

Bell Gully



Contents

	PAGE
1.0 Introduction	3
2.0 Industry Structure: New Zealand Winegrowers	5
3.0 Establishment and Development	9
3.1 Property Issues	9
3.2 Building Act 2004	13
3.3 Land Use and Planning Issues	14
4.0 Grape growing	23
4.1 Grape Supply Contracts	23
4.2 Vineyard Management Contracts	27
4.3 Employment Issues	28
4.4 Health and Safety	29
4.5 Hazardous Substances and New Organisms	30
5.0 The Wine Act 2003	33
6.0 Production of Wine	35
6.1 The Food Act 1981	37
6.2 Food Safety	37
6.3 Composition of Wine	39
6.4 Labelling and Packaging	41
6.5 Geographical Indications (Wine and Spirits) Registration Bill	45
7.0 Distribution	49
7.1 Distribution Agreements	49
7.2 Advertising	58
7.3 Promotions	61
8.0 Sales	63
8.1 Fair Trading Act 1986	63
8.2 Consumer Guarantees Act 1993	65
8.3 Insurance	67

8.4	Product Recall	69
8.5	“Skins” Contracts	73
8.6	Licensing	74
9.0	Intellectual Property	77
10.0	International Requirements	81
10.1	International Fair Trade	81
10.2	Export Requirements	84
11.0	Excise and Taxation	87
12.0	Succession Planning and Business Growth	89
13.0	Contacts and Publications	94

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 with 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 Geographic Indications Act 1994 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: grapegrowers, 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 licenses 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 trade liberalisation initiatives? What are the requirements for exports?
- Excise and Taxation: What are the key excise duty and taxation issues for the wine industry?

Disclaimer: This publication is not a definitive source of all legal matters relevant to the wine industry and is necessarily brief and general in nature. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions. The legislative provisions summarised in this guide represent the law at the date of publication. The legal information contained in this guide should not be regarded as a substitute for detailed advice in specific cases. You should seek professional advice before taking any action in relation to the matters dealt with in this publication. Please refer to Part 12 for the contact details for key personnel at Bell Gully, and at New Zealand Winegrowers.

- 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?

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.

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 January 2007. The most recent forms of the Wine Regulations 2006 and the Geographical Indications Bill are included.

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).

NZ Winegrowers have also reached an in-principle agreement with the New Zealand Grape Vine Improvement Group. Pursuant to this agreement, NZ Winegrowers administer some of the Group's administrative functions. A Memorandum of Understanding will be entered into to establish the Group as a sub-committee of NZ Winegrowers.

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, there are now over 350 vineyard and winery members representing over 60% of the national producing vineyard and 10,000 tonnes of processed winegrapes.¹

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:

1. Figures are from the Wine Institute of New Zealand's Annual Report 2005.

- 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 2,000,000 litres each;
- Category III winemakers - three voting directors elected by members elected by wineries with annual grape wine sales of more than 2,000,000 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 2004. It is imposed on the following terms:

- A levy is imposed on wine grapes grown in New Zealand for sale.²
- 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.³
- The levy is calculated on the basis of the value of winegrapes 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 winegrape growers.
- The current levy on grape wine is instituted by the Wine (Grape Wine Levy) Order 2005 and imposed on the following terms:

2. "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.

3. "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.

- The commodity levied is grape wine and the grape wine component of grape wine products.⁴
- Wineries are primarily responsible for the payment of the levy.⁵
- 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.
- 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.

4. "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.

5. "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.

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 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.

3.1. Property Issues

System of Land Ownership

New Zealand's land ownership system is built upon foundations of the English common law. By virtue of taking sovereignty over New Zealand, the Crown acquired ultimate ownership of the underlying title of all land in New Zealand. In order to recognise an individual's interest and proprietary right in land, the concept of "estates" was created.

An interest in land, or "estate" in land, is classified according to the duration of ownership and extent of rights associated with the land. The most common estates in land in New Zealand are estates in fee simple (freehold), leasehold estates and stratum estates (cross leases/unit titles).

An estate in fee simple provides the owner with the most extensive property rights available and is an estate where the duration of tenure is uncertain and potentially infinite. Such land is capable of being passed on to heirs and successors.

A leasehold estate provides the lessee with exclusive possession of the land, but not ownership. A leasehold interest in land is created for a set duration and the rights associated with the land are generally determined by the terms and conditions of a lease entered into between the fee simple land owner, the lessor, and the lessee.

In the 1970s an unusual form of joint land ownership was developed as a highbred of the fee simple and leasehold estates in land. An owner of a cross lease title owns an undivided share of the fee simple estate of a property (including buildings) and at the same time, is also the lessee of a specific defined part of the property.

All transactions relating to a piece of land, including sales and mortgages, are noted on the certificate of title, together with any other third party interests, including caveats, easements and even local territorial authority requisitions. Land registration is dealt with under the Land Transfer Act 1952.

Land Transfer Act 1952

The Land Transfer Act 1952 (the LTA) sets out the statutory framework for registration of land in New Zealand. Almost all privately owned land in New Zealand falls under the LTA. The LTA is designed to:

- Ensure that bona fide purchasers of land gain good title to that land, regardless of any defects in the vendor's title.
- Provide a register of all land under the LTA, so that the information about, and history of, any particular title is publicly available to any person dealing with the land.
- Establish a mechanism for the State to guarantee title to land.

Issue of Titles

The 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 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 1952.

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

Recent changes to the LTA have brought in electronic registration and issuing of titles. The electronic system is known as Landonline. Since 1 June 2002, titles and interests registered against land are stored as digital records in the Landonline computer system. This enables real time registration and efficient access to property information available under Landonline.

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

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 90B & 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.

Property Law Act 1952

The Property Law Act 1952 (the PLA) is an important piece of legislation that draws together various enactments which impact on real and personal property in New Zealand. The PLA covers matters such as:

- Technical requirements for documents relating to the transfer of, and dealing with, interests in land.
- Powers and conditions of sale, and the protection of purchasers and creditors.
- Covenants relating to land.
- Mortgages.
- Leases and tenancies.
- Easements, including matters affecting neighbouring land.

Matters affecting neighbouring land

The PLA sets out the way in which easements, including those affecting more than one property are created and managed. This includes easements relating to access, light, air and support.

The legal relationship between neighbouring properties is an area of particular relevance to land owners. Issues often arise in relation to trees and fencing.

Trees

The PLA provides for the occupier of land used for residential purposes, to apply to Court to require a neighbouring occupier to remove or trim any trees growing or standing on that land, or to remove, repair, or alter any structure erected on that land, where it is causing a danger or undue obstruction to the occupier's use and enjoyment of the land or buildings on it. Landowners are also entitled to trim the branches or roots or any tree encroaching onto their land.

Fencing

The rights of land owners in relation to fencing are set out in the Fencing Act 1978. This Act allows an owner to compel a neighbouring owner to contribute to the cost of erecting and maintaining a boundary-line fence. Parties can come to their own agreement on the fencing of a shared boundary, and such agreements are registerable under the LTA.

