

Grape growers: Have you secured due payment of your grape supply invoices?

If you sell grapes to wineries on credit (i.e. if wineries are not required to pay you for grapes supplied until after you have delivered the grapes to the winery), it would be beneficial to secure the winery's obligation to pay your invoices on time and in full. One way of doing this is by taking security over the grapes you sell to the winery (together with the wine produced from those grapes and the sale proceeds derived from them).

It is also important to take steps to 'perfect' that security interest to maximise your chances of being paid.

What if I don't take security over my grapes?

If you don't take security over the grapes that you sell to a winery (and any resulting wine product and sale proceeds), or you fail to 'perfect' that interest you may not be able to recover the unpaid purchase price for those grapes if the winery goes into liquidation.

Instead, the liquidator (after making any required payments to secured creditors of the winery) will likely keep any remaining goods and sell them for the benefit of unpaid creditors of the winery as a whole. If that happens, there is no guarantee that your invoices will be paid by the liquidator in full. In fact, in many cases, there may not be sufficient surplus funds left over after payment of secured creditors and other priority payments to enable the liquidator to pay you anything at all.

How do you take a security interest and 'perfect' it?

Winemakers now generally require title in the grapes that they purchase to pass to the winery at the point of delivery because under the current WET regime, wineries must be considered to be the legal owner of those grapes immediately before crushing in order to qualify for a producer rebate. For this reason, the inclusion of a traditional 'retention of title' type of security in grape supply agreements is no longer acceptable to wineries.

To overcome this, growers can instead ask a winery to grant them a 'security interest' over the grapes they sell to the winery (together with proceeds). Where appropriately drafted, this security interest can serve a similar purpose to the traditional 'retention of title' security from the grower's perspective, without precluding wineries from claiming a producer rebate on wine made from the relevant grapes.

Given that this type of security interest secures the unpaid purchase price of grapes sold by a grower to a winery, it is classed as a 'purchase money security interest' ('**PMSI**') under the relevant law (the *Personal Property Securities Act 2009* (Cth) or '**PPSA**'). This means that growers are also able to take advantage of 'super priority' status given to PMSIs under the PPSA. This is important because PMSIs are usually given priority over other competing security interests in the same goods (even if they were registered first).

If you wish to take a security interest over grapes supplied by you to a winery and to 'perfect' that security in order to maximise your chances of being paid, the key steps to be completed are:

1. **Include a security for payment clause** in your grape supply agreement (see example clause below).

2. Ensure the supply agreement is **executed** by all parties. This is important because the PPSA only allows you to register a security interest if the winery has agreed to provide that security interest to you.
3. **'Perfect' the security interest** by making a **legally compliant registration** against the winery on the public online register of security interests, known as the Personal Property Securities Register or **'PPSR'**.

In order for your registration to provide you with effective protection it must meet all prescribed requirements. To be afforded with 'super priority', it must also indicate that it is a PMSI and must comply with the timing requirements referred to below.

If you do not make a complying registration (or you do not make any registration), your security interest will be 'unperfected' at law, which will mean in the case of the insolvency of the winery, that your security interest is disregarded and you will be treated as an unsecured creditor of the winery.

4. **Provide the winery with** a copy of the **Verification Statement** generated by the PPSR when you made the registration as soon as reasonably practicable after the registration is made. This step is not required if your security for payment clause includes a waiver of this requirement (see 1.3 of the example clause below).

When should a registration be made?

In order to obtain the best possible protection, you will need to register your security interest on the PPSR:

- **within 20 business days** of entering a grape supply agreement (otherwise, if the winery goes into administration or liquidation at any time during the 6 month period after you make your registration, your security interest will be invalid); and
- **before the first supply of grapes is made** to the winery under the supply agreement (this is a prerequisite if you wish to obtain PMSI 'super priority' as described above).

Assuming your security interest clause is drafted appropriately, you will usually only need to make one registration to cover all future supplies of grapes under the relevant supply agreement. However, if you execute a new supply agreement, a new registration will most likely need to be made in order to protect any supplies of grapes made under that new agreement.

What happens to my security once my grapes are combined with other grapes?

The PPSA includes specific rules which regulate how a security interest in your grapes will be treated once your grapes become unidentifiable within a larger mass (because they are combined with other grapes or are processed). In short:

- your security interest continues in the combined mass as a whole (i.e. your security now captures all grapes within the mass and all wine product produced from those grapes);
- each other person who has a security interest over grapes that become commingled with your grapes (e.g. other secured growers) also obtains a security interest over the mass as a whole (including your grapes); and

- you and other secured parties will have a proportionate claim to any sale proceeds derived from the commingled grapes.

Example “grower” security interest clause

On the following page, we have included an example of a “grower” security interest clause which provides for a security interest of this nature.

If you require assistance in securing payment of your grape supply invoices or perfecting any security interest, you should contact a lawyer.

Further information

This document has been prepared by Piper Alderman for WGCSA. For further information concerning this document or related issues, please feel welcome to contact:

Bianca Jennings
Partner | Piper Alderman



t +61 8 8205 3406 | m +61 413 315 111
bjennings@piperalderman.com.au | www.piperalderman.com.au

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Example grower security interest clause*

1. Security over delivered produce and PPSA

- 1.1 The Customer grants the Grower a security interest over all grapes and other produce (whether processed or unprocessed) from time to time delivered by the Grower to the Customer, together with all proceeds of such grapes and other produce (the **Collateral**) to secure punctual payment of all amounts which are or may from time to time become owing by the Customer to the Grower in relation to the purchase price and any other monies payable by the Customer to the Grower in respect of the Collateral (**Amount Owing**). The Customer acknowledges that the Grower's security interest continues in the Collateral notwithstanding the Collateral may be processed into or otherwise commingled with other goods.
- 1.2 If the Customer:
- (a) becomes insolvent (within the meaning given by the *Corporations Act 2001* (Cth)) or otherwise subject to any form of external administration; or
 - (b) does not punctually pay to the Grower the Amount Owing (or any part of it) as and when due,
- the Grower may at any time, in addition to any other rights or remedies it may have, do any of the following (any number of times):
- (c) make all or any part of the Amount Owing immediately due and payable;
 - (d) appoint a receiver to all or any part of the Collateral to do anything which a receiver may do at law (such as taking possession of the Collateral, selling the Collateral or recovering sale proceeds of the Collateral);
 - (e) do anything which a receiver could do under the preceding paragraph; and
 - (f) enter land and other premises owned or occupied by the Customer (by itself or via its agents) for the purpose of exercising any rights and remedies under this clause 1.2.
- 1.3 To the extent the law permits, the Customer waives its rights to receive any notice that is required by any provision of the PPSA (including a notice of a verification statement).
- 1.4 The Customer consents to the Grower effecting a registration on the register (in any manner the Grower considers appropriate) in relation to any security interest arising under or in connection with this clause 1.
- 1.5 In this clause 1:
- (a) **PPSA** means the *Personal Property Securities Act 2009* (Cth) as amended;
 - (b) **receiver** has the meaning given by the *Corporations Act 2001* (Cth), and the following terms have the meaning given to them by the PPSA: **account; financing statement; proceeds; register; secured party; security interest; verification statement.**

* This example clause is provided for illustrative purposes and is general in nature. It has not been prepared with your specific circumstances in mind and it may not be appropriate for your specific supply agreements. If you wish to secure payment of your invoices using a security interest clause, you should speak with a lawyer.