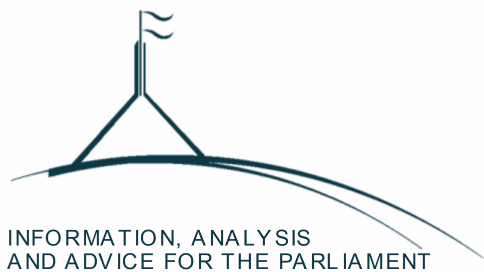

INFORMATION AND RESEARCH SERVICES
PARLIAMENTARY LIBRARY

Bills Digest
No. 9 2004–05

Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004

Thomas John
Law and Bills Digest Section
28 July 2004

DEPARTMENT OF PARLIAMENTARY SERVICES

ISSN 1328-8091

© Copyright Commonwealth of Australia 2004

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

General Distribution Papers (GDP) are prepared for senators and members of the Australian Parliament. While great care is taken to ensure that they are accurate and balanced, papers are written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in papers is provided for use in parliamentary debate and for related parliamentary purposes. The papers are not professional legal opinion. Readers are reminded that GDPs are not official parliamentary or Australian government documents. IRS staff are available to discuss any paper's contents with senators and members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Parliamentary Library can be found at: http://www.aph.gov.au/library/

Published by Information and Research Services, Parliamentary Library,
Department of Parliamentary Services, 2004.

Contents

Purpose. 1
Background. 1
Main Provisions 3
Schedule 1 – Wine producer rebates 3
Schedule 2 – Compliance improvement measures 5
Wine packaging (Item 1, Schedule 2) 5
Wine export (Item 2, Schedule 2) 5
Schedule 3 – Capital allowance for grapevines 6
Potential issues of concern 7
Issue 1: WET rebate and the CER. 7
The 'rebate' as a 'tax cut' 7
The 'rebate' as a 'subsidy' 8
Effects of a dispute under CER 9
Issue 2: WET rebate and GATT 9
Violation of Art III of the GATT: cause of action pursuant to Article XXIII, 1(a) 10
Frustrating the spirit of the GATT: cause of action under Article XXIII, 1(b) 11
The dispute resolution mechanism available under Article XXII, XXIII 11
The effects of a dispute under GATT 13
Concluding Comments. 13
Endnotes. 13

Glossary of Abbreviations:

AOU	application to own use
Bill	Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004
CER	*Australia and New Zealand Closer Economic Relations Trade Agreement of 1983*
DSU	*The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*
Equal amount	amount of money equal to a rebate excess received during the financial year
GATT	*General Agreement on Tariffs and Trade 1994* incorporating the *General Agreement on Tariffs and Trade 1947*
GATT 1947	*General Agreement on Tariffs and Trade 1947*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Minute	*Agreed Minutes on Industry Assistance 1988*
Rebate	wine producer rebate
WET	wine equalisation tax
WET Act	*A New Tax System (Wine Equalisation Tax) Act 1999*
WFA	Winemakers Federation of Australia
WTO	World Trade Organisation
WTO Agreement	*Marrakech Agreement Establishing the World Trade Organization*

Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004

Date Introduced: 24 June 2004

House: House of Representatives

Portfolio: Treasury

Commencement: The formal provisions, the technical amendments and the measures relating to compliance improvement contained in the Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004 commence on Royal Assent. The measures relating to tax rebates and capital allowances for grapevines will commence on 1 October 2004.

Purpose

The purpose of the proposed legislation is to make amendments to the *A New Tax System (Wine Equalisation Tax) Act 1999* ('WET Act') to:

- introduce a wine producer rebate to off-set wine equalisation tax up to a maximum amount of $290 000
- improve compliance, and
- abolish accelerated depreciation of grapevines.

The main thrust of the amendments is to reduce the tax burden for small and medium sized businesses and to decrease the overall paperwork for wine producers. In addition, the amendments are designed to reduce incidences of tax minimisation and to align depreciation rules for grapevines with those applicable to horticultural plants.

Background

There have been various reactions to the measures proposed for implementation through the Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004 ('the Bill').