Maori Land

In New Zealand, most land is classified as "general land". Some land, however, falls within the category of "Maori land" and is governed by the Te Ture Whenua Maori Act 1993 (the TTWMA). The TTWMA attributes one of the following statuses to land in New Zealand:

- Maori customary land.
- Maori freehold land.
- General land owned by Maori.
- General land.
- Crown land.
- Crown land reserved for Maori.

The way in which the first three categories of land (referred to generally as “Maori land”), are owned, managed and sold, is prescribed by the TTMMA and administered through the Maori Land Court. One of the main purposes of the TTMMA is to retain Maori land in Maori ownership. Under the TTMMA there are restrictions on the way in which Maori land can be owned and used. These restrictions derive from the status of the land, as determined under the TTMMA. The key points to note are that:

- The status of Maori land cannot be changed, except by court order, and only in limited circumstances; and
- It is also very difficult to purchase Maori land as this requires a special resolution of the owners (usually the approval of 75% or more of the owners). Even if a special resolution is obtained, the Maori Land Court still has the discretion to decide whether the land can be transferred. As noted above, even after sale the land will still remain Maori land unless the status is changed.

Relationship between the TTMMA and the LTA

By virtue of the TTMMA and the LTA, there are effectively two systems for recording title in New Zealand: the Land Transfer register and the Maori Land Court register. Titles under the LTA take priority to the record of title under the TTMMA. However, the latter provides a record of equitable ownership, which the LTA does not. This dual system of registration means that it is important to search both registers before dealing with Maori land.

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.

The new Building Act has had a staggered commencement, which began on 30 November 2004, when the Department of Building and Housing (a government department) took responsibility for the administration of building legislation. The entire Act is now in force, although there are some provisions that contemplate future action, including a complete review of the Building Code (currently in its initial stages), and the establishment of a register of licensed building practitioners.

A “building” broadly means any temporary or permanent, moveable or immovable 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 immovable 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.

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)⁶ 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.

The Act introduces a new document called a certificate of acceptance. Certificates of acceptance enable territorial authorities⁷ to "legitimise" buildings that were constructed without consent or were constructed with consent but lack a code compliance certificate. 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, which means that additional or more restrictive performance criteria than those specified in the Building Code must be achieved.

3.3. Land Use and Planning Issues

Introduction

The Resource Management Act 1991 (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.

6. 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.

7. A territorial authority is a city council or a district council.

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 (both as to performance and bulk and location) 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 be 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 of and disparity 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 event facilities.

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, 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.
- 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, 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 are 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 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 may enter the water. 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.

The rules in a regional plan controlling the application of agrichemical sprays will determine whether a resource consent is required. The performance standards set in a plan will 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 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 assisted NZ Winegrowers and regional groups with negotiating acceptable standards for the use of and noise produced by bird scaring devices in Gisborne, Hastings, South Wairarapa and Wairau/Awatere. Now that these standards have been integrated into the plans, the issue is now ensuring compliance with the relevant district plan standards 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.

- 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.

FIRST SCHEDULE	
(Servient Land)	
Certificate of Title	Lot and Deposited Plan Number
SECOND SCHEDULE	
(Dominant Land)	
Certificate of Title	Lot and Deposited Plan Number
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.

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.

SCHEDULE A

Registered Properties

Certificate of Title

SIGNED by the Covenantor)

by:)

Director

Director

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 \$200,000. 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

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 hectareage 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 may be required to be kept and contingencies 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 agreement between the grower and the wine company where the management entity will manage the grower’s vineyard, employing best management practices to provide quality grapes whilst giving due regard to optimising the financial awards the grower wishes to reap.

Vineyard management contracts are often a corollary of grape supply contracts.

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 in New Zealand is primarily governed by the Employment Relations Act 2000, 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 Employment Relations Act 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 to ensure that the relationship will not be constructed as one of ongoing permanent employment.

Significant amendments to the Employment Relations Act 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. 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.

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 Risk Management Authority (ERMA). 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 (eg, managing ignition sources for flammable substances or restricting workplace exposures to toxic substances), controls relating to the life cycle of the substance (eg, 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 ERMA 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 2004.⁸ 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 ERMA website (www.ermanz.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.

8. Note that 1080 has also been transferred (as of 1 July 2005).

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.

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 2005

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

On 1 January 2004, the Wine Act 2003 came into force and applies to all wine made for reward or for 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 explosive growth of the wine industry – growth in participants, areas under vine and export sales plus anticipated multilateral and bilateral requirements of international agreements, gave impetus to the creation of a new, more cohesive, legislative framework.

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 New Zealand Food Safety Authority (NZFSA) will be the regulatory body responsible for implementing the provisions of the Wine Act (with the exception of matters relating to funding, which have also been amended by the Wine Act).

The Wine Act provides for the creation of regulations and the issue of regulatory notices by the NZFSA to set out specific regulatory outcomes and detail on how those outcomes should be achieved by winemakers. The Wine Regulations 2006 have now been promulgated, and these will be complemented by the Wine Notice 2006 which is currently being prepared by NZFSA.

Wine Standards Management Plans

Once the Wine Act becomes fully operative on 1 December 2008, all winemakers will operate under a registered Wine Standards Management Plan. That plan will have been put together by the winemaker and approved by an independent verifier. It is anticipated that New Zealand Winegrowers (in consultation with the NZFSA) will develop a template wine safety management plan that will be useful for most winemakers, with the potential for different templates (based on, for example, the different categories of winemakers) incorporating existing systems and codes of practice within that industry, to then be approved by the NZFSA. It is hoped that the development of template plans should reduce compliance costs to individual winemakers.

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 audit.

Until such time as Wine Standards Management Plans have been registered and adopted, the current food safety, hygiene, composition and labelling legislation continues in force. The transitional requirements for food safety and hygiene, composition and labelling are discussed in Section 6.

The existing export certification system provided in the Winemakers Act 1981 is carried through into the new Wine Act. The requirements of this system are now called "export eligibility requirements", and are designed to protect the reputation of New Zealand wine. Export requirements 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 the NZFSA, 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 Ministry of Agriculture and Forestry 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 NZFSA website (www.nzfsa.govt.nz) provides further information on the implementation of the Wine Act and the timeframes estimated for key milestones under the Act.

6.1. The Food Act 1981

It is in the interest of public health and safety that all food sold to the public is of an adequate standard, and that food is handled and prepared in a hygienic manner. The Food Act 1981 is the source of the vast majority of food safety law in New Zealand and has an enormous ambit, encompassing all types of food and beverages (not just wine) and most methods of production or manufacture.

