

Wine Victoria

Submission

Proposed Exposure Draft Legislation to amend A New Tax System (Wine Equalisation Tax) Act 1999 to give effect to reforms to the Wine Equalisation Tax (WET) rebate



Prepared by: Wine Victoria | April 2017

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Statement from the Chair

Wine Victoria welcomes the opportunity to comment on the government's exposure draft legislation and associated explanatory material that would amend the *A New Tax System (Wine Equalisation Tax) Act 1999* to give effect to reforms to the wine equalisation tax (WET) rebate announced in December 2016.

Wine Victoria is the peak body representing the Victorian wine industry. We advocate on behalf of the wine industry ensuring our members remain a high priority with the Victorian Government and our national governing bodies. Our mission is to develop and enhance the long-term sustainability of the Victorian wine industry.

Snapshot of the Victorian industry

The wine industry is one of the last regionally-based manufacturing industries that value-adds. The Victorian wine industry is recognised for its premium quality and diversity of styles. The industry is central to primary production, manufacturing, tourism, trade and retailing and provides a foundation for a future of strong economic growth in Victoria.

The Victorian wine industry:

- boasts 21 wine regions
- generates 13,000 direct jobs, 33,000 indirect jobs
- encompasses 740 wine makers, 1130 grape growers
- adds an estimated economic value added impact of \$7.6 billion per annum to the Victorian economy, and
- drives 3.2 million wine visits to cellar doors per year

Wine Victoria's position on Wine Equalisation Tax (WET) reforms

Wine Victoria welcomed the Federal Government's reforms on the WET Rebate announced in December 2016 which followed an extensive consultation process.

Wine Victoria has consistently supported efforts to reform the WET Rebate to return eligibility back to the original policy intent and to prevent instances of abuse and fraudulent behaviour.

Many of our members are still recovering from long periods of decline and need a model of government investment that will incentivise an efficient method of production and point of sale that enables increased business competitiveness.

Accordingly, it is the position of Wine Victoria that the proposed tightening of the eligibility criteria together with the introduction of the Wine Tourism and Cellar Door Grant (to be introduced simultaneously with the WET rebate cap reduction) should result in a positive development for the industry.

In relation to the exposure draft legislation and explanatory material, Wine Victoria would like to provide specific comments on various components on the proposed new law. These sections have been drawn from '*Comparison of key features of new law and current law*', featured in the Explanatory Material and commencing on page 5.

Whilst Wine Victoria is grateful for the opportunity to comment on the exposure draft legislation, it is noted that the amendments and accompanying material are very complex for an industry association on which to provide feedback. As such, Wine Victoria has taken a position of support for the Winemakers Federation of Australia's (WFA) who has sought specific legal advice in relation to the proposed changes.

Wine Victoria remains committed to participating in future discussions regarding intended WET reforms to the wine industry.

If you wish to discuss these matters further, please don't hesitate to contact Wine Victoria Executive Officer Rachael Sweeney on 0422 067 858 or secretariat@winevictoria.org.au.

Yours sincerely,



Damien Sheehan
Chair
Wine Victoria

Comments from Wine Victoria are provided under each section

1. WET producer rebate eligibility criteria

To qualify for a WET producer rebate for wine the following criteria must be met:

- an ownership test of the wine's source product throughout the wine-making process;
- a wine packaging test for retail sale; and
- WET must have been paid or is liable to be paid on the wine.

Comment: Wine Victoria supports the tightening of eligibility criteria to return the WET rebate back to its original policy intent and prevent instances of abuse. Comments regarding ownership eligibility are dealt with in the section below.

2. WET producer rebate eligibility criteria: Ownership of source product throughout the wine-making process

Wine satisfies this criterion if:

- at the conclusion of the winemaking process, 85 per cent of the wine that is in its final form as packaged branded product fit for retail sale was produced from the source product owned by the producer before the winemaking process commenced (excluding crushing); and
- the producer owned the wine throughout the winemaking process.

Comment: It is Wine Victoria's understanding that the intention of the proposed provision is to ensure the source product is owned by the producer throughout the wine production process. Wine Victoria notes section 1.17 of the proposed Explanatory Material (EM) which stipulates this provision 'ensures wine producers who may only gain legal ownership of the source product after it is crushed are not adversely impacted'. Wine Victoria strongly supports the objective of this provisions; namely, to ensure ownership by the wine producer throughout the wine-making process.

However, the following issues are evident:

Contract processing:

In relation to contract processing, our members have questioned whether they would qualify as producers under the proposed new definition of producer where grapes have been contract-processed by a third party.

