Submission on the Wine Equalisation Tax Rebate Exposure Draft Bill [Treasury Laws Amendment (Measures for a Later Sitting) Bill 2017: Wine Equalisation Tax] and Draft Explanatory Material

Treasury Wine Estates & Pernod Ricard Winemakers

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Introduction

Treasury Wine Estates (TWE) and Pernod Ricard Winemakers (PRW) welcome the opportunity to comment on the Wine Equalisation Tax (WET) Rebate Exposure Draft Bill [Treasury Laws Amendment (Measures for a Later Sitting) Bill 2017: Wine Equalisation Tax] (the draft Bill) and the accompanying draft Explanatory Material (the draft EM). Our submission on the draft Bill and draft EM build on TWE's and PRW's previous submissions on the WET rebate and wine taxation, as provided to the Department of the Treasury throughout 2015 and 2016.

In addition, as members of the Winemakers' Federation of Australia (WFA), TWE and PRW support the WFA submission on the draft Bill and draft EM and make the below comments in addition to those provided by WFA.

Executive Summary

TWE and PRW commend the Government on the draft Bill and draft EM (collectively, the Materials) and consider that it accurately reflects the Government's December 2016 decision on reforming the WET rebate.

TWE and PRW support key elements of the Materials, including:

- improving the integrity of the WET rebate by restricting its availability to wine on which WET is ultimately paid;
- the exclusion of bulk and unbranded wine from eligibility of the WET rebate;
- the requirements of grape ownership throughout the manufacturing process to be eligible for the rebate;
- the reduction in the WET rebate cap from $500,000 to $350,000; and
- the tightened associated producer rule.

Given the complexity of the amendments, however there are, a number of improvements that could be made to the draft Bill and draft EM to ensure the reforms are implemented in the way intended, that is to address 'distortions in the market through the misuse and exploitation of the WET Rebate scheme' [Assistant Minister Ruston, Media Release, *Backing Australia's Wine Industry*, 2 December 2016].

Primarily we consider the materials could be improved by:

1. Removing the reference to a 'common law trade mark that cannot become a registered trademark'.
2. Strengthening the connection between branding and the trade mark requirement.
3. Removing the amendments to the definition of 'grape wine product'.
4. Clarifying what records will be required to prove ownership (ie the 85% rule).
5. Strengthening and clarifying elements of the draft EM, including identifying bulk wine eligibility as a key element of the reforms.

1. Trade mark provisions – removing the reference to common law trade marks

Our companies believe that the trade mark clauses as currently drafted are unworkable in practice.

Currently, item 6 of the draft Bill recognises either a registered trade mark or a common law trade mark established in Australia 'that cannot become a registered trade mark'. However, registered and

common law trade marks have the same elements and are not mutually exclusive. All trade marks must:

- Function as an exclusive indicator of origin
- Be represented graphically
- Be goods specific
- Be territorially specific

If a trade mark is *prima facie* incapable of registration, then it is also incapable of functioning as a common law trade mark. For example, Geographical Indicators (GIs) are incapable of functioning as either a registered or a common law trade mark.

In addition, recognising in any form a common law trade mark as 'established in Australia' for these amendments is also problematic, as this is an issue to be determined exclusively by the Courts. The ATO is unable to make this assessment. That is, the only way to prove the validity of a common law trade mark is through litigation. Without this, there is no *prima facie* common law trade mark that is capable of enforcement.

Accordingly, we believe the proposed item 6 (new ss19-5(5)) which states that the trade mark can be a registered trade mark or a 'common law trade mark established in Australia that cannot become a registered trade mark' is unworkable.

While we understand the Government's concern that some brands may be comprised solely of GIs that prevent the business registering a trade mark, the GI name similarly cannot, in and of itself be a common law trade mark. We note that the IP Australia website states that 'generally, you won't be able to register a geographical name as a trade mark unless you add your own distinctive elements such as a logo.' It therefore would be very unusual, and highly inadvisable from a business perspective for a winemaker/brand owner to have no other distinctive brand elements beyond the use of a GI trade mark, as this would essentially mean that they did not have a functioning viable trade mark to represent their brand. The vast majority of winemakers/brand owners would have an additional word in the brand name, a logo, or other identifying mark that was registerable.

TWE and PRW recommend that only registered trade marks are considered evidence of brand ownership, and thereby recognised in the Bill.

Secondly, additional amendments may be required to reflect the fact that many producers, for asset protection purposes, hold their valuable assets such as trade marks, in a separate entity from their trading entity, and license or lease those assets to their trading entity. Hence, as the trading entity does not own the trade mark, under the current draft Bill, the producer will not be eligible to claim producer rebates on the wine it sells.

While it is not recommended that the draft Bill recognise leased or licenced use of trade marks, as this is too broad and could easily undermine a key element of the reforms, we consider that the Government could consider requiring the container to be branded with a trade mark that is 'owned by, or owned by an entity that is *connected with (referencing ITAA 1997, section 328-125), the producer'. This ensures that only the situation above, where the trade mark is held by another entity for asset protection purposes is recognised.

Finally, given it can take between 18-24 months to register a trademark, transitional provisions may be required to allow for producers who currently haven't registered their trademarks to do so. This transition could be aided by IP Australia providing information on registration to small winemakers to assist them to commence their registration process if required.

