



Australian Government

Australian Grape and Wine Authority

RULES OF USE FOR THE CERTIFICATION TRADE MARK 'TOPAQUE'

1. The Australian Grape and Wine Authority (Wine Australia) has applied to register 'Apera' (Trade Mark Application No. 1276429) as a certification trade mark in class 33..
2. The use of the Trade Mark will be governed by these Rules.
3. The Rules relate to the use of the Trade Mark in respect of the following goods and services:
 - a. Alcoholic beverages (except beers); wines and fortified wines; and
 - b. Advertising, marketing and promotional services; business management and administration services; business advice and consultation services relating to the wines and beverages industries; advertising and promotion of the wine and beverages industries in Australia; arranging and conducting trade shows and exhibitions; demonstrations of goods; market research services; provision of information in relation to the aforesaid services

Definitions

4. In these Rules:
 - a. 'Approved User' means a party who has entered into a Licence Agreement with the Wine Australia;
 - b. 'AGWA Act' means the *Australian Grape and Wine Authority Act 2013*;
 - c. 'AGWA Regulations' means the *Australian Grape and Wine Authority Regulations 1981*.
 - d. 'Classification Terms' means 'classic', 'grand' or 'rare' as defined in the Code of Practice;
 - e. 'Code of Practice' means the Australian Wine Industry Fortified Wine Code of Practice as amended from time to time and published on the website of the Winemakers' Federation of Australia Inc;
 - f. 'Description and Presentation' has the same meaning as in the AGWA Act;

- g.** 'Food Standards Code' means the Australian New Zealand Food Standards Code within the meaning of the Food Standards Australia New Zealand Act 1991;
- h.** 'Licence Agreement' means the licence agreement in the form set out in Schedule A;
- i.** 'Licence Fee' means the licence fee as determined by the Wine Australia from time to time;
- j.** 'Licensee' means a party who has been authorised under a Licence Agreement by the Wine Australia to use the Trade Mark;
- k.** 'Relevant Laws' includes, but is not limited to, the AGWA Act, AGWA Regulations and the Food Standards Code.
- l.** 'Rules' means the rules of use for the certification trade mark 'Topaque' as amended from time to time and includes any schedules to these rules;
- m.** 'Topaque Wine' means a wine:
 - i.** produced exclusively from grapes harvested in Australia and at least 850ml/L of which must be obtained from vine variety muscadelle;
 - ii.** made with the addition of Australian grape spirit or brandy; and
 - iii.** that contains no less than 150ml/L and no more than 220ml/L of ethanol at 20 degrees centigrade.
- n.** 'Trade Mark' means the certification trade mark referred to in Rule 1.

Interpretation

- 5.** In these Rules where the context permits or requires:
- a.** words in the singular shall include the plural, words in the plural shall include the singular, and words importing the masculine gender shall include the feminine and neuter;
 - b.** where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning;
 - c.** a statute, regulation or provision of a statute or regulation ('Statutory Provision') includes:
 - i.** that Statutory Provision as amended or re-enacted from time to time;
 - ii.** a statute, regulation or provision enacted in replacement of that Statutory Provision; and
 - iii.** another regulation or other statutory instrument made or issued under that Statutory Provision;
 - d.** a reference to an entity, group or association includes that entity's, group's or association's successors or assigns;
 - e.** a reference to money is to Australian dollars; and

- f. 'including' and similar expressions are not words of limitation.

Property in the Trade Mark

6. The Trade Mark is the absolute property of the Wine Australia and shall not be used by any person except with the authority of the Wine Australia.

Right to use Trade Mark

7. The Wine Australia shall have the authority, in its absolute discretion, to permit Approved Users to use the Trade Mark.
8. Persons who have not entered into a Licence Agreement with the Wine Australia are not permitted to use the Trade Mark.

Use of the Trade Mark

9. Approved Users:
- a. must only advertise, promote, offer or sell Topaque Wine under or by reference to the Trade Mark;
 - b. subject to the prohibited uses set out in clause 10, may use the Trade Mark generally for the purpose of promoting Topaque Wine including on the following goods and in the following contexts:
 - i. on merchandise, such as aprons and ice buckets, among other things;
 - ii. on signage at its cellar door and/or winery;
 - iii. at domestic and international wine shows;
 - iv. on websites; and
 - v. on printed materials, such as packaging materials and business documents.

Prohibited Use

10. Approved Users must not:
- a. use the Trade Mark in any manner or form or in respect of any goods whatsoever or any services except as specified in these Rules;
 - b. use the Trade Mark in any manner or form, whether directly or indirectly, in respect of or to refer to wines other than Topaque Wine;
 - c. do anything that may encumber or otherwise prejudice the Wine Australia's rights in the Trade Mark, or the goodwill or reputation of the Wine Australia in the Trade Mark.

Classification Terms

11. Approved Users may only use a Classification Term in the Description and Presentation of a Topaque Wine provided:
- a. the use of the Classification Term complies with the Code of Practice; and

- b. the Description and Presentation includes a geographical indication registered in relation to Australia other than the term “Australia”.

