WETR 2009/2 - Wine equalisation tax: operation of the producer rebate for other than New Zealand participants

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There is a Compendium for this document: **WETR 2009/2EC** .

From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the GST, Luxury Car Tax, and Wine Equalisation Tax legislation with the term 'indirect tax zone' by the *Treasury Legislation Amendment (Repeal Day) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the GST Act.

This document has changed over time. This is a consolidated version of the ruling which was published on *29 June 2018*

Wine Equalisation Tax Ruling

Wine equalisation tax: operation of the producer rebate for other than New Zealand participants

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Preamble

This publication provides you with the following level of protection:

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If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://www.ato.gov.au/law) to check its currency and to view the details of all changes.]

Summary – what this Ruling is about

1. The *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) deals with a tax on sales, importations and certain other dealings with wine which take place on or after 1 July 2000. The tax on wine is referred to in this Ruling as WET.

2. From 1 October 2004, the WET Act provides for a producer rebate in the form of a WET credit.

2A. This Ruling explains:

- how the WET producer rebate operates for producers of wine other than New Zealand participants.[1]
- eligibility for the rebate
- how the rebate is calculated, and
- when and how to claim any rebate you are eligible for.

3. Unless otherwise stated, all legislative references in this Ruling are to the WET Act and all references to the WET Regulations are to the A New Tax System (Wine Equalisation Tax) Regulations 2000.

4. [Omitted.]

5. [Omitted.]

Background

How does WET work?

6. The broad aim of the WET Act is to impose WET on dealings with wine in Australia. The WET is applied to both Australian produced wine and imported wine. Dealings that attract WET are referred to as assessable dealings and can include selling wine, using wine, or making a local entry of imported wine at the customs barrier.

7. WET is normally a once only tax designed to fall on the last wholesale sale. When a wholesaler sells wine to a retailer – for example, to a bottle shop, hotel or restaurant – WET is calculated on the selling price of the wine excluding WET and Australian goods and services tax (GST). If there is no wholesale sale, for example, where the wine is sold by retail by the manufacturer at the cellar door or used by the manufacturer for tastings or promotional activities, alternative values are used to calculate the tax payable.

8. [Omitted.]

9. Refer to Wine Equalisation Tax Ruling WETR 2009/1 *Wine equalisation tax: the operation of the wine equalisation tax system* for a detailed discussion about how WET works.

[1] See Wine Equalisation Tax Ruling WETR 2006/1 *Wine equalisation tax: the operation of the producer rebate for producers of wine in New Zealand* for an explanation of how the wine tax producer rebate operates for producers of wine in New Zealand that have their wine exported to Australia.
[2] [Omitted.]

Producer rebates

10. From 1 October 2004, the WET Act has provided a rebate of WET for producers of rebatable wine that are registered or required to be registered for GST in Australia.

10A. From 1 October 2004, the maximum amount of producer rebates an Australian producer (or group of associated producers) could claim in a full financial year was $290,000. From 1 July 2006, the maximum rebate amount for a financial year was increased to $500,000. From 1 July 2018, the maximum amount of rebate an Australian producer (or group of associated producers) can claim in a full financial year is $350,000, effectively offsetting WET on A$1.2 million (wholesale value) of eligible sales and applications to own use per year.

11. [Omitted.]

12. [Omitted.]

13. From 1 July 2005, access to the producer rebate was extended to eligible New Zealand wine producers that have their wine exported to Australia. The operation of the producer rebate for New Zealand participants is described in Wine Equalisation Tax Ruling WETR 2006/1 *Wine equalisation tax: the operation of the producer rebate for producers of wine in New Zealand*.

13A. [Omitted.]

Previous rulings

14. This Ruling replaces paragraphs 121 to 135 inclusive of Wine Equalisation Tax Ruling WETR 2004/1 *Wine equalisation tax: the operation of the wine equalisation tax system*. WETR 2004/1 was withdrawn on 24 June 2009.

14A. This Ruling reflects changes made to the WET Act by *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.

[3] [Omitted.]
[4] [Omitted.]
[5] [Omitted.]
[6] [Omitted.]
[7] [Omitted.]
[8] [Omitted.]
[9] [Omitted.]
[9A] [Omitted.]

Ruling

Who is eligible for the producer rebate?

14B. You can claim a producer rebate for an assessable dealing you have with rebatable wine during the financial year when you meet all of the following requirements:[9B]

- you are the producer of the rebatable wine, and
- you either:
  - have a WET liability for the assessable dealing, or
  - would have had a WET liability for the assessable dealing but for the fact the purchaser quoted on the basis that they intended to pay WET on their subsequent dealing with the wine, and
- of the total volume of the rebatable wine, you owned at least 85% as source product at all times from immediately prior to crushing (or immediately prior to fermentation in the case of mead and sake)
- at the time of the assessable dealing, the rebatable wine was in retail packaging of 5 litres or less (51 litres for cider or perry), and
- was branded by a trade mark owned by you (or an associated entity) that identifies you or can be readily associated with you.

Rebatable wine

15. [Omitted.]

16. Rebatable wine[11] means grape wine, grape wine products, fruit or vegetable wine, cider or perry, mead or sake.[12]

17. The definitions and examples of these various products are set out in Appendix 1 to this Ruling and are discussed in paragraphs 8 to 36 of WETR 2009/1.

[9B] Subsection 19-5(1). Note that these requirements are subject to transitional rules as explained in paragraphs 61AAB to 61AAY of this Ruling.
[10] [Omitted.]
[11] As defined in section 33-1.
[12] Sections 31-1, 31-2, 31-3, 31-4, 31-5, 31-6 and 31-7. See also WET Regulations 31-2.01, 31-3.01, 31-4.01 and 31-6.01.

Producer of rebatable wine

18. You are entitled to a producer rebate for rebatable wine *only* if you are the 'producer' of the wine.[13]

19. There are two main elements to the definition of producer. You are the producer of rebatable wine if you:

- **manufacture** the wine, or
- supply **source product** to another entity that manufactures wine from it on your behalf.[14A]

20. [Omitted.]

21. [Omitted.]

22. [Omitted.]

23. [Omitted.]

24. [Omitted.]

25. [Omitted.]

Manufacture of wine

26. Manufacture is defined[16] in the WET Act to include:

(a) production

(b) combining parts or ingredients so as to form an article or substance that is commercially distinct from the parts or ingredients, and

(c) applying treatment to foodstuffs as a process in preparing them for human consumption.[16A]

27. The definition of manufacture is inclusive not exhaustive, and extends the ordinary meaning of manufacture.

27A. We consider that wine is manufactured when processes are applied to inputs that result in an article (wine) that is commercially distinct from those inputs.[18A]

27B. Whether or not certain processes that are carried out constitute manufacture is a matter of fact and degree in each case.

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[13] Subsection 19-5(1).
[14] [Omitted.]
[14A] 'Source product' is a defined term in the WET Act and is discussed in paragraphs 43E and 43F of this Ruling.
[15] [Omitted.]
[16] Section 33-1.
[16A] This third limb of the extended meaning of manufacture in section 33-1 is not relevant in determining if an entity is a producer of rebatable wine. This is because wine is not a foodstuff.
[17] [Omitted.]
[18] [Omitted.]
[18A] *McNichol and Anor v. Pinch* [1906] 2 KB 352; *Federal Commissioner of Taxation v. Jack Zinader Pty Ltd* [1949] HCA 42.

Example 1 – manufacture from grapes

27C. Wine Co grows Merlot grapes in its vineyard. It crushes the grapes and carries out primary and secondary fermentation, filtration and stabilisation. The resulting Merlot wine is packaged in 750ml bottles ready for retail sale.

27D. As the wine is a commercially distinct product from its inputs, Wine Co has manufactured the wine.

Example 2 – manufacturing and bottling

27E. Bottle Co purchases bulk Chardonnay wine from Chard Pty Ltd in isotankers. The Chardonnay is pumped from the isotanker into a storage tank at Bottle Co's premises in preparation for bottling. After it has passed through a fine mesh filter in the bottle filling line to reduce the risk of insoluble matter making its way into the bottles, the Chardonnay is placed in bottles that have been washed. The bottled wine is labelled and branded with a registered trade mark.

27F. The processes undertaken to package the bulk wine are not considered to result in a product that is commercially distinct from its inputs and as such, Bottle Co has not manufactured the Chardonnay wine.

28. [Omitted.]

29. [Omitted.]

30. [Omitted.]

31. [Omitted.]

32. [Omitted.]

33. [Omitted.]

34. [Omitted.]

35. [Omitted.]

36. [Omitted.]

37. [Omitted.]

38. [Omitted.]

39. [Omitted.]

[19] [Omitted.]
[20] [Omitted.]
[21] [Omitted.]
[22] [Omitted.]
[23] [Omitted.]
[24] [Omitted.]
[25] [Omitted.]

