

**AUSTRALIAN WINE INDUSTRY CODE OF CONDUCT**  
**CODE ADMINISTRATION COMMITTEE**  
**ANNUAL REPORT 2009 – 2010**

## **SECRETARIAT**

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## **INTRODUCTION**

This is the second Annual Report of the Code Administration Committee established under the Australian Wine Industry Code of Conduct. It covers the period from 1 July 2009 to 30 June 2010.

### **The Australian Wine Industry Code of Conduct**

The Australian Wine Industry Code of Conduct<sup>1</sup> which was signed by representatives of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) on 19 December 2008 has two main aims

- to establish a common Australian wine grape supply contract framework, thus setting minimum standards for agreements between winegrape growers and winegrape purchasers
- to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.

Winegrape purchasers who are Signatories to the Code agree to be bound by the principles set out in the Code in their commercial dealings with winegrape growers. They also undertake to provide a winegrape grower with a copy of the Code whenever that grower signs a new Agreement.

With the exception of Part 2 (Winegrape Purchase Agreements), the Code took effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new agreements for the supply of winegrapes for the 2010 vintage onward. With existing agreements, each Signatory agrees to offer to its winegrape growers 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.

Signatories also commit to promoting the adoption of the Code. The WFA and WGGA have agreed to publicize and promote the Code and its dispute resolution procedures, and to work to maximize its adoption within the industry.

### **Signatories to the Code**

A winegrape purchaser may become a signatory to the Code which is not compulsory by providing a written notice to the Committee. A register of signatories is

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<sup>1</sup> The Australian Wine Industry Code of Conduct can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Downloads.html>

maintained and available on the WFA, WGGA and the Code Administration Committee websites.<sup>2</sup>

### **The Wine Industry Code Administration Committee**

The Code is overseen and administered by an independent Code Administration Committee of three members and an alternate member with appropriate commercial experience, jointly appointed by the Boards of the WFA and WGGA.<sup>3</sup> The members are part-time. The current members with terms until 30 September 2010 are

- **Presiding Member:** Graham ('Bert') Mowbray, retired Federal Magistrate and former Member of the Administrative Appeals Tribunal, holds qualifications in agriculture, agricultural economics and law. His early work experience was in agriculture, followed by a lengthy legal career, principally in public and administrative law.
- **Member:** Ian Cox, an Agribusiness Consultant with formal qualifications in agriculture, management and property valuation, has an extensive background in agriculture, management and finance. He has worked as an agribusiness specialist for many years.
- **Member:** James Omond is a lawyer and principal of Omond & Co providing specialist services to the wine industry. Mr Omond's work includes specific wine-industry operational advice and trade practices/competition experience. He is an executive member of a number of organisations associated with the wine industry.
- **Alternate Member:** John Dickie is the inaugural chairman of the Film Exhibition and Distribution Code of Conduct Administration Committee established in 1998. Mr Dickie, who is a journalist, has had extensive experience in communications work both in public administration and private enterprise.<sup>4</sup>

The Committee is supported by an independent secretariat, The Accord Group, a firm specializing in industry code administration, mediation and training in negotiation, complaints handling and mediation.

The Committee's responsibilities include facilitating resolution of disputes over winegrape prices and vineyard downgrades and rejections, and inquiring into alleged breaches of the Code. It is to produce an annual report to be published by 30 September each year containing

- a description of the nature and number of disputes received
- any comments it wishes to make about conduct or trends in the industry
- a report on the operations of the Code, including the names of any parties removed from the Code.

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<sup>2</sup> <http://www.wfa.org.au>, <http://www.wgga.com.au>, and <http://www.wineindustrycode.org>

<sup>3</sup> Part 5 of the Code

<sup>4</sup> Fuller details on members can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Committee.html>

In monitoring the Code, the Committee may recommend any amendments that may assist in the operation of the Code.

## **OPERATION OF THE CODE 2009 – 2010**

This is the first annual report covering a full year, 1 July 2009 to 30 June 2010.

### **Committee Operations**

The Committee met on eight occasions during the year – 10 August 2009, 15 October 2009, 9 December 2009, 10 February 2010, 7 April 2010, 22 April 2010, 5 May 2010 and 23 June 2010. Five of these meetings were by Skype conferencing calls and three were in person.

The range of issues considered by the Committee included

- Procedures for appointment of independent experts<sup>5</sup>
- Operational procedures for independent experts
- Preparation of lists of independent experts
- Application and independent expert fees
- Informal early dispute resolution by the secretariat
- Notification to growers of their rights to dispute resolution
- Disputes arising at the weighbridge
- Time limits under the Code
- Conflicts between the Code and winegrape purchase agreements
- Retention of title clauses
- Promotion of the Code
- Possibility of retaliatory action for those who use the Code dispute resolution procedures
- The independent review of the Code, including selection of reviewer and discussion with the reviewer of his draft report
- A complaint by a grower of an alleged breach of the Code.

On 2 December 2009 the Presiding Member, Bert Mowbray, met with the Executive of the WGGGA and members of the WFA/WGGGA Code Management Committee to discuss the recommendations made by the Committee in its 2009 Annual Report and in a later e-mail of 5 November 2009. Mr Mowbray also addressed the Annual General Meeting of the WFA and the WGGGA Executive on the Committee's activities and the opportunities presented by the Code.