The focus of the Food Act is to ensure that all food sold, imported, produced, or manufactured is safe for human consumption and free from disease and any other undesirable contamination. It contains general standards regarding food safety, processor hygiene and food suitability. It is also the umbrella legislation under which the Food (Safety) Regulations 2002, the Food Hygiene Regulations 1974, the New Zealand (Maximum Residue Levels of Agricultural Compounds) Food Standards 2005, as well as the regulations that empower the creation and implementation of food standards through the Australia New Zealand Food Standards Code.

The Food Act is administered by the NZFSA alongside the Wine Act, making them the key regulators in respect of wine making.

6.2. Food Safety

Wine Standards 2006

The Wine Standards 2006, promulgated under the Wine Act, set out new standards applicable to the safety of wine and wine products. In particular, they require that all winemakers must ensure that:

- grapes used to make wine are handled during the winemaking process in a manner that ensures that hazards are not introduced to the wine; and
- the processes and practices used by the winemaker during the winemaking process ensure that hazards are not introduced to the wine; and
- wine is made and stored in a manner that ensures hazards are not introduced to the wine.

The Wine Regulation 2006 provides that all winemakers and exporters must maintain records that would allow wine to be tracked throughout the production and processing chain, from commodity to final packaging for sale. Such records would need to be kept for at least seven years. This requirement is essentially the same as already applied for export wines.

This Regulation will be supported by the Wine Notice 2006 which is currently in preparation. This notice will give more detail on how the Regulation will apply in practice. Together, the Regulation and Notice will form the core regulatory requirements with which a winery must comply through its Wine Standards Management Plan. NZ Winegrowers is currently developing a template Wine Standards Management Plan for use by all wineries.

Food Hygiene Regulations 1974

The aim of the Food Hygiene Regulations 1974 is to protect public health. As such, the regulations set food handling requirements, including registration of food premises, and apply to all food manufacturing premises and premises on which food (which includes wine) may be sold. The regulations contain specific provisions on the manufacture, preparation, storage, casking and bottling of wine and on the sale of liquor. As mentioned above, in the future, once a winemaker has a registered Wine Standards Management Plan, they will then be exempt from the Food Hygiene Regulations 1974 as provided for by section 8AB of the Food Act 1981. However, until such time as registered Wine Standards Management Plans and appropriate regulations are in place, the provisions of the Food Hygiene Regulations will remain in force.

Important aspects of the Food Hygiene Regulations include:

- Wineries must be registered with the local district or city council;
- Wineries are inspected regularly to ensure compliance with the regulations;
- “Manufacture, Preparation, Storage, Casking and Bottling of Wine” covers a number of issues including:
 - No products may be stored at wineries which are not used in the winemaking process;
 - Winery wastes may not be kept for more than 48 hours on premises used for manufacturing;
 - All equipment must be situated to provide easy access for cleaning and inspection;
 - Hoses must be made from high grade rubber or non-toxic material;
 - Valves, pipes and fittings must be clean and protected from contamination; and

- Wine for sale must not be siphoned by mouth.

The regulations contain the minimum requirements for floors, walls, ceiling, lighting, ventilation, space, changing facilities, toilets, hand-basins, hot and cold water supply, plumbing, sewage, and yards applicable to premises used for the manufacture of wine.

The Food Hygiene Regulations primarily concern the buildings and equipment that may be used in winemaking and the procedures governing the handling of wine. The regulations are highly detailed and specific – wineries should have a copy of the regulations on hand at all times, and their requirements should be well known by appropriate personnel.

The Act states that winemakers and makers of wine products are exempt from the requirements of the Food Hygiene Regulations 1974 for any operations carried out under a registered Wine Standards Management Plan. However, as stated above, until a Wine Standards Management Plan has been registered, winemakers have two options:

- Compliance with the provisions of the Food Hygiene Regulations; or
- Exemption through adoption of a Food Safety Programme.

In practice, the adoption of Food Safety Programmes in lieu of compliance with the Food Hygiene Regulations has not been popular in the wine industry, and will be superseded through the introduction of Wine Standards Management Plans under the Wine Act 2003.

See further discussion of the provisions of the Food Act in relation to product recalls in Section 6.

6.3. 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 chemicals 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.

Australia New Zealand Food Standards Code

The standards governing the composition of food (including wine) in New Zealand and Australia are found in the Australia New Zealand Food Standards Code. The Food Standards Code is incorporated into New Zealand law through regulations made under the Food Act 1981. The Food Standards Code itself does not contain any infringement or penalty provisions for non-compliance - it is dealt with under the Food Act 1981 and explained in detail in section 110, of Part 2A.

The principal aims of the Food Standards Code are to:

- Protect the public from products which may be harmful to health; and
- Harmonise food manufacturing and labelling requirements for the Australian and New Zealand markets.

Provisions on the composition of wine are contained in the following Standards:

Standard 1.3.1

- Regulates the use of food additives in the production and processing of wine and prohibits the addition of food additives unless expressly permitted.
- Prescribes that additives may only be added to wine in order to achieve an identified technological function according to good manufacturing practice.
- Lists the additives that may be used in the production of wine, sparkling wine and fortified wine.

Standard 1.3.3

- Regulates the use of processing aids in wine manufacture, prohibiting their use in food unless there is a specific permission within Standard 1.3.3.
- Provides that processing aids may only be used in the course of manufacturing wine at the lowest level necessary to achieve a function in the processing of that wine, irrespective of any maximum permitted level specified.

Standard 2.7.4

Stipulates that the following products may be added to wine during production:

- Grape juice and grape juice products;
- Sugars;
- Brandy or other spirit;
- Water where the water is necessary to incorporate any permitted additive or processing aid;
- Specified additives (as above);
- Specified processing aids (as above).

A guide to the food composition requirements for wine in the Food Standards Code are available on the members section of NZ Winegrowers website www.nzwine.com.

Food (Safety) Regulations 2002

The Food Safety Regulations 2002 set the maximum permitted alcohol content for wine, sparkling wine, fruit wine, sparkling fruit wine and mead sold in any off-licence at no more than 15% alcohol by volume (when measured at 20 degrees).

Under the Sale of Liquor Act 1989, a supermarket or grocery store which has been granted an off-licence can only sell wine that conforms to the Food Safety Regulations 2002. Other off-licence premises remain entitled to sell other kinds of liquor, such as fortified wines (subject to conditions imposed on the relevant licence by the District

Licensing Agency or the Liquor Licensing Authority). Licensing is discussed in Section 8.

6.4. 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.
- 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.

The Australia New Zealand Food Standards Code outlines what must be stated on a wine label, but is not as prescriptive as the former Food Regulations 1984. For instance, there is no longer any requirement that lettering on a label be a particular size (with the exception of mandatory warning statements which must be at least 3mm high), but rather, there is a general legibility requirement stipulating that each prescribed statement set out in a label must be written or set out legibly and prominently in distinct contrast to the background, and be written in English.