The majority of reactions were in relation to the introduction of a wine producer rebate ('the rebate'). In Australia, the Government's announcement and proposal was initially

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

well received. After having lobbied heavily to achieve modifications to ease the tax burden on smaller producers[1], the Winemakers Federation of Australia ('WFA') announced that 'In the 2004/05 Federal Budget, announced 11 May 2004, we were successful.'[2] In similar fashion, the media commented that it was a 'victory for struggling small producers in South Australia.'[3]

However, the WFA also pointed out that it has not been able to change the Government's policy to tax wine by sales figures rather than volumetrically.[4] This was also noted by Robert Gottliebsen who pointed out in The Australian that no changes have been made to the mode of levying the tax, with the Government still 'taxing wine on selling prices rather than amount of liquor.'[5] A change to a volume based tax, he suggested, would remove the 'big winery bias and enable[d] the smaller wineries to come together.'[6] In addition, he criticised that any delayed implementation would have a dramatic impact upon the cash flow of wine producers and argued that 'many will have no choice but to ask for a receiver.'[7]

Another issue of concern is the proposed abolition of the State Cellar Door Rebate. The abolition is intended to reduce the paperwork for wine producers.[8] However, it was reported that the Victorian Treasurer alerted the Federal Treasurer that medium-sized wineries in Victoria with a high proportion of cellar door sales could be worse off under the new scheme.[9]

In New Zealand, the proposed introduction of the rebate was heavily criticised by the Government, claiming that the proposed introduction of the rebate would constitute a breach of the *Australia and New Zealand Closer Economic Relations Trade Agreement of 1983* ('CER').[10] New Zealand's Finance Minister, Dr Michael Cullen, argued after receiving 'a further briefing paper from the Ministry of Foreign Affairs' that:

> [I]t does appear that there may be a breach of article 7 (2) of the Closer Economic Relations agreement with Australia. The rebate that the Australian Budget announced for Australian wine differentiates on taxation between Australian producers and New Zealand producers which, on the face of it, is a breach.[11]

However, one of New Zealand's most influential winemakers was reported to have been suggesting that the New Zealand Government should follow the Australian model and provide similar rebates or subsidies to the New Zealand wine industry.[12]

Other issues that were noted in the media included the timing of the rebate. Several commentators emphasised that the tax measures were motivated by the upcoming election. One commentator concluded that:

> The budget may not quite have something for everyone but with an election looming, it might just have something for everyone who matters...[including winemakers, who] had their wish granted.[13]

Others were more specific, explaining that:

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

> SA Liberals, including some of the state's four Cabinet ministers, have strongly backed a wine industry campaign to cut the 29 per cent wholesale tax. [...] Two key marginal seats, Kingston and Wakefield, include the Clare Valley and McLaren Vale Wine regions, while Alexander Downer's seat includes the Adelaide Hills region.[14]

Finally, in relation to the removal of accelerated depreciation of grapevines it was noted that this measure would discourage speculative investments in vineyards and wineries.[15]

Main Provisions

Schedule 1 – Wine producer rebates

Pursuant to **Item 2** of the Bill, **Schedule 1** will commence on 1 October 2004.

Item 1, Schedule 1 of the Bill repeals Division 19 of the *A New Tax System (Wine Equalisation) Act 1999* and substitutes a new **Division 19**, setting out a new regime for the rebate.

The new **section 19-5** stipulates who will be entitled to the rebate under the new scheme. The rebate will only be available in the following circumstances:

- pursuant to **paragraph 19-5(a) -** where a producer is liable for the WET on a 'taxable dealing'[16] in the wine that gives rise to the WET, or
- pursuant to **paragraph 19-5(b) -** where a producer made a sale to a purchaser who quotes for the sale.

Pursuant to the new **section 19-10**, a producer will not be entitled to the rebate in relation to transactions where the producer does not incur a direct liability for the WET. The exceptions are:

- pursuant to **subsection 19-10(1)** - where the producer was notified by the purchaser of the wine that the purchaser intends to make a GST-free supply of the wine, and
- pursuant to **subsection 19-10(2)** - where the producer has already claimed, or subsequently claims, a wine tax credit other than the rebate.

The basis upon which the rebate is quantified is set out in the new **section 19-15** of the Act. In relation to wholesale sales, a producer is entitled to a rebate of 29 per cent of the total of the wholesale price of wine sold during a financial year (**paragraph 19-15(1)(a)**). The same percentage applies to retail sales and application to own use ('AOU').

Pursuant to **subsection 19-15(2)**, the maximum amount of rebate that can be claimed by a producer per financial year is capped at $290 000, or, in other words, a producer will be entitled to claim a rebate for up to $1 000 000 worth of product.

