2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL
2009

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Agriculture, Fisheries and Forestry, the Hon. Tony Burke MP)
AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL 2009

GENERAL OUTLINE

The purpose of the first schedule of amendments contained in this bill is to make the necessary amendments to Australian legislation for Australia to bring the Australia–European Community (EC) Agreement on Trade in Wine (the agreement) into force. The schedule amends the Australian Wine and Brandy Corporation Act 1980 (AWBC Act) and Trade Marks Act 1995 (Trade Marks Act).

The agreement was signed by the Australian Government and the European Community on 1 December 2009. It is a significant revision of the 1994 Australia–European Community Agreement on Trade in Wine. It provides benefits to both parties and is strongly supported by the Australian wine industry.

The amendments provide rules for the protection of foreign country geographical indications (GIs), translations of foreign country GIs, traditional expressions (TEs), Australian quality wine terms and other additional terms. Significantly, the amendments provide a determination process for foreign country GIs and translations of GIs. To provide for these changes the objects of the AWBC Act and the powers of the Australian Wine and Brandy Corporation (AWBC) are amended.

The amendments also resolve issues around the meaning of false and misleading practices in relation to GIs, traditional expressions and protected terms, including providing exceptions from the false and misleading provisions relating to the sale, export or import of wine, as they relate to GIs, for common English words.

The amendments replace the previous Register of Protected Names with a new Register of Protected Geographical Indications and Other Terms.

Amendments to the Trade Marks Act are necessary to implement the agreement and to ensure that its interpretation is consistent with that of the AWBC Act. Common definitions relevant to the agreement will be amended and provision will be made for the Registrar of Trade Marks to be able to amend the representation of a trade mark or an application to register a trade mark. The amendments will also make it clear that trade marks that include a common English word that coincides with a geographical indication can be registered.

The purpose of the second schedule of amendments to the AWBC Act is to further protect Australia’s reputation for the production of wines of quality and integrity. This will be achieved by strengthening the AWBC’s Label Integrity Program (LIP).
The LIP was established to ensure truth in labelling, thereby increasing consumer confidence in the reliability of label claims. The LIP is currently limited to wine manufacturers and does not cover other participants in the wine supply chain, such as wineries that do not make wine but merely perform a limited range of grape juice processing procedures, agents, growers, wholesalers and retailers. These people play a fundamental role in the supply chain.

The amendments will provide that those involved in the production, distribution and sale of wine and grapes used to make wine must keep a record of the date of receipt, quantity, vintage, variety, GI and the identity of the supplier (or recipient) of those goods. A new offence will be created to apply to a person who makes a claim relating to vintage, variety or GI of wine goods when that claim is not supported by their records.

The purpose of the third schedule is to correct a number of weaknesses with the compliance provisions of the AWBC Act that have been identified by the AWBC. The changes to the compliance provisions will strengthen the AWBC’s ability to stop a person from engaging in action that may be contrary to the AWBC Act and enable the AWBC to pass on information obtained under the AWBC Act to others who may have a role in enforcing laws relating to wine and health.

The amendments also align the penalties in the AWBC Act with government policy regarding offence provisions and the use of penalty units as a replacement for fixed dollar amounts.

FINANCIAL IMPACT STATEMENT

There are no financial implications for the Commonwealth as a result of the bill.
REGULATION IMPACT STATEMENT

The following regulation impact statement has been prepared for the amendments to the LIP. A regulation impact statement was prepared for the wine agreement. It is available at the Australian Treaties Library on the AustLII Database at http://www.austlii.edu.au/au/other/dfat/.

REGULATION IMPACT STATEMENT 7634

AMENDMENT OF THE AUSTRALIAN WINE AND BRANDY CORPORATION ACT 1980 AND REGULATIONS 1981 TO PROTECT AUSTRALIA’S REPUTATION FOR PRODUCTION OF WINES OF QUALITY AND INTEGRITY

Background

The Australian Wine and Brandy Corporation (AWBC) was established by the Australian Wine and Brandy Corporation Act 1980 (the Act) in July 1981. The AWBC is an Australian Government statutory marketing authority established with the aim, among others, to promote and control the export of Australian wine grape products. Consequently the AWBC has responsibility for preserving Australian wine’s internationally recognised reputation for quality and integrity.

The AWBC’s quality assurance and regulatory activities are codified in its wine export procedures and the wine law compliance program.

The purpose of the Act, when it was enabled in 1980, was principally to promote and control the export of grape product from Australia. At that time Australian wine imports exceeded exports and some of the wine being exported was of questionable quality. The export controls were instigated to improve the quality of wine being exported and hence improve the reputation of Australian wine. Provision was made in the Act for the licensing of exporters and the issuing of permits for the export of grape products which were assessed as being sound and merchantable and where they met the importing countries’ requirements.

In 1989 the Act was amended, at the request of industry, to include the Label Integrity Program (LIP) requiring winemakers to keep records to substantiate label claims. The objective of the LIP is to ensure truth in labelling where claims are made concerning vintage, variety or geographical indication of wine manufactured in Australia.

The AWBC conducts an audit program to monitor compliance with wine manufacturing and labelling requirements. Audits may be triggered by consumer or trade complaints, emerge from routine export inspection of wine by the AWBC or be initiated by the AWBC on a random basis to assess the accuracy of label claims. 170 audits were
completed in 2006-07. The audits assess whether a trail can be followed from the vine to the dispatch of an export consignment.

Wine sector compliance with the legislative requirements continues to be very high. The AWBC works hard to cultivate a culture of compliance within the industry. It regularly discovers anomalies in label claims through the export control procedures and consequently is able to prevent potentially false or misleading labels being printed and/or applied to bottles. Most of these anomalies are not fraudulent and are remedied without prosecution.

The Australian wine industry has become increasingly export orientated with about 60 per cent of its production exported. Some 787 million litres of wine at a value of $2.87 billion were exported in 2006-07 by approximately 1,800 licensed exporters of Australian wine.

The AWBC’s role in maintaining the quality and integrity of Australian wine is important and is valued by industry. Major wine marketing research consistently shows that, in order of importance, consumers purchase wine based on price, country or region of origin, grape variety and then brand. This is recognised and reinforced by the wine retail sector who organise their display shelves based on country of origin and who in many cases also have special promotional activities based around country of origin, for example, showcasing wines from Australia for the month.

In this global market place a selling point for Australian wine is its reputation for quality and value for money.

Wine is not a homogenous product and individual producers have invested heavily to differentiate their brand. Sales of Australian wine are none the less vulnerable to a health or product standard scandal resulting from the actions of a single person.

Therefore, particularly in export markets, Australian wine is vulnerable to having the actions of individuals tainting views about Australia and an effective legislative framework backed by strong enforcement provides protection for the industry as a whole.

Regulation of both wine exports and wine exporters is seen as a way of protecting against the adverse effects of a wine scandal of the type experienced by the Austrian and Italian wine export industries. The Austrian case involved seven winemakers adding small amounts of ethylene glycol to add body and sweetness. The ensuing world wide publicity cost the Austrian industry millions of dollars in export losses. Exports of Austrian wine to the United Kingdom fell from 100,000 cases in 1985 to only 7,000 cases in 1989, and many producers went bankrupt. The Austrian wine industry is only now getting back to its former size. This is despite the promulgation by Austria of some of the most restrictive winemaking laws aimed at regaining consumer confidence.

There have been many cases of wines from prestigious regions in Europe found to have been sourced from less distinctive regions. For example, 9 million bottles of fake Chianti
Classico were seized by Italian officials in October 2005. The Australian wine industry believes that a reason for the European industry losing market share is consumer and retailer cynicism about label claims and the product the consumer is actually buying. In contrast, Australian wine is known for the simplicity and integrity of labelling. This is an effective marketing advantage.

The industry therefore places a high priority in operating under legislation that works efficiently and effectively to provide the AWBC with the powers to investigate and prosecute breaches of the Act.

Importing nations are increasingly testing the variety of wine to attempt to detect fraud. Although these tests are not yet 100 per cent effective they are relied upon by importing countries. Only a paper based audit trail is able to provide the importer of the necessary assurance of variety and region. The LIP should provide importers of Australian wine with the assurance they need.

**Issue to be addressed**

In 2003, the AWBC began investigating allegations that some products supplied by a wine producer were not consistent with the accompanying label declaration. In conducting this investigation and exploring avenues for prosecuting the alleged offender, the AWBC identified loopholes in the Act that resulted in it being unable to adequately investigate the allegations or launch a prosecution.

The fundamental problem concerns the LIP and its focus on wine manufacturers keeping records rather than requiring an audit trail of the growing, transport, manufacturing and sales chain. This is a flaw because a fraud could occur at any stage in the system which would undermine the integrity of the label and the information being supplied to consumers.

Other problems that arose during the investigation included the limited injunctions power and an inability to stop the export of a product not supported by an audit trail. These are also addressed in the RIS.

**Label Integrity Program**

**Background**

The explanatory memorandum to the *Australian Wine and Brandy Corporation Amendment Bill 1989* that established the LIP states that the LIP will “enable the Corporation to trace a wine to the point where the grapes or juice from which it was made were first harvested or processed.”

The purpose of the auditing is to “ensure truth in labelling, thereby increasing consumer confidence in the reliability of ‘label claims’ and enhancing the reputation of Australian wine in domestic and export markets.”
As outlined above wine consumers are prepared to pay a premium for wine produced from certain regions and for wines made from certain varieties (see Table 1). Wine producers are therefore prepared to pay a premium for grapes from certain regions and for particular varieties. However, as there is no objective measure for assessing region or variety consumers identify premium wines and regions from claims made on wine labels. An effective LIP would provide consumers with certainty that they are buying the product they pay for.

Table 1: Comparative prices for wine grapes by geographical indication, 2006-07, $AUD.

<table>
<thead>
<tr>
<th>Region</th>
<th>Cabernet Sauvignon</th>
<th>Chardonnay</th>
<th>Merlot</th>
<th>Sauvignon Blanc</th>
<th>Semillon</th>
<th>Shiraz</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adelaide Hills</td>
<td>1,509.29</td>
<td>1,607.03</td>
<td>1,266.02</td>
<td>1,678.94</td>
<td>1,227.00</td>
<td>1,648.17</td>
</tr>
<tr>
<td>Adelaide Plains</td>
<td>1,093.40</td>
<td>1,021.51</td>
<td>965.06</td>
<td>895.89</td>
<td>757.28</td>
<td>1,034.91</td>
</tr>
<tr>
<td>Clare Valley</td>
<td>1,382.07</td>
<td>1,208.86</td>
<td>1,257.84</td>
<td>1,092.69</td>
<td>1,006.76</td>
<td>1,502.64</td>
</tr>
<tr>
<td>Riverland</td>
<td>570.62</td>
<td>655.34</td>
<td>550.51</td>
<td>517.71</td>
<td>438.04</td>
<td>670.83</td>
</tr>
</tbody>
</table>

Issue to be addressed

For the AWBC to be able to guarantee the integrity of a wine label it has to be able to confirm that the variety, region and vintage on the label accurately report what was picked in the vineyard. This requires traceability in the wine supply chain from the grapes to sales.

