



Wine Grape Council  
South Australia

# A guide to negotiating the sale of wine grapes in South Australia

*Information for Wine Grape Growers  
and Purchasers*



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# A GUIDE TO NEGOTIATING THE SALE OF WINEGRAPES IN SOUTH AUSTRALIA

This information complements the provisions made within the 'Australian Wine Industry Code of Conduct' ('the Code') and aims to provide a process that is regarded as industry best practice. By improving transparency and clarity around the process of entering into a wine grape sale agreement, this process should occur in a way that is fair for both the grape grower and the grape purchaser, and in doing so inform both parties of their rights and responsibilities.

## Acknowledgements

### Original material

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## *Disclaimer*

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*The information in this report is current as of November 2013. Any person using this information should independently verify its currency before relying on it.*

## WHAT IS COVERED IN THE GUIDE?

The document is designed to assist grape growers and grape purchasers to navigate their way through each stage of developing and implementing a wine grape sale agreement, starting with preparing to negotiate and the development of a contract, through to options for the grower in the event of a purchaser becoming insolvent. The sections can be read separately or in series.

Section	Descriptor
Section 1	Preparing to enter into an agreement
<i>This section outlines the responsibilities of the grape grower and the grape purchaser, how to do due diligence checks, the legislation and Australian Wine Industry Code of Conduct that relates to these transactions. It also considers how a grape grower can best prepare for a negotiation to ensure the best outcome.</i>	
Section 2	Writing contracts
<i>This section outlines the difference between an agreement and a legally binding contract. It provides examples of the types of language and clauses contained in wine grape sale agreements, and some of the pitfalls they may pose. The use of a Retention of Title clause is explained. There is also a checklist of questions for both parties to consider prior to entering into a wine grape sale agreement.</i>	
Section 3	Navigating your way through a dispute
<i>This section discusses the importance of documentation (written, photos, emails etc.) and the option of involving an independent expert to help navigate disputes to a suitable resolution. It also covers a range of Alternative Dispute Resolution options available and the difference between mediation, expert determination and arbitration.</i>	
Section 4	Payment problems
<i>This section discusses issuing a 'letter of demand' and a 'winding up' order. It also looks at differences between 'secured' and 'unsecured' creditors and what happens in the event of voluntary administration, liquidation and receivership.</i>	
Appendix 1	Terminology and further information
<i>Definitions for commonly used contract terms and a list of websites and other reference sources for further information related to the topics in this document.</i>	
Appendix 2	Example Personal Property Security Interest clauses and PPSR terminology
<i>Examples of clauses that can be inserted into a contract to secure payment of the full purchase price.</i>	
Appendix 3	Vineyard access considerations
<i>Vineyard protection protocols and other considerations regarding visitors to the vineyard.</i>	
Appendix 4	Marketing your winegrapes
<i>A separate worksheet developed by Wine Grape Growers Australia that provides guidelines to growers for adding value to your product and increasing sales in a difficult market.</i>	
Appendix 5	Improving your negotiation outcomes
<i>A separate worksheet developed by Wine Grape Growers Australia that gives tips on how to develop your negotiation skills and help you negotiate the best outcome for yourself without compromising the relationship with your supplier.</i>	
Appendix 6	Sample wine grape purchase agreements
<i>Currently under development. See WGCSA website for updates.</i>	
Appendix 7	Wine Industry Code of Conduct
<i>Copy of the Code for your reference.</i>	

## Flowchart 1 – Preparing to sell your fruit

### Fruit

- **Specifications**
  - variety/clone, yield
- **Potential**
  - history of previous crop outcomes
- **Price**
  - What do you need to cover costs?
  - What is the market value of your fruit?

See section 1  
page 8

### Buyer

- Who is the best match for the fruit (products made, location)
- Does the buyer have a good reputation - including payment history?

See section 1  
page 7

### Contract

- Are the terms and clauses fair and reasonable?
- Do the payment terms comply with the Wine Grapes Industry Act?
- Do you have a retention-of-title clause and a dispute resolution clause?
- Have you sought legal advice on the wording of the contract?

See section 2  
page 11 – 19 and  
Appendix 2

## SECTION 1 – PREPARING TO ENTER INTO AN AGREEMENT

### What should I do before entering into a grape sale agreement?

#### *Due diligence*

It is necessary for each party to make suitable enquiries so they can be discerning about whom they do business with. This can provide the basis of a solid and long-term working relationship, as well as achieving an agreement that works well for both parties.

#### ***Grape grower***

One of the best ways a grape grower can protect their interests is to carry out due diligence prior to finding a home for their grapes. Taking the time to know the customer may prevent a lot of the heartache that may otherwise occur. Here are some tips:

- ★ Get to know the grape purchaser and their reputation.
  - What is the grape purchaser's history? Who are the owners? Have they weathered downturns before and, if so, how did they respond?
  - What is the grape purchaser's track record for timely payment? Some grape purchasers have no problem demonstrating financial ability, by having their lenders confirm that they have the capacity to pay or by providing trade references (from other grape growers, suppliers etc).
  - See if the business is listed on Creditor Watch as having any adverse finding. Refer to section 4 for more information
- ★ If you have reasonable grounds to feel insecure about the purchaser's ability to pay, ask for adequate assurance that the grape purchaser is able to meet their obligations (financial statements, letters of credit, collateral, personal guarantees, advance payment or cash on delivery). If the buyer cannot provide those assurances, ask yourself whether it is wise to risk doing business with them.
- ★ If a purchaser in South Australia has outstanding debts to grape growers from previous seasons then they are not permitted under the South Australian Wine Grapes Industry Act 1991 to accept delivery of any further winegrapes for processing (see below for more details).
- ★ If you are only supplying to one purchaser and you have concerns about their ability to meet their obligations into the future, you may want to consider selling some of your fruit to other processors to reduce your risk

#### ***Grape purchaser***

Similarly, it is important for the grape purchaser to take an active interest in the vineyards they source grapes from.

