complying Signatories in its Annual Report and on its website.

² <http://www.wfa.org.au>, <http://www.wgga.com.au>, and <http://www.wineindustrycode.org>

³ Part 5 of the Code

⁴ Fuller details on members can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Committee.html>

The Committee is also to produce an annual report to be published by 30 September each year containing

- a description of the nature and number of disputes received
- any comments it wishes to make about conduct or trends in the industry
- a report on the operations of the Code, including the names of any parties removed from the Code.

In monitoring the Code, the Committee may recommend any amendments that may assist in the operation of the Code.

Review of the Code

A formal review of the Code will be conducted after the 2010 vintage by suitably qualified persons appointed by the Committee.⁵ It is also proposed that thereafter the Committee will review the operations of the Code not less than every three years.

The objectives of the review will include assessing the extent to which the Code has reduced disputes and the effectiveness of the dispute resolution system. The review is to recommend any amendments to the Code required to address any issues identified during the review process.

It is intended that these reviews will be completed by 30 June in the relevant year.

OPERATION OF THE CODE – 2009

The reporting period covers the time from the appointment of Committee members on 25 February 2009 to 30 June 2009. As the Code has recently come into existence and only the dispute resolution provisions applied to the 2009 vintage there are limited matters on which the Committee can report this year.

Committee Operations

The Committee met for the first time on 27 May 2009 when it was briefed by representatives of the WFA and the WGGGA on background to the Code. It considered the listing of a panel of experts for disputes over winegrape prices or vineyard downgrades and rejections, draft procedures for appointment of independent experts, and operational procedures for independent experts.⁶

At this meeting the Committee settled a range of administrative matters – such as its budget, banking, and financial arrangements, the creation of a website, etc.

⁵ See Part 1 of the Code

⁶ An outline of the procedure for appointment of independent experts can be found on the Code Administration Committee website at http://www.wineindustrycode.org/Dispute_Resolution.html

Signatories to the Code

A winegrape purchaser may become a signatory to the Code by providing a written notice to the Committee. Signatories at 30 June 2009⁷ were

- Constellation Australia Limited
- Orlando Wines, a division of Pernod Ricard Pacific Pty Ltd
- Tyrrell's Vineyards Pty Ltd

The percentage of total crush represented by these signatories for the 2009 vintage was approximately 25%.

The Margaret River Wine Industry Association has given its support to the Code and is encouraging its members to become signatories.

Disputes

Only one dispute was notified to the Committee during the reporting period. It involved prices offered in February 2009 to a South Australian grower by a signatory to the Code. The dispute was successfully settled after an independent expert appointed by the parties under the Code made a determination.

Breaches of the Code

No complaints of breaches of the Code have been referred to the Committee during the reporting period.

ISSUES UNDER THE CODE

It is too early in the operation of the Code for the Committee to be in a position to provide any detailed analysis of its operations, its effectiveness and possible improvements. However there are a small number of matters which have come to the Committee's attention and which warrant a comment.

Informal Early Dispute Resolution

Some other voluntary codes allow for early intervention by their secretariats seeking to facilitate resolution on an informal basis before resorting to the formal processes under the code. On receiving notification of a dispute the secretariat contacts the parties, usually by telephone, to try and assist them resolve the dispute informally and as expeditiously and efficiently as possible.

The Committee has agreed that a similar approach should be incorporated in the wine industry procedures, thus providing for early intervention by the Secretariat. On receipt of a Notice of Dispute, the Secretariat will contact the parties by telephone and

⁷ Fosters has since lodged its Signatory Notification Form with the Code Secretariat on 20 August 2009

attempt to resolve the matter without it escalating into the formal dispute resolution process.

Time Limits

On its face the Code provides inflexible time limits for various actions by the parties: for example for price disputes, 7 business days for lodging a Notice of Dispute with the Committee, 7 business days for a response, and 28 business days for requests to the Committee for appointment of an independent expert. The timeframes for disputes involving downgrades or rejections is much tighter.⁸

The Committee is uncertain whether the intention is that these time limits be enforced rigorously or whether there should be some scope for the Committee to use its discretion to extend the limits in compelling circumstances. Alternatively it could extend the time limit if the winegrape purchaser agrees. If so, the question arises as to what would amount to compelling circumstances.

Notices to Growers

Notwithstanding the answer to the question raised above on the Committee's discretion to extend time limits, the Committee strongly **recommends** that the Signatories include with all notifications of prices, downgrades or rejections a written statement in a prescribed form alerting the growers to the time limits under the Code and the possible consequences of failing to comply with these limits.

Disputes over Downgrades and Rejections at the Weighbridge

The Code does not currently provide for use of independent experts in resolving disputes over downgrades and rejections at the weighbridge.⁹ Clearly these are matters that require very quick settlement.

The Committee **recommends** that the WFA and WGGGA examine whether a pool of independent experts could be established for resolving these weighbridge disputes. Such people should have suitable experience and cover an appropriate geographic spread.

Retention of Title Clauses

After the end of the reporting period the Committee had drawn to its attention a case suggesting the vulnerability of growers as unsecured creditors where receivers had been appointed to a winemaker. The media report in this matter suggested that over 100 growers were owed about \$4m.

In view of the implications of failure by larger wineries, the Committee **recommends** that the WFA and WGGGA give consideration to whether Retention of Title Clauses may assist in such circumstances, and if so, whether they should be a standard clause in winegrape purchase agreements and included in Part 2 of the Code.¹⁰

⁸ See Parts 3.1 and 3.2 of the Code

⁹ See Part 3.3 of the Code

¹⁰ Clause 2.10.1 of the Code is a more limited provision on title in winegrapes

Promotion of the Code

Clearly it is early in the life of the Code. Part I of the Code says on performance targets

Performance will be measured by the total numbers of Signatories, and the percentage of the national annual winegrape harvest purchased by those Signatories. The percentage-of-crush performance targets are:

- *75% of the purchased crush in first vintage after implementation*
- *85% of the purchased crush in the second vintage after implementation*

To date the number of major companies that have become Signatories has been encouraging. We are not in a position to know how well known the Code is among growers.