The LIP legislation is limited to wine manufacturers and does not cover other players in the wine supply chain, such as wineries that do not make wine but merely perform a limited range of grape juice processing procedures as well as agents, growers, wholesalers and retailers. These people play a fundamental role in the supply chain.

The practical effect of the LIP was illustrated when the AWBC investigated a matter where there was evidence that a company deliberately collected grapes in a particular region and transported them to a contract winery in a second region and passed them off as grapes sourced in the second region in order to receive a financial benefit. The LIP with its focus on the wine manufacturer did not allow the AWBC to investigate the activities where the alleged fraud occurred.

Objective:

The objective in seeking the amendments is to ensure that the Label Integrity Program enables the AWBC to verify wine label claims by tracing the supply chain from grape to the sale of the wine.

Options

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1 AWBC Winefacts, “Australian Winegrape Prices & Tonnes Crushed”.
1. No change

2. Abolish the Label Integrity Program

3. Provide the AWBC with the means to protect the integrity of Australian wine by
   - extending the LIP record making and keeping requirement to grape growers/grape suppliers at the start of the LIP chain,
   - extending the scope of LIP so that the LIP audit trail and other parts of the AWBC legislation (such as Part VIB and the Export Regulations) are integrated and can be better administered,
   - aligning the audit trail requirements with current international best practice on wine/food traceability, particularly the International Organisation of Vine and Wine and the Codex Alimentarius,
   - creating a situation where the same rules and recording requirements apply to all activities and situations.

**Impact analysis**

**Impact groups**

- The estimated 7000 independent grape growers
- The estimated 2000 winemakers
- Wine wholesalers
- Wine retailers
- Traders and agents
- The AWBC (as administrator of the Act and regulations)

**Option 1**

The benefits of no change are that the industry is familiar with current arrangements and would not face any costs of adopting new arrangements.

The cost of the 'no change' option is that it does not address the identified problem. In many wine consuming nations, including Australia’s largest export markets, the use of particulars such as variety and vintage are dependent on a geographical indication appearing on the bottle. Regulators in these markets expect that label claims will be verifiable and in the absence of an effective LIP may be reluctant to accept Australian wine.

The Australian wine industry requested the LIP and has indicated it believes an effective label integrity system is necessary. It fears that under the current flawed LIP, consumers and the industry are unprotected from some types of fraudulent behaviour with regard to the integrity of wine labels. A scandal arising from a proven instance of mis-labelling has the possibility of damaging domestic and export sales of Australian wine in general, not just the wine that is the subject of the scandal.
The risk that importing countries and consumers could lose faith in the dependability of the LIP is high under the 'no change' option.

**Option 2**

There would be only a marginal benefit for winemakers if the LIP was removed from the Act and any benefits may be more apparent than real. Claims of variety or vintage may still need to be verified under the *Trade Practices Act*. In many wine consuming nations, including Australia’s largest export markets, the use of particulars such as variety and vintage are dependent on a geographical indication appearing on the bottle. Regulators in these markets expect that label claims will be verifiable and, in the absence of a national system such as the LIP, may be reluctant to accept Australian wine.

As the LIP does not currently extend to other participants in the wine audit trail, they would not be affected.

The Australian wine industry requested the LIP and in consultations has indicated it still supports the LIP. It fears that the abolition of the LIP could result in consumers and the industry being left unprotected from some types of fraudulent behaviour with regard to the integrity of wine labels. A scandal arising from a proven instance of mis-labelling has the possibility of damaging domestic and export sales of Australian wine in general, not just the subject of the scandal.

**Option 3**

This would allow the AWBC to trace a batch of wine from the retailer to the vineyard and confirm that the details that appear on the label are consistent at each point of the supply chain.

It will extend the coverage of the LIP to all wines, not just those that make a claim with regard to vintage, variety, geographical indication. In practice, most wineries already record this information for all wines. There are no statistics kept regarding the percentage of label claims made in Australia. Statistics kept for geographical indication claims for Australian wine exports indicate that more than 90 per cent of packaged wines carry a geographical indication claim. That figure would almost certainly apply for domestic wines and AWBC surveillance has shown that even a substantial percentage of cleanskin wines still carry a label claim as to vintage, variety and geographical indication.

Under current LIP legislation, for every wine grape delivery the grower has to declare the vintage, variety and geographical indication of the grapes because the wine manufacturer has to record that information (even where it is known that no label claim will subsequently be made).

While wine growers will be free to make and keep their own records (and many do) the standard grape delivery docket issued by receiving wineries to wine grape growers and
standard payment records provided by wineries will in most instances be sufficient record in themselves.

We are advised that not all grape growers record the geographical indication of the vineyard in which the grapes were grown. However, as geographical indications are widely known within the grape growing and winemaking community this adjustment cost is not expected to be a significant burden.

Therefore, it is not expected that the amended LIP provisions will add to the administrative workload of growers, makers and deliverers who use delivery dockets.

The integrity gained by growers recording full label claim information is achieved by having a record of the grapes supplied to manufacturers. This record can be compared to grape receival label claims and subsequent label claims made by manufacturers. The fact that the manufacturer’s payment advice to the grower may form a substantial part of the records needed to be kept by the grower reduces the opportunity for the manufacturer to later alter the label claims for a wine.

Growers will be required to keep records for seven years. The records will typically be in the form of a grape delivery docket which is kept by growers or their accountants for tax purposes.

Wholesalers and retailers typically keep the required records through bar codes or on paper. Most billable material under this option should contain the information. Therefore, it is not expected that the amended LIP provisions will add to the administrative workload of wholesalers and retailers.

It is important to note that those now to be included within the LIP record keeping provisions are already covered by the Part VIB provisions (Register of Protected Names, false and misleading provisions, blending rules) and the Export Regulations provisions, and they are already included in the Inspection Powers provisions of Part VIA of the AWBC Act. The proposal is extending the record keeping requirements.

The main benefit to consumers and industry is improved certainty that Australian wine labels are truthful and accurate.

**Consultation**

The AWBC, as the responsible authority, requested the amendments. The amendments are supported by the Winemakers’ Federation of Australia (WFA), the national representative body for winemakers with voluntary membership representing more than 95 per cent of the wine produced in Australia.

The amendments have been discussed at, and are supported by the Legislation Review Committee (LRC) of the AWBC. The LRC consists of representatives from WFA, an independent lawyer and the major wine companies.
A representative of Wine Grape Growers Australia (WGGA) also attended the LRC and supports the amendments including the requirement that wine grape growers keep a record of the geographical indication in which the grapes were grown.
**Conclusion and recommended option**

Option 3 is the preferred option. It provides the AWBC and industry with an improved label integrity system without additional cost to industry or government. It will provide the AWBC with a comprehensive system allowing a wine product to be traced from the grape vine to final sale. It also has the support of industry bodies.

**Injunctions Power**

*Issue to be addressed*

The AWBC can seek an injunction under Part VIB (Register of Protected Names, false and misleading provisions, blending rules) but cannot seek injunctions as tool for policing other Parts of the Act.

If a person is suspected of breaching one of the objects of the Act (e.g. truth in labelling or the export controls) the AWBC is unable to prevent the person from taking an action that could damage the reputation of the wine industry.

The AWBC has been involved in a situation where this narrow injunctions power meant it was unable to prevent the sale of a product in a situation where the company was unable or unwilling to provide records to substantiate the integrity of that product.

Even if a person has been convicted of an offence under the Act, unless the offence is in relation to Part VIB and an injunction can be obtained, the AWBC cannot stop the person from continuing to breach the Act.

*Objective*

The objective of the amendments is to provide the AWBC with the means to protect the reputation for quality of the Australian wine industry where a person is performing actions that may be contrary to the Act.

*Options*

1. Take no action.
2. Amend the AWBC Act to provide the AWBC the power to apply for an injunction to stop or to direct a person engaging in action that may be contrary to the objects of the Act.
Impact analysis

Impact groups

Potentially
- The estimated 7000 independent grape growers
- The estimated 2000 winemakers
- Wine wholesalers
- Wine retailers
- Traders and agents
- The AWBC (as administrator of the Act and regulations)

Option 1

Under this option the AWBC will continue to be in a position where it is limited in its ability to fulfil its obligation to enforce the Act. There will be circumstances in which it is aware of a breach of the Act but is unable to take action to prevent the breach recurring, with the consequence that the international wine community may consider that Australia does not have the capacity to enforce its wine laws.

Option 2

An expanded power to seek injunctions will provide the AWBC with a means to prevent behaviour that breaches the Act. It will have no costs to the majority of the wine industry against whom an injunction will not be sought.

It is expected that the AWBC would only very rarely seek injunctions as suspected breaches of the Act have been very few and in most cases have been resolved without a resort to legal action.

The safeguard against misuse of this power is that injunctions are issued by court and are subject to a court hearing where the court hears arguments from both parties and can make orders for costs.

Consultation

The AWBC, as the responsible authority, requested the amendments. The amendments are supported by the Winemakers’ Federation of Australia (WFA), the national representative body for winemakers with voluntary membership representing more than 95 per cent of the wine produced in Australia.

The amendments have been discussed at, and are supported by the Legislation Review Committee (LRC) of the AWBC. The LRC consists of representatives from WFA, an independent lawyer and the major wine companies. A representative of WGGA also attended the LRC and supports the amendments.
Conclusion and recommended option

Option 2 is the preferred option as it provides the AWBC with a means to stop an event occurring that is in breach of the Act and so provides a means of better enforcement of the Act.

The proposal to amend the Act to provide the AWBC the power to apply for an injunction to stop or to direct a person engaging in action that may be contrary to the objects of the Act

- has the support of industry bodies;
- has the potential to benefit the industry by strengthening the ability of the AWBC to prevent breaches of the Act; and
- is not expected to impose additional on government or the majority of industry that complies with the legislation.

Circumstances in which the AWBC can prohibit the export of a grape product

Issue to be addressed

The Act and the *Australian Wine and Brandy Corporation Regulations 1981* (AWBC Regulations) provide the AWBC with general export controls. The legislation requires the AWBC to:

- issue licences to export wine;
- issue certificates for exports of Australian wine; and
- run a label integrity program to validate claims relating to wine variety, wine region and vintage.

AWBC Regulation 5 provides the matters the AWBC shall take into account when considering whether to issue a person a licence to export grape products. AWBC Regulation 6 provides conditions that are necessary to be met before a wine product can be exported. AWBC Regulation 7 provides that if the conditions of export are not met the AWBC must refuse to issue an export certificate.

The AWBC Regulations do not give the AWBC a power to stop the export of wine where no LIP audit trail records are available to support the integrity of the wine goods or where there is doubt as to the integrity of the goods.