Blending as manufacture

40. It is a normal part of winemaking to blend wines. In some cases, the wines that are blended may be different varieties of wine (for example, Cabernet Sauvignon and Merlot). In other cases the blended wines may be the same variety of wine but with each wine in the blend having individual characteristics that, when combined, results in a wine with its own commercially distinct characteristics.

40A. Where you combine different wines to produce wine with its own characteristics that are distinct from the individual blended wines, you manufacture wine.

Example 3 – manufacture by blending own wine with purchased wine

41. *NH Wines Pty Ltd manufactures Cabernet Sauvignon wine from fresh grapes it owns, and purchases bulk Merlot wine from another winemaker. NH Wines blends the wines to produce their own distinctive Cabernet Merlot wine.*

42. *NH Wines Pty Ltd manufactures the Cabernet Merlot wine.*

Example 4 – blending wine with grape juice concentrate

43. *Blend Co purchased bulk Grenache wine from BB Wine. To increase the sweetness of the wine, Blend Co blends the Grenache wine with grape juice concentrate before bottling. The grape juice concentrate comprises 2% of the total volume of the finished product.*

43A. *The addition of the grape concentrate to the Grenache wine is considered to have resulted in a product that is commercially distinct from its inputs so Blend Co is considered to have undertaken manufacture.*

43B. Although wine blending or further treatment may be considered manufacture for the purposes of the definition of 'producer', you are not entitled to claim a rebate for blended or further manufactured wine unless you meet all of the other eligibility criteria, including the 85% source product ownership rule.[25A]

'Producer' of wine – contract manufacture

43C. There are two limbs to the definition of producer. Under the first limb, you must manufacture the wine yourself (either personally or by engaging employees).

43D. Under the second limb, you will be the 'producer'[25B] of wine where you engage a contract winemaker to manufacture the wine on your behalf, and you provide the winemaker with the 'source product' from which the wine is made.

[25A] See paragraphs 61C to 61ABC of this Ruling.
[25B] Section 33-1 paragraph (b) of the definition of 'producer'.

Source product

43E. Source product has the meaning given by subsection 19-5(4), and for each wine product is as follows:

- grape wine – fresh grapes
- grape wine products – fresh grapes
- fruit or vegetable wine – fruit or vegetables
- cider or perry – apples or pears
- mead – honey, and
- sake – rice.

43F. To qualify for a producer rebate, a producer must 'own' the source product from immediately prior to crushing (or immediately prior to fermentation in the case of mead and sake). We consider this to mean that you must have title to the source product before it is crushed or, where relevant, ferments.[25C]

44. [Omitted.]

45. [Omitted.]

46. [Omitted.]

47. [Omitted.]

48. [Omitted.]

49. [Omitted.]

50. [Omitted.]

51. [Omitted.]

52. [Omitted.]

53. [Omitted.]

54. [Omitted.]

55. [Omitted.]

Eligible sales and applications to own use

56. Before you can claim a producer rebate for an assessable dealing with rebatable wine during the financial year, one of the following must apply:

- you are liable for WET on the assessable dealing, or

[25C] Paragraph 1.15 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.
[26] [Omitted.]
[27] [Omitted.]
[28] [Omitted.]

- you would have been liable for WET on the assessable dealing had the purchaser not quoted, and the purchaser's quote states that it intends to have an assessable dealing with the wine for which it will have a WET liability.[29]

Example 5 – liability for WET

57. *Tim's Tasty Wines Pty Ltd makes Chardonnay. Tim's Tasty Wines is registered for GST and sells the Chardonnay at its cellar door.*

58. *Tim's Tasty Wines is liable for WET on its sales and therefore satisfies this requirement.*

Example 6 – sold under quote where subsequent dealing is taxable

59. *Vino Pty Ltd is the producer of Cabernet Sauvignon wine. Grace's Gourmet Produce Pty Ltd, a food retailer, purchases Cabernet Sauvignon wine from Vino. Grace's Gourmet Produce quotes for the purchase from Vino and states that it intends to make a taxable dealing in the wine.*

60. *As Vino would have incurred WET if Grace's Gourmet Produce had not quoted, and the quote states that Grace's Gourmet Produce will have a liability for WET on its dealing with the wine, Vino satisfies this producer rebate requirement for the dealing.*

Exceptions

61. You are not entitled to the producer rebate if:

- the purchaser quotes for the sale and indicates that it will not have a taxable dealing with the wine, by stating that it intends to:[31A]
  - make a GST-free supply of wine
  - sell the wine under quote, or
  - use the wine as a material in manufacture or other treatment or processing.

Example 7 – sold under quote where purchaser's dealing is not taxable

61A. *Good Guy Wines is a producer of Sauvignon Blanc wine. Fancy Wines Pty Ltd purchases the Sauvignon Blanc wine from Good Guy Wines. Fancy Wines quotes for the purchase from Good Guy*

[29] Subsection 19-5(1).
[30] [Omitted.]
[31] [Omitted.]
[31A] Paragraph 19-5(1)(c).

Wines. In its quote, Fancy Wines states that it intends making a GST-free supply of the Sauvignon Blanc (and therefore will not have a taxable dealing with the wine).

61B. *Good Guy Wines would have incurred WET if Fancy Wines had not quoted. However, as Fancy Wines stated in its quote that it does not intend making a taxable dealing with the wine, Good Guy Wines cannot claim a producer rebate for this assessable dealing.*

Source product – 85% ownership rule

61C. You are eligible for a producer rebate only where at least 85% of the total volume of the wine (in its final packaged and branded form ready for retail sale), originated from source product owned by you at all relevant times.[31B]

61D. Whether the 85% ownership of source product rule for wine is satisfied will be determined on the facts of each case.

61E. Paragraph 43E of this Ruling sets out the source products for various types of wine.

61F. To comply with the 85% source product ownership rule, you must maintain ownership of at least 85% of the source product at all relevant times. For grape wine, grape wine products, fruit or vegetable wine, and cider or perry, you must own at least 85% of the source product from immediately prior to crushing all the way through the winemaking process, until the wine is placed in a container that meets the packaging and branding requirements discussed at paragraphs 61ABD to 61ACB of this Ruling.[31C]

61G. Because honey and rice are not crushed as part of the winemaking process, you must own the source product for mead and sake from immediately prior to initial fermentation all the way through the winemaking process, until the wine is placed in a container that meets the packaging and branding requirements discussed at paragraphs 61ABD to 61ACB of this Ruling.[31D]

61H. Whether you have ownership of source product at all relevant times will be a question of fact. Where source product is supplied to you under a supply agreement, we consider ownership of the source product will pass when the parties to the agreement intend and agree for ownership to pass.

61I. Where source product is crushed (or where relevant, fermented) before ownership passes under such an agreement, the producer will not own the source product at all relevant times.

61J. Where a security interest is registered in respect of source product supplied under an arrangement, the mere fact of registration

[31B] Paragraph 19-5(1)(e).
[31C] Paragraph 1.16 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.
[31D] Paragraph 1.16 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.

will not necessarily affect legal ownership. Consideration will need to be given to the terms of the particular arrangement.

Example 8 – ownership of source product at all times

61K. *Winery Wines Co has a grape supply contract with Fresh Grape Co. Under the terms of these contracts, legal title to the grapes passes from the grape supplier to Winery Wines Co upon delivery of the grapes to their weighbridge.*

61L. *Winery Wines pays for the grapes in instalments paid both before and after the time that legal title passes.*

61M. *Winery Wines Co has a grape crushing and wine processing contract in place with another entity. The grapes owned by Winery Wines Co are crushed and made into bulk wine under contract. At no time does legal title to the grapes or the resultant wine pass to the entity responsible for crushing the grapes and processing the wine, or to any other entity.*

61N. *The bulk wine is delivered to Winery Wine Co's premises, where it is bottled in 750ml bottles and labelled with Winery Wine Co's registered trade mark.*

61O. *Winery Wine Co has maintained ownership of the grapes and resultant wine at all relevant times throughout the winemaking process.*

Example 9 – retention of title clause

61P. *Winery Co has a grape supply contract with Grapes Co. Under the contract, Winery Co pays for the grapes in three separate instalments.*

61Q. *The contract includes a retention of title (Romalpa) clause, under which Grapes Co retains ownership of the grapes until they are paid for in full.*

61R. *The grapes are delivered to Winery Co at the weighbridge and the grapes are crushed before the final instalment is paid.*

61S. *As Winery Co does not own the grapes as whole unprocessed grapes, it will not satisfy the 85% source product ownership rule in respect of these grapes.*

Source product – deeming provisions

61T. The WET Act recognises that traditional winemaking processes involve the use of additives and ingredients (in small quantities) other than source product. Therefore, certain ingredients and additives are deemed, or taken to be, source product owned by

you for the purpose of determining whether the 85% source product ownership rule has been satisfied.[31E] These ingredients are:

- grape spirit
- brandy
- alcohol used in preparing vegetable extracts (including spices, herbs and grasses)
- ethyl alcohol from a source specified in the regulations[31F]
- water
- grape juice concentrate[31G], provided the grape juice concentrate does not comprise more than 10% of the total volume of the wine, and
- any other substance[31H], provided that substance (or that substance together with similar substances) does not comprise more than 1% of the total volume of the wine.