The Australia New Zealand Food Standards Code provides that general labels on bottles or casks of wine for retail sale or for catering purposes must include the following core information:

- Name of the product (Standard 1.2.2(1)) ie wine, sparkling wine, wine cooler. The Australian Wine and Brandy Corporation guidelines on labelling suggest that either a descriptive name (ie. wine) or a varietal (ie Chardonnay) is “sufficient to indicate the true nature of the food”.

- Name and street address of supplier. This may be the importer, producer or the seller (Standard 1.2.2(3)).
- Mandatory declaration of the presence of certain substances which are known to provoke allergic reactions, for instance, egg and egg products, fish and fish products (including isinglass), milk and milk products (including casein) and sulphites (Standard 1.2.3(4)).
- Country of origin statement (Standard 1.1A.3(11)) clearly indicating the country of origin of the wine or wine product. If any of the grape juice, concentrated grape juice, potable spirit, or wine spirit used in any wine product originates in a country other than the country of origin of the wine, that country must also be named on the label as a source of ingredients.

On 28 October 2005, the Australia New Zealand Food Ministerial Council agreed on a new mandatory country of origin labelling standard. The New Zealand government has effectively 'opted-out' of the joint standard on third country trade grounds.

The only mandatory country of origin labelling for food in New Zealand currently applies to wine, and this is under review. The proposed wine standards (released by NZFSA in December 2005 for further industry comment) recommend that Standard 1.1A3(11) be referenced in the Wine Act standards and that mandatory country of origin labelling for wine is retained. It is important to note that the reference in the Wine Act Standards will apply only to wine produced (including wine that is bottled or labelled) in New Zealand, and that wine imported into New Zealand will be subject to Standard 1.1A.3(11) for the remainder of the two year transitional period.

- Alcohol content (Standard 2.7.1(2)) expressed in mL/100mL or X% ALCOHOL BY VOLUME or words and expressions of the same or similar effect. The stated content must be accurate to within +/- 1.5% alc/vol.
- Standard drinks (Standard 2.7.1(3)). This must be a statement of the approximate number of standard drinks in a bottle accurate to the first decimal place (e.g. for a 750mL bottle of 12.5% wine "Contains approximately 7.4 standard drinks").
- Lot number (Standard 1.2.2(2)) which includes the lot and batch number or an equivalent date coding. The main purpose of such information is to enable effective product recall in the event of a particular lot or batch of wine becoming unsafe or unsuitable for consumption.
- Net content of the package, expressed as Litres (L), decilitres (dL), centilitres (cL) or millilitres (mL) in a prominent position, in lettering at least 2mm high, and in a colour which contrasts distinctly with the background (Regulation 79 of the Weights and Measures Regulations 1999).
- Date marking (Standard 1.2.5(2)). Foods with a shelf life of less than two years (ie cask wine) must have a "best before" date. Although wine may still be safe for consumption after the best before date, it may have decreased in quality or altered in taste, and consumers should be made aware of this information.
- GM Labelling (Standard 1.5.2). The label on a package of genetically modified food (or food containing a genetically modified ingredient) must include the statement "genetically modified" in conjunction with the name of that food (or the ingredient or processing aid which is genetically modified).

Example of a New Zealand Wine Label

WINERY NAME/BRAND NAME (optional)	Laird Estate
PRODUCT NAME eg 'wine', 'sparkling wine' or varietal name	Gewürztraminer
AREA OF ORIGIN (optional but likely to be covered by the Geographical Indications Bill once enacted).	Martinborough
VINTAGE (optional) (ie year grapes harvested)	2005
NAME, STREET ADDRESS OF SUPPLIER (mandatory) refer page 42	Laird Estate 15 Street Address Suburb/Town/City
ALLERGENS DECLARATION (mandatory where applicable) refer page 42	Preservative (220) added or, contains sulphites [insert any other prescribed allergenic substances the product contains (eg egg, milk, fish, nuts etc)]
COUNTRY OF ORIGIN (mandatory) refer p page 42	Produce of New Zealand or New Zealand wine
ALCOHOL CONTENT (mandatory) refer page 42	12.5% alc/vol
STANDARD DRINKS (mandatory) refer page 42	Approx 7.4 standard drinks
LOT NUMBER (mandatory) refer page 42	L3208
NET CONTENT (mandatory) in a prominent position, min 2mm in height and in a contrasting colour – refer page 42	750ml

Note: Wine and wine products produced in Australia must also comply with the requirements of Standard 4.5.1 of the Food Standards Code.

The Food Standards Code does not regulate the manufacture of packaging materials and consequently does not specify which materials may be added to or used to produce food packaging materials, or any articles and materials in contact with food. It is the responsibility of wine producers and retailers to ensure that the products used in association with wine are safe and comply with:

- Standard 1.4.3 – which provides that articles and materials may be placed in contact with food only if there is no possibility of them being swallowed, obstructing airways or otherwise causing bodily harm if taken into the mouth.

- Standard 1.4.4 – which sets out the maximum levels for a number of metal and non-metal contaminants and natural toxicants which may be present in wine as a result of contact with packaging materials.
- Section 9(4)(c) of the NZ Food Act 1981 which states that packaging must not cause food to be unsafe or tainted. Although packaging is not subject to legal controls, there are conventions on what is considered to be appropriate packaging methods for wine. In particular, there does not appear to have been any suggestion to date that corks of any kind may breach Standard 1.4.3 (ie by posing a threat to health if swallowed).

Enforcement of compliance with the Food Standards Code is dealt with by the New Zealand Food Safety Authority (primarily in the event of more serious instances of non-compliance) and health protection officers at the public health unit of a district health board.

As a worst case scenario, the relevant authority is empowered to bring prosecutions under the Food Act 1981 for non-compliance with the Food Standards Code. In particular, section 110 of the Food Act prohibits the production, manufacture or sale of food in contravention of the Food Standards Code (including in relation to the composition or labelling of wine). If any wine is produced or labelled in a manner that does not comply with the Food Standards Code, the sale of that wine would constitute a breach of section 110 of the Food Act 1981.

Every company who breaches section 110 of the Food Act 1981 is deemed to commit an offence and may be liable for a fine not exceeding \$20,000. Where the offence continues, the company may also be liable for a further fine not exceeding \$1,000, for every day or part of a day during which the offence continues.

In practical terms, this means that section 110 of the Food Act would require the withdrawal from sale of any wine which breaches the Food Standards Code. Leaving such wine for sale would leave the supplier liable for an additional fine of up to \$1,000 for every day during which the contravening wine remains available for sale.

The current emphasis of the relevant authority is to educate rather than prosecute and accordingly, depending on the type of breach of the Food Standards Code, a range of less serious consequences may be pursued prior to prosecution. The relevant authority will usually take into account the compliance history of a company and the reaction of a company to a complaint in determining whether to issue a warning, commence enforcement proceedings, or pursue a number of intermediate steps.

Once the Wine Act 2003 comes into full effect, compliance and enforcement of the provisions of the Food Standards Code will likely be dealt with under the Wine Act as each winemaker will be expected to comply with the wine standards and any relevant food standards through their “use standards management plan”.