The AWBC has had recent experience where it was unable to prevent the export of a product where a company was unable or unwilling to provide records to substantiate the integrity of the product. Authorities in international markets can and do analyse wines to test that label claims are accurate. If a fraudulent claim were to be discovered this could have a detrimental effect on the reputation and sales of the broader industry.
**Objective**

To provide the AWBC with the means to refuse the export of wine goods where no audit trail records are produced to support the integrity of the wine goods.

**Options**

1. Maintain the status quo.

2. Provide the AWBC with the power to:
   
   i. refuse the export of the relevant wine goods, by any party, until such time as the AWBC is satisfied as to the integrity of the product; and

   ii. where a person refuses or is unable to produce records to verify label claims or other information (to be specified in the Regulations) required by the AWBC in its normal business, to refuse the export of the relevant wine goods, by any party, until such time as the AWBC is satisfied as to the integrity of the product.

AWBC Regulation 10 would continue to provide a right of appeal to the Administrative Appeals Tribunal in the event that the AWBC does refuse the export of the relevant wine goods.

**Impact analysis**

**Impact groups**

Potentially, all 1800 licensed wine exporters, but in practice only those that breach the legislation. The AWBC has cancelled just one export licence, although it has suspended five and has had reason to seek to cancel an export permit on approximately 15 occasions.

**Option 1**

While Option 1 imposes no new costs and has the benefit that the industry is familiar with the current requirements, it also has the weakness of maintaining a system that experience has shown to have gaps and loopholes that are able to be exploited, and which has potential to impose costs on the industry.

**Option 2**

Option 2 imposes no compliance costs on the majority of industry because it would not change any existing practices. It is only in the very small minority of instances where a company is unable to demonstrate the integrity of the goods that there may be a cost in that an export certificate may be refused.
The refusal of an export certificate could significantly affect a wine exporter. Certificates are issued for all exports of over 100 litres with an average export certificate being for about 12,000 litres. It is not possible to quantify the cost to exporter of refusing a certificate.

However it is not a power that the AWBC would be expected to use regularly and it could only be used after a prospective exporter has refused or proven unable to verify a label claim or other relevant information specified in the Regulations required by the AWBC.

The aim of the proposal is to give the AWBC greater power in the very few instances where an exporter is suspected of breaching the Act or a breach has been proven.

The AWBC has only recently encountered a situation where it was unable to prevent the export of a wine where it was unable to verify the label claims. This instance exposed a loophole in Australia’s export certification procedures. If this loophole is not closed it exposes the Australian wine industry to an increased possibility of a negative publicity that could disrupt sales of, and impose costs on innocent parties.

Australian wine has a reputation for label integrity. If this reputation is threatened it could affect sales. The introduction of a provision that allows the AWBC to halt an export where the integrity of the product is not proven could therefore benefit the entire industry.

Review by the Administrative Appeals Tribunal of AWBC decisions would ensure that the provision is not ‘misused’.

**Consultation**

The AWBC, as the regulator, requested the amendments. The amendments are supported by the Winemakers’ Federation of Australia (WFA), the national representative body for winemakers with voluntary membership representing more than 95 per cent of the wine produced in Australia.

The amendments have been discussed at, and are supported by the Legislation Review Committee of the AWBC. The LRC consists of representatives from WFA, an independent lawyer and the major wine companies. A representative of WGGA also attended the LRC and supports the amendments.

**Conclusion and recommended option**

Option 2 is the preferred option as it provides the AWBC with a means to stop an event occurring that is in breach of the Act and so provides a means of better enforcement of the Act.
The proposal to amend the Regulations to provide the AWBC the power to refuse the export of wine goods where a party refuses to produce appropriate documentation or the AWBC is not satisfied as to the integrity of the wine goods:

- has the full support of industry bodies;
- has the potential to benefit the industry by strengthening the ability of the AWBC to protect the integrity of wine exports; and
- is expected to impose no additional costs on government or the majority of industry that complies with the legislation.

**Implementation and review**

The amendments are to be implemented as soon as practicable, depending on the legislative process.

The amendments will be notified to the industry through an announcement by the Minister for Agriculture, Fisheries and Forestry, and through AWBC and WFA industry newsletters and Internet sites.

While the proposed amendments do not require additional record keeping they will require that records be kept for longer than is currently the case. Therefore the AWBC, WFA and WGGG will undertake an educational campaign through regional grape grower and winemaker associations to ensure that grape growers are aware of the new rules. The AWBC is developing a program to advise and educate retailers of the new requirements.

The Department of Agriculture, Fisheries and Forestry will monitor the legislation and review it as necessary.

**Wine Policy Section**  
**Agricultural Productivity Division**  
**Australian Government Department of Agriculture, Fisheries and Forestry**  
**June 2008**
NOTES ON ITEMS

Section 1  Short Title

This item is a formal provision specifying the short title of the Act as the *Australian Wine and Brandy Corporation Amendment Act 2009*.

Section 2  Commencement

Item 2 inserts a three column table setting out commencement information for the various provisions in the Act. Each provision of the Act specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms. Column 3 is empty and may be used in published versions of the Act to state the date of commencement in each Schedule.

Table item 1 provides that Sections 1 to 3 commence on Royal Assent.

Table item 2 provides that Schedule 1 commences on a date to be fixed by Proclamation. This date is likely to be when the Australia-European Community on Trade in Wine enters into force, on the first day of the second month following the exchange of letters between Australia and the European Community advising that their respective requirements for entry into force of the Agreement have been complied with.

Table item 3 provides that Schedule 2 commences on a date to be fixed by Proclamation.

Table item 4 provides that Part 1 of Schedule 3 commences on the 28\(^{th}\) day after Royal Assent.

The commencement provision of table item 5 is designed to ensure that Part 2 of Schedule 3 does not commence before Schedule 1 commences.

Table item 6 provides that Part 3 of Schedule 3 commences when Part 1 of Schedule 3 commences, that is on the 28\(^{th}\) day after Royal Assent.

Section 3  Schedules

This item provides that the legislation referred to in each Schedule of the Bill will be amended or repealed in accordance with the terms in that Schedule.
SCHEDULE 1 – AMENDMENTS RELATING TO THE AGREEMENT BETWEEN AUSTRALIA AND THE EUROPEAN COMMUNITY ON TRADE IN WINE

Part 1 – Amendments

*Australian Wine and Brandy Corporation Act 1980*

**Item 1 Paragraph 3(1)(e)**

This amendment clarifies that the objective of the Act is to meet the obligations of all relevant international agreements to which Australia is party.

**Item 2 Paragraph 3(1)(f)**

This subsection of the Act is being repealed because subsections 3(1)(a-e) state the objectives of the Act clearly, rendering 3(1)(f) redundant.

**Item 3 Subsection 4(1) (paragraph (a) of the definition of agreement country)**

The reference to the European Economic Community is updated to reflect that Australia’s partner in the new agreement on trade in wine is the European Community, the successor legal entity to the European Economic Community.

**Item 4 Subsection 4(1)**

This amendment provides that country, for the purposes of the Act, the term has the special meaning at 4(2) of the Act.

**Item 5 Subsection 4(1)**

A designated foreign country is one for which geographical indications have been included on the Register of Protected Geographical Indications and Other Terms.

**Item 6 Subsection 4(1) (definition of EC country)**

The reference to the European Economic Community is updated to reflect that Australia’s partner in the new agreement on trade in wine is the European Community (EC), the successor legal entity to the European Economic Community.

**Item 7 Subsection 4(1) (definition of geographical indication)**

This amendment aligns the definition of the term geographical indication with that set out at Article 22.1 of the 1994 World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights.
The definition is also used in the Trade Marks Act 1995, except that the definition in the Australian Wine and Brandy Corporation Act 1980 (AWBC Act) refers only to wine goods, reflecting the narrow focus of the AWBC Act.

**Item 8  Subsection 4(1) (definition of modify)**

The list of requirements in the definition of the term modify is comprehensive and does not need to allow for other elements.

**Item 9  Subsection 4(1)**

This amendment states that the definition of the term protection date as it applies to a registered traditional expression is at Item 37 (Subsection 40DB(6)) of the Bill.

**Item 10  Subsection 4(1) (definition of Register)**

This amendment reflects the change in name of the Register of Protected Names to the Register of Protected Geographical Indications and Other Terms.

**Item 11  Subsection 4(1)**

This item provides a definition of registered additional term as a term included in Part 4 of the Register of Protected Geographical Indications and Other Terms.

**Item 12  Subsection 4(1) (definition of registered ancillary protected expression)**

This definition is redundant as all references to registered ancillary protected expression(s) have been repealed from the Act.

**Item 13  Subsection 4(1) (definition of registered condition)**

The definition of registered condition is to be repealed because this term has been replaced by the term registered conditions of use.

**Item 14  Subsection 4(1)**

This amendment provides a definition of the term registered conditions of use, which is outlined in Section 40G of the Bill.

**Item 15  Subsection 4(1) (definition of registered geographical indication)**

This amendment clarifies that a registered geographical indication is included in Part 1 of the Register of Protected Geographical Indications and Other Terms.
Item 16 Subsection 4(1)

This amendment defines a registered quality wine term as a term, which is included in Part 3 of the Register of Protected Geographical Indications and Other Terms.

Item 17 Subsection 4(1) (definition of registered traditional expression)

This amendment clarifies that a registered traditional expression is included in Part 2 of the Register of Protected Geographical Indications and Other Terms.

Item 18 Subsection 4(1)

This amendment clarifies that a registered translation of a registered geographical indications is included in Part 1 of the Register of Protected Geographical Indications and Other Terms.

Item 19 Subsection 4(1) (definition of registered variety of grapes)

This definition is to be repealed as Australia has removed the capacity to register varieties of grapes on the Register of Protected Geographical Indications and Other Terms. Therefore, the definition is redundant.

Item 20 Subsection 4(1) (definition of Registrar)

This definition changes the name of the Registrar to the Registrar of Protected Geographical Indications and Other Terms.

Item 21 Subsection 4(1) (definition of traditional expression)

This definition of traditional expression is the same as in the Australia – European Community (EC) Agreement on Trade in Wine except that it does not restrict traditional expression(s) to wines originating in the EC.

Item 22 Subsection 4(1)

This amendment provides a definition for the World Trade Organization (WTO), which is referred to at section 4(2) of the Act.

Item 23 After Subsection 4(1)

This amendment defines that any reference to a country in this Act includes a member of the World Trade Organization such as a regional economic integration organisation or an autonomous customs territory.
Item 24  Subsection 4(3)

The reference to the European Economic Community is updated to reflect that Australia’s partner in the new agreement on trade in wine is the European Community, the successor legal entity to the European Economic Community.

Item 25  Section 5C

This amendment broadens the definition of description and presentation of the previous Act to include the term indications which reflects a change in the definition of the term geographical indication.

