Winegrowers Legal Guide

MAY 2012

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BELL GULLY

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1 INTRODUCTION

New Zealand wines occupy a premium position in the international market. Decades of investment, planning, hard work, and foresight have resulted in the international recognition of the calibre of New Zealand wines.

Consolidating the market position of the New Zealand wine brand in the overseas market and retaining the strength of the domestic production base and market will lead to further institutional changes to the structure and size of the country's wine industry.

The accolades awarded to New Zealand wines are testament to the commitment to quality which has underpinned the development of the industry. Bell Gully has the same objective: providing the highest quality assistance to our clients in relation to the legal and commercial aspects of the wine industry.

The Firm has advised the Wine Institute on all legal matters and the development and drafting of all legislative matters since its inception in 1974, including the Winemakers Levy Act 1976, the Winemakers Act 1981, the Sale of Liquor Act 1989, the Geographical Indications (Wine and Spirits) Registration Act 2006 and the Wine Act 2003. We value our long-term relationship with the Wine Institute and New Zealand Winegrowers. Our Senior Partner, David McGregor, continues as the honorary solicitor to New Zealand Winegrowers.

Building on this relationship, this guide has been designed as a reference tool for all participants in the industry: grape growers, winemakers, suppliers, distributors and other stakeholders. It provides a useful reference to the most important of the extensive range of legislative and regulatory requirements that need to be considered in establishing your winery or vineyard or selling and distributing your product. This will enable you to identify potential issues in the following areas:

- Establishment and Development: What property, planning and employment issues should you be aware of in setting up a winery or vineyard? What is the impact of the hazardous substances and new organisms legislation?
- Wine Act 2003: What regulatory framework does the Wine Act put in place?
- Production of Wine: What contractual, manufacture and management issues should be considered? What are the legislative requirements for labelling and packaging?
- Distribution: What issues should form the basis of a distribution agreement? With which advertising codes should you comply? How can wine be used for promotional purposes?
- Sales: What licences must be obtained? How does consumer protection law affect your operation? What are the insurance issues of which you should be aware?
- Intellectual Property: What are the legal aspects of branding?

- International Requirements: What are the current market access initiatives? What are the requirements for exports?
- Excise and Taxation: What are the key excise duty and taxation issues for the wine industry?
- Succession Planning and Business Growth: What issues should be considered when selling the business or passing it on to the next generation? What are the options for raising capital?

The legislative and regulatory framework within which the wine industry operates is dynamic in nature. This dynamism necessitates periodic review. This edition of the "Winegrowers' Legal Guide" incorporates changes to the relevant legislation and other sources of regulation up to April 2012.

2 INDUSTRY STRUCTURE: NEW ZEALAND WINEGROWERS

In March 2002, New Zealand Winegrowers was established, following an agreement in principle between the Wine Institute of New Zealand Incorporated (Wine Institute) and the New Zealand Grape Growers Council Incorporated (Grape Growers Council) that the creation of a unified industry organisation to represent, enhance and develop the collective interests of winemakers and grape growers in New Zealand was in the best interests of the industry.

The objectives of New Zealand Winegrowers (NZ Winegrowers) are to promote, represent and research the national and international interests of the New Zealand wine industry. A Board of Directors directs and co-ordinates the activities of NZ Winegrowers. There are 12 directors on the Board: seven voting members of the Wine Institute Board and five representatives of the Grape Growers Council as appointed by the Council Executive.

Existing legislation provides the Wine Institute and the Grape Growers Council with a means of obtaining funding through industry levies. The Wine Act 2003 and the Commodity Levies Act 1990 allow each organisation to impose levies on grape growers and wine producers. Under the Wine Act, the Wine Institute is also charged with the rights and liabilities of the trustee (as it existed under the Wine Levy Act 1976).

Sustainable Winegrowing New Zealand

Sustainable Winegrowing New Zealand (SWNZ) is an industry initiative directed through NZ Winegrowers. Developed to provide the framework for grape growers and wineries to develop and enhance practices that are socially, economically and environmentally sustainable, over 90% of winemaking capacity and vineyards are currently in sustainable production. The programme is intended to deliver the following benefits:

- A vehicle for technology transfer;
- A rigorous audit structure that has the integrity to comply with market expectations;
- A format of continual improvement to ensure companies operate with the constant goal of improving operational practices; and
- A framework of viticultural and winemaking practices that protect the environment whilst efficiently and economically producing premium grapes and wine.

The Wine Institute

Established in 1975 by and for New Zealand winemakers, the Wine Institute is an incorporated society established to promote, develop, research and serve the general advancement of New Zealand grape wine producers. The Institute is governed by a Board of Directors. The current composition of the board (as detailed in the new Rules of the Wine Institute) is as follows:

- Category I winemakers - two voting directors elected by members with annual grape wine sales of not more than 200,000 litres each;
- Category II winemakers - two voting directors elected by members with annual grape wine sales of not less than 200,000 litres and not more than 4,000,000 litres each;
- Category III winemakers - three voting directors elected by members elected by wineries with annual grape wine sales of more then 4,000,000 litres.

New Zealand Grape Growers Council

Established in 1968, by and for New Zealand Grape Growers, the Council represents all contract grape growers. The Council undertakes research and disseminates information to its members and is also an advocate for grape growers on national issues relevant to the industry.

The Council's activities are directed by a board of 10, elected by and from regional grower associations.

Funding

As indicated above, existing legislation provides the Grape Growers Council and the Wine Institute with a means of obtaining funding through industry levies. Under the Commodity Levies Act, organisations wishing to impose a compulsory levy on a commodity must first obtain a specific mandate from potential levy payers through a referendum. Both organisations hold referendum support for their respective commodity levies.

The commodity levy on grape wine is imposed by the Wine Institute in accordance with the Commodity Levies Act, but under the provisions of the Wine Act, support for the commodity at a referendum must meet 60%. The commodity levy over wine grapes, imposed by the Grape Growers Council, is governed solely by the Commodity Levies Act. The referendum threshold remains at 50%.

The current levy on wine grapes is instituted under the Commodities Levies (Wine grapes) Order 2010. It is imposed on the following terms:

- A levy is imposed on wine grapes grown in New Zealand for sale.[1]
- The levy is to be calculated on the basis of the value of wine grapes produced for sale.
- Growers are primarily responsible for the payment of the levy.[2]
- The levy is calculated on the basis of the value of wine grapes produced for sale. The value is either the farm-gate price (for grapes sold in New Zealand), the FOB value (for grapes exported from New Zealand), or the notional value (for grapes processed into grape juice or grape juice concentrate).
- The maximum levy rate is 1.5% of the farm-gate price, notional price or FOB value.
- The levy rate is set annually by the Grape Growers Council. The current levy rate has been set at 0.75% of the farm-gate price, notional price or FOB value.
- The order sets the time frame within which payment must to be made to the Council.
- The levy is spent on activities closely related to the interests of wine grape growers.
- The current levy on grape wine is instituted by the Wine (Grape Wine Levy) Order 2010 and imposed on the following terms:
  - The commodity levied is grape wine and the grape wine component of grape wine products.[3]
  - Wineries are primarily responsible for the payment of the levy.[4]
  - The levy is calculated on the basis of the volume, in litres, of grape wine sold in a levy year.
  - The maximum levy rate is 3.5 cents (plus GST) per litre of grape wine sold in New Zealand and overseas in a levy year.
  - Levy payments are due quarterly, with the exception of wineries making the minimum levy payment of $400 per year.

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[1] "Winegrapes" means grapes grown in New Zealand and intended to be used to make wine (whether directly or after the manufacture of grape juice or grape juice concentrate from them) or grape juice or grape juice concentrate.

[2] "Grower" means a person whose business is or includes the growing of winegrapes for sale or for the production of grape juice or grape juice concentrate for sale; and in relation to any grapes, means their grower at the time of harvest; and in relation to any grape juice or grape juice concentrate, means the grower of the grapes from which it was made.

[3] "Grape wine" means the product of the complete or partial fermentation of fresh grapes, or a mixture of that product and products derived solely from grapes. This definition is limited to grape wine made from wine grapes grown in New Zealand.

"Grape wine product" means a wine product in which the wine content is solely grape wine.

"Grape wine component" means the volume of grape wine contained in a grape wine product.

[4] "Winery" means a person whose business is, or includes the making and sale of grape wine or grape wine products, or the sale of grape wine or grape wine products that have been made on that person's behalf.

- The levy rate is set annually by the Board of the Wine Institute. The current levy rate is set at 2.5 cents (plus GST) per litre of grape wine sold in New Zealand and overseas in a levy year.
- The levy is spent on activities closely related to the interests of wineries.

3 ESTABLISHMENT AND DEVELOPMENT

When establishing or developing your vineyard or winery, there are numerous property law and planning issues to consider. These include good title and properly obtained and maintained consents or permits under the Building Act 2004 or the Resource Management Act 1991 as may be required. Planning issues in particular, are subject to change and it is important to monitor these changes to ensure that established operations continue to comply.

Employment issues should be considered when hiring permanent and casual staff and health and safety legislation requirements must be observed.

Finally, the use of pesticides and other hazardous goods, and the importation of plant material must be undertaken in accordance with the Hazardous Substances and New Organisms Act 1996.

3.1 Property Issues

Issue of Titles

The Land Transfer Act 1952 (LTA) sets out the processes for obtaining a new title or subdividing an existing one. Land must be surveyed and the boundaries clearly identified on a survey plan. The plan is then lodged with Land Information New Zealand (a national body which administers the LTA) and titles issued in accordance with the plan.

Registration

Once a title has been issued for the land, various encumbrances such as mortgages, easements and statutory encumbrances can be registered against the title. Registration involves the processing and recording of encumbrances. The form of encumbrances that can be registered are prescribed by statute, most commonly by the LTA or the Property Law Act 2007.

The LTA system of registering encumbrances on land means that the State can then guarantee titles issued under that system. Compensation is available for loss suffered as a result of reliance on a guaranteed title.

Landonline

Landonline is an electronic system which allows titles and interests registered against land to be stored as digital records in the Landonline computer system. This enables real time registration and efficient access to property information.

Encumbrances on the Land

The owner of land for which a separate certificate of title has been issued has the right of exclusive possession of the land, subject to any encumbrances noted on the certificate of title. Such encumbrances may include leases, easements, caveats, mortgages and statutory encumbrances.

An example of an encumbrance is a restrictive covenant. In the case of the wine industry, land use covenants have been used to regulate conflicts between vineyards and neighbouring residents. "No complaints" covenants ensure that neighbours understand the processes occurring on a vineyard and do not complain or enter into litigious or planning processes to restrict the lawfully conducted operation of the vineyard. However, a "no complaints" covenant has risks to the extent that it is only enforceable as a contract between the parties.

An example of a "no complaints" covenant is attached at the end of this document.

Easements

When a land owner grants a third party a right over that property which falls short of a grant of possession (in contrast to a lease or licence), then an easement in favour of that third party can be noted on the relevant certificate of title. Easements can be granted as positive or negative encumbrances on the land. A positive easement grants a third party a right to use the relevant land for a specific purpose, for example, a neighbour is entitled to use the driveway on the owner's land as a right of way to access their own property. A negative easement is one where the land owner is restricted from exercising a right over their land that they would otherwise be entitled to exercise, for example, a building restriction prohibiting the owner from erecting any building over a certain height. Once an easement is noted on the certificate of title, it stays with the land and will bind all future owners of the property.

Caveat

A caveat can be noted on a certificate of title by any person claiming to have a legal or beneficial interest in the relevant land. A caveat is essentially a notice to the world preventing any action being taken in respect of the land without the caveator's consent or a withdrawal of the caveat being provided.

Mortgage

A mortgage is a charge over the land to secure the land owner's obligations in a separate contract to repay certain monies. The mortgagee (usually a bank or other lending institution) has the ability to enter into possession of the land and sell it, upon default of the land owner under the loan contract.

In the case of a lease or licence being granted in respect of the property, or a profit a prendre (being a right to take something from the land, i.e. grapes) such a grant is only binding on the mortgagee to the extent that the grant has been consented to by the mortgagee (section 90E(3) & 119 Land Transfer Act 1952). If the mortgagee's consent is not obtained for the grant of the lease or profit, the grantee of the profit or lease runs the risk that the mortgagee may exercise its power of sale.

Where a mortgagee has consented to the grant of a lease or profit, that mortgagee may only exercise their rights and remedies if they are without prejudice to the lease or profit. There is an exception for residential tenancies where, regardless of mortgagee consent, the tenancy will continue after the mortgagee has entered into possession.

Statutory Encumbrances

A person's right of ownership may also be subject to statutory encumbrances which restrict the use of the land. For example, any minerals on the property are automatically reserved by the Crown. Local territorial authorities may also note interests in a certificate of title, including consent notices, which require that where activities are undertaken on the land, certain council requirements must be complied with. For example, a consent notice on a title may require that prior to the construction of any buildings on the property, a qualified engineer's report must be obtained and provided to the council.

3.2 Building Act 2004

The purpose of the Building Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings. The general purpose of the Act is to ensure that people who use buildings can do so safely without detriment to their health, physical independence and wellbeing. The Act also serves to ensure that buildings are designed, constructed and are able to be used in ways that promote sustainable development.

As part of the implementation of the Building Act, there was a complete review of the current Building Code. This was completed in 2008. The government subsequently agreed to a staged approach for implementing the recommended changes and the Department of Building and Housing has been progressively putting some of these changes into place in order of priority.

A "building" broadly means any temporary or permanent, moveable or immoveable structure, including structures that are intended for occupation by people, animals, machinery or chattels. The definition of "building" also includes any mechanical, electrical or other system, any fence, any vehicle or motor vehicle that is immoveable and is occupied on a permanent or long term basis, and may also include mast poles and telecommunication aerials. "Building work" includes sitework, and work for or in connection with the construction, alteration, demolition and removal of a building.

All building work must comply with the Building Code, regardless of whether a building consent is required for the building work. Compliance with the Code's minimum specified performance standard is sufficient to satisfy this requirement.

In most cases, it is an offence to carry out any building work, except in accordance with a building consent. An application for a building consent must be made to a Building Consent Authority (BCA).[5] The owner of a building must apply for a code compliance certificate as soon as practicable after the work specified in a building consent has been completed. The grant of a code compliance certificate is dependent on an inspection. A certificate will be issued where the BCA is satisfied that the work complies with consent. Unlike the Building Act 1991, the building consent itself is the key point of assessment, rather than the Building Code.

If buildings were constructed without consent, a certificate of acceptance under the Building Act enables territorial authorities[6] to certify these buildings. A certificate of acceptance states that, to the extent the territorial authority can ascertain, the work complies with the Building Code.

A compliance schedule is required for every building (that is not used as a single household unit) that contains specified systems, including automatic sprinklers, mechanical ventilation and emergency warning systems. On the anniversary of the issue of a compliance schedule, a building warrant of fitness (certifying that the requirements of the compliance schedule have been complied with during the previous 12 months) must be supplied to the territorial authority.

It is a condition of every building consent that an agent of the BCA may undertake inspections of buildings to ensure building work is being carried out in accordance with a building consent.

Relationship with the Resource Management Act

District plans under the Resource Management Act 1991 (RMA) determine whether a resource consent is required for a structure to be erected on a site. If land use consent is granted, the Building Act will determine how the structure is to be built. If a resource consent that will materially affect the building has not been granted, building cannot start until the resource consent has been obtained.

Under the RMA, regional and district councils can make rules for the protection of other property from the effects of surface water This means that additional or more restrictive performance criteria than those specified in the Building Code must be achieved.

[5] Building Consent Authorities are responsible for issuing building consents, code compliance certificates and notices to fix. The Act allows for territorial authorities, regional authorities, private companies and individuals to register as BCAs.