The cap will also apply to a group of associated producers to preclude large groups of producers from being entitled to multiple rebates. Pursuant to **subsection 19-15(2)**, the maximum amount a group of associate producers as a whole can claim as rebate is $290 000. The term 'associated producer' is defined in the new **section 19-20** and the Explanatory Memorandum notes that a producer is an associated producer if:

- one is connected to the other pursuant to section 152-30 of the *Income Tax Assessment Act 1997* (ITAA 1997) (i.e. if one entity controls the other or if both entities are controlled by a third entity, but without the exception in section 152-30(8) that severs the link between producers where an intermediary is a public entity);
- one is under an obligation or might reasonably be expected to act in accordance with the directions of the other in relation to their affairs;
- each of them is under an obligation or might reasonably be expected to act in accordance with the directions of the same third entity; and
- one is under an obligation or might reasonably be expected to act in accordance with the directions of a third producer and the third producer is under an obligation or might reasonably be expected to act in accordance with the directions of the second producer. [17]

New **section 19-25** of the Act governs the repayment of amounts equal to excess rebates received during a financial year. **Subsection 19-25(1)** will provide that a producer is liable to repay an amount of money equal to the rebate excess received during the financial year ('the equal amount').

The liability to repay rebate excesses will also apply to groups of producers. **Subsection 19-25(3)** provides that all associate producers within the meaning of **section 19-20** are jointly and severally liable to repay the equal amount. Accordingly, each associate producer of the group becomes liable for the equal amount, not just a proportionate amount according to his or her contribution. Where an associate producer was required to repay the entire equal amount, this associated producer may take redress against the other associate producers in the group of producers by virtue of subdivision 265-A of the *Taxation Administration Act 1953*.[18]

Under the proposed amendments, it will be an offence where a purchaser at the time of the purchase under a quote fails to notify the producer of the intention to make a GST-free supply of wine. New **section 19-30** imposes a maximum penalty of 20 penalty units, with one penalty unit currently valued at $110 pursuant to section 4AA of the *Crimes Act 1914*.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 7, **Schedule 1** of the Bill stipulates that the proposed amendments will apply to dealings in wine on or after 1 October 2004.

Item 8, Schedule 1 sets out transitional provisions, stipulating that the currently applicable scheme will be applied as if the end of the financial year would be on 30 September 2004. With the implementation of the new rebate scheme, producers will only be entitled to a pro-rated portion of the total maximum rebate of $290 000.

Period	Months	Percent of the financial year	Maximum rebate available to a producer in $
1 July – 30 June (full financial year)	12 months	100%	**$290 000**
1 October 2004 – 30 June 2005 (pro-rated financial year)	9 months	75%	**$217 500**

Schedule 2 – Compliance improvement measures

Schedule 2 of the Bill contains two separate measures to improve compliance. Pursuant to **Item 3** of the Bill, they will commence on the day the Act receives Royal Assent.

Wine packaging (Item 1, Schedule 2)

Item 1, Schedule 2 will ensure that the packaging costs for wine will be included into the tax base. This measure will prevent large retailers from avoiding the WET component for packaging in bottles or casks by buying bulk volumes of wine to perform the packaging themselves.[19] By amending **section 5-5**, the proposed new law seeks to overcome this issue by ensuring that the packaging costs become an integral part of the costs of the retail sale where the packaging occurred after the final wholesale sale. To avoid multiple payments of the WET, tax that has already been borne may be claimed as tax credit against the new liability.[20]

Wine export (Item 2, Schedule 2)

Item 2, Schedule 2 of the Bill aims at ensuring that wine producers are not able to use import and export arrangements to avoid the payment of the WET. The new **section 17-37** creates a liability to repay amounts equal to wine tax credits paid under Credit Rule 10 in section 17-5 of the WET Act. Credit Rule 10 provides:

Wine Tax Credit Table

No.	Summary of ground	Details of ground	Amount of *wine tax credit	Time wine tax credit arises
CR10	Wine exported by you while still assessable wine	Wine on which you have borne wine tax has been exported by you while still assessable wine.	the wine tax borne	time of export

Under the current scheme, exporters are entitled to claim tax credits for wine tax they have borne prior to exporting the wine. They remain entitled to these tax credits under the new scheme, however, after the implementation of the amendments, these wine tax credits must be repaid if the wine is imported back into Australia and the imported wine:

- is not taxable pursuant to subsection 7-5(b) or section 7-25 of the WET Act, and
- is later sold by retail sale or AOU.

