

## Frequently Asked Questions

### Getting Started:

#### **I am considering becoming a Signatory to the Code. What will this mean?**

Signatories should review their Agreements in order to identify inconsistencies with the amended Code. There is a transitional period provided for under the Code which means within three months of becoming a Signatory, you must make a written offer to your Growers to amend Agreements, to make them consistent with the Code, with effect no later than from 31 December 2021 (see also advice provided on Clause 1.4). Signatories' Agreements entered into from 1 July 2021 must contain a statement that the Code is incorporated into the Agreement by reference.

#### **I am an existing Signatory to the former Code, what is next?**

Existing Signatories must within three months make a written offer to their Growers to amend Agreements, to make them consistent with the amended Code of November 2020, with effect no later than from 31 December 2021 (see also advice provided on Clause 3.3 (a) on amending Agreements).

### Interpreting the Clauses

#### Clause 1.4

#### **Regarding the requirement for signatories to offer to *amend existing agreements to reflect changes to the code*, in order to save amending each individual agreement, is an email or other form of written communication outlining the amendments considered sufficient?**

Yes, any form of written communication is sufficient providing it is clear as to which Grower Supply Agreement(s) the proposed changes are to be applied should the offer be accepted. It is in the best interest of the winery to ensure that all required amendments to bring the agreement in line with the amended Code are clearly communicated, noting that inconsistencies between a Grower Supply Agreement and the amended Code could result in uncertainty or ambiguity which is at odds with the intention of the Code. Therefore, in some cases, amending individual agreements may be the safest option. If there are any negotiated alternative arrangements made under clause 3.4, these should be clearly stated.

#### Clause 3.2

#### **To fulfil the requirement that all agreements must be in writing, is there a template available to assist with this?**

Yes, code signatories may download a template for recording verbal agreements or spot Grower Supply Agreements by clicking [here](#).

### Clause 3.3 (a)

**For Agreements entered into prior to becoming a Signatory, is an email or other form of written offer stating that *the Code is incorporated into the Agreement by reference* likely to be sufficient to meet the requirements of this clause?**

Yes, assuming the grower agrees to the offer, any form of written communication is sufficient providing it is clear as to which Grower Supply Agreement(s) the Code is to be incorporated. The Winery should be aware that Code provisions will henceforth prevail over any inconsistent terms within their Agreements. It is in the best interest of the winery to ensure that all required amendments to bring the agreement in line with the Code are clearly communicated, noting that inconsistencies between a Grower Supply Agreement and the Code could result in uncertainty or ambiguity which is at odds with the intention of the Code. The Winery should therefore carefully consider the extent of any inconsistencies and whether Grower Supply Agreements should be individually amended for the avoidance of doubt. If there are any negotiated alternative arrangements made under clause 3.4, these should be clearly stated.

### Clause 3.4

**Where there is a negotiated alternative arrangement, who determines the meaning of “no worse off”?**

In terms of its legal impact in the event that this alternative arrangement was challenged and found to leave a grower *worse off*, it is likely that such a clause would be void. In certain circumstances, an incorrect interpretation of ‘no worse off’ could result in a breach of the Code.

**If a winery were to implement payment terms such as a 50% payment in May and the final payment at the end of June (ie average days to payment from EOM after a January harvest would be 135 compared to 140 required under the Code), would it stand to reason that this would be accepted as better than the minimum required under the code?**

As the average days from harvest to payment are better than the standards set in the Code, then this should meet the definition of ‘no worse off’. Important to note is that it still needs to be negotiated in good faith and mutually agreed to by the grower.

### Clause 3.6

**Where can I find further information about “unfair Grower Supply Agreement terms”?**

The ACCC enforces consumer law under the *Competition and Consumer Act 2010*. They publish information about unfair Grower Supply Agreement terms and how they are enforced [here](#). Under the Code, all Agreements must avoid the use of unfair Grower Supply Agreement terms or the Signatory may be found to be in breach of the Code.

## Clause 4

### How has price transparency improved?

Base prices must either be fixed or calculated using an objective formula. The only exception is "fair market price" Grower Supply Agreements. These prices must now be genuine offers (not estimates as indicative prices were). Grower may accept, or negotiate, with no "out clauses" for the Winemaker.

