

## Winter 2009

### The Law Report

Welcome to the "new look" newsletter. In keeping with the new office, the new website and new tag-line, comes this new format. While I can't promise this means the newsletter will come out more frequently, or even more regularly, hopefully you will still find it just as interesting as feedback has indicated past updates have been. As always, please feel free to forward a copy of this to anyone else who may be interested.

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#### About us:

Omond & Co is a "boutique" law firm specialising in commercial and intellectual property law, with a strong focus on the wine industry.

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#### The GFC – Steps to protect yourself

There have been quite a few articles written recently about different means of protecting your business in these troubled times. The following are more bullet points than detailed solutions but they should be sufficient for you to conduct a "mini audit".

#### "Get It In Writing"

Too many people are still operating without a set of standard terms and conditions of sale for their wine, or without a written agreement with their distributor. These documents don't have to be particularly long, but there are some key issues which should be addressed, including a "retention of title" clause [see below], a clause which allows interest on overdue payments, and clear termination provisions.

#### Retention of title

There was an article in the Melbourne press recently about wine suppliers walking into the Botanical Hotel and taking back their wines from the famous "wine wall". If you have a "retention of title" clause, you can do this when a customer's finances go south.

Unfortunately, without such a clause, you are simply an unsecured creditor, which puts you at the very end of the queue trying to get money out of the collapsed financial ruin.

#### Debt Recovery

There are a number of options for pursuing debts. Once the debt is reasonably substantial (say, more than \$5,000), I find the most useful is the "creditor's statutory demand" under the Corporations Act. For this

to work, the debtor must be a company, and there must be no genuine dispute as to the debt. If this is the case, you provide a demand in the prescribed form, supported by an affidavit. Then, the debtor has 21 days to either pay the debt in full, or they have to go to the Court to have the demand set aside. If they do neither, you can have them wound up. We have had a 100% success rate with this strategy over the last 12 months, so let us know if we can help.

#### WET Producer Rebate – Warning

Although the wine industry was fortunate that there were no changes to the producer rebate in the Federal Budget, the ATO had already released two new WET Tax Rulings on 1 April 2009 (no, it wasn't an April Fool's Day joke) regarding the producer rebate, looking to crack down on what is seen as "rotting" of the current rebate.

Tax Rulings do not change the law, but they do provide an indication of the way the ATO intends applying the law – which means you will need to take them to court if they claim tax is payable by you in accordance with the Ruling.

Released with little fanfare, the new Rulings have already resulted in Woolies changing its business model, according to [an article in the Sydney Morning Herald](#) on 21 May 2009, causing an estimated dent in revenue of \$30 million. Please let us know if you require detailed advice on the current situation with producer rebates.

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### Component pricing – changes to the Trade Practices Act

The “clarity in pricing” changes to the Trade Practices Act came into effect on 25 May 2009. This addresses the practice of advertising the selling price of something in component parts, such as a new car for “\$20,000 plus on road costs” rather than providing a single, all inclusive figure.

Where the provision applies, companies must disclose in a “prominent way” and as a “single price”, the minimum total price to the extent that it can be worked out at the time of the advertisement.

The requirement only applies to goods and services “of a kind ordinarily acquired for personal, domestic or household use or consumption” – which obviously would include wine.

The main areas in the wine industry where this may come into play are:

- o price books issued by distributors which do not include GST and WET;
- o winery websites and mail-outs offering special pricing.

You are not obliged to include delivery charges in the advertised price; however, if the delivery charge is not included, but must be paid by a customer and is known at the time, the minimum amount of those charges must be disclosed as a separate component of the price.

Please let us know if you would like any more detail regarding this issue.

### EU Wine Agreement benefits obvious from US problems

A story from [The Associated Press](#) has highlighted the benefits to Australian producers of Australia’s wine trade agreement with the EU.

The EU has recently invoked a treaty provision allowing it to prohibit import into the EU of US wines with labels that include any of a dozen “traditional” words or phrases to describe the wine or name of the winery, including chateau, classic, fine, noble, ruby, superior, tawny, vintage and clos – unless the producer has a trade mark registration incorporating that term in the import country.

This will affect hundreds of US wineries, and some fear that even the trademark exception could be repealed later this year, affecting even more.

Although US producers have traditionally focussed their sales efforts domestically, US wine exports topped \$1 billion for the first time last year, of which nearly half were shipped to the EU, up 9% from 2007.

### Reduced trade mark registration fees in the EU

Thinking about registering a trade mark in the EU?

Don’t do it! At least, not yet, because the Madrid Protocol registration fee is proposed to be reduced from €1450 to €870. The new Madrid fees will become effective 3 months after the Commission notifies WIPO. There is also a proposed reduction in the fee for additional classes.

Somewhat eating into this saving, is an increase in the IP Australia A\$ application fee which is up from \$774 to \$859.

### Half-day conference

Together with AON [one of the world’s largest insurance broker], Empirics Marketing [specialists in direct marketing solutions], and Simon Calabria [an indirect tax specialist with wine industry expertise], we will be presenting a half-day seminar on *The Business of Wine* in the Yarra Valley, tentatively scheduled for 19 November.

Please let us know if you would like to receive an invitation (although if you receive this newsletter, I’m sure you’ll also receive an invitation).