- ★ Is the grape grower able to meet expectation and grow fruit that is 'fit for purpose'? Are they able to produce the volume and quality of grapes that you need reliably?
  - Such requirements should be in writing and be reflected in the grape payment schedule so that the grape grower can justify any additional expenses in growing the grapes to specification.
- ★ Can you negotiate to have input into growing practices in the vineyard throughout the growing season to ensure the wine grapes are grown 'fit for purpose'?
  - It is common practice for grape growers to be supplied with grower manuals (including spray diaries and, increasingly, environmental certification requirements) by grape purchasers who expect the directives contained within the manuals to be followed, and for forms to be filled out accurately when growing contracted grapes.
- ★ What access can you reasonably expect to the vineyard during the growing season?

## Know your market and what your product is worth

- ★ Research the market conditions by contacting other grape growers and/or a number of grape purchasers, to compare the demand and prices on offer. The Phylloxera and Grape Industry Board of South Australia publishes an annual survey that gives the weighted district average price by variety and region for grapes sold in SA.
  - To access these reports, go to [www.phylloxera.com.au/utilisation](http://www.phylloxera.com.au/utilisation) then select the year of interest.
  - Wine Australia also publishes a detailed price dispersion report on a national basis each year. This gives the range of prices and how much fruit was sold in each price bracket as well as the average price. These reports can be found at [www.wineaustralia.com](http://www.wineaustralia.com) (go to Winefacts and search for “Price dispersion reports”).
- ★ Know your costs of production so you know exactly what price you can afford to accept or pay. Having this information improves your negotiation position and earns the respect of the other party.
- ★ Treat the purchaser as a customer. Relationships between grapegrowers and winemakers have not always been easy. However, if growers can treat purchasers as customers and aim to provide them with the right product for their requirements, they are likely to win more business and better long-term prospects. The purchaser in turn is a supplier to a retailer or a consumer and having a good relationship with a grape grower for a reliable supply of the right fruit provides the purchaser with a competitive advantage in their market.

See Appendix 4 *Increasing Sales in a Difficult Market* for guidelines on marketing grapes effectively.

## Establish clear communication lines and a good working relationship

- ★ Clarify who will be liaising with the grower on behalf of the purchaser during the growing season and, importantly, at vintage time. Is this the same person negotiating the contract?
- ★ If there are any concerns over grape quality, who will raise them with the grower (the winemaker, grower liaison officer or viticulturist)? Will this be done in a timely fashion so there is time to remedy any issues?
- ★ Both parties should encourage a frank and open debate about any mutual concerns that may arise, so they can be addressed quickly and not fester into a larger issue.

## Governing law and Code of Conduct

### South Australian Wine Grapes Industry Act (1991)

The South Australian Wine Grapes Industry Act 1991 (SAWGI Act) is legislation relating the payment of ALL wine grapes sold in SA. It is important to note this legislation is not mirrored in the other states of Australia and if you sell your grapes interstate, you are not currently afforded the same level of legislative protection.

The SAWGI Act specifies when payment must be made for grapes (see section 4 for details). If a processor defaults in making a payment within the time fixed above, there are provisions within the Act for the processor to pay the producer interest and/or take action to recover costs.

Section 9 of the Act states:

*‘A processor must not accept delivery of wine grapes for processing unless all amounts that have previously fallen due for payment by the processor for wine grapes received by the processor, or any person acting on the processor's behalf, in a previous season have been paid in full’.*



If grape growers are asked to accept payment for grapes outside of the payment periods mandated by the Act and would like advice or assistance in this matter, they should contact WGCSA or Primary Industries and Regions SA (PIRSA), or seek legal advice.

A copy of the SAWGI Act can be downloaded from [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au) (search for 'Wine Grapes Industry Act 1991') or from [www.wgcsa.com.au](http://www.wgcsa.com.au).

### ***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) with the support of the Federal Government's Department of Agriculture, Fisheries and Forestry.

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. If a purchaser is a signatory to the Code then their contracts must comply with the requirements of the Code, which gives growers some assurance that they will be fair and reasonable.

More information on the Code, including a list of all the current signatories to the Code, can be found on the Code website [www.wineindustrycode.org](http://www.wineindustrycode.org) or the WGGA or WFA websites.

## Flowchart 2 – Managing your contract

### Communication

- **Vineyard visits**
  - protocols for vineyard access
  - frequency of visits
  - requirement to notify grower first
- **Management**
  - how much say does the winery have?
- **Spray diaries and other records**
  - What has to be kept?
  - What has to be provided to the winery?

See checklist page 17 and appendix 3

### Vineyard quality assessments

- **Quality specifications**
- **Assessment methods**
- **Disputes over grading**
  - documentation
  - independent assessment
  - dispute resolution options

See checklist page 17, section 3 and Appendix 7

### Harvest and delivery

- **Timing of harvest**
  - who decides?
  - notification of readiness
- **Freight**
  - who pays?
  - who takes risk?
- **Delivery**
  - point of transfer of ownership
  - weighbridge assessment

See checklist page 17 and page 15

## SECTION 2 – WRITING CONTRACTS

The manner in which contract negotiations are approached and conducted is important and it is necessary for both parties to take a professional approach.

Similarly, a renegotiation is a good opportunity to review an existing wine grape sale agreement, correct any shortcomings, and make sure that the contract adequately covers the principal elements of a well-drafted agreement.

### What is the difference between an agreement and a contract?

A range of terminology is currently used to describe the sale of wine grapes.

**Grape purchase agreement**

**Grape supply agreement**

**Grape sale and purchase agreement**

**Annual grape contract**

**Fruit purchase contract**

**Memorandum of agreement (supply of wine grapes)**

The source for contractual obligations is an agreement, but agreement is a general expression. “Contract” is a legal term and conveys something more specific than just agreement. For an agreement to become a contract it must have three identifiable features:

- ★ An agreement
- ★ Legally binding
- ★ Consideration

#### **Agreement**

Agreement occurs when one person accepts the other party’s offer, so there have been both:

- ★ An offer, and
- ★ Acceptance of that offer.