Mr Mowbray and Ms Nathalie Birt from the Committee's Secretariat participated in a telephone conference with members of the Code Management Committee on 16 February 2010 to help settle procedures for the appointment of independent experts and for their operational procedures.

On 22 March 2010 Mr Mowbray and Mr Omond attended a meeting with the Code Management Committee to consider various issues raised by the Committee including those covered in the 2009 Annual Report.

In March 2010 the Committee produced a short article entitled **A New Way to Do Business** to promote the Code. This was provided to both the WFA and WGGGA for use in various industry newsletters and publications. It is also on the Committee's website.<sup>6</sup>

### **Signatories to the Code**

A winegrape purchaser may become a signatory to the Code by providing a written notice to the Committee. Signatories at 30 June 2010 were

- Balnaves Vineyard Services Pty Ltd t/as Balnaves of Coonawarra
- Constellation Australia Ltd
- Foster's Group
- Henry Holmes Wines Pty Ltd
- Orlando Wines, a division of Pernod Ricard Pacific Pty Ltd
- Tyrrell's Vineyards Pty Ltd

The percentage of total crush represented by these Signatories for the 2010 vintage was approximately 37%.

### **Disputes**

No dispute under Part 3 of the Code was notified to the Committee during the reporting period.

### **Breaches of the Code**

One complaint alleging breach of the Code was notified to the Committee during the reporting period. This alleged a breach by a Signatory of the price notification requirements of the winegrape purchase agreement provisions of Part 2 of the Code. The grower asserted that as a consequence he was significantly underpaid for his crop.

This complaint was initially made orally to the Committee's Secretariat which assisted the complainant to present his concerns in a form consistent with the Code and suitable for consideration by the Signatory. The written complaint when received was referred to the Signatory which then sought advice from the Secretariat on the

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<sup>6</sup> <http://www.wineindustrycode.org/Downloads.html>

process. Both parties contacted the Secretariat on a number of occasions to assist. On 7 July 2010 the complainant advised the Secretariat he had reached an agreement with the Signatory and he therefore wished to withdraw his complaint.

This matter demonstrates the clear benefit of incorporating informal early dispute resolution mechanisms into a code such as the wine industry one. This complaint was able to be resolved without resort to the more formal requirements of the Code through active early consultation by the Secretariat with both parties. In this particular case because of deficiencies in the transitional provisions in the Code an agreement may not have been reached without the Secretariat involvement. The Secretariat in addition played a significant educational role.

This case reinforces the Committee's views on informal early dispute resolution in the 2009 Annual Report.<sup>7</sup>

## **REVIEW OF THE CODE**

The Code provides for a formal review after the 2010 vintage by suitably qualified persons appointed by the Committee.<sup>8</sup> It is also proposed that thereafter the Committee will review the operations of the Code not less than every three years.

The objectives of each review include assessing the extent to which the Code has reduced disputes and the effectiveness of the dispute resolution system. The review is to recommend any amendments to the Code required to address any issues identified during the review process and is to be completed by 30 June in the relevant year.

Following consideration of a number of possible reviewers the Committee appointed Mr Neill Buck of Neill Buck and Associates to conduct the first review. Over the past 20 years Mr Buck has undertaken a large number of independent reviews, including examination of self regulatory and related arrangements. On 17 May 2010 the Committee issued a press release announcing the review and Mr Buck's appointment.

Mr Buck prepared a discussion paper, followed by consultations with small, medium and large winemakers, a number of grape growers from various wine growing regions and their representatives, and other stakeholders and interested parties. The Committee met with Mr Buck on 5 May 2010 prior to his selection as reviewer and on 23 June 2010 to discuss a draft of his report.

The report was received on 29 June 2010 and forwarded to both the WFA and the WGA. It can be found on the Committee's website at <http://www.wineindustrycode.org/Downloads.html> and its recommendations are at Appendix A to this report.<sup>9</sup>

## **ISSUES UNDER THE CODE**

### **Awareness and Promotion of the Code**

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<sup>7</sup> See recommendation 8 in the Buck review referred to in the next section, at Appendix A.

<sup>8</sup> See Part 1 of the Code

<sup>9</sup> These recommendations were considered by a joint meeting of the Committee with the WFA/WGA Code Management Committee on 28 July 2010.

Although the Code has now been operating for some 18 months, it has only attracted six Signatories representing 37% of the total crush. There has been one dispute under Part 3 of the Code and one complaint under Part 4.

The Committee has offered to assist the industry organisations in increasing awareness of the Code and has prepared and distributed a short article **A New Way to Do Business** to promote the Code. The WFA and the WGGGA have agreed to review blockages that appear to be stopping more wine companies signing up and to implement a one-on-one follow up with the 64 large and medium wine companies. They however do not see any immediate role for the Committee in promoting the Code.