Food (Safety) Regulations 2002

In addition to the Food Standards Code, the Food (Safety) Regulations 2002 provide discrete labelling requirements for wine. In particular, Regulation 20 regulates the use of varietal labelling:

- If wine is labelled with a single varietal name, then the wine must be derived from at least 75% by volume of juice from the variety of grape stated on the label.
- If two or more varieties of grape are stated on the label, then the wine must be derived from at least 75% by volume of juice from those grape varieties.
- The names of the varieties of grape present on a wine label must be listed in descending order of proportion.

Wine Regulation 2006

The Wine Regulation 2006 establishes the following standard in relation to labelling:

“wine must not be labelled with a false or misleading representation concerning its variety, vintage or area of origin.”

The standard is to be implemented by specifications which prescribe minimum percentages where a wine label references grape variety, vintage and/or area of origin. For example, where a wine label includes a reference to a single grape variety, vintage or area of origin other than a country, the wine it refers to would be required to contain a combined percentage of at least 85% from that variety, vintage or area. This would involve a 10% increase in the necessary threshold for single varietals.

This standard would also apply to all imported wine blended, bottled or labelled in New Zealand. Wine imported into New Zealand that is ready for sale (ie. bottled or packed) would not be covered by this proposal.

Not only will this standard bring New Zealand's labelling requirements into line with the internationally accepted 85% minimum homogeneous grape content (where a label includes a reference to a single grape variety, vintage or area of origin), but it will also pave the way for a similar 85% minimum requirement in the Geographical Indications (Wines and Spirits) Registration Bill in relation to references to registered geographical indications.

6.5. Geographical Indications (Wine and Spirits) Registration Bill

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.

In June 2005, the Geographical Indications (Wines & Spirits) Registration Bill was introduced into Parliament. The Bill has now had its third reading and will shortly be passed into law.

The Bill will replace the Geographical Indications Act which was passed in 1994 following the WTO Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS), but which was never brought into effect.

At present, New Zealand implements its obligations under TRIPS to protect foreign GIs by preventing misleading or deceptive use of those GIs under the Fair Trading Act 1986 and the tort of passing off. By establishing a register for geographical indications, it is hoped that the Bill will provide legal certainty as to the status of geographical terms.

Key differences to the 1994 Act are:

- a new definition of a geographical indication to ensure only GIs that meet the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) definition may be registered;
- the registration of GIs is to be limited to wine and spirits only; and
- the "first-in-time, first-in-right" principle is to be applied when determining whether a GI or a trade mark has priority.

Definition of a 'geographical indication'

The 1994 Act's definition of GI simply refers to indications that identify a good as originating from a particular area. The TRIPS definition on the other hand, requires the good to possess a certain quality, reputation or other characteristic due to its geographical origin.

According to the Bill:

"A geographical indication is an indication that identifies a wine or spirit as originating in the territory of a country, or a region or locality in that country, where a given quality, or reputation or other characteristic, of the wine or spirit is essentially attributable to its geographic origin."

This aligns the Bill's definition of a GI with the TRIPS definition, placing a greater emphasis on perceived links between the quality of goods and their geographic origin.

The application process

The Bill provides that applications for the registration of both foreign and New Zealand GIs will be subject to an examination and opposition process. The Registrar must not register:

- A GI for a wine or spirit which is identical to an already registered geographical indication in respect of the same or similar geographical origin;
- customary names of grape varieties or common names of New Zealand wines; or
- GI's identical or confusingly similar to a pre-existing trade mark (unless the trade mark owner consents).

Conditions may be imposed on the registration to ensure that the use of similar GIs and trade marks does not lead to confusion in the market place.

Geographical indications vs trade marks

In managing the relationship between trade marks and geographical indications, the Bill implements a "first-in-time, first-in-right" principle for determining which right has priority. This essentially will involve trade mark owners needing to provide the dates on which their trade marks were first used and recognised as trade marks. Although it is easy to prove the date of use for registered trade marks (as this information is generally held by IPONZ on its database), proving that an unregistered trade mark was used before a GI may present more of a problem. For this reason, it would be prudent for users of

unregistered trade marks to at least apply to register their trade mark before the Bill is enacted.

In very limited circumstances, the Bill allows for the potential of a later-filed geographical indication to be registered despite a pre-existing trade mark having priority.

In determining whether a later-filed geographical indication should be registered, the Registrar is to give consideration to:

- the geographical indication's history of use and recognition as a geographical indication in New Zealand;
- the legitimate interests of the owner of the trade mark and of third parties; and
- other relevant factors, which may include international considerations.

Once the Bill becomes law, all trade mark owners (both registered and unregistered) will need to take notice of all GI applications and consider opposing any applications which may result in registration of a confusingly similar GI and thereby erode their intellectual property and branding rights in New Zealand.

Homonymous geographical indications

Homonymous geographical indications are geographical indications that are identical in name but relate to different geographical areas. For example, Martinborough (North Island) and Martinborough (South Island). Provided that both are legitimate, the Bill allows for the possibility of the registration of both geographical indications.

Nature of protection

Once a GI is registered, it may only be used in relation to a wine if at least 85% of the wine is obtained from grapes harvested in the geographical origin.

Consistent with Article 23 of the TRIPS Agreement, this applies whether or not:

- the true origin of the wine or spirit is indicated;
- the geographical indication is used in translation; or
- the use of the geographical indication is accompanied by words such as "kind", "type", or "style".

The restrictions on use of a registered GI do not apply in respect of the use of a trade mark registered or acquired by use in New Zealand before the effective date.

For further information on the review of the Bill, contact the Ministry of Economic Development (www.med.govt.nz).

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. Less 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 Union.

After many years of debate, the European Commission adopted new regulation 2790/1999 on vertical agreements. It is a new 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)?
- Dependant 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?

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.

The agreement should 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.

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
- 6.9 Pass on information
- 6.10 Registered user
- 6.11 Protection of intellectual property
- 6.12 Secrecy
- 6.13 Sales reports
- 6.14 Demand forecasting
- 6.15 Ordering
- 6.16 Stock
- 6.17 Payment for certificates of origin
- 6.18 Quality and storage
- 6.19 Disputes
- 6.20 Accounts
- 6.21 Customer list
- 6.22 Inspection of books of premises
- 6.23 Notice
- 6.24 Sub distributor
- 6.25 Assignment
- 6.26 Delegation
- 6.27 Bank account
- 6.28 Grant back
- 6.29 Prompt payment
- 6.30 Indemnity
- 6.31 Standard terms
- 6.32 No credit
- 6.33 Pay expenses
- 6.34 No profit
- 6.35 No warranty
- 6.36 Act as principal
- 6.37 Not to tamper with product
- 6.38 Minimum stock
- 6.39 Runs

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

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. If passed in its current form however, the Sale of Liquor (Youth Alcohol Harm Reduction) Bill would transfer the sole jurisdiction for management of broadcast liquor advertising to the Broadcasting Standards Authority. (See comments below in relation to the proposed Sale of Liquor (Youth Alcohol Harm Reduction) Bill).

