NEW ZEALAND
HIGH COMMISSION

New Zealand Ministry of
Foreign Affairs and Trade
Manatu Aorere

65 Canberra Avenue
Canberra ACT 2603
Australia

T +61 2 6270 4211

28 April 2017

Manager
Indirect Tax and Not-for-profit Unit
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear David

Wine Equalisation Tax Submission from the New Zealand Government

On behalf of the New Zealand Government, we welcome the opportunity to provide a submission in response to the Australian Government's implementing legislation for the Wine Equalisation Tax (WET) rebate reforms. This submission responds to the draft legislation and the associated explanatory material that would amend the *A New Tax System (Wine Equalisation Tax) Act 1999*.

The Australian Government extended the WET rebate to New Zealand producers in July 2005 in accordance with the commitments set out under Article 7(2) of the Australia New Zealand Closer Economic Relations Trade Agreement (CER). Throughout Australia's recent review of its taxation policy and the subsequent review of the WET, the New Zealand Government has made a number of submissions to ensure that the "core obligation of equal treatment for New Zealand wine producers will be preserved in any changes to the WET rebate."

We are pleased, therefore, that Australia intends to continue making the rebate available to qualifying New Zealand producers, and that this is reflected in the draft legislation.

As you are aware, New Zealand has a genuine commercial interest in Australia's approach to taxing wine. Australia is New Zealand's third largest wine export market, valued at NZD362 million in the year to June 2016. Over the same period, 70 percent of all imported wine into New Zealand came from Australia. This demonstrates that New Zealand is also an important market for Australia's wine industry, which derives commercial benefits from the effective working of the closer economic relationship.

Australia and New Zealand also work closely to advance our mutual interests in the global wine market place. In particular, our cooperation in organisations such as the

World Wine Trade Group and the International Organisation of Vine and Wine (OIV) ensure that we work together to progress the interests of our wine industries and address barriers to our wine exports.

Our specific comments on the draft legislation are provided in the attached annex.

Yours sincerely

Chris Seed
High Commissioner

POLI-33-3517

Annex: New Zealand Government comments on the WET Draft Legislation and associated explanatory material

New Zealand has given careful consideration to the draft legislation and associated explanatory material. We have also consulted with the New Zealand wine industry and understand that they are making their own submission. As noted in the covering letter, we appreciate that Australia has ensured that the draft legislation retains the equal treatment of New Zealand wine producers. Our comments below are focused on seeking further clarification of the practical application of the revised legislation for New Zealand producers.

Meaning of "produced by you"

2 New Zealand would appreciate clarification of the criterion for eligibility for the WET rebate under 19-5(2)(a), specifically in regards to the phrase "produced by you." In particular, we would be interested to receive clarification of whether New Zealand producers that have their wines made by a contract manufacturer would be eligible for the WET rebate. The Explanatory Material (1.20) states that manufacturing includes product made by a contract manufacturer "on your behalf from inputs that you own." This is common practise particularly for small wine producers. However, it is not clear that the eligibility criterion that the wine be 'produced by [a New Zealand participant] in New Zealand' covers this situation and our industry seeks clarity on this. They also noted the explanation of 1.20 does not appear fully consistent with the current definition of "manufacturer" as defined in 33-1 of the Act. In a similar vein, we would also appreciate clarification as to whether this criterion includes the situation where a wine is produced in New Zealand, but packaged in Australia under contract. This is also common practice for New Zealand wine producers exporting wine to Australia.

Trade mark requirements

3 The draft legislation sets out an eligibility requirement in 19-5(5)(b) and (c) that requires the eligible wine producer to hold either a trade mark or a common law trade mark. Australia and New Zealand do not currently share a Trans-Tasman trade marks regime, we therefore appreciate that the legislation provides provision for the recognition of New Zealand trade marks and common law trade marks. However, we are concerned that this policy approach may have unintended impacts for wine producers in Australia and New Zealand and we wish to make some broader comments on this.

4 Trade mark registration can be a complicated, lengthy and expensive process for businesses and the costs involved can be a significant burden particularly for smaller wine producers who are likely to benefit the most from eligibility to the WET. It would also impose other obligations on wine businesses that are not imposed on other industries.

5 It is not mandatory in either Australia or New Zealand for businesses, including wine producers, to register their trade marks in order to be able to use them. There are likely to be a variety of reasons why a business may choose not to register their trade marks. For example, small wine producers may not be able to afford the time and cost involved in registering a trade mark to protect their brand and instead may want to rely

on other consumer protection legislation or common law tort of passing off to protect their brand.

6 Furthermore, wine producers may be using trade marks owned by others under license. Using trade marks under licence does not mean that the wine belongs to the licensor, rather wine produced can still belong to the licensee.

7 As a result, we anticipate there may be wine producers in either country that do not own registered trade marks used on their products but have previously been eligible for the WET rebate and would be disadvantaged as a consequence of the new trade mark requirement. Although the draft legislation provides for producers to use common law trade marks, as drafted the legislation only permits the use of common law trade marks that "cannot become a registered trade mark".

8 It is also not clear from the draft legislation what constitutes an "unregistrable" trade mark and the implications of using this as an eligibility criterion. If a trade mark is unregistrable then it will be unlikely to be able to function as a trade mark and therefore unlikely to be used for branding purposes. For example, registration may have been refused because the mark was:

- not capable of distinguishing the goods of one wine producer from those of another wine producer in the same market; or
- identical or similar to another prior registered (or unregistered) trade mark and its use is likely to deceive or confuse.

9 In these two scenarios, would the wine producer still be able to qualify for the rebate? We have some concerns that the latter scenario may inadvertently encourage producers to infringe a registered trade mark, or breach the common law tort of passing off in respect of an unregistered trade mark, for the purpose of qualifying for the rebate.

10 It is also unclear how a wine producer would establish that their trade mark is in fact unregistrable to qualify for the rebate and who would determine this. Would the wine producer need to first expend the time and resources of having an application for registration refused by either IP Australia or the Intellectual Property Office of New Zealand? In which case the benefit to the wine producer of receiving the rebate could be significantly reduced. The costs associated with an application for registration being refused invariably are significantly larger that the costs associated with an application being registered, especially where registration was opposed by a third party or competitor.

Transitional provisions

11 Finally, if these changes are implemented we would appreciate confirmation that transitional provisions will allow producers time to register their trade marks before the changes to the rebate are implemented. We understand both the Intellectual Property Office of New Zealand and IP Australia prioritise trade mark applications on a first come, first served basis and registration in New Zealand takes a minimum of six months.[1]