



## Australian Wine and Brandy Corporation Amendment Bill 2009

Peter Hicks  
Economics Section

Juli Tomaras  
Law and Bills Digest Section

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## Australian Wine and Brandy Corporation Amendment Bill 2009

**Date introduced:** 22 June 2009

**House:** House of Representatives

**Portfolio:** Agriculture, Fisheries and Forestry

**Commencement:**

Sections 1 – 3: on Royal Assent.

Schedules 1-2: on a single day to be fixed by proclamation, or if any of the provision do not commence within 6 months of Royal Assent, then they commence on the first day after that period.

Schedule 3 Parts 1 and 3: on 28th day after Royal Assent.

Schedule 3 Part 2: the latter of immediately after the 28<sup>th</sup> day after Royal Assent and the commencement of Schedule 1.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

There is a threefold purpose to the Australian Wine and Brandy Corporation Amendment Bill 2009 (the Bill):

1. to bring into force the Australia – European Community (EC) Agreement on Trade in Wine (the Agreement)
2. to further protect Australia's reputation for the production of wines of quality and integrity by strengthening the Australian Wine and Brandy Corporation's (AWBC) Label Integrity Program (LIP) and
3. to correct a number of weaknesses with the compliance provisions of the *Australian Wine and Brandy Corporation Act 1980* (the AWBC Act).<sup>1</sup>

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1. Explanatory Memorandum, Australian Wine and Brandy Corporation Amendment Bill 2009, p. 2, viewed 4 August 2009, [http://parlinfo/parlInfo/download/legislation/ems/r4061\\_ems\\_26e45f18-b1cc-4840-868d-a61629e990db/upload\\_pdf/330970.pdf;fileType=application%2Fpdf](http://parlinfo/parlInfo/download/legislation/ems/r4061_ems_26e45f18-b1cc-4840-868d-a61629e990db/upload_pdf/330970.pdf;fileType=application%2Fpdf)

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## Background

### The Australian wine industry

In 1996, the Australian wine sector set as one of its key targets to achieve annual sales of \$4.5 billion by the year 2025. This figure was actually surpassed in 2005 some 20 years early.<sup>2</sup>

The Australian wine industry expanded very rapidly between the mid 1990s and the middle of the present decade stimulated by significant growth in export markets. Production rebounded in 2007–08 following a very sharp downturn in 2006–07 when wine grape yields fell nearly 30 per cent on the previous year. However, another significant yield decline occurred in 2008–09 as a result of ongoing shortages of water for irrigation in some regions; high temperatures in late January and early February 2009; and bushfires in Victoria. Consequently, the 2008–09 harvest was about 13 per cent lower than the previous year.<sup>3</sup> Further growth in wine grape production is expected over the next few years but at a more modest rate than during the boom period. It also remains to be seen what impacts, if any, will flow from the collapse of managed investment schemes operated by Timbercorp and Great Southern Plantations.

Export demand has recovered somewhat from the sharp fall seen in 2007–08. However, with only subdued growth in export volumes anticipated in the medium term, a build up of stocks is expected.<sup>4</sup>

Summary statistics on the Australian wine industry for recent years are provided in Table 1 along with figures for 1995–96, which indicate the magnitude of change that has occurred in the industry since the mid 1990s. In addition to the industry growth reflected in Table 1, the number of wine companies in Australia more than doubled between 1995–

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2. Wine Australia, *Directions to 2025*, p. 1, May 2007, viewed 29 July 2009  
<http://www.wineaustralia.com/australia/LinkClick.aspx?fileticket=QsfzgT21xhE%3d&tabid=3529>

3. T Jackson, *Australian wine grape production projections to 2010–11*, ABARE research report 09.7, March 2009, viewed 30 July 2009  
[http://www.abare.gov.au/interactive/09\\_ResearchReports/WineGrapeProj/](http://www.abare.gov.au/interactive/09_ResearchReports/WineGrapeProj/)

4. A comprehensive assessment of the outlook for the wine industry is provided by the Australian Bureau of Agricultural and Resource Economics at page 61 of the March 2009 issue of *Australian Commodities*:  
[http://www.abare.gov.au/publications\\_html/ac/ac\\_09/ac\\_09.html](http://www.abare.gov.au/publications_html/ac/ac_09/ac_09.html)

The report cited in note 3 above provides comprehensive estimates of wine grape production for the 2007–08 vintage and production projections for 2008–09, 2009–10 and 2010–11. Estimates have been made for specialist, multi-purpose and minor wine grape varieties in each of Australia's wine grape producing regions.