If there is sufficient demand, the seminar may also be repeated in other regions across the country, so please let me know if you think there would be interested in the seminar in your neck of the woods.

Those who have to rack up “continuing professional development” points should be able to claim for their attendance; with further details available closer to the date.

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### What's Been Happening

It has been a very hectic last 6 months or so – in between moving office, installing a new practice management software system, and fulfilling both mum and dad roles at home while my wife recuperated from a full hip replacement, but I have still managed to find time to do a wide range of work. Sure, this list might be seen as boasting, but hopefully it also serves a couple of other purposes – answering questions as to what exactly the firm does, and gives you some insight into what issues are confronting others out there in the wine industry.

#### Agency & Distribution

- Draft JV agreement for establishment of a new brand to be co-owned by US distributor and local producer;
- Review and advise on terms of “importer only” agreement into the US.;
- Termination of a number of local, Australian distributorships.
- Advise on ability to claim royalties for the use of packaging designs and concepts developed in Australia, and proposed to be used in another country by the ultimate owner of the brand;
- Advise on re-structuring joint venture agreement between producer and importer in the US to allow the producer to leverage the distributor/importer distribution network in the US without the risk of not being paid;
- Advise on termination of exclusive distribution agreement in India;
- Advise on ability to restrict UK importer from bringing in bulk wine from other Australian producers;
- Advise on UK purchaser of bulk wines' ability to [mis]use producer's name/trade mark
- Advise on terms of distribution agreement in Australia for multinational spirits producer.
- Advise on termination of Belgium distributorship

#### TM's

- Countless new TM applications (OK, I could count them, but there's lots and I've got better things to do)
- Likewise – prepared and filed many TM applications in overseas countries using the Madrid Protocol;
- Filed 3 new “removal for non- use” applications, two of which succeeded without opposition and the third has resulted in a satisfactory settlement allowing our mark to register;
- Settled an earlier non-use application against an international soft drink manufacturer under which they consented to our client's registration in class 33 [wines] of a mark similar to their (soft drink) brand;
- Filed and conducted lots of TM Oppositions, including associated actions such as deferring examinations of TM applications
- Issuing Federal Court proceedings after an adverse Opposition decision – resulting in a successful outcome for the client (i.e. they gave up);
- Drawing up Federal Court proceedings and threatening to issue against two TM applications, resulting in a successful outcome for the client;
- Preparing two certification TM's to register sub-region names which will not be protected by the GIC;

- Presentation to the Board of WFA regarding the Rothbury GI court decision, and the implications for TM's and registered GI's;
- Arrange compromise of TM dispute in the US over use by Australian client of a sub-brand;
- Draft licensing agreements to structure the establishment of “cellar door” operations overseas by third parties;
- Prepare submissions to the Trade Marks Office to overcome adverse reports preventing registration of three different clients' trade marks which each include a geographical element;

#### Operational

- Draft grape supply agreement between producer and JV partner to provide for retention of title and other protective mechanisms.
- Various debt recovery proceedings [all 100% successful!] including overpayment to a supplier, failure to pay by a distributor, and failure to pay by a client who claimed to be unhappy with the services received;

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- Review agreement for reinstatement of winery buildings damaged by fire and smoke;
- Review and advise on extent of existing cellar door liquor license in terms of outdoor service of alcohol during function and events
- Advise on terms of sale, including on-line retailing and cellar door loyalty/continuity packs;
- Advise on structuring of agreement for maximum WET producer rebate entitlements
- Advise on terms of various bottle purchase agreements with O-I and Amcor;
- Drafting of contracting processing agreements for processors and for clients of third party processors;
- Draft wine warehousing agreements;
- Advise on liability issues concerning errors made by contract bottler, resulting in bottler paying all costs of product withdrawal and rebottling;
- Advise on liability for incorrect screw caps provided by supplier;
- Advise on various vineyard lease issues following Victorian bush fires;
- Provide standard Privacy Policies for use on websites.
- Draft suite of agreements for purchase of wine brand, and to provide continuity of supply of the wine;
- Advise on ability to not purchase fruit under grape supply agreements, and assist in various types of termination, including financial assistance for grubbing up of vines;
- Various liquor licensing advise, including appropriateness of different licenses available to wineries;
- Advise on sale of part of water licence;

- Draft agreements for the placement of a 20% share issue to a publically listed company taking equity in client's business;
- Trade Practices Act compliance training.

### Non- Wine

- Advise on recovery of amounts from telecommunications company due to poor service;
- Advise and drafting of documents to allow buy out of a shareholder along the lines of "compulsory acquisition";
- Recovery of lease payments made due to failure of telco agent to terminate finance lease for PABX equipment when arranging renewal of Telco contract.
- Advise on software licensing agreements
- Advise on new franchising agreement;
- Advise on wording of submission to Royal Commission;
- Advise on changes to Deed of Partnership;
- Provide compliance advise and services to a licensee under the Financial Services Regulations;
- Establishment of new constitution for Sommeliers Australia, and managing winding up of the NSW chapter and conversion of the Victorian Chapter to become the National Association.

### The lighter side of life

Signs seen on the back of a couple of septic tank trucks:

### Yesterday's Meals on Wheels

### Caution - This Truck is full of Political Promises