The Committee therefore encourages the WFA and the WGGA to undertake further promotion among their members about the importance and benefits from participation in the Code.

Alternate Committee Members

The Code currently makes no provision for any Alternate Committee Member.¹¹ As the Committee understands that the WFA and WGGA propose to appoint a permanent Alternate Committee Member to cover for absences of members, the Committee **recommends** that Part 5 of the Code be amended at an appropriate time to allow for such a member.

Quorum for the Committee

The Code provides that a quorum shall comprise “the Presiding Member and all other Members”.¹²

The Committee believes that on occasion this may present some difficulty and understands the WFA and WGGA would support a quorum of two.

The Committee therefore **recommends** that the Code be amended to set a quorum of any two members, or any three members where one of the members present is the Alternate Member.

Appointment of an Acting Presiding Member

The Code is currently silent on whether the Presiding Member can appoint a Member to preside when the Presiding Member is absent.

It would be desirable to make express provision for this in the Code.

¹¹ See Part 5 of the Code

¹² Clause 5.1.5

ACKNOWLEDGEMENTS

The Committee Members are grateful to the WFA and WGGGA for the opportunity presented them to participate in this new venture for the wine industry. They also wish to express thanks for the help given by WFA and WGGGA officers.

The Committee extends its especial appreciation to its Secretariat, The Accord Group, in particular Ms Nathalie Birt, for their ready and professional assistance in the establishment of the Committee and the early operations of the Code.

30 September 2009

A NEW WAY TO DO BUSINESS

The Code of Conduct for the Australian wine industry has established a new way for doing business.

Its purpose is to promote fairness and transparency in dealings between growers and winemakers and to establish a common grape supply contract framework which can be used throughout Australia.

And if there is a dispute over agreements between a grower and wineries about the sale and purchase of wine grapes, there is an in-built system for the resolution of disputes.

Under the code, disputes can be resolved without resort to the traditional legal system for a minimum cost. The whole process is presided over by an independent Code Administration Committee whose task is to ensure a fair and open process.

The major organisations in the industry, the Wine Grape Growers Australia and the Winemakers' Federation of Australia, drew up the code following a Senate inquiry into the state of the Australian wine industry.

Both these organisations have endorsed the code, the creation of which has been supported by the Australian Department of Agriculture, Fisheries and Forestry.

It costs nothing to join and it has a support service provided by the code secretariat.

New Agreements

The code's purpose is to sign up all of the winemakers throughout Australia to bring about a national approach to the buying and selling of winegrapes. Signatories will follow the new provisions set out in the code.

While growers are not signatories to the code, they will benefit from the new forms of agreement and the dispute resolution procedures.

With major problems arising in the industry, particularly the issue of oversupply and the major restructuring of the industry, the code sets out minimum requirements for agreements between winemakers and growers, as well as a simple and clear dispute resolution procedure.

In the past there may have been some agreements which were unfair to one of the parties. Under the code, these agreements will be phased out and replaced by those whose terms comply with the principles set out in the code.

The code framers, the Government and the signatories believe that if the code can provide a clear basis for their commercial dealings and for disputes to be resolved within it, then it will be an important step towards harmonious relations within the wine industry.

The code sets out to cover all of the important areas of transaction between growers and winemakers. As a minimum, grape purchase agreements must be in writing and conform to the principles of fairness and transparency listed in the code.

Importantly the agreements must be clear and concise and in plain English.

All of the parties involved in the agreement must be included and identified as well as when the agreement starts and when it finishes. All of the agreements must contain a fixed price or a clear statement about how the final price can be determined.

Among other things, the code deals in detail with:

- terms of payment
- tonnage and vineyard details
- winegrape standards, assessment and harvest
- delivery and freight
- acceptance and rejection
- title in winegrapes, and
- professional advice

All of these provisions are set out fully in the code which can be found on the web at www.wineindustrycode.org

Dealing with disputes

History shows that the main causes of disputes arise over the grape price, about the maturity, purity or the condition of the grapes or about rejection of the grapes.

If a dispute does arise, there are steps in place to try to deal with it quickly. While there are formal time limits for action to be taken under the code, there are shortcuts built into the code to get the matter moving.

The code is supported by The Accord Group as its secretariat and it is only a phone call away if a dispute is looming (tel. (02) 9264-9506). It may be that if the secretariat gets the phone call early enough, the matter can be resolved very quickly.

In other codes of conduct, an early intervention by the secretariat has been able to nip potential disputes in the bud.

However, not all disputes will be that simple. If it cannot be resolved at that stage, a Notice of Dispute must be sent to the secretariat with a fee of \$250. Within a business day of receiving the notice, the secretariat will again try to resolve the dispute informally.

Independent Experts

If that does not happen but the parties can agree on a qualified independent expert, that person will begin to resolve the dispute.

If the parties cannot agree on a suitably qualified person, the Presiding Member of the Code Administration Committee will appoint one to deal with the dispute.

This Independent Expert will then set about resolving the dispute under the provisions of the code and make a decision which will be final and binding.

Independent Code Committee

The operation of the Code is overseen by the Code Administration Committee – an independent body consisting of the Presiding Member, Mr Bert Mowbray, two Committee members, Mr Ian Cox and Mr James Omond, and an alternate member, Mr John Dickie.

All members have had either extensive experience in the law (Mr Mowbray is a retired Federal Magistrate with experience in agriculture), experience in the wine industry or in the administration of other voluntary codes.

The code is not written in stone. It is due for a comprehensive review at the conclusion of the 2010 harvest to see how it is performing and how it can be improved.

The code establishes the parameters for how business should be done between growers and winemakers. Properly embraced it can bring about a new way of doing business based on trust, fairness and openness.