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96 and 2005–06 from 892 to 2008, while direct employment almost doubled from 15,743 to 31,000.<sup>5</sup>

Table 1: Australian wine industry – summary statistics

	unit	1995-96	2004-05	2005-06	2006-07	2007-08	2008-09 s	2009-10 f
Wine grapes								
area	'000 ha	63	153	158	163	166	168	171
production	kt	883	1 925	1 902	1 397	1 837	1 594	1 820
yield	t/ha	14	12.6	12.0	8.6	11.1	9.5	10.7
gross value of production	\$m	548	1 377	1 172	898	1 446	1 100	1 230
unit value	\$/t	621	715	615	643	787	690	676
Wine								
volume of exports	ML	131	661	736	798	709	735	740
value of exports	\$m	474	2 748	2 799	2 988	2 682	2 370	2 360
volume of imports	ML	20	22	27	34	53	62	-
domestic sales of Aust wine	ML	307	430.1	432.4	448.1	427.5	430.7	-

s – ABARE estimate f – ABARE forecast na – not available

Sources: Australian Bureau of Agricultural and Resource Economics, *Australian Commodity Statistics* and *Australian Commodities*, various issues. Australian Bureau of Statistics, *Sales of Australian Wine and Brandy by Winemakers*, cat. no. 8504.0, June 2009, Canberra, 3 August 2009 [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DDAE510ADB15F334CA257604001AE23E/\\$File/85040\\_jun%202009.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DDAE510ADB15F334CA257604001AE23E/$File/85040_jun%202009.pdf)

Although Australia exports to over 100 destinations, three markets have long dominated Australia's wine industry – the United Kingdom (UK), the United States (US) and Canada.<sup>6</sup> For the seven years to 2007–08, the UK accounted for 35% of exports (in value terms) at an average \$905 million per year. Thirty-two per cent of exports went to the US, averaging \$823 million per year. Canada was the third most important market with 8 per cent of exports or \$218 million per year on average.<sup>7</sup>

## The Australian Wine and Brandy Corporation

The AWBC is a statutory authority, established in 1981 to provide strategic support to the Australian wine sector.<sup>8</sup> Its responsibilities include the matters dealt with by the Bill,

5. Wine Australia, op. cit., p. 6.
6. As to Australian wine export destinations see Australian Wine and Brandy Corporation, *Winefacts*, October 2007, viewed 29 July 2009, <http://www.wineaustralia.com/Australia/LinkClick.aspx?fileticket=jUowz4QA25w%3d&tabid=4350>
7. Australian Bureau of Agricultural and Resource Economics, *Australian Commodity Statistics 2008*, p. 149, viewed 29 July 2009, [http://www.abare.gov.au/publications\\_html/acs/acs\\_08/acs\\_08.html](http://www.abare.gov.au/publications_html/acs/acs_08/acs_08.html)
8. This section is largely extracted from the AWBC's *2007-08 Annual Report*, pp. 8–9, viewed 4 August 2009, <http://www.wineaustralia.com/australia/Default.aspx?tabid=148>

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namely, international marketing of wine; the integrity of wine labels and wine making practices; and compliance. The AWBC's objects, functions and powers are set out in the AWBC Act and the *Australian Wine and Brandy Corporation Regulations 1981* (the AWBC Regulations).

### Objectives of the AWBC Act

These objectives are set out in section 3 of the AWBC Act and include:

- promoting and controlling the export of grape products from Australia
- promoting and controlling the sale and distribution, after export, of Australian grape products
- promoting trade and commerce in grape products among the States; between States and Territories; and within the Territories
- improving the production of grape products, and encouraging the consumption of grape products, in the Territories
- enabling Australia to fulfil its international obligations under prescribed wine-trading agreements
- for the purpose of achieving any of the objects set out in the preceding paragraphs:
  - determining the boundaries of the various regions and localities in Australia in which wine is produced
  - giving identifying names to those regions and localities, and
  - determining the varieties of grapes that may be used in the manufacture of wine in Australia
- advancing the objects of the AWBC Act by helping to ensure the truth and the reputation for truthfulness, of statements made on wine labels, or made for commercial purposes in other ways, about the vintage, variety or geographical indication of wine manufactured in Australia, and
- regulating the sale, export and import of wine:
  - for the purpose of enabling Australia to fulfil its obligations under prescribed wine-trading agreements, and
  - for certain other purposes for which the Parliament has power to make laws.

### Functions of the AWBC

The AWBC's functions relate to defined grape products that comprise Australian wine, brandy, grape spirit and products derived in whole or in part from grapes that have been declared by the AWBC Regulations to be grape products.

