

**Submission to the Public Consultation on the Australian Small Business and Family Enterprise
Ombudsman Bill 2015**

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Introduction

This submission is prepared by the Winemakers Federation of Australia (WFA) on behalf of the Australian wine industry. WFA welcomes the opportunity to comment on the draft legislation and is strongly supportive of measures to provide better advice for small businesses and to provide a 'concierge for dispute resolution' when there are no other mechanisms. WFA looks forward to working in the future with the Ombudsman to contribute to small business-friendly Commonwealth laws and regulations, in particular, to ensure that, wherever possible, red tape burdens are minimised or removed

Background

WFA represents approximately 90% of Australian winemakers by value and has a good spread of representation (some 380 plus members) drawn from large, medium and small businesses. The large, medium and small member colleges of WFA each have a committee which provides their respective Board members with input on issues and with the ability to raise new issues. While a number of smaller wine businesses are not direct WFA members they are members of state bodies which have direct representation on the Board of WFA. This indirect representation minimises smaller operators paying multiple fees.

We also work closely with Wine Grape Growers Australia (WGGA). There are roughly 6,200 wine grape growers in Australia and WGGA can count around 3,700 of these as having a direct involvement in the organisation.

WFA and WGGA are the two peak national industry bodies and this is recognised in legislation covering the wine sector with both organisations formally nominated as the two industry representative bodies.

Issues

There are three key issues that WFA would like to raise concerning the draft Bill.

Dispute resolution mechanisms

WFA is supportive of the intent within the Bill to provide alternative dispute resolution mechanisms offered through the Ombudsman and its recognition that there are other alternative dispute resolution mechanisms available apart from recourse to long and costly legal battles. However, we are concerned that the Bill, as drafted, does not adequately recognise these alternative dispute resolution mechanisms and may be used to re-open resolved disputes or provide an opportunity for repeated disputes. Therefore, it is important that the drafting of the Bill reflects the current dispute management arrangements available to the wine sector.

For example, the Australian wine sector has recognised that disputes may arise in some transactions between winemakers and grape growers. It is in neither party's interest for these disputes to escalate into costly and time consuming legal action. That is why the Winemakers Federation of Australia (WFA) and Wine Grape Growers Australia (WGGA) have developed a Wine Industry Code of Conduct (CoC). This Code aims to resolve disputes quickly and as amicably as possible and for this reason, WFA urges all Winemakers to sign on to the Code.

Disputes in the main occur over a perceived inadequacy of the wine grape price or an apparent failure to comply with specifications for wine grape maturity, purity or condition. This results in either a price adjustments or a rejection of the wine grapes leading to sometimes lengthy and expensive disputes.

If there is a disagreement over the sale or purchase of wine grapes, it is important for a grape grower to raise the complaint directly with the grape purchaser to try and negotiate a suitable outcome. In the event that the parties cannot resolve the dispute independently, the main forms of alternative dispute resolution that apply to the wine industry include mediation, expert determination, and arbitration.

Arbitration is a formal dispute resolution process governed by the Commercial Arbitration Act (in each state) in which two or more parties refer their dispute to an independent third person (the arbitrator) for determination. Providing that the arbitration is conducted according to the principles of natural justice, its procedures may be varied by the parties to suit the size and complexity of their dispute.

The result of the arbitration, known as the Award, is enforceable in the same manner as a court judgment. Commercial arbitration in Australia has become the preferred procedure for parties seeking a binding determination of their dispute and as an alternative to court based litigation. If alternative dispute resolution procedures fail and all other options of dispute resolution have been exhausted, litigation may be the only way to settle the dispute or to seek final recourse.

Other options to resolve disputes are:

- The Australian Wine Industry Code of Conduct ; and
- The Farming Industry Dispute Resolution Code (if one of the businesses is in South Australia)

Australian Wine Industry Code of Conduct

The Australian Wine Industry Code of Conduct was launched in December 2008. It was developed by Wine Grape Growers Australia (WGGA) and the Winemakers' Federation of Australia (WFA) in the interests of a sustainable Australian wine industry following a recommendation by a Federal Senate enquiry in 2005. The research and development of the Code was supported by the Federal Governments Department of Agriculture, Fisheries and Forestry.

