THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

WINE AUSTRALIA AMENDMENT (LABEL DIRECTORY) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture
Senator the Hon. Bridget McKenzie)
Wine Australia Amendment (Label Directory) Bill 2019

GENERAL OUTLINE

The Wine Australia Amendment (Label Directory) Bill 2019 (the Bill) will amend the Wine Australia Act 2013 (the Act) to provide for Wine Australia—a Statutory Authority continued in existence under section 6 of the Act—to establish and maintain a directory of labels that are attached to grape products such as wine intended for export from Australia (the Label Directory), as a part of Wine Australia’s export controls.

The purpose of the Label Directory is to deter exports of copycat wine (and other grape products as defined in section 4 of the Act) from Australia. Copycat grape product exports are products that are exported from Australia with labels that seek to mimic elements of Australian brands for commercial gain and unfairly benefit from the reputation of those brands. These labels may contain trademarked intellectual property (IP) elements, infringing on the private IP rights of Australian brands.

The Bill will enable regulations to be made which would enable Wine Australia to establish a Label Directory that would be a publicly available database of images of labels attached to wine and grape products for export. The Label Directory would enable brand owners to search for images of labels that will be attached to products intended for export that may potentially infringe on their IP rights and, as a result, enable them to undertake civil action against the exporter of copycat grape products through the Australian legal system.

Further, the Bill will enable Wine Australia to use the Label Directory in performing its functions and exercising its powers under the Act and regulations, such as determining whether the labels contravene the Label Integrity Program under Part VIA of the Act.

The Bill will:

- clarify that establishment of the Label Directory is included in the object of the Act to control the export of grape products from Australia;
- enable regulations made under the Act to provide for the:
  - establishment and maintenance of the Label Directory;
  - Label Directory to include digital colour images of grape product labels and information in relation to the grape products and those exporting them;
- enable Wine Australia to use the Label Directory as a part of its role controlling the export of grape products under the Act and regulations;
- clarify that the Label Directory is not a legislative instrument.

Consultation

A label directory was initially proposed by the then Winemakers’ Federation of Australia, (now Australian Grape and Wine Incorporated (AGW)), an industry representative organisation, to address the issue of copycat labels in Australia’s export markets. Public consultation was undertaken by the Department on the proposal to develop the Label Directory over a period of four weeks from 21 September 2018 to 19 October 2018, and the majority of submission from the wine industry broadly supported the need and proposed model for the Label Directory. Following this consultation, the Department further refined the proposal with Wine Australia and AGW. The Department of the Prime Minister and Cabinet, and IP Australia were also consulted.
FINANCIAL IMPACT STATEMENT
The Bill will have no financial impact on the Australian Government Budget.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS
This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The full statement of compatibility with human rights is attached to this explanatory memorandum.
## ACRONYMS, ABBREVIATIONS AND COMMONLY USED TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act</td>
<td><em>Wine Australia Act 2013</em></td>
</tr>
<tr>
<td>the Authority</td>
<td>Wine Australia, as defined in subsection 4(1) and continued in existence by section 6 of the Act</td>
</tr>
<tr>
<td>the Department</td>
<td>the Department administered by the Minister administering the <em>Wine Australia Act</em></td>
</tr>
<tr>
<td>IP</td>
<td>intellectual property</td>
</tr>
<tr>
<td>the Privacy Act</td>
<td><em>Privacy Act 1988</em></td>
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<tr>
<td>the current regulations</td>
<td><em>Wine Australia Regulations 2018</em></td>
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NOTES ON AMENDMENTS

Preliminary

Clause 1 Short Title
Clause 1 provides for the short title of the Act to be the Wine Australia Amendment (Label Directory) Act 2019.

Clause 2 Commencement
Clause 2 provides for the commencement of each provision in the Act, as set out in the table.

Item 1 in the table provides that the whole of the Act will commence on a day to be fixed by Proclamation. However, if any of the proposed provisions do not commence within the period of 12 months beginning on the day the Act receives the Royal Assent, then they will commence on the day after the end of that period. Deferring commencement in this manner for the whole of the Act is necessary to enable time for the Authority to develop the online platform that the Label Directory will be published and maintained on.