Under section 7 of the AWBC Act, the AWBC's functions are:

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- promoting and controlling the export of grape products from Australia
- encouraging and promoting the consumption and sale of grape products both in Australia and overseas
- improving the production of grape products in Australia
- conducting, arranging for, and assisting in, research relating to the marketing of grape products, and
- other functions in connection with grape products as are conferred on the AWBC by the AWBC Act or the AWBC Regulations.

The Geographical Indications Committee's (the GIC's) functions are set out in section 40P of the AWBC Act and include making determinations of geographical indications (GIs) for wine in relation to regions and localities in Australia.

#### Powers of the AWBC

Under section 8 of the AWBC Act, the AWBC has power to do all things necessary to be done in connection with the performance of its functions.

#### The Australia-EC Wine Agreement

On 1 December 2008, Stephen Smith, Minister for Foreign Affairs and Trade, formally signed the Agreement. The European Union (the EU) signatory was Mariann Fisher-Boel, the EU Commissioner for Agriculture and Rural Development. The Agreement had been initialled in Canberra in June 2007 and replaces the first such agreement signed in 1994 (the initial Agreement).

Under the EC/Australia Bilateral Wine Agreement, which came into effect on 1 March 1994, Australia gained improved access to the EC market through the lowering of technical barriers to Australia's wines in return for the Australian wine industry phasing out its use of European geographical indications. The use of some names such as Hock and White Bordeaux is being phased out and further negotiations will be held to establish phase-out arrangements for European names in widespread use in Australia such as Chablis and Champagne.

The Australian industry will in future use varietal, regional and brand names to market its wines. There will also be a need to develop replacement names where protected EC names have entered into common use, such as Sherry.<sup>9</sup>

In effect, the Agreement is the finalisation of negotiations on outstanding issues from the initial Agreement, especially on GIs and traditional expressions (TEs).

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9. Department of Foreign Affairs and Trade, *Australia's Wine Industry*, Fact sheet, January 1995, viewed 30 July 2009, <http://coombs.anu.edu.au/SpecialProj/ERIC/013wine.html>

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The Agreement ensures winemakers have continued access to Australia's largest export market. During 2007–08, Australia exported 397 million litres of wine to the EC—worth \$1.3 billion; and imported 18 million litres from Europe, valued at \$212 million. The EC accounted for just over half of all Australian wine exports during that time.

The main benefits to Australian wine producers from the Agreement are:

- European recognition of an additional 16 Australian winemaking techniques
- simpler arrangements for approving winemaking techniques that may be developed in the future
- simplified labelling requirements
- protection within Europe for Australia's 112 registered GIs
- wholesalers will have five years to sell stock labelled with an EC GI and retailers will be able to sell all their stock and
- defined use of a number of quality terms used in the presentation and description of wine.<sup>10</sup>

Australia has agreed to:

- protect more than 2,500 registered European GIs; including from member states who have joined the EC since 1994
- protect 12 sensitive European GIs that have previously been used to describe Australian wines
- prevent Australian producers from using a range of European TEs in the language specified in the agreement and
- phase out the use of the term “Tokay” to describe Australian fortified wines within 10 years.<sup>11</sup>

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10. Department of Agriculture, Fisheries and Forestry, *Australia - European Community Agreement on Trade in Wine Signed 1 December 2008-frequently asked questions*, p. 3, viewed 30 July 2009, [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0006/912309/wine-faqs.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0006/912309/wine-faqs.pdf)

A full copy of the Agreement is available at [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0011/913754/wine-agreement.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0011/913754/wine-agreement.pdf)

11. Department of Agriculture, Fisheries and Forestry, *Australia - European Community Agreement on Trade in Wine Signed 1 December 2008-frequently asked questions*.

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Negotiation of the Agreement was a long-standing bilateral issue between Australia and the EU, where expectations that the matter would have been concluded much earlier were not realised. In November 2002, for example, then Agriculture Minister the Hon. Warren Truss:

... welcomed the breaking of a deadlock [this week] between Australian and European Commission officials on proposed changes to the European Union (EU)/Australian Wine Agreement ...

and was

... hopeful that a revised Wine Agreement can be concluded in the first half of 2003.<sup>12</sup>

Somewhat previously, the then Deputy Prime Minister and Minister for Trade, Tim Fischer MP announced that he and Sir Leon Brittan, the EC Commissioner, had resolved jointly in April 1999 to try to finalise all outstanding issues at a meeting in June that year.<sup>13</sup>

At the time of signing, it had been expected that the new Agreement would take effect in mid-2009, but there has obviously been some slippage of this timetable.<sup>14</sup>

### **Position of significant interest groups/press commentary**

The signing of the Agreement has been welcomed by the Winemakers Federation of Australia (WFA), which noted that benefits would include:

recognition of all existing winemaking techniques used in Australian production of wine and a simplified procedure to authorise the approval of new winemaking techniques.