Whilst Wine Victoria notes that 1.2 of the EM stipulates 'manufacturing includes having a product made by a contract manufacturer on your behalf'; it recommends further clarity (including further examples of different contract arrangements that would be permitted under the proposed legislation) be provided to industry in relation to this section.

85% of the final product:

Significant concern has been raised from our membership in relation to the impact of the proposed amendments on the fortified wine sector. Under the 85% ownership rule, the 15% allowance covers all inputs that are not from the source material. These include: yeast, water, grape concentrate and alcohol (i.e. not just purchased wine).

Many of the fortified wines have more than 15% alcohol added, which accordingly, on the proposed provisions, would mean the producers of this wine would be unable to claim a WET rebate. It is the view of Wine Victoria that such an adverse effect on those winemakers (with a significant investment and commitment to the industry) would be contrary to the intention of the proposed reforms and as such should be amended to ensure fortified wines are eligible.

Averaging:

A key point strongly argued during industry consultation was that having an 85% ownership test was quite stringent and allowance needed to be made for adverse weather events. Wine Victoria supports the proposal was for a four-year averaging of the 85% grape ownership rule to take into account these events or the introduction of an exceptional circumstances clause.

3. WET producer rebate eligibility criteria: Packaging requirements

Wine must be packaged in a container that does not exceed five litres (51 litres for cider and perry), be branded with a registered trademark owned by the producer or a common law trade mark and, as packaged, be suitable for retail sale.

Comment: Wine Victoria broadly supports the proposed criterion regarding package requirements to prevent the rebate being claimed on bulk and unbranded wine; namely, the wine must: be suitable for retail sale if purchasers would ordinarily expect to find wine packaged in such a container when sold on a retail basis. There are however some issues we believe need to be addressed.

Vessel Size:

Our members have raised concerns that the restriction of 5LTRs for wine will impede industry innovation in relation to wine supply in a branded keg for tap based wine sales. They have indicated they wish to see the proposed vessel size reviewed in line with Cider and Perry (51LTRs).

Trademarks:

Our members have raised significant concerns in relation to proposed trademark provisions.

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.

4. WET producer eligibility criteria: WET must have been paid or is liable to be paid

A producer is eligible for a WET producer rebate (subject to the other criteria) if the producer:

- *has or will have a WET liability; or*
- *sells wine to a purchaser under quote and the purchaser quotes that they intend to use the wine to make a dealing other than:*
- *a dealing that is a GST-free supply;*

- *use it as an input into manufacture; or*
- *on-sell it under quote.*

Wine Victoria supports the legislations intent that they mandatory tying of the liability of the WET tax (i.e. WET must be paid or is liable to be paid) to the receipt of the WET rebate. The amount of the rebate should be equal to the WET that has been or is liable to be remitted to the government on that wine.

Wine Victoria supports the WFA position that wine producers, before claiming a rebate, will need to satisfy themselves that the purchaser does not intend to on-sell the wine under quote (e.g. to another wholesaler or via export) or use the wine as an input in the manufacture of another product. Wine Victoria notes WFA's concern regarding the suggestion that the amendments imply a higher onus on the producer to make investigations and enquiries of the purchaser and its circumstances. Accordingly, Wine Victoria would like to reiterate that that the onus should be on the purchaser to notify the producer of his/her intended use of the wine.

5. Purchaser has an assessable dealing with certain wine they purchase under quote from a producer

A purchaser will have a taxable dealing (without an exemption or exclusion from WET applying) for wine if:

- *they purchased the wine under quote from a producer;*
- *they quoted to the producer that they intend to make a taxable dealing with that wine; and*
- *the wine was:*
 - *used to make a GST-free supply;*
 - *sold under quote; or*
 - *used as an input into manufacture.*

Comment: It is Wine Victoria's understanding that the intention of this change is to require a purchaser to be liable for WET if the purchaser quotes an intention to have a taxable dealing – regardless of whether the purchaser actually has a taxable dealing. Again, Wine Victoria supports the notion that the onus should be on the purchaser to notify the producer of the intended use of the wine, and supports the objective of the change that WET is paid on wine for which the rebate has been claimed.

6. Quote for the purchase of certain wine is ineffective

A quote for the purchase of wine is ineffective if the entity to which the quote is made purchased the wine for a price that included WET.

Comment: Under the current legislation, a purchaser can sell wine under quote if WET is included in the purchase price and that purchaser is entitled to a WET credit for the amount of WET included in the purchase price.