Signing up will make a major contribution.

The code can be found on the web at www.wineindustrycode.org



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Report of a Review of the Wine Industry Code of Conduct

June 2010



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Introduction

The Review was commissioned by the Wine Industry Code of Conduct Administration Committee (the Committee). I was appointed on 11 May 2010 with the requirement that my report be made available to the Committee on 30 June 2010.

The Wine Industry Code of Conduct (the Code) was developed for the Australian wine industry by the Wine Industry Relations Committee, a joint committee of the Winemakers Federation of Australia (WFA) and Wine Grape Growers Association (WGGA), following a recommendation by an Australian Senate enquiry in 2005. The Executive Councils of the WFA and WGGA have endorsed the Code.

The Code has two main aims:

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between wine grape growers and wine grape purchasers;
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

The Code has been introduced over the past two years and the Code requirements are now for the most part in place.

Signatories agree to:

- apply the Code (with the exception of Part 2) with effect from 1 January 2009;
- bring existing agreements in line with the provisions of Part 2 of the Code at the time of any material variation to the agreement.

They also agree to promote the Code and to work to maximise its adoption within the industry.

Under the Code a review was scheduled for mid 2010 and whilst the Code has only been in place for a short time it is important to ensure that in its initial phase the Code is effective in addressing the aspirations of the industry.

Therefore this Review is intended to consider the Code and its operation to ensure that it reflects good practice, is relevant and meets the objectives set for it by the industry parties.

The Terms of reference set for the Review by the Committee were as follows:

- assess the extent to which the Code has reduced disputes;
- assess the effectiveness of the dispute resolution system;
- assess the performance of the industry against the performance targets contained in the Code, and recommend new performance targets as required;
- recommend any amendments to the Code required to address any problems or issues identified during the review process.

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In order to facilitate discussion and to address the terms of reference I prepared a Discussion Paper which was intended to facilitate discussion and to guide those who may wish to comment on the operation of the Code to date. I understand the paper was circulated to the industry parties (a copy of that discussion paper is at attachment one).

In conducting the review, consultations and discussions were held face to face but mostly by phone with interested parties.

All those who spoke to me did so on the basis that the names of those individuals, companies and organisations would not be included in the report. I spoke to small, medium sized and large winemaker companies, a number of grape growers from various wine growing regions of Australia and their representatives and other stakeholders and interested parties.

I am particularly grateful to those who gave of their time to discuss this matter and to provide input into the Review. Given the time table for the Review it is inevitable that some who may have wished to contribute may not have been available. However I believe that the cross-section of the industry and other interested parties who contributed to the Review provide a sound basis for the conclusions and findings of the report.

Findings

As a result of my enquiries I found the following.

Adopting the Code

The Code is not yet widely adopted by the industry. Only 6 wine maker companies have signed the Code representing 4 larger companies and two small companies. There seem to be barriers to increasing the number of signatories and while these remain in place the Code is unlikely to be successful.

It is important to note that this is a new Code. In my experience it takes time for a level of trust in the Code and between the parties to grow and at this formative stage it is to be expected that there will be some reluctance to sign up. I have made some recommendations on how to encourage all parties to adopt the Code by signing up, by lodging complaints and by participating in the dispute resolution process.

There is no doubt on the basis of my enquiries that this industry is no different to any other and there are areas of dispute where the Code should be able to perform a useful role.

Performance measures

The current performance measure for the Code appears inappropriate as it means that even with less than 10 signatories the Code is deemed to be a success.

It should be changed to reflect a revised target. I suggest a reasonable target should be 50% of all winemakers who crush over 100 tons which on my calculation would be around 350 of 700.

I would also suggest that the Committee set a performance target of this number by the end of season 2012 and 25% by end of season 2011. Were the Committee to find that at the end of 12 months there was not a significant increase in signups I would recommend that they resign and advise the government that this Code is not likely to be successful and that they should try a different approach to regulating the industry.

In my view it is unreasonable to create expectations that a voluntary Code of Conduct will effectively manage issues in an industry and then have only a very small number of participants signed up compared to the number of participants in the industry.

Encouraging sign ups and education

Those winemakers that have signed so far have done so because they support such an industry code as an indicator of good practice. It seemed to me that many winemakers do not yet see benefit in the Code. More generally I think there is an information gap amongst the parties as to the merits of this Code.

During my review I was provided with a copy of a publication I understood was prepared by the Code Committee entitled a "New Way to Do Business". I was surprised to find no copy of this publication on any website of any of the parties and in fact other than a complex Q&A document I found no simple explanation of the benefits to growers and/or winemakers of

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complying with Code. I did see a submission to the Government by the WFFA that indicated strong support for the Code as means of regulating conduct in the industry. This submission from May 2009 indicated to me that the industry was strongly supportive of and had high expectations of the success of the Code.

One important aspect missing from this Code is a requirement of disclosure by the Code signatories that they are signatories and with that comes certain rights and obligations on all parties to any agreement. I would have expected to see a guide for signatories on how they disclose that they are signatories including the contact details of the Code Secretariat. Normally this would be an addendum to any contract or handed out at the time of signing. I was told that one reason that this was not done because parties were fearful of someone complaining.

In addition it is important that information on disputes and how they work under the Code be provided by one party (usually the winemaker) to the other party when the dispute arises; ie when told of prices or advised of a downgrade/rejection. Therefore the Code Administration Committee should develop a form of words or a leaflet that should be made available to the parties at this time.

If this Code is successful, my experience with similar Codes is that industry participants will make decisions as to whether they choose to deal with companies on the basis that they have signed the Code. I can see no reason why, where they have a choice, down-stream purchasers of product ie wholesalers and retailers should also choose to only deal with companies that have sign up to the Code.

At this stage I understand that no attempt has been made by participants in the sector to encourage the end users or distributors of wines to ask such questions. This approach has been very successful in other industries.