#### **Legally binding**

A contract becomes **legally binding** the moment the acceptance is communicated. This can be done in writing, via a ‘handshake’ agreement which is communicated by telling the other person that you agree, or by demonstrating this to them by your actions, or in some circumstances, just by carrying out the contract.

## Consideration

Making a contract involves an exchange of something of value to each party. This is often an exchange of money paid to another person who in turn gains a benefit, such as goods or services. Whatever is paid is called 'consideration'. For example supply of goods (wine grapes) or services (contractor harvester) for the payment of a specified sum of money (**consideration**).

Each party to a contract is legally obliged to carry out his or her part of the agreement and a party who fails to do so may be in **breach of contract**. A court can require the party in breach to put things right, either by fulfilling the contract (called 'performance') or paying compensation for any loss (called 'damages').

### **'Handshake' agreements**

If a 'handshake' agreement is negotiated it is important to make a written note of the arrangement (**see the section on contemporaneous notes in Section 3**) or preferably to seek written confirmation – for example a letter, fax, or email is acceptable. By doing this you have a record to refer back to and if there is a disagreement, you have written evidence to support your claim. If there is no written record, this can make it hard to verify the claim and it may come down to a 'we said, they said' situation, which is less compelling in a court of law. Once there is agreement, any changes need to be agreed by both parties.

## Intention

The intention to enter into a legally binding agreement is seldom stated, but is usually inferred from the circumstances surrounding the agreement. For example, when you buy something in a shop, you and the seller both intend that once the goods are purchased, they will be legally yours to do with what you like and the seller will be legally entitled to keep your money.

If you are presented with a 'standard' wine grape sale agreement, you do not have to accept the terms of the agreement, unless you are satisfied with the terms and clauses it contains.

There is an obligation on grape growers to take the necessary steps to understand the content of a contract offered by a purchaser. However, the contract should be written in plain English to make that easier.

**ONCE A CONTRACT IS SIGNED IT IS A LEGALLY BINDING DOCUMENT THAT CAN BE ENFORCED BY LAW.  
IF YOU ARE UNSURE, GET LEGAL ADVICE BEFORE YOU SIGN.**

## What to look out for in contracts: problematic language and clauses

The following are examples of commonly used wording, clauses, and provisions to be wary of in contracts.

<b>Complicated sub-clauses</b>	Be aware of complicated sub-clauses which relate to another part of the contract. They can be confusing to follow and understand. It is important to read the fine print carefully to ensure that a clause that may be subject to another clause does not void the original clause
<b>Non-specific dates</b>	Make sure the agreement states a commencement date (not just the date signed) and a specific expiry date (not just a term – eg “five years” or a vintage).
<b>Zero/No minimum price contracts</b>	All contracts should include a minimum or fixed price, or if a ‘market price’ is specified, a clear statement as to how the price is to be determined.  Ensure that there is an appropriate period of time stipulated if there is to be a price offer, or confirmation of pricing structure, prior to harvest. Otherwise grape growers may be at a significant disadvantage in finding an alternative purchaser for their grapes if they do not agree with the indicative prices offered. The Code of Conduct specifies price notification requirements.
<b>Payment terms</b>	Ensure the minimum grape payment terms (schedule of payments) specified in the South Australian Wine Grapes Industry Act 1991 are adhered to ( <a href="#">See Section 4</a> ). Be cautious of accepting payments in equal monthly payments, if selling grapes outside of SA.
<b>Bi-lateral agreement</b>	Ensure that the agreement may only be amended in writing and executed by both parties
<b>Consequential loss</b>	Grape growers should not be held responsible for any consequential costs, expenses, or losses once the grapes start fermentation, unless the grape grower is guilty of gross negligence or wilful misconduct.
<b>Force majeure</b>	The lack of production capacity for the grape purchaser should never be considered a force <i>majeure</i> (an extraordinary event or circumstance beyond the control of the parties) able to absolve the grape purchaser of responsibility for taking the grapes.
<b>Sole discretion</b>	The term ‘sole discretion’ by either party should rarely be used and only in cases where its application is truly justified. Consider substituting the concepts of ‘reasonable judgment’ or ‘good faith’ in lieu of ‘sole discretion’.
<b>As determined by the grape purchaser</b>	Be wary of assertions being made which do not have any definition or right to appeal – eg relating to determination of grape quality, prices or bonuses.
<b>Controlling interest</b>	Be wary of statements that give the purchaser a controlling interest in future vineyard management decisions, the appointment of a vineyard manager, or sale of the vineyard.  For example, a grape grower may be required to seek approval from a grape purchaser to remove or replant vines, change vineyard manager or sell the vineyard, which approval might be withheld at the purchaser’s sole discretion or for any reason.
<b>Non-performance</b>	Be wary of clauses that entitle the grape purchaser to recover losses sustained by them and any processor as a result of the grape grower’s failure to deliver (where the grape grower is not liable for any loss due to force <i>majeure</i> ).
<b>Vineyard practices</b>	Be wary of clauses that state that if a grape grower does not comply with the direction given by the grape purchaser with regard to vineyard practices, it shall not be obliged to purchase any of the grapes, and conversely, the grape purchaser will not be liable for any loss incurred by the grape grower as a result of any advice provided by the grape purchaser and followed by the grower.

## Securing payments

### *Registering grapes or wine on the PPSR*

Since 30 January 2012 wine grape growers have had the opportunity to register the grapes or wine that they supply for sale on the Personal Property Security Register (PPSR). This provides potentially greater security in the event of the buyer not being able to meet their financial obligations.

The following is a brief overview of how the system works. For more information visit [www.ppsr.gov.au](http://www.ppsr.gov.au)

The PPSR is an on-line register, available 24 hours a day, seven days a week. It replaces all Commonwealth, state and territory registers of security interests in personal property and the old "retention of title" or Rompala clauses.

A person supplying, selling or leasing goods (e.g. a grape grower) registers a Personal Money Security Interest (PMSI) over the goods on the PPSR. A PMSI can be applied to almost any personal property except real estate and fixtures (e.g. buildings, water rights).