[6] A territorial authority is a city council or a district council..

3.3 Land Use and Planning Issues

Introduction

The RMA is the principal piece of environmental legislation in New Zealand, regulating the effects of activities on the land, air and water components of the environment. The RMA focuses on the effects of activities, rather than the activities themselves.

The rules regulating the use and development of natural and physical resources are contained in plans prepared by regional and district councils.

District councils are responsible for controlling the use of land (including subdivision), the control of emission of noise and the surface of the water in rivers and lakes.

Regional councils control the taking, use, damming and diversion of surface water, ground water and geothermal water; maintaining water quality and quantity; the discharge of contaminants to land, air and water; activities in the coastal marine area; and the effects of land use for soil conservation purposes (the control of earthworks).

Land within a district council's jurisdiction is often grouped into zones, for example, rural, residential or commercial zones. These zones are identified in the maps accompanying a district plan. Development standards are set for each zone, and may include a maximum building height, the minimum size of yards, controls on the appearance of buildings, maximum noise and a minimum standard of access.

Regional plans may also be accompanied by maps which identify matters such as aquifers, water management classes or air quality management areas. Rules in regional plans will set different resource consent requirements for the discharge of contaminants, for example, sprays, or the use of water (allocation), depending on the effects of the discharge or use of water.

In some districts and regions, there may be more than one plan in effect. In exceptional cases, plans prepared under the legislative predecessor to the RMA are still in effect while plans prepared under the RMA complete the full approval process (which may include litigation before the Environment Court). The practical effect of this is that more than one resource consent may be required for the same activity. One plan will be given more weight than another; this is determined by how far advanced any proposed plan is through the statutory process.

Once a proposed plan has been declared operative by the Environment Court, its provisions may be subject to change. Proposed plan changes are publicly notified and are open to submissions. Plans are reviewed regularly and the provisions of a newly proposed plan may give rise to new resource consent requirements.

The RMA and the wine industry

The wine industry presents unique challenges for resource use and management due to the number and variety of processes involved in the industry. This distinguishes viticulture from other productive agricultural activities. The operation of a vineyard and winery will combine primary production processes, industrial processing, marketing, commercial sales, distribution, and may also involve the operation of tasting and cellar door operations.

Some vineyards and wineries are supporting these primary activities with the establishment of ancillary operations such as cafes and restaurants, cooking schools, cheese factories and event venues. This adds a further layer of complexity when working with the resource management regulatory framework.

Resource Consents

If an activity undertaken on a property complies with the provisions of a regional plan or district plan (including all relevant development controls), the activity is permitted and can be undertaken as of right. Compliance with the provisions of a plan can be certified by requesting a Certificate of Compliance from the council. This confirms that the activity can be undertaken lawfully without a resource consent in respect of a particular location. A Certificate of Compliance is deemed to be a resource consent and is valid for five years (in other words, the activity must be commenced within that five year period).

If an activity is not permitted, a resource consent is required to authorise that activity. Activities that require resource consent are classified under the RMA into four different activity status categories:

- Controlled activities are allowed if a resource consent is obtained. A resource consent application for a controlled activity cannot be declined by the council if the relevant standards are met, but conditions can be imposed;
- Discretionary activities require a resource consent and the plan contains criteria to assist the council in deciding whether to grant or refuse resource consent. A discretionary activity can be "restricted" which means that the council will consider only a limited range of assessment criteria when making its decision;
- Non-complying activities are not provided for in the plan or contravene a rule in the plan. They are allowed only if a resource consent is granted. The legal threshold that must be satisfied before the consent can be granted is high; and
- Prohibited activities are those activities which are not allowed under any circumstances. No resource consent application can be lodged for a prohibited activity. However, a plan change request could be made.

An application for a resource consent must be in the form and manner prescribed in the RMA and must be accompanied by an Assessment of Environmental Effects. Obtaining professional advice on resource consent issues can be very useful to ensure that all necessary resource consents and issues arising have been identified, and that any appropriate expert information has been obtained to support an application and to assist in managing the application process. A comprehensive Assessment of Environmental Effects will assist in determining whether a proposal needs to be notified, and if so, whether limited notification (to those potentially adversely affected) is appropriate.

Resource Consents for Wineries and Vineyards

A winery and vineyard will require a number of consents. Consents must be exercised in accordance with the conditions attached.

- A land use consent will be required if the winery or vineyard is not permitted activities in the zone in which they are proposed to be located, or if the proposed activity does not comply with all relevant development controls.
- Possible conditions will include a limit on crush size, set hours of operation, landscaping requirements, limits on the number of bird scaring devices, or frost fans that may be employed and limiting sales of wine to that which is produced on site.
- A water permit will be required to take, use or divert water for viticultural or winemaking purposes.
- The conditions will specify a maximum take. Other conditions may include monitoring of the water resource, to be submitted to the regional council.
- A discharge permit is required to authorise the discharge of a contaminant into the air, water, into land or onto land in circumstances where the contaminant is likely to change the condition of that air, water or land. A "contaminant" is broadly defined in the RMA. Contaminants associated with the wine industry will include winery waste and agrichemical sprays.

It is not uncommon for licence agreements to be concluded for spraying winery waste water onto other land by self propelled irrigation systems.

Possible conditions will include a maximum authorised quantity of contaminants discharged, application rates, monitoring of soils or water where the contaminants are being discharged and a requirement to keep a complaints log and/or monitor any discharge.

The rules in a regional plan controlling the application of agrichemical sprays will determine whether a resource consent is required. The performance standards may include public notice of spraying activities, the preparation of spray plans and GROWSAFE certification.

Existing Use Rights

Longstanding activities that contravene a rule in a district plan may be allowed if the activity was lawfully established before the rule came into force, the effects of the activity are the same or similar in character, intensity and scale to those that existed prior to the rule coming into force and the activity has not been discontinued for a continuous period of more than 12 months. It should be noted, however, that there can be significant uncertainty involved in dealing with planning issues on the basis of existing use rights.

If a proposed change in the rules contained in a regional plan means an activity that was lawfully established or previously permitted now requires a resource consent, then that activity may continue after the changes are confirmed in an operative plan, as long as an application is made for a resource consent no later than six months after the plan becomes operative.

Environmental Issues for the Wine Industry

Noise

Vineyard operation, crop harvesting, frost fans and bird scaring devices create noise. Under the RMA, there is a general duty imposed on every occupier of land to ensure that the emission of noise does not exceed a reasonable level. Compliance with a rule in a district plan or reference to general standards does not necessarily ensure compliance with this duty.

The council can issue an abatement notice requiring vineyard owners to comply with the district plan and/or adopt the best practicable option to ensure the emission of noise does not exceed a reasonable level. The council can also issue an excessive noise direction requiring that the noise be immediately reduced to a reasonable level.

Bell Gully has previously assisted NZ Winegrowers and regional groups with negotiating acceptable standards for the use of and noise produced by bird scaring devices and more recently, frost fans in the Wairarapa and Hurunui districts. Now that these standards have been integrated into the plans, the issue is now ensuring compliance with the relevant rules and managing possible interface conflicts with rural residential lifestylers. Interface conflicts are discussed in more detail below in the “Reverse Sensitivity” section.

Water allocation

Water is required for all operations at a winery and vineyard: for crop requirements, for wash water in the winery and for use in any tastings or visitor facilities.

Viticulture is distinct from other horticultural practices, in that a significant amount of viticulture is now managed by deficit irrigation on soils with minimal water holding capacity. A saturated vineyard will usually only hold enough water for 2-3 days crop requirement, whereas soils for other crops can hold enough water for significantly longer periods. Dealing with competing requirements and the allocation of water in any period of shortfall is important to ensure that viticultural activities are not placed in a position of disproportionate risk.

Reverse sensitivity

The RMA presumes that land users may undertake any activity provided they do not generate adverse effects on the environment beyond the boundary of the land. In reality, some uses of land, including vineyards, generate effects beyond the farm gate that are not capable of being avoided, remedied or mitigated.

Vineyards are particularly susceptible to conflict between uses on adjoining properties. The romantic, idyllic imagery associated with the industry is a powerful marketing tool for prospective subdivision of rural land for rural residential lifestyle blocks. The reality of the working environment is often at odds with new residents' perceptions. Planning mechanisms such as "no complaints covenants" (see appendix for example), separation distances and buffer zones have been used to address this issue.

The importance of reserving productive land for primary production, and of using rules and zonings to assist in managing conflicts has been recognised and successfully implemented into many district plans which include wine regions. An example is the Te Mata Special Character Zone, which recognises the established viticultural activities and makes specific provision for the separation of viticulture and rural residential lifestyle.

The efficacy of these mechanisms as planning tools to obtain long term planning certainty for continued viticultural activity will depend on support and foresight from the relevant councils, as well as integrity in the planning processes for which they are responsible. The industry must also take a proactive stance to build on these platforms for future certainty and return of investment by being aware of and responding to resource consent applications or changes to planning provisions that could undermine the efficient operation or future growth of the industry.

For further information see the "Guide to Planning for the Wine Industry" (available at www.qualityplanning.co.nz.)

Enforcement and Penalties

The RMA provides three enforcement mechanisms to ensure compliance with its provisions, rules in an operative or proposed district or regional plan and resource consents. The possible sanctions are:

Enforcement orders

These are issued by the Environment Court upon application by a council or third party. An enforcement order may require the following:

- Any illegal activity or activity that may cause adverse environmental effects to cease.

- Remedial work to ensure compliance or to avoid, remedy or mitigate adverse environmental effects.
- Compensation.
- A resource consent be changed or cancelled.

Abatement notices

These are issued by a council, and may order the same work or action as an enforcement order, with the exception that an abatement notice cannot be used to change or cancel a resource consent.

Infringement Offences

Infringement notices are issued by a council for contravening an abatement notice or contravening a duty under the Act in relation to the use of air, land or water or the discharge of contaminants. An infringement offence will require the payment of an infringement fee.

Enforcement orders and abatement notices are used to stop activities which are likely to be noxious, dangerous, offensive or objectionable and have an adverse effect on the environment.

It is an offence under the RMA to use land or water or to discharge contaminants without a resource consent or to contravene an enforcement order, abatement notice or water shortage direction. Every person who commits an offence is liable upon conviction to imprisonment for a term not exceeding two years or a fine not exceeding $300,000. A person who is not a natural person (such as a company), may be liable for a fine not exceeding $600,000. If the offence is a continuing one, such as continuing to discharge winery waste without a resource consent, a person is liable to a further fine not exceeding $10,000 for every day during which the offence continues.

If the winery or vineyard company is convicted of an offence under the RMA, criminal proceedings may be issued against any director or manager who authorised, permitted or consented to the offence and who could reasonably be expected to know of the offence and failed to take all reasonable steps to prevent it.

4 GRAPE GROWING

Grape growing requires consideration of grape supply contracts, vineyard management contracts, employment issues and health and safety.

4.1 Grape Supply Contracts

A grape supply contract formalises an agreement between a grape grower and winery company, whereby the grape grower supplies grapes of an agreed standard and quality to a winery company in accordance with the winery's commercial requirements.

A grape supply contract is one of the most significant contractual arrangements for a grower and winery, because it represents the grower's source of income and the grapes are the raw material for the winery. Ensuring the grapes are of premium quality is vital to both parties.

This section sets out a list of terms commonly found in grape supply contracts and comments on those terms where relevant. This list is not a replacement for obtaining advice on specific grape supply contracts.

Recitals

The mutual expectations of the parties should be recorded. This can assist in the event that questions as to the intentions of the parties arise.

Parties

Include provisions as to whether the parties can assign their rights and obligations.

Supply

The agreement should record a description of the vineyard, a legal description and specify the vines from which grapes will be supplied (block reference, variety, clone, vine spacings and row numbers).

What undertakings has the grower given to the winery company? These will usually include an undertaking that the grapes supplied will be produced in accordance with good viticultural practice and in consultation with the company, will be substantially free from disease and totally free from contamination and from defects. It is now common that significant incentive for quality grapes is incorporated into the operative provisions of a contract relating to "supply".

Term

Is there an initial term during which the winery company will assess the grower's performance? Is there a renewal term? How much notice is required? There is no normative term. Some supply contracts are for long terms (20-30 years) others for relatively short terms (two to three years).

Harvest, delivery and weighing

This section of the contract should set out the protocols to be followed at harvest time once the winery company has nominated the date for harvest. There may be provision for the grower to advise the winery of the hectarage harvested for a consignment of grapes and what percentage the consignment represents in relation to all the vines specified in the contract.

Responsibility for co-ordinating pickers should be assigned.

Delivery must be made and the grapes must be accepted (subject to other terms of the agreement) at the place nominated by the winery company. The grower is normally liable for the costs of loading and delivery.

There may be provision for the winery to determine the time for, the quantity of, and the schedule of delivery of different varieties of grapes to be provided under the contract. The notice to be given should be considered, as should protocols for where climatic conditions are such that there is a possibility of the quality of the grapes deteriorating.

Separate contractual arrangements may be made for the winery to harvest and collect the grapes. If so, the impact on the monies paid to the grower should be considered.

Documentation relating to the weighing of the grapes should be determined.

Risk

The contract must specify when risk in the grapes passes from the grower to the winery. Is it when the trucks carrying the grapes exit the grower's property? Or when the winery has completed delivery inspection, weighing and confirms its acceptance of the grapes?

When does ownership in the grapes pass from one party to the other?

Rejection

Under what circumstances can the winery reject the grapes supplied?

Price

Price is often a matrix of a number of factors or a formula which is normally included as a schedule to the agreement.

Weight and tonnages

What happens if the grower produces more than the tonnages agreed in the contract? How is surplus tonnage to be dealt with in the context of the contract between the parties and does it affect the price?

Grape pricing categories

Are these fixed for the term of the agreement? Under what circumstances can grapes be upgraded to a higher pricing category?

Base price

Is there a base price per tonne of grapes? How is the price per tonne calculated? Is there a separate base price for each of the specified vines? Is there any provision for the adjustment of the base price? If so, under what circumstances?

Brix scale

How does the contract define the brix scale? What is the minimum acceptable brix scale?

Quality incentive

Is there to be provision for any quality incentives? How will an incentive be determined?

Crop reduction bonus

Is there to be provision for a bonus to compensate the grower for yield losses that result from vineyard practices requested by the company? If there is to be a bonus, how is it calculated in the price?

Payment

Is there provision for pre-payment? How is the pre-payment calculated?

How is the balance of payment to be rendered? Within what time periods following delivery of the grapes? What if payment is late?

What if there is a dispute over the price calculated?

Grape inspection and quality control

The agreement may make provision for the winery to request that the grower undertake specific practices in the vineyard. The grower must allow the winery access to the vineyard to assess the quality of the grapes and to assess the viticultural techniques and management practices.

The agreement must consider how quality is to be assessed and what should occur in the event of a dispute between the grower and the winery regarding the assessment of the quality. A quality threshold should be agreed which triggers an option to refuse grapes that do not meet the threshold.

Spray diaries must be kept and contingencies should be made in the event a spray diary is not kept.

Provision should also be made for the timing of a pre-harvest inspection and for communication protocols in the event of the actual or potential contamination of the grapes.

Warranties as to ownership

Has the grower given warranties as to the legal tenure of the land upon which the grapes are to be grown?

Additional plantings and replacement of vines or stocks

Does the planting of new vines affect the agreement? Is there provision for these to be incorporated into the grape supply contract?

Replacement of existing grape vines, root stock or varieties should be consequent upon the consent of the winery.

Sale of land

Does the winery company have the first right of refusal? What is the period within which the company must respond to the notice of the intention to sell? When is the grower free to sell the land to a third party in the absence of notice from the company?

If the land is sold, will the agreement remain in force through a deed of covenant? What option to terminate does the winery have in respect of the new purchaser?