Records, Inspection and Audit

- 12. Approved Users must, if requested by the Wine Australia, provide records verifying that the Approved User’s wine that includes the Trade Mark in its Description and Presentation is Topaque and complies with all Relevant Laws.
- 13. Approved Users must permit representatives of the Wine Australia to:
 - a. enter, during business hours, any premises from which it offers goods and/or services under or by reference to the Trade Mark; and
 - b. inspect and photograph goods it offers for sale and sells under or by reference to the Trade Mark; and
 - c. conduct an audit of documentation verifying that the Approved User’s wine that includes the Trade Mark in its Description and Presentation is Topaque and complies with all Relevant Laws.

Fees

- 14. In accordance with the Licence Agreement, each Approved User shall pay the Licence Fee to the Wine Australia.

Breaches

- 15. If an Approved User:
 - a. breaches any of its obligations under these Rules and fails to remedy any such breach within thirty (30) days after written notice is sent to the Approved User by the Wine Australia, the Wine Australia may revoke the approval to use the Trade Mark by giving written notice of three (3) months to the Approved User to such effect;
 - b. breaches any of its obligations under these Rules and the said breach cannot be remedied, the Wine Australia may revoke the approval to use the Trade Mark by giving written notice of one (1) month to the Approved User to such effect.

Disputes

- 16. If a dispute arises from a refusal by the Wine Australia to allow the use of the Trade Mark, a party to the dispute must give to the other party to the dispute notice specifying the details of dispute and requiring its resolution under this Rule 16 (‘Notice of Dispute’).
- 17. The principal executive officers of each party must confer within 7 days after the Notice of Dispute is given to try and resolve the dispute.
- 18. If the dispute is not resolved within 14 days after the Notice of Dispute is given to the other party (‘First Period’), the dispute is by this Rule submitted to determination by an Expert (‘Hearing’). The Hearing must be conducted in South Australia. The provisions of the ‘Rules for the Expert Determination of Commercial Disputes’ as published by the Institute of Arbitrators and Mediators Australia (see www.iama.org.au) apply, except to the extent that there are inconsistent provisions in these Rules.

- 19.** If the parties have not agreed upon the Expert and the Expert's remuneration within 7 days after the First Period:
- a.** the Expert is the person appointed by the President of the Law Society of South Australia ('President') or the President's nominee acting on the request of any party to the dispute; and
 - b.** the remuneration of the Expert is the amount or rate determined by the President.
- 20.** After considering such evidence as the parties may submit, including any evidence requested by the Expert, and after each party has had an opportunity of being heard, the Expert shall decide the matter.
- 21.** The parties must pay the Expert's remuneration in equal shares. Each party must pay its own costs of the Hearing
- 22.** Nothing in Rules 16-21 prevent any party from obtaining any injunctive, declaratory or other interlocutory relief from a court which may be urgently required.

Inconsistency

- 23.** If there is any inconsistency between these Rules and the Licence Agreement, the Licence Agreement prevails to the extent of that inconsistency.

Amendment

- 24.** The Wine Australia may amend the Rules, and undertakes to notify any such amendment to all Approved Users.

Schedule A – Licence Agreement

DATE:/...../.....

PARTIES

The Australian Grape and Wine Authority, ABN 89 636 749 924 (Wine Australia) of Industry House, Corner Botanic and Hackney Roads, Adelaide SA 5000

And

.....(the Licensee)

AGREED TERMS

1 The Topaque Trade Mark

The Wine Australia is registered owner of the Trade Mark.

2 Licence to use the Trade Mark

In consideration of the Licensee hereby agreeing to immediately pay any licence fee payable to the Wine Australia, the Wine Australia grants to the Licensee a non-exclusive, royalty-free licence to use the Trade Mark in respect of the labelling, packaging, advertising, promotion and sale of Topaque Wine, subject to the terms and conditions of this Agreement ('the Licence').

3 Acknowledgement

The Licensee acknowledges that the Wine Australia is the registered owner of the Trade Mark and that nothing in this Agreement has the effect of transferring any ownership or other rights (save for the Licence) in or to the Trade Mark to the Licensee.

4 Topaque Wine and Classification Terms

The Licensee agrees that it will only:

- (a) advertise, promote, offer or sell Topaque Wine under or by reference to the Trade Mark; and
- (b) use a Classification Term in the Description and Presentation of Topaque Wine provided:

- I. the use of the Classification Term complies with the Code of Practice; and
- II. the Description and Presentation includes a geographical indication registered in relation to Australia other than the term "Australia".

5 Permitted uses

Subject to the prohibited uses set out in clause 6, the Licensee may use the Trade Mark generally for the purpose of promoting Topaque Wine including on the following goods and in the following contexts:

- (a) on merchandise, such as aprons and ice buckets, among other things;
- (b) on signage at its cellar door and/or winery;
- (c) at domestic and international wine shows;
- (d) on websites; and
- (e) on printed materials, such as packaging materials and business documents.

6 Prohibited uses

The Licensee may not:

- (a) use the Trade Mark in any manner or form or in respect of any goods whatsoever or any services except as specified in this Licence;
- (b) use the Trade Mark in any manner or form, whether directly or indirectly, in respect of or to refer to wines other than Topaque Wine;
- (c) do anything that may encumber or otherwise prejudice the Wine Australia's rights in the Trade Mark, or the goodwill or reputation of the Wine Australia in the Trade Mark.