Registering a PMSI requires the agreement of the supplier and the purchaser – typically this would be a written contract. It only applies to transactions that require payment for goods or the performance of an obligation (e.g. processing into wine). Contracts must have clauses reflecting that the Personal Goods are to be registered (see template clauses in Appendix 2).

Advantages of registering a PMSI for wine grape growers:

- ★ Grape growers are typically unsecured creditors. This usually means that if a processor becomes insolvent debts are first paid to secured creditors (e.g. the ATO, banks, etc.) and whatever is left is divided amongst the unsecured creditors - frequently nothing is paid. Assuming the registration is completed in accordance with the regulations, the consignee has 'super priority' in terms of recovering any outstanding debt from the receiver or liquidator.
- ★ A grape grower selling grapes to a winery will only ever need to register its PMSI once for each processor to secure all future deliveries (including the proceeds of sale).
- ★ It may make borrowing money easier because the lender has the option of using your crop as security
- ★ You can search the register to check if property (e.g. a tractor) has a registered security interest over it before you commit to purchasing it

Disadvantages for wine grape growers:

- ★ it requires the agreement of the processor to include a Retention of Title clause in the grape contract
- ★ the process can be complex and the terminology is difficult to understand.
- ★ while the fees for using the PPSR are not very high, most growers are likely to need legal assistance in reviewing a contract and registering the PMSI

### ***Steps in registering your Personal Goods***

1. Determine if your Personal Goods (grapes or wine) warrant attaching a PMSI. This will be influenced by the value of the grapes or wine (e.g. can you continue if you don't get paid), your confidence in the ability of the purchaser to pay, the willingness of the processor to agree to a PMSI clause in your contract and the time and cost of registering
2. Arrange for new PMSI clause to be inserted into your contract (see sample clauses Appendix 2). This should be finalised before grapes or wine are delivered. *NB if you already have a Retention of Title clause in your contract it is important that you register it on the PPSR website.*
3. Register the PMSI – this is essential to 'perfect' (finalise) the process. In the case of inventory (e.g. grapes) this must occur before the goods are delivered. Registering after will not invalidate the PMSI, however, its "super priority" status will be delayed if not defeated by another secured party;
4. Give a copy of the Verification Statement to any grantor listed in the registration immediately before or after the registration event. See Section 157 of the *Personal Property Securities Act 2009* (PPS Act).

## Other things for growers to consider when negotiating agreements

- ★ **District average price**
- ★ Reliance on the district weighted average price is not recommended, as prices are not published until at least August and the average prices paid (\$/t) for each variety do not include bonus payments.
- ★ **Bottle retail price**
- ★ Accepting a price based on the retail bottle price of the brand the grapes go into is not advisable, as there may be no way of verifying which product your grapes went into. Similarly, if a particular brand is deleted from a wine range this will add to the uncertainty of traceability and transparency.
- ★ **Vineyard grape quality assessments**
- ★ Any grape quality specifications should be spelled out clearly in the wine grape sale agreement as well as a clearly defined and transparent method for assessing fruit quality. Discuss the inclusion in the contract of vineyard based quality assessments that allow sufficient time to discuss grading results in the vineyard prior to picking the grapes.
- ★ **Access to the vineyard**
- ★ The grape purchaser may expect access to the vineyard during the growing season. If this is the case, it is important that vineyard access protocols are understood and adhered to, so that your vineyard is protected from phylloxera and other pests and diseases and you comply with your legal obligations and duty of care to visitors. (See appendix 3.)
- ★ **Independent expert**
- ★ It is wise for both parties to stipulate the option of involving an independent and suitably qualified third party, to help intervene in the event of a dispute over grape quality, purity and condition thresholds, which may result in price penalties or outright rejection of the grapes.
- ★ **Emerging issues**
- ★ There has been a greater focus in recent years on issues such as smoke taint, herbicide drift, restrictions on the use of phosphorous acid for international markets, and rising salinity issues. Ensure that any requirements and/or rejection thresholds for these are clearly stated.
- ★ **Timing of picking**
- ★ There is a risk associated with leaving grapes on the vines after they have achieved the desired quality parameters. Capacity restrictions mean grape purchasers may not be able to pick all grapes at the optimal time. It is important to be clear about who holds the risk if the decision to pick is premature, or significantly delayed from the agreed picking date, and what recourse there is if this disadvantages one or more parties
- ★ **Sufficient time to consider the agreement**
- ★ The Australian Wine Industry Code of Conduct suggests the following timelines to consider the terms of the agreement:
  - For an Agreement that extends over more than one vintage, a 'reasonable period' is 15 business days from the date of receipt by the wine grape grower.
  - For all other Agreements other than spot market purchases, a 'reasonable period' is seven business days from the date of receipt by the wine grape grower.
  - For spot market purchases, a 'reasonable period' will depend on the circumstances and may be relatively short (for example, less than one business day if harvest is imminent).
- ★ **Alternative Dispute Resolution**
- ★ Consider including a graduated alternative dispute resolution escalation structure similar to the options included in the Australian Wine Industry Code of Conduct. This is generally preferable to litigation which can be a cumbersome, time consuming, expensive and a very public way to settle a dispute. *Alternative dispute resolution options are explained further in Section 3.*
- ★ **Termination**
- ★ The termination of a contract should be a last resort; but the contract should provide a mechanism for the contracted parties to part amicably if the relationship isn't working. The process should allow time for the purchaser to find a new source of grapes, and for the grower to find a new buyer.





## Wine grape contract checklist

The following checklist of questions may prove useful when negotiating the sale of grapes. Compare the checklist with the information contained within your wine grape sale agreement.