Is there a special definition for what constitutes a "sale"?

Termination

On what grounds can the grower or winery terminate the supply agreement?

Confidentiality

Are the parties bound by confidentiality agreements? Under what circumstances can information be disclosed?

Force majeure

What happens if circumstances beyond the control of either party prevents them from fulfilling their obligations under the contract? What happens to any pre-payment made?

Warranties and indemnities

What warranties have been given by the grower in relation to the viticultural practices to be employed on the vineyard? What consultation will there be? What quality will the grapes be and how will they be delivered to the winery?

What are the consequences of breaching these warranties?

Dispute resolution

Historically disputes have been centred mainly around pricing. Some arrangements were held to constitute “price fixing”. The most current form of dispute resolution incorporated in most ordinary commercial contracts is mediation and/or arbitration. As some wine companies are now owned and operated by foreign interests the place of dispute resolution and its jurisdiction are important issues.

4.2 Vineyard Management Contracts

Vineyard management contracts are commonly entered into where the grower is an investor and/or not actively involved in grape growing.

They record the engagement of the management entity to manage the grower’s vineyard, employing best management practices to provide quality grapes at the lowest cost.

Vineyard management contracts are often linked to grape supply contracts so that they buyer of the grapes also provides management services.

Vineyard management agreements formalise into contractual form the relationship between the management entity and the grower. The grower wants to receive the best possible return from his or her crop and the management entity wants to deliver good quality grapes, either to the grower or the purchaser of the grapes under a grape supply contract.

Key Terms

Parties

Who are the parties? Are they free to assign their rights and obligations under the contract?

Application of the contract

Has the area of vineyards, the variety or varieties of grapes and the target cropping level and maximum quantity of grapes been identified?

Term

Is there a fixed term? How much notice is required for termination?

Quality

What are the quality objectives and quantity targets? Is there an obligation to consult with the grower, and if so, in what circumstances? What happens if the grapes do not meet the quality objectives? Is the management entity excluded from any liability?

Management services

What provision is made for agreeing on a management schedule? When is it to be agreed? What will it include? How much will it cost?

Management fees

What is the fee? When is it to be paid? What is the basis for the fee? If fees are not paid, is interest payable? If so, at what rate?

Plant and machinery

Who provides all the plant and equipment? Who supplies the fuel? How will the costs of the machinery and plant owned by the management entity be charged?

Termination payment

What is the arrangement in relation to payment of fees if the grower gives notice?

Disputes

What mechanisms are provided for dispute resolution? What if the parties cannot agree on a dispute resolution process?

4.3 Employment Issues

Employment Relations Act 2000

Employment relations in New Zealand are primarily governed by the Employment Relations Act 2000 (**ERA**), which requires employers and employees to act in good faith towards each other. This places obligations on the parties not to mislead or deceive each other, and to operate the employment relationship according to the core principle of trust and confidence.

The ERA requires that all employees not bound by a collective agreement have a written individual employment agreement, and that as a minimum the agreement includes:

- The names of the employee and employer concerned;
- A description of the work to be performed by the employee;
- An indication of where the employee is to perform the work;
- An indication of the arrangements relating to the times the employee has to work;
- The wages or salary payable to the employee;
- A plain language explanation of the services available for the resolution of employment relationship problems, including that an employee has 90 days to file any personal grievance.

Whilst the usual manner of employment is ongoing permanent employment, it is possible for employers to engage employees either on a casual or on a permanent basis for a fixed period of time. However, if this is an employer's intention, it is important that advice is sought prior to the offer of employment being made. This will ensure that the relationship will not be constructed as one of ongoing permanent employment.

Significant amendments to the ERA occurred in December 2004. The Employment Relations Amendment Act 2004 further defines the precise nature of the good faith obligation, promotes collective bargaining, protects the integrity of individual choice and promotes mediation over judicial intervention.

"Good faith" is wider in scope than the implied mutual obligations of trust and confidence. It requires parties to an employment agreement to be active and constructive in establishing and maintaining a productive employment relationship. "Good faith" requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide the employees affected access to information and an opportunity to comment. An employer can deny access to confidential information where there is good reason for maintaining confidentiality.

Labour used for vineyard operations, particularly contract labour, raises specific issues for growers with regard to immigration status, taxation and health and safety.

Recognised Seasonal Employer Work Policy

Particularly relevant to winegrowers is the New Zealand Government's Recognised Seasonal Employer (**RSE**) Work Policy. The RSE Work Policy is aimed at facilitating the temporary entry of overseas workers to plant, maintain, harvest and pack crops to meet times of labour shortage.

Bell Gully and NZ Winegrowers have produced "Seasonal Vineyard Workers: a practical guide to grape growers' legal obligations" which is available on the members section of NZ Winegrowers website *www.nzwine.com*. This guide includes more detailed information regarding the RSE Work Policy.

4.4 Health and Safety

Health and Safety in Employment Act 1992

The Health and Safety in Employment Act 1992 (the Act) requires employers to take all practicable steps to ensure the safety of employees while at work by providing and maintaining for employees a "safe working environment."

Similarly, the Act requires employers to take all practicable steps to ensure that no hazard arising from the workplace harms either employees or people who are in the vicinity of the workplace. The latter includes contractors, visitors, customers, people undertaking work experience and people who are in the area solely for the purpose of recreation and leisure. Work related stress is also considered a "harm" for the purposes of the Act.

The Act requires employers to put in place methods for identifying, managing and where possible, eliminating existing hazards and new hazards as they arise. Information must be supplied to employees about all identified hazards, what to do if an emergency arises, and where all necessary safety clothing etc. are kept. Employers must develop procedures for allowing employee participation in health and safety matters and for dealing with emergencies that may occur in the workplace. Similarly, accidents and near misses must be recorded in a register, and the Department of Labour must be notified of incidents of serious harm. Compliance manuals should be maintained and regular training in the processes of the manuals undertaken.

Compliance with the Act is monitored by Labour Department inspectors, who also provide information and education on improving workplace safety. Failure to comply with the provisions of this Act can result in the imposition of a fine of up to $500,000 or imprisonment for a term not exceeding two years.

Further information is available from the Department of Labour's website: *www.osh.govt.nz*.

4.5 Hazardous Substances and New Organisms

The Hazardous Substances and New Organisms Act 1996 (HSNO) is designed to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

New Organisms

An organism is defined to include any animal, fish, seed, plant or micro-organism. A "new organism" includes any plants, animal or micro-organism developed through genetic engineering and an organism belonging to a species that was not present in New Zealand immediately before 29 July 1998.

It is illegal to import, develop, field-test or release any new organism without an approval from the Environmental Protection Authority (EPA). Different forms of approval may be granted, with different controls, for different types of activities involving the new organism.

Importation of Plant Material

All plants and plant products are prohibited entry into New Zealand unless an import health standard has been issued in accordance with the Biosecurity Act 1993.

Regulating the importation of plant material is the responsibility of the Ministry of Agriculture and Forestry's Biosecurity Unit.

The importation into New Zealand of any plant or plant product (or other regulated article) that could carry an unwanted organism (regulated pest) must be covered by an Import Health Standard. Import health standards include the phytosanitary measures that must be implemented in the exporting country, during transit and during importation and quarantine in order to enable biosecurity clearance to be given.

Plants and plant products are grouped into commodity classes, including nursery stock and plant products. The import health standard for the commodity class will specify the current entry conditions for the commodity and whether any post entry quarantine is required. Generally speaking, an import permit is required from MAF Biosecurity to import plant and plant products. For specific assistance, there is a list of contacts on the MAF website (see *www.maf.govt.nz*). The New Zealand Grape Vine Improvement Group may also be of assistance.

Hazardous Substances

HSNO also controls the importation, manufacture, storage, transport, use and disposal of hazardous substances.

Regulations apply to substances such as:

- Natural gas, LPG, CNG, propane, odorant etc;
- Hydrocarbons, including specialist lubricants and oils;
- Process chemicals and catalysts;
- Biocides, herbicides and pesticides; and
- Paints and solvents.

Hazardous substances have one or more of the following properties:

- Explosive;
- Flammable;
- Able to oxidise (to accelerate a fire);
- Corrosive;
- Acute or chronically toxic;
- Eco-toxic, with or without bio-accumulation; or
- Can generate a hazardous substance on contact with air or water.

HSNO regulates hazardous substances on a "cradle to grave" basis – their import, manufacture, storage, labelling, transport, use and disposal. The HSNO Act places obligations on every person and/or organisation involved with the importation, manufacture, transportation, use, storage and disposal of hazardous substances.

Performance-based controls contained in regulations are the primary tool to manage possible adverse effects from hazardous substances. These controls relate to the intrinsic hazards of the substances (e.g. managing ignition sources for flammable substances or restricting workplace exposures to toxic substances), controls relating to the life cycle of the substance (e.g. packaging and identification requirements, tracking the movement of specified highly hazardous substances, disposal and emergency management) and controls relating to personnel qualifications.

Compliance with the controls is demonstrated by test certificates issued by EPA that certify the location and storage mechanisms and that personnel have the appropriate qualifications to deal with specified hazardous substances. Appropriately qualified personnel are referred to as "Approved Handlers". The applicable controls and required personnel qualifications depend on the type and quantity of hazardous substance involved.

The control of pesticides is of particular importance to the wine industry. Pesticides were transferred to the HSNO regime on 1 July 2004. Vertebrate poisons and fumigants were transferred on 1 November 2004. Lists of all transferred pesticides (including herbicides, insecticides, fungicides and molluscicides), vertebrate poisons and fumigants, with the classifications and controls that apply to each substance are available on the EPA website (*www.epa.govt.nz*).

Test certificates are now required for some hazardous substances, including pesticides, vertebrate poisons and fumigants. Other hazardous substances must be under the control of an Approved Handler and tracked. Tracking requires the location and movement of the substance to be recorded at every stage of its lifecycle.

Agrichemical Trespass

Agrichemical trespass occurs when agrichemicals travel off-target during application or use and affect others.

The two key pieces of legislation that deal most directly with management of agrichemical use to prevent agrichemical trespass, and to deal with the consequences should a trespass occur, are the RMA and HSNO.

The HSNO Act controls the use of agrichemicals and provides a suite of controls that will regulate the use of an agrichemical in an application area. The HSNO Act was designed to address some of the problems associated with agrichemical trespass. While the transfer of substances into the HSNO regime is largely complete, a small number of substances have yet to be transferred. Until the entire transfer process is complete, it will be difficult to assess how well the provisions of the HSNO Act will work in practice. Regional plans under the RMA will be the key to preventing agrichemical trespass in specific areas.

There are common law actions available to individuals who seek compensation for property damage. This would require proving a case of negligence and/or nuisance against the trespasser. There are significant difficulties in successfully prosecuting a case, particularly in relation to the level of proof which must be met.

For further information, please consult the NZW Spraydrift Protocol which is available on the NZ Winegrowers website, www.nzwine.com under Info Centre / Legal.

Compliance and Penalties

In relation to new organisms, it is an offence to develop, field test, import or release a new organism in contravention of HSNO, or to fail to comply with any controls imposed by any approval. In relation to hazardous substances, it is an offence to manufacture a hazardous substance, or to fail to comply with any controls specified in any regulations, or to fail to obtain a test certificate.

Every person who commits any of the above offences is liable to be fined up to $500,000 for each breach and up to $50,000 for every day that a person continues to be in breach. Imprisonment for a term of up to three months may also be imposed.

Failure to comply with any compliance order may result in a fine of up to $50,000 and $5,000 for every day during which the compliance order is breached.

New Zealand (Maximum Residue Levels of Agricultural Compounds) Food Standards 2010

These standards set maximum limits for the presence of residues of pesticides and other agricultural compounds in foods that are sold in New Zealand, including grapes and wine.

Growers producing grapes for wine intended for export must also follow the Export Wine Grape Spray Schedule published annually by New Zealand Winegrowers to assist with compliance in foreign markets.

5 THE WINE ACT 2003

The production of wine in New Zealand is subject to numerous legislative controls designed to protect consumers. The key pieces of legislation are the Wine Act 2003, the Food Act 1981 and the various regulations and notices issued under these Acts. These laws aim to protect consumers, both in terms of prevention of personal injury through unsafe product composition or unhygienic manufacture, and protection from misleading and deceptive information about a wine.

Winemakers should comply in all respects with the requirements for producing wine in New Zealand, but should also be aware that wine produced for export may be subject to additional international standards and controls.

6 PRODUCTION OF WINE

The Wine Act 2003 applies to all wine made for reward, trade or export.

The Wine Act replaced the Winemakers Act 1981 and the Winemakers Levy Act 1976 and incorporates food safety outcomes regulated under the Food Act 1981.

The Wine Act is intended to provide an integrated compliance regime for the production, labelling and export of wine. The objects of the Wine Act are as follows:

- To set standards for identity, truthfulness in labelling, and safety of wine;
- To minimise and manage risks to human health arising from the making of wine and ensuring compliance with wine standards;
- To facilitate the entry of wine into overseas markets by providing the controls and mechanisms needed to give and safeguard official assurances issued for the purpose of enabling entry into those markets;
- To enable the setting of export eligibility requirements to safeguard the reputation of New Zealand wine in overseas markets;
- To promote consultation with industry organisations on the regulation of the industry, as an aid to fostering efficiency and growth in the New Zealand wine industry;
- To enable levies to be imposed on winemakers for payment to entities representing their interests for the funding of industry-good activities.

The Ministry for Primary Industries (MPI) is the regulatory body responsible for implementing the provisions of the Wine Act.

The Wine Act provides for the creation of regulations and the issue of regulatory notices by the MPI to set out specific regulatory outcomes and detail on how those outcomes should be achieved by winemakers. The relevant supporting legislation is the Wine (Specifications) Notice 2006 and the Wine Regulations 2006 which provide further detail on the requirements in relation to wine making, labelling, Wine Standards Management Plans and record keeping. You can access this legislation via the MPI website.

Wine Standards Management Plans

Under the Wine Act, all commercial winemakers are required to operate under a registered Wine Standards Management Plan. That plan will have been put together by the winemaker and approved by an independent verifier. Wine Standards Management Plans are intended to implement mechanisms and protocols to cover all the winemaker's requirements for compliance with food safety, composition, and labelling in an integrated way that recognises the low risks inherent in wine production. Wine Standards Management Plans are intended to:

- Assist winemakers by providing a method of ensuring they comply with the requirements of the Act; and
- Enable demonstration of that compliance (as creation, registration and adherence to a Wine Standards Management Plan should result in almost all instances in compliance).

The emphasis of Wine Standards Management Plans is on active compliance. Each Wine Standards Management Plan should set out the substantive matters required to ensure compliance with the Act, and any standards or regulations and should also describe the steps the business operator in respect of whom the plan is registered will take to confirm the plan is working effectively. The efficacy of the measures implemented in each Wine Standards Management Plan will be subject to an annual verification.

New Zealand Winegrowers have developed a template wine safety management plan that has been approved by MPI and can be adapted to apply to wineries of any size. The New Zealand Winegrowers Wine Standards Management Plan Code of Practice (the Code of Practice) has been in use since the Wine Act was implemented on 1 December 2008 and outlines procedures and practices to aid compliance with the legal requirements for all wine produced, blended, finished or bottled in New Zealand. From 1 December 2011 all operators with registered wine standards management plans are required to follow Version 2 of the Code of Practice. It is recommended that exempt small winemakers also follow the Code of Practice as a way of meeting the requirements under the Wine Act. A copy of the code is available on the New Zealand Winegrowers website (www.nzwine.com) under ‘Legal’.

Export requirements under the Wine Act are discussed in Section 10.

Enforcement

The Wine Act has a range of enforcement provisions that can be adopted according to the circumstances of a particular non-compliance situation. These range from a direction to comply with the Wine Act issued by MPI, to the suspension of a Wine

Standards Management Plan (and thus suspension of the ability to make or export wine).