Although these ingredients are expressly deemed to be source product, they can only be added to rebatable wine to the extent allowable under the individual wine product definitions.

61U. Grape juice concentrate is deemed be a source product that satisfies the ownership test if it comprises no more than 10% of the wine. Where grape juice concentrate comprises more than 10% of the total volume of the wine, then none of the grape juice concentrate is deemed to be source product that satisfies the ownership test.[31I]

Example 10 – grape juice concentrate more than 10% of total volume of wine

61V. *Wine-ing Co manufactures grape wine using whole unprocessed fresh grapes it has purchased, and maintains ownership of those grapes and the resultant wine throughout the winemaking process. Each one litre bottle of wine manufactured by Wine-ing Co contains the following ingredients:*

- *800mls originating from grapes owned by Wine-ing Co that it owned immediately prior to crushing, up to and including bottling, and*

[31E] Subsections 19-5(5) and 19-5(6).
[31F] Refer paragraphs 31-4(b), 31-5(b), 31-6(b) and 31-7(b).
[31G] For the purposes of clarity, this includes grape juice concentrate that you have caused to be added to the wine where you have wine made under contract on your behalf.
[31H] For the purposes of clarity, this includes any other substance that you have caused to be added to the wine where you have wine made under contract on your behalf.
[31I] Table 1.2 in Explanatory Memorandum *to Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

- *200mls of purchased grape juice concentrate.*

61W. *As the grape juice concentrate comprises more than 10% of the total volume of the wine, no part of the grape juice concentrate is deemed to be source product that satisfies the ownership test for the purposes of determining whether the 85% source product ownership rule is satisfied.*

61X. *Wine-ing Co does not satisfy the 85% source product ownership rule and is not eligible for a producer rebate.*

Example 11 – purchased grape pulp does not satisfy the ownership of source product test

61Y. *Purple Wine Co has Shiraz wine made under contract on its behalf by another entity from purchased grape pulp (crushed unprocessed grapes) and purchased grape juice. Purple Wine Co maintains ownership of the grape pulp and the grape juice from the time of purchase, throughout the process up to and including bottling and labelling.*

61Z. *Of the total volume of the packaged and labelled wine, 45% originates from the grape pulp and 45% originates from the grape juice.*

61AA. *Because Purple Wine Co did not own the fresh grapes from which the grape pulp and grape juice were produced, Purple Wine Co does not satisfy the 85% source product ownership rule.*

61AB. Substances added temporarily to wine as a part of the winemaking process do not count toward the 85% source product ownership test. For example, charcoal might be added and removed as part of a filtration process.[31J]

61AC. The addition of 'any other substances' refers to substances that include, but are not necessarily limited to, yeast, preservatives, juice, colours, and flavours to the extent they are allowed under the wine definitions.[31K] Each of these substances is deemed to be a source product for which the producer satisfies the ownership test provided that substance comprises no more than 1% of the total volume of the wine in its final packaged and branded form.

61AD. Where a particular substance exceeds 1% of the total volume of the wine, no part of it is deemed to be source product that satisfies the ownership test.

61AE. Similar substances are considered together for the purpose of determining whether 'any other substance' makes up more than 1% of the total volume of the wine. As this is not a defined term in the WET Act, it takes on its ordinary meaning.

[31J] Paragraph 1.21 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

[31K] Refer to Appendix 1 of this Ruling.

61AF. Substances are considered to be similar where they resemble one another in character, function and purpose, without being identical.[31L]

61AG. In the context of wine, different varieties of grape juice are considered to be similar substances and would be considered together for the purpose of determining whether grape juice as 'any other substance' makes up more than 1% of the total volume of the wine. Likewise, different types of flavouring (whether natural or artificial) are considered to be similar substances. Different forms of sulphites added to wine are also considered to be similar substances.

61AH. However, yeast and sulphur dioxide for example are considered to be different substances. This is because yeast is added to wine to convert sugars into alcohol and carbon dioxide, whereas sulphur dioxide is added to wine as a preservative. These substances are different in character, function and purpose.

61AI. Whether substances added to wine are similar to each other will be a question of fact in each case.

Example 12 – any other substances – not similar

61AJ. *Winemaker Co manufactures a Cabernet Merlot wine from a combination of grapes it grows in its vineyard, and whole fresh unprocessed grapes it purchases. During the winemaking process, Winemaker Co ferments the grapes it grew or purchased (and owned from before the time of crushing), and adds yeast, a preservative and some purchased merlot grape juice. The finished wine in its packaged branded form contains 1% purchased grape juice, 0.5% yeast and 1% preservative.*

61AK. *As these additives are not considered to be similar substances, and each comprises not more than 1% of the total volume of the wine in its final packaged and branded form, they are all taken to be source product for the purpose of determining whether the 85% source product ownership rule is satisfied.*

Example 13 – any other substances – similar

61AL. *Vigneron Co manufactures a Grenache Shiraz Mouvedre wine, which is packaged in branded 1 litre bottles. Of the total volume of the wine:*

- *820ml originated from whole fresh unprocessed grapes owned by Vigneron Co at the commencement of the winemaking process*
- *150ml is bulk wine that was purchased by Vigneron Co*
- *10ml is purchased unfermented Grenache grape juice*

[31L] Refer to GSTR 2003/5.

- *10ml is purchased unfermented Shiraz grape juice*
- *8ml is purchased unfermented Mouvedre grape juice, and*
- *2ml is preservative.*

61AM. *Although the three portions of grape juice each comprise 1% or less of the total volume of the wine when considered individually, they are considered to be 'similar substances' and must therefore be considered collectively for the purpose of the deeming provisions. On the basis that the grape juices comprise 28ml (2.8%) of the total volume of the wine, the grape juices are not taken to be source product for which the producer satisfies the ownership test. However, the preservative, a different substance, comprises only 0.2% of the total volume of the end product and as such is taken to be source product that satisfies the ownership test.*

61AN. *Only 82.2% of the Grenache Shiraz Mouvedre wine (being 82% from grapes owned by Vigneron and 0.2% preservative) is source product owned by Vigneron Co at all relevant times. Vigneron Co does not satisfy the source product ownership test in respect of the remaining 17.8%. Vigneron Co does not satisfy the 85% source product ownership rule for this wine.*

61AO. You must convert solid or gaseous additives to a volumetric measure to determine whether an additive is a deemed source product and therefore whether a wine satisfies the 85% source product ownership rule.[31M]

Example 14 – 85% source product ownership rule satisfied

61AP. *WeFortify Ltd produces a fortified grape wine. Another entity manufactures the wine on behalf of WeFortify Ltd pursuant to a wine processing agreement. The wine is manufactured from whole unprocessed grapes owned by WeFortify Ltd. At no time throughout the winemaking process does ownership of the grapes or resultant wine pass from WeFortify Ltd. Each 1 litre bottle of fortified grape wine is comprised of the following:*

- *500mls originating from the grapes owned by WeFortify Ltd as whole unprocessed grapes*
- *200mls purchased brandy*
- *150mls purchased wine*
- *80mls grape juice concentrate*
- *50mls water*
- *10mls yeast, and*
- *10mls sulphur dioxide*

[31M] Paragraph 1.20 of Explanatory Memorandum *to Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

61AQ. *Fifty per cent of the product originated from whole unprocessed grapes owned by WeFortify Ltd at all relevant times and as such, 50% of the total volume of the wine is made from source product for which WeFortify Ltd satisfies the ownership test.*

61AR. *The brandy, grape juice concentrate (no more than 10% of the total volume of the wine) water, and the additives (each dissimilar and comprising no more than 1% of the total volume of the wine) are taken to be source product that satisfies the ownership test. Together these substances comprise 350mls (35%) of the total volume of the wine and are taken to be source product owned by WeFortify Ltd at all relevant times.*

61AS. *Therefore, of the total volume of the fortified wine in its packaged, branded form, WeFortify Ltd owned 85% as source product at all relevant times.*

Example 15 – 85% source product ownership rule not satisfied

61AT. *OwnGrape Pty Ltd grows its own grapes, which it uses to make Sauvignon Blanc wine. OwnGrape Pty Ltd maintains ownership of the grapes throughout the winemaking process, up to and including bottling. Each 1 litre bottle of wine comprises:*

- *700mls originating from grapes grown and owned by OwnGrape Pty Ltd*
- *200mls of purchased wine*
- *50mls of grape juice concentrate*
- *40mls of water, and*
- *10mls of additives (yeast, sulphur dioxide, tartaric acid).*

61AU. *700mls (70%) of the total volume of the end product originated from source product owned by OwnGrape Pty Ltd at all relevant times. A further 100mls (10%), being the water, grape juice concentrate and additives, are deemed to be source product that satisfies the ownership test.*

61AV. *OwnGrape Pty Ltd does not satisfy the 85% source product ownership rule because only 80% of the total volume of the wine was owned by OwnGrape Pty Ltd as source product (including deemed source product). The remaining 200mls (20%) is purchased wine (which does not satisfy the ownership test).*

Example 16 – beverage that falls under the grape wine product definition – 85% ownership of source product rule not satisfied.