The WFA also considers:

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12. W Truss, *Welcome progress made on EU/Australia Wine Agreement*, media release, Canberra, 22 November 2002, viewed 30 July 2009, <http://pandora.nla.gov.au/pan/54888/20051219-0000/www.maff.gov.au/releases/02/02336wt.html>
  13. T Fisher, Speech to the Festival of Boutique Winemakers, Renaissance Hotel, Sydney, 18 June 1999, viewed 30 July 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=customrank;page=1;query=Content%3A%22wine%20agreement%22%20Dataset%3Apressrel;querytype=:rec=1;resCount=Default>
  14. Department of Agriculture, Fisheries and Forestry, Australia - European Community Agreement on Trade in Wine signed 1 December 2008-frequently asked questions, op. cit.

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... this agreement ushers in a new era of cooperation with the European Union, which will bring mutual benefits, not just to our respective wine industries, but will help cement wider relations.<sup>15</sup>

The Explanatory Memorandum states that, in relation to the Bill as a whole:

The AWBC, as the responsible authority, requested the amendments. The amendments are supported by the Winemakers' Federation of Australia (WFA), the national representative body for winemakers with voluntary membership representing more than 95 per cent of the wine produced in Australia. The amendments have been discussed at, and are supported by the Legislation Review Committee (LRC) of the AWBC. The LRC consists of representatives from WFA, an independent lawyer and the major wine companies.

A representative of Wine Grape Growers Australia (WGGA) also attended the LRC and supports the amendments including the requirement that wine grape growers keep a record of the geographical indication in which the grapes were grown.<sup>16</sup>

## Label Integrity Program

The wine industry LIP was introduced at the request of industry in 1989, under the provisions of the *Australian Wine and Brandy Corporation Amendment Act 1989*. The LIP has its origins in the first (1981–82) and second Annual General Meetings of the AWBC. At these forums, the wine industry gave the AWBC permission to recommend to the Minister that legislation be enacted for an industry wide system of record keeping to substantiate label claims in respect of vintage, variety and region of origin. The permission and subsequent recommendation stemmed from concerns within the industry over a number of scandals in New South Wales involving wine additives and the potential effect that further scandals could have on wine exports.<sup>17</sup>

The regulations covering the LIP require winemakers to keep records to substantiate label claims and are set out in the AWBC Act (Part VIA, sections 39A - 39ZL).

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15. Winemakers Federation of Australia, *WFA welcomes historic Australia and European Community Wine Agreement*, media release, 2 December 2008, viewed 30 July 2009, [http://www.wfa.org.au/files/media/2008/MR\\_Dec2.pdf](http://www.wfa.org.au/files/media/2008/MR_Dec2.pdf)

16. Explanatory Memorandum, op cit., pp. 10-11.

17. Department of the Parliamentary Library, *Australian Wine and Brandy Corporation Amendment Bill 1992*, Bills digest, Canberra, 19 August 1992, viewed 4 August 2009, <http://parlinfo.parlInfo/search/display/display.w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=customrank;page=0;query=Title%3A%22australian%20wine%20and%20brandy%22%20Dataset%3AbillsPrevParl;querytype=:rec=8;resCount=Default>

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The LIP was introduced for the 1990 vintage and is now the basis of the Australian label-claim system in respect of vintage, variety and geographical indication. Winemakers are not required to make a label claim about the wine vintage, (grape) variety or region of origin of the grapes, but must keep an audit trail if they do. The LIP prescribes what events must be recorded, but not how records must be kept.

A “label claim” includes claims made on a wine label, in a commercial document or in an advertisement, about the vintage, variety or geographical indication of wine goods or of the wine goods from which they were manufactured. Generic name wines, such as Moselle, Claret, Dry Red, Dry White etc., which make no reference in a label statement as to vintage, variety or geographical indication, are not included.<sup>18</sup>

The AWBC’s 2007–08 Annual Report states:

The Corporation’s auditors monitor the industry for compliance with the LIP provisions of the AWBC Act through an audit program that checks that the origin of a wine can be traced from the grapevine through to the despatch of an export consignment or to the domestic retailer’s shelf. A total of 133 LIP audits were conducted throughout Australia in 2007–08 with 76 wineries visited in South Australia, 19 in Victoria, 19 in New South Wales and seven in Tasmania.