The Act enables the appointment of wine officers with broad powers of entry, in order to determine whether any person or any wine is in compliance with the provisions of the Wine Act or any other legal requirements.

A wine officer may examine documents and containers, take samples and remove documents for copying. Subject to consultation (where practicable), a wine officer may interrupt any operations involved in making or exporting wine. The obstruction of a wine officer in the performance of their duties is an offence punishable by a fine of up to $50,000 for an individual or up to $250,000 for a company.

The Act also empowers the Director-General of the MPI to recall wine for examination, reclassification or disposal where the wine is not fit for its intended purpose or is mislabelled or incorrectly identified.

Operations authorised under a Wine Standards Management Plan may be suspended if wine does not comply with the Act's requirements or the plan is proving ineffective. Repeated suspensions may lead to the deregistration of a Wine Standards Management Plan.

Penalties

The Act's compliance regimes include monetary disincentives for failure to comply with the Act, any regulations or a condition or notice (for example, fines of up to $20,000 for an individual or up to $100,000 for a company).

Where a body corporate is convicted of an offence under the Act, every director and manager will also be found guilty if it is proved that the act or omission took place with the authority or consent of the person, or the person knew the offence had or was to be committed and failed to take all reasonable steps to prevent it.

The Act specifies specific penalties for offences involving deception, the export of wine that does not comply with export eligibility requirements, the sale of non-complying wine, and the endangerment of human health.

Further Information

The MPI food safety website (*www.foodsafety.govt.nz*) provides further information on the implementation of the Wine Act.

6.1 Composition of Wine

There are legislative controls over the composition of wine for sale in New Zealand and for export. Local requirements prescribing the permitted composition of wine, with particular focus on the use of processing aids and additives in wine making and the permitted residual levels of such chemicals, are primarily contained in the Australia New Zealand Food Standards Code, and to a lesser extent in the Food (Safety) Regulations 2002 and the New Zealand (Maximum Residue Levels of Agricultural Compounds) Food Standards 2005.

In addition to specific local requirements, winemakers should familiarise themselves with the relevant international standards and accords governing the composition of wine for sale in foreign jurisdictions.

Members of New Zealand Winegrowers can access further information in the New Zealand Winegrowers International Winemaking Practices Guide available in the members section of their website.

6.2 Labelling and Packaging

There are legislative controls over the labelling and packaging of wine for sale in New Zealand and for export. Requirements for labelling cover the quantity and integrity of information provided to consumers prior to purchase, and are primarily designed to promote informed consumer choice and to prevent misleading and deceptive conduct.

Labelling requirements for wine are found in the Australia New Zealand Food Standards Code, the Food (Safety) Regulations 2002 and the Wine Act 2003. Winemakers should also ensure that all wine labels adhere to the broad prohibition against misleading and deceptive conduct under the Fair Trading Act 1986 (fair trading legislation is discussed further in Section 8).

Australia New Zealand Food Standards Code

Until December 2002, the labelling of wine in New Zealand was controlled by the Food Regulations 1984. In December 2002, the Australia New Zealand Food Standards Code was adopted and now controls the labelling of all food products (including wine) in New Zealand (and, to a certain extent, in Australia as well).

The following Standards govern the production of wine in particular:

- Standard 2.7.1 – Labelling of alcoholic beverages and food containing alcohol – provides general labelling requirements for alcoholic beverages and food containing alcohol;
- Standard 2.7.3 – Fruit Wine and Vegetable Wine – defines the terms fruit wine and vegetable wine, mead and associated products and sets out compositional requirements for those products; and
- Standard 2.7.4 – Wine and Wine Product – sets out general definitions for wine and wine product and provides permission for the addition of certain foods during the production of wine.

Members of NZ Winegrowers should consult the latest version of the NZW International Labelling Guide for detailed information on domestic and international labelling requirements.

6.3 Geographical Indications (Wine and Spirits) Registration Act 2006

A geographical indication (GI) denotes that a wine or spirit comes from a specific geographical origin and possesses a particular quality, reputation or other characteristic that arises from that place of origin.

The Geographical Indications (Wine and Spirits) Registration Act replaces the Geographical Indications Act which was passed in 1994 following the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but has not been brought into effect.

7 DISTRIBUTION

The advertisement and promotion of wine are important steps in the overall process of distribution. These two factors alone have significant impact on the economic success of a brand or vintage of wine.

In order to secure the successful distribution of wine, winemakers should have contractual arrangements to ensure that each brand and label of wine is placed in the hands of the right sellers and under favourable terms.

The climate of responsibility and moderation in the consumption of alcohol extends to the advertisement and promotion of wine and any publicity attaching to wine should be generated with those overarching principles in mind.

7.1 Distribution Agreements

The distribution agreement and the grape supply contract are the two most critical contractual arrangements for grape growers and wineries.

This section uses a checklist of clause headings to provide a practical perspective on common issues that arise under each area.

However, you should always seek specific advice on each and every agreement to ensure that the terms of the agreement are consistent with the law on distribution agreements and comply with the legislation and regulations of any overseas export destination.

Type of agreement

Business people often consider the distinction between an agency or distribution agreement to be academic. Indeed, the term "distributor" is frequently applied indiscriminately both to agents and distributors. In law, however, the distinction is crucial.

An agent is a person or company who sells goods belonging to his or her principal in return for a commission.

A distributor, by contrast, is an independent person or company who purchases goods as principal in his or her own right for resale. The distributor's profit is derived from the "return" made from the sale.

Whether such goods are or are not on consignment often blurs this distinction.

For this discussion, the definition of a distribution agreement from *Porter v Customs and Excise Commissions* [1985] STC 45, CA has been adopted:

> "Distributors differ from Agents in an important respect: the Distributor buys on his own behalf and resells on his own behalf. No contractual bond is established between the third party buying the goods from the

> Distributor and the Principal (wine producer). The Distributor accordingly bears the risk of slow moving inventory which has been purchased from the Principal (wine producer)."

Matters to consider

Parties

- Are they free to assign rights and obligations?
- Are they related, for example, a subsidiary of a parent company?
- Where are they situated? Define the territory.
- Is the distributor an independent trader in his or her own right?
- Can they be defined unambiguously?
- Do they require sales training, specialised marketing or specialised brand protection?

Recitals

Effective date of distribution agreement

Despite the date of the agreement, the distribution is often prescribed for a 12-month period starting from the "effective date" or any anniversary. The "effective date" should be non vintage for the reason that vagaries of vintages are able to be considered in the context of producers' capacity to supply.

General appointment

The principal clause of the agreement is the general appointment. It is important to determine the basis of this, whether or not it is exclusive and to spell out any other qualifications that may exist. This is particularly true if you are changing distributors, in which case specific transition provisions are required.

The appointment can also be as agent in respect of the sale of products to key accounts or to regional trade accounts already established.

Competing brands represented by the distributor should be limited, especially those from the same region or with a similar product range. If you are giving the distributor rights to exclusive distribution, you will want equivalent exclusivity in return – and try to avoid distributors who have too many brands.

Related to the general appointment are the definition of territory, the obligation by the producer to communicate to the distributor any potential on-trade business opportunities for the products within the territory, and the covenant that the producer will not authorise others to sell the products to on-trade customers in the defined territory.

You should also consider whether new products will be included automatically in the distribution agreement.

Target sales/Operating plans

Target sales should be set to increase current levels and to be in line with achievable production capability and quality standards. The distributor should report actual sales and location of sales regularly. Retail customers will often ask the winery where its wines can be bought and this information is of interest and benefit to both parties.

Pricing

The distributor purchases from the producer for an agreed margin on the wholesale price. A producer may wish to increase profitability by raising prices – if the market will tolerate it. This will have to be negotiated and a mechanism for price increases should be contained in the agreement.

Payment

Payment terms should be as short as possible. Fewer than 60 days is terrific, 60 days is normal and to be expected, while 90 days should be tolerated only if you know you will get paid!

If goods are supplied to the distributor on credit, a Romalpa (retention of title) clause should be used to allow goods to be tracked in the event that the distributor's business gets into trouble. If so, consider inserting the retention of title provision.

Promotions

Promotional budget contributions by the producer are to be expected but politely minimised. Realistically, expect to set aside an amount equal to 5% of the wholesale price. This sum will form part of the producer's joint marketing plan with the distributor.

A balance needs to be struck here. If the producer wants the distributor to build rather than just maintain the brand, then the producer must expect to fund that asset creation at least in part. The producer will require the distributor to account for such expenditure.

Territory

- Can it be defined unambiguously?
- Is it within the EU?
- Can the principal
  - Sell direct? or
  - Appoint other distributors?
- Can the distributor respond to orders from outside the territory?

- Are there any specific governmental regulatory consents needed for the distributor to carry on the business in any part of the territory?
- Are the distributor's promotional/advertising activities being co-ordinated with the principal's activities in other territories?
- Is it important the distributor should maintain particular sales locations within the territory?

The definition of the territory needs to be specific. It is often prescribed by schedule and often requires innovative drafting.

Definition of the territory is perhaps an appropriate place to discuss the requirement to obtain advice on trade practice issues in every jurisdiction. An historic example is the European Union (EU).

In a Commission notice issued on 24 December 1962, the European Commission said that an agreement between a principal and its agent was not one which fell within the ambit of Article 85(1) of the Treaty of Rome. As a result, producers entering into exclusive distributions effectively needed to obtain consent as this was a trade practice that was not condoned by the EU.

After many years of debate, the European Commission adopted new Regulation No. 2790/1999 (now amended by Regulation No. 772/2010) on vertical agreements. It comprises a set of rules which apply throughout the whole European Union and European Economic Community, which state what clauses may be agreed in distribution agreements, and all contracts used by those operating a selective distribution network in the EU. (The supremacy of this provision must be checked before it is relied upon).

Many distribution agreements contain commercial restrictions. There is a grave risk that those restrictions will be void, which means they cannot be enforced in court often because they breach EU competition or anti-trust law. Even worse, anyone agreeing to them can be fined up to 10% of world-wide group turnover for breach of Article 81 (ex 85) of the Treaty of Rome.

Term

- Fixed term?
- Renewal intervals?
- Fee?
- Indefinite, subject to (how much notice)?
- Dependent upon performance?

The duration or term of distribution agreements for wine seems to vary. A normal timeframe would be for a term of three years with a renewal term of a further period of three years.

From a distributor's point of view, the lead time for such things as restaurant lists, availability of stock, etc is such that, inevitably they will be looking for a longer rather than a shorter period.

Continuity of supply

Supply issues can present challenges. Apart from seasonal matters – which should be excused (force majeure) – the producer must also try to retain a reasonable amount of discretion to allocate his product amongst his various markets.

A producer will often have a star product line in his portfolio and other perhaps new or slower moving lines. Invariably, the star product will be in short supply, will sell easily and give high profit margins. Slower moving lines will be the opposite.

Their distributors will want the star product and more of it, and the producer needs to use it as a draw card or reward for those that service the full portfolio.

Quality issues

A range of issues around quality may be relevant:

- Expect that a distributor will want to return any goods that are faulty – even if it is just the packaging that is faulty – and, in particular, wine that may be corked.
- Maintaining quality from vintage to vintage may be another issue for the distributor. Query how this can be adequately addressed. A suggestion that might be used is to find another producer and/or wine with similar regional/price/quality criteria to the producer's wines and set this as an indicative benchmark. However, there are obvious limitations as to how far such a comparison could be utilised.
- A producer will be concerned that the distributor and their customers look after the stock correctly, as they will be aware of the negative effects on wine quality of poor storage conditions. This is particularly relevant where wine must travel over long distances or is returned to the producer (e.g. upon termination). One bad bottle of a producer's wine opened by a consumer can damage the producer's reputation.

Intellectual property

- Does the producer own patents, trademarks, registered designs or other intellectual property rights in the territory?

If the producer has not registered his or her trademark, the distributor, since he is the person selling the goods in the territory under the trademark, may be able to acquire rights in the trademark, either under the general law, or by registration, to the detriment of the producer. Thus, it is important to ensure that the intellectual property of the producer is acknowledged and retained, while being made available to the distributor for use during the term of the agreement. It should be maintained and returned to the producer intact.

Assignment

Personal relationships are of great importance in the wine industry. A producer should not allow a change in control of a distributor or an assignment of the distributor's interest in a distribution agreement without the consent of the producer.

Termination

Rights of termination should be made available to the producer if:

- There is a breach of a material term of the agreement, which, if capable of remedy, is not remedied within a reasonable time;
- The distributor fails to meet targets over a certain period or by a certain margin; or
- For other reasons that either specifically or generally breach the agreement.

Any right for the producer to terminate early is likely to risk a claim for compensation. In *Lonsdale v Howard & Hallam Ltd*, the House of Lords considered the right to compensation with the termination of a distribution agreement. The Court held that any compensation should exclude or discount any goodwill that the agent retains for himself by taking customers from the principal and sourcing products for them from elsewhere. The decision reflects the necessity for distribution agreements to include express provision for the calculation of goodwill in the circumstances of the termination of the agreement. The agreement should also explain how the relationship will be unwound following termination. It is important that this covers how unsold stock will be dealt with, intellectual property returned and customers serviced (again, the list of customers is important here).

Unsold stock can be an issue. The distributor is generally in a position to manipulate circumstances in their favour by holding stock that is less than the value of unpaid invoices due to the producer. The distributor will seek to either return the stock to the producer or sell it on to the new distributor.

Miscellaneous

There are other matters that can be included, such as:

- Minimum stock holdings;
- Transport and risk;
- Dispute resolution;
- Confidentiality.

"Boilerplate" clauses will provide for these issues.

Oral or partly written agreements

Oral or partly written agreements present obvious dangers to both producer and distributor. An agreement that fails to address or fails to adequately address any of the issues listed above may catch either party out.

Often the term is missing from these agreements. Although failure to set a term may be perceived by either party to be a benefit, believing that they may terminate on short notice without compensation, this is not necessarily the case.

For a start, a court will imply that reasonable notice of termination be given. What is reasonable will then depend on the nature of the relationship between the parties, and one should not assume a three to six-month period will apply in all cases.

You should also not assume that no compensation will be payable. The courts will consider this as they would any other implied term and will consider matters such as business efficacy in coming to its decision.

Indemnity provisions

Indemnification for product and general liability is extensive. Normal provisions of notice and force majeure should be included.

The agreement should conclude with provisions for dispute resolution, and the normal legal provisions of severability, no waiver amendment, contractual privacy, entire agreement and assignment.

Applicable law

Applicable law should be in accordance with New Zealand law and be subject to the non-exclusive jurisdiction of the New Zealand Courts.

Dispute resolution

Dispute resolution should include alternative dispute resolution, compelling each party to use good faith to restore any disputes that may arise under the terms of the agreement.

If the dispute cannot be resolved within a reasonable time period, then a suggested mechanism is that either party shall have the right to invoke a special dispute resolution provision by presenting such a dispute in writing to a designated senior executive officer of the other party.

The designated senior executive officers must communicate promptly, with a view to resolving the disagreement within 60 days of the start of negotiations.

Any dispute or discord related to the agreement or performance under the agreement that cannot be resolved by mutual accord can probably be settled only by arbitration. Agreements with UK distributors are often subject to the rules of the International Chamber of Commerce. Such arbitration may be conducted in the

United Kingdom if initiated by the producer and in New Zealand if initiated by the distributor.

Protection of the principal

- Are particular rights to be reserved?
- Are the standard terms to be incorporated in the distributor's sales?
- Is compensation to be payable on termination?
- Are there secrecy obligations upon distributor’s part?
- Is a separate bank account to be maintained?
- Does the principal have the right to inspect the distributor’s books and premises?
- Does the distributor grant back improvements in the products?
- Does the principal retain title over unsold goods in the distributor’s possession?
- Is the distributor restricted from dealing in competing products?
- Can the distributor appoint sub-distributors?