Schedule 3 – Capital allowance for grapevines

Schedule 3 of the Bill will make amendments to the WET Act to abolish accelerated depreciation of grapevines and to align their depreciation with that for other horticultural plants. Pursuant to **Item 2** of the Bill, this Schedule will take effect on 1 October 2004.

Under the current scheme, grapevines are dealt with differently to other horticultural plants. The following is a schematic overview of those differences:[21]

	Grapevine	Horticultural Plant
Prerequisites for deductibility	Decline in value can be deducted where conditions in subsection 40-525(3) of the WET Act are fulfilled.	Decline in value can be deducted where conditions in subsection 40-525(2) of the WET Act are fulfilled.
Start of depreciation	Starts to decline in value in the income year in which it is first used in a primary production business for the purpose of producing assessable income.	Starts to decline in value in the income year in which the plant's first commercial season starts.
Write off periods	Written off over 4 years or 25 per cent per annum.	Written off pursuant to the effective life of the horticultural plant.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

After the amendments take effect, grapevines will be treated like any other horticultural plant and the depreciation rules applicable to these plants will become applicable to grapevines.

Potential issues of concern

As indicated above, New Zealand continues to argue that the rebate possibly violates Australia's obligations under the CER and the GATT. This issue has already attracted scrutiny of various committees, including the Economics Legislation Committee[22] and the Foreign Affairs, Defence and Trade Committee.[23]

Issue 1: WET rebate and the CER

New Zealand asserts a possible breach of Article 7.2 of the CER, according to which Australia is prohibited from levying any tax or charge (directly or indirectly) on New Zealand goods in excess of that which would apply to like Australian products.

Article 7.2 of the CER provides:

> 2. A Member State shall not levy on goods, ingredients or components contained in those goods, originating in and imported from the territory of the other Member State, any internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic goods, ingredients or components.[24]

In other words, the provision mandates that neither country shall take measures that are discriminating between its own goods and those which were imported from the other country. Arguably, the rebate to be introduced under the Bill could be characterised either as a tax cut for Australian producers which is not available to their New Zealand counterparts, or as a subsidy, also limited to the Australian wine producers.

The 'rebate' as a 'tax cut'

There are two possible arguments:

- The pro-rebate argument: The WET charged on sales of New Zealand wine under the rebate scheme is no more than that on sales of Australian wine – 29% in each case. The proposal is to give Australian producers a *rebate* on that tax, not a tax cut, and therefore there is no tax or charge imposed upon New Zealand wine in excess of that which would apply to Australian products.

- The contra-rebate argument: The rebate is *effectively* a tax cut for Australian producers, therewith creating a scheme according to which New Zealand goods are charged or taxed in excess of their Australian counterparts.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

This latter position is not easy to deny for two reasons:

- first, the rebate is linked to the payment of tax and it is likely to be paid at the same time the tax is paid, and
- second, it could result in cheaper prices for Australian wines, adversely affecting the sale of New Zealand wines in Australia.

The possible answer to whether Article 7.2 of the CER is breached will depend upon the preferred reading of the provision in a dispute.

Arguably, on a strict reading of the provision, it would not apply to the WET rebate: Australia does not levy a different tax on New Zealand wines in excess of the Australian ones – it is 29 per cent in both cases – and the provision is not applicable to rebates, but only to charges and levies.

However, pursuant to Article 1(c) and (d) of the CER, the objectives of the agreement include:

> to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner … [and] to develop trade between New Zealand and Australia under the conditions of fair competition.

The rebate does appear to deny New Zealand a benefit it would have expected under Art 7.2 of the CER, namely fair competition, therewith frustrating the general objectives of the CER. Where such benefit is denied or where the 'achievement of any objective of this Agreement is being or may be frustrated', Article 22(2) of the CER requires the parties to enter into consultations to solve the issue.

A consultation under the CER would require consultations 'with a view to seeking an equitable and mutually satisfactory solution', arguably fairly weak remedies for either side. As the Department for Foreign Affairs and Trade's guide to the CER notes:

> There are no specific dispute settlement procedures under the CER Agreement. Because consultations are non-binding, successful settlement relies on the *goodwill* of both parties to work out amicable and practical solutions.[25] [emphasis added]

It follows that compliance with CER is, for practical purposes, a political rather than a legal issue.