Subclause 2(2) provides that any information in column 3 of the table is not part of the Act. It also clarifies that information may be inserted in column 3 of the table, or information in the table may be edited, in any published version of the Act.

Clause 3 Schedules
Clause 3 provides that legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms. This is a technical provision to give operational effect to the amendments contained in the Schedules.
Schedule 1—Amendments

Overview

Schedule 1 to the Bill will amend the Act to provide for regulations to make provision for the establishment by Wine Australia of the Label Directory, its contents and uses.

Wine Australia Act 2013

Item 1  Paragraph 3(b)
Item 1 repeals an object of the Act (paragraph 3(b), to control the export of grape products from Australia), and reinserts the same object with an addition that establishing a Label Directory is included in the object to control the export of grape products from Australia.

This item provides that a Label Directory included in this object is one that contains digital colour images of grape product labels to allow persons to identify potential infringements of their IP rights.

Item 2  Subsection 4(1)
Item 2 inserts a new definition to subsection 4(1) of the Act. The definition of grape product label is provided to make clear what kind of labels the Label Directory will contain images of, as set out in section 45A of the Act (inserted by Item 6 of the Bill).

With establishment of the Label Directory, it is intended that exporters of grape products would be subject to additional requirements as a condition of the export controls administered by Wine Australia under Part 3 of the current regulations. The addition of this definition would assist exporters of grape products to understand the information they will be required to provide when asked to submit digital colour images of grape product labels under the current regulations. Further, this definition will assist Wine Australia in enforcement of the Label Directory.

For consistency, the definition of grape product label is modelled off that for wine label under subsection 4(1) of the Act which is provided for the purposes of the Label Integrity Program administered by Wine Australia under Part VIA of the Act. The Label Integrity Program was implemented for the primary purpose of enabling Australia to meet its international obligations under wine-trading agreements. For this reason the Part VIA of the Act applies to wine labels, not grape product labels more broadly. A definition of grape product is already provided in subsection 4(1) of the Act, which includes wine, but also includes other products which are subject to the export control activities established under paragraph 3(b) of the Act.

Item 3  Subsection 4(1) (definition of package)
Item 3 repeals the current definition of package in subsection 4(1) of the Act, and substitutes a new definition of package in that subsection of the Act. This item has the effect of expanding the existing definition of package to all grape products including wine (as per the definition of grape product in subsection 4(1) in the Act), instead of only wine.

This item is a consequential amendment as a result of Item 2.
Item 4  Subsection 4(1)
Item 4 inserts a new definition of personal information to subsection 4(1) of the Act. The definition provides that personal information shall have the same meaning as in the Privacy Act 1988. This definition is provided to clarify the kind of personal information that may be included in the Label Directory as a result of Item 6.

Item 5  At the end of section 7
Item 5 adds a note at the end of section 7 (Functions of the Authority) of the Act that clarifies that one of Wine Australia’s functions under the regulations is to establish, maintain and make publicly available a Label Directory.

This note is supplementary to Item 1 that provides that the establishment and maintenance of the Label Directory is included in the object of the Act to control the export of grape products under paragraph 3(b). This note is provided to make clear that as per the new object at paragraph 3(b), establishing and maintaining the Label Directory would also be a function of Wine Australia associated with control of the export of grape products set out in paragraph 7(f) of the Act. Subparagraph 7(h)(ii) of the Act provides that Wine Australia’s functions include those conferred on it by the regulations.

Item 6  After section 45
Item 6 inserts a new section (45A) after section 45 that sets out the framework for regulations making provision for the establishment and maintenance of the Label Directory by Wine Australia. As permitted by paragraph 46(1)(c) of the Act, the current regulations prohibit the export of a consignment of grape product, unless certain conditions are complied with. The content of those conditions is contained in the current regulations. It is intended that submission of grape product labels for the purposes of the Label Directory would become a condition for the export of grape products. In this way, prescribing the Label Directory in regulations would be consistent with the current regulations.