61AW. *GWP Ltd manufactures an alcoholic beverage classified as a grape wine product under the WET Act. Under the grape wine product definition, amongst other things, a beverage must contain at least 700mls of grape wine per litre (70% grape wine).*

61AX. *GWP's product contains 75% grape wine. 100% of the grape wine in GWP's grape wine product originated from fresh grapes owned by GWP at all relevant times.*

61AY. *The remaining 25% of the total volume of GWP's grape wine product is comprised of various fruit juices, natural colours and flavouring (and each type of additive comprises greater than 1% of the final product).*

61AZ. *Because only 75% of the total volume of the grape wine product originated from source product owned by GWP (with the remaining 25% being comprised of substances other than source product), GWP does not satisfy the 85% source product ownership rule in relation to the grape wine product.*

Example 17 – grape wine product – 85% source product ownership rule not satisfied

61AAA. *GWP manufactures a grape wine product. Each 1 litre bottle of grape wine product is made up of the following:*

- *950ml grape wine*
- *38ml water*
- *10ml natural fruit flavouring, and*
- *2ml preservatives.*

61AAB. *Of the grape wine used to make the grape wine product, 750ml was made from whole unprocessed grapes and GWP therefore satisfy the ownership rule for this portion of the finished product.*

61AAC. *The remaining 200ml is purchased grape wine.*

61AAD. *Therefore, of the total volume of the grape wine product, only the grape wine made from GWP's grapes, the water, the fruit flavouring and preservatives are (or are taken to be) source product that meets the ownership test. This totals only 80%, and therefore GWP does not satisfy the 85% source product ownership rule.*

Transitional rules

2018 vintage wine

61AAE. 2018 vintage wine is wine where more than 50% of the total volume originates from source product that was crushed (or, in the case of mead and sake, initial fermentation had commenced) on or after 1 January 2018.

61AAF. To be able to claim a producer rebate for 2018 vintage wine that is the subject of an assessable dealing on or after 1 January 2018, you must meet all of the eligibility criteria.[31N]

2017 and earlier wine – 85% source product ownership rule

61AAG. In some circumstances, if you have owned at least partially manufactured wine before 1 January 2018, and had an assessable dealing with it on or after that date, you will not need to satisfy the 85% source product ownership rule. That is, your ownership of the source product will be deemed.[31O]

61AAH. However, you still need to meet all the other eligibility requirements to claim a producer rebate for the wine.

2017 and earlier wine

61AAI. The 85% source product ownership rule for wine is deemed to be satisfied if you meet **all** of the following requirements:[31P]

- the wine was 2017 or earlier wine – that is more than 50% of the total volume of the wine originated from source product that was crushed (or, in the case of mead and sake, initial fermentation had commenced) before 1 January 2018, and
- the wine you sell comprises more than 50% wine that you owned immediately prior to 1 January 2018 and continued to own until the time of sale
- you have an assessable dealing with the wine before 1 July 2023, and
- either:
  - the wine was in a container[31Q] before 1 July 2018, or
  - at the time of the assessable dealing, the wine is labelled with the vintage year of the wine.

61AAJ. All product derived from source product (for example, purchased wine or purchased juice) is taken into account for these rules.[31R]

[31N] Subsection 19(2) of the *Treasury Laws Amendment (2107 Measures No. 4) Act 2017*. Producer rebates for 2018 vintage wine are not subject to the earlier producer rebate rules.

[31O] Subsection 20(1) of the *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.

[31P] Section 20 of the *Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

[31Q] We consider a container in these circumstances to be a container that meets the packaging and branding requirements explained at paragraphs 61ABD to 61ACB of this Ruling.

61AAK. Additionally, where you have used purchased wine to manufacture 2017 and earlier wine that is covered by these transitional provisions, you will still need to account for any earlier rebates for the purchased wine you used.[31S]

61AAL. Where you have an assessable dealing with 2017 or earlier wine on or after 1 July 2018 and all of these requirements are not met, you will need to meet the 85% source product ownership rules to claim the rebate. You will also still need to meet all of the other requirements.

Example 18 – 85% source product ownership rule deemed to be satisfied for 2017 vintage wine

61AAM. *In January 2017, PT Wines Co purchased bulk 2017 vintage Riesling. In February 2017, PT Wines blended the purchased Riesling with purchased grape concentrate.*

61AAN. *PT Wines was holding the Riesling in bulk storage on 30 June 2018. On 25 August 2018, PT wines bottled the Riesling, branded it with PT Wines' registered trade mark and labelled it with the 2017 vintage date. PT Wines sold the 2017 vintage Riesling wine in its final packaged form in September 2018.*

61AAO. *More than 50% of the Riesling originated from source product crushed before 1 January 2018. The Riesling was owned by PT Wines immediately before 1 January 2018, and it was the subject of an assessable dealing before 1 July 2023. At the time of the dealing the Riesling was in a container and was labelled with the 2017 vintage date. Therefore, PT Wines will be deemed to have met the 85% source product ownership rule for the Riesling.*

61AAP. *PT Wines can claim a rebate if it meets all of the other eligibility criteria. It will also have to account for any earlier rebates for the purchased wine when determining the amount of the rebate it can claim.*

2017 year and earlier fortified wine

61AAQ. For the purposes of the transitional provisions, fortified wine refers to wine (as defined in the WET Act) that meets the requirements for fortified wine specified in the *Australia New Zealand Food Standards Code*.[31T] Specifically, fortified wine must contain no

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[31R] Paragraph 1.68 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

[31S] Subsection 20(5) of the *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*. Refer also to our website for a general discussion about how the earlier producer rebate provisions operate – https://www.ato.gov.au/Business/Wine-equalisation-tax/Producer-rebate/Earlier-producer-rebate-amounts/.

[31T] Section 22 of the *Treasury Laws Amendment (2017 Measures No.4) Act 2017* Refer to Standard 4.5.1– Wine Production Requirements as made under section 92 of the *Food Standards Australia New Zealand Act 1991*.

less than 150mls of ethanol per litre, and no more than 220mls of ethanol per litre.

61AAR. You are taken to have satisfied the 85% ownership of source product rule to claim a producer rebate for fortified wine if you meet **all** of the following requirements:[31U]

- more than 50% of the total volume of the wine originated from source product that was crushed (or, in the case of mead and sake, initial fermentation had commenced) before 1 January 2018, and
- you owned the wine immediately before 1 January 2018 and maintain ownership of it until the time of an assessable dealing, and
- you have an assessable dealing with the fortified wine on or before 1 July 2025, and
- on 1 January 2018, the wine was either:
  - in the process of being manufactured into fortified wine, or
  - already bottled fortified wine.

61AAS. It is a question of fact whether wine is in the process of being manufactured into fortified wine on 1 January 2018. In the context of this provision, wine that is ageing in wood as at 1 January 2018 to impart oak characteristics for example will be considered to be undergoing 'manufacture'.[31V]

61AAT. This transitional provision deems a producer to have satisfied the 85% source product ownership requirement for the wine provided it is sold before 1 July 2025.

61AAU. There is a further transitional rule that applies to stored wine that is to undergo further manufacture prior to sale as fortified wine. A producer is deemed to have owned the source product used to make the stored wine provided the following requirements are satisfied:

- the wine subject to an assessable dealing is fortified wine
- the fortified wine was manufactured using wine that was stored in tanks or barrels (but not bottles) before 1 January 2018, and
- the producer of the fortified wine owned the stored wine immediately before 1 January 2018.

61AAV. This transitional rule applies regardless of when your assessable dealing occurs. You will be deemed to have owned 100%

[31U] Section 21 of the *Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*
[31V] Refer to paragraph 1.75 of the *Explanatory Memorandum to the Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

of the source product used to make the stored wine that satisfies the above tests from the point of crushing. However, you will still be required to satisfy the 85% source product ownership rule – so at least 85% of your final fortified wine must consist of stored wine that meets the above tests and source product that meets the ownership requirement (or inputs that are deemed to be source product that are taken to have met the ownership requirement).

