

AUSTRALIAN WINE INDUSTRY CODE OF CONDUCT
CODE ADMINISTRATION COMMITTEE
ANNUAL REPORT 2010 – 2011

SECRETARIAT

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INTRODUCTION

This is the third Annual Report of the Code Administration Committee established under the Australian Wine Industry Code of Conduct. It covers the period from 1 July 2010 to 30 June 2011.¹

The Australian Wine Industry Code of Conduct

The Australian Wine Industry Code of Conduct² which was signed by representatives of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) on 19 December 2008 has two main aims

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

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

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

- apply the Code (with the exception of Part 2) with effect from 1 January 2009
- bring existing agreements in line with the provisions of Part 2 of the Code at the time of any material variation to the agreement.

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

Signatories to the Code

A winegrape purchaser may become a signatory to the Code which is not compulsory by providing a written notice to the Committee. A register of signatories is maintained and available on the WFA, WGGA and the Code Administration Committee websites.³

¹ On 16 August 2011, after this Annual Report had been drafted, the Presiding Member was informed by telephone that the Committee was to be dissolved. This was confirmed during a Skype call between the Committee and Mr Lawrie Stanford on 17 August 2011, and in a letter dated 5 September 2011. The Addendum to this report at page 13 covers the period from 1 July 2011 to 30 September 2011.

² The Australian Wine Industry Code of Conduct can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Downloads.html>

³ <http://www.wfa.org.au>, <http://www.wgga.com.au>, and <http://www.wineindustrycode.org>

The Australian Wine Industry Code Administration Committee

The Code is overseen and administered by an independent Code Administration Committee of three members and an alternate member with appropriate commercial experience, jointly appointed by the Boards of the WFA and WGGGA.⁴ The members are part-time. The current members are

- **Presiding Member:** Graham ('Bert') Mowbray is a retired Federal Magistrate and former Member of the Administrative Appeal Tribunal, who holds qualifications in agriculture, agricultural economics and law. His early work experience was in agriculture, followed by a lengthy legal career, principally in public and administrative law.
- **Member:** Ian Cox is an Agribusiness Consultant with formal qualifications in agriculture, management and property valuation, who has an extensive background in agriculture, management and finance. He has worked as an agribusiness specialist for many years.
- **Member:** James Omond is a lawyer and principal of Omond & Co providing specialist services to the wine industry. Mr Omond's work includes specific wine-industry operational advice and trade practices/competition experience. He is an executive member of a number of organisations associated with the wine industry.
- **Alternate Member:** John Dickie is the inaugural chairman of the Film Exhibition and Distribution Code of Conduct Administration Committee established in 1998. Mr Dickie, who is a journalist, has had extensive experience in communications work both in public administration and private enterprise.⁵

The initial term of these members was until 30 September 2010. They were subsequently reappointed for a further term until 30 September 2011.⁶

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

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

- a description of the nature and number of disputes received
- any comments it wishes to make about conduct or trends in the industry

⁴ Part 5 of the Code

⁵ Fuller details on members can be found on the Code Administration Committee website at <http://www.wineindustrycode.org/Committee.html>

⁶ By letter dated 5 September 2011 the members were informed that as the Committee was to be dissolved their terms would not be renewed beyond 30 September 2011.

- a report on the operations of the Code, including the names of any parties removed from the Code.

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

OPERATION OF THE CODE 2010 – 2011

This Annual Report covers the year from 1 July 2010 to 30 June 2011.⁷

Committee Operations

The Committee met on five occasions during the year – 15 July 2010, 28 July 2010, 11 August 2010, 10 February 2011 and 27 April 2011. The 28 July 2010 meeting was jointly with the WFA/WGGA Code Management Committee in Adelaide. Each of the other four meetings was by Skype conferencing call.

Much of the Committee's time this year has been taken in considering recommendations arising from the independent review of the Code by Mr Neill Buck received on 29 June 2010. The joint meeting on 28 July 2010 with the Code Management Committee focussed on these recommendations.

Among the range of matters considered by the Committee, some of which flowed from the Buck Review, were

- Abolition of the \$250 fee for lodging a Notice of Dispute under Part 3 of the Code
- Preparation of a simple one page document outlining the dispute resolution processes under the Code
- A draft amendment to the Code giving the Committee limited discretion to extend time limits in compelling cases
- Preparation of a submission to the NSW Legislative Council Standing Committee on State Development inquiry into the wine grape market and prices
- Promotion of the Code and possible Committee assistance to the WFA and WGGA in such promotion
- The role of the Australian Competition and Consumer Commission (ACCC) in relation to industry codes
- Five disputes from growers concerning issues under the Code.