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:

- A1** Saturation of liquor promotions, separately or in combination, must be avoided.
- A2** 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.
- A3** Broadcasters will ensure that the incidental promotion of liquor is minimised.
- A4** Broadcasters will ensure that backdrops and props for studio programmes do not carry liquor promotions.
- A5** 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 on radio and television 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 current Code for Advertising Liquor came into effect on 1 September 2003 and 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 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 products, including those with advertising already 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.

New Zealand Sports Assembly Voluntary Sports Code

The New Zealand Sports Assembly also has a Voluntary Sports Code relating to liquor advertising and promotion on television. The purpose of the Voluntary Code is to:

- Assist and encourage sports organisations to adhere to the principle of moderation in liquor consumption; and
- Clarify the position of sports organisations, sports persons, broadcasters and sponsors in the manner and extent to which liquor may be promoted both in terms of brand advertising and liquor sponsorship messages on television.

Specifically the Code deals with incidental promotion of liquor and saturation of the product, as well as setting out particular technical requirements for the display of sponsorship messages (e.g. signage at grounds and on team apparel). Wine companies should comply with the Voluntary Code in all respects.

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

In January 2006 the Government initiated a comprehensive review of the legislation and regulations controlling the advertising and promotion of alcohol generally. The review forms part of the current Government's policy on alcohol related harm minimisation (one of 13 priority population health objectives of the New Zealand Health Strategy) and will assess whether improvements can be made within the current voluntary self-regulatory framework or whether consideration will need to be given to a different form of regulatory approach.

At the time of printing, it is anticipated that a steering group comprising members of the Alcohol Advisory Council of New Zealand, the Ministries of Health, Justice, Youth Development, and Culture and Heritage, the Advertising Standards Authority and Broadcasting Standards Authority plus two independent members has been appointed and will provide recommendations to the Government in late 2006.

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 into the new realm of the Gambling Act (contrary to prior suggestions from some quarters that liquor may be removed from the list of prohibited prizes once the Gambling Act was brought into force).

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 money when the outcome depends wholly or partly on chance. Interestingly, "money" is also a defined term in the Gambling Act and includes "money's worth, whether or not convertible into money" (ie "money" can be any prize whatsoever, whether or not that prize is transferable or exchangeable for cash).

For example, 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 (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 to consumer sales reps and any other person charged with describing the characteristics of a wine to consumers, care should be taken to ensure that only accurate statements are made in relation to 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.
- Adhesive stickers applied to the packaging.
- Bottle size (i.e. use of a large bottle which is not filled).

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. Last year 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 the recent appearance of 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 likely to be well 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.

Recent amendments to the Fair Trading Act have increased the maximum fines from \$30,000 to \$60,000 for individuals, and from \$100,000 to \$200,000 for companies. Historically, Court imposed fines have been at the lower end of the scale. However, the increase in maximum fines has already resulted in a 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.

In May 2003 a complaint was made to the Advertising Standards Board in relation to the use of a sticker on the label of a New Zealand wine. The Advertising Standards Board ruled that the sticker on the label of the wine bottle was in the nature of labelling rather than advertising and declined to consider the merits of the complaint. It is not yet clear whether that same complaint has been repeated to the Commerce Commission. 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. Consumer Guarantees Act 1993

The Consumer Guarantees Act prescribes the guarantees given, or deemed to be given, to consumers upon the supply of goods or services, and provides consumers with specific rights against suppliers and manufacturers if those goods or services do not comply with a guarantee provided by the Act.

The guarantees prescribed in the Act only apply to goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption. As the Act does not apply to goods or services acquired for resupply, consumption in production or otherwise in trade, the guarantees provided should generally not apply to sales from wineries to companies such as wine merchants or restaurants (this does not however mean that the sale from a wine merchant or restaurant to a consumer is not the subject of guarantees under the Consumer Guarantees Act.).

The Consumer Guarantees Act 1993 implies the following guarantees that are relevant to the wine industry:

- Acceptable quality and/or fitness for purpose

The test of "acceptable quality" is whether a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the

goods as acceptable (having regard to the nature of the goods, the price, any statements made about the goods on any packaging or label, either on the goods or by the supplier or manufacturer of the goods, and all other relevant circumstances of the supply of the goods).

It is likely that a bottle of wine that is corked and/or contaminated product would breach the guarantee of acceptable quality and/or fitness for purpose (because it is unlikely that a reasonable consumer would purchase a bottle of wine he or she knew was corked). However, consumer habits mean this is not as risky an issue as it otherwise could be. Most consumers (when at home) tend to simply discard corked wine and open a replacement bottle. In addition, given that consumers frequently experience corkage in older vintages, as time progresses it will be more difficult for the consumer to prove where they brought it from, and that the corkage has not occurred as a result of factors subsequent to purchase.

Where consumers are unable to provide proof of purchase and/or it is reasonable to expect that any contamination may have occurred post purchase, the decision to refund or replace such wine is likely to be more an issue of reputation and avoidance of potential bad publicity rather than a question of legal obligation.

- *Compliance with description*

The “description” is the identification of goods by reference to the class of things to which they belong (i.e. the grape variety, manufacturer, vintage and potentially geographical origin). This implied guarantee may be of particular relevance to sales of wine en primeur where each sale is based on a description of the wine to be supplied at a future date where the consumer purchases in reliance on the description provided.

- *Compliance with sample*

Provided wine tastings are carried out professionally, and with care to ensure that product sold as a result of a tasting is of the same vintage and quality as the tasting bottle, there should be no risk of breaching this guarantee.

If wine of the same variety and vintage is produced in batches then there is a requirement that those batches be blended to ensure a homogeneity across the variety and vintage.

- *Express guarantees*

An express guarantee given or made in connection with the supply of wine by a supplier, or in connection with a promotion, may bind the winemaker. For this reason, winemakers should ensure that they are familiar with the terms of any in-store promotions run by suppliers.

If the wine does not comply with the guarantees above, the consumer is entitled to redress from the supplier. This usually takes the form of a replacement bottle or a refund. Often the form of redress is at the consumer’s election.

In addition to the right to reject the goods and claim compensation, the consumer may also claim damages for any loss which was reasonably foreseeable as liable to result from the failure (with the probable exception of damages for personal injury which are excluded by New Zealand's no fault ACC scheme).

Consumers have a right of redress against manufacturers (as well as suppliers) where these guarantees are not complied with, unless such failure to comply is due to:

- The act of any person other than the manufacturer; or
- A cause independent of human control which occurred after the goods left the control of the manufacturer.

Note: The guarantees provided by the Consumer Guarantees Act will not apply to any agreement to supply wine to a consumer entered into prior to the commencement of the Act on 1 April 1994.

