



Australian Government

Wine Australia

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## **RULES OF USE FOR THE CERTIFICATION TRADE MARK 'Apera'**

1. Wine Australia has registered 'Apera' (Trade Mark Application No. 1276429) as a certification trade mark in class 33.
2. The use of the Trade Mark and certification of Approved Users will be governed by these Rules and by Wine Australia, as the Australian Government statutory authority established in 1981 responsible for providing strategic support to the Australian wine sector, including the core responsibilities of export regulation and compliance, domestic and international wine promotion, wine sector information and analysis, maintaining the integrity of Australia's wine labels and winemaking practices, defining the boundaries of Australia's wine producing areas, and assisting with negotiations with other countries to reduce trade barriers.
3. The Rules relate to the use of the Trade Mark in respect of the following goods and services:
  - a. Fortified wines; and
  - b. Advertising, promotion, marketing, publicity and public relations services; marketing research services; services associated with labelling, compliance and export; business, business administration and business management assistance services; consultancy and advisory services; arranging, organising and conducting exhibitions, tasting events, trade shows and fairs; provision of information; all of the foregoing being in relation to wines, the sale thereof, wine production and the wine industry

### **Definitions**

4. In these Rules:
    - a. 'Wine Australia Act' means the *Wine Australia Act 2013*;
    - b. 'Wine Australia Regulations' means the *Wine Australia Regulations 2018*.
    - c. 'Apera Wine' means a wine which:
      - i. complies with and has the taste, aroma and characteristics referred to in the Code of Practice;
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- ii. is produced in Australia; and
  - iii. is a wine made with the addition of grape spirit that contains no less than 150ml/L and no more than 220ml/L of ethanol at 20 degrees centigrade.
- d. 'Approved User' means a party who has entered into a Licence Agreement with Wine Australia;
  - e. 'Code of Practice' (the current version of which is annexed to these Rules) 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 Wine Australia 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 Wine Australia from time to time;
  - j. 'Licensee' means a party who has been authorised under a Licence Agreement by Wine Australia to use the Trade Mark;
  - k. 'Relevant Laws' includes:
    - i. where Apera Wine is produced in Australia - the Wine Australia Act, Wine Australia Regulations and the Food Standards Code; or
    - ii. in any other case – the laws of the country in which it is produced.
  - l. 'Rules' means these rules of use for the Trade Mark as amended from time to time including any schedules;
  - m. '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;

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- 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 Wine Australia and shall not be used by any person except with the authority of Wine Australia.

#### **Right to use Trade Mark**

- 7. 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 Wine Australia are not permitted to use the Trade Mark.

#### **Certification Requirements**

- 9. The certification requirements are:
  - a. completion of an application form for a Licence Agreement;
  - b. submission to Wine Australia of proposed labelling;
  - c. approval of the proposed labelling by Wine Australia;
  - d. adherence with the Code of Practice;
  - e. adherence with the Food Standards Code; and
  - f. completion of a Licence Agreement, including payment of the Licence Fee.

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### **Approved Certifier**

- 10.** Wine Australia (***the Approved Certifier***), as the Australian Government statutory authority with the responsibilities outlined in clause 2 above, is the sole body approved to:
- a.** assess whether a person has met the certification requirements set out in clause 9(a) to (f);
  - b.** grant a licence to use the Trade Mark to an Approved User.

### **Use of the Trade Mark**

- 11.** Approved Users:
- a.** must only advertise, promote, offer or sell wine under or by reference to the Trade Mark that is Apera Wine;
  - b.** subject to the prohibited uses set out in clause 12, may use the Trade Mark generally for the purpose of promoting Apera 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**

- 12.** Approved Users may not:
- a.** use the Trade Mark in any manner or form or in respect of any goods or any services whatsoever except as specified in the 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 Apera Wine;
  - c.** do anything that may encumber or otherwise prejudice Wine Australia's rights in the Trade Mark, or the goodwill or reputation of Wine Australia in the Trade Mark.

### **Records, Inspection and Audit**

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13. Approved Users must, if requested by Wine Australia, provide records verifying that the Approved User's wine that includes the Trade Mark in its Description and Presentation is Apera Wine and complies with all Relevant Laws. The Label Integrity Program (**LIP**) under Wine Australia Act requires winemakers to keep records to substantiate label claims. It is proposed that the LIP audit program will be expanded as practically appropriate to assess compliance with the Rules by Approved Users, including based on trade complaints, routine export inspections and random inspections by Wine Australia.
14. Approved Users must permit representatives of 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 Apera Wine and complies with all Relevant Laws.