This check list normally enables a determination of the form of agreement required for the appointment of an exclusive or non-exclusive distributor.

7.2 Advertising

The advertising of wine, as with advertisements for any type of alcohol, should be approached with particular attention to the current climate of responsibility and moderation in the consumption and enjoyment of alcohol.

There are numerous codes of practice (both voluntary and compulsory) to which advertisers should adhere prior to the publication of any advertisement. In addition, the broad overarching provisions of the Fair Trading Act should be considered prior to the approval of any advertising copy.

Codes of Broadcasting Practice for Radio and Television

The Broadcasting Standards Authority is a crown entity set up by the Broadcasting Act 1989, whose purpose is to encourage broadcasters to develop and maintain programme standards which respect human dignity, reflect current social values and acknowledge research findings, while providing a process for the consideration of complaints from the public about broadcasting standards.

While the Broadcasting Standards Authority does not handle complaints about advertisements per se, provision is made for public complaints to the Advertising Standards Authority about the nature of alcohol advertising.

Although the Broadcasting Standards Authority does not currently receive consumer complaints regarding advertising, the following programme standards relate to the advertising of alcohol and should be adhered to:

1) Saturation of liquor promotions, separately or in combination, must be avoided.
2) Broadcasters will not broadcast trailers for programmes sponsored by liquor advertisers which:
   a) Employ aggressive themes; or
   b) Portray competitive behaviour or masculine images in an overly dramatic manner.
3) Broadcasters will ensure that the incidental promotion of liquor is minimised.
4) Broadcasters will ensure that backdrops and props for studio programmes do not carry liquor promotions.
5) Broadcasters - including announcers, programme hosts and commentators - will not make ad lib comments which refer directly or indirectly to the use of consumption of liquor in any way prohibited by the Advertising Standards Authority's Code for Advertising Liquor.

Code for Advertising Liquor

Liquor advertisements (including on radio, television, the internet and in print) are also subject to the Advertising Standards Authority's Code for Advertising Liquor.

A "liquor advertisement" is any advertisement, by whatever means it is disseminated, that promotes liquor by product, brand or outlet, but does not include a sponsorship advertisement or an advertisement in which reference to or the depiction of liquor or liquor packaging or a liquor outlet is incidental to its purpose.

The Code for Advertising Liquor is designed to ensure that liquor advertising is conducted in a manner which neither conflicts with nor detracts from the need for responsibility and moderation in liquor merchandising and consumption, and which does not encourage consumption by minors. The Code prohibits televising of liquor advertisements between 6.00am and 8.30pm.

In addition, the following Principles and Guidelines of the Code for Advertising Liquor are of note:

1) Liquor advertisements shall not emphasise a product's alcoholic strength, except where the product is a light (or lite) alcohol product.
2) No product shall be advertised that does not comply with certain listed requirements of the National Guidelines on the Naming, Packaging and Merchandising of Alcoholic Beverages, published by the Alcohol Advisory Council of New Zealand (June 2000).

3) Liquor advertisements shall not offer motor vehicles or boats as prizes in any competition.
4) Liquor advertisements shall be directed to adult audiences. Liquor advertisements shall not be directed at minors nor have strong or evident appeal to minors in particular. By way of example, in late 2005 the Advertising Standards Complaints Board ruled in response to a consumer complaint that a billboard featuring graffiti-style graphics to advertise an alcoholic beverage was in breach of this principle of the Code for Advertising Liquor (along with Principle 2 of the Code for Advertising Liquor) in that the graffiti-style graphics were likely to appeal to minors. The billboard accordingly had to be removed by the advertiser.
5) Liquor advertisements shall not use or refer to identifiable heroes or heroines of the young.
6) Sponsorship advertisements and sponsorship credits shall clearly and primarily promote the sponsored activity, team or individual. The sponsor, the sponsorship and items incidental to them, may be featured only in a subordinate manner.

Particular care should be taken when featuring celebrity images in liquor advertisements (including any cartoon or fictional characters), as any reliance on celebrity endorsement may breach Principle 4 of the Code for Advertising Liquor.

In addition to the Code for Advertising Liquor, all advertisements for wine must comply with the Advertising Code of Ethics and the Code for Advertising Food (as wine is considered a food product).

In conjunction with the introduction of the Code for Advertising Liquor, the Liquor Advertising Pre-Vetting System (LAPS) was also established, with the aim of ensuring compliance particularly with the Code for Advertising Liquor, but also with other advertising codes. All liquor advertisements, including those which have already been approved in overseas markets, are required to have their advertising pre-vetted by LAPS.

It is important to note that liquor advertisers as well as their advertising agencies are responsible for ensuring that their advertisements comply with the intention and spirit of all advertising codes of practice and that liquor advertisements are submitted to LAPS for approval prior to publication.

The Code has recently undergone an extensive review and the new version will soon be published.

Code for Naming, Labelling, Packaging and Promotion of Liquor

The Code for the Naming, Labelling, Packaging and Promotion of Liquor applies to the naming, labelling, packaging and promotion of liquor in New Zealand. Its purpose is to ensure that liquor naming, labelling, packaging and promotions will be conducted n a manner that is not inconsistent with the need for responsibility, moderation, minimisation of harm and minimisation of appeal and exposure to minors.

It applies to all pre-packaged and bulk alcoholic drinks with an alcoholic strength above 1.15% , which are marketed for sale and consumption in New Zealand. The Code also applies to homebrew and distillation kits.

The two central principles of the code are to ensure that:

1) Liquor marketing and promotions shall neither conflict with nor detract from the need for responsibility and moderation in liquor consumption.
2) Liquor marketing and promotion shall observe a high standard of social responsibility.

Other related legislation

The Food Act 1981 and the Food Standards Code both impose similar restrictions on misleading and deceptive advertisements to those found in the Advertising Codes and the Fair Trading Act. These restrictions are dealt with in other parts of this guide.

Future regulation

Alcohol Reform Bill

The stated purpose of the Alcohol Reform Bill 2010 is to put in place a new system of control over the sale and supply of alcohol, and to reform more generally the law relating to the sale, supply, and consumption of alcohol to facilitate the administration of the Act. Particular motivation for the Bill comes from the Law Commission's 2010 report on alcohol use in New Zealand, Alcohol in Our Lives: Curbing the Harm, which highlighted the culture of excessive and irresponsible drinking and the widespread harm caused by such drinking. Increases in the crime rate, injury rate and road crash statistics were of particular concern.

To achieve these purposes, the primary policy objectives of the Bill are to:

- Reduce excessive drinking by young people and adults;
- Reduce the harm caused by alcohol use, including crime, disorder, public nuisance and negative public health outcomes;
- Support safe and responsible sale, supply and consumption of alcohol;
- Improve community input into local alcohol licensing decisions; and
- Improve the operation of the alcohol licensing system.

The Bill will repeal and replace the Sale of Liquor Act 1989 and amend certain sections of the Summary Offences Act 1981, the Children, Young Persons, and

Their Families Act 1989 and the Local Government Act 2002. Many fundamental provisions of the Sale of Liquor Act however are retained in the Bill.

Broadly speaking, the measures contained in the Bill relate to the following areas:

- The operation of the licensing system, including licence criteria, licence conditions and licensing bodies;
- The alcohol buying age;
- Supply of alcohol to under18 year-olds by parents and other people;
- Promotion of alcohol;
- The management of alcohol in public places through alcohol-control bylaws; Provision to ban alcoholic products; and
- Enforcement of licences and alcohol offences.

More specifically, the Bill raises the age at which people can buy alcohol for consumption somewhere other than a licensed premise (buying at an off-licensed premise) to 20 years. The age at which people can buy alcohol for consumption on site remains 18 years. The Bill restricts the trading hours of on-licensed premises from 8am to 4am and off-licensed premises from 7am to 11pm. It also allows territorial authorities to set their own policies relating to the sale and consumption of alcohol within their districts.

The Bill passed its second reading on 13 September 2011 but is unlikely to come into force until the end of 2012.

7.3 Promotions

The Gambling Act 2003 came into force on 1 July 2004 (replacing the previous Gaming and Lotteries Act 1977) and regulates the running of sales promotions and what were formerly described as prize competitions, instant games and lotteries in New Zealand.

Section 17 of the Act provides that the Governor-General may specify any property or a class of property that must not be:

a) offered as a reward for gambling; or
b) used to reward a winner of gambling.

On 21 November 2005 the Governor-General issued an order in council stating that:

a) liquor as defined in the Sale of Liquor Act 1989; and
b) a voucher or entitlement to liquor as defined in the Sale of Liquor Act 1989,

must not be offered as a reward for, or used to reward a winner of, gambling. This formalises the previous prohibition against offering liquor as a prize. The definition of “liquor” in the Sale of Liquor Act 1989 provides that “liquor” is any fermented, distilled, or spirituous liquor (including spirits, wine, ale, beer, porter, honeymead, stout, cider, and perry) that is found on analysis to contain 1.15 percent or more alcohol by volume.

Therefore, any sales promotion scheme which offers liquor (including wine) as a prize will be deemed to be illegal gambling.

However, not all promotions come within the definition of “gambling” in the Gambling Act and accordingly such promotions will fall outside the ambit of the Act. The Act provides that gambling is any activity in which a person pays or stakes consideration, directly or indirectly, on the outcome of something seeking to win a prize when the outcome depends wholly or partly on chance.

Accordingly, promotions involving the following types of mechanics will be outside the provisions of the Act:

- If the winner is determined solely on the basis of skill and no element of chance is involved, for example a sporting competition such as a golf or tennis tournament; or
- No consideration at all (whether direct or indirect) is paid to enter.

As the above sorts of promotions are not “gambling” for the purposes of the Gambling Act, it would be permissible to offer liquor as a prize for those promotions (or any other promotion which did not fall within the scope of the Act).

Where a winemaker or supplier is approached to supply wine for use as a prize in any sort of promotion, it would be prudent to first obtain a copy of the terms and conditions for the promotion in order to determine whether the promotion is covered by the Gambling Act and consequently whether liquor is a prohibited prize for that particular promotion.

8 SALES

A number of statutory regimes exist today which lay down rules of conduct for the sale of wine. The focus of sales law on consumer protection and consumer safety requires honest sales tactics and vigilance on the part of winemakers to ensure that adequate insurance cover is obtained and maintained (in the event that product safety is threatened) and that licensing requirements are complied with at all times.

8.1 Fair Trading Act 1986

The Fair Trading Act regulates conduct in trade, and prohibits misleading or deceptive conduct generally (section 9), conduct that is liable to mislead in relation to goods (section 10) and false or misleading representations as to the quality, grade, composition, style or nature of products (section 13).

Specifically, the Fair Trading Act regulates "representations" about food (which includes wine). A representation about wine is anything that sends a statement to consumers about that wine. The following elements may be, or contribute to, a representation about wine:

- The wine itself (i.e. what it looks like);
- Verbal statements about the wine (i.e. by sales reps). For instance, when promoting wine sales reps and any other person charged with describing the characteristics of a wine to consumers, should take care to ensure that only accurate statements are made in relation to (for example) the advisable length of cellaring, desirability and flavour profile of a particular wine. Any exaggerations in relation to, for example, the likely performance of a particular wine or vintage (especially where false) are likely to be misleading or deceptive and in breach of the Fair Trading Act;
- Pictorial images on the wine label; and
- Adhesive stickers applied to the packaging.

The Fair Trading Act requirements apply directly to both product labelling and advertising, and will be breached if the labelling or advertising might mislead or deceive ordinary shoppers about any characteristic of a wine, including the place of origin, price or quality.

Although labelling and advertising may comply with the strict requirements of the Food Standards Code, Food Act and other food labelling and advertising legislation, it may still breach the Fair Trading Act if the overall impression given by the labelling is misleading. In 2004 the Winemakers' Federation of Australia introduced a code which provides that from the 2005 vintage onwards gold, silver and bronze medals on wine bottles must only be from open, objective and independent wine competitions. The code is intended to eliminate symbols and stickers which appear to be medals on wine bottles promoting things such as anniversaries and sponsorships, which are not indicative of quality and which have the potential to inaccurately influence consumer choice. There are no current plans in New Zealand to introduce a similar code as such conduct is policed under the regime of the Fair Trading Act. New Zealand winemakers will however need to be aware of the code's requirements when exporting wine to Australia.

The difficulty with the Fair Trading Act generally is that it is relatively easy for would-be complainants to raise an argument that a representation is misleading or deceptive to "consumers". The class of "consumers" who may be misled or deceived includes the inexperienced as well as the experienced, and the gullible as well as the astute (although the "moron in a hurry" has been held by Courts to be excluded). Naturally, a naïve or inexperienced consumer may be more easily misled or deceived than a more sophisticated or knowledgeable consumer. When formulating labelling or advertising, err on the side of caution when assessing the intelligence of the consumer.

It is the role of the Commerce Commission to ensure compliance with the Fair Trading Act. The Commission undertakes investigations leading to letters of advice, general warning, settlements and prosecution of offences.

Whether a Commission investigation leads to prosecution will depend upon numerous factors, including the extent of detriment to consumers, the seriousness of the conduct, and the level of public interest in a particular industry or industry practice at the time.

An investigation will usually lead to prosecution where there is a "likely and serious" breach of the Fair Trading Act and the Commission wishes to stop the behaviour and penalise the business in question, as well as inform and modify the behaviour of others in the industry.

A breach of the Fair Trading Act may result in the commission of both civil and criminal offences, although there is no provision in the Act for imprisonment. The usual range of civil remedies are available for breach of the Fair Trading Act (for instance, injunctions which immediately restrain infringing conduct). In addition, fines for infringing conduct may be imposed.

The maximum fines under the Fair Trading Act are $60,000 for individuals and $200,000 for companies. Historically, Court imposed fines have been at the lower end of the scale. However, there is a current trend towards increased levels of fines being imposed.

It is important to note that the Commission is notorious for generating publicity about its prosecutions as a deterrent to others – which may in practice be more damaging to a brand than the actual fine imposed.

The Commission takes a strict approach to the use of descriptive terms such as "pure", "100%", "fresh" and "free". These claims are defined as being exact terms and should only be used where the manufacturer is confident they are strictly applicable to the product. For instance, wine described as "pure merlot" or "100% New Zealand wine" should not contain anything other than the stated variety of grape, or grapes of the stated origin. Although the Commission has not yet focussed particularly on the Wine Industry, there are numerous examples of the strictness of approach adopted by the Commission in relation to the juice industry. In one case, the presence of 0.03% ascorbic acid (vitamin C) was enough to make the claim "pure orange juice" misleading in breach of the Fair Trading Act.

Representations that a product has a particular endorsement, sponsorship or approval (particularly where that endorsement, sponsorship or approval indicates high quality or desirability of the product) will also be subject to close scrutiny by the Commission.

For example, the use of a red tick has been deemed to create a misleading impression that the food in question had the Heart Foundation's approval. The use of small gold, silver or bronze adhesive stickers (which resemble medals or awards but which nonetheless do not falsely proclaim to be an award) on wine bottles, where the wine has not in fact received an award, or where the award was made in relation to an earlier vintage or variety, are likely to fall within this class of conduct.

Although there does not appear to have been any judicial decision on the use of such stickers in New Zealand to date, there is a real risk that such conduct would be misleading or deceptive under the Fair Trading Act and as the use of such stickers becomes more prevalent in New Zealand it is increasingly likely that the Commission will take an interest in complaints relating to non-competition endorsed stickers.