The Presiding Member, Bert Mowbray, met informally with Mr Lawrie Stanford, Executive Director of the WGGA, on 16 March 2011 and Mr Andrew Wilsmore, General Manager, Policy and Government Affairs, of the WFA on 23 March 2011 to discuss the future of the Code and how the Committee might be able to assist, particularly in its promotion.

⁷ See page 13 for an Addendum for the period 1 July 2011 to 30 September 2011.

On 29 March 2011 Mr Mowbray participated in a video conference with Mr Konrad Chmielewski, Director, Education and Engagement, and Mr Richard Weksler, Assistant Director, Codes, from the Australian Competition and Consumer Commission to discuss ways in which the ACCC might be able to provide guidance and assistance on the implementation and development of the Code, and to consider various issues relating to voluntary and mandatory codes.

Signatories to the Code

A winegrape purchaser may become a signatory to the Code by providing a written notice to the Committee. Signatories at 30 June 2011 were

- Balnaves Vineyard Services Pty Ltd t/as Balnaves of Coonawarra
- Constellation Australia Ltd
- Henry Holmes Wines Pty Ltd
- Orlando Wines, a division of Premium Wine Brands Pty Ltd
- Rusden Wines Pty Ltd
- Treasury Wine Estates Ltd, the demerged wine business of the Foster's Group Ltd
- Tyrrell's Vineyards Pty Ltd

The percentage of total crush represented by these Signatories for the 2011 vintage was estimated as approximately 31%.

Disputes

Five disputes were notified to the Committee during the reporting period.

The first alleged that the grower had been entitled to a bonus payment for his 2010 crop. This had not been paid. As it was unclear whether the complaint fell under the Code, the Secretariat communicated on a number of occasions with both parties and requested further documents from them. In the end it was clear that among a number of issues the notice of dispute was out of time and the Committee did not have jurisdiction to deal with it.

The second complainant alleged that she had been told in July 2010 that her contract would be extended for the 2011 vintage and a signed copy would be sent at a later date. The grower said that they had been led to believe as late as December 2010 that this was so. However in January 2011 the grower was told that the contract would not be extended for the 2011 vintage. The Secretariat communicated informally with both parties and after the grower had discussions with the winemaker the matter was resolved.

In February 2011 a complaint was received concerning a group of growers involved in negotiations with a winemaker over prices. As it appeared the growers misunderstood the normal procedures the Secretariat suggested that they discuss the issue with their winemaker. This early action facilitated settlement.

The fourth and fifth complaints were both about rejection of the crop in the vineyards. In neither case was the respondent a signatory to the Code. The Committee thus had no jurisdiction to deal with the disputes. However the Secretariat referred both complainants to the Horticulture Mediation Adviser.

The way these matters have been handled demonstrates the clear benefit of incorporating informal early dispute resolution mechanisms into a code such as the wine industry one. They were able to be resolved without resort to the more formal requirements of the Code through active consultation by the Secretariat with both parties. The fourth and fifth complaints were also referred to the Horticulture Mediation Adviser with the assistance of the Secretariat. The Secretariat in addition played a significant educational role.

These cases reinforce the Committee's views on informal early dispute resolution in the 2009 Annual Report⁸ and the 2009-2010 Annual Report.⁹

Breaches of the Code

No complaints of breaches of the Code have been referred to the Committee during the reporting period.

REVIEW OF THE CODE – THE BUCK REVIEW

The Code provided for a formal review after the 2010 vintage by suitably qualified persons appointed by the Committee.¹⁰ It is also proposed that thereafter the Committee will review the operations of the Code not less than every three years.

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

As noted in the 2009-2010 Annual Report the Committee appointed Mr Neill Buck of Neill Buck and Associates to conduct the first review. His report was received on 29 June 2010 and forwarded to both the WFA and the WGGGA.¹¹

The recommendations were considered by a joint meeting of the Committee with the WFA/WGGGA Code Management Committee on 28 July 2010 and at a Code Management Committee meeting on 6 April 2011.

At its 6 April 2011 meeting the Code Management Committee made decisions on the recommendations, including those on industry education, Code coverage targets, grower ownership of the Code, Code simplification, multi party disputes, inclusion of "fair and equitable" and "non retaliation" clauses, ACCC access, cost recovery and Code administration. Some of these would involve amendments to the Code. The Code Management Committee recommendations were then to be submitted to the Boards of the WFA and WGGGA for implementation. A subcommittee of the Code Management Committee was also formed to advise the Boards on revisions to the

⁸ See page 7 of the 2009 Annual Report

⁹ See page 9 of the 2009-2010 Annual Report

¹⁰ See Part 1 of the Code

¹¹ See the Buck Report at the Committee's website at <http://www.wineindustrycode.org/Downloads.html>

Code, Code promotion, cost reductions and also noting those recommendations of the Buck Review which had been declined.