The 'rebate' as a 'subsidy'

In the alternative, if the rebate cannot be characterised as a tax cut as suggested above, it does qualify as a subsidy in the form of a direct financial assistance from the government having possibly adverse effects on competition. This subsidy would be subject to the *Agreed Minute on Industry Assistance* ('the Minute') attached to CER, according to which the parties are required to:

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

> [T]ry to avoid the adoption of industry specific measures (bounties, subsidies and other financial support) which have adverse effects on competition between industries in the Free Trade Area.[26]

The Minute, agreed upon in 1988, goes on to provide that:

> If either country nevertheless considers that it must adopt such a measure, e.g. on the grounds of overriding national interest, it will seek, and take into account, the views of the other country *before* making its final decision. A minimum time period, of one month will be allowed for the either country to present its views. [emphasis added][27]

Since 1992, the consultation can occur *after* the announcement of a measure if the party introducing the measure believes that it does not affect competition or if the decision and announcement had to be taken quickly.[28] Whilst the phrase 'try to' and the use of 'nevertheless' make it clear that this is not a binding obligation on either party, the Minute provides that New Zealand would have a right to request consultations in these circumstances.

Effects of a dispute under CER

There are no other remedies available under the CER other than the request of consultations remedy. As indicated above, this is a fairly weak, probably a rather more political remedy. However, the consultations will have a financial impact and may be embarrassing to Australia.

Issue 2: WET rebate and GATT

The other argument put forward by New Zealand is based on a possible violation of the *General Agreement on Tariffs and Trade 1994*, which incorporates the *General Agreement on Tariffs and Trade 1947* (both agreements together are referred to as 'the GATT') and is an integral part of the *Marrakech Agreement Establishing the World Trade Organization* ('WTO Agreement").[29] Under the GATT, a dispute arises where one country adopts a trade policy measure or takes some action that another World Trade Organisation ('WTO') member considers:

- to be breaking the WTO agreements, or
- to be a failure to live up to the other member's obligations under GATT.[30]

The GATT dispute resolution mechanism and remedies are available to all members of the WTO, not only New Zealand. However, so far New Zealand appears to be the only country alleging that the rebate breaches Australia's obligations under the GATT and is therefore the focus of the following discussion.

Where such a dispute arises, a country may utilise the dispute resolution mechanism available under the GATT by pursuing either or both of two distinct causes of action set forth in Article XXIII of the GATT:[31]

- Under Article XXIII, 1(a), a member may have a claim where another member has failed to carry out one or more of its obligations or has acted inconsistently with a provision of the GATT
- New Zealand could mount an argument that the rebate would create a protective measure for Australian products which, in turn, constitutes a violation of Article III of the GATT. This would provide New Zealand with a cause of action under Article XXIII, 1(a) of the GATT
- Under Article XXIII, 1(b), a member may commence proceedings on the basis that, through the application of a measure, another member has violated the spirit of the GATT, regardless of whether the measure conflicts with an express obligation. This is called a 'nullification or impairment dispute', and
- New Zealand could assert that the rebate frustrates the object and purpose of the GATT and the reasonably expected benefits that flow there from. This would provide a cause of action for frustrating the spirit of the GATT pursuant to Article XXIII, 1(b) of the GATT.

Violation of Art III of the GATT: cause of action pursuant to Article XXIII, 1(a)

The principle entrenched in Article III of the GATT agreement is to avoid protectionism in the application of internal tax and regulatory measures.[32] The Article has been interpreted to enshrine the principle of *pacta sunt servanda*.[33] This principle, which translates as 'agreements are to be kept' or 'treaties should be observed', was described as the:

> 'bedrock of the customary international law of treaties and, according to some authorities, the very foundation of international law. Without such an acceptance, treaties would become worthless. [34]

It ensures that members cannot undermine their commitments under GATT,[35] obliging them to provide equality of competitive conditions for imported products in relation to domestic products.[36] If it is possible to successfully argue that the rebate is effectively a tax cut or a subsidy for Australian producers, the measure may be found to disturb the equilibrium envisaged under Article III of GATT, providing New Zealand with reasonable grounds to argue a violation of this provision and therewith a cause of action to commence dispute settlement procedures against Australia pursuant to Article XXIII, 1(a) of the GATT.