Disputes

There has been only one dispute referred to the Code despite unsubstantiated complaints to me of conduct that may breach the Code. If the 2005 Senate Enquiry, the issues that were brought to me in my review of the Horticulture sector in 2004 and in this review have any substance there should be more disputes coming to the Code.

As a matter of record the type of allegations that were made to me concerned the following matters:

- unilateral variation of contracts;
- unfair or unreasonable decisions generally; and
- misrepresentation by both growers and winemakers regarding the quality of fruit.

I am not in a position to say if these claims have any veracity. I was told by an industry stakeholder that such claims are often made but rarely able to be substantiated. Unfortunately given the low take up of the Code it is not possible for the industry to tell those people to put up or keep quiet. In my view a well supported Code, where such allegations could be aired, would ensure that if these claims are not valid they can be dismissed. As it stands the ability of parties to make such claims without them being able to be tested does not help anyone.

Dispute process

The Code dispute resolution process appears complex and difficult to navigate. There is no quick and easy way to address a dispute as in other Codes. As the Code Committee said:

“On its face the Code provides inflexible time limits for various actions by the parties: for example for price disputes, 7 business days for lodging a Notice of Dispute with the Committee, 7 business days for a response, and 28 business days for requests to the Committee for appointment of an independent expert. The timeframes for disputes involving downgrades or rejections is much tighter” Annual report 2009.

During the course of my enquiry I was told that there is an informal mechanism for disputes to be managed under the Code. I assume that because I did not find out about it from any of the people in the industry it is not well publicised.

The apparent rigidity of the Code complaint procedure appears to me to be a barrier to people initiating disputes. It is not clear if it would also create barriers to resolution but given the time that can elapse between making a dispute and resolution it appear to me that allowing the issues to fester for this time would only exacerbate the dispute.

With this in mind I believe that the Committee and Secretariat should have much more discretion to informally address disputes. It is not clear what happens for example if one party misses a deadline. Even if it was clear most of the wine growers and wine makers would struggle as I did to understand the intricacies of the process. There needs to be a simpler process to enable quick and informal resolution of disputes. The current system appears to me likely to intimidate both complainants and discourage people from signing up because of fear of just what might happen if there was a complaint.

I thought that the application fees for this Code were expensive and a barrier to complaints coming forward. I was told that the fees and the process were designed to prevent frivolous and vexatious complaints being made. While such claims are made under these Codes such barriers to complaint are in my experience likely to discourage legitimate complainants.

I thought the independent expert process was good one. I think that the type of expert used should be senior members of the industry. I have seen this work well in other industries.

Multi Party Disputes

I was surprised that there is no capacity for the Code to hear disputes involving more than one party. Several allegations made to me involved multiple parties. Where there are similar facts taking the class action model of simply using one case as an example would be a quick and easy way to do this.

Prior to doing this I would suggest for caution that an informal approach be made to the ACCC Small Business Commissioner to ensure that such an approach does not require ACCC authorisation.

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I was also surprised at the lack of use by wine growers of the collective negotiation provisions under the Trade Practices Act. These provisions have been used in many industries across Australia and there are examples of how they can work in this industry.

Specific drafting issues

A matter of good practice I can see no reasons why a signatory to the Code should be prohibited from taking their complaint to the ACCC (clause 3.4). I have noted similar attempts to prevent companies taking disputes to the ACCC in other Codes. I suggest this aspect of clause 3.4 be removed as it is unenforceable and arguably illegal.

I also found it intriguing that there is a punitive sanction imposed on a complainant whose complaint is not made out.(clause 4.3). Whilst it is reasonable to impose a sanction where a complaint is made out there needs to be careful consideration of the implication of imposing sanctions on complainants just because they complain. If the industry wishes to leave this clause in place I suggest the addition of the word vexatious. It would be better to leave it out.

I was also unable to find anything in the Code that said that one party had to pay the other party for grapes.

On the issue of retention of title clauses I understand such retention of title clauses varied from 10 lines to 10 pages.

I think the best that can be hoped for in the area of retention of title is that the Code should require that any agreement makes clear when title on the product passes and when the seller will be paid. This is a basic commercial principle.

Obligations on both parties – Fair and equitable

I do not think it reasonable that growers should be excluded from compliance obligations under the Code.

I suggest that the Code require members of both the WGGGA and WFA to be deemed to be signatories to the Code unless they specifically opt out.

Further I suggest that there should be a new clause added to the Code which requires growers and winemakers to treat each other **fairly and equitably**. This is a simple concept and provides a foundation for openness and trust. It is also only good commercial practice.

The Australian Competition and Consumer Commission has a definition that helps understand what I have in mind:

“In determining what constitutes fair and equitable dealings within the meaning of the Code regard should be had to the relative strengths in the bargaining position of the relevant parties and their willingness to negotiate in good faith.”

It seemed to me that such a clause would also address some of the more difficult areas in the Code such as downgrades at weighbridges. I was told that this issue is difficult as fruit will change quickly and the events often occur away from the eye of the key stakeholders. If such disputes arise having time critical evidence will always be helpful.

Code administration

The Code administration arrangements are unusual for this type of Code. Good practice suggests that the management of voluntary Codes should be undertaken by a committee of industry representatives. In this case I would have expected a Code Administration Committee of 3 or 4 growers, 3 or 4 winemakers (possibly also representative associations), an independent chair and observers including the Commonwealth government and in the short term the ACCC.

I was told that this Code took a long time to develop and that the parties involved had great difficulty in reaching any type of consensus on a Code. Such debate and careful development is often helpful. Given the current administration arrangements I suggest that the Chair of the Code Administration Committee be appointed as independent Chair of the industry working group of wine makers and wine growers who meet to consider issues under the Code. I also suggest that the ACCC and the Commonwealth government be invited to the meeting as observers.