There are a number of areas flowing from the Buck Review for which the Code Administration Committee has had some responsibility: the \$250 fee for lodging a Notice of Dispute under the Code, simplifying the dispute resolution process, time limits for lodging Notices of Dispute and simplified information on the dispute process.

Lodgement fee: The Buck Review found that the application fee under the Code was expensive and a barrier to complaints being made. At its 10 February 2011 meeting the Committee abolished this \$250 lodgement fee.

Informal early dispute resolution: As noted in both previous Annual Reports¹² the Committee has instituted a procedure for early intervention to facilitate resolution on an informal basis before resorting to the formal processes under the Code. The value of this approach has been reinforced with this year's disputes, all of which have been finalised by this means without having to engage the formal dispute resolution process.

Time limits: The Committee has previously expressed concern about the inflexibility of time limits in the Code.¹³ It queried whether these time limits should be enforced rigorously or whether there was scope for it to use its discretion to extend the limits in compelling circumstances. In response the Code Management Committee decided that it would be appropriate for the Committee only to extend the time limit where both parties agreed.

The Buck Review recommended that one way of simplifying the dispute resolution process would be to allow the Committee and its Secretariat the discretion to vary time limits.¹⁴ Although the Code Management Committee has expressed disagreement with this recommendation, the Code Administration Committee remains of the view that it should have the flexibility to allow for an extension of the seven day deadline for lodging a notice of dispute over winegrape prices. The Committee has suggested an amendment to the Code along the following lines

3.1.8 The Presiding Member of the Committee (or other Committee Member appointed to preside in the event that the Presiding Member is unavailable) may extend the period of 7 Business Days for lodging a Notice of Dispute under clause 3.1.1 if (a) the other party agrees, or (b) in circumstances the Presiding Member (or other Committee Member) decides are exceptional or compelling. The extension shall be for such period as determined by the Presiding Member (or other Committee Member). Two examples of exceptional or compelling circumstances could be delays in receipt of pricing information beyond the grower's control and a grower's illness.

Information on the dispute resolution process: The Buck Review recommended that a simple one page flow chart of how the dispute resolution process works should be produced.¹⁵ The Code website already contains two documents outlining step by

¹² See page 7 of the 2009 Annual Report and page 9 of the 2009-2010 Annual Report

¹³ See page 8 of the 2009 Annual Report and page 10 of the 2009-2010 Annual Report

¹⁴ Recommendation 8

¹⁵ See recommendations 6 and 8

step the process for disputes over winegrape prices and disputes over downgrades and rejections in the vineyard. The Committee has amended these so that together with a flow chart prepared by the WGGA they can be provided to growers and also in a “starter pack” for new signatories.

NSW LEGISLATIVE COUNCIL STANDING COMMITTEE ON STATE DEVELOPMENT

On 5 August 2010 the Hon Steve Whan, the NSW Minister for Primary Industries, referred the matter of the **Wine Grape Market and Prices** to this Committee. The Code Administration Committee made a written submission to the Standing Committee on 21 October 2010 and the Standing Committee reported on 3 December 2010. Both documents are on the Standing Committee’s website.¹⁶

The purpose of the Code Administration Committee’s submission was to provide information on the Code and the role it might play in addressing the issues which were the subject of the inquiry.

Among the Standing Committee’s recommendations are ones on

- Indicative price listing
- Standard terms of payment for winegrapes
- The role of the Wine Grapes Marketing Board
- The introduction of a mandatory code of conduct including effective penalties for breaches
- A review of the effectiveness of the dispute resolution process under any mandatory code after twelve months
- Investigation of the utility of an independent dispute resolution body to monitor complaints if the Wine Industry Code of Conduct remains voluntary.

UPTAKE OF THE CODE

The Code commenced operation on 1 January 2009 and has now been operating for some 30 months. It has only attracted seven Signatories representing an estimated 31% of the total crush. One new Signatory joined the Code this year. There have been six disputes under Part 3 of the Code and one complaint under Part 4. Three of the disputes purporting to come under Part 3 were not covered by the Code as they were either out of time or the respondent was not a Signatory.

Performance targets under the Code are set as follows

Performance will be measured by the total numbers of Signatories, and the percentage of the national annual winegrape harvest purchased by those Signatories. The percentage-of-crush performance targets are:

¹⁶ <http://www.parliament.nsw.gov.au/statedevelopment>

- 75% of the purchased crush in first vintage after implementation
- 85% of the purchased crush in the second vintage after implementation¹⁷

Following the Buck Review the Code Management Committee has recommended that these targets be reviewed and replaced with certain percentages of the top 100 producers at the end of the 2012 and 2013 vintages.

Even though it is still relatively early in the life of the Code and one would expect that it would take some time for the Code to be accepted, the Committee remains very concerned at the low uptake by winemakers and the apparent ignorance or fear of using it among growers.