TOPIC	Question
1. Parties	<ul style="list-style-type: none"> <li>✓ Are all parties to the agreement clearly identified – including a landowner if different from the grower?</li> </ul>
2. Vineyard details	<ul style="list-style-type: none"> <li>✓ Are the grapes to be sold clearly identified? <ul style="list-style-type: none"> <li>○ Vineyard name, location and area,</li> <li>○ Management units (include parts of management units if required), and</li> <li>○ Varieties (include clones if required).</li> </ul> </li> </ul>
3. Contracted tonnage	<ul style="list-style-type: none"> <li>✓ What are the stated minimum/maximum tonnes to be supplied? <ul style="list-style-type: none"> <li>○ Is the contracted tonnage based on area (tonnes per hectare) or on total tonnes?</li> <li>○ How and when is yield to be estimated?</li> <li>○ Is the tonnage to be capped (t/ha)?</li> <li>○ What is the penalty for delivering above the target tonnes?</li> <li>○ What restrictions are there on selling excess fruit to other buyers?</li> </ul> </li> </ul>
4. Vineyard practices	<ul style="list-style-type: none"> <li>✓ To what extent does the purchaser have a say on cultural practices? <ul style="list-style-type: none"> <li>○ Crop thinning, irrigation, canopy management requirements, other.</li> </ul> </li> </ul>
5. Setting the price	<ul style="list-style-type: none"> <li>✓ How is the final price payable to be determined (and is this clearly stated)? <ul style="list-style-type: none"> <li>○ Is a minimum and/or maximum price per tonne set for each variety?</li> </ul> </li> <li>✓ What is the timeframe for grape purchasers to notify price for each vintage period?</li> </ul>
6. Adjusting the price	<ul style="list-style-type: none"> <li>✓ What adjustments (bonus/penalties) are allowable for quality issues?</li> <li>✓ What deductions are applicable if the grapes do not meet the purity and condition standards?</li> </ul>
7. Grape quality assessment, acceptance and rejection	<ul style="list-style-type: none"> <li>✓ What is the quality standard for the grapes being supplied? <ul style="list-style-type: none"> <li>○ Chemical analysis (Baumé, titratable acidity, pH, anthocyanins – colour, other)?</li> </ul> </li> <li>✓ What are the grape ‘purity and condition’ standards for the grapes being supplied? <ul style="list-style-type: none"> <li>○ What are the guidelines for MOG (material other than grapes), damaged, or contaminated grapes?</li> </ul> </li> <li>✓ Who will conduct grape sampling, chemical analysis and grape quality assessment? <ul style="list-style-type: none"> <li>○ How is grape maturity to be defined?</li> <li>○ What are the sampling procedures and standards that will be followed?</li> <li>○ When will grape quality, purity and condition assessment take place?</li> <li>○ Will the grape grower be notified of the results of the assessment?</li> <li>○ How will the grape grower be notified if grapes are to be rejected (in writing, timing prior to commencement of harvest, or at the weighbridge)?</li> <li>○ What are the provisions for recourse if the grape grower disagrees with the assessment?</li> </ul> </li> <li>✓ How will the grape grower be notified if the grape purchaser wishes to visit the vineyard?</li> </ul>

<b>8. Harvest, delivery and freight</b>	✓ What is the delivery date or window for delivery (how will this be decided and communicated)?
	✓ Are any additives required to be added to the harvested grapes?
	✓ How will the grapes be picked: machine / hand (who will pay for the cost of hand picking if requested by the grape purchaser)?
	✓ How and where will the grapes be delivered (include access to bins)?
	○ Who pays for the harvest and delivery costs?
	○ Is there a financial penalty if the truck or carrier is made to wait beyond the agreed delivery time (what is an acceptable waiting time)? If so, who is responsible for payment?
	○ What information needs to be provided prior to, and at the time of, delivery (spray diaries, agrochemical declarations)?
	✓ Who will purchase insurance and for what aspects?
<b>9. Title in wine grapes</b>	✓ Is there a force <i>majeure</i> clause in place to protect either party equally?
	✓ When does the title of the wine grapes pass from the grape grower to the grape purchaser (at the weighbridge receival point)? Is this clearly stated?
<b>10. Terms of payment, GST and levies</b>	✓ Does the Wine Grape Sale Agreement include a 'Retention of Title' clause?
	✓ When will the grower be paid? Will the terms outlined in the <i>Wine Grapes Industry Act 1991</i> , be adhered to (minimum requirement in SA) as a minimum?
	✓ Does the contract include a detailed payment schedule that specifies key dates?
	✓ Will interest be accrued and paid if payment is not received when due?
<b>11. Duration of contract</b>	✓ What are the taxes and levies involved?
	✓ Will the contract be for one sale, one year, or multiple years?
<b>12. Reasonable time</b>	✓ Are specific commencement and expiry dates defined?
	✓ Has reasonable time been allowed to read and understand the document and obtain independent advice before entering into the Agreement?
<b>13. Signatures</b>	✓ Did everyone sign in a representative capacity (name and title)?
	✓ Did everyone date the contract?
<b>14. Sale of a vineyard</b>	✓ Are there any restrictions imposed by the grape purchaser on the rights to transfer possession or ownership of the vineyard?
	✓ What are the obligations in the event of a sale or disposal of possession of the vineyard?
<b>15. Termination of contract</b>	✓ Is the contract set up to expire after a set period of time? What is the expiry date?
	✓ Is the contract set up for automatic renewal (if so, what are the options for either party to terminate the contract)?
	✓ Can the contract be terminated early for breach of contract, if the issue is not remedied after notice?
	✓ Can the contract be terminated early for convenience (what notification period is required)?
<b>16. Liability limitations</b>	✓ Has consequential loss been excluded?