Subsection 45A(1) enables the regulations to make provision for and in relation to the establishment and maintenance of the Label Directory by the Authority. This subsection also provides that the regulations may allow Wine Australia to publish the Label Directory for any person to use.

Subsections 45A(2)–(5) set out the contents of the Label Directory that may be established by the regulations. The Label Directory would include digital colour images of grape product labels. It is intended that submission of images of both the front and back labels of the grape product would be required to be provided by grape product exporters by Part 3 of the current regulations, as these would represent the information provided to consumers overseas when purchasing the grape products in a retail store (physical or online), restaurant or other venue.

Subsection 45A(2) also states that the regulations may provide for information in relation to the grape products or to exporters of grape products to be included in the Label Directory. In practice this information would be information for the purposes of identifying the images of the labels in the Label Directory, and to enable brand owners to identify who they would need to make an IP claim against if it was considered that a label infringed the brand owner’s IP rights.
The kinds of information that is intended to be sought under a regulation made for this purpose includes:

- the brand and grape product name; and
- the exporter name, business address and business identifier (e.g. Australian Business Number, Australian Company Number or Australian Registered Body Number) of the grape product exporter.

Subsection 45A(3) sets out that the regulations may provide for the information and images to be sought under subsection 45A(2) to include personal information. **Personal information** is defined by subsection 4(1) as a result of Item 4 and has the same meaning as in the **Privacy Act 1988**. For example, the kind of information to be provided under subsection 45A(2) to comply with requirements to be set out in the regulations would include names and business addresses. This information is also required to be included on the label affixed to grape products itself under the **Australia New Zealand Food Standards Code**, so would be the kind of information that is already available to purchasers of grape products within Australia and within the intended export markets.

Subsection 45A(4) enables the regulations to provide for corrections to be made to the contents of the Label Directory. The kind of corrections envisaged by this item include circumstances where a grape product has been approved for export and images of the labels have been submitted to the Label Directory, but before the intended export changes are made to the contents of the label. It is intended that the regulations would provide that exporters would be responsible for updating the images of the grape product labels to ensure the labels are accurate at the time of export. It is also intended that the regulations made under subsection 45A(4) would also allow for typographical errors to be corrected as well as other change in information such as names or business addresses.

Subsection 45A(5) provides that subsections 45A(2) and (4), which provide for the regulations to provide for certain matters relating to the Label Directory, do not limit the general power in subsection 45A(1) for the regulations to make provision for Wine Australia to establish and maintain the Label Directory. For example, it is intended that the regulations are to provide for submission of images to the Label Directory to be a requirement for grape product approval and for Wine Australia to have the ability to suspend or cancel an export licence due to non-compliance with the requirements of the Label Directory.

Subsections 45A(6) provides for how the contents of the Label Directory may be used by Wine Australia.

Paragraph 45A(6)(a) provides that Wine Australia can use the Label Directory in deciding whether it is satisfied that there has been a contravention of the Label Integrity Program of Part VIA of the Act. The Label Integrity Program is concerned with ensuring that the description and presentation of Australian wine on labels is truthful and consistent with Australia’s international obligations under wine-trading agreements. Wine Australia has powers to enforce the Label Integrity Program under Part VIA to ensure the reputation of Australian wine overseas including the collection of records and search and inspection powers. Further, it is already a condition of export under section 14 of the current regulations that grape products must have appropriate description and presentation having regard to the requirements of the Act, as well as other Australian laws and the laws of other, relevant countries.
This paragraph has the effect of enabling Wine Australia to take into account the images of the labels included in the Label Directory in assessing whether the Label Integrity Program has been contravened. In practice, this is consistent with the current ability of Wine Australia to use images of wine labels available for sale within Australia or in export markets to make its determination.

Paragraph 45A(6)(b) establishes that Wine Australia may use the contents of the Label Directory for the purposes of performing its functions, or exercising its powers, under the Act or the regulations. The functions and powers envisaged by this item include those explained above regarding the Label Integrity Program but also include enforcement of Part VIB of the Act, protection of geographical indications and other terms, and the export controls set out in Part 3 of the current regulations. For example, in administering export licences under Division 2 of Part 3 of the current regulations, Wine Australia must consider matters relating to the promotion of grape products and matters relating to whether an export licence holder may have a negative impact on the export trade in grape products. It may be open to Wine Australia to consider information included in the Label Directory when making a decision to suspend or cancel an export licence under section 13 of the current regulations.