It is clear from the Legislative Council Standing Committee Report that relationships between many growers and winemakers are stretched. Indeed it is itself of significance that of the 53 persons or organisations making submissions to this inquiry 25 had their names suppressed and 6 submissions were confidential. Individual grape growers requested the Standing Committee that they be able to provide oral evidence *in camera*.¹⁸

The Code was launched in December 2008 following endorsement by the Boards of both the WFA and the WGGGA. The Code's operation relies on winemakers becoming signatories. It is somewhat incongruous that many of the winemakers who have representatives on the WFA Board are still not Signatories. Furthermore the Committee was advised in January 2011 that a survey by the WFA of medium sized non-signatory companies indicated that although they were aware of the Code there was unlikely to be an increase in the uptake of the Code in its present form. Nevertheless Signatories apparently were still very supportive of the Code.

The Buck Review recommended that if there were not a significant increase in uptake by the end of the 2012 season, the Committee should resign and advise the stakeholders and the Government that a voluntary code does not work in this sector.¹⁹

As noted in the 2009-2010 Annual Report the Committee has offered to assist the industry organisations in increasing awareness of the Code and has prepared and distributed a short article **A New Way to Do Business** to promote the Code.²⁰ The Presiding Member of the Committee, Bert Mowbray, met informally with Mr Lawrie Stanford, Executive Director of the WGGGA, on 16 March 2011 and Mr Andrew Wilsmore, General Manager, Policy and Government Affairs, of the WFA on 23 March 2011 to discuss the future of the Code and how the Committee might be able to assist particularly in its promotion. These organisations however do not see any immediate role for the Committee in promoting the Code.

Mr Mowbray also met with representatives of the ACCC to determine ways in which the ACCC might provide guidance and assistance in the Code's development and implementation. They advised that due to resource restraints the ACCC's focus was now on mandatory codes not voluntary ones, and that they no longer participate as a

¹⁷ See Part 1 page 9 of the Code

¹⁸ See pages 1 and 71-72 of the Standing Committee's Report

¹⁹ Recommendation 3

²⁰ Page 9 of the 2009-2010 Annual Report

member on industry code committees. Nevertheless the ACCC was willing to assist with advice, guidance and ideas. This information was passed to the WFA and WGGA suggesting that they make contact with the ACCC.

RESPONSE TO PREVIOUS RECOMMENDATION

Inconsistency between the Code and Winegrape Purchase Agreements

In previous years as well as in last year's Annual Report²¹ the Committee has expressed its concern over ambiguity in the Code when the Code and a winegrape purchase agreement are in conflict, in particular about limitations imposed on independent experts. The Committee is concerned that any determination made by an independent expert runs the risk of being meaningless unless they are permitted unfettered discretion under the Code. The Code Management Committee has accepted that there is some confusion on this in the Code and has recommended that this be clarified.

ACKNOWLEDGEMENTS

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

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

30 September 2011

²¹ Page 9 of the 2009-2010 Annual Report

ADDENDUM

On 16 August 2011, after this Annual Report had been drafted, the Presiding Member was informed by Mr Lawrie Stanford, the Executive Director of Wine Grape Growers Australia, by telephone that the Committee was to be dissolved because of the costs of the Code relative to the number of disputes. Mr Stanford further explained the reasons for this decision during a Skype conference call with the Committee at its scheduled meeting on 17 August 2011. The decision was formally conveyed by a letter dated 5 September 2011 which included the following

It is with regret that we write to inform you that due to a decision to dissolve the Code Administration Committee, your membership of this committee will not be renewed when the current tenure expires on 30 September 2011.

The Code Management Committee (CMC) has been obliged to examine the costs associated with the Code considering the low uptake and low number of disputes. The WGGGA and WFA Boards have approved a recommendation by the CMC that most aspects of the administration of the Code will be overseen by the CMC and a firm, like the Accord Group, will administer the dispute resolution process at 'arms-length' from the industry.

This Addendum therefore reports on the Committee's activities from 1 July 2011 until 30 September 2011.

During this period the Committee met by Skype conferencing call on two occasions – 20 July 2011 and 17 August 2011. Matters considered by the Committee included

- Finalisation of a document on the dispute resolution process, prepared following a recommendation from the Buck Review
- Finalisation of a flow chart on the dispute resolution process to accompany this document
- A Committee recommendation to the CMC and the Boards providing a form of words for an amendment to the Code on extending time limits in compelling circumstances²²
- The decision of the Boards to dissolve the Committee
- The draft Annual Report for 2010-2011.

During this short period there have been no disputes nor any complaints of breaches notified to the Committee.

While understanding the reasons for the decision to dissolve the Committee, it is regrettable that it has had to be made. The Committee is extremely disappointed that the Code has not attracted the support it deserves.

30 September 2011

²² See page 9 of this Annual Report