The Australian Wine Industry Code of Conduct advocates an early informal dispute resolution process which seeks to educate parties in the dispute about their rights under 'the Code', and to encourage resolution without progressing to formal dispute resolution procedures. However, this option is only available if the grape purchaser is a signatory to the Code. The aim of the voluntary Code is two-fold: **firstly to establish a common Australian wine grape supply contract framework and secondly, to provide a dispute resolution system to manage disagreements which exist over price or quality assessments.** The minimum requirements set out in the Code have been agreed to by the lead industry organisations for both grapegrowers and winemakers.

It is important to emphasize that the Code is only in place to provide a dispute resolution system for price and quality assessments. Other issue relating to contracts must be resolved thorough other avenues.

The Australian Wine Industry Code of Conduct provides a guide to help resolve disputes between the wine grape purchaser and the wine grape grower in a timely and cost efficient manner which it is hoped, will preserve ongoing commercial relationships.

The Code requires both parties to participate in the dispute resolution procedure and outlines a systemised way to manage the communication around the dispute. It also allows for the appointment of a mediator or Independent Expert who has final binding say over the outcome.

Farming Industry Dispute Resolution Code

Under the *Small Business Commissioner Act 2011* the South Australian Government has given the Small Business Commissioner the task of developing prescribed industry codes of conduct under the *Fair Trading Act 1987*. The first of these codes prepared by the Small Business Commissioner and Deputy Small Business Commissioner was the *Fair Trading (Farming Industry Dispute Resolution Code) Regulations 2013* known as the Farming Industry Dispute Resolution Code. The Code gives South Australian farming participants the ability to access an enforceable mandatory dispute resolution framework to assist in dealing with a wide range of business to business disputes, as well as business to Local or State Government.

WFA is very concerned of the potential adverse impact upon the operation of the Wine Industry Code of Conduct and its potentially adverse impacts on the signatories. Particular concerns relate to:

- Increased administrative burden with potentially wineries and grape growers having to participate in two different dispute resolution processes for the same issue
- Potential for increased expensive and lengthy legal action resulting from the possibility of two different decisions from the dispute settlement process
- Decreased participation in and reduced uptake of the Wine Industry Code of Conduct

Both WFA and the WGGA are actively involved in promoting uptake of the Wine Industry Code of Conduct and we believe the legislation determining the activities of the Ombudsman must recognise existing dispute resolution methods, in particular, the Wine Industry Code of Conduct.

Specifically, the Ombudsman must recognise these dispute settlement mechanisms and the Bill must recognise that if a dispute has already gone through a legal process or arbitration, then the Ombudsman should not take the matter up. In addition, if a party has chosen not to use these alternative existing dispute resolution settlement procedures then the Bill should require the ombudsman to refer them to these as per Section 71 or again, decide not to provide assistance. This could be clarified in Article 68. This would be consistent with Section 71 which allows the recommendation of alternative dispute settlement procedures.

Information gathering powers

The information gathering powers under sections 37 and 76 are extremely broad and there are few restrictions on what can be gathered (including confidential corporate information and presumably privileged advice as well) and what can be done with it.

Much of the information required for a dispute is market sensitive. If the information is subject to Freedom of Information process it could be detrimental to both parties. We would seek assurance that this information is protected. Whilst there are protections against disclosure under FOI, it is a

difficult, expensive and time consuming to deal with and there are always risks that the information will be disclosed.

Contributing to small business-friendly laws and regulations

The Ombudsman will also contribute to small business-friendly laws and regulations by providing advice to Government. This also relates to recommendations on best practices (refer s64).

While in principle this is a good idea, there doesn't appear to be guidelines around what the Ombudsman can recommend and how these reflect 'best practice'.

The Ombudsman is required to write a report for the Minister once a quarter, which will outline the research conducted and inquiries made and details of any laws, policies or practices that the Ombudsman believes are having (or could have) an adverse effect on small businesses. The reports will be informed by the Ombudsman's experience and will provide the Government with new insights into how regulations are impacting on small businesses, for appropriate action (refer s40).

This is an important role and transparency around the Ombudsman activities is important.

Conclusions

The Bill as drafted has the potential make it much more complex for wine companies to do business as we potentially have multiple regimes to deal with whereas the intention of the Code was to bring it all together into one place.

It would be ideal if the ombudsman was required to refer the dispute to existing dispute settlement provisions (such as the CoC) where the parties had already contractually agreed to a form of alternate dispute resolution (in our case, under the Code).

The information gathering powers should also be reviewed to provide protection for confidential corporate information and market sensitive information, including through FOI requests.