Wine sector compliance continues to be very high. Nevertheless, the export licences of two wine producers were suspended during the year due to non-compliance with the LIP provisions. The Corporation is involved in the ongoing prosecution of a wine producer over allegations of false label integrity records.<sup>19</sup>

As the current LIP is limited to wine manufacturers, other players in the wine supply chain are not covered. These include wineries that only perform a limited range of grape juice processing procedures, agents, growers, wholesalers and retailers. The practical consequence of this limitation became evident when the AWBC investigated an alleged fraud. The LIP’s focus on the wine manufacturer did not allow it to investigate the activities where the alleged fraud occurred and thus it does not currently ensure adequate traceability through the wine supply chain.<sup>20</sup>

The objective of the amendments is:

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18. AWBC, *Label Integrity Program*, viewed 4 August 2009, <http://www.wineaustralia.com/AUSTRALIA/Default.aspx?tabid=258>
  19. Australian Wine and Brandy Corporation, *Annual Report 2007-08*, Adelaide, AWBC, 2008, p. 24, viewed 4 August 2009, <http://www.wineaustralia.com/australia/Default.aspx?tabid=148>
  20. Explanatory Memorandum, op. cit., pp. 11–12; T Burke, ‘Second Reading Speech: Australian Wine and Brandy Corporation Amendment Bill 2009’, House of Representatives, *Debates*, 22 June 2009, pp. 6736–6741, viewed 4 August 2009, <http://www.aph.gov.au/hansard/reps/dailys/dr220609.pdf>

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... to ensure that the Label Integrity Program enables the AWBC to verify wine label claims by tracing the supply chain from grape to the sale of the wine.<sup>21</sup>

The Government expects that the proposed changes will achieve that objective by requiring all those involved in the production, distribution and sale of wine and grapes used to make wine, to record the specified information to ensure a traceable trail throughout the wine production process.<sup>22</sup>

## Financial implications

The Government does not expect the new LIP arrangements to add to the administrative workload of growers, winemakers and deliverers who use delivery docketts. Nor is it expected to add to the workload of wholesalers and retailers.<sup>23</sup>

The Government advises there are no financial implications for the Commonwealth as a result of the Bill.<sup>24</sup>

## Main provisions

Schedule 1—Amendments relating to the Agreement between Australian and the European Community on Trade in Wine

### Part 1—Amendments

#### *Australian Wine Brandy and Corporation Act 1980*

**Items 1–69** of Schedule 1 in the Bill propose amendments to the AWBC Act. **Item 1** clarifies that an objective of the Act is to enable Australia to fulfil its obligations under all relevant international agreements to which Australia is a party (**proposed subsection 3(1)(e)**).

**Item 7** amends the definition of the term ‘**geographical indication**’ (GI) consistent with the definition set out in Article 22.2 of the 1994 World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights*. A GI is basically a name or sign used on certain products, which corresponds to a specific geographical location or origin (for example, a town, region, or country). The significance of using a particular GI is that it may act as an indication or signal that the product in question possesses a certain quality, or reputation, on account of its geographical origin. In simple terms, GI law operates to

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21. Explanatory Memorandum, op. cit., p. 9

22. Explanatory Memorandum, p. 11

23. Explanatory Memorandum, pp. 9–10

24. Explanatory Memorandum, p. 3

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restrict the use of a GI for the purpose of identifying a certain product, unless the product or its constituent materials actually come from the region in question or meet certain standards.

It is noteworthy that Australia has removed the capacity to register varieties of grapes on the Register of Protected Geographical Indications and Other Terms, hence the definition of ‘registered variety of grapes’ has been repealed (**Item 19**).

**Item 12** repeals the definition of ‘**registered ancillary protected condition**’ in subsection 4(1); it is replaced by the term ‘**registered conditions of use**’ (**item 14**), where in relation to:

- (a) a registered geographical indication; or
- (b) a registered translation of such an indication; or
- (c) a registered traditional expression; or
- (d) a registered quality wine term; or
- (e) a registered additional term;

means a condition of use included in the Register that is applicable to the geographical indication, translation, traditional expression, quality wine term or additional term (as the case may be).

This definition is used by **proposed section 40G (item 37)**, which creates an offence to sell, import or export wine in contravention of those conditions of registered use.

**Item 16** defines a **registered quality wine term**, as one which is included in Part 3 of the Register of Protected Geographical Indications and Other Terms (**subsection 4(1)**).

As noted earlier, the Agreement benefits Australian winemakers by improving access to the European markets. One way that this is achieved, is by defining the use of a number of quality terms used in the presentation and description of wine. The Agreement allows Australia to be able to continue to use a variety of EC-claimed ‘traditional expressions’ (TEs), which it otherwise could not use on wines exported to Europe.<sup>25</sup> In the Australian context, TEs will however, be referred to as **quality wine terms**.

**Item 25** broadens the definition of **description and presentation** to include the term **indications (proposed section 5C)**.