Subsection 45A(7) provides that the uses of the Label Directory set out in subsection 45A(6) does not limit the purposes for which the contents of the Label Directory may otherwise be used. As the Label Directory would be made available to the public, subsection 45A(7) has the effect of clarifying that use of the contents of the Label Directory is not limited to Wine Australia. The purpose of the Label Directory that would be established and made publicly available as per subsection 45A(1) is to assist brand owners to take steps to protect their private IP rights. So for example, subsection 45A(7) would have the effect of clarifying that brand owners could use the information in the Label Directory to demonstrate potential infringement of their IP in undertaking civil action against a wine grape exporter who had provided images and information to the Label Directory.

Subsection 45A(8) provides that the Label Directory is not a legislative instrument. The Label Directory would not determine or alter the content of the law or have the effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right of grape product exporters, or anyone else.

The Label Directory may be used to apply existing rules, contained elsewhere, rather than prescribing the content of those rules.

That is, the Label Directory has the function of a repository of information that may be used by:

- Wine Australia to determine whether it is satisfied that there has been a contravention of Part VIA of the Act, and to perform its functions under the Act and regulations (as a result of subsection 45A(6));
- brand owners to take steps to protect their private IP rights.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS


Wine Australia Amendment (Label Directory) Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act.

Overview of the Bill

The Wine Australia Amendment (Label Directory) Bill 2019 (the Bill) will amend the Wine Australia Act 2013 (the Act) to provide for Wine Australia—a statutory authority continued in existence under section 6 of the Act—to establish and maintain a directory of labels that are applied to grape products such as wine intended for export from Australia (the Label Directory), as part of Wine Australia’s export controls.

The purpose of the Label Directory to deter exports of copycat wine (and other grape products as defined in section 4 of the Act) from Australia. Copycat wine and other grape product exports are products that are exported from Australia with labels that seek to mimic elements of Australian brands for commercial gain and unfairly benefit from the reputation of those brands. These labels may contain trademarked intellectual property (IP) elements, infringing on the private IP rights of Australian brands.

The Bill will enable regulations to be made which would enable Wine Australia to establish a Label Directory that would be a publicly available database of images of labels attached to wine and grape products sold overseas. The Label Directory would enable brand owners to search for images of labels that will be affixed to products intended for export that may potentially infringe on their IP rights and, as a result, enable them to undertake civil action against the copycat exporter through the Australian legal system.

Further, the Bill will enable Wine Australia to use the Label Directory in performing its functions and exercising its powers under the Act and regulations, such as determining whether the labels contravene the Label Integrity Program under Part VIA of the Act.

The Bill will:

- clarify that establishment of the Label Directory is included in the object of the Act to control the export of grape products from Australia;
- enable the regulations made under the Act to provide for:
  - the establishment and maintenance of the Label Directory;
  - the Label Directory to include digital colour images of grape product labels and information in relation to the grape products and those exporting them;
- enable Wine Australia to use the Label Directory as a part of its role controlling the export of grape products under the Act and regulations; and
- clarify that the Label Directory is not a legislative instrument.

A label directory was initially proposed by Australian Grape and Wine Incorporated (AGW), an industry representative organisation, to address the issue of copycat labels in Australia’s export markets. Public consultation was undertaken by the Department on the proposal to develop the Label Directory over a period of four weeks from 21 September 2018 to 19 October 2018, and the majority of submission from the wine industry broadly supported the
need and proposed model for the Label Directory. Following this consultation, the Department further refined the proposal with Wine Australia and AGW. The Department of the Prime Minister and Cabinet, and IP Australia were also consulted.

**Human rights implications**
The Bill does not engage any of the applicable rights or freedoms.

**Conclusion**
The measures in the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act, as the Bill does not engage any human rights issues.

(Circulated by authority of the Minister for Agriculture, Senator the Hon. Bridget McKenzie)