## Clause 4.1 (a) (iv)

### What is the difference between 'fair market price' and indicative regional pricing under the former code?

Under the former Code, there was a provision that meant a final price agreement could occur as late as 10 business days prior to anticipated harvest date or, if subject to a pre-vintage inspection, as soon as practicable prior to the anticipated harvest date. This was sometimes followed by a price negotiation between the Winemaker and Grower. In any case where an Agreement lacked a fixed price, Winemakers were compelled to state their 'indicative regional prices' by a prescribed date, but this was not a binding offer. The amended code requires that unless the price can be determined objectively (eg. under provision 4 (a) (v)), a genuine offer must be made by the date prescribed in the Price Offer Notification Schedule. Unlike the 'indicative regional price', Growers may accept this price, at which point that price forms part of the Agreement. This arrangement provides certainty regarding price much earlier in the season. Should a dispute arise, a 'fair market price' assessment will be conducted independently of any deductions that the grape price may also be subject to (such as failure to meet MP&C specifications). Where the Agreement combines 'fair market price' and grading of the resultant wine, the Independent Pricing Expert may need to consider the 'fair market price' for each of the grades on offer.

### How is a 'fair market price' determined and why would a Grower accept this?

The trade-off between the security of a fixed price and a variable price agreement must be considered by both parties, noting that this can work for or against either party depending on the market forces in play at the time. For 'fair market price' Agreements, the Code provides some comfort to the Grower in that the price must be provided by a certain date (see Price Offer Notification Schedule). This allows them time to negotiate and or enter into the dispute resolution procedure outlined in the Code if negotiations fail.

**In the case that a Grower wishes to raise a formal dispute regarding a price offer, how will an independent expert determine what is considered to be 'fair market price' for the grapes.**

The Independent Pricing Expert will need to determine the fair price for the particular variety, region and (where specified in the Agreement), the agreed grade as well. The expert is likely to draw upon their research into prices being paid by competitors for comparable grapes. There is no prescribed mechanism nor a set formula so there is inevitably the potential for some degree of ambiguity. Growers entering into 'fair market price' Agreements should therefore be aware of the risks that the final price will not meet their expectations.

## Clause 4.2

**What was the rationale behind leaving minimum payment terms unchanged?**

The Code Management Committee considered the pros and cons of mandating shorter payment terms and concluded that payment terms should be a matter for commercial decision-making so long as the Winery pays heed to the general principle that money is worth more the sooner it is received. The three-tiered payment term set out in 4.2 (a) should not be considered an industry norm, but rather a bare minimum. The ACCC recommends long term payment periods be phased out in favour of 30 days terms. When determining payment terms, wineries should also consider whether laws relating to unfair contract terms apply.

## Clause 5.2

**Can subjective measures such as sensory assessment be used for price affecting decisions?**

Subjective measures must not be used to determine price where objective measures are available and could be as effective. To the extent practicable, any pricing mechanism should remove the opportunity for the Winemaker to influence the price. The exception is for grading or calculating bonus payments against a known base price. In such circumstances, Grapes or the resulting wine may be assessed for quality measures that rely partly or fully on personal judgement and Growers must remain aware that such assessments are therefore prone to ambiguity.

## Clause 5.3

**Where a Grower Supply Agreement contains a fixed price or a base price under what circumstances can price deductions or downgrades be applied?**

Unless grapes have failed to meet MPC standards or other agreed specifications or terms in the Agreement, price deductions must not be imposed and grapes must not be rejected. Precise measures must be used and these should be clearly communicated along with the timing for the assessment. Methods must follow [Industry Endorsed Standard Procedures](#) where they exist.

**What is considered acceptable in terms of notifying a grower regarding a price deduction or rejection? For example, is provision of analytical results that show the grapes to be outside of the specified acceptable range sufficient?**

The Code is built on a foundation of good relationships and trust. A decision to impose a price deduction or rejection may have serious financial implications so it is important that this is communicated in a way that is clear, transparent and timely so as to leave no doubt in the Grower's mind.

**Does the decision to impose a price deduction need to be made within 4 hours of delivery – what if other factors are yet to be considered?**

Yes, however the dispute resolution procedure allows for a period of negotiation whereby parties may negotiate a decision to impose a price deduction. If the parties then determine that the dispute is non-time sensitive, they have some additional time to negotiate the result before an independent expert must be appointed. Notwithstanding this, the notification must be made to the grower within the time frames set out in Clause 5.3.

**Are latent defect clauses for the purpose of deductions and rejections allowed under the Code?**

Latent defect may be considered necessary when specifications are not obvious or readily observable at the time of transfer of title. The decision to accept such clauses were considered a commercial decision for the Grower when entering into the Grower Supply Agreement. As long as the clause is not inconsistent with other provisions of the Code such as those in Clause 5, then these clauses are acceptable under the Code. Agreements must state the point in time when assessments will be made, so it would be in the interest of the grower to ensure that they are satisfied with that timing prior to reaching agreement. Pricing mechanisms that contain latent defect clauses may be found to be in breach of the Code (and the Agreement) where a Winemaker's influence over the resulting wine has contributed to those grapes failing to meet the specifications of the Grower Supply Agreement.