Item 26  Paragraph 8(2)(aa)

This amendment provides the Australian Wine and Brandy Corporation (AWBC) with the power to determine conditions of use for registered geographical indications (GIs) and registered translations of registered GIs. It provides for the AWBC to put conditions on GIs independently of the Geographical Indications Committee. For example, if a GI is determined and included on the Register of Protected Geographical Indications and Other Terms without conditions and a homonymous GI is later determined, the AWBC will have the power to place conditions of use on the registered GI.

Item 27  Paragraph 8(2)(ab)

This paragraph is to be repealed due to the Act no longer recognizing Australian traditional expressions.

Item 28  Paragraph 8(2)(ac) and (ad)

This amendment relates to the specific powers of the Australian Wine and Brandy Corporation (AWBC) under the Act.

Subsection 8(2)(ac) repeals the reference to ancillary protected expressions as this term is no longer used in the Act. The new subsection provides for the AWBC to determine traditional expressions (TEs) and conditions of use for those TEs from any foreign country.

Subsection 8(2)(ad) provides the AWBC with the power to determine additional terms and conditions of use for those additional terms.

Item 29  Paragraph 8(2)(ae)

This paragraph is to be repealed due to the Act no longer recognising the defined term registered variety of grapes.
Item 30  After paragraph 8(2)(g)

This amendment provides for the Australian Wine and Brandy Corporation to charge fees for work undertaken by the Geographical Indications Committee.

Item 31  Subsection 8(2A)

This amendment amends the lists of those items of section 8(2) for which a determination by the Australian Wine and Brandy Corporation must be in writing and under the common seal to include Subsections 8(2)(ac) or 8(2)(ad).

Item 32  Subsection 8(2F)

Subsection 8(2F)(1A) provides a timeframe for appeals of Australian Wine and Brandy Corporation (AWBC) decisions to be made to the Administrative Appeals Tribunal (AAT). The amendment alters the list of items in section 8(2) covered by this section to include Subsections 8(2)(ac) or 8(2)(ad).

Subsection 8(2F)(1B) provides a restriction on the timeframe for appeals to the AAT. The amendment alters the list of items in section 8(2) covered by this section to include Subsections 8(2)(ac) or 8(2)(ad).

Item 33  Subsection 38(4)

This amendment corrects a minor formatting error in the Act.

Item 34  Subsection 38(4)

This amendment has the effect of requiring the Australian Wine and Brandy Corporation to include in its Annual Report a report on the number of translations of geographical indications that the Geographical Indications Committee determined during the reporting year.

Item 35  Part VIB (heading)

The heading is to be changed in order to more clearly articulate the overarching objective of this section of the Act. Part VIB provides the basis for the protection of registered geographical indications (GIs), registered translations of GIs, and other terms such as registered traditional expressions.

Item 36  Paragraph 40A(a)

This amendment clarifies that the objective of Part VIB is to meet the obligations of all relevant international agreements to which Australia is party.
Item 37  Sections 40C to 40H

This item repeals sections 40C to 40H and replaces them as described below.

Section 40C(1) makes it an offence to sell, export or import wine, in trade or commerce, with a false description and presentation. The following fault elements apply to the offence:

(a) intention applies to whether or not the person sold, exported or imported wine;

(b) recklessness applies to whether or not the person sold, exported or imported the wine in trade or commerce;

(c) recklessness applies to whether or not the description and presentation of the wine includes a registered Geographical Indication (GI), a registered translation of such an indication, a registered traditional expression (TE), a registered quality wine term or a registered additional term; and

(d) recklessness applies to whether or not the description and presentation of the wine does not comply with any registered conditions of use applicable to the GI, translation, TE, quality wine term or additional term.

Under the current system the penalty provision for selling a wine with a false or misleading description and presentation is subject to the fault element of intention. The mental element of intention could allow a person to avoid liability by giving incontestable evidence that they had no intention to mislead. This barrier to prosecution has been the catalyst for changing the fault element to recklessness. The amendment also brings the offence provisions in line with the Criminal Code Act 1995.

This amended offence provision will apply to all elements of the supply chain. However, the risk of prosecution for those who conduct their business in accordance with the rules and act in good faith is low.

For example, a small wine retailer is unlikely to be liable for prosecution if they bought a bottle of wine with a false or misleading description and presentation, in good faith, from a wholesaler and sold that wine in their store. To be liable for prosecution under the amended provision, the small wine retailer would need to be aware of a substantial risk that the wine from the wholesaler had a false and misleading description and presentation, and irrespective of that risk, sold the bottle of wine with that description.

If a person sells, exports or imports wine with a false description and/or presentation, the person faces imprisonment for 2 years, or a maximum fine of 120 penalty units instead of, or in addition to imprisonment.

Subsection 40C(2) states that the description and presentation may be false even if it indicates the country, region or locality in which the wine originates.
Subsection 40D provides meaning for the term *false description and presentation* as it applies to section 40C of the Act.

Subsection 40D(2)(a) makes it false to use the name of a country, or any other indication that the wine originated in a particular country (for example, a national flag on a label), when the wine did not originate in that country.

Subsection 40D(2)(b) makes it false to use a GI on a wine if the wine did not originate in the particular country, region or locality in relation to which the GI is registered.

Subsection 40D(2)(c) makes it false to use a registered translation of a registered GI if the wine did not originate in the particular country, region or locality in relation to which the GI is registered.

Subsection 40D(2)(d) makes the description and presentation of a wine false if it includes a registered TE in the language in relation to which the expression is registered and the wine is in the category of wine in relation to which the expression is registered and the wine is not a wine in relation to which the expression is registered (TEs are listed in Annex III of the Australia – European Community (EC) Agreement on Trade in Wine (the Agreement) according to their country, under the headings Wine Concerned, Wine Category, and Language. Subsection 40D(2)(d)(i) refers to the wine concerned, subsection 40D(2)(d)(ii) refers to the wine category and 40D(2)(d)(iii) refers to the language of the TE.) For example:

- *Reserva* is listed in Annex III of the Agreement as a TE for Spain and Portugal in Spanish and Portuguese respectively. *Riserva* is also listed in Annex III as a TE for Italy in Italian. *Reserve* in English is not listed and is therefore not protected so Australian producers can continue to use Reserve in the description and presentation of their wine.

- Vintage is listed in Annex III of the Agreement as a TE in English for DO Porto wines in the wine category of Quality liqueur wine psr (in Australia this equates to fortified wines). Under this section, the term *vintage* in English can therefore continued to be used in the description and presentation of Australian wines other than fortified wines. (It is important to note, however, that the term *vintage* in English is a quality wine term in relation to wines originating in Australia and can be used in the description and presentation of Australian fortified wines provided the registered conditions of use are complied with.)

Subsection 40D(2)(e) provides that the Regulations may prescribe other circumstances when the description and presentation will be false.

Subsection 40D(3) provides that subsection 40D(2) is not an exhaustive list of circumstances when the description and presentation of a wine is false.
Subsection 40D(4) provides that a registered GI, registered translation of a registered GI, or registered TE accompanied by an expression such as “kind”, “type”, “style”, “imitation”, “method”, or any other similar expression used in the description and presentation of a wine is subject to the false provisions of Section 40. For example:

- an Australian producer would not be able to label their wine as a “Burgundy Style” even though it may be produced in the same way as those wine producers in the Bourgogne GI in France.
- an Australian producer of Riesling could not use the phrase “Clare Valley Method Riesling” on a wine made from Riesling grapes grown in the McLaren Vale.

Section 40DA sets out in detail the circumstances in which the description is not false.

Subsection 40DA(1)(a), (b) and (c) provide that if a registered GI that is identical to another registered GI is included in the description and presentation of wine, the inclusion of the indication will not make the description and presentation false. However, the description and presentation may be false for another reason.

Subsection 40DA(2) provides that the use, in good faith, of common English words, which also include a word or term that is a registered GI, registered translation of a GI, or a registered TE in relation to a country, region or locality in the description and presentation of wine is not false merely because it includes the word or term.

For example, the use of “port” in a place name does not preclude it from being a common English word.

Subsection 40DA(3) provides for the situation where the name of a winemaker is also a registered GI, registered translation of a GI or a registered TE. The subsection provides that winemaker’s name can be used in the description and presentation of a wine. It also provides that the individual’s name is not false if the person using the name is legally entitled to do so. This allows a winemaker to sell a brand or business established with the winemaker’s name, and for successors in business to continue to use the name.

Section 40DB provides details of circumstances in which description and presentation is not false with regard to TEs.

Subsection 40DB(1) provides that if an Australian wine uses a registered quality wine term in its description and presentation, then the description and presentation is not false, even if the registered quality wine term is also a registered TE, and the wine is in the same category of wine in relation to that which the TE is registered.

For example, an Australian producer can use the quality wine term Solera in its description and presentation of a wine as long as it complies with the registered conditions of use.
Subsection 40DB(2) provides that foreign countries that are not agreement countries can use TEs to describe their wine, provided consumers are not misled, the origin of the product is stated, and the use does not constitute unfair competition as that term is understood in Article 10bis of the Paris Convention for the Protection of Industrial Property of 20 March 1883 as amended.

Subsection 40DB(3) provides that if a trade mark contains or consists of a registered TE, then the description and presentation of the wine is not false merely because it includes the trade mark as long as that trade mark was entered in good faith in the Register of Trade Marks or the owner of the trade mark had acquired rights in the trade mark through use in good faith, before the protection date for the TE.

For example, a trade mark which includes the word *Chateau* can continue to be used in Australia after the term *Chateau* is protected under the Agreement.

Subsection 40DB(4) provides a carve out for those businesses which have a name which includes a registered TE, so long as the name was registered in good faith under the law of a State or Territory before the date of protection of the TE.

Subsection 40DB(5) explains that subsection 40DB(4) does not limit, in any way, subsection 40DA(3).

Subsection 40DB(6) defines the protection date as either the date on which the relevant prescribed wine-trading agreement was signed or the date the agreement was modified to include the TE.

For non-agreement countries, subsection 40DB(6)(b) states that the protection date for a TE is the date on which the TE is registered.

Section 40E sets out the offence provisions for the sale, export or import of wine with a misleading description and presentation.

Subsection 40E(1) provides the Act with offence provisions in relation to selling, exporting or importing wine with a misleading description and presentation.

The fault elements that will apply to each aspect of this offence are the same as will apply in relation to Section 40C (that is, intention for paragraph (1)(a) and recklessness for paragraph (1)(b)).

The amendment simplifies the offence provision by stating that if a person sells, exports or imports wine with a misleading description and/or presentation, the person faces imprisonment for 2 years, or a maximum fine of 120 penalty units instead of, or in addition to imprisonment.

Subsection 40E(2) states that the description and presentation may be misleading even if it indicates the country, region or locality in which the wine originated.
Section 40F provides meaning for the term misleading description and presentation as it applies to this section of the Act.