61AAW. Where you have used purchased wine to manufacture fortified wine that is covered by these transitional provisions, you will still need to account for any earlier rebates for the purchased wine you used.[31W]

Example 19 – fortified wine made from blending wines stored immediately prior to 1 January 2018

61AAX. *Benny's Wines owns wine stored in a series of barrels immediately before 1 January 2018. Benny blends 900 litres of the stored wine with 100 litres of wine purchased on 1 July 2030. Benny bottles the fortified wine and affixes his proprietary label. He sells the fortified wine in 2031. Benny satisfies the 85% source product ownership rule because 90% of the fortified wine he is selling was made from stored wine that he has owned from before 1 January 2018. Any producer rebate to which Benny is entitled must be reduced by any earlier rebate amounts for purchased wine.*

Example 20 – blend of stored wine, wine produced by the producer after 1 January 2018 and purchased wine

61AAY. *Benny also blended a fortified wine in 2030 comprising:*

- *70% stored wine (that he had owned from before 1 January 2018)*
- *20% wine that he produced from grapes he owned at the time of crushing in 2030, and*
- *10% purchased wine.*

In this case, he is deemed to satisfy the source product ownership rule for the 70% of the blended wine that was sourced from his stored wine (that he had owned from before 1 January 2018). He also owned the source product for the requisite time period for the 20% wine component that he made in 2030. Therefore, he satisfies the source product ownership rule for 90% of the wine. Any producer

[31W] Subsection 20(5) of the *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*. Refer also to our website for a general discussion about how the earlier producer rebate provisions operate – https://www.ato.gov.au/Business/Wine-equalisation-tax/Producer-rebate/Earlier-producer-rebate-amounts/.

rebates to which Benny is entitled must be reduced by any earlier rebate amounts for purchased wine.[31X]

Example 21 – fortified wine in a solera system

61AAZ. *Strong Co is the producer of fortified Tawny wine. Strong Co uses a solera system at its winery to age the Tawny wine by fractional blending.*

61ABA. *On 31 December 2017 the Tawny wine that Strong Co has ageing in the solera system in tanks and barrels is a mixture of purchased product and product that originated from grapes grown on Strong Co's vineyard. On and from 1 January 2018, all of this wine is considered to have originated from source product owned by Strong Co.*

61ABB. *Over the following years, Strong Co bottles and sells wine from the tanks and barrels and tops them up with younger wine. If this younger wine is made from grapes that Strong Co owned immediately prior to crushing, Strong Co will continue to satisfy the source product ownership rule for 100% of the wine in the tanks and barrels. However, if Strong Co adds wine to the tanks and barrels that it did not own immediately before 1 January 2018 and for which Strong Co did not own the grapes at the time of crushing, then Strong Co will need to keep details of the percentage of wine in a particular tank or barrel that satisfies the 85% source product ownership rule. For example, if a barrel held 200 litres of pre-1 January 2018 wine, and 20 litres was drawn off and replaced with purchased wine, then 90% of the wine in the barrel will satisfy the source product ownership rule. If a further 20 litres is drawn off and replaced with purchased wine, then the percentage will drop to 81% (162 litres of the 200 litres will be pre-1 January 2018 wine and 38 litres will be purchased wine).*

61ABC. *Any rebate Strong Co is entitled to for any wine made from pre-1 January 2018 wine must be reduced by any earlier rebate amounts for purchased wine used to manufacture the Tawny wine.*[31Y]

Container for retail sale

61ABD. You are entitled to claim a producer rebate for an assessable dealing with rebatable wine only if the wine is packaged in a container suitable for retail sale with a capacity of 5 litres or less.[31Z] The exception to this rule is cider and perry, which may be packaged in containers (such as kegs) of 51 litres or less.[31AA] This exception

[31X] Subsection 21(3) of the*Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.
[31Y] Refer to our website for a general discussion about how the earlier producer rebate provisions operate – https://www.ato.gov.au/Business/Wine-equalisation-tax/Producer-rebate/Earlier-producer-rebate-amounts/.
[31Z] Subsection 19-5(7).
[31AA] Subsection 19-5(7).

recognises that cider and perry are often sold on tap at retail premises.

61ABE. We consider that a retail sale of wine is a sale to the end consumer.[31AB] Wine is packaged in a container suitable for retail sale when it is in a form that consumers would ordinarily expect to find in a retail setting, including displaying the appropriate regulatory markings (for example, complying with Label Integrity Program requirements)[31AC] and being branded with a trade mark (see paragraphs 61ABK to 61ACJ of this Ruling).

61ABF. This refers to containers such as bottles, casks and kegs at the stage before the contents are decanted into glasses or other drinking vessels in retail settings such as hotels and restaurants.

Example 22 – container for retail sale – rule satisfied

61ABG. *WineCo is the producer of a Semillon Sauvignon wine. The wine is packaged in 750ml glass bottles. WineCo sells the wine in individual bottles, in cases of 12 bottles and by the pallet. Each bottle is labelled with WineCo's registered trade mark. The label also sets out:*

- *the volume of the wine (750ml)*
- *the designation and country of origin (wine of Australia)*
- *alcohol content (13.5% alcohol by volume)*
- *allergens (sulphites and processing aids (milk and eggs))*
- *name and street address of the producer (including Lot number)*
- *standard drinks the bottle contains (8.3)*
- *vintage (2018)*
- *variety (Semillon Sauvignon), and*
- *region (geographical Indicator).*

61ABH. *WineCo's bottled Semillon Sauvignon meets the producer rebate eligibility requirement that wine must be packaged in a container with a capacity not exceeding 5 litres in a form that is suitable for retail sale.*

[31AB] Refer to the definition of 'retail sale' in section 33-1.

[31AC] For example, grape wine labels are governed by the *Australian Grape and Wine Authority Act 2013* and Regulations, the *Food Standards Code, National Trade Measurement Regulations 2009*, the *Competition and Consumer Act 2010* and State Consumer Laws.

Example 23 – size and not suitable for retail sale

61ABI. *Sally Co is a producer of Shiraz wine. The wine is packaged in 1 litre bottles. Sally Co sells the bottled Shiraz in cases of six to a purchaser in Australia. The bottles are not labelled, but a label affixed to each carton sets out the origin, grape variety, alcohol content and Sally Co's street address.*

61ABJ. *As the labels are not on each bottle and do not set out all of the information a purchaser at the retail level would ordinarily expect to see, Sally Co's Shiraz wine does not meet the packaging requirements and Sally Co is not able to claim a producer rebate in relation to the Shiraz.*

Branded with a trade mark

61ABK. To claim a rebate for an assessable dealing with wine, the container that holds the wine at the time of the assessable dealing must be branded with a trade mark that:[31AD]

- identifies or can be readily associated with you as the producer of the wine, and
- is owned by you or an entity associated with you (as determined under paragraph 19-20(1)(a), the first limb of the associated producer provisions), and
- is a trade mark within the meaning of the *Trade Marks Act 1995*, and
- satisfies any one of the following requirements:
  - is a registered trade mark within the meaning of the *Trade Marks Act 1995*
  - an application to register the trade mark has been made under the *Trade Marks Act 1995* which satisfies the requirements under that Act for the application to be pending, or
  - you have used the trade mark throughout the period beginning on 1 July 2015 and ending at the time of the assessable dealing.

61ABL. The container that holds the wine will be 'branded' with the trade mark where it appears on the container that immediately holds the wine. It is not sufficient for the trade mark to appear on a carton that holds 'cleanskin' bottles of wine. The labels on the bottles themselves must bear the trade mark. With regard to cask wine, although the wine itself is contained in a bladder within a box, it is sufficient that the box itself bear the trade mark as the bladder and box collectively form the container that holds the wine.

[31AD] Paragraphs 19-7(b)-(f) inclusive.

What is a trade mark?

61ABM. Your trade mark must be a 'trade mark' within the meaning of the *Trade Marks Act 1995.* The term 'trade mark' is defined in section 6 of the *Trade Marks Act 1995* as having the meaning given by section 17 of that Act. Section 17 of that Act provides that:

> A trade mark is a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person.

61ABN. Under section 6 of the *Trade Marks Act 1995*, a 'sign':

> …includes the following or any combination of the following, namely, any letter, word, name, name signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound, or scent.

'Identifies' or 'readily associated with' you

61ABO. The trade mark on the retail container must 'identify' or be 'readily associated with' you as the producer of the wine.[31AE]

61ABP. Whether a trade mark identifies or can be readily associated with you, as the producer of the wine, will be a question of fact in each case. However, generally, where you can be identified as the owner of a trade mark, it is considered that the trade mark can be readily associated with you.

61ABQ. The trade mark requirement does not mean that you are required to own a different trade mark for each range or collection of wine you produce. The trade mark requirement operates at the entity level. However, it does not necessarily prevent you from having and using more than one trade mark and still meeting the trade mark requirements.

61ABR. Where co-branding arrangements exist, and the retail packaging is branded with multiple trade marks, we consider a producer may still be able to claim a rebate where its trade mark is dominant on the retail packaging. This will be a question of fact.

Example 24 – trade mark that identifies the producer

61ABS. *Golden Vines is a producer of wine and has registered the imprint of a golden vine and its name as a trade mark.*

61ABT. *Golden Vines sells three different ranges of wine, catering to different markets. Golden Vines has a budget range, a mid-tier range, and a premium range. The ranges are called Stringy*

[31AE] Paragraph 19-5(7)(c).