In order to determine whether the Consumer Guarantees Act applies to any given sale of wine, it is the date on which the agreement to effect that sale (or the sale itself) took place which must be considered. That is, the Act does not apply to any contract for the supply of goods entered into before 1 April 1994. However, the fact that a vintage wine was produced prior to 1 April 1994 will not take the sale of that vintage wine outside the ambit of the Act if the agreement to sell that vintage is not entered into until after 1 April 1994. Accordingly, winemakers should note that wine produced well before the introduction of the Consumer Guarantees Act may in fact be required to comply with the guarantees implied by that Act.

8.3. 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".

Within that simple clause are a number of terms which have kept lawyers in work for many years.

Terms that give rise to interpretative difficulties (or opportunities for lawyers) 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 – eg. 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.

8.4. 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

Standards

Two types of standards can be set under the Fair Trading Act: Consumer Information Standards and Product Safety Standards.

To date there have not been any Consumer Information Standards adopted in relation to wine or the wine industry. If any such Standards are proposed in the future, the wine industry as a whole would be given the opportunity to comment on any proposed Consumer Information Standards relating to the production, labelling or sale of wine prior to such standards being set. The same process of consultation would be followed if any additional Product Safety Standards were proposed.

There are several Product Safety Standards dealing with related fields which winemakers may wish to consult.

It is prohibited to supply, or to offer or advertise to supply goods or services for which a Consumer Information Standard or Product Safety Standard has been prescribed, unless the standard is complied with. This prohibition applies only to goods intended for use inside New Zealand. However, any goods intended for use outside New Zealand only (and which do not comply with the relevant Standard), must bear a statement that they are for export only. This statement must either be part of the goods, or affixed to them, or applied to a covering label, reel, or thing in which the goods are supplied.

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.

Food Act 1981

The Food Act provides a further consumer protection mechanism where food (which includes wine) is unsound or unfit for human consumption or is damaged or deteriorated or perished, or that is contaminated with any poisonous, deleterious, or injurious substance.

Any importer, manufacturer, or seller of wine, may be ordered to direct the recall, destruction or denaturing of such wine in order to protect the public.

Where any importer, manufacturer, or seller receives an order to recall and/or destroy any wine, that importer, manufacturer or seller must notify the Minister of:

- The details of the manner in which compliance with the order will be achieved; and
- The date on which the recall and/or destruction is completed.

Winemakers should be aware that they may be responsible for the recall of wine for which they are merely the importers or sellers, and should ensure that wine supply contracts contain adequate protection in the event that an imported or agency wine is the subject of a recall and/or destruction order under the Food Act. For instance, winemakers should attempt to include limitation of liability clauses in all wine supply contracts or indemnity clauses for this particular eventuality.

Any importer, manufacturer or seller who does not comply in any respect with any order issued under the Food Act commits an offence and may be liable to imprisonment for a term not exceeding three months or a fine not exceeding \$2,000, and if the offence continues, (that is ongoing non-compliance with a recall order) to a further fine not exceeding \$100 for every day during which non-compliance continues. In addition, the Court may order the withdrawal from sale of all wine of the particular description contained in a recall order, until the matter in relation to which the offence was committed has been remedied. In practical terms, this is likely to occur where an

importer, manufacturer or seller challenges the veracity or need for compliance with a recall order.

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”.

8.5. “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.

8.6. 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.

The philosophy behind the Sale of Liquor Act is that liquor licences are easier to get and easier to lose, and that legislation has some role to play in controlling liquor abuse. The Court of Appeal has stated that "the controls under the Act should be neither excessive or oppressive. This object reflects a legislative perception that controls provided by the

licensing system have the capacity to contribute to the reduction of abuse of alcohol in the community but that there are limits to that capacity”.

In contrast to the old Act, the Sale of Liquor Act 1989 does not provide for the general economic regulation of the liquor industry as an aspect of the licensing system. The notion that if the availability of licences to sell and supply liquor restricted the abuse of liquor no longer applies.

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 license and certified manager. Previous events such as the New Zealand Wine Trade Show, required only one license 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-license, 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.

A major consequence of the Wine Act in terms of licensing was to remove the requirement to have a winemaker's licence, which saved time and money for all winemakers. You should be aware of your continuing requirements to comply with the Food Hygiene Regulations. The obligations imposed under these regulations and the relationship of the regulations to the Wine Act and Wine Standards Management Plans are discussed in Section 5.

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 against fair competition – 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.

The best brands are invented words, such as Kodak™ or Pantene™.

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 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, you 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 2002 contains some interesting provisions for the wine industry, 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 new 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 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 is not yet a member, it is likely to join soon.

10. International Requirements

Export volumes and values of New Zealand wines have continued to grow as the New Zealand wine brand has strengthened. In the year end to June 2006, exports continued to exceed domestic sales.

For year end 2006, exports reached record levels, totalling \$512 million from shipments of 58 million litres. Forecasts project that export values will reach \$1.5 billion by 2010. These confident projections reflect the strong growth of wineries, and a positive perception of 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 Fair 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 our wines.

Given the export ambitions for the industry, NZ Winegrowers has a vital interest in pursuing free and fair access to international markets. As a result, NZ Winegrowers pursues a proactive approach to trade liberalisation. Domestically, in recent years NZ Winegrowers has advanced a trade liberal approach to the re-writing of the wine standard of the new Food Standards Code. NZ Winegrowers is also a supporter of the advocacy group, the Trade Liberalisation Network.

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). 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, if you are exporting wine to a signatory country, you 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 WTTG is also committed to addressing labelling issues (as mandated by the MAA). The World Wine Trade Group Agreement of Requirements for Labelling has been finalised and is likely to be initialled by the New Zealand Government in due course. This Agreement will provide exporters with simplified front label options that can be used in all major markets.

The Labelling Agreement also contains a definition of the term “ice wine” and its variants. The effects of this will be that New Zealand wine for export to other signatories will not be able to 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.

International Wine Organisation (OIV)

The International Wine and Vine Organisation (known by its French acronym, OIV) is an inter-governmental organisation with competence in scientific and technical aspects of grapegrowing and winemaking. It was created in 2001 as a reformation of the International Wine and Vine Office, which was founded in 1924. The reason for the change was to give New World producers more of a voice in this important international forum. New Zealand is a member of the OIV, as are most other wine producing countries (other than the USA).

One of the main functions of the OIV is to make recommendations regarding matters relevant to the grape and wine industries through its Commissions on “Viticulture”, “Oenology”, “Law and Economy” and “Safety and Health”, as well as various sub-commissions and special project groups. These recommendations are compiled in:

- Compendium of International Methods of Analysis of Wines and Musts – International methods of analysis, models of certificates of analysis, maximum accepted limits, International Convention of Unification of Methods of Analysis 1954.