Wine Victoria understands that under the proposed changes, a purchaser cannot on-sell wine under quote if WET is included in the purchase price and the purchaser must make a taxable dealing with that wine. Wine Victoria further understands that a purchaser is entitled to a WET credit for the amount of WET included in the purchase price.

Wine Victoria supports the objective of the change – that the WET paid on wine stays with the ATO. In the event that wine that has the WET applied to it to offset the producer rebate claimed could be sold under quote, a net outflow could result. As the EM stipulates, this is

'because the purchaser selling the wine under quote could claim a WET credit for any WET that had been paid, effectively cancelling its collection'.

Wine Victoria notes the intention of such a change to protect the integrity of the WET system and prevent instances of an outflow of funds from the WET system.

However, Wine Victoria supports the WFA Position is cognisant of concerns raised by WFA that amendments to the quoting rules may result in certain supply chain arrangements giving rise to a WET liability without a corresponding producer rebate.

Wine Victoria further recommends that this change be clearly spelled out in the EM, citing additional examples of where a quote for the purchase of wine is ineffective. It is the position of Wine Victoria that these complex changes must be clearly articulated to industry to avoid unintentional non-compliance with the new regime.

7. WET producer rebate cap

Producers of eligible wine that are registered or required to be registered for GST in Australia and New Zealand participants are entitled to a maximum \$350,000 WET producer rebate for a financial year.

Wine Victoria recognises the decision of a \$350,000 cap, to be introduced in 2018, combined with the Wine Tourism and Cellar Door Grant programme, is significantly more favourable to industry than the 2016-17 Federal Budget statements and provides a platform for future growth of the industry.

Whilst it is not Wine Victoria's preference that New Zealand participants be included in the rebate arrangements, Wine Victoria recognises the difficulty faced by the government in introducing such a restriction in this draft legislation.

8. Definition of grape wine product

Grape wine product and grape wine-based product must contain at least 850 milliliters of grape wine or grape wine-based product respectively per litre (and satisfy other existing requirements in section 31-3 of the WET Act and Chapter 22 of Schedule 3 to the Customs Tariff Act 1995 respectively).

Comment: Wine Victoria notes the purpose of this provision is to align with the 85% ownership of source product test, but notes and supports the position adopted by WFA on this criterion, namely:

- The 85% eligibility of wine product definition was never raised during the consultations
- Changing the status of wine products from a WET product to an excisable product will not facilitate the stated objectives of the legislation
- Increasing the wine content from 70% to 85% will create production difficulties and increased cost of production, given the extraction processes to generate flavours for wine products requires the provision of up to 30% non-wine based product. In addition, many are sweet and sugar is often up to 25% of the final product volume; and
- The new definition of grape wine product could be potentially inconsistent with the production standard cited in the Australia and New Zealand Food Standards Code eligibility criteria (refer Standard 2.7.4 Wine and Wine Product).

Our members have also submitted that the application of an excise tax on wine based

beverages could have a substantial industry impact on this category of products by significantly raising the tax on these products to levels, effectively pricing these products out of the market.

In addition, Wine Victoria submits that the current 700 millimetres per litre requirement is appropriate for innovative products – particularly those which support responsible consumption strategies (i.e. a lower alcohol content, achieved through blending with other non-alcoholic and non-grape products). If the proposed change is made, larger wine companies have indicated that they may cease making these products, to avoid a significantly more burdensome and complex excise tax regime which wine companies have not been set up to comply with.

9. *Associated producers rule*

A producer is an associated producer of another producer for a financial year if the associated producers control test is met at any time during that financial year.

Comment: Wine Victoria supports this criterion, but recommends that the Australian Tax Office provide specific guidance / information support to the industry prior to introduction of the new legislation.

10. *Transitional provisions*

Comment: Wine Victoria notes and supports the position adopted by WFA; namely, that:

- The introduction of the WET eligibility criteria to assessable dealings in wine will apply from 2018-19 and beyond, and the amendments to reduce the WET rebate cap from \$500,000 to \$350,000 and to amend the definition of grape wine product will apply from 1 July 2018. However, the legislation introduces a transitional rule that the amendments to introduce the WET eligibility criteria apply to: grape wine, grape wine products, fruit and vegetable wine and cider and perry if the crushing of the source product for more than 50% of the wine (measured by volume) occurred on or after 1 January 2018.
- Accordingly, wines from the 2017 and earlier vintages are not captured which implies the new grape ownership rule is retrospective. Wine Victoria supports the WFA position that that wines from 2017 and earlier vintages that are packaged, branded and bear a vintage date should be eligible to claim the WET rebate under current rules, with a transition to 50% grape ownership in 2018 and 85% ownership from the 2019 vintage.

For more information

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