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25. ‘TEs are words or expressions used in the description and presentation of the wine to refer to the method of production, or to the quality, colour or type, of the wine’: Department of Agriculture, Fisheries and Forestry, *Australia - European Community Agreement on Trade in Wine signed 1 December 2008-frequently asked questions*, op. cit. Please note that Australia has agreed to use different definitions (for the terms cream, ruby, tawny and vintage) for the domestic market versus the export market. Without this, Australian wines would be precluded from using these terms to describe wine destined for export to the EC.

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**Item 26** gives the AWBC the power to determine the conditions of use for registered GIs, independently of the GIC (**proposed paragraph 8(2)(aa)**).

**Items 28** gives the AWBC the power to determine TEs and conditions of use for those TEs registered in relation to wine originating from a foreign country (**proposed paragraph 8(2)(ac)**); and also to determine additional terms and conditions of use for those additional terms (**proposed paragraph 8(2)(ad)**). **Item 31** provides that these determinations must be in writing under the common seal (**proposed subsection 8(2A)**).

**Item 30** recognises that the GIC's increased level of responsibility entails a greater workload and therefore enables the AWBC to charge cost-based fees in relation to the work of the GIC in determining GIs and translating those determinations (**proposed paragraph 8(2)(ga)**).

**Item 34** mandates that the AWBC must include in its annual report, the number of translations of geographical indications that the GIC determined during the reporting year (**proposed subsection 38(4)**).

**Item 37** repeals sections 40C–40H, which deal with provisions relating to sale, import and export of wine, and replaces them as follows.

The current operation of section 40C, which makes it an offence to sell, export or import wine<sup>26</sup> with a false description and presentation, requires the fault element of intention to be made out for all elements of the offence, thus making successful prosecution of offenders difficult. However, in relation to the 'false or misleading description and presentation' element, under **proposed section 40C**, it will only be necessary to prove that only that the relevant was reckless as whether the description and presentation was false.<sup>27</sup> However, the intention element is retained for selling, exporting or importing element of the offence. The existing maximum penalty is unchanged: 2 years imprisonment.<sup>28</sup>

**Proposed section 40D** sets out the meaning of **false descriptions and presentations** for the purpose of its application to proposed section 40C. However, this is subject to **proposed sections 40DA** and **40DB**.

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26. The sale etc has to be in 'trade or commerce'.

27. Recklessness is the relevant fault element due to the operation of 5.6(2) of the *Criminal Code 1995*. The fault element for the 'trade and commerce' aspect of the offence is likewise recklessness.

28. Under section 4B of the *Crimes Act 1914*, a court could impose a fine instead of, or addition to imprisonment. For a natural person the maximum fine would be 120 penalty units (\$13,200), or five times that for a corporation.

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**Proposed section 40DA** sets out the circumstances in which a description or presentation is not false. In general, these circumstances are: the inclusion of a GI, translation or traditional expression registered for more than one place; inclusion of a common English word or term; and the inclusion of the name of an individual or address of winery.

**Proposed section 40DB** provides details of circumstances in which description and presentation is not false with regard to TEs. In general, these circumstances are: the inclusion of a registered quality wine term; where the wine in question originates in a non-agreement country; the inclusion of a trade mark, subject to certain conditions; and the inclusion of a business name, also subject to certain conditions.

**Proposed section 40E** details the offence provisions relating to the sale, export or import of wine with a misleading description and presentation. The use of recklessness as a fault element in paragraph (1) (b) mirrors the rationale and approach in **proposed section 40C**.

**Proposed section 40F** sets out the meaning of **misleading descriptions and presentations** for the purposes of **proposed section 40E**. Basically, the description and presentation of a wine is misleading where it includes a registered GI or a registered translation of a registered GI, and the indication or translation is used in a way which is likely to mislead a consumer as to the country, region or locality in which the wine originated (**proposed paragraphs 40F(2)(a)** and **(b)**). It is also misleading where:

- it includes a registered TE in the language in relation to which the expression is registered;
- the wine is not in the category of wine in relation to which the expression is registered;
- the wine is not a wine in relation to which the expression is registered;
- the expression is used in such a way as to be likely to mislead that the wine originated in a country, region or locality in relation to which the expression is registered; or
- that the wine is in a category of wine in relation to which the expression is registered (**proposed paragraph 40F(2)(c)**)

**Proposed subsection 40F(3)** provides that a registered GI, a registered translation of a registered GI, or a registered TE accompanied by an expression, such as ‘kind’, ‘type’, ‘style’, ‘imitation’, ‘method’, or any other similar expression used in the description and presentation of a wine, is subject to the misleading provisions of **proposed subsection 40F(2)**.