7 No challenge by the Licensee

The Licensee agrees that neither it nor its officers, employees, servants or agents will, during the term of this Agreement or thereafter, directly or indirectly dispute the validity of the Wine Australia's trade mark registrations for the Trade Mark.

8 Benefit of the Licensee's use accrues to the Wine Australia

The Licensee agrees and acknowledges that all and any use made by the Licensee of the Trade Mark and any benefit accruing by its use of the Trade Mark will accrue solely to the benefit of the Wine Australia.

9 Registration of business, company and domain names

The Licensee agrees that it will not register or attempt to register the word TOPAQUE or any names or words substantially identical or deceptively or misleadingly or confusingly similar to the word TOPAQUE, as a business, company or domain name or as an e-mail address.

10 The Licensee to provide records

The Licensee must, if requested by the Wine Australia, provide records verifying that the Approved User's wine that includes the Trade Mark in its Description and Presentation is Topaque Wine and complies with all Relevant Laws

11 Rights of Inspection and Audit

The Licensee must permit representatives of the Wine Australia to:

- a. enter, during business hours, any premises from which it offers goods and/or services under or by reference to the Trade Mark; and
- b. inspect and photograph goods it offers for sale and sells under or by reference to the Trade Mark; and
- c. conduct an audit of documentation verifying that the Approved User's wine that includes the Trade Mark in its Description and Presentation is Topaque Wine and complies with all Relevant Laws.

12 No right of the Licensee to take action

Subject to clauses 13-14, the Licensee may not take any measures whatsoever, whether by way of litigation or any other means, against any third party which is alleged to have infringed the Trade Mark or which claims that use of the Trade Mark infringes any third party rights.

13 The Licensee must notify the Wine Australia

The Licensee must notify the Wine Australia immediately if it becomes aware of any actual or suspected infringement of the Trade Mark, or any claim by a third party that the use of the Trade Mark infringes any third party rights.

14 The Licensee must provide assistance to the Wine Australia

The Licensee must, if requested by the Wine Australia, provide the Wine Australia with such reasonable assistance as the Wine Australia may require in conducting enforcement proceedings or defending any third party claim in respect of the Trade Mark.

15 Restrictions of assignment

The Licensee must not sell, transfer, delegate or assign or mortgage, charge or otherwise encumber, any of its rights under this Agreement without the prior written consent of the Wine Australia, which consent may be withheld at the absolute discretion of the Wine Australia.

16 Term

- (a) The Licensee may terminate this Agreement at any time without cause upon one (1) month notice to the Wine Australia.
- (b) The Wine Australia may terminate this Agreement at any time without cause upon six (6) months notice to the Licensee.

17 Termination for breach by the Licensee

The parties agree that:

- (a) if the Licensee breaches any of its obligations pursuant to this Agreement and fails to remedy any such breach within thirty (30) days after written notice advising of the breach is sent to the Licensee by the Wine Australia, the Wine Australia may at its option terminate this Agreement by giving written notice of three (3) months to the Licensee to such effect; and

- (b) if the Licensee breaches any of its obligations pursuant to this Agreement and the breach cannot be remedied, the Wine Australia may at its option terminate this Agreement by giving written notice of one (1) month to the Licensee to such effect.

If the Wine Australia terminates the Agreement pursuant to sub-paragraphs (a) or (b) above it will not prejudice any cause of action or claim of the Wine Australia accrued or to accrue on account of any breach of this Agreement by the Licensee.

18 No licence after termination

- (a) The parties agree that upon termination of this Agreement, the Licence will immediately terminate.
- (b) The Licensee agrees that, upon termination, it will immediately cease to use the Trade Mark in any manner whatsoever provided always that it is agreed that the Licensee shall have a period not exceeding two (2) months after termination of this Agreement in which to re-brand its premises, business stationery, promotional materials and other goods (if permitted) bearing the Trade Mark.

19 Dispute Resolution

If a dispute arises in relation to this Agreement, Rules 15-21 apply.

20 General

- (a) If a provision in this Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- (b) If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Agreement.
- (c) This Agreement contains the entire understanding between the parties as to its subject matter. All previous agreements, representations, warranties, explanations and commitments (expressed or implied) affecting this subject matter are superseded by this Agreement and have no effect.
- (d) The Licensee hereby agrees and acknowledges that it does not have the power to obligate or bind the Wine Australia and nothing in this Agreement will be construed or deemed to constitute a partnership, joint venture, employee or agency relationship between the Licensee and the Wine Australia
- (e) If a party consists of more than one person, this Agreement binds each of them jointly and severally.
- (f) This Agreement is governed by and is to be construed in accordance with the laws of South Australia. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of South Australia (including the Federal Court of Australia) and waives any right to object to proceedings being brought in those courts.

EXECUTED AS AN AGREEMENT

Executed for an on behalf of the Wine Australia

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Signature

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Name and Position

Executed for an on behalf of the Licensee

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Signature

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Name and Position