Numerous other pieces of food and beverage legislation provide similar prohibitions on misleading labelling (and advertising) to that in the Fair Trading Act (including sections 10 and 11 of the Food Act and several principles under the Code for Advertising of Food). Therefore, any breach of the Fair Trading Act is likely to result in a breach of the similar prohibitions under at least the Code for Advertising of Food and the Food Act.

8.2 Insurance

What type of cover should you have?

The best way of determining what kind of cover you need is to tell your broker or prospective insurer exactly what it is you are planning to do and in which markets you are intending to sell your product. Policies will have territorial limits and you may well need different or additional cover for, say, the United States and Canada. These two countries are typically excluded from general liability policies.

There is an enormous range of cover available for different types of risks, but the "anchor" policy will be some kind of general liability policy with a goods products extension.

General Liability

A general liability policy will normally be divided into separate sections.

The primary insuring provision in a general liability policy will normally contain what is called the "insuring provision" under which the insurer agrees to indemnify you for:

> "All amounts which the insured becomes legally liable to pay by way of compensation for personal injury or property damage occurring within the policy territory during the policy period. Your liability must be caused by an occurrence in connection with the business".

Terms that give rise to interpretative difficulties in terms of these concepts is that of "property damage"; is a bottle of wine which may or may not have a defective rim damaged? Is a bottle of wine which may or may not contain a defective cork damaged? Is a bottle of wine which has a label on it showing an inaccurate alcohol level damaged?

Overseas vendors/distributors

The next kind of cover you might consider purchasing is cover for overseas vendors/distributors. A typical insuring clause provides:

> "We will indemnify any vendor or distributor specifically noted in the schedule against all sums for which they shall become legally liable to pay for compensation as a result of personal injury or property damage occurring within the policy territory during the policy period."

By virtue of the inclusion of this type of indemnity in your liability policy, you are insuring the liability of your distributor. Obviously your distributorship agreement needs to tie in with your insurance arrangements.

A concept that is central to either type of indemnity is the notion of an "occurrence" which causes personal injury or property damage. It is that occurrence which must take place within the policy period, not the act of supply. You need to have a policy which is current at the time the actual damage occurs in order to be covered for future liability. It is the date of the damage, not the date of discovery of the damage, which is critical.

Export

A totally separate type of policy to the general liability policy is an export policy of trade credit insurance. Under this kind of policy the insurer agrees to indemnify the insured:

> "… for the direct loss arising from the non-payment of any insured debt due to the insolvency of, or if there is a protracted default by, or contract repudiation by an insured buyer in the approved countries".

In taking out that type of cover a specific trade credit proposal needs to be completed in which you identify the buyer, your financial exposure and the terms of payment, for example, 90 days from the bill of lading being cut. As with all types of proposals, it is important that complete and honest answers are given to questions asked as the policy will only respond to disclosed buyers within disclosed limits.

Product recall

The last type of policy to mention is product recall cover. Under this kind of policy you are insured for the cost associated with recalling a product from the market. Not all underwriters are prepared to write this cover and it can be expensive. You need to consider carefully whether you need this cover given the high cost involved.

In order for a product recall policy to "swing into action", there does need to be some physical damage to either persons or property. The possibility of such damage is not enough to trigger the application of the policy.

The best way to ensure that you have all the cover you need is to sit down and think "what can possibly go wrong and what I can be sued for". You need to have at least a superficial knowledge of the exposures that exist in the particular market into which your goods are being exported – e.g. if you export to the United States are your risks there different than those which you face in the United Kingdom?

You also need to be particularly attentive to the level of cover you need. Your policy will have a sum insured specified and there may be various "sub-limits" in relation to other sums insured such as defence costs.

The broker and the insurers that you use need to be familiar with the wine industry and the markets in which you are selling your product. You should quiz your broker on the number of wineries he or she has placed cover for and their claims experience. You should find out how long the insurer the broker recommends you place the cover with has been writing this kind of business and what their claims experience is – does that insurer have an international presence such that they can quickly deal with claims in the United Kingdom or the United States? How long do they take before they pay out on any claims?

Time spent sitting down with the broker and the underwriter working through the policy is time well spent – you do not want the first time that you read through the policy to be after you have received the phone call in the early hours of the morning from the other side of the world about a problem with the product.

8.3 Product Recall

Winemakers have a responsibility to ensure they are aware of product safety issues when manufacturing, importing and selling wine.

Consumer safety is an important part of wine manufacture and consumption and the legislation designed to ensure that consumers are protected from any injury is focussed on ensuring that winemakers regard safety as an integral part of their operations.

Winemakers have a responsibility to provide wine that is safe for consumption and to address issues of safety as they arise. These issues include not only the physical characteristics of the wine but also an understanding of the likely manner in which wine will be purchased and consumed and any other factors which may impinge on safe production.

Fair Trading Act

Product Recall

Where goods (including wine) may cause injury to any person, or do not comply with a prescribed Product Safety Standard, and the supplier has not already taken voluntary steps to recall them, the Minister of Consumer Affairs has the power under the Fair Trading Act to require the supplier to do any of the following at the supplier's own expense:

- Recall the goods;
- Publish information concerning the aspects of the goods which make them unsafe or any other matters;
- Replace the goods; or
- Refund an appropriate amount of money to purchasers.

Suppliers must comply with product recall notices, and must not continue to supply the goods specified in the notice.

In addition, it is prohibited to import goods into New Zealand that are unsafe or that do not comply with Consumer Information Standards or Product Safety Standards. Any such goods which are imported are deemed prohibited imports under the Consumer Act 1966 and may be forfeited under that Act.

Generally speaking, most product recalls take place voluntarily without the need for the Minister to issue a product recall notice. Voluntary recall may avoid unwanted negative publicity and preserves the integrity of the supplier in the mind of consumers.

The Ministry of Consumer Affairs requests that it be notified of any product recall. Although there is no formal requirement to involve it or obtain its approval, liaison is advisable in order to reduce the risk of compulsory product recall. There may also be a requirement to liaise with other government agencies (for example, MAF in the case of wine).

Product recall process

The Ministry of Consumer Affairs recommends the following product recall process be adopted:

- Stop production and distribution of the product;
- Identify which batches of the product are affected;
- Notify distributors, wholesalers, importers, agents and retailers quickly and in writing;
- Notify the relevant Government department;
- Make arrangements for providing refunds or replacing the recalled product;
- Where records are available, notify individual customers directly of the recall;
- Prepare and undertake a publicity programme to ensure all users of the product are aware of the recall. This is particularly important where it is not possible to identify all purchasers individually using sales records;
- Arrange to destroy the faulty products or to store them securely until they can be made safe; and
- Keep a record of all items returned.

Taking the steps above should reduce the potential for an increase in liability for failing to warn consumers of any risks and puts the onus on purchasers to return at risk products. It should also reduce the risk of a compulsory recall order and/or prosecution for violating safety standards.

Wine Act 2003

In addition to the general product recall provisions in the Fair Trading Act, the Wine Act 2003 provides the Director-General with powers to:

- issue a notice in writing requiring the taking of preventative or corrective action in respect of wine that the Director General cannot be reasonably satisfied will meet the requirements of the Wine Act (in the absence of such steps being taken);
- issue a notice in writing directing the recall of any wine that he or she has good reason to believe is not fit for its intended purpose, or that is mislabelled or incorrectly identified; and
- publish statements relating to any wine for the purpose of protecting or informing the public.

The Director-General may require any such wine to be delivered to a place specified in the notice for the purpose of examining, reclassifying or rectifying any mislabelled or misdescribed wine, or disposing of any wine that is not fit for its intended purpose.

It is important that any such notices be complied with as soon as practicable (including informing the Director General of the details of the manner in which the notice will be complied with and when the recall – or any specified element of the recall – has been completed).

If a person who owns or has control of wine subject to a recall notice fails or refuses to comply with any notice, the Director-General may —

- Take any reasonable steps necessary to ensure control of the wine (including entry by wine officers into premises under a warrant); and
- Recover the costs and expenses reasonably incurred in assuming control of the wine as a debt due from that person.

In addition, the Director-General may publish statements relating to any wine, for the purpose of protecting or informing the public.

International recall obligations

Winemakers should also familiarise themselves with the requirements for product recall and potential liability overseas. For instance, the no-fault ACC scheme that protects winemakers from claims for personal injury in New Zealand does not function in most foreign jurisdictions.

As a preliminary step, winemakers should ensure that they have in place:

- Insurance that would cover product recall events in foreign jurisdictions;
- Contractual provisions and terms of trade dealing with liability in the event that product recall becomes necessary; and
- Contractual exclusion of liability clauses to the extent possible.

The ability to locate accurate information quickly will be critical to getting an idea of the potential scale of a problem and also to ensuring that insurers and other relevant parties are able to determine the lines of liability and which statutory provisions will apply.

Possibly the best way for winemakers to ensure they have adequate insurance and record keeping procedures in place is to ask “what could possibly go wrong and what could I be sued for”.

8.4 “Skins” Contracts

On occasion, wineries may sell skins to other winery companies or to the trade (i.e. retailers), perhaps as a result of surpluses, failed orders or mislabelled goods.

The contractual arrangements surrounding the supply of skins are reasonably standard and should cover the following issues:

1) Price

   How is the price set? When is the price set and can the supplier change its prices? Is delivery included? Who pays for delivery and freight?

2) Terms of Payment

   When is payment due? Is any prepayment required? What happens if the purchaser of the skins is unable to fulfil its payment obligations? Is interest due on overdue payments? If so, what is the rate? Does default of payment entitle the supplier to terminate the contract?

3) Delivery

   At whose risk is delivery made of the goods? And when is delivery deemed to be effected?

4) Title

   When does title of the goods pass from the supplier to the purchaser? If title passes on the payment of all monies due, in what capacities does the customer hold the goods until payment is rendered? If there is a default in payment or if the customer becomes insolvent, does the supplier have the right to search for and remove goods supplied? If the customer resells the goods supplied, in what status does the customer sell the goods? What monies are to be paid to the supplier in these circumstances?

5) Cancellations

   When can a contract be cancelled?

6) Claims

   What is a liability of the supplier? What is the protocol if goods supplied are defective?

7) Acknowledgements and Warranties

   If the bulk goods to be supplied are bulk groups, a customer should acknowledge that it is purchasing the goods for the manufacturer of wine and warrant that it will transport the goods directly to a Licence Customs Controlled area as defined in the Customs and Excise Act 1996. What warranties does the company give in terms of the brix level and advance samples provided of the grapes? Is there an acknowledgement by the purchaser that it has not relied on the company's assessment of the goods?

8) Notice

9) Variation of Conditions

   How can conditions in terms be varied?

This list is a short checklist of the most common terms and should not be relied upon as the definitive source of law that pertains to these agreements. Specific advice should be sought in respect of individual agreements.

8.5 Licensing

Sale of Liquor Act 1989 and Wine Act 2003

The production and sale of wine in New Zealand is governed by licensing requirements in the Sale of Liquor Act 1989 (the Act) and associated Regulations.

Sale and supply of liquor to the public

The object of the Sale of Liquor Act is to establish a reasonable system of control over the sale and supply of liquor to the public. The sale of liquor to the public requires a licence.

The following kinds of licences may be granted:

- *On-licences:* authorises the holder of the licence to sell and supply liquor on the premises. In considering any application for an on-licence, the Liquor Licensing Authority considers the suitability of the applicant, days and hours during which the applicant proposes to sell liquor, etc;
- *Off-licences:* authorises the sale or delivery of liquor off the premises. Winemakers should note that if they hold an off-licence they are permitted to conduct mail order sales under this licence. However if you are considering internet distribution, legal advice should be sought as this remains a controversial issue. The legislation is inadequate to deal with modern technology as far as liquor is concerned.
- *Club licences:* authorises the sale and supply of liquor on the premises to any member of the relevant club;
- *Special licences:* authorisation for the sale and supply of liquor at special events that continue in force until the end of the event. The District Licensing Authority and the police have tightened the control of licensing special events by requiring every separate stall holder to have their own licence and certified manager. Previous events such as the New Zealand Wine Trade Show required only one licence and certified manager, treating all participants as one group.

When liquor is sold or supplied to the public on any licensed premises, either the licensee or a manager must be on duty at all times. It is not acceptable for the manager to be available on the telephone. The Authority will require the manager to be physically accessible to deal with any issues that arise in relation to the control of the sale of and consumption of alcohol on the premises.

Sales by unlicensed persons or on unlicensed premises is an offence under the Sale of Liquor Act. The penalties imposed upon conviction of such an offence may be up to three months imprisonment or a fine of up to $400,000. There are also enforcement provisions relating to the sale or supply of liquor to minors and intoxicated persons, and other miscellaneous offences on licensed premises.

The Act controls the days on which liquor may be sold or delivered under an off-licence. Where a person holds an on-licence, no liquor may be sold or delivered on Good Friday or Christmas Day. It is possible to sell wine on Easter Sunday, but not before 1pm on Anzac Day (April 25).

Tasting wine (with or without food) has not – as yet – precipitated the requirement for an on-licence. However, if charges were made for samples, such a licence would be required. If a wine bar/cafe and/or restaurant is operated upon the premises, then an on-licence is required.

Applications for a licence are considered and determined by the Licensing Authority. Liquor licence applications are dealt with in the Sale of Liquor Regulations 1990. Any queries should be directed to the Liquor Licensing Authority or District Licensing Authority (DLA).

The Sale of Liquor Act has more stringent requirements for manager's certificates that are subject to compliance with DLA inspection. Also, temporary licences can be relied upon for the transfer on sale of the premises while the original licence is still current. However, once this licence expires it cannot be relied upon. It is imperative that a licence does not expire before its application for renewal is lodged. Otherwise, the DLA will require the licensee to re-apply for a fresh licence.

9 INTELLECTUAL PROPERTY

Protecting your brands

Your brands are integral to the success of your business locally and overseas. Whether you are developing a new brand or building on long-established success, you need to choose well and protect your investment.

A brand can carry many meanings for your business but, at its simplest level, it is a trade mark – a means of identification. It signifies that all goods bearing the trade mark come from a single source and allows a company to distinguish its goods from those of its competitors.

A brand also conveys the quality and characteristics of a product or service and your marketing will define who your brand is viewed by your customers and clients.

It is important to remember that a brand is also intangible property that can be bought and sold, just as easily as land, buildings and machinery. Brands can be worth a lot of money, particularly if they have an international reputation.

As they are the unique representation of your business, your brands should be treated with even more respect than other, more obvious, forms of property.

Trade marks

A trade mark can be:

- a logo, such as the Ngatarawa horse's head device;
- an entire label design on a bottle, such as Cloudy Bay's Blenheim landscape label; or
- a word or a combination of words, such as Church Road™ or Villa Maria™.

Trade marks guarantee the source and the quality of your organisation's goods. A trade mark reassures satisfied customers that subsequent purchases will be from the same source and to the same standard as the first.

Trade marks also distinguish between your goods and those of your competitors. They can be a powerful commercial weapon– and a powerful legal weapon against unfair competition.

Creating a brand

A good brand differentiates or distinguishes your product from competing products and can be registered as a trade mark.

A brand that simply describes a product is often a weak brand, as it can be hard to protect or prevent others from using the same words to describe their product. An example of a descriptive brand would be the trade mark "FAST COURIERS" –

other companies or competitors cannot be deprived of the right to say that they provide “fast courier services”.

Common surnames and well-known geographical names are weak brands. This is because a competitor may also legitimately use such words on its own label to describe who has made the wine or where the wine has been produced.

Protection through registration

A trade mark registration grants the owner the exclusive right to use the trade mark for specified goods or services – in other words, a monopoly right.

This is an extremely powerful right, as the owner of a registered trade mark is also able to stop other parties from using the same or a similar brand on the same or similar goods or services as those for which it is registered, throughout the country in which it is registered.

The costs of protecting a brand through a trade mark registration are minimal when compared with the potential costs of not having a registered trade mark at all.