It should be noted that the argument that the rebate will not change the price of a bottle of wine but rather increase the profit margin of the producer would not provide a defence for Australia. The focus of the Article is the maintenance of the equilibrium created by

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

GATT, and therefore, it is irrelevant that the differential treatment between imported and domestic products has no trade effect. It was noted that:

> It is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III.[37]

Frustrating the spirit of the GATT: cause of action under Article XXIII, 1(b)

New Zealand may also have a case to argue that Australia's measures would frustrate the object and purpose of the GATT and the reasonably expected benefits that flow therefrom. Under Article XXIII, 1(b) of the GATT, a party has a cause to activate the dispute resolution process against another member where it is alleged that the 'spirit' of the agreement rather than its letter is violated by a contracting party's behaviour.[38] The test developed to establish whether there is a violation is three-pronged and includes the following limbs:

- there must be the application of a measure by a WTO member
- the benefit in question must accrue under the relevant agreement, and
- the nullification or impairment of the benefit must be due to the application of the measure and could not have been reasonably expected by the exporting member.[39]

The WET rebate does appear to deny New Zealand a benefit it would have expected under the GATT, namely fair competition between Australian and New Zealand products. It therefore frustrates the general objectives of the GATT. Further, it could be argued that the frustration of the fair competition expectation could not have been reasonably expected by New Zealand, especially given the additional agreement between Australia and New Zealand to a similar effect, the CER. Therefore, New Zealand seems to have also reasonable grounds to establish a cause of action pursuant to Article XXIII, 1(b) of the GATT, providing it an alternative to commence dispute resolution proceedings against Australia.

The dispute resolution mechanism available under Article XXII, XXIII

Causes of action arising under the GATT can be pursued under a dispute resolution mechanism provided for by Article XXII and XXIII of the GATT and the provisions set forth in the *The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes* ('the DSU').[40] The dispute resolution mechanism is two-tiered and provides for a consultation and a panel stage.

Pursuant to Article 4 and 5 of the DSU, before any other procedure is pursued, the parties have to engage in consultations, discussing the disputed issues amongst each other. The period allowed for this consultation is up to 60 days. During the consultation stage, the

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

parties can also request any kind of assistance in settling their dispute, including requesting mediation. Where, however, the consultation stage fails altogether, the complainant country may proceed pursuant to Articles 6 and 7 of the DSU by asking for the appointment of a panel. The panel, in assisting the WTO's Dispute Settlement Body, conducts the procedure with a view:

- to establish whether the GATT was violated
- to recommend that the responding country is to achieve conformity with the agreement, and
- to make recommendations on how to achieve this conformity.[41]

The dispute resolution process is characterised by tight timeframes and the following table provides a brief overview of the approximate periods applicable:

How long to settle a dispute? These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.	
60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	**(without appeal)**
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	**(with appeal)**

Source: Understanding The WTO: Settling Disputes.[42]

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The effects of a dispute under GATT

The effects of such a dispute under the GATT are difficult to predict, however, it could be a lengthy and potentially expensive process, possibly embarrassing to Australia in the international arena.

Concluding Comments

The introduction of the rebate indeed raises the issue of its compatibility with Australia's international trade obligations. There are arguments supporting New Zealand's view that the introduction of the rebate in its current form may violate both the CER and the GATT. If New Zealand decided to take action, the consultations under the CER or the dispute resolution under the GATT may become an expensive and embarrassing exercise for Australia.

However, it is important to realise that even where a bi-lateral solution was found with New Zealand, for example by introducing an exemption from WET for New Zealand wines, GATT compliance will not be achieved. Due to the multi-lateral nature of the GATT, a violation could still be alleged by any other WTO member with a significant interest in wine production so that Australia, having resolved the issue with New Zealand, may still be exposed to further disputes with other WTO members.

Endnotes

---

1 Wine Federation of Australia, '*WET Update – Pressure at the Top*', Tax News, 19 March 2004, available at http://www.wfa.org.au/PDF/Tax%20190304.pdf, accessed 1 June 2004.

2 S Strachan, '*Wine Taxation*', Core policy issues of the Winemakers Federation of Australia, available at http://www.wfa.org.au/policyissues/tax.html, accessed 1 June 2004.