Retaliation

I was told that some in the industry took exception to my raising the issue of retaliation in my discussion paper. I found this surprising because if it is not an issue why should there be a concern with including a paragraph on the subject in the Code. Human nature being as it is people will always fear retaliation even if the fears are groundless.

Wine growers suggest that there are matters that would be referred to the Code if more companies were signatories. On the other hand I was told on a number of occasions that in the current economic climate if a grower was to raise a dispute with a winemaker they may be successful but they would be unlikely to be able to sell their fruit in the future. Given the nature of this review I have no evidence to support this assertion but it was made to me in each of the consultations I had with growers or their representatives. In my view complaints against non-signatories to this Code that cannot be easily resolved should be referred to the ACCC;

Other good practice codes such as the Film Distribution and Exhibition Code acknowledge this issue and include a clause regarding retaliation against complainants in the Code. I was told that there would be considerable concern if the Code contained a requirement that parties not retaliate.

A number of those I spoke to indicated that the industry is cyclical. I was told that because of an oversupply at the current time it is claimed the balance of power currently favours the winemakers. I was told that when the balance was the reverse the conduct by some growers was inappropriate. The reality appears to be that at this time at least, all parties are suffering from a flat and difficult market across the industry. Importantly this is a strong argument for a robust, fair and efficient voluntary Code that increases certainty for all parties. Such a Code enables certainty and assures that even in the tough times lines of communication are open. In fact one of the best outcomes from voluntary codes such as these is an increase in trust in the industry, the availability of circuit breakers and quick and easy dispute resolution.

Conclusions

Despite the good will of many, on the evidence represented to me the Code is not yet effective in its mission:

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between wine grape growers and wine grape purchasers;
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

It is too soon to tell if this Code will be effective in the longer term.

I appreciate the time and effort taken by those who spoke to me or those who organised people to whom I might speak. In the end the code addresses complex commercial relationship and sectoral issues and such a review can only look at matters at a point in time. I believe the information on which I relied and findings of this review are robust and should be seen as a positive opportunity to continuously improve this Code of Conduct.

I have made a series of recommendations below in light of what I found during the review. For completeness I have also provided some commentary against issues raised with me against the discussion paper.

Recommendations

1. That the Code Administration Committee and in turn the industry should make every effort to educate industry participants of the benefits of this Code. With this in mind the Code Administration Committee should seek funds to conduct an industry awareness program regarding the Code.

- I would anticipate that the industry associations and as appropriate government agencies providing funds to the Committee charged with administering the Code to promote the Code.
- I mentioned in my report the ‘New Way to Do Business’ publication which could form the basis of this campaign.
- I understand that the government currently funds business education in the sector and including information on the Code in this program would be an excellent way to increase understanding.
- Another useful area for education would be in University and College courses for winemakers to ensure that those entering the sector are also aware of the Code.

2. That the indicator of success for this Code be changed to be signatories including 50% of winemakers who crush over 100 tonnes.

- It seems to me that this is a more realistic indicator. On my count this would mean some 700 wine makers would be eligible to sign. The current model could demonstrate success with as few as 10 wine makers as signatories. Also I have recommended that growers be able to become signatories to the Code.

3. That the Code Administration Committee set a realistic target for progress to the 50% target at the end of 2011 season say 25%. If that target is not reached they should resign and advise the stakeholders and government that a voluntary Code in this sector does not work.

4. That membership by a winemaker or a grower of the two industry peak associations WFA and WGGGA be taken to mean that the member is deemed to be a signatory unless they specifically opt out.

- This type of commitment would indicate to all stakeholders that the industry remains committed to the Code.

5. That the Code Administration Committee prepare a simple sample disclosure statement to be attached to all contracts between wine makers and growers who are signatories to the Code. Disclosure of this information ie that the party is a signatory to the Code and what to do if there is a dispute including the Code contact details should be a requirement of all code signatories.

- In my experience once the parties get past the concern that someone may actually complain and accept that this is just good business practice then this requirement will not be seen as a challenge.

6. That the Code Administration Committee prepare a simple document that is to be provided to the parties to a dispute that describes in simple terms what happens when a

dispute arises and who does what - including in particular the option for informal resolution using the Code Secretariat.

- It is clear that most people who might like to invoke the Code would have little idea what happens in such an arrangement. On the basis of my enquiries people are nervous about this. Issuing such a document at the time that a dispute arises would give assurance to both parties.
- **I would expect the party being complained about to be accountable for providing the document as soon as the other party raises an issue of dispute that cannot easily be resolved internally.**

7. That the industry participants seek the involvement of other participants in the supply chain to apply the principles of corporate social responsibility in regard to this Code. This includes seeking agreement from downstream customers such as retailers and distributors, where they have the choice, to only deal with companies that are signatories to the Code of Conduct in the industry.

- In some industries signing up to the Code has been seen as a badge of honour and an indicator that the party is likely to be a fair and equitable trader.

8. That the dispute resolution process be made simpler in the following ways:

- **By promoting the already existing informal dispute resolution process;**
- **By producing a simple one page flow chart of how the dispute resolution process operates;**
- **By allowing the Code Committee and in turn the Secretariat the discretion to vary the time limits and other procedures to quickly resolve disputes;**
- **By reducing the charge for submitting a dispute;**

9. That the independent expert process be more widely used and that senior members of the sector be asked as appropriate to step up to take a role as learned parties in informally resolving disputes as a supplement to the existing process.

10. That the Code be amended to allow disputes involving more than one party and that the method for doing so involve hearing one matter and assuming similar facts deeming that resolution to apply to all the affected parties.

11. That Clause 3.4 be amended to remove the prohibition on a signatory or any party from going to the ACCC at their discretion.

12. That Clause 4.3. be reviewed.

While it may arguably be reasonable to seek some recompense from a party to a dispute it would appear to be a major disincentive to complain if after it is over and your complaint is not made out you would receive a bill in addition to the application fee and other costs you have incurred. In my experience this type of clause is of little consequence to a large player but of great concern to a small player.