<b>17. Indemnifications</b>	<ul style="list-style-type: none"> <li>✓ Is there an agreement to/not to compensate the other party for loss or damage, or to pay/not pay a claim brought against the other by a third party?</li> </ul>
<b>18. Governing law</b>	<ul style="list-style-type: none"> <li>✓ Do the laws of South Australia and the Commonwealth of Australia govern the agreement? Which courts will have jurisdiction?</li> </ul>
<b>19. Dispute resolution clause</b>	<ul style="list-style-type: none"> <li>✓ Has a process been identified for resolving a dispute?</li> <li>✓ Does it comply with the Code of Conduct?</li> <li>✓ What steps are identified?</li> </ul>
<b>20. Is the grape purchaser a signatory to the Australian Code of Conduct?</b>	<ul style="list-style-type: none"> <li>✓ If so, familiarise yourself with the requirements under 'the Code'.</li> <li>✓ Ask Signatories to 'the Code' to include a copy of 'the Code' and Secretariat contact details with the wine grape sale agreement.</li> </ul>

**\*\* DO NOT SIGN AN AGREEMENT IF YOU ARE UNSURE OF YOUR OBLIGATIONS \*\***

**CONTRACTS ARE LEGALLY BINDING DOCUMENTS**

*Seek independent legal, financial, viticultural and/or taxation advice **BEFORE** you enter into a wine grape sale agreement.*

## Flowchart 3 – Payment problems

### Warning signs

- **Note warning signs**
- **Document all communication**
- **Monitor company**
  - Creditor Watch

See section 4 page 25

### Overdue payment

- **Wine Grapes Industry Act terms of payment**
- **Debt retrieval**
  - Letter of demand
  - Winding up order

See section 4  
page 25 -26

### Buyer insolvent

- **Voluntary administration, liquidation and receivership**
- **Secured and unsecured creditors**

See section 4  
page 27 – 28 and  
appendix 2

## SECTION 3 – NAVIGATING YOUR WAY THROUGH A DISPUTE

The main cause of disputes in the wine industry at vintage time is grape price, which is often closely related to grape quality, maturity, purity, and/or condition, resulting in either price adjustments or rejection of the wine grapes either in the vineyard, or at the weighbridge. Here are some guidelines for managing disputes effectively.

### Documentation

If a dispute occurs, it is important for both parties to document what happened as it occurs. If there is no evidence, or written documentation is poor, it is hard to clearly demonstrate the sequence of events leading up to the dispute and defend a claim. Documentation (written, photos, etc.) and/or grape samples collected (and appropriately stored) at the time of the dispute, can be used to review what happened after the event, either by the parties themselves or by an independent and suitably qualified third person who may be called in to resolve a dispute.

#### *Contemporaneous notes*

Contemporaneous notes are notes taken at the time, or shortly after an event or incident. For example, you may make a note of meeting with someone, a conversation, or a note of an action such as inspecting a document or grapes in a vineyard. It is important that the relevant information is factual and is created while the details are fresh in your memory. Remember to date (and time) each entry. If you are verbally notified of changes in picking times, grape prices, downgrades, or grape rejection, always request this as a written statement.

### Independent assessment

It is common for a specific percentage threshold to be identified as a level for deduction from the agreed or market price, or rejection of the grapes if the rejection standard is reached. If there is a dispute relating to the grape purity and condition schedule outlined in the wine grape sale agreement, it is wise to engage the services of an independent and suitably qualified third party to separately assess the issue raised, especially if the potential loss is significant.

#### *In the vineyard*

Sufficient time is needed to carry out the assessment prior to picking the grapes and for the parties to discuss the outcome. If there is an issue in the vineyard with regard to pests or disease, sunburn, shrivel or other damage, this is normally assessed by examining 200 bunches (or bunch stalks) in the management unit to determine the incidence and severity of the damage in question. Other issues such as the presence of Ochratoxin A (resulting from fungal infection), Laccase (resulting from Botrytis infections), phosphorous acid, herbicide, or agrichemical residues, salinity, smoke or other taints may require a representative grape or tissue sample to be sent to a laboratory for positive identification and/or to determine the levels of the compound(s) present.

#### *At the weighbridge*

The weighbridge/load assessment station is usually the final checkpoint for checking the quality of the wine grapes against minimum standards for chemical measurements such as Baumé, titratable acidity, pH, and colour, material other than grapes (MOG), and the general purity and condition of the load.

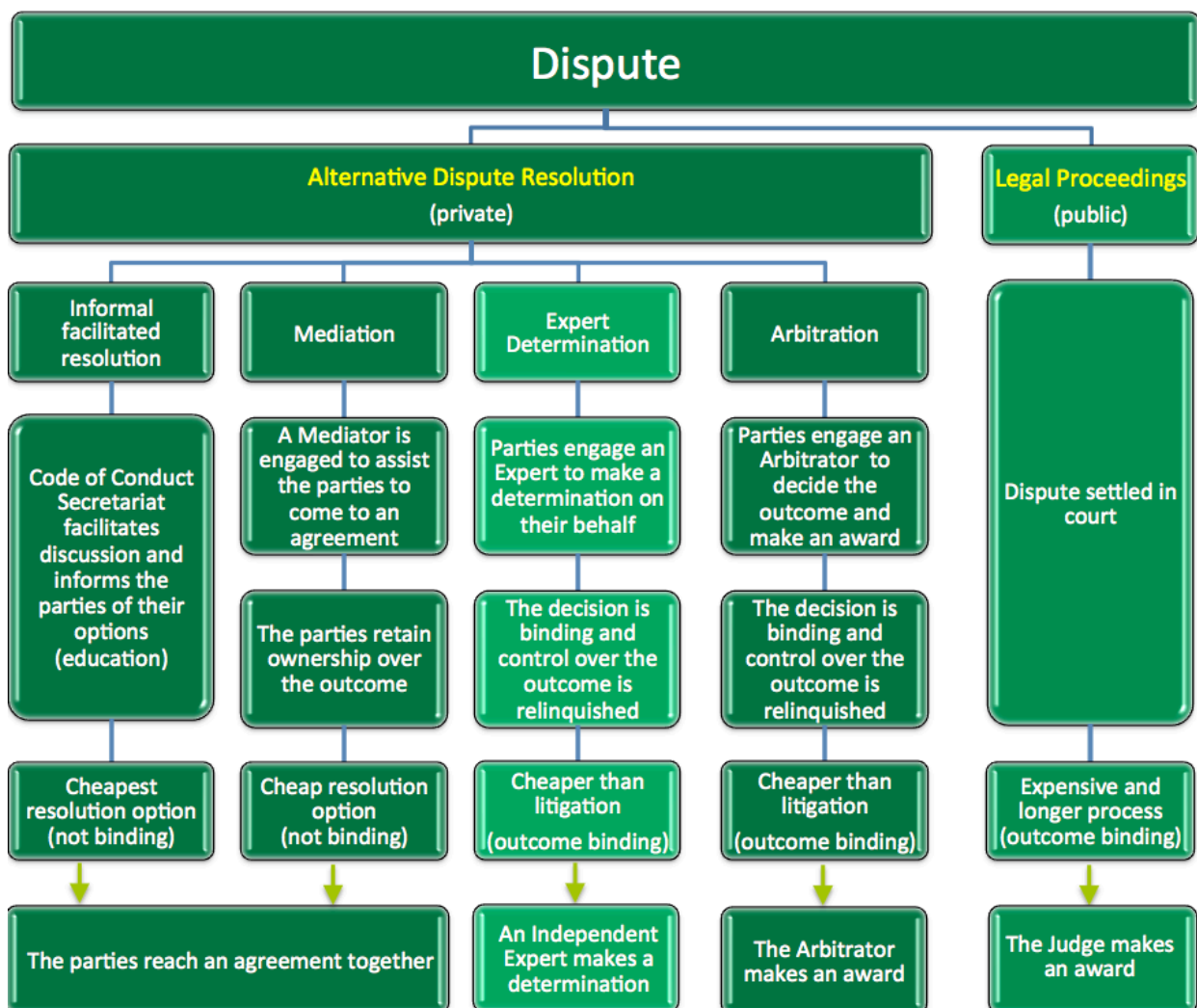
For more information, download the 'Winegrape Assessment in the Vineyard and at the Winery' guide from the Code of Conduct website ([www.wineindustrycode.org/downloads](http://www.wineindustrycode.org/downloads)). Alternatively, the 'Australian Winegrape Load Assessment Guide' has been reproduced at the back of Krstic et al (2003) 'Growing Quality Grapes to Winery Specifications', which is available from [www.winetitles.com.au](http://www.winetitles.com.au)