Subsection 40F(1) states that 40F has effect for the purposes of section 40E.

Subsection 40F(2) provides that a description and presentation of wine is misleading if it includes a registered GI or a registered translation of a registered GI and the indication or translation is used in a way which is likely to mislead a consumer as to the country, region or locality in which the wine originated. TEs will be listed in the Register of Protected Geographical Indications and Other Terms according to their country, under the headings: Wine Concerned; Wine Category; and Language. Subsection 40F(2)(c)(i) refers to the wine concerned, subsection 40F(2)(c)(ii) refers to the category of wine and 40F(2)(c)(iii) refers to the language of the TE.

The description and presentation of a wine is misleading if:
- it includes a registered TE in the language in relation to which the expression is registered;
- the wine is not in the category of wine in relation to which the expression is registered;
- the wine is not a wine in relation to which the expression is registered;
- the expression is used in such a way as to be likely to mislead that the wine originated in a country, region or locality in relation to which the expression is registered; or
- that the wine is in a category of wine in relation to which the expression is registered.

Under the current system the penalty provision for selling a wine with a false or misleading description and presentation is subject to the fault element of intention. The mental element of intention could allow a person to avoid liability by giving incontestable evidence that they had no intention to mislead. This barrier to prosecution has been the catalyst for changing the fault element to recklessness. The amendment also brings the offence provisions in line with the Criminal Code Act 1995.

This amended offence provision will apply to all elements of the supply chain. However, the risk of prosecution for those who conduct their business in accordance with the rules and act in good faith is low.

For example, a small wine retailer is unlikely to be liable if they bought a bottle of wine with a false or misleading description and presentation, in good faith, from a wholesaler and sold that wine in their store. To be liable for prosecution under the amended provision, the small wine retailer would need to be aware of a substantial risk that the wine from the wholesaler had a false and misleading description and presentation, and irrespective of that risk, sold the bottle of wine with that description.
Subsection 40F(3) provides that a registered GI, registered translation of a registered GI, or registered TE accompanied by an expression such as “kind”, “type”, “style”, “imitation”, “method”, or any other similar expression used in the description and presentation of a wine is subject to the misleading provisions of Section 40E.

Subsections 40F(4)(a) and (b) provide that the description and presentation of wine is misleading if it includes an indication or term that so resembles a registered GI or a registered translation of a registered GI as to be likely to mislead that the wine originated in a country, region or locality in relation to which the indication is registered.

Subsection 40F(4)(c) provides that the description and presentation of wine from a foreign country that is not an agreement country is misleading if it includes a term that so resembles a registered TE as to be likely to mislead that the wine originated in the country, region or locality in relation to which the expression is registered, or that the wine is in a category of wine in relation to which the expression is registered.

Subsection 40F(5) provides that the description and presentation of a wine is misleading if it includes the name of an individual, the name of a winery or the address of a winery, and these names or address are used in such a way as to be likely to mislead as to the country, region or locality in which the wine originated.

To provide a fictional example, if a McLaren Vale producer’s address was “Barossa Valley Road”, and that producer included the text “Barossa Valley” in large letters on its wine label, while McLaren Vale was written in small text, this may be misleading.

Subsection 40F(6) provides that the Regulations may prescribe other circumstances when the description and presentation will be misleading.

Subsection 40F(7) provides that subsections 40F(2), (3), (4), (5) and (6) do not limit the circumstances in which a description and presentation can be misleading.

Subsection 40FA provides circumstances in which the description and presentation is not misleading.

Subsection 40FA(1) provides that the description and presentation of a wine is not misleading merely because the indication or term is, or resembles, a registered GI, a registered translation of a registered GI, or a registered TE, in relation to another country, region or locality. This means that it will be possible for two registered GIs or registered translations of GIs which are homonyms of each other to be used concurrently in the market if each is being used in accordance with authorised conditions of use that differentiate one from the other.

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

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

- the word or term is used in good faith.

Subsection 40FB provides circumstances in which description and presentation is not misleading – including TEs and quality wine terms.

Subsection 40FB(1) provides that if the description and presentation of a wine includes a registered quality wine term, and the description and presentation of the wine states that the wine originated in Australia or in a region or locality in Australia, then the description and presentation of this wine is not misleading merely because the quality wine term is also a registered TE and the wine is in a category of wine in relation to which the TE is registered.

Subsection 40FB(2) provides that if the description and presentation of a wine includes a trade mark and the trade mark includes a registered TE, then as long as the trade mark was entered in good faith in the Register of Trade Marks, or the owner of the trade mark had acquired rights in the trade mark through use in good faith, before the protection date for the TE, the description and presentation is not misleading merely because it includes that trade mark.

Subsection 40FB(3) provides that if the description and presentation of wine includes a business name and the business name contains or consists of a registered TE, then as long as the business name was registered in good faith under applicable State or Territory laws, then the description and presentation of a wine is not misleading merely because it includes the business name.

Subsection 40FB(4) provides that subsection 40FB(3) does not limit subsection 40F(5).

Section 40G makes it an offence to sell export or import wine in contravention of registered conditions of use.

Subsection 40G(1) provides that a person commits an offence if the person sells, exports or imports wine, in trade or commerce, with a description and presentation that includes a registered GI, a registered translation of a registered GI, a registered TE, a registered quality wine term, or a registered additional term and does not comply with the registered conditions of use.

The fault elements that apply in relation to section 40G(1) are:

(a) intention applies to whether or not the person sold, exported or imported wine; and

(b) recklessness applies to whether or not the person sold, exported or imported the wine in trade or commerce; and
(c) recklessness applies to whether or not the description and presentation of the wine includes a registered GI, a registered translation of a registered GI, a registered TE, a registered quality wine term or a registered additional term; and

(d) recklessness applies to whether or not the description and presentation of the wine does not comply with any registered conditions of use applicable to the GI, translation, TE, quality wine term or additional term.

This offence attracts a penalty of imprisonment for 1 year, or a maximum fine of 120 penalty units instead of, or in addition to imprisonment. Should a body corporate be convicted, they may be fined up to 5 times that maximum fine (600 penalty units).

Subsections 40G(2) and 40G(3) provide details of circumstances in which the offence provisions stated in 40G(1) do not apply.

Subsection 40G(2) provides that 40G(1) does not apply if a producer uses a registered indication or term which is registered in one or more parts of the Register in a description and presentation if:

- the user complies with the registered conditions of use for that indication or term; and
- in the description and presentation, the country, region or locality from which the wine originated is indicated.

This subsection notes that the defendant bears an evidential burden in relation to the matters in this subsection.

Subsection 40G(3) also provides that 40G(1) does not apply if a producer uses a registered additional term which appears more than once on the Register if the producer complies with the applicable terms and conditions.

This subsection also notes that the defendant bears an evidential burden in relation to the matters in this subsection.

**Item 38 Subsection 40J(1) – definition of the offence provisions**

This section is amended to refer to the section numbers of the new offence provisions.
Item 39  **Subsection 40K(1)**

This item amends the text of subsection 40K(1) to reflect the fact that section 40H is to be repealed from the Act.

Item 40  **Paragraph 40K(1)(b) and (c)**

This provision broadens the classes of people who can institute a proceeding under the offence provisions to include people from countries in relation to which a geographical indication (GI), translation of a registered GI or traditional expression is registered.

Item 41  **At the end of section 40K**

This provision is necessary to implement item 40 as it defines a designated foreign country in relation to which a geographical indication (GI), registered translation of a GI, traditional expression or additional term is registered on the Register of Protected Geographical Indications and Other Terms.

Item 42  **Subsection 40M(1)**

This subsection is to be amended so that for wine originating in any foreign country, any requirement in a national food standard in relation to oenological practices or processes or compositional requirements is to be replaced by the following:

- the oenological practices or processes, or compositional requirements set out in the relevant prescribed wine-trading agreement as in force or existing from time to time; or if accordance with such an agreement, Australia has been notified of the authorization of modifications of the oenological practices or processes, or compositional requirements, set out in the agreement – the oenological practices or processes, or compositional requirements, as so modified; or
- The oenological practices or processes, or compositional requirements prescribed by regulations in relation to wines originating in any foreign country. The regulations must not prescribe oenological practices or processes or compositional requirements unless they are recognized by the laws and regulations of a foreign country. The regulations may prescribe oenological practices or processes or compositional requirements by applying, adopting or incorporating (with or without modification) a written instrument or other document as in force or existing at a particular time or as in force or existing from time to time.

Item 43  **Subsection 40M(2)**

This subsection is to be amended as oenological practices and processes and compositional requirements are the complete set of items for which the Minister may suspend operations of the section.
**Item 44 Paragraph 40P(1)(b)**

This amendment provides the Geographical Indications Committee with the power to determine conditions of use for Australian geographical indications.

**Item 45 At the end of paragraph 40P(1)(d)**

This amendment provides the Geographical Indications Committee with the following powers in accordance with applicable regulations.

- To deal with applications for the determination of geographical indications (GIs) and translations of GIs in relation to regions and localities in a foreign country and to make determinations of such GIs and translations of GIs including determining any conditions of use applicable to such GIs and translations of GIs; and
- to make determinations for the omission from the Register of Protected Geographical Indications and Other Terms any registered GIs, and registered translations of such GIs, in relation to a foreign country, or region, or locality in a foreign country.

**Item 46 Subsection 40PA(1) (note)**

This amendment explains that geographical indications (GIs), and translations of such GIs as they relate to wine originating in a foreign country, are determined by the Geographical Indications Committee in accordance with applicable regulations. This means that they are not determined under this Division of the Act.

**Item 47 At the end of Section 40PA**

This amendment states that the operation of this Division of the Act may be modified by changes to the applicable regulations. This will enable Division 4 of the Act to be applied in such a manner as to ensure that applications for and determinations of geographical indications, and translations of those indications, as they relate to wines originating in foreign countries can be dealt with in a manner consistent with Australia’s international obligations under regulations made with regard to subsection 40P(1)(ca).

**Item 48 Section 40RB**

This amendment ensures that this section of the Act is consistent with the definition of geographical indication.

**Item 49 Paragraph 40T(1)(b)**

As the new definition of a geographical indication (GI) refers to the term “indication” rather than merely “word or expression”, this amendment is necessary to ensure consistency with the new definition of the term GI.
Under the new definition of GI, a “word or expression” would be considered an indication.

**Item 50  At the end of subsection 40T(1)**

This amendment provides the Geographical Indications Committee with the power to determine conditions of use for geographical indications.

**Item 51  Paragraph 40T(3)(b)**

As the new definition of a geographical indication (GI) refers to the term *indication* rather than merely *word or expression*, this amendment was necessary to ensure consistency with the new definition of the term GI.

Under the new definition of GI, a word or expression would be considered an indication.

**Item 52  Division 4A of Part VIB (heading)**

This amendment provides for a change of the heading for Division 4A so that it accurately reflects the contents of the Division.