13. That the Code be revisited to ensure that the following requirements are clear to all parties:

- **That a signatory to the Code should actually pay for grapes they purchase;**
- **That it be clear in any agreement when title passes for product;**
- **That it be made clear in all contracts when the seller will actually be paid and that this information be provided by the purchaser in advance of handing over the product; and**
- **That such agreements cannot be unilaterally changed.**

14. That the Code be amended to place obligations on growers and winemakers and that the primary obligation on both parties is to treat each other in a fair and equitable manner.

- The Code is not the law and as such the Code Committee should be able to use its discretion in light of the ACCC's definition to adjudicate on such matters.
- This is also an important step to ensure that wine makers do not think that they are the only ones with obligations under the Code.

15. That the administration of the Code be revisited and the current Chair of the Code Administration Committee be also made independent Chair of the Industry Code Committee ie the committee where representatives of the parties meet to discuss Code issues and further that the ACCC and Commonwealth Government be invited to attend as observers of that committee when it meets.

- This is an important forum where decisions about the Code are made and it is important that it is able to quickly resolve procedural issues.
- The industry should consider appointing 3 growers and 3 winemakers to that committee as well as one member from each of the peak bodies. The parties may wish to seek out opinion leaders from across the industry for such a committee and where travel is involved consider some recompense for individual members.
- Over time it may be that that committee could take over the role of the Code Management Committee but at this formative stage that is not appropriate.

16. That the Code include a paragraph on retaliation along the following lines;

“No grower or winemaker signatory may engage in retaliatory conduct against a grower or winemaker because they have invoked the provisions of this Code.”

Issues Addressed in the Discussion Paper

Performance targets for coverage of the Code:

How does the Code improve its coverage and what are the barriers to this?

The code must be seen as:

- simple to use;
- fair and not likely to result in retribution;
- not too onerous for winemakers to comply with;
- inclusive of commitments by wine growers; and
- managed closer to the industry where issues can be resolved informally.

Importantly there needs to be a balance. At the moment rightly or wrongly some see this Code as a Code designed to make winemakers do things rather than improve industry practice.

What factors influence wine makers to sign the Code?

Winemakers who signed the code told me that they did so because it was the right thing to do for the industry and it represented good practice.

Are wine makers who have not signed the code likely to be complying with the Code principles anyway?

Many winemakers have robust contracts and dispute resolution processes. But on the other hand I was told stories (unsubstantiated) of poor conduct in this area. Most winemakers need their growers as much as the growers need the winemakers and those who realise this have robust procedures. Many of those people would sign the Code if they were encouraged. There may be some impediments but these should be discussed.

What are the reasons why only a limited number of issues have been raised with the Code?

In the short term there should be a substantial number of issues brought to a Code such as this. That there are almost none suggests one of three reasons. One is fear of retribution, two is there are no issues and three the parties are unaware of the Code and how to use it.

I was told that there are plenty of issues. I was told that fear of retribution was an issue but I was also told that in the first instance people need to understand how the Code exists, how it works and have confidence that the systems and processes are not onerous.

Are there particular barriers to the parties using the Code to resolve disputes?

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The code is complex and there is limited capacity for informal resolution using the Code Secretariat.

Could the process for the management of disputes under the Code be improved? If so, how?

I have referred to Codes such as the Film Code in the comments above. I agree with the Management Committee's view in their last report quoted in the body of the report above.

I have set out several ways of improving the management of this Code.

Promotion and awareness of the Code

Are key stakeholders aware of:

- **the Code;**
- **the benefits of the Code;**
- **the risks of the Code being ineffective including failing to attract sufficient signatories;**
- **the fact that failure of this Code may lead to pressure on the Government to mandate a Code under the Trade Practices Act ie making it law?**

I found that many parties were aware of the Code but did not appreciate its benefits. I think there is room for more education and the inclusion of information on the Code in every contract and generally as part of the industry internal communication.

I formed a view that everyone is afraid of having a dispute go to the Code. The point of any complaints system is to have complaints. The success of any Code should not be measured on the number of complaints but on:

- the ease with which people can complain;
- the satisfaction of the parties with the process (not the outcome necessarily); and
- the degree of trust the parties have in the process.

What, if any, are the implications for the Code and the industry of the new powers given to the ACCC under the new penalty notice regime and the change from a criminal to a civil fines regime for Part V (misleading and deceptive conduct) of the Trade Practices Act?

I think that it is premature to consider these issues but were some of the matters raised with me taken to the ACCC it may be that they may commence an investigation.

Timing and effect of indicative and final prices

Are these arrangements appropriate, helpful and being applied in accordance with the expectations of the Code and its stakeholders?

Some winemakers are resistant to publishing final prices. Others publish final prices that are so indicative as to be unhelpful. Others found the process to be helpful.

I think that this aspect of the Code should be looked at again as it does create a barrier to

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signing. In practice I was told that some indicative prices are not helpful as they are so indicative as to be unhelpful.

I note for completeness that some who I spoke to would prefer to have such pricing issued earlier.

Notifying growers of their rights to dispute relevant decisions

Should the Code include provision for growers to be advised of their dispute rights and associated time limits at the time when they are notified of downgrades or rejections? If so how?

Are growers aware of the Code and how they can use it?

If so are growers and winemakers aware of the benefits of this form of voluntary industry based Code?

Has the communications process worked?

Is more promotion of the Code required and what form should this take?

Is the Code working as is anticipated by its stakeholders?

If so should more issues have been raised under the Code?

Growers should be notified of their rights in contracts and at the point of dispute. This should be made easy by the provision of education material and the development of simple standard form disclosure text. There are models for simple and complex versions of this type of notification. The more complex it is the less likely growers are to read it.

I have commented on these issues in the body of the report.

