NEW ZEALAND WINE

PURE DISCOVERY

WINE EQUALISATION TAX REBATE – SUBMISSION OF NEW ZEALAND WINEGROWERS INC

Introduction

This submission responds to the exposure draft legislation and associated explanatory material that would amend the *A New Tax System (Wine Equalisation Tax) Act 1999*.

This submission is made on behalf of New Zealand Winegrowers Inc. (NZW). NZW provides strategic leadership for the wine industry and is the peak body that represents the interests of all of New Zealand's grape growers and wine makers. NZW grew out of longstanding cooperation and collaboration between the New Zealand Grape Growers Council and the Wine Institute of New Zealand, and began operation as a combined entity in 2002. In 2016 the separate entities merged to become a single unified industry body: New Zealand Winegrowers Inc. NZW represents all of New Zealand's 700 winery and over 800 independent grape grower members.

NZW understands that the policy behind the exposure draft regulation is a matter for the Government of Australia. NZW's comments are directed at ensuring that this policy is implemented in a way that ensures equivalent treatment between New Zealand and Australian producers consistent with international obligations, as well as ensuring operational clarity and efficiency.

Definition of "producer" and "produced by you"

Under 19-5(1)(a), the first criterion for eligibility for the WET rebate for an Australian producer is that they must be "the producer of the wine". At 1.20 of the Explanatory Material, it is stated that manufacturing includes having a product made by a contract manufacturer "on your behalf from inputs that you own". This is an extremely important explanation, since the cost of winemaking plant means that contract production is a very common and efficient means small and medium enterprises to access the means of production.

However, the explanation at 1.20 does not appear to be consistent the current definition of "manufacturer" in 33-1 of the principal Act which states: "*manufacturer, in relation to particular wine, means the entity that (not as an employee) *manufactured the wine, whether or not the entity owned the materials out of which the wine was manufactured*".

The proposed legislation does not appear to contain any revision of that definition. NZW proposes that the definition of "manufacturer" should be amended to reflect the policy intent as stated in the Explanatory Materials.

For a New Zealand participant, the equivalent criterion in 19-5(2)(b) is that "the wine was produced by you in New Zealand[…]". NZW is concerned that the difference in wording could have the effect of excluding New Zealand wines made under contract from eligibility for the WET rebate. This would be contrary to the policy and would also create a difference in treatment of New Zealand producers that would be inconsistent with international obligations.

NZW is further concerned that the meaning of "produced by you in New Zealand" could exclude the packaging in Australia of wines owned by the producer. This is a common practice that produces not only economic efficiencies for New Zealand producers but also directs funds towards Australian packaging businesses and is more environmentally sustainable. NZW does not question that the rebate should only be available for New Zealand wines, but believes that there is a more effective way of targeting such products.

In order to address the issues identified above, NZW submits that the words "produced by you in New Zealand" should be replaced with "you are the producer of the wine from source products grown in New Zealand".

Ownership requirements

Under 19-5(3), the producer must own the source product from the period immediately after crushing through to its final packaging as finished wine. Ownership structures within a corporate group may be complex for many reasons, including taxation, and it may be that a wine remains within the ownership of a corporate group but is transferred between associated entities at different stages of production.

Since associated producers cannot claim the WET rebate, it is logically consistent that associated producers should be included within the ownership rule – i.e. that a source product/wine may be transferred between associated producers without becoming ineligible on the basis of ownership. NZW submits that the legislation should be amended to reflect this.

Under 19-5(2)(d), producers must satisfy these ownership requirements for at least 85% of the wine by volume. This is a high threshold, particularly taking into account the fact that adverse weather conditions may require small and medium producers to buy in juice or wine in order to maintain economic viability. NZW suggests that some flexibility to take into account exceptional circumstances should be incorporated into this requirement.

Trade mark requirements

NZW believes that the trade mark requirements in 19-5(5)(b) and (c) would result in impractical and arbitrary outcomes. Some of the problems that we anticipate with this requirement are as follows:

- Trade marks may not always function as anticipated by the policy. Trade marks can be complex and contain many elements or alternatively, they could be nothing more than a colour or a sound. Consequently there will be many circumstances when it is difficult to determine which trade mark or element of a trade mark constitutes the "branding" required by the policy.
- Registration of a trade mark can be a matter of some complexity and cost to producers, and even the most straightforward registration takes time. While trade mark registration is backdated to the date of application, it is unlikely that the WET rebate would be. Registration may be subject to lengthy examination or opposed by a third party, thereby holding up entitlement to the WET rebate indefinitely on grounds that are totally unrelated to the ownership of wine.
- The relationship between registered and common law trade marks is not an either/or relationship. Although a common law trade mark should be able to be registered, an unregisterable trade mark is neither likely to be used for branding purposes nor considered a common law trade mark. The evidence referred to in 1.27 of the Explanatory Material would appear to be evidence that a trade mark should not be considered a common law trade mark, rather than evidence that it should be so considered.
- A trade mark might be used under licence, which does not mean that the wine bearing the trade mark is not branded and owned by the producer.
- A packaged wine might in fact bear a number of trade marks, not all of which may be owned by the producer e.g. certification marks for organic or sustainable production.
- The requirement is easily undermined by the registration of a "nonsense" trade mark (eg a small irregular blue shape) which could then be printed and placed inconspicuously on the label.

In view of the many issues with this aspect of the policy, we suggest that a far more simple means of achieving the outcome of linking the producer and the product would be to require that the name and address of the supplier, as mandated by standard 1.22-4 of the Australia New Zealand Food Standards Code, is the name of the producer (including an associated producer as above). This would clearly identify the producer and is already required to appear on all labels of packaged product.

Transitional provisions

It is not clear how the transitional provisions apply to wines made from grapes harvested in 2017 or earlier, but which may have undergone some winemaking or packaging operations after 1 January 2018. It would be helpful for the purpose of clarification to specify that the amendments do not apply where the source product more than 50% of the wine was crushed before 1 January 2018.

Thank you for the opportunity to make this submission. If you require any further clarifications, please do not hesitate to contact the writer.

Yours faithfully

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