Vine, Australis Gold, and The Platinum Series respectively, with the name of the range featuring prominently on the front label of each 750ml bottle of wine. None of the ranges have trade marks registered in respect of them.

61ABU. *Golden Vines affixes the imprint of the golden vine (registered trade mark) to each bottle of wine it sells in all of its ranges. Because the imprint identifies Golden Vines as the producer of each bottle of wine it sells, it meets the trade mark requirement and it is not required to register trade marks in respect of each range.*

Ownership of the trade mark

61ABV. You, or an entity associated with you, must own the trade mark.[31AF]

61ABW. An entity will be associated with you if, assuming it were a producer (regardless of whether it is in fact a producer), it would be an associated producer of yours under paragraph 19-20(1)(a); the first limb of the associated producer provisions of the WET Act.[31AG]

61ABX. We consider that ownership of a trade mark refers to the right to use the trade mark to the exclusion of all other entities, and does not include the exclusive use of a trade mark under a licence or other permission. Whether you (or an associated entity) own a trade mark will be a question of fact in each case. However, indicators that you own a trade mark include:

- you are registered as the owner of the trade mark with IP Australia
- you have the right to sell, license, or mortgage the trade mark, and
- you can take legal action against third parties for infringement against the trade mark.

Registered trade mark

61ABY. A trade mark is registered if it is registered under the *Trade Marks Act 1995* with IP Australia.[31AH]

Example 25 – registered trade mark

61ABZ. *SFWines Co is the producer of strawberry fruit wine which it sells in 750ml bottles. SFWines Co has registered the trade mark, 'StrawberryFieldz Wines' with IP Australia and SFWines Co is the sole owner of the trade mark.*

[31AF] Paragraph 19-5(7)(d).
[31AG] Refer to paragraph 66 of this Ruling.
[31AH] For further information refer to www.ipaustralia.gov.au/trade-marks.

61ACA. *Each bottle of SFWines Co's wine has a label affixed to it on the front and back of the bottle. The trade mark, 'StrawberryFieldz Wines ®' is prominently displayed on the label on the front of the bottle and in smaller writing on the back. As such, SFWines Co meets the producer rebate trade mark requirements.*

Application pending

61ACB. An application for an Australian trade mark is pending from the time it is filed until any of the following occurs:[31AI]

- it lapses, or is withdrawn or rejected
- the Registrar of Trade Marks refuses to register the trade mark and either:
  - there is no appeal against the decision and the period allowed for the appeal has ended, or
  - the decision is appealed and the decision to refuse registration is upheld, or
- the trade mark is registered under the *Trade Marks Act 1995* with IP Australia.

In use since 1 July 2015

61ACC. You will meet the trade mark requirement where you can show that you have used the trade mark throughout the period beginning 1 July 2015 and ending at the time of the assessable dealing. Whether you have used a qualifying trade mark during that time will be a question of fact in each case.

61ACD. This type of trade mark includes a common law trade mark. A common law trade mark is a trade mark that has been recognised by an Australian Court or the Registrar of Trade Marks as a common law trade mark in Australia.

Example 26 – common law trade mark

61ACE. *Comon Wines Ltd has been producing wine and selling it under its brand Whinedy Road on an ongoing basis since 1 January 2015.*

61ACF. *In February 2016, another wine producer commenced legal proceedings against Comon Wines Ltd alleging that the Whinedy Road brand infringed a trade mark owned by them and that Comon Wines Ltd was 'passing off' its wine as the other producer's product.*

[31AI] Paragraph 1.37 of Explanatory Memorandum to *Treasury Laws Amendment (2017 Measures No. 4) Act 2017.*

61ACG. *The other producer's claim was dismissed by the court which, in doing so, recognised Whinedy Road as a trade mark belonging to Comon Wines Ltd.*

61ACH. *In placing the Whinedy Road trade mark on the labels affixed to 750ml bottles and 2 litre casks of wine it has produced, Comon Wines meets the trade mark requirements.*

61ACI. You may meet the trade mark requirements if you have applied an unregistered trade mark to your wine that is not a common law trade mark since 1 July 2015. The following factors may be indicative of whether you have used a qualifying unregistered trade mark:

- you can provide details of the specific goods or services sold using the trade mark during the relevant time
- you can provide historical context about your use of the trade mark, including the reason for choosing the trade mark, when you first started using the trade mark, whether it has been used continuously, and if not, when and for how long it was used
- advertising and marketing material, photographs of signage, or other images that show your use of the trade mark, and
- whether there has been any confusion or dispute in relation to the trade mark and how it was resolved.

61ACJ. Note however that even an unregistered trade mark that has been used by the producer since 1 July 2015 to the time of the assessable dealing, must be 'owned' by the producer (or an associate). It is accepted that trade marks that you have used since 1 July 2015 are 'owned' by you provided no-one else owns that trade mark.

62. [Omitted.]

63. [Omitted.]

Calculating the amount of rebate

63A. The amount of any producer rebate you may be entitled to claim is calculated as follows:[33A]

- for wholesale sales – 29% of the price (excluding WET and GST) for which the wine was sold, and

[32] [Omitted.]
[33] [Omitted.]
[33A] Section 19-15.

- for retail sales and applications to own use – 29% of the notional wholesale selling price of the wine.

63B. For 2017 and earlier wine that has been manufactured using purchased wine, the amount of producer rebate for an assessable dealing with the wine may need to be reduced by any earlier rebate amounts.[33B]

63C. From 1 July 2018, the maximum amount of producer rebate for a financial year is $350,000. The maximum entitlement for associated producers **as a group** for each financial year from 1 July 2018 is $350,000.[33C]

64. [Omitted.]

65. [Omitted.]

65A. [Omitted.]

65B. [Omitted.]

65C. [Omitted.]

65D. [Omitted.]

65E. [Omitted.]

65F. [Omitted.]

65G. [Omitted.]

65H. [Omitted.]

65I. [Omitted.]

65J. [Omitted.]

65K. [Omitted.]

65L. [Omitted.]

65M. [Omitted.]

65N. [Omitted.]

65O. [Omitted.]

65P. [Omitted.]

65Q. [Omitted.]

[33B] Sections 19, 20 and 21 of *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*. Refer to our website for a general discussion about how the earlier producer rebate provisions operate – https://www.ato.gov.au/Business/Wine-equalisation-tax/Producer-rebate/Earlier-producer-rebate-amounts/.

[33C] Subsections 19-15(2) and (3). Refer to paragraphs 66 to 66C of this Ruling for a discussion about when producers will be associated.

[34] [Omitted.]

[34A] [Omitted.]

[34B] [Omitted.]

[34C] [Omitted.]

[34D] [Omitted.]

[34E] [Omitted.]

[34F] [Omitted.]

65R. [Omitted.]

65S. [Omitted.]

65T. [Omitted.]

65U. [Omitted.]

65V. [Omitted.]

65W. [Omitted.]

65X. [Omitted.]

65Y. [Omitted.]

65Z. [Omitted.]

65AA. [Omitted.]

65AC. [Omitted.]

65AD. [Omitted.]

65AE. [Omitted.]

65AF. [Omitted.]

Associated producer

66. From 1 July 2018, you are an associated producer of another producer for a financial year if, at any time during the financial year:[35][35A]

- you are 'connected with' each other. You are connected with each other if you would be 'connected with' each other under section 328-125 of the *Income Tax Assessment Act 1997* (ITAA 1997) if subsection 328-125(8) of the ITAA were omitted[36], or
- one of you is under an obligation (formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the other in relation to their financial affairs.[36A]

66A. You are an associated producer if:

[34G] [Omitted.]
[34H] [Omitted.]
[34I] [Omitted.]
[34J] [Omitted.]
[34K] [Omitted.]
[34L] [Omitted.]
[35] Subsection 19-20(1).
[35A] For the 2017–18 financial year, you are an associated producer of another producer for the financial year if, at any time between 1 October 2017 and 30 June 2018, you meet any of the association tests set out in paragraphs 66 to 66C of this Ruling.
[36] Paragraph 19-20(1)(a).
[36A] Paragraph 19-20(1)(b).

- each of you is under an obligation (formal or informal), or might reasonably be expected to, act in accordance with the directions, instructions or wishes of the same third entity in relation to your financial affairs.[36B]

66B. Further, you (first producer) are an associated producer of another producer (second producer) if:

- you are under an obligation (formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of a third producer and the third producer is under an obligation (formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the second producer in relation to their financial affairs.[36C]

66C. The term 'financial affairs' in the associated producer provisions refers to the business and financial affairs of your wine production business or the wine production business of the other producer(s).[36D]

Date of effect

66D. This Ruling applies both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
24 June 2009

[36B] Subsection 19-20(2).
[36C] Subsection 19-20(3).
[36D] *SJ Buller Pty Ltd and Commissioner of Taxation* [2013] AATA 617.