## Alternative dispute resolution options

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. If that doesn't work, there are a number of **Alternative Dispute Resolution (ADR)** options available to grape growers and grape purchasers, when navigating their way to a suitable resolution to a dispute.

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.

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**. Each of these ADR options (along with suggested clauses for contracts) is explored further below.



**Figure 1:** Alternative dispute resolution versus legal proceedings.

## Mediation

Mediation is a **confidential and voluntary process** where those parties involved in a dispute jointly explore and attempt to reconcile their differences. An independent and neutral third party can be brought in to assist the parties to negotiate and reach a decision about their dispute. A mediator has no authority to impose a settlement. Their strength lies in their ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

Mediation is particularly useful in complex matters involving parties who have an ongoing contractual relationship, where less formal communication may be helpful.

### **An example of a standard mediation clause:**

*‘Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules.’*

For more information about mediation contact the Institute of Arbitrators and Mediators Australia: [www.iama.org.au/what-we-do/mediation](http://www.iama.org.au/what-we-do/mediation)

Another more recent option is to use the mediation services of the SA Small Business Commissioner, [www.sasbc.sa.gov.au](http://www.sasbc.sa.gov.au) or phone toll-free 1800 072 722

## Expert determination

Expert determination is an alternative procedure for the resolution of disputes, based upon the decision of an independent and suitably qualified third party. The parties agree beforehand to be bound by the decisions of an independent expert. Expert determination is often the quickest and most effective way of resolving a dispute that is relatively simple in content or disputes that are essentially technical in nature.

The expert has a duty to act fairly and impartially between the parties, giving each party a reasonable opportunity to present its case.

### **An example of a standard expert determination clause:**

*‘Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to an expert in accordance with, and subject to, The Institute of Arbitrators and Mediators Australia Expert Determination Rules’*

For more information about Expert Determination contact the Institute of Arbitrators and Mediators Australia: [www.iama.org.au/what-we-do/expert-determination](http://www.iama.org.au/what-we-do/expert-determination)

## **Signatories to the Australian Wine Industry Code of Conduct**

Signatories to the Australian Wine Industry Code of Conduct agree to be bound by its rules, including the use of ‘Independent Experts’ to resolve disputes over wine grape price or downgrades or rejections in the vineyard. Subject to compliance with ‘the Code’, the decision of the ‘Independent Expert’ is final and binding on all parties and cannot be appealed or challenged except in the case of a manifest error or proven misconduct. The independent expert is chosen jointly by the parties from a list maintained by the Code secretariat. This list can be obtained from the website or by contacting the Winemakers’ Federation of Australia Wine Grape Growers’ Australia.

The resolution procedure and the timing of each step within ‘the Code’ for resolving issues over wine grape price, disputes over downgrades or rejections in the vineyard, can be found on the Code website [www.wineindustrycode.org](http://www.wineindustrycode.org) or at [www.wgga.com.au](http://www.wgga.com.au).

## 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.

- ★ A small case, for example, may be heard on the basis of documentary submissions alone, which can reduce its costs significantly.
- ★ Other more complex cases may benefit from a more judicial style of hearing in which formal claims and defenses are lodged, and evidence is put forward by each party and tested by cross-examination.

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.

Arbitration should be selected as the preferred process for dispute resolution when parties require defined procedures that are a subset of those available in court but without the delays, public access or formality. Under the direction of a qualified arbitrator, it is an expedient, private and efficient method of dispute resolution.

### **An example of a standard arbitration clause**

The standard clause, which is recommended for insertion in agreements where arbitration is the desired method of resolving a dispute, is:

*‘Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations.’*

For more information about arbitration contact the Institute of Arbitrators and Mediators Australia, [www.iama.org.au/what-we-do/arbitration](http://www.iama.org.au/what-we-do/arbitration)

### **Where can I seek guidance on the option that will best suit the nature of the disagreement?**

The **Institute of Arbitrators and Mediators Australia** can provide assistance in working out the best ADR option to suit the nature of your disagreement. The SA Chapter of IAMA can be contacted by calling 1800 724 762 (1800 SA IAMA), or visiting [www.iama.org.au](http://www.iama.org.au).