**Item 53  At the end of subsection 40ZAA(1)**

This amendment explains that geographical indications (GIs), and translations of GIs as they relate to wine originating in a foreign country, are not omitted under this Division of the Act. They are omitted by the Geographical Indications Committee in accordance with applicable regulations.

**Item 54  At the end of section 40ZAA**

This amendment states that the operation of this Division of the Act may be modified by changes to the applicable regulations. This will enable Division 4A to be applied in such a manner as to ensure that the determination of removal of Australian geographical indications from the Register of Protected Geographical Indications and Other Terms can be done in a manner consistent with Australia’s international obligations.

**Item 55  After Division 4A of Part VIB**

This amendment provides for regulations to be made that provide a process to determine foreign country Geographical Indications (GIs) and translations of those GIs. This amendment reflects the process for determining Australian GIs in the Act and regulations.

Subsection 40ZAQ(1) provides for the regulations to make provision for the determination of foreign country GIs and translations of those GIs.
Subsection 40 ZAQ(2) provides, through the regulations, the Geographical Indications Committee (GIC) the power to:

- deal with applications for the determination of GIs and translations of such GIs;
- make determinations of GIs, their translations and their conditions of use;
- set out criteria for the Committee to use when it makes such determinations; and
- provide for a review of such determinations by the Administrative Appeals Tribunal.

Subsection 40ZAQ(3) provides the regulations the power to allow objections to the Registrar of Trade Marks in relation to determination of foreign country GIs and their translations and on what grounds such objections may be made. This amendment states that the process for dealing with such objections can be dealt with in the regulations.

This amendment also provides that the regulations will allow the Registrar of Trade Marks to make recommendations to the GIC in relation to the determination of proposed foreign country GIs and their translations.

Subsection 40ZAR provides for a process to appeal against decisions made by the Registrar of Trade Marks. This appeal lies to the Federal Court, to the exclusion of the jurisdiction of any other court except the High Court. This is prescribed by regulations. This amendment also states what the Federal Court may do upon hearing an appeal against a prescribed decision and explicitly states that the Registrar of Trade Marks may appear and be heard with regard to an appeal against such a decision.

40ZAS provides that if a decision is made by the Federal Court under 40ZAR of the Act, or under the regulations, the Court’s decision can not affect rights under the Trade Marks Act.

40ZAT provides for the GIC to deal with and make determinations on applications in relation to the omission of registered foreign country GIs and translations of such GIs. In addition, this amendment provides for the regulations to set out how such determinations may be made. Furthermore, this amendment provides that the regulations may provide for the Administrative Appeals Tribunal to review such determinations.

**Item 56  Division 5 of Part VIB (heading)**

This item renames the heading for the Division of Register of Protected Names as the Register of Protected Geographical Indications and Other Terms (the Register) to reflect that the Register will include geographical indications (GIs), translations of GIs and other terms such as traditional expressions, quality wine terms and additional terms.
Item 57  Subsection 40ZA(1)

This item provides the Registrar of Protected Names with a new title that reflects the renaming of the Register of Protected Geographical Indications and Other Terms.

Item 58  Paragraph 40ZB(a)

This item amends the functions of the Registrar of Protected Geographical Indications and Other Terms to reflect the renaming of the Register of Protected Geographical Indications and Other Terms.

Item 59  Paragraph 40ZB(b)

This item more accurately reflects the role of the Registrar of Protected Geographical Indications and Other Terms.

Item 60  Paragraph 40ZB(e)

This item requires the Registrar of Protected Geographical Indications and Other Terms, at the direction of the Geographical Indications Committee, to advise relevant authorities and organisations in foreign countries of changes to the Register of Protected Geographical Indications and Other Terms. These changes may include when geographical indications (GIs), translations of GIs and other terms such as traditional expressions, quality wine terms and additional terms are included on the Register.

Item 61  Subsection 40ZC(1)

This item renames the Register of Protected Names as the Register of Protected Geographical Indications and Other Terms (the Register) to reflect that the Register will include geographical indications (GIs), translations of GIs and other terms such as traditional expressions, quality wine terms and additional terms.

Item 62  Subsections 40ZD(1) and (2)

This item updates the contents of the Register of Protected Geographical Indications and Other Terms (the Register). Subsection 40ZD(1) sets out the four parts of the Register.

Part 1 – Australian geographical indications (GIs), foreign country GIs and translations of those GIs and any conditions of use applicable to those indications.

Part 2 – Traditional expressions in relation to wines originating in a foreign country and any conditions of use applicable to those indications.

Part 3 – Quality wine terms. These are terms that Australia would not otherwise be able to use because they are traditional TEs and any conditions of use applicable to those indications.
Part 4 – Other terms that are not GIs, translations of GIs, TEs or quality wine terms and any conditions of use applicable to those indications. It is proposed to enter the term *methode champenoise* in this part of the Register as, under the Agreement, Australia has agreed to prevent this term from being used in the description and presentation of wine unless the wine is produced in Champagne using this method (as this term is a reference to a method rather than the name of a geographic location it is not registered as a GI. While it may be possible to rely on the false and misleading provisions to prevent its use due to its similarity to ‘Champagne’ – a registered GI – registering it under this part of the Register will ensure certainty of prosecution).

The parts containing traditional expressions in relation to wines manufactured in Australia and the names of varieties of grapes for use in the manufacture of wines in Australia have been removed from the Register as they are not required.

Subsection 40ZD(2) provides that geographical indications are to be entered on the Register and describes what information will be included in Part 1 of the Register. The term Australian is to be deleted as the use of adjectival forms of geographical indications is captured under the false and misleading use provisions in Part VIB of the Act. The subsection provides that Australian GIs, agreement country GIs and foreign country GIs may be included on the Register.

Subsection 40ZD(2A) provides that traditional expressions are to be entered on the Register for agreement countries and other foreign countries and describes what information will be included in Part 2 of the Register.

Subsection 40ZD(2B) provides that quality wine terms for Australian wines are to be entered on the Register and this will include conditions of use and describes what information will be included in Part 3 of the Register.

Subsection 40ZD(2C) provides that additional terms in relation to Australia, an agreement country and foreign countries are to be entered on the Register and describes what information will be included in Part 4 of the Register.

**Item 63 Paragraph 40ZD(3)(a)**

This amendment states that the operation of this Division of the Act may be modified by changes to the applicable regulations. This will enable Division 5 of the Act to be applied in such a manner as to ensure that entries in the Register of Protected Geographical Indications and Other Terms can be dealt with in a manner consistent with Australia’s international obligations.

**Item 64 Clause 1 of the Schedule (definition of nominated member)**

This item provides for an increase in membership of the Geographical Indications Committee.
Item 65  Subclause 2(1) of the Schedule

This item provides for the Geographical Indications Committee to have other than 3 members.

Item 66  At the end of subclause 2(1) of the Schedule

This item provides for the Australian Wine and Brandy Corporation Regulations to specify additional members of the Geographical Indications Committee (GIC). An increase of the membership size of the GIC is considered desirable if it is to determine foreign geographical indications (GIs) and registered translations of GIs.

Item 67  At the end of subclause 10(3) of the Schedule

This item provides for the Australian Wine and Brandy Corporation Regulations to be able to prescribe a different quorum if the Geographical Indications Committee has more than 3 members.

Item 68  At the end of subclause 10(7) of the Schedule

This item provides that the Australian Wine and Brandy Corporation Regulations may prescribe a process for resolving questions in the event of a deadlock.

Item 69  At the end of clause 10 of the Schedule

This item provides that the Australian Wine and Brandy Corporation Regulations may require an increased quorum when more than 3 members are appointed, and may make rules for the decision making process in such a case.

*Trade Marks Act 1995*

Item 70  Section 6

This item is to be added for the purpose of formatting and clarity following the introduction of Item 72.

Item 71  Section 6 (definition of *geographical indication*)

This amended definition of the term *geographical indication* brings the definition in the Act closer to that stated in Article 3 of the *Agreement on Trade Related Aspects of Intellectual Property Rights*.

A slightly different definition is being inserted into subsection 4(1) of the AWBC Act reflecting the narrow focus of that Act.
Item 72  Section 6

This provides for a definition for the World Trade Organization (WTO), referred to in the definition of terms such as country.

Item 73  At the end of section 6

A definition of country in subsection 6(2) of the Trade Marks Act is being inserted to accord with the definition in subsection 4(1) of the AWBC Act. It will state that for the purposes of the Act, a country includes a member of the World Trade Organization (WTO). This definition will encompass WTO members that are not countries in their own right such as the European Community or Hong Kong.

Item 74  After paragraph 61(2)(a)

Paragraph 61(2)(aa) is being added so that an opposition will fail if the geographical indication (GI) is not recognised in the country in which the designated goods originate. The addition of this paragraph follows the removal of this criterion as part of the definition of a GI to accord with that in the Agreement on Trade Related Aspects of Intellectual Property Rights. No change in outcome is intended.

Item 75  At the end of section 61 (before the notes)

Under the AWBC Act, a geographical indication (GI) cannot be used in the description or presentation of a wine unless the wine originates in that country, region or locality.

A number of GIs listed in the Register of Protected Geographical Indications and Other Terms are common English words. Using such words, even with their common English meaning, in the description and presentation of wine could be an offence under the AWBC Act. For example, the use of the registered GI ‘Orange’ in a trade mark ‘Orange Roughy’ in respect of wine may not be allowable unless the wine originates in Orange NSW. This is even though it would be unlikely to deceive or confuse members of the public as to the origin of the wine.

Subsection 61(4) is being inserted to reflect subsection 40DA(2) of the AWBC Act. It provides a new ground on which an opposition to the registration of a trade mark will fail. This will be if the registered GI is also a common English word and it is not being used in a manner likely deceive or confuse members of the public as to the origin of the goods.

Also captured by this change will be the use of the word ‘Port’, with its common English reference to a harbour. Australia has newly agreed that it will no longer use ‘Port’ in the description and presentation of a style of fortified wine. However, trade mark owners will be able to use ‘Port’ in its common English meaning, for example ‘Port Jackson shark’ where consumers would not be confused as to the origin of the goods.
Item 76  At the end of Subdivision A of Division 1 of Part 8

In agreeing to phase out wine terms Burgundy, Chablis, Champagne, Graves, Manzanilla, Marsala, Moselle, Port, Sauterne, Sherry and White Burgundy, the Government was aware that a small number of registered trade marks, some dating back to 1906, include those terms. Use of these trade marks after the phase out date may leave the trade mark owner open to prosecution under the AWBC Act.

Subsection 83A(1) will enable the owner of a registered trade mark to request an amendment to their trade mark or the particulars as they appear on the Trade Marks Register in order to comply with the new obligations.

Subsection 83A(1) will apply to only a limited set of registered trade marks; those where continued use of the trade mark on the registered goods would be inconsistent with a new international obligations which did not exist at the time the trade mark was registered.

