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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](mailto: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**

**Contact**  
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[comply@comply.com.au](mailto:comply@comply.com.au)

**11 May 2010**