If you have a registration and discover that one of your competitors is using your brand, producing the Certificate of Registration will often cause them to back down. Without a registration, you could be facing an exorbitant court battle to resolve the issue.

To illustrate this, let’s imagine that one company owns the trade mark registration BEACON POINT covering wine. This is likely to be infringed by another company’s use of POINT BEECON as a beer trade mark. Obviously beer is not the same as wine but it could be regarded as being a “confusingly similar good” to wine, which is the infringement test under the Trade Marks Act.

Before committing to any new brand, first check the rights of others – you do not want to finalise your artwork and print your labels to discover that one of your competitors is already using the same or similar brand or holds a trade mark registration for that brand.

Ask your trade mark lawyer to conduct a search through the trade mark records held at the relevant Trade Marks Office and to check the marketplace to ensure that your competitors are not using the same or a similar brand to yours.

Once your new label hits the market, your must be able to protect it from being stolen by one of your competitors. Therefore, once your searches are complete, it is imperative that you protect the brand by filing an application at the Intellectual Property Office of New Zealand (IPONZ) to register the trade mark.

It is also very important to remember that brand registration in New Zealand will only protect you in New Zealand. Trade mark protection is country specific and a registration in New Zealand does not afford protection in any other country.

Brand must be distinctive

To take advantage of the protection that trade mark registration offers, you must ensure the brand is distinctive.

Avoid words that describe the character or quality of the product. For example, the trade mark "Vineyard Estate" or "The Vintner's Drop" could not be registered as they describe the product that carries the brand.

Avoid common surnames, initial and numerals unless they are arranged in a logo, for example the Rolls Royce "RR" symbol.

Make sure the mark is not deceptive. The brand should not mislead the consumer, such as the brand "SAFE" for rat poison.

The Trade Marks Act contains some interesting provisions, including provisions that prevent the registration of a trade mark if it is "culturally offensive" – this will have an impact on any brands that incorporate Maori words. Also under the provisions of the Trade Marks Act, protected geographical indications cannot be registered as trade marks, taking into account the effect of the Geographical Indications Act.

Managing your brands and trade marks

Once you have created and registered your trade marks, it is important to use them appropriately and maintain your registrations.

Always identify your brand as a trade mark. If is registered, insert the ® symbol beside it. If it is not registered, insert the ™ symbol beside it.

Ensure that the trade mark stands out from its surroundings and do not use it in association with a generic description of the product e.g. Brady Bunch Winery™ Pinot Noir.

Identify the trade mark and who owns it. If you have a licensee using the trade mark with your permission, identify the licensee.

Only use a trade mark for products sold under that mark and in the form in which it is registered.

Always try to bring a registered trade mark into use before the end of its protective period. In New Zealand, a trade mark registration becomes vulnerable for removal from the register if it is not used for a period of three years from the date of registration. The non-use period varies in different jurisdictions.

Lastly, keep an eye on your marketplace for potential infringement, and enforce your rights by taking legal action – or at least threatening to – if necessary.

International implications

There are a number of issues to be considered by those planning to export brands overseas.

You should first conduct a New Zealand trade mark search. Even if you have an export-only wine label or brand, you still need to ensure that one of your competitors has not registered that brand as a trade mark in New Zealand. By bottling and labelling your product in New Zealand, even if it is intended solely for export, you may infringe a New Zealand trade mark registration for an identical or similar brand.

Before exporting, you should first conduct a trade mark search in your target countries and markets – you need to ensure that your brand will not infringe any trade mark registrations held in those countries.

Ask your trade mark lawyer to conduct a search through the trade mark records held at the Trade Marks Office in each country and to check the marketplace to ensure that no-one is using an identical or similar brand.

Once you are satisfied that you will not infringe another brand or trade mark registration, register your brand in all the relevant markets.

Internationally, trade mark protection is made easier by:

- Paris Convention, which provides a right of priority for trade mark applicants in any of the member countries deriving from the date of the first application for the trade mark in a member country, provided the subsequent applications are made within a period of six months after the first application.
- Community Trade Mark (CTM), which enables a trade mark owner to file a single application, pay one set of fees and obtain protection for their mark throughout the European Community. It is more cost-effective and efficient than filing separate applications in each country.
- The Madrid Protocol is a new system that enables a trade mark owner to file a single trade mark application covering up to 50 countries that have joined the Protocol. While the Protocol simplifies the filing procedure and reduces the cost of filing trade mark applications in many foreign countries, once the international application is filed it is treated as a national application in each country. Although New Zealand has joined the Madrid Protocol, the Protocol is not yet in effect in New Zealand.

10 INTERNATIONAL REQUIREMENTS

Export volumes and values of New Zealand wines have continued to grow as the New Zealand wine brand has strengthened.

In 2010 wine exports totalled over $1 billion, representing 2.2% of total goods exports from New Zealand. This represents a significant increase from previous years, reflecting the strong growth of wineries. It is also positive for the future place and presence of New Zealand wines in the international markets.

However, there are risks to be managed: avoiding oversupply conditions, changes in the value of the New Zealand dollar and technical barriers constraining access to international markets.

10.1 International Trade

As a niche producer, the availability of New Zealand wine will always be constrained by price and supply issues to some extent. However, technical barriers to trade also limit the availability of New Zealand wine in international markets, and increase the price of the wines.

Internationally, NZ Winegrowers is an active participant, and supports the government's involvement, in the World Wine Trade Group (WWTG) and the OIV (the International Wine Organisation).

These activities aim to ensure unnecessary obstacles to trade do not limit New Zealand's international sales. However such obstacles still exist, often for reasons of history, culture or geography. In the modern trading world, those obstacles need to be re-assessed against the disciplines agreed by member governments of the World Trade Organisation (WTO).

World Wine Trade Group

The WWTG is an informal grouping of industry representatives from wine producing countries founded in 1998. The group aims to share information, collaborates on a variety of international issues and endeavours to create an environment for free trade in wine.

Meetings are attended by both the government and industry sectors. The joint participation of government and industry representatives at meetings is designed to ensure a free exchange of information between sectors and a better understanding of issues being discussed. NZ Winegrowers is recognised as forming part of the WWTG.

The WWTG has promulgated a Mutual Acceptance Agreement on Oenological Practices (MAA) and an agreement for the labelling of wine exports. The New Zealand Parliament ratified this Agreement in 2005. This enables New Zealand wines to freely enter key markets such as the USA and Canada without further controls on winemaking practices; resulting in significant savings for New Zealand winegrowers. In other words, an exporter of wine to a signatory country may use winemaking practices permitted in New Zealand, regardless of the rules in a signatory country.

Thus, the Mutual Acceptance Agreement on Oenological Practices facilitates international trade and removes obstacles to trade in wine in accordance with the Marrakesh Agreement establishing the World Trade Organization of 15 April 1994.

The WWTG is also committed to addressing labelling issues (as mandated by the MAA). The World Wine Trade Group Agreement of Requirements for Labelling was signed by WWTG members in January 2007. The Agreement entered into force in New Zealand on 1 July 2010. The Agreement was adopted into the existing regulatory framework without the need for new legislation. This Agreement provides exporters with simplified front label options that can be used in all major markets.

The Agreement allows for the placement of four items of mandatory information (country of origin, product name, net contents and alcohol content) anywhere on a wine bottle label provided they are presented in a single field of vision.

The Labelling Agreement also contains a definition of the term "ice wine" and its variants. The effects of this is that New Zealand wine for export to other signatories cannot use the term "ice wine" unless it is made from grapes naturally frozen on the vine. Alternative terms such as "Iced Riesling" or "Winter Wine" may be used.

There is no obligation in the Labelling Agreement for producers to stop using the term "ice wine" for wines made by post-harvest refrigeration sold on the local market or to countries that have not signed the Labelling Agreement. However, producers using "ice wine" on these sorts of wines should note that the New Zealand Government has signed up to a definition which differs from this usage. This may have implications under the Fair Trading Act and producers may wish to consider different terminology for the domestic market as well.

Further international trade groups include:

- International Wine Organisation (OIV)
- International Wine and Spirits Federation (FIVS)
- Codex Alimentarius Commission
- International Wine Law Association.

10.2 Export Requirements

Export Eligibility Requirements

All New Zealand grape wine exported from New Zealand must obtain export eligibility approval from WECS or MAF. The export eligibility approval system replaces the previous export certification system, although in practice there are relatively few changes. The requirements of the export eligibility approval are set out in the Grape Wine Export Code published by NZFSA and available on their website at *www.nzfsa.govt.nz/wine*.

- All wineries who export wine must have had their wine produced and bottled under a Wine Standards Management Plan.
- Application for export eligibility approval in respect of a homogenous amount of finished wine that is bottled or ready for bottling with no further winemaking adjustments.
- An application for export eligibility approval is submitted online to the Wine Export Certification Service (WECS) through their website. Two sample bottles of the finished product are required by WECS, one sample is submitted to a panel of three approved sensory evaluators to determine whether it shows "obvious fault". The second bottle is re-evaluated by another panel if the first bottle is found to show obvious fault. Wines that show "obvious fault" in both panels will be refused export eligibility approval although an appeal process is available.
- If a wine is destined for the European Union, Brazil or another country that requests laboratory testing (e.g. Japan, China), a third bottle must be submitted for analysis to a New Zealand Food Safety Authority (NZFSA) approved laboratory. If the wine fails the laboratory analysis for the EU, it is not eligible for export to the EU but may be eligible to export to non EU countries.
- Every consignment of wine being exported requires an Export Eligibility Statement. These are applied for online.

Overseas Market Access Requirements

The Wine Act requires that the Director-General notifies exporters and winemakers of any particular overseas market access requirements (OMARs) for grape wine in order to facilitate exports to that market. An OMAR may be issued where a particular country requires that the New Zealand government provide an official assurance in respect of a particular matter or undertake to regulate a particular aspect of wine making process. The situation where this occurs in New Zealand is in relation to the VI1 certificate that is required for the export of wines to the EU and for Brazil where a combined Certificate of Origin and Analysis is required. It is in order to meet these OMAR's that the analysis of the third bottle of wine is required as mentioned above.

The Director-General may issue further notices stating how the requirements set out in an OMAR are to be met. Once satisfied that the contents of an OMAR have been met, the Director-General may issue an official assurance in respect of a consignment of wine. The official assurance for the EU is the VI1 certificate and for Brazil the Certificate of Origin and Analysis.

The official assurance is a separate and additional certificate to the Export Eligibility Statement described above. The Director-General cannot issue an official assurance unless satisfied that the information given by the applicant justifies the issue of an assurance.

Winemakers should be aware of the OMARs imposed by the European Union and Brazil. Wine destined for export to these countries must comply with the rules of that market. NZ Winegrowers are developing a Code of Practice relating to access to the European and Brazilian market.

The text of the OMAR notice relating to the European Union and Brazil can be viewed on the NZFSA website (*www.nzfsa.govt.nz*).

Duties of Exporters

It is the duty of each exporter to ensure that his or her export operations do not contravene the Wine Act and that they only export wine that meets the relevant standards and specifications and export eligibility requirements. Notice must be given where exported wine is no longer fit for its intended purpose or is refused entry by a foreign government. Finally, an exporter must be able to demonstrate that records are being kept of the provenance and processing of wine exported.

The Director-General may give written notice to any exporter or person in charge of a Wine Standards Management Plan, requiring whatever preventative or corrective action is considered appropriate and reasonable, in respect of wine that the Director-General cannot be reasonably satisfied will meet the requirements of this Act in the absence of such action.

International Standards

Wines exported to foreign markets must comply with the rules relating to composition that apply in those markets. However, under the World Wine Trade Group Agreement on Mutual Acceptance of Oenological Practices, wines made in accordance with New Zealand wine making rules are acceptable for sale in Australia, Canada, Chile, USA and Argentina regardless of the rules that apply in those countries.

Wine labels must also be designed to meet the requirements of export markets, and these can vary quite significantly. NZ Winegrowers has published an International Labelling Guide which is available on the members section of their website *www.nzwine.com*.

The NZ Winegrowers International Practices Guide may also be accessed for further information.

11 EXCISE AND TAXATION

Customs and Excise Act 1996

Excise duty must be paid on the production of wine. Excise is a tax levied on wineries by the Government under the Customs and Excise Act. The manufacture, import and export of wine is subject to the control of the New Zealand Customs Service.

Licensed Manufacturing Areas

Any area used for the manufacture of wine must be a licensed manufacturing area. An application for a Customs Controlled Area (CCA) licence may be made by the owner, occupier or person in charge of the area to be licensed.

It is an offence to manufacture wine without a CCA licence. An individual who fails to comply with this requirement is liable upon conviction to a fine of up to $5,000 and any body corporate convicted may be fined up to $10,000. The obligation to pay excise duty remains regardless of whether a CCA licence has been obtained.

The application must be submitted to the local Customs office. The application should include a diagrammatic plan of the area to be licensed. Application forms are available on the New Zealand Customs website: see *www.customs.govt.nz.*

Areas used for the storage of wine manufactured in New Zealand that cannot be physically accommodated within the manufacturing area where it was manufactured, are also required to be licensed as Customs Controlled Areas.

A Customs Controlled Area licence is granted subject to conditions. A two-part procedure statement is issued to all manufacturing areas. Part One contains the terms, conditions or restrictions of the licence. Part Two contains the operating procedures, which determine the frequency of lodging excise returns.

Every licensee must keep records as prescribed in the procedure statement. The records will provide an audit trail from manufacture of the wine through to bottling and packaging and ultimate removal from the licensed area and will prove that the excise duty declared for payment is correct. A Customs officer may enter onto business premises to audit records.

The excise duty falls due when the wine is removed from the manufacturing area licensed as a CCA and there is no further manufacturing to be carried out on the wine. Payment of the excise duty is generally due on the last working day of the month following the month in which the goods were removed from the CCA. However, if the total excise duty liability of a licensee for a year commencing on 1 July is estimated to be equal to or under $50,000, or between $50,000 and $100,000, payment will be due on different dates.

Generally, wine may be removed from a CCA without incurring liability for excise duty payment in the following circumstances:

- It is exported;
- It is removed to an export warehouse licensed as a CCA;
- It is removed to another CCA for further manufacture (such as blending or bottling)
- It is removed temporarily for a manufacturing process and returned to the CCA pursuant to an approval given by the Chief Executive;
- It is taken as legitimate manufacturing samples;
- It is removed to a licensed offsite storage facility by or for the manufacturer or first owner.

Excise is payable on tasting samples and goods consumed before removal from the manufacturing area.

Excise rates on alcoholic products can be adjusted annually in accordance with movements in the Consumers Price Index. Any change will come into force on 1 June in each calendar year. As at 17 April 2012, wine of fresh grapes containing more than 14% volume, fortified by the addition of spirits or any substance containing spirits attracted an excise rate of $49.550 per litre of alcohol. Any other wine is taxed at a rate of $2.7206 per litre.

Questions on excise should be directed to the local Customs office (*www.customs.govt.nz*) or NZ Winegrowers.

Spoilage and Disposal

Customs has the authority and discretion to approve the remission of duty for wine which has deteriorated in condition prior to its release from the control of Customs. Duty will only be remitted to the extent to which Customs is satisfied that the wine has actually deteriorated, and duty cannot be remitted in full unless the spoiled wine is destroyed under the supervision of Customs or is exported. A further requirement for the remission of duty is that the deterioration of the wine must not have been caused by wilful act or negligence.

Goods and Services Tax Act 1985

Winemakers who make supplies worth in excess of $60,000 per annum must register for GST regardless of whether they carry on business as individuals or through companies or other entities. GST is generally "zero rated" on exports meaning that exporters do not have to charge GST (although they are still entitled to a refund of GST paid for inputs). GST is collected on goods imported into New Zealand.