Procedures and timing for informal early dispute resolution

Has the Code brought about improved communications and early intervention in areas of potential and actual dispute?

Are there alternate ways for early intervention?

- **for example in the Film Industry Code early intervention occurs via informal telephone approaches to Managing Directors or CEOs of Companies alerting them to an issue. In some cases this has been sufficient to address the problem thus avoiding a formal dispute and saving money.**

What evidence is there that the existence of the Code has been a helpful factor in preventing or reducing disputes and creating certainty in relationships between signatories and growers and between non signatories and growers?

There is some evidence that the existence of the Code has delivered more certainty in relationships. But the number of signatories is so small that it is difficult to generalise this.

There should be an informal process for dispute resolution as is found in other Codes.

A good challenge for all parties is to draw a road map of the current dispute resolution process on a piece of paper.

I have commented on these issues further in the body of the report.

Handling group or class disputes under the Code

Should the Code handle disputes from more than one person with common issues? If so, how?

If so what fees should apply for such disputes?

What if any Trade Practices Act issues are raised by such arrangements where the parties to the dispute raising the issues are actual or potential competitors?

If the Code was to handle group disputes how could this be done eg by dealing with one case and using it as the guide for others. Given the time critical nature of many disputes what would be the implications for the Code and its procedures?

I can see no reason why the Code cannot handle multiple person disputes. Many of the allegations that were made to me involved multiple growers. Where there are similar facts taking the class action model of simply using one case as an example would be a quick and easy way to do this. Prior to doing this I would suggest for caution that an informal approach be made to the ACCC Small Business Commissioner to ensure that such an approach does not require ACCC authorisation.

I noted my surprise that the wine growers had not taken more advantage of the collective negotiation authorisation facilities under the Trade Practices Act.

Application fees

Is the Code cost effective including costs for experts taking account of alternatives such as a mandatory Code, the absence of a Code?

Other Codes were cheaper. I was told that the fees and some controls were designed to stop frivolous and vexatious complaints. In my experience given the significance of the issues such complaints are rare under Codes of this type.

Time limits for dispute resolution under the Code

Do the present time limits allow for the parties to bring matters forward in a timely manner?

Are there ways in which these more formal processes could be sped up by informal mechanisms? If so, how?

The model used in the Film Code provides an example of how this can work. In my view this works because the parties trust each other and also because the parties meet as a Code Management Committee where many things are addressed informally and relationships are forged. In my view a management committee of the type suggested in the notes above would facilitate this process.

Procedures for independent experts

Are these procedures likely to be effective if applied widely in the industry?

Are their suitable independent experts available to manage disputes and are they able to assist within the arrangements set out in the Code?

This appeared to be appropriate. In my view the best experts for such resolution are senior figures in the industry who have the trust and respect of all parties. Often these people can

bring a degree of gravitas to the discussion that stops the angst and other distractions from the issues in dispute.

Inconsistency between the Code and wine grape purchase agreements, including in relation to powers of independent experts

Is the Code limited by contracts and wine grape purchase agreements that reduce the ability of the Code to address issues?

If so what options could be considered to address this issue?

The industry needs to work out what takes precedence, a Code or contract. I was told that at present this is unclear and even if it is not some clarification should be provided. Parties are entitled to certainty of contract **but if the contract follows the Code including the dispute resolution provisions then the issue should not arise**

Retention of Title Clauses

What is the impact of retention of title on the level of disputation in the industry? Should this matter be addressed in the Code? How?

I was told of some issues in this area. This industry is not simple in this regard as the fruit passes through a number of processes ultimately resulting in the production of wine.

I believe that the code should mandate a retention of title clause be included in contracts without being specific as to what it should say.

Fear of retaliation

Are concerns expressed by some growers of possible retaliatory action if they seek dispute resolution justified?

How can the parties be encouraged to trust the Code processes?

Has the Code assisted in providing more open dialogue in the sector and have fears of retaliation against complainants been eased by the model adopted by the Code? If not what can be done to address this?

This is always going to be a claim that can rarely be substantiated. I was told of this fear in my review and have no doubt that the fear exists whether or not it is true.

The Code should address this issue in the manner outlined above ie making retaliation or the threat of it a breach.

Disputes over downgrades and rejections at the weighbridge

Is it possible to have in place arrangements to address this problem before the event?

Are their ways in which such time critical disputes can be resolved quickly?

This is matter of trust. There should be obligations on both parties in these disputes. But in the end someone has to decide and by the time a dispute reaches the Code the fruit has deteriorated. Often these events occur away from the major parties at a weighbridge.

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I can see no barrier to dispute resolution under the Code provided evidence can be collected and presented. This requires all parties to be more careful in recording the nature of the product so that subsequent discussions can be informed by fact rather than assertion

Any formal amendments to the Code.**Are there specific drafting and amendments that would make the Code more effective? If so please indicate and provide drafting suggestions?**

I received no suggestions.

I have not provided detailed amendments to the Code as this is a matter for the parties. I have made a number of recommendations including:

- Changes to the management committee structure;
- Changes to the dispute process to introduce a simplified and quick complaint and dispute resolution procedure;
- Introduce a capacity to deal with group disputes on common facts;
- Introduction of a clause on retaliation;
- Include obligations on wine growers in the Code; and
- Review those sections of the Code that non signatory wine makers say are barriers to their signing.

The Discussion Paper

Review of the Australian Wine Industry Code of Conduct

Submissions to

Neill Buck – Independent Reviewer

GPO Box 4963 Sydney 2001

By phone 0418977074

By Email comply@comply.com.au

To meet the prescribed June 30 deadline please provide all submission by email or phone by 15 June at the latest.

Discussion Paper May 2010

Purpose

The purpose of this discussion paper is to provide a framework for discussions and submissions to the Review of the Australian Wine Industry Code of Conduct (the Review).

Interested parties are invited to contact the Review by phone or email to provide any commentary or suggestions in response to the issues in this paper or any other matter they may think appropriate.