In general, the description and presentation of a wine may also be misleading if it includes: a word resembling a GI, translation or TE (**proposed subsection 40F(4)**); a name of an individual; or the name or address of a winery (**proposed subsection 40F(5)**), and the use of these names are likely to mislead as to the country, region or locality in which the wine originated.

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There are circumstances where the description and presentation of wine will not, in general, be misleading for the purposes of section 40E and 40F.

**Proposed subsection 40FA(1)** provides that where the description and presentation of a wine includes an indication or term that is a registered GI; a registered translation of such GI; or a registered TE in relation to a country, region or locality; and the wine originated from that country, region or locality, as indicated in the description and presentation—that description and presentation is not misleading merely because the indication or term either resembles or is a registered GI; a registered translation of such GI; or a registered TE in relation to another place. It will also depend on whether usage occurs in accordance with authorised conditions of use of those terms that differentiate one term from another.

**Proposed subsection 40FA(2)** provides that where the description and presentation of a wine includes a word or a term that is also a registered GI, translation of a registered GI, or a registered TE, then the description and presentation is not misleading merely because:

- the word or term is a common English word or term
- the word or term is not used in such a way as to indicate that the wine originated in the country, region or locality in relation to which the GI, translation or TE is registered, and
- the word or term is used in good faith.

It is also recognised that under defined circumstances, a description and presentation of a wine is not misleading merely because of the following are included in that description and presentation: a registered quality wine term (**proposed subsection 40FB(1)**); a trade mark (**proposed subsection 40FB(2)**); or a business name (**proposed subsection 40FB(3)**).

**Proposed section 40G** deals with offences relating to the sale, export or import of wine in contravention of registered conditions of use.

**Item 40** amends **paragraphs 40K(1)(b)** and **(c)** so as to expand the category of people who may commence a proceeding under specified offence provisions, to include people from countries in relation to which a GI, translation of a registered GI, or a TE is registered.<sup>29</sup>

**Item 42** amends **subsection 40M(1)** so that basically, a national food standard as set out in the prescribed wine-trading agreement (as in force, or as existing from time to time) has effect, in relation to wine that comes from any foreign country (**proposed 40M(1A)**).

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29. It is proposed in **item 38** of the Bill that such offence provisions would mean **proposed subsections 40C(1), 40E(1) and 40G(1)**.

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Also, replacement practices, processes or requirements must, in general, be the oenological (or winemaking) practices or processes or compositional requirements, prescribed by the regulations in relation to wine originating in any foreign country (**proposed 40M(1B)**). Such prescribed oenological practices or processes or compositional requirements must apply to wine under the laws and regulations of the foreign country in question.

**Item 44** extends the GIC's function to determining conditions of use for Australian GIs (**proposed paragraph 40P(1)(b)**). In accordance with the regulations, the GIC is also given additional powers: to deal with applications for the determination of GIs; translations of GIs; and any conditions of use applicable to such GIs and translations of GIs in relation to wine originating in a foreign country (see **items 45** and **55**). Where authorised by regulations, the GIC may also make determinations for the omission from the Register of Protected GIs and Other Terms (the proposed Register) of registered GIs and registered translations of such GIs in relation to a foreign country, region, or locality in a foreign country (see **items 45** and **53**). Such determinations are reviewable by the Administrative Appeals Tribunal (**item 55 – proposed subsection 40ZAQ(2)**).

Objections to the Registrar of Trade Marks in relation to determination of foreign country GIs and their translations, and the grounds for such objection, will also be the subject of regulatory powers. In addition, the regulations may also enable the Registrar of Trade Marks to make recommendations to the GIC in relation to the determination of proposed foreign country GIs and their translations (**proposed paragraph 40ZAQ(3)(d)**).

The regulations may also prescribe when appeals against decisions made by the Registrar of Trade Marks may be made to the Federal Court (**proposed subsection 40ZAR(1)**).

However, a decision made under this subsection, or under regulations made for the purposes of **proposed section 40ZAQ** does not create or affect a statutory right under the *Trade Marks Act 1995* (the Trade Marks Act) or a common law right in respect of a trade mark; or in any way pre-empt or affect a decision of the Registrar of Trade Marks under the Trade Marks Act in respect of a pending application for the registration of a trade mark (**proposed section 40ZAS**).

**Item 62** updates the proposed Register of Protected Geographical Indications and Other Terms.<sup>30</sup> **Proposed subsection 40ZD(1)** divides the proposed Register into four parts:

- Part 1: GIs in relation to wines originating in Australia and any conditions of use applicable to those indications; as well as GIs in relation to wines originating in a foreign country, any translations thereof, and any conditions of use applicable to those indications and translations

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30. It is currently called the Register of Protected Names.