Subsection 83A(2) will enable the registered trade mark owner to submit in writing a request that the Registrar of Trade Marks amend either or both of the following:
- part but not all of the of the trade mark;
- the particulars entered onto the Trade Marks Register.
by removing or substituting the newly prohibited term.

Subsection 83A(3) states the Registrar of Trade Marks must advertise the request for amendment if he or she is proposing to make the amendment.

Subsection 83A(4) allows people to oppose the granting of the request to amend a registered trade mark if they believe their own trade mark could be adversely affected.

Subsection 83A(5) permits the Registrar of Trade Marks to grant the request for the amendment if he or she is satisfied that the amendment is reasonable. In determining whether the request is reasonable, the Registrar must take into consideration:
- the extent to which the amendment relates to the inconsistency with international obligations;
- whether the amendment involves replacing the existing term with another term recognised by the relevant industry;
- the extent to which the grounds on which a person has opposed the amendment has been established; and
- any other circumstances.

The intention is that the reasonableness test will not allow the Registrar of Trade Marks to grant an amendment that would introduce a completely new trade mark.

Under subsection 83A(6) the Registrar of Trade Marks may grant the request for amendment even if the amendment may substantially affect the identity of the mark or extend the rights of the trade mark owner.
Subsection 83A(7) provides that if the Registrar of Trade Marks is satisfied the amendment requested under subsection 83A(2) should not be granted then it need not be advertised. The Registrar of Trade Marks must then refuse to grant the request.

Subsection 83A(8) provides that the registered owner or anyone who opposes under subsection (4) may appeal to the Federal Court of Australia.

**Part 2 – Application and transitional provisions**

**Item 77  Application of item 37**

This item provides that the new provisions in relation to the protection of geographical indications and other terms do not apply in relation to wine that is sold, exported or imported before the commencement of Schedule 1. The amendments do not apply to wine in transit to Australia on the commencement date.

**Item 78  Application of items 39 to 41**

This item provides that the new provisions in relation to section 40K do not apply before the commencement of Schedule 1.

**Item 79  Application of items 44 and 50**

This item provides that the new provisions in relation to section 40P(1)(b) and 40T(1)(b) do not apply before the commencement of Schedule 1.

**Item 80  Appointment of Registrar unaffected**

This item provides that the appointment of the Registrar of Protected Names is not affected until Schedule 1 commences.

**Item 81  Application of items 71, 74 and 75**

Item 81 is an application provision. The amendments made by items 71, 74 and 75 apply to all applications for the registration of trade marks that are made on or after the commencement of this item. The amendments made by items 71, 74 and 75 also apply to applications that are pending on commencement of this item.

The amendments made by items 71, 74 and 75 also apply to applications under section 88 of the Trade Marks Act that are made on or after commencement of this item in respect of trade marks registered before, on or after that commencement. Section 88 of the Trade Marks Act relates to applications to amend or cancel registered trade marks.
Item 82  Application of item 76

Item 82 is an application provision. The amendment made by item 76 will apply to trade marks registered before, on or after commencement of this item. Item 82 applies only to trade marks affected by international obligations not in force at the time of their registration.
SCHEDULE 2: LABEL INTEGRITY PROGRAM

Part 1 – Amendments

Item 1  Subsection 4(1)

This item defines the meaning of blend in the context of the Act to be a blend of wines from different vintages, varieties or geographical indications (GIs). To be a blend at least one of the vintages, varieties or GIs should be different between the wines.

Examples of a blend would include:
- A non-vintage sparkling wine in which grapes from the 2006 and 2007 vintages were used; or
- A wine blend of the grape varieties Shiraz and Viognier; or
- A Chardonnay blend of Chardonnay grapes from the Adelaide Hills, Mornington Peninsula and McLaren Vale GIs.

Item 2  Subsection 4(1)

This item defines the term direct sale. The term direct sale means “a sale of wine goods to a consumer” for the purpose of the Act.

This term is defined broadly in order to encompass a wide variety of circumstances in which wine goods are sold to consumers.

For example, a direct sale could include but is not limited to:
- the sale of bottled wine at a retail outlet to a consumer;
- the sale of wine in bulk, vessels such as barrels, or other containers, to a consumer; or
- the sale of bottled wine at a winery cellar door to a consumer.

Item 3  Subsection 4(1)

This item moves the definition of examinable document from Section 39C and defines which documents need to be kept and are open to examination under the Act for the purposes of the Label Integrity Program.

Item 4  Subsection 4(1)

This item moves the definition of grape extract from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.

Item 5  Subsection 4(1)

This item moves the definition of inspection power from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.
Item 6  Subsection 4(1)

This item moves the definition of inspector from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.

Item 7  Subsection 4(1)

This item inserts a definition of a label claim in relation to wine goods.

It is important to note that this is more than simply a reference to the label on a bottle of wine. In the context of the Act, a label claim refers to a written claim about the wine goods’ vintage, variety, or geographical indication (GI), including such a claim on a label, in a record that is required to be kept under section 39F, in any other commercial document or in an advertisement. The definition states that a label claim can be either explicitly made, or implied. A written label claim includes electronic forms.

Examples of label claims could be, but are not limited to, the examples below:

- On a bottle of 2007, Barossa Valley, Shiraz, the label claims would be:
  - 2007 as the vintage;
  - Barossa Valley as the GI; and
  - Shiraz as the variety.

- A contract between a winegrape grower and a wine maker would outline, for example, the vintage, variety and GI of the wine good which is being sold.

Item 8  Subsection 4(1)

This item defines a label law as a law in relation to Part VIA, Part VIB and Part VII of the Act.

Item 9  Subsection 4(1)

This item moves the definition of label offence from Section 39C to Section 4(1) to consolidate definitions in one place in the Act. The definition is expanded to detail the Parts of the Act (Part VIA, Part VIB, Part VII) where a label offence can occur.

Item 10  Subsection 4(1)

The definition of manufacture ensures that making a blend is considered to be manufacturing a wine.

Item 11  Subsection 4(1)

This item moves the definition of manufacturer from Section 39C to Section 4(1) to consolidate definitions in one place in the Act. The definition is expanded to include an establishment where wine goods are processed, modified or packaged.
Item 12  Subsection 4(1) (definition of originate)

This item broadens the scope of the definition of the term originate. Whereas formerly, the definition only referred to wine, it now also includes “or grape extract that is used or intended to be used in manufacturing wine.”

The broader definition provides coverage for the use of wine goods which are not wine. For example, this definition will apply to items such as grape juice, grape must and other extracts.

Item 13  Subsection 4(1)

This item moves the definition of package from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.

Item 14  Subsection 4(1)

This item provides a definition of a prescribed geographical indication (GI) to be a GI identified in the AWBC Regulations that can be used for the purpose of recording the origin of wine goods.

Item 15  Subsection 4(1)

This item moves the definition of principal employee from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.

Item 16  Subsection 4(1)

This definition defines a relevant agency for the purpose of the Australian Wine and Brandy Corporation providing information for the collection of levies or charges.

Item 17  Subsection 4(1)

This item moves the definition of variety from Section 39C to Section 4(1) to consolidate definitions in one place in the Act. For example, Shiraz winegrape juice would be obtained from the Shiraz grape variety.

Item 18  Subsection 4(1)

This item moves the definition of vintage from Section 39C to Section 4(1) to consolidate definitions in one place in the Act. In the context of the Act, vintage refers to the year in which wine grapes were harvested, or in which the wine grapes from which wine or grape extracts were manufactured or obtained were harvested. The meaning of year for the purpose of this subsection is affected by the definition of harvest year in subsection 4(3), item 23 of this explanatory memorandum.
Item 19    Subsection 4(1)

This item moves the definition of *wine goods* from Section 39C to Section 4(1) to consolidate definitions in one place in the Act. The item broadens the definition to cover grapes or grape extract used or intended to be used in manufacturing wine.

Item 20    Subsection 4(1)

This item defines a *wine label* as a label which appears on a wine bottle or any other container of wine. This applies to any writing which appears on a label which is attached to a wine bottle or other package, the lid, cap or cork of the vessel, or any writing which appears on the actual wine package, including writing etched or moulded into the wine package.

Item 21    Subsection 4(1)

This item moves the definition of *wine premises* from Section 39C to Section 4(1) to consolidate definitions in one place in the Act.

Item 22    Subsection 4(1) – (at the end of the definition of *year*)

This item provides a note to the definition of year that indicates that the definition of year does not apply to the definition of *vintage* which has a specific meaning for the purposes of the Act.

Item 23    Before subsection 4(3)

This item identifies that grapes harvested in the second half of a calendar year are to be regarded as being harvested in the following calendar year. This picks up the possibility that very early ripening grapes may be harvested prior to the commencement of the next calendar year and provides for wine made from such grapes to be labelled with the vintage of the following year.

Item 24    Section 5D

This item explains what is meant when the *Australian Wine and Brandy Corporation Act 1980* and of Trade Marks Regulations make reference to a wine originating, for example, in a particular region.

Subsection 5D(a) states that a wine or grape extract intended to be used to make wine originates in a country only if the wine or extract is made from grapes grown in a territory of that country.

Subsection 5D(b) similarly provides that a wine or grape extract originates in a region or locality of a country only if it is made from grapes grown in that region or locality.
**Item 25  Subsection 30(2)**

This item removes the previous text and replaces it with the defined term *principal employee*.

This item does not change the meaning of the clause in any substantial way.

**Item 26  Subsection 30(3)**

This item removes the previous text and replaces it with the defined term *principal employee*.

This item does not change the meaning of the clause in any substantial way.

**Item 27  Sections 39B to 39EA**

Section 39B sets out to whom the Label Integrity Program applies, to include
- record keepers by or through whom constitutional corporations or partnerships carry out their business functions and activities; and
- record keepers who supply wine goods to certain constitutional corporations or partnerships.

Section 39C provides the categories of people to whom the part applies. It provides for regulations to be made to include or exclude classes of persons if it is necessary to either provide for additional people to be included if the wine supply chain changes, or for certain classes of persons to be excluded as they should not be required to keep records. Part VIA applies only to wine goods originating in Australia.

**Item 28  Sections 39F to 39ZAAA**

Subsection 39F(1) provides an obligation to keep written records and details the information that the record keeper must keep. A person will have to keep a number of records because the time requirements under subsection 39F(2) will apply in relation to different events.

Subsection 39F(2) allows a person three days after the day that an event, circumstance or state of affairs occurs to make a record for them to keep. Each record must be kept for a period of seven years.

Subsection 39F(3) provides that a person who supplies wine goods must provide a copy of the record kept under subsection 39F(1) to the person to whom the wine goods are supplied. Under subsection 39F(4) the person to whom the wine goods are supplied must keep a copy of the record for seven years.

Section 39G provides circumstances where records are not required to be kept.
Subsection 39G(1) provides that a wine grape grower is not required to keep records in relation to the grapes grown by the grower.