#### **Fees**

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

#### **Breaches**

16. 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 Wine Australia, 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, 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**

17. If a dispute arises from a refusal by Wine Australia to certify, allow the use of the Trade Mark, or any other matter relating to the Trade Mark (including any amendment to the Rules or the Code of Practice), 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 17 ('Notice of Dispute').
18. The principal executive officers of each party must confer within 7 days after the Notice of Dispute is give to try and resolve the dispute.

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- 19.** 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](http://www.iama.org.au)) apply, except to the extent that there are inconsistent provisions in these Rules.
- 20.** 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.
- 21.** 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.
- 22.** The parties must pay the Expert's remuneration in equal shares. Each party must pay its own costs of the Hearing
- 23.** Nothing in Rules 17-22 prevent any party from obtaining any injunctive, declaratory or other interlocutory relief from a court which may be urgently required.

#### **Inconsistency**

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

#### **Amendment**

- 25.** Wine Australia may amend the Rules, and undertakes to notify any such amendment to all Approved Users, and seek the consent of the Australian Competition and Consumer Commission (**ACCC**) to such amendments.

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## Schedule A – Licence Agreement

DATE:

### PARTIES

And

\_\_\_\_\_ (the Licensee)

### AGREED TERMS

#### 1 The Apera Trade Mark

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 the Licence Fee due payable to Wine Australia, 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 Apera Wine produced by the Licensee, subject to the terms and conditions of this Agreement ('the Licence').

#### 3 Acknowledgement

The Licensee acknowledges that 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 Apera Wine

The Licensee agrees that it will only advertise, promote, offer or sell Apera Wine under or by reference to the Trade Mark.

#### 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 Apera 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;

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- (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 Apera Wine;
- (c) do anything that may encumber or otherwise prejudice Wine Australia's rights in the Trade Mark, or the goodwill or reputation of Wine Australia in the Trade Mark.

## **7 Additional restrictions**

The trade mark Apera must only be used for Australian fortified wines, and only under the following conditions;

- (a) that when appearing on the front label of products, Apera shall always be used in the same field of vision as the distinguishing trade mark(s) (whether registered or un-registered) of the licensee;
- (b) that products shall always display the licensee's distinguishing trademark(s) (whether registered or unregistered) more prominently than the trademark Apera;
- (c) that when appearing on a label of products as well as in any other material/activity (e.g. advertising & promotional materials/activities), the licensee's distinguishing trademark shall always be at least **twice the size of Apera;**
- (d) that the font, colour and lettering of the labels used on products bearing Apera shall be such as to avoid any confusing similarity with the labels of the Aperol drinks as per samples below, including any future restyling;





- (e) that Apera shall never be used alone;
- (f) that Apera may only be used/filed/registered for Australian fortified wines;
- (g) that Apera will never be used in combination with the word Spritz(er) or any other designation confusingly similar thereto including, but not limited to, SPRITZZ, SPRIZ, SPRIZZ, SPRITZING, either on the labels of the products or in relation to products including in the advertising material; and

**8 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 Wine Australia's trade mark registrations for the Trade Mark.

**9 Benefit of the Licensee's use accrues to 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 Wine Australia.

**10 Registration of business, company and domain names**

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

**11 The Licensee to provide records**

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

## **12 Rights of Inspection and Audit**

The Licensee must permit representatives of 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 Apera Wine and complies with all Relevant Laws.

## **13 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.

## **14 The Licensee must notify Wine Australia**

The Licensee must notify 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.

## **15 The Licensee must provide assistance to Wine Australia**

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

## **16 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 Wine Australia, which consent may be withheld at the absolute discretion of Wine Australia.

## **17 Term**

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

## **18 Termination for breach by the Licensee**

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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 Wine Australia, 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, Wine Australia may at its option terminate this Agreement by giving written notice of one (1) month to the Licensee to such effect.

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

## **19 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.

## **20 Dispute Resolution**

If a dispute arises in relation to this Agreement, Rules 17-23 apply.

## **21 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 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 Wine Australia

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- (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.

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EXECUTED AS AN AGREEMENT

**Executed for and on behalf of Wine Australia**

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Signature

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Name and Position

**Executed for and on behalf of the Licensee**

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Signature

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Name and Position