3 P Starick, 'Wine Tax Win', *Advertiser (Adelaide)*, 11 May 2004, p. 1.

4 S Strachan, loc. cit.

5 R Gottliebsen, 'Vignerons to get the grapes of wrath', *The Australian*, 12 May 2004, p. 43.

6 R Gottliebsen, 'Costello's cure fatal for wineries', *The Australian*, 24 May 2004, p. 27.

7 R Gottliebsen, *Vignerons to get the grapes of wrath*, loc. cit.

8 The Hon. W Truss, Minister for Agriculture, Fisheries and Forestry, *Wine industry initiatives welcomed*, media release, 12 May 2004.

9 B Foley, 'Wineries sour over tax', *Australian Financial Review*, 20 May 2004, p. 6.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

10 T Watkins, 'Winemakers purple over $2 tax on bottles', *Dominion Post (New Zealand)*, 25 June 2004, p. 3; C Clarke, 'Trans-Tasman tiff over wine', *Advertiser (Adelaide)*, 15 May 2004, p. 2.

11 The Hon. Dr M Cullen, Deputy Prime Minister, New Zealand, '*Cullen to raise wine issue with Downer*', media release, available at http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19689, accessed 1 June 2004.

12 T Watkins, loc. cit.

13 K Middleton, 'A package timed to win over key voters', *West Australian*, 12 May 2004, p. 2.

14 P Starick, loc. cit.

15 L de Kretser, 'A grape day for wine growers', *The Herald Sun (Melbourne)*, 13 May 2004, p. 67.

16 A ***taxable dealing*** is an assessable dealing that happens on or after 1 July 2000 for which no exemption is available under Division 7. Assessable dealings are listed in section 5-5 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

17 Explanatory Memorandum, paragraph 1.24.

18 Explanatory Memorandum, paragraph 1.26.

19 Explanatory Memorandum, paragraph 2.3 to 2.4.

20 Explanatory Memorandum, paragraph 2.14.

21 Explanatory Memorandum, paragraph 4.4 to 4.8.

22 Estimates Committee, Economics Legislation Committee, 'Treasury Portfolio: Australian Taxation Office', Senate, 3 June 2004, p. 112.

23 Estimates Committee, Foreign Affairs, Defence and Trade Legislation, 'Foreign Affairs and Trade Portfolio', Senate, 3 June 2004, p. 57.

24 The CER Agreement between Australia an New Zealand, available at http://www.dfat.gov.au/geo/new_zealand/anz_cer/anzcerta1.pdf, accessed 14 July 2004.

25 Department of Foreign Affairs, 'Closer Economic Relations, Background Guide to the Australia New Zealand Economic Relationship', *background paper*, Australian Government Publishing Services, Canberra, 1997, p. 23.

26 *Agreed Minute on Industry Assistance of 1988*, paragraph 3(a).

27 *Agreed Minute on Industry Assistance of 1988*, paragraph 3(b).

28 *Exchange of Letters on the Agreed Minute on Industry Assistance of 1992*, *Notification and Consultation Provisions of the Agreed Minute on Industry Assistance*.

29 Signed at Marrakech, Morocco, 15 April 1994 and entered into effect on 1 January 1995.

30 The World Trade Organisation, 'Understanding the WTO, Dispute Settlement: A unique contribution', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, accessed 14 July 2004.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

31 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, paragraph 8.252.

32 *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p 16.

33 *Korea – Measures Affecting Government Procurement*, WT/DS163/R, paragraph 7.92 to 7.93.

34 Elizabeth A. Martin (ed) '*A Dictionary of Law: pacta sunt servanda*'. Oxford University Press, 2002., available at http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t49.e2563, accessed 14 July 2004.

35 *Korea – Measures Affecting Government Procurement*, WT/DS163/R, paragraph 7.92 to 7.93.

36 *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, paragraph 5.1.9.

37 *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, p. 17.

38 M J Trebilcock, R Howse, '*The Regulation of International Trade*', 2nd ed, Routledge Publishers, Lodon, New York, 1999, p. 57.

39 *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44, paragraph 10.41; *Korea – Measures Affecting Government Procurement*, op. cit., paragraph 7.86.

40 *The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*, full text version available here, brief commentary available here.

41 M J Trebilcock, R Howse, op. cit., p. 77.

42 The World Trade Organisation, '*Understanding the WTO, Dispute Settlement: A unique contribution*', loc. cit.