Wine Equalisation Tax

Wine Equalisation Tax (WET) is a value-based tax paid on certain dealings with wine sold in Australia. This is charged under the Australian tax legislation. For wine that is produced in New Zealand and subject to a dealing in Australia for which WET is paid, a producer rebate may be available. This entitles producers of wine to a rebate of 29% of the selling price.

This is an extremely brief overview of excise duty and GST considerations for winemakers. A more detailed description of relevant considerations can be found in the Bell Gully guide “Doing Business In New Zealand” which can be accessed via the internet at http://www.bellgully.com/resources/resource.03111.asp.

12 SUCCESSION PLANNING AND BUSINESS GROWTH

Succession Planning

One of the most crucial decisions in the life of a business is deciding whether the business will be passed on to family members or whether the business should be sold. Regardless of which option is pursued, a business requires a "warrant of fitness" to be a viable option.

This will require ensuring that business records are sufficient for the purposes of due diligence by a prospective purchaser, trustee or extended family. By anticipating the requirements of the due diligence process, the viability of a business as an attractive option for purchase or succession will be increased.

Due diligence

Due diligence is about ensuring that a decision to purchase a business is fully informed and that there will be no future unpleasant surprises. It enables the purchaser to rely on his or her own investigations, information gathered and judgment as to whether or not the business is a sound investment.

Warranties as to the state of the business are only as good as the person giving them. Undertaking appropriate due diligence processes will assist in precluding future liability of the vendor. Essentially, the due diligence process represents a checklist for the purchaser on acquisition of the business whether by way of succession or by sale.

Purchaser's checklist on succession and/or sale

- Anticipate speculation on behalf of the purchaser or successor as to the reason for succession and/or sale
- Declining business.
- Changes in character of the locality.
- Lack of competitive strengths.
- Expiring lease or franchise.
- Imminent rent review.
- Future loss of business because of actual or anticipated changes in government policy.
- Change in zoning.
- Change in roading.
- Problems with creditors or suppliers.
- Critical staff retiring.
- Labour problems.
- Bad reputation which may stay with the business.

- Capital assets require replacement.

If any of these reasons have promoted the sale or succession of the business, they will have consequent effect on the purchase price.

Action List by the Solicitor or Professional Adviser for the Purchaser or Successor

The solicitor or professional adviser assisting the successor or purchaser will undertake a review of the instruction, status and contractual arrangements pertaining to the business. This will include the following:

- The components of the purchase price.
- GST and tax positions.
- Valuation requirements.
- Insurance/risk requirements.
- The chattels being purchased.
- Employee issues.
- Grape supply contracts.
- Licences to operate the business (e.g. Sale of Liquor Licences and Food Premises Registration Licences).
- Whether Overseas Investment Office (OIO) approval is required (this is discussed in further detail in following section)
- Warranties required from the vendor. Examples are warranties as to the financial accounts, turnover, a period of assistance from the vendor, restraints of trade, encumbrances on the property, debts, liabilities, licences and consents.
- Review the title and any lease or licence documentation.
- The means of funding the purchase.
- The payment of any fees.

Sale to Overseas Investors

The Overseas Investment Act 2005 came into force on 25 August 2005. The Act replaced the Overseas Investment Act 1973 and its associated regulations. The Overseas Investment Office (**OIO**) is a dedicated unit within Land Information New Zealand which is responsible for administering the government's foreign investment policies and monitoring compliance with the conditions of consent granted to overseas persons under the Act.

The core work of the OIO is to assess applications for consent to a proposed acquisition by an overseas person who wishes to make a substantial investment in New Zealand through the purchase of "sensitive land" (as defined in the Act), significant business assets (valued at more than NZ$100 million) and/or an interest in fishing quota.

An overseas person intending to acquire 25% or more of the shares in a company which owns or controls sensitive land (either directly or indirectly) will require consent under the Act. Consent is also required if the overseas person intends to acquire an interest in a lease of sensitive land, where the lease is for a term of three years or more (including rights of renewal).

The purpose of the Act is to acknowledge that it is a privilege for overseas investors to own or control sensitive New Zealand assets. Applications that require ministerial approval are determined by the Ministers of Finance, Land Information and Fisheries. Some applications may be determined by the OIO under delegation from the relevant Minister.

The OIO requires applicants to submit an "investment plan" where the investment involves sensitive land. At a minimum, the investment plan must include a business plan relating to any business to be undertaken on the land; reports identifying mechanisms to be adopted to protect (and in some cases enhance) indigenous vegetation and fauna, wildlife, historic heritage and walking access (amongst other things); and, a report identifying the nature of any current business undertaken on the land.

Criteria used to consider an application

The OIO must be satisfied that the applicant meets the investor test and that investment is in the national interest, before approval is granted. The OIO must be satisfied that:

- The overseas person has, (or if that person is not an individual) the individuals with control have business experience and acumen relevant to the particular investment;
- The overseas person has demonstrated financial commitment to the overseas investment; and,
- The overseas person is (or if that person is not an individual, the individuals with control are) of good character.

For the purposes of assessing whether the investment will benefit New Zealand, the following matters will be considered:

Whether the overseas investment will or is likely to result in:

- The creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost;
- The introduction into New Zealand of new technology or business skills;
- Increased export receipts for New Zealand or exporters;
- Added market competition, greater efficiency or productivity, or enhanced domestic services in New Zealand;
- The introduction into New Zealand of additional investment for development purposes; or
- Increased processing in New Zealand of New Zealand's primary products.

Whether there are, or will be, adequate mechanisms in place for:

- Protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- Protecting or enhancing existing areas of significant habitats of trout, salmon and other wildlife and game;
- Protecting or enhancing areas of historic heritage; and
- Providing, protecting or improving walking access over the relevant land and to any wildlife habitats affected.

This list of factors is not exhaustive. The Overseas Investment Regulations 2005 contain further factors for assessing the benefit of the overseas investment to New Zealand, including whether there are any consequential benefits to New Zealand, the overseas investor's current or future New Zealand investment position, matters relevant to New Zealand's trade or international relations and compliance with its international obligations, and whether the investment will advance or give effect to significant Government policy or strategy.

There are additional requirements for the acquisition of "farm land". "Farm land" includes land used principally for horticultural purposes and thus includes vineyards. The application must adduce evidence that the farm land has initially been offered on the domestic market for at least 20 working days to persons who are not overseas persons. This requirement does not prohibit owners from selling farm land to an overseas person and the owner can enter into a conditional agreement with an overseas person to sell the property prior to advertising the property on the domestic market. Provision can also be included in such an agreement for the overseas person to equal or better any genuine offer that may be made to the owner during the advertisement period. The provision would need to allow the owner to revert back to the offeror in circumstances where the overseas person did equal or better the offer.

Other Options of Realising your Investment

There are other options available to realise the investment you have made in your company. Other possible exit strategies include merging with another "natural partner" in exploiting synergies between the businesses to obtain strategic advantages. Another option is a management buyout, which is a possibility to consider if you feel a sense of loyalty to employees who may have assisted you to grow the company from nothing.

Business Growth

The growth of a business can be stifled by limited access to capital. Capital is required to finance start-up costs, negative cashflows and expansion until demand increases and to cover operating expenses (such as wages) and major capital expenditures (such as buildings, land and equipment).

There is a range of viable options for raising capital regardless of the size of the company. Capital can be freed up using internal measures or obtained externally as debt or equity. Internal financing requires investment by the owners. External financing involves either debt or equity. Debt involves borrowing a set amount in exchange for a set payment obligation, whereas equity involves a capital investment and dilution of the ownership of a business.

Debt financing is generally provided by lenders on a "low risk, low return" basis. Businesses will need to secure debt against personal assets and there is a high need for liquidity. This is, therefore, a limited source of finance for businesses in the early stages.

By contrast, equity financiers are usually prepared to provide funding on a "high risk, high return" basis by effectively buying in for a share of the business return. The need for liquidity is not as high, but owners should expect to lose some autonomy.

There are advantages and disadvantages attached to each option and professional advice should be sought in order to best tailor an option to a business and its growth strategy.

For newly established and small wineries, growth in the scale and range of private equity and venture capital has been stimulated by the establishment of the New Zealand Venture Investment Fund. The VIF was established by the Government in 2001 as an equity investment programme designed to accelerate the development of the venture capital market in New Zealand. There are also a number of other sources of financial assistance and business funding.

Category II and III wineries wanting to introduce new capital may wish to consider an initial public offering (IPO) by offering shares in the company to the public by listing on the New Zealand Stock Exchange (NZX).

For small to medium sized companies that want to raise capital and move away from their founding structure to a broader ownership model, the NZAX Alternative Market (NZAX) will provide many of the benefits of a NZX listing without all of the cost and compliance requirements of a main board listing.

Listing on the main board, the NZSX, provides an opportunity for larger companies to sell down an existing shareholding, introduce new capital, or a combination of both.

Bell Gully has assisted many businesses through the development stages and has been heavily involved with the NZX since its inception.

13 APPENDIX

No Complaints Covenant

DEED dated the day of

PARTIES

1. ("Covenantee")

2. The person or persons specified in Schedule A ("Covenantor")

RECITAL OF FACTS

A. The Covenantor is registered as proprietor of the estate described in the First Schedule ("Servient Land").

B. The Covenantee is registered as proprietor of the estates described in the Second Schedule ("Dominant Land").

C. The Covenantor has agreed with the Covenantee to accept restriction upon the Servient Land for the benefit of the Dominant Land.

COVENANTS

1. The Covenantor for itself and its successors in title to the Servient Land hereby covenants and agrees with the Covenantee and its successors in title to the Dominant Land, that the Covenantor will henceforth and at all times hereafter observe and perform the stipulations and restrictions contained in the Third Schedule to the end and intent that each of the stipulations and restrictions shall, in the manner and to the extent prescribed, forever inure for the benefit of, and be appurtenant to, the whole of the Dominant Land and every part thereof.

2. This deed shall be registered against the estate described in the First Schedule by the Covenantor forthwith following execution, and the provisions of this deed shall run forever in favour of the registered proprietor of the Dominant Land or any part thereof from time to time, subject to the provisions of clause 3.

3. The covenants on the part of the Covenantor are to continue to apply so long as the vineyard, the vineyard restaurant and shop are operated on the Dominant Land notwithstanding any intensification in or change of method of operation of the vineyard, the vineyard restaurant and shop.

4. This covenant shall immediately determine and the Owner for the time being of the Dominant Land shall be entitled to a surrender of the covenant when the vineyard, the vineyard restaurant and shop are no longer operated on the Dominant Land.

FIRST SCHEDULE
(Servient Land)

Certificate of Title Number	**Lot and Deposited Plan**

SECOND SCHEDULE
(Dominant Land)

Certificate of Title Number	**Lot and Deposited Plan**

THIRD SCHEDULE

The Covenantor acknowledges and agrees that:

(a) The Covenantee owns and operates vineyards, a vineyard restaurant and shop on the Dominant Land;

(b) Noise generation is an unavoidable effect of such vineyard operation, including without limitation, noise from the operation of turbine sprayers, compressed air leaf removers, tractors, harvesters, trimmers, motor bikes, frost protecting windmills and bird scaring devices (including without limitation propane gas canons, shotguns, electronic bird distress calls, horns and sirens);

(c) Spray drift is also an unavoidable effect of such vineyard operation. In particular spray drift from herbicide spraying during [ ] and fungicide spraying during [ ];

(d) The operation of the vineyard, a vineyard restaurant and shop is a permitted activity conducted in accordance with the [ ]District Plan, to which the Dominant Land is subject.

(e) The operation of the vineyard restaurant and shop includes use of those facilities for recreational and entertainment purposes.

The Covenantor agrees and covenants that:

(a) The Covenantor will allow the Covenantee to carry on the operations of the vineyard, the vineyard restaurant and shop without interference or restraint from the Covenantor.

(b) The Covenantor will not, so long as the operations of the vineyard, the vineyard restaurant and shop are carried on in accordance with the [ ] District Plan or any replacement plan, bring any proceedings for damages, negligence, nuisance, trespass or interference arising from the use of the vineyard, the vineyard restaurant and shop.

(c) The Covenantor will not:

(i) make nor lodge; nor
(ii) be party to; nor
(iii) finance nor contribute to the cost of;

any submission, application, proceeding or appeal (either pursuant to the Resource Management Act 1991 or otherwise) designed or intended to limit, prohibit or restrict the continuation of the operations of the vineyard, the vineyard restaurant and shop on the Dominant Land, including without limitation any action to require the Covenantee to modify the operations carried out on the Dominant Land.

SCHEDULE A

Registered Properties	**Certificate of Title**

SIGNED by the Covenantor)
by:)

____
Director

____
Director

Distribution agreements: Clause heading check list

1. **Parties**
2. **Recitals**
3. **Definitions**
4. **Grant (and reservations)**
5. **Principal's obligations**
   - 5.1 Sole and exclusive distributor
   - 5.2 Support and information
   - 5.3 Not to delegate
   - 5.4 Indemnity
   - 5.5 Insurance
   - 5.6 Delivery of product
   - 5.7 Maintenance of intellectual property
   - 5.8 Extension in term
   - 5.9 Extension of territory
   - 5.10 Extension of products
   - 5.11 No assignment
   - 5.12 Credit limited
   - 5.13 Credit review
6. **Distributors obligations**
   - 6.1 Diligence
   - 6.2 Exclusive agency and territory
   - 6.3 No description as agent
   - 6.4 No pledge of credit
   - 6.5 Diligently to promote
   - 6.6 Good faith
   - 6.7 Compliance
   - 6.8 Disclosure
7. **Termination**
   - 7.1 Time
   - 7.2 Low orders
   - 7.3 Fundamental breach
   - 7.4 Insolvency
   - 7.5 Conduct prejudicial
   - 7.6 Change of management or control
   - 7.7 Notice
8. **Termination consequences**
   - 8.1 Procedure
   - 8.2 Financial consequences
   - 8.3 Distributors inventory
   - 8.4 Compensation for termination
   - 8.5 Default notice
   - 8.6 Notice of solicitation
   - 8.7 Existing rights
9. **Miscellaneous**
   - 9.1 Warranty
   - 9.2 Retention of title
   - 9.3 Reservation of rights
   - 9.4 Force majeure
   - 9.5 Severance
   - 9.6 Whole agreement
   - 9.7 Supersedes prior agreements
   - 9.8 Discretion
   - 9.9 Change of address
   - 9.10 Notices
   - 9.11 Headings
   - 9.12 Joint and several
   - 9.13 No partnership
   - 9.14 Principal's right to assign
   - 9.15 Proper law and jurisdiction
   - 9.16 Rights cumulative
   - 9.17 Survival of terms
   - 9.18 Waiver
   - 9.19 Costs
   - 9.20 Acceptance and delivery
     - (i) Acceptance
     - (ii) Shipping dates
     - (iii) Carriage
     - (iv) Insurance
     - (v) Certificates of origin and other documentation
     - (vi) Packaging for delivery and risk in transit
     - (vii) Defective consignment
     - (viii) Invoices
     - (ix) Price increases
     - (x) Faulty products
   - 9.21 Payment of invoices

BELL GULLY

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Members of NZ Winegrowers may contact John Barker or Kristy McKay for general advice on winemaking rules, labelling, market access requirements and the Geographical Indications Act.

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BELL GULLY

PUBLICATIONS

Bell Gully produces a broad range of publications exploring different legal aspects of business which may be useful. These include detailed guides, such as *Doing Business in New Zealand*, *Commercialisation of Innovation*, *The Takeovers Guide* and *Intellectual Property Update*, as well as regular newsletters and articles on issues in employment, finance and corporate regulations.

Publications are available at the firm's website, www.bellgully.com, or on request from any of the Bell Gully staff listed above.

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