The Committee is concerned at the low take up of the Code by winemakers and the apparent ignorance or fear of using it among growers. The Committee believes that it is critical to the Code's success for both the WFA and the WGGGA to redouble its efforts to engage signatories and to promote the importance and benefits of the Code with growers. Members of the Committee stand willing and ready to assist in any way they can.<sup>10</sup>

### **Inconsistency between the Code and Winegrape Purchase Agreements**

On a number of occasions during the year the Committee expressed its concern over ambiguity in the Code when the Code and a winegrape purchase agreement are in conflict, in particular about limitations imposed on independent experts. The Committee is concerned that any determination made by an independent expert runs the risk of being meaningless unless they are permitted unfettered discretion under the Code. Although this may only be a transitional matter involving old agreements, the Code Management Committee referred it for consideration in the review of the Code.

### **Fees for Independent Experts**

At its December 2009 meeting the Committee decided to invite the Code Management Committee to consider asking independent experts to provide a fixed hourly rate/fee for the whole vintage and to agree to a capped maximum amount with appropriate sanctions. This issue was referred by the Code Management Committee to the review of the Code.

## **RESPONSE TO PREVIOUS RECOMMENDATIONS**

In its 2009 Annual Report the Committee raised various issues for consideration by the WFA and WGGGA and made a number of recommendations to them. It is appropriate to report on the responses on these matters.

### **Informal Early Dispute Resolution**

Some other voluntary codes allow for early intervention by their secretariats seeking to facilitate resolution on an informal basis before resorting to the formal processes under the code. The Committee has agreed that a similar approach should be incorporated in the wine industry procedures.

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<sup>10</sup> The Committee notes that the Buck review recommended changed targets with the Committee resigning if those targets are not met.

The WFA/WGGA Code Management Committee agreed that the Committee could perform this role as the agreement with the Secretariat would cover any costs arising from it. The grower should however lodge a notice of dispute and the winemaker be given the opportunity to respond before any attempt by the Secretariat to facilitate resolution of the dispute. This matter should also be considered in the review of the Code.

It is significant that the only substantive dispute or complaint under the Code this year was resolved informally through Secretariat assistance.<sup>11</sup>

### **Time Limits**

The Committee expressed concern about the inflexibility of time limits in the Code. It queried whether these time limits should be enforced rigorously or whether there was scope for it to use its discretion to extend the limits in compelling circumstances.

The Code Management Committee decided that it would be appropriate for the Committee only to extend the time limit where both parties agreed.

### **Notices to Growers**

In the 2009 Annual Report the Committee recommended that the Signatories include with all notifications of prices, downgrades or rejections a written statement in a prescribed form alerting the growers to the time limits under the Code and the possible consequences of failing to comply with these limits. On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for such notices.

The Code Management Committee however was of the view that it would be best to continue with grower education and for the WFA “to develop a check list and write to signatories reminding them of their obligations, including informing staff of these.”

### **Disputes over Downgrades and Rejections at the Weighbridge**

In the 2009 Annual Report the Committee recommended that the WFA and WGGA examine whether a pool of independent experts could be established for resolving weighbridge disputes. On 5 November 2009 the Committee provided the WFA and the WGGA with a form of words for a notice which could be displayed at weighbridges advising growers of the availability of such experts.

The Code Management Committee has advised that weighbridge disputes present peculiar difficulties and this recommendation may not be feasible.

### **Retention of Title Clauses**

The Committee recommended that the WFA and WGGA give consideration to whether Retention of Title Clauses may assist in cases of failure by larger wineries, and if so, whether they should be a standard clause in winegrape purchase agreements and included in Part 2 of the Code.

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<sup>11</sup> See **Breaches of the Code** at page 7 above. It is also worth noting that in his review Mr Buck placed considerable emphasis on the importance of the Secretariat having more discretion to informally address disputes.

The Code Management Committee decided that this matter should be considered in the review of the Code.

### **Promotion of the Code**

The Committee encouraged the WFA and the WGGGA to undertake further promotion among their members about the importance and benefits from participation in the Code. This matter is considered at page 9 above.

### **Alternate Committee Members**

The Code Management Committee accepted the Committee recommendation that Part 5 of the Code be amended at an appropriate time to allow for an Alternate Committee Member.

### **Quorum for the Committee**

The Code provides that a quorum shall comprise “the Presiding Member and all other Members”.<sup>12</sup> The Committee recommended that the Code be amended to set a quorum of any two members, or any three members where one of the members present is the Alternate Member.

The Code Management Committee decided that the quorum should be any three of the Presiding Member, the other two Members and the Alternate Member.

### **Appointment of an Acting Presiding Member**

The Code is currently silent on whether the Presiding Member can appoint a Member to preside when the Presiding Member is absent. The Code Management Committee agrees with the Committee that it would be desirable to make express provision for this in the Code.

## **ACKNOWLEDGEMENTS**

The Committee Members are grateful to the WFA and WGGGA and their officers for their assistance and cooperation during the year.

The Committee extends its especial appreciation to its Secretariat, The Accord Group, in particular Ms Nathalie Birt, for their ready and professional support throughout the year.

30 September 2010

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<sup>12</sup> Clause 5.1.5

## APPENDIX A

### Report of a Review of the Wine Industry Code of Conduct – June 2010

#### 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 WGGA 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.”**