Subsection 39G(2) provides that a person engaged in direct sales (a sale of wine goods to a consumer) is not required to keep records of the person to whom the direct sale was made but must record sales over the period, not longer than one year, including details of the total quantity and the vintage, variety and prescribed geographical indication of the wine goods sold.

Section 39H provides the details that a record keeper is required to be kept under section 39F. In particular, subsection 39H(3) provides that the details required under paragraph 39F(1)(g) must be in a form that allows an auditable trail to be readily traced and for details of all steps to be readily checked. Details of blends of wines, or grape extract, derived from grapes of different vintages, varieties or geographical indications must show what proportion of the blend or wine goods are represented by each blended wine or grapes and those proportions should total 100 per cent.

Section 39J creates three separate offences relating to the record-keeping obligations specified under section 39F.

Subsection 39J(1) creates an offence for both failing to keep a record and failing to keep a complete record in accordance with section 39F.

Subsection 39J(2) creates an offence to address the situation where a person’s label claim and records conflict, or the record kept by the person is inadequate to support the person’s label claim, because either the record or the label claim has been falsified.

Subsection 39J(3) creates an offence for keeping a false or misleading record. This provides for a situation where the record and the label claim do not conflict because both of them have been falsified.

The penalty for record-keeping offences under section 39J is two years imprisonment. This penalty has changed from the existing penalty under section 39ZAAA of $15,000. Currently, there are no authoritative methods to verify the vintage, variety or geographical indication of wine goods. Therefore, in order to prove the commission of offences under sections 40C and 40E (e.g. that wine has been sold with a false or misleading description or presentation) the prosecution relies heavily on the existence of complete and accurate records that comply with section 39F.

If, for example, under the current offence provisions, a supplier of bulk wine were to claim that wine produced from sultana grapes was derived from chardonnay grapes, in order to attract a higher purchase price from their customer, then, given the absence of objective analytical methods to confirm varietal origin, the supplier would, were they to destroy, or fail to make, accurate records, be in a position to frustrate investigation into the validity of the label claim and be rendered liable only to the lesser penalties applying to record keeping offences rather than those applying to false label claims.
Therefore, the penalty for record-keeping offences under section 39J includes a term of two years imprisonment, to remove the incentive for a person to falsify, destroy or create inadequate records to avoid being prosecuted under sections 40C or 40E. This penalty will assist in maintaining the integrity of the regulatory regime.

Subsection 39K(1) provides that a person commits an offence if they fail to provide a copy of a record in relation to the supply of wine goods. This offence is intended to deter people from falsifying, destroying or creating inadequate records, and to ensure records are consistent and accurate throughout the supply chain.

Subsection 39K(2) provides that a person commits an offence if they fail to keep a copy of a record in relation to the supply of wine goods. This offence carries a penalty of two years imprisonment. Currently, there are no authoritative methods to verify the vintage, variety or geographical indication of wine goods. Therefore, in order to prove the commission of offences under sections 40C and 40E (e.g., that wine has been sold with a false or misleading description or presentation) the prosecution relies heavily on the existence of complete and accurate supply records that comply with section 39F.

Failing to keep a record in relation to the supply of wine goods under subsections 39K(1) and (2) is just as serious as failing to keep a record under section 39J and this is reflected in the penalty for this offence. Like section 39J, subsections 39K (1) and (2) will remove the incentive for a person to falsify, destroy or create inadequate supply records to avoid being prosecuted under sections 40C or 40E. This penalty will assist in maintaining the integrity of the regulatory regime.

Section 39L provides that a prosecution may be brought within seven years (the period for which records are required to be kept).

Section 39M extends the current section 39ZAAA(2) to grape extract as well as wine.

**Item 29 Subsection 39ZAA(1)**

Subparagraph 39ZAA(1)(a) allows the Australian Wine and Brandy Corporation (AWBC) to require a person whose name and address appears on a wine label as the supplier of the wine (within the meaning of the Australian New Zealand Food Standards Code) to provide specified information in relation to records required to be kept under Part VIA Division 2. For example, it will enable the AWBC to obtain information regarding the manufacturing process for wine where a person’s name appears on the label but that person does not receive or supply wine goods or take any steps that change or affect the wine goods and therefore is not required to keep written records under subsection 39F(1).
**Item 30  Section 39ZAB**

This item provides that a person commits an offence if they fail to or refuse to comply with a section 39ZAA notice. This item is important because without this information the Australian Wine and Brandy Corporation (AWBC) may be unable to identify the wine manufacturer and verify label claims. For example, there are people who market and sell wine under their own label but who have no involvement in the process. Their name will appear on a label and the only way for the AWBC to identify the wine manufacturer is through obtaining information from the person on the wine label. Therefore, for the system to work it is essential that this person supplies the requested information.

The penalty for failure to comply with section 39ZAA notice is two years imprisonment. The reason for this significant penalty is to match the penalties that apply for breaches of sections 39J, 39K, 40C and 40E, thereby removing an incentive for a person to fail to comply with a section 39ZAA notice in order to avoid being prosecuted under sections 39J, 39K, 40C or 40E.

**Item 31  Paragraph 39ZB(2)(b)**

This is a minor amendment required because the term *approved* defined in section 39C of the Act to mean approved by the Australian Wine and Brandy Corporation in writing will be repealed by item 27.

**Item 32  Paragraph 39ZJ(1)(c)**

This item is necessary to allow the Australian Wine and Brandy Corporation to give information obtained under Part VIA to a person who is prosecuting (or proposing to prosecute) or taking (or proposing to take) other proceedings against, a person under sections 39J and 39K.

**Item 33  Subsections 39ZL(1A) and (2)**

This item provides that the Australian Wine and Brandy Corporation may, with a person’s consent provide information it obtained under Part VIA to a relevant agency. Subsection 39(4) provides that a relevant agency is an agency under the *Public Service Act 1999* with responsibility for levies.

**Item 34  Section 40ZF**

This item provides that the provisions of the *Australian Wine and Brandy Corporation Act 1980* relating to inspections that are set out in Division 4 of Part VIA also apply to Division 3.
Item 35  Subsection 44(2)

This item provides that the provisions of the Australian Wine and Brandy Corporation Act 1980 relating to inspections that are set out in Division 4 of Part VIA also apply to section 44.

Part 2 – Application and transitional provisions

Item 36  Application of amendments

Part 1 of the item provides that the Label Integrity Program records required under section 39F of the Australian Wine and Brandy Corporation Act 1980 are to be kept after the Schedule commences.

Part 2 of the item provides that the provisions in force before the commencement of the Schedule continue to apply after the amendments take effect.

Item 37  Preservation of instruments

The item provides that instruments in force at the commencement of the Schedule and identified in the item continue.
Schedule 3 – Compliance

Part 1 – Main amendments

Item 1  Section 9

This item is repealed as the Australian Wine and Brandy Corporation has not and does not approve carriers of grapes and does not determine contracts for the carriage of grape products.

Item 2  At the end of section 39A

The amendments inserts a note that advises that under section 44AB an injunction can be sought for a person engaging in conduct in breach of the Label Integrity Program.

Item 3  Subsection 39ZB(3) (penalty)

This change modernises the penalty provision by expressing it in penalty units.

Item 4  At the end of section 39ZC

The amendments inserts a note that note clarifies the parts of the Act under which an inspector may exercise their powers.

Item 5  At the end of subsection 39ZD(1)

The note explains when an inspector may apply for a warrant.

Item 6  Section 39ZE

The amendment provides for inspectors to secure evidence, pending a warrant application, where an inspector enters wine premises with the consent of the wine manufacturer, even when the consent is subsequently withdrawn.

Item 7  At the end of Subsection 39ZF(1)

The amendment inserts a note that clarifies how and when an inspector may apply for a warrant.

Item 8  Section 39ZH

This amendment removes a reasonable excuse as a reason for not providing documents to an inspector. It retains the right of a person to refuse or fail to answer a question or produce a document if answering the question or producing the document would tend to incriminate the person.
The amendment also modernises the penalty. Section 39ZI provides for an inspector to obtain a search warrant by telephone or other means. It is drafted in accordance with Section 3R of the *Crimes Act 1914* which provides a model for such offences.

Section 39ZIA provides offences in relation to the obtaining of warrants by telephone or other electronic means. It is drafted in accordance with section 3ZU of the *Crimes Act 1914* which provides a model for such offences.

**Item 9 Subsection 39ZJ(1)**

This amendment removes a reference to section 42 which is being repealed.

**Item 10 Subsection 39ZL(1A)**

This amendment removes a reference to section 42 which is being repealed.

**Item 11 At the end of section 40A**

This amendment advises that injunctions can be obtained for actions that contravene this Part of the Act.

**Item 12 Section 40L**

This section is repealed because a single injunctions power is included in Section 44AB.

**Item 13 Section 42**

This section is repealed as it has not been used by the Australian Wine and Brandy Corporation.

**Item 14 Subsections 44(1) and (1A)**

This amendment provides that the export of grape products in contravention of the regulations is an offence for which the penalty is imprisonment for six months.

**Item 15 After section 44AA**

This amendment provides a single source of injunctions power in the Act.

Subsection 44AB(1) sets out the circumstances in which an injunction can be sought.

Subsection 44AB(2) provides that an injunction can be made to restrain a person from doing an act or require a person to do an act.
Subsection 44AB(3) provides who may seek an injunction. It does not amend the list of who may apply for an injunction from the list in the previous section 40L. However, Item 18 of these amendments does extend this list once Schedule 1 of these amendments commences. Item 18 provides that the following persons may apply for an injunction:

- manufacturers of wine from foreign countries;
- grape growers from foreign countries or
- organisations of foreign countries that have a registered geographical indication or registered traditional expression.

Subsection 44AB(4)- 44AB(7) provide rules for the injunctions and do not amend the rules in the previous section 40L.

**Item 16 Subparagraph 46(1)(h)(i)**

This amendment modifies the penalty that may be imposed in regulations made under the Act by expressing it in penalty units.

**Item 17 Subparagraph 46(1)(h)(ii)**

This amendment modifies the penalty that may be imposed in regulations made under the Act by expressing it in penalty units.

**Part 2 – Amendment contingent on the commencement of Schedule 1 to this Act**

**Item 18 Paragraphs 44AB(3)(d) and (e)**

This amendment provides that following commencement of Schedule 1 manufacturers of wine or grape growers from foreign countries or organisations of foreign countries that have a registered geographical indication or registered traditional expression may apply for an injunction.

**Part 3 – Application and transitional provisions**

**Item 19 Preservation of injunctions**

This item provides that injunctions in force when Part 3 commences under section 40L of the Act will continue.

**Item 20 Application of item 14**

This amendment provides that the offence of exporting grape products (Item 14) in contravention of the regulations commences when Part 3 commences.
Item 21  Application of item 15

This amendment provides that the extended injunctions section (Item 15) does not apply to conduct engaged in before the commencement of Part 3.