- International Oenological Codex – Detailed description of products used in oenology, analytical techniques and the according reagents or titrated.
- International Code of Oenological Practices – Definitions concerning grapes, musts and special wines. Detailed description of practices and treatments.

These recommendations are not binding on New Zealand producers, although they are of relevance for the future of international wine regulation. NZ Winegrowers' John Barker is Scientific Secretary to the Law and Economy Commission.

International Wine and Spirits Federation

The International Wines and Spirits Federation (known by its acronym FIVS) is a world-wide organisation representing the interests of the wine, spirits and beer industries. It is committed to promotion of a successful global beverage alcohol sector operating on principles of corporate social responsibility and sustainability, focussed on consumer interests in an environment free from trade-distorting factors of all kinds.

As the leading NGO for the wine, spirits and beer industries, FIVS is an important and effective forum for sharing up-to-date information on international wine trade developments and developing and representing common industry positions on issues of mutual interest or concern. FIVS interacts with a number of other important international organisations, including the OIV, the WTO and the OECD.

FIVS has taken a very proactive approach to sharing information among its members, and its website and regular email updates are a very valuable way for exporters to obtain up to date issues about potential trade impediments, rather than finding out when their wines are sitting on the dock waiting to be cleared. It has a number of other initiatives underway to address regulatory issues that may impede the wine trade.

There are other international organisations you should be aware of:

Codex Alimentarius Commission

The Codex Alimentarius Commission was created in 1963 by the Food and Agriculture Organisation and the World Health Organisation to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. Codex Alimentarius aims to protect the health of consumers, ensure fair trade practices in the food trade, and promote coordination of all food standards work undertaken by international governmental and non-governmental organisations.

The numerous official standards adopted by the Codex Alimentarius Commission are extremely detailed and provide guidance on all aspects of the composition of wine. Winemakers should bear in mind the Codex Alimentarius standards wherever possible, as compliance can be helpful particularly in overseas markets. When adopting new standards under the Food Standards Code, the New Zealand Food Safety Authority has regard to the Codex Alimentarius standards and is influenced by the content of any relevant Codex Alimentarius standards when determining the general policy/and or content of new standards under the Food Standards Code.

International Wine Law Association

You should also be aware of the International Wine Law Association (Association Internationale des Juristes du Droit de la Vigne et du Vin – AIDV), which is aligned to the

OIV. The AIDV was founded in 1985 to provide an international forum for the study and discussion of legal issues relating to the wine industry. There is an Australasian chapter that holds a conference annually. It is a good network to establish offshore legal requirements. It also maintains an international list of arbitrators and mediators suitable for wine-specific dispute resolution.

The AIDV has a website (www.aidv.org). Bell Gully's David McGregor is a committee member of the Australasian chapter of AIDV.

10.2. Export Requirements

Export Eligibility Requirements

All New Zealand grape wine exported from New Zealand must obtain export eligibility approval from the NZFSA. 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 a current record keeping audit to demonstrate compliance with the NZ Winegrowers' Record Keeping Code of Practice. The audit must be conducted by an auditor approved by the NZFSA.
- 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 to the Wine Export Certification Service (WECS) in the prescribed form together with two samples. 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 or another country that requests laboratory testing (e.g. Japan), a third bottle must be submitted for analysis. If the wine fails the laboratory analysis for the EU, it is not eligible for export to the EU but may be eligible for export of sale in other countries.
- When an exporter wishes to export a wine that has been approved as eligible for export, they must make an application to WECS of the prescribed form. An export eligibility statement will then be issued confirming the status of the consignment and the wine may be exported.

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 only significant situation where this occurs in New Zealand is in relation to the V11 certificate that is required for the export of wines to the EU. It is in order to meet this OMAR 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 is, in effect, the V11 certificate.

The official assurance is a separate and additional certificate to the Certificate of Compliance 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. Wine destined for export to the European Union must comply with the rules of that market. NZ Winegrowers are developing a Code of Practice relating to access to the European market.

The text of the OMAR notice relating to the European Union 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.

Wine Regulations 2006

The Wine Regulations 2006 cover export requirements for wine and relate to a number of matters, including truth in labelling, record keeping, winery hazards, hygiene and cost recovery. These Regulations set out the outcomes that wineries must achieve in each of these areas.

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 due on the last working day of the month following the month in which the goods were removed from the CCA. If the total excise duty liability of a licensee is under \$10,000, payment is due on a different date. Please contact your local Customs office for details.

Generally, excisable goods 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;
- It is taken as legitimate manufacturing samples.

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 30 June 2004, 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 \$41.146 per litre of alcohol. Any other wine is taxed at a rate of \$2.2592 per litre.

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

Income Tax Act 2004

The Income Tax Act imposes a tax on the profits of a winemaker, regardless of whether it is an individual, a company or other entity.

It is possible to depreciate the cost of resource consents relating to taking water from rivers or lakes and discharging contaminants. In certain circumstances a deduction is allowed for expenditure incurred in relation to a resource consent application that is not granted or is withdrawn.

Expenditure incurred in obtaining consents to use land for a particular purpose cannot generally be depreciated or deducted. Costs incurred in planting vines are able to be deducted on a diminishing value basis.

Goods and Services Tax Act 1985

Winemakers who make supplies worth in excess of \$40,000 per annum must register for GST regardless of whether they carry on business as individuals or through companies or other entities. GST is "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.

This is an extremely brief overview of income tax and GST considerations for winemakers. A more detailed description of relevant New Zealand income tax and GST 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/pdfs/Doing_Business_in_NZ.pdf.

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

1. 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 position.
- Valuation requirements.
- Insurance/risk requirements.
- The chattels being purchased.
- Employee issues.
- Grape supply contracts.
- Licenses to operate the business (e.g. Sale of Liquor Licenses and Food Premises Registration Licenses).
- 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, licenses and consents.
- Review the title and any lease or license 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 Act sees the Overseas Investment Commission replaced by the Overseas Investment Office, a unit within Land Information New Zealand. The Ministers of Finance, Land Information and Fisheries are the responsible for administration of the new regime and considering applications that require ministerial approval.

The Overseas Investment Office administers the government's foreign investment policies. The core work of the Office is to assess applications for consent to a proposed acquisition by an overseas person who intends making a substantial investment in New Zealand through the purchase of significant land and/or non-land assets. Non-land acquisitions will include the acquisition of shares in a company.

The purpose of the Act is to acknowledge that it is a privilege for overseas investors to own or control sensitive New Zealand assets. The Act applies to all investment transactions involving sensitive land (as defined in the Act), significant business assets and fishing quotas. The threshold for business assets has been increased to \$100 million.

The following categories of land will no longer be screened in the absence of sensitive features:

- Land with an unimproved land value over \$10 million;
- Land adjoining non-sensitive reserves (such as drainage and hospital reserves).

The OIO requires that applicants 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 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 including whether there are any consequential benefits to New Zealand, the 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". 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 undertaking the advertising.

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 are 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. Contacts and Publications

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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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