Appendix 1

Rebatable wines

66E. Set out below are the definitions of products for the purposes of the WET Act.[36E] The definitions incorporate the requirements of the regulations set out in the WET Regulations. The WET applies to alcoholic products which satisfy the definitions and contain more than 1.15% by volume of ethyl alcohol. Some examples of products that satisfy the various definitions and products that do not are provided - the examples are only covered by the definitions where they meet the requirements in the column on the left. Alcoholic products containing more than 1.15% by volume of ethyl alcohol that are not covered by the wine equalisation tax are subject to the excise/duty regime.

Definitions	**Examples**
Grape wine *Grape wine is a beverage that:* • *is the product of the complete or partial fermentation of fresh grapes or products derived solely from fresh grapes, and* • *does not contain more than 22% of ethyl alcohol by volume.* ***Note:*** *a beverage does not cease to be the product of the complete or partial fermentation of fresh grapes or products derived solely from fresh grapes merely because grape spirit, brandy, or both grape spirit and brandy have been added to it.*	Grape wine includes: • table wines (red, white and rosé) • sparkling wines • fortified wines, and • dessert wines.
Grape wine products *A grape wine product is a beverage that:* • *contains at least 70% grape wine* • *has not had added to it any ethyl alcohol from any other source, except* • *grape spirit, or* • *alcohol used in preparing vegetable extracts (including spices, herbs and grasses) where the alcohol:* - *is only used to extract flavours from vegetable matter* - *is essential to the extraction process* - *adds no more than one*	Grape wine products include: • vermouth • marsala • green ginger wine (except green ginger wine with spirits such as scotch added) • wine-based cocktails and creams that do not contain the flavour of any alcoholic beverage (other than wine) whether the flavour is natural or artificial, and • imitation liqueurs (wine-based) that do not contain the flavour of any alcoholic beverage (other than wine) whether the flavour is natural or artificial

[36E] Refer to paragraphs 10 to 36 of WETR 2009/1 for further explanation of the definitions of alcoholic products for the purposes of the WET Act.

Definitions	Examples
percentage point to the overall alcoholic strength by volume of the beverage, *- has not had added to it the flavour of any alcoholic beverage (other than wine), whether the flavour is natural or artificial, and* *- contains between 8% and 22% (inclusive) of ethyl alcohol by volume.*	but only where they satisfy the requirements in the column on the left. Grape wine products do not include: • wine coolers (unless they satisfy the requirements in the column on the left) • ready to drink (RTD) or designer drinks that contain a wine base (unless they satisfy the requirements in the column on the left) • RTDs or designer drinks that contain spirits (other than grape spirit), and • spirit-based (other than grape spirit) cocktails, creams and liqueurs.
Fruit or vegetable wine *Fruit or vegetable wine is a beverage that:* • *is the product of the complete or partial fermentation of the juice or must of fruit or vegetables, or products derived solely from fruit or vegetables* • *has not had added to it any ethyl alcohol from any other source except grape spirit or neutral spirit* • *has not had added to it any liquor or substance that gives colour or flavour except grape spirit or neutral spirit, and* • *contains between 8% and 22% (inclusive) of ethyl alcohol by volume or if grape spirit or neutral spirit has been added contains between 15% and 22% (inclusive) of ethyl alcohol by volume* ***Note:*** *a product is only a fruit or vegetable wine after the addition of grape spirit or neutral spirit if that product met the definition of fruit or vegetable wine before the spirit was added.*	Fruit or vegetable wines include: • table wine • sparkling wine, and • fortified wine. Fruit or vegetable wines do not include: • RTD or designer drinks that may contain alcohol fermented from fruits such as lemons, oranges, etcetera. (unless they satisfy the requirements in the column on the left).
Cider and perry *Cider or perry is a beverage that:* • *is the product of the complete or partial fermentation of the juice or must of apples or pears* • *has not had added to it any ethyl alcohol from any other source, and* • *has not had added to it any liquor or*	Cider and perry include: • traditional cider and perry • draught cider and perry • dry cider and perry, and • sweet cider and perry. Cider and perry do not include: • cider or perry that has had lemon,

Definitions	Examples
substance (other than water or the juice or must of apples or pears) that gives colour or flavour.	black currant or other fruit flavourings added, and • cider or perry that has had cola or other flavourings added.
Mead *Mead is a beverage that:* • *is the product of the complete or partial fermentation of honey, and* • *has not had added any ethyl alcohol from any other source, except grape spirit or neutral spirit, and* • *has not had added to it any liquor or substance that gives colour or flavour other than:* - *grape spirit or neutral spirit* - *honey, herbs and spices, all of which can be added at any time* - *caramel, provided it is added after the fermentation process is complete, or* - *fruit or product derived entirely from fruit, provided:* ▪ *the fruit or product has not been fermented* ▪ *the fruit or product is added to the mead before fermentation of the mead, and* ▪ *after the addition of the fruit or product and before fermentation the mead contains not less than 14% by volume of honey and not more than 30% by volume of the fruit or product, and* ▪ *if fruit or product is added the mead contains between 8% and 22% (inclusive) of ethyl alcohol by volume, and* • *if grape spirit or neutral spirit has been added contains between 15% and 22% (inclusive) of ethyl alcohol by volume. However, grape spirit or neutral spirit can only be added if the beverage meets the definition of mead before the grape spirit or neutral spirit is added.* ***Note:*** *If fruit or product derived from fruit is added and it contains concentrated fruit juice or fruit pulp, the proportion of fruit or product in the mead is worked*	Mead includes: • honey mead • fortified mead • liqueur mead, and • spiced mead.

Definitions	Examples
out by assuming that it has been reconstituted according to the recommendations of the manufacturer of the concentrated fruit juice or pulp.	
Sake *Sake is a beverage that:* • *is the product of the complete or partial fermentation of rice* • *has not had added to it any ethyl alcohol from any other source, and* • *has not had added to it any liquor or substance that gives colour or flavour.*	Sake includes: • fermented sake, and • rice wine. Distilled sake does not satisfy the definition and is not included.

Appendix 2 – Compliance guide

This Appendix contains information to assist taxpayers in complying with relevant tax laws. Provided you follow the advice in this appendix in good faith and consistently with the ruling section, the Commissioner will administer the law in accordance with this guide.

Claiming the producer rebate

67. You can claim any producer rebate you are eligible for in the activity statement for the tax period to which the WET on the dealing is attributed.[37] For dealings on which a purchaser quotes and indicates that they will have a taxable dealing it is the tax period in which WET would have been payable if the purchaser had not quoted. The producer rebate is claimed by adding the rebate in the total amount of WET credits claimed and entering this total amount against Label 1D (WET refundable).

68. Any subsidy payable by the States or Territories, or grant payable by another Federal Government agency (including payments under the Wine Tourism Cellar Door grant scheme) is claimable from the relevant department or authority. It must not be claimed on the activity statement.

68A. [Omitted.]

What happens if the producer rebate is claimed when it should not be claimed or when it is over-claimed

Not entitled to the producer rebate

68B. If you have claimed a rebate to which you are not entitled in whole or in part, amend you net amount for that tax period. Circumstances where an entity is not entitled to a rebate include the following:

- you are not the producer of the wine[37C]

[37] Subsection 17-10(1), read in conjunction with the fourth column in the Wine Tax Credit Table, in section 17-5, in relation to CR9 and with section 21-15, indicates that producer rebates are claimed in the final tax period for the year. However, subsection 19-25(1) seems to contemplate (and arguably would otherwise be otiose) that producer rebates are claimed progressively throughout the year in the activity statement for each tax period. Accordingly, the Commissioner accepts that producer rebates may be claimed in the activity statement for the tax period to which the wine tax on the dealing is attributed. Where the entitlement for the producer rebate arises because you would have incurred wine tax if the purchaser had not quoted for the sale then the producer rebate is claimed in the period in which it would have been attributable if the purchaser had not quoted.

[37A] [Omitted.]

[37B] [Omitted.]

[37C] Paragraph 19-5(1)(a).

- of the total volume of the wine, you did not own at least 85% as source product[37CA]
- you are not liable to WET for a taxable dealing or would not have been liable to WET for a taxable dealing even if the purchaser had not quoted[37D]
- you sold the wine under quote and the purchaser stated in its quote that it intended making a GST-free supply of the wine, selling the wine under quote or using the wine as a material in manufacture or other treatment or processing[37DA]
- the wine was not packaged in a container fit for retail sale that met the container size and branding requirements[37DB]
- you calculated the amount of producer rebate incorrectly[37E], and
- you are not entitled because one of the exceptions in section 19-10 applies.[37F]

Example 27 – entity not a producer of wine

68C. *Wisdom Company lodged quarterly returns in the 2018–2019 financial year claiming producer rebates totalling $350,000 in the following tax periods: Quarter 1 September 2018 – $100,000; Quarter 2 December 2018 – $125,000; Quarter 3 March 2019 – $175,000; Quarter 4 June 2019 – $100,000.*

68D. *Wisdom Company was not a producer of the wine in any of the tax periods and therefore not entitled to the producer rebate in any of those tax periods.*

68E. *Therefore, Wisdom Company's assessed net amounts for each of Quarters 1, 2, 3, and 4 would be amended to disallow the rebates claimed.*

68F. This Ruling does not deal with the imposition of penalties. However, it is important to note that in these circumstances the Commissioner will consider whether an administrative penalty is applicable [37G] by reference to each of the relevant tax periods in which an amendment is made. The Commissioner will also determine the general interest charge (GIC) that applies less any remission by reference to those tax periods.