2. Strengthening the connection between branding and the trade mark requirement

Currently there is no clear relationship between brief mentions in the draft EM of a need for 'branding' and the trade mark requirement, and, to clarify, an entity stating that they have a 'brand' does not necessarily mean that they have a registered or viable trade mark. In other words, one does not necessarily denote the other.

Item 6 of the draft Bill refers to containers, and lists the requirements for containers, which include that 'a trade mark owned by the producer of the wine is applied to the container in which the wine is placed at the time of the assessable dealing.' There is no mention in the draft Bill that wine should be packaged so that 'each container is *branded* with a trade mark that is owned by the producer' (see paragraph 1.23 of the draft EM).

While it is a way to distinguish one business from another, trade marks can be a letter, word, phrase, sound, small, shape, logo, picture, aspect of packaging or a combination of these (see IP Australia website) and a container may have a number of different trade marks represented on it some of which do not represent the primary brand name of the product itself.

As a result, trade marks are not always a part of the product branding and branding was a critical part of the reforms (ie eligibility should be limited to branded wines). The Government should consider whether to restrict the eligible containers to being ones that bare the primary trade mark that represents the product brand (being the wine brand) rather than the company brand or a some other sub-tier brand (for example, for the label Penfolds Koonunga Hill, Penfolds is the primary brand identifier, not Koonunga Hill (which is a sub-tier/label)).

Alternatively, the concept of 'branded' could be added to the draft Bill in Item 6, proposed new subsection 19-5(5), such that it reads: '19-5(5)(b) *branded with a* trademark owned by the producer of the wine is applied to the container…'.

In addition, the draft EM paragraphs 1.17-1.18 refer to wine that is packaged branded product fit for sale/ready for sale (as the end point of the manufacturing process). As above, the mention of 'branded' is not linked to the trade mark requirement in the draft Bill and is only linked once in the draft EM (in paragraph 1.23 of the draft EM). Similarly, the draft EM does not link the requirement that the product be in a container, to these references. We recommend that the links between container and trade mark requirements to the references to being a packaged, branded product fit for retail sale, be made clear in the EM, and that the EM is further strengthened by clarifying that only one trade mark owner per container can claim the rebate

3. Grape wine product definition – removing the proposed amendment

Our companies are opposed to the proposal to reclassify the definition of a wine product, and thus exclude traditional wine products like vermouth, sangria and wine spritzers, from the scope of the wine equalisation tax (item 21 of the draft Bill and paragraphs 1.44 to 1.46 of the draft EM). We note that the justification of the proposal was to align the 85 per cent threshold with that of wine ownership in the final product being eligible for the WET rebate. However, we believe this amendment is redundant, as rebatable wine already has to meet the new 85 per cent ownership threshold as a result of other eligibility changes.

We note that the proposed amendment, to exclude beverages which are 70 to 85 per cent wine-based from the definition of a wine product, would contradict the definitions of wine products found

both in the Australian Grape and Wine Authority Act (2013), and the Australian Food Standards Code. The effect of the change would not just exclude these products from being eligible for the rebate, but would lead to them being taxed under the excise system, with its increased compliance requirements for transportation and storage, which may make most existing products commercially unviable. We do not believe this was envisaged at any point during stakeholder engagement meetings with government, and believe that remaining within the scope of the wine equalisation tax is appropriate given the nature of the product and the intent of the legislative reforms.

4. **Ownership of source product – proof**

Paragraphs 1.17-1.18 of the draft EM describe the requirement that the producer own 85% of the source product throughout the production process. There is no mention in the draft EM about how ownership will be proven or documented in order to ensure it was auditable, and the requirement, robust. As this rule is a key eligibility requirement, and a significant element to the reform which is aimed at restoring integrity to the WET regime, we recommend that the draft EM refer to the need for the claimant to maintain proof of ownership and documentation requirements, linking back to general tax record obligations, and that the ATO provide details via an administrative note or guidance before the date of commencement.

If the Government considers it appropriate, the draft EM could refer more specifically to the requirement to maintain Label Integrity Program documentation, or other documentation and records as the ATO determines, as outlined in ATO guidance. In this vein, we note that the draft EM provide examples of what evidence would be satisfactory for the common law trade mark element, but not the ownership rule.

Finally, we note and support the WFA submission which recommends that the ownership of source product test apply to ownership *before* crush (ie at the weighbridge).

5. **Strengthening and clarifying elements of the draft EM:**
    a. The draft EM does not reference 'bulk' wine as being a target of the reforms. Given the focus throughout the reform discussions on the impact that distortions in the bulk wine sector were having on the broader industry, we would recommend that the draft EM refer to removing bulk wine from eligibility as a key purpose of the reforms. This could be inserted in to the 'context of amendments' or the 'packaging requirements' section.
    b. In the 'summary of new law', dot point 3, we would suggest that the dot point is amended to read 'producers have branded and packaged *the final product* for retail sale.'
    c. In the 'comparison of key features of new law and current law', in row 5, we would suggest that the second dot point be clarified to state that the 'producer owned *the source product and the resultant wine* throughout the wine-making process'. This ensures the table is consistent with item 6 of the draft Bill and paragraphs 1.14 and 1.17 of the draft EM, which both refer to ownership of the source product.
    d. The draft Bill refers to containers which are 'suitable' for retail sale, the draft EM states that the container should be 'ready' for retail sale. In order to ensure clarity, the same terminology should be used between the documents. Some may argue that the container itself may be suitable for retail sale, but not ready (ie not labelled appropriately for the destination market).