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- Part 2: TEs in relation to wines originating in a foreign country, and any conditions of use applicable to those expressions
- Part 3: quality wine terms in relation to wines originating in Australia and any conditions of use applicable to those terms, and
- Part 4: other terms (not being GIs, translations of GIs, TEs or quality wine terms) in relation to wines, and any conditions applicable to those other terms.

**Proposed subsections 40ZD(2)–(2C)** set out the particulars that must be included in Parts 1–4 of the proposed Register.

### ***Trade Marks Act 1995***

**Items 70–76** of Schedule 1 in the Bill propose amendments to the Trade Marks Act.

**Item 71** amends the definition of GI to bring it in closer alignment with Article 3 of the [Agreement on Trade Related Aspects of Intellectual Property Rights](#) (**proposed section 6**).

**Item 75** proposes a new reason for which an opposition to the registration of a trade mark, on the grounds stated in subsection 61(1) of the Trade Marks Act, will fail. This is in the case of a registered GI that is also a common English word and it is not being used in a manner that is likely to deceive or confuse members of the public as to the origin of the goods (**proposed subsection 61(4)**). This proposed amendment is designed to dovetail with **proposed subsection 40DA(2)** of the AWBC Act (as discussed above).

**Item 76** enables the registered owner of a registered trade mark to request an amendment to their trade mark or particulars, as they appear on the Trade Marks Register, in particular circumstances (**proposed subsections 83A(1)** and **(2)**). This is to enable compliance with the new obligations in so far as they phase out the use of certain terms (Burgundy, Chablis, Champagne, Graves, Manzanilla, Marsala, Moselle, Port, Sauteme, Sherry and White Burgundy) and would thus expose the owner of a trademark with any of those terms, to prosecution under the AWBC Act. **Proposed subsection 83A(5)** provides for the considerations that the Registrar of Trade Marks must take in account when making a decision to allow such amendment .

### **Schedule 2—Label Integrity Program**

Amendments proposed to the AWBC Act in Schedule 2 of the Bill relate to the LIP under that Act.

In relation to the operation of the LIP, Schedule 2 defines a number of key terms including: ‘blend’, ‘direct sale’, ‘examinable document’, ‘label claim’, ‘manufacture’, ‘originate’ (see, in particular, **items 1–23**).

**Item 27** provides that the persons to whom the LIP applies includes:

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- record keepers by or through whom constitutional corporations or partnerships carry out their business functions and activities; and
- record keepers who supply wine goods to certain constitutional corporations or partnerships (**proposed sections 39B–**).

In addition, **item 27** provides that the LIP also applies to people who grow grapes that are wine products; manufacturers, suppliers and receivers of wine products; whoever is prescribed by regulations for such purpose; as well as agents of the above listed persons (**proposed section 39C**). However, regulations may exclude a class of persons from LIP obligations, or exclude class of persons in specified circumstances.

**Item 28** provides that there is an obligation to keep written records; and sets out type of the information required to be retained by the record keeper and the circumstances under which these records are to be kept (**proposed sections 39F–39H**). **Proposed sections 39J–39M** include offence provisions and set out certain prosecution requirements in relation to such offences. Maximum penalties now included imprisonment (up to 2 years) – current penalties for LIP-related record-keeping offences do not appear to include imprisonment.

**Item 29** provides that the AWBC may require a person whose name and address appears on a wine label as the supplier of the wine to provide specified information in relation to records required to be kept under Part VIA Division 2 of the Act and, in some case, to produce the record itself (**proposed 39ZAA(1)**).

### Schedule 3—Compliance

Amendments proposed in Schedule 3 of the Bill relate to addressing inadequacies in monitoring and enforcing compliance with requirements under the AWBC Act.

**Item 6** gives inspectors a right of entry; and the power to inspect and secure evidence pending a warrant application, where the inspector enters wine premises with the voluntary and informed consent of the wine manufacturer (see **proposed subsections 39ZE(1)–(4)**). Note that when consent is subsequently withdrawn, although an inspector may continue to secure evidence pending a warrant application, the inspector cannot exercise any other power and must otherwise leave the premises (**proposed subsection 39ZE(5)**).

**Item 8** removes does away with ‘reasonable excuse’ as a ground for not providing documents to an inspector. However, a person retains the right to refuse or fail to answer a question or produce a document if doing so would tend to incriminate the person (**proposed subsection 39ZH(3)**).

**Proposed section 39ZI** enables an inspector to obtain a search warrant by telephone or other electronic means.

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**Proposed section 39ZIA** provides for offences in relation to obtaining a warrant by telephone or other electronic means.

Both of these proposed amendments are consistent with sections 3R and 3ZU respectively of the *Crimes Act 1914*, which serves as a model template for such offences.

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