[37CA] Paragraph 19-5(1)(d).
[37D] Paragraph 19-5(1)(b).
[37DA] Paragraph 19-5(1)(c).
[37DB] Paragraph 19-5(1)(e).
[37E] Section 19-5.
[37F] Section 19-5.
[37G] Section 284-75 of Schedule 1 to the TAA and section 298-20 of Schedule 1 to the TAA.

68G. Given the penalty and interest outcomes discussed in the paragraph 68F of this Ruling, it is prudent that you do not claim rebates to which you are not entitled. If you do, you should correct the claim as soon as possible.

What happens if the producer rebate is over-claimed

'Excess claim – single producer'

69. If you claim amounts of producer rebate to which you are entitled under subsection 19-5(1), and then ascertain that the total amount you have claimed exceeds the amount to which the entity is entitled for a financial year, you are liable to pay an amount equal to that excess.[38] The amount payable is treated as if it is WET payable and is attributable to the last tax period of the financial year in which the excess claim was made.[39]

69A. Therefore where you are not an associated producer, you can correct an excess claim by attributing the amount payable as WET payable to the last tax period of the financial year in which the excess claim was made.[39A]

69B. The WET law clearly sets out the maximum entitlement for a single producer[39B] and the producer rebate may be claimed in the tax period to which the WET on the dealing is attributed.[39C] Therefore, if the Commissioner discovers the excess claim (for example through compliance activity) and you have not corrected the claim, then the Commissioner will amend the your assessed net amount for each of the tax periods to the extent of the excess claim.[39D]

69C. This Ruling does not deal with the imposition of penalties. However, it is important to note that in these circumstances the Commissioner will determine any administrative penalty applicable[39E] by reference to each of the relevant tax periods in which an amendment is made. The Commissioner will also determine the GIC that applies less any remission by reference to those tax periods.

69D. Given the penalty and interest outcomes discussed in paragraph 69C of this Ruling, it is prudent that you ensure that you do not exceed your maximum entitlement. If you do, you should correct the excess claim as soon as possible.

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[38] Subsection 19-25(1).
[39] Subsection 19-25(4).
[39A] subsection 19-25(1).
[39B] subsection 9-15(2).
[39C] Refer to paragraph 67 of this Ruling.
[39D] The Commissioner will identify the earliest tax period in the financial year in which the producer rebates have been claimed for that financial year where the total claim for the year has exceeded the maximum, and amend that tax period and all subsequent tax periods (where relevant).
[39E] Sections 284-75 and 298-20 of Schedule 1 to the TAA.
[39F] [Omitted.]

Example 28 – single producer excess claim

69E. *Montes Company lodged quarterly returns in the 2018–19 financial year claiming the producer rebate in the following tax periods: Quarter 1 September 2018 – $100,000; Quarter 2 December 2018 – $100,000; Quarter 3 March 2019 – $155,000; Quarter 4 June 2019 – $50,000.*

69F. *In August 2019, Montes Company discovers that due to a software error they had over claimed the producer rebate by $55,000 in the 2018–2019 financial year ($405,000 claimed less $350,000 maximum entitlement). They can correct the excess claim by attributing $55,000 as WET payable at label 1C of the activity statement in Quarter 4 (that is, the tax period ending June 2019).*

69G. *If Montes Company does not correct the excess claim and the Commissioner discovers it through compliance activity, the Commissioner would amend Montes Company's assessed net amounts in Quarter 4 by $50,000 and in Quarter 3 by $5,000.*

69H. *The Commissioner would determine any administrative penalty and GIC less any applicable remission for the Quarter 3 and Quarter 4 tax periods.*

'Excess claim – associated producer'

70. If you are a member of a group of associated producers and the rebate claimed by the group for a financial year is more than the maximum amount of producer rebates to which the group is entitled for the financial year, each member of the group is jointly and severally liable to pay an amount equal to the excess.[40] However, you will not be liable to pay an amount that exceeds the sum of the amounts of producer rebates that you claimed for the financial year.[41]

70A. Therefore, if you are an associated producer of one or more other producers for a financial year and:

- the rebate claimed by the group for a financial year is more than the maximum amount of producer rebates to which the group is entitled for the financial year, and
- you or any other member of the group have not corrected the excess claim in the last tax period of the financial year in which the excess claim was made[41B],

then the Commissioner will:

- amend your net amount to include the WET payable in the last tax period of the financial year in which the excess claim was made[41C],

[40] Subsections 19-25(2) and 19-25(3).
[41] Subsection 19-25(3).
[41A] [Omitted.]
[41B] Subsection 19-25(4).

- seek to recover the excess claim from the group (if appropriate), as each producer member is jointly and severally liable to pay an amount equal to the excess claim,[41D] by amending those entities' net amounts in accordance with section 19-25 to include the WET payable, and
- ensure each of the entities assessed net amounts are not amended for more than the total amount of rebate they individually claimed during the financial year.[41E]

Example 29 – associated producer during the year – excess claim

70B. *In Quarter 1 of 2019, Hill Company claimed a producer rebate of $350,000. In Quarter 3, Flat Company claimed a producer rebate of $300,000. The Commissioner determines that Hill Company is an associated producer of Flat Company for the financial year ending 30 June 2020.*

70C. *The maximum rebate Flat Company and Hill Company are entitled to as a group is $350,000. Therefore, they are jointly and severally liable to pay the excess claim of $300,000 ($650,000 claimed less $350,000 maximum).*

70D. *The Commissioner will amend Hill Company's assessed net amount under section 19-25 to include $300,000 WET payable in Quarter 4. The Commissioner will also amend Flat Company's assessed net amount under section 19-25 to include $300,000 WET payable in Quarter 4. The Commissioner will not collect more than $300,000 (the sum of the excess claim) from the group.*

Example 30 – associated producer, producer rebate claimed less than excess claim

70E. *In Quarter 1, Charles Company claimed a rebate of $350,000. In Quarter 2, Miranda Company claimed a rebate of $350,000. In Quarter 3, Stanley Company claimed a rebate of $200,000.*

70F. *The Commissioner determines that Charles Company, Miranda Company and Stanley Company are associated producers for the financial year. The maximum rebate to which they are entitled as a group is $350,000. Charles Company, Miranda Company and Stanley Company are jointly and severally liable to pay the excess claim of $550,000 ($900,000 total of rebates claimed less $350,000 maximum entitlement).*

[41C] Subsection 19-25(4).
[41D] Subsection 19-25(3).
[41E] Subsection 19-25(3). The Commissioner will ensure the aggregate amount recovered from the group of associated producers does not exceed the excess claim of the group.
[41F] [Omitted.]

70G. *The liability of each producer cannot exceed the total amount of producer rebate claimed by that producer for the financial year. Since two of the producers only claimed $350,000 and the third producer only claimed $200,000, the Commissioner can only seek to recover $350,000 of the total $550,000 over-claim from each of Charles Company and Miranda Company and $200,000 from Stanley Company. The Commissioner will not collect more than $550,000 (the sum of the excess claim) from the group.*

70H. This Ruling does not deal with the imposition of penalties. However, it is important to note that in these circumstances the Commissioner will consider whether administrative penalties are applicable.[41G] The Commissioner will also determine any GIC that applies less any remission, by reference to those tax period(s).

Impact of volume rebates and discounts

71. If you allowed volume rebates or discounts which effectively reduce the price for which your wine is sold (see paragraphs 118 to 122 of WETR 2009/1) and the volume rebate or discount has not been factored into the calculation of the producer rebate claimed, you will need to adjust your producer rebate accordingly.

72. Consistent with other claims to which you are not entitled[41H], in these circumstances, an amendment should be made to your assessed net amount for the tax period in which the incorrect amount was claimed.

[41G] By reference to the amount payable by each entity under section 19-25 and in accordance with sections 284-75 and 298-20 of Schedule 1 to the TAA.
[41H] Refer to paragraph 68B of this Ruling.

Appendix 3 – Detailed contents list

73. Below is a detailed contents list for this Ruling:

References

Previous draft:

WETR 2008/D2

Related Rulings/Determinations:

GSTR 2003/5; TR 2006/10; WETR 2006/1; WETR 2009/1

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- Explanatory Memorandum to the Treasury Laws Amendment (2017 Measures No. 4) Bill 2017

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