The Reviewer welcomes all comments. All submissions not marked confidential will be acknowledged in the Review Report. Submission or comments that are of a confidential nature will be treated that way by the Review.

Copies of the Australian Wine Industry Code of Conduct (the Code) and other documents are available at <http://www.wineindustrycode.org>

Background

The Code has been in place for a relatively short time but consistent with the requirements of the Code it is timely to ensure that at this stage the Code is moving in the direction intended by key stakeholders.

The Code was signed by representatives of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) on 19 December 2008.

The Code has two main aims

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between wine grape growers and wine grape purchasers
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

The Code has been introduced over two years and the Code requirements are now for the most part in place.

Signatories agree to

- apply the Code (with the exception of Part 2) with effect from 1 January 2009
- bring existing agreements in line with the provisions of Part 2 of the Code at the time of any material variation to the agreement.

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They also agree to promote the Code and to work to maximize its adoption within the industry.

This Review is intended to consider the Code and its operation to ensure that it is relevant, efficient and demonstrating good practice in dispute prevention and dispute management and resolution.

Terms of Reference

The Review is required to:

- assess the extent to which the Code has reduced disputes;
- assess the effectiveness of the dispute resolution system;
- assess the performance of the industry against the performance targets contained in the Code, and recommend new performance targets as required;
- recommend any amendments to the Code required to address any problems or issues identified during the review process.

Issues

This is an indicative list and is not intended to limit submissions or be exhaustive. Stakeholders and interested parties are invited to comment on these matters as well as anything else they wish to raise. The issues and related questions below are presented to facilitate discussions and submissions only.

Performance targets for coverage of the Code:

- How does the Code improve its coverage and what are the barriers to this?
- What factors influence wine makers to sign the Code?
- Are wine makers who have not signed the code likely to be complying with the Code principles anyway?
- What are the reasons why only a limited number of issues have been raised with the Code?
- Are there particular barriers to the parties using the Code to resolve disputes?
- Could the process for the management of disputes under the Code be improved? If so, how?

Promotion and awareness of the Code

- Are key stakeholders aware of:
 - the Code;
 - the benefits of the Code;
 - the risks of the Code being ineffective including failing to attract sufficient signatories;
 - the fact that failure of this Code may lead to pressure on the Government to mandate a Code under the Trade Practices Act ie making it law?
- What, if any, are the implications for the Code and the industry of the new powers given to the ACCC under the new penalty notice regime and the change from a criminal to a civil fines regime for Part V (misleading and deceptive conduct) of the Trade Practices Act?

Timing and effect of indicative and final prices

- Are these arrangements appropriate, helpful and being applied in accordance with the expectations of the Code and its stakeholders?

Notifying growers of their rights to dispute relevant decisions

- Should the Code include provision for growers to be advised of their dispute rights and associated time limits at the time when they are notified of downgrades or rejections? If so how?
- Are growers aware of the Code and how they can use it?
- If so are growers and winemakers aware of the benefits of this form of voluntary industry based Code?
- Has the communications process worked?

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- Is more promotion of the Code required and what form should this take?
- Is the Code working as is anticipated by its stakeholders?
- If so should more issues have been raised under the Code?

Procedures and timing for informal early dispute resolution

- Has the Code brought about improved communications and early intervention in areas of potential and actual dispute?
- Are their alternate ways for early intervention for example in the Film Industry Code early intervention occurs via informal telephone approaches to Managing Directors or CEOs of Companies alerting them to an issue? In some cases this has been sufficient to address the problem thus avoiding a formal dispute and saving money.
- What evidence is there that the existence of the Code has been a helpful factor in preventing or reducing disputes and creating certainty in relationships between signatories and growers and between non signatories and growers?

Handling group or class disputes under the Code

- Should the Code handle disputes from more than one person with common issues? If so, how?
- If so what fees should apply for such disputes?
- What if any Trade Practices Act issues are raised by such arrangements where the parties to the dispute raising the issues are actual or potential competitors?
- If the Code was to handle group disputes how could this be done eg by dealing with one case and using it as the guide for others. Given the time critical nature of many disputes what would be the implications for the Code and its procedures?

Application fees

- Is the Code cost effective including costs for experts taking account of alternatives such as a mandatory Code, the absence of a Code?

Time limits for dispute resolution under the Code

- Do the present time limits allow for the parties to bring matters forward in a timely manner?
- Are there ways in which these more formal processes could be sped up by informal mechanisms? If so, how?

Procedures for independent experts

- Are these procedures likely to be effective if applied widely in the industry?
- Are their suitable independent experts available to manage disputes and are they able to assist within the arrangements set out in the Code?

Inconsistency between the Code and wine grape purchase agreements, including in relation to powers of independent experts

- Is the Code limited by contracts and wine grape purchase agreements that reduce the ability of the Code to address issues?
- If so what options could be considered to address this issue?

Retention of Title Clauses

- What is the impact of retention of title on the level of disputation in the industry?
- Should this matter be addressed in the Code? How?

Fear of retaliation

- Are concerns expressed by some growers of possible retaliatory action if they seek dispute

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resolution justified?

- How can the parties be encouraged to trust the Code processes?
- Has the Code assisted in providing more open dialogue in the sector and have fears of retaliation against complainants been eased by the model adopted by the Code? If not what can be done to address this?

Disputes over downgrades and rejections at the weighbridge

- Is it possible to have in place arrangements to address this problem before the event?
- Are there ways in which such time critical disputes can be resolved quickly?

Any formal amendments to the Code.

- Are there specific drafting and amendments that would make the Code more effective? If so please indicate and provide drafting suggestions?

Anything else interested parties may wish to add.

- This list is specifically open ended.
- There will be other issues not included here and interested parties should feel free to raise anything they wish in regard to the operation of the Code in this industry.

Neill Buck
Reviewer

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11 May 2010