### **What are the options when ADR fails?**

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.



## SECTION 4 – PAYMENT PROBLEMS

### What can a grape grower do if they have not received payment for their grapes?

It is important for grape growers not to ignore nagging warning signs of non-payment until it becomes too late to protect them from recovering outstanding monies. The most common warning signs are the following behaviours from the purchaser:

- ★ loss of an important employee or manager
- ★ offers for arrangements to avoid cash payment, e.g. profit sharing
- ★ slow or late payments
- ★ messages not returned, letters/emails unanswered
- ★ agrees to meet but fails to attend
- ★ promise of full payment- cheque arrives and its less
- ★ asks for documentation more than once
- ★ payments made by post-dated cheques
- ★ unjustified disputes in order to delay settlement
- ★ tells elaborate story about securing financing
- ★ vaguely states “We’re doing the best we can”
- ★ indicates they have more important bills to pay
- ★ claims they won’t be able to pay until they collect their own receivables

Rumours of others experiencing the same problem are also an important signal.

#### *Creditor Watch*

Creditor Watch ([www.creditorwatch.com.au](http://www.creditorwatch.com.au)) is an online service that can be used to:

- ★ search for a business using its Name, ABN, ACN or Account Number
- ★ review a company’s credit file to access important historical data and assess their credit risk
- ★ monitor a business to receive alerts when changes like adverse finding or defaults occur or it comes under administration

There is a fee to use the service but at the time of this update a month’s free trial was available.

#### *Debt retrieval*

If payment to a grape grower is outstanding but insolvency procedures have not been instigated, it may be possible to recover payment by being fair, but firm.

1. The first action is to send a ‘**Letter of Demand**’ that outlines in writing the amount owed, and the time frame for payment (for example, 10 days). The creditor (the person owed money) must sign and date the letter. You may find it advantageous to have a Solicitor send the letter on your behalf
2. If there is no response, send another letter of demand outlining a final period for payment (for example, 21 days) after which ‘winding up’ proceedings will commence.

Often this is sufficient for receipt of the outstanding monies owed. However, if your letters are ignored or your demand is refuted, you have the option of taking the party to court, or you may wish to follow this up by making an application to the courts for a ‘winding up’ order.

## Wine Grapes Industry Act

The Wine Grapes Industry Act fixes the terms and conditions implied in every sale of wine grapes as below:

<i>For grapes delivered:</i>	<b>First payment</b>	<b>Second payment</b>	<b>Third payment</b>
before 1 April	1/3 by the end of the month following the month of delivery	1/3 by 30 June	1/3 by 30 Sept
1 April to 1 May	1/3 by 31 May	1/3 by 30 June	1/3 by 30 Sept
After 1 May	2/3 by 30 June	1/3 by 30 Sept	

For more information about these terms visit: [www.pir.sa.gov.au/wine/](http://www.pir.sa.gov.au/wine/) (go to the section on 'Legislation', and look for 'Terms and Conditions of Payment').

The Act requires that if a purchaser of wine grapes does not make a payment within the times set out above, the grower must be paid interest on any amount that remains outstanding. The interest rate used is based on the Commonwealth Bank standard overdraft rate plus 1% per annum until 31 December, and thereafter at the standard rate plus 5% per annum.

If grape growers have not been paid according to the legislated terms, they should contact PIRSA who, upon request, will write a letter (maintaining grower anonymity) to the offending party seeking prompt payment. If no payment is forthcoming then a grower may choose to initiate legal proceedings.

It's important that you factor in the interest rate when seeking to recover outstanding payments.

Grape growers should be particularly wary of any company in the marketplace which is attempting to buy grapes, while still making late payments to grape growers for grapes supplied in the prior vintage. This is illegal in South Australia, (*for more information see Section 1*).

## Winding up order

A winding up order is the most serious action that can be taken against the company. Often the company has breached any trust the creditor had; payment deals have failed, cheques bounced and, most importantly, the directors have not kept their word to pay.

You can make an application for a 'winding up' order if the debt remains unpaid for 21 days after service of a statutory demand (section 459E(2) of the Corporations Act 2001). You should obtain legal advice on how to make statutory demand

Typically, a creditor asks a solicitor to make a petition to the Supreme Court (in your State) or the Federal Court of Australia to 'wind the debtor company up' to recover debts, or to stop the company making its debts worse. It is important for anyone considering this action not to make vexatious claims.

For more information on steps to be taken in obtaining a winding up order go to [www.fedcourt.gov.au](http://www.fedcourt.gov.au) and select 'Law and Practice' then under 'Corporations' select 'Winding up guide'.

## What is the grape grower's position if a grape purchaser becomes insolvent?

A company is said to be insolvent when it is unable to pay all its debts, as and when they fall due for payment.

Section 588G of the *Corporations Act 2001* places a duty of care on directors of a company to prevent it from incurring debts that it is not able to pay. There are severe penalties for trading while insolvent and these cases are often referred to ASIC for further investigation and possible criminal prosecution.

If a company is placed in administration, receivership or liquidation (see explanations below) it is important that you contact the administrator or receiver and advise them of the details of the monies owed to you.

### *Secured and unsecured creditors*

If a company is insolvent, there are a number of mechanisms available to creditors to pursue outstanding funds. There is an important difference between secured and unsecured creditors.

- ★ A **'secured'** creditor is someone who the company has given a 'charge', such as a mortgage over all or part of its assets in return for value, usually loan funds.
- ★ An **'unsecured'** creditor is a creditor who does not have a charge over the company's assets, for example, a grape grower who has sold their grapes to a grape purchaser but has not received payment, is referred to as an unsecured creditor.

In the event of liquidation, secured creditors have higher ranking to claim outstanding money owing to them than unsecured creditors. One reason to consider negotiating to have a Personal Money Security Interest clause included in any grape contracts is to move up the hierarchy for payment. (Refer to Personal Property Security Register information in section 2 and appendix 2.)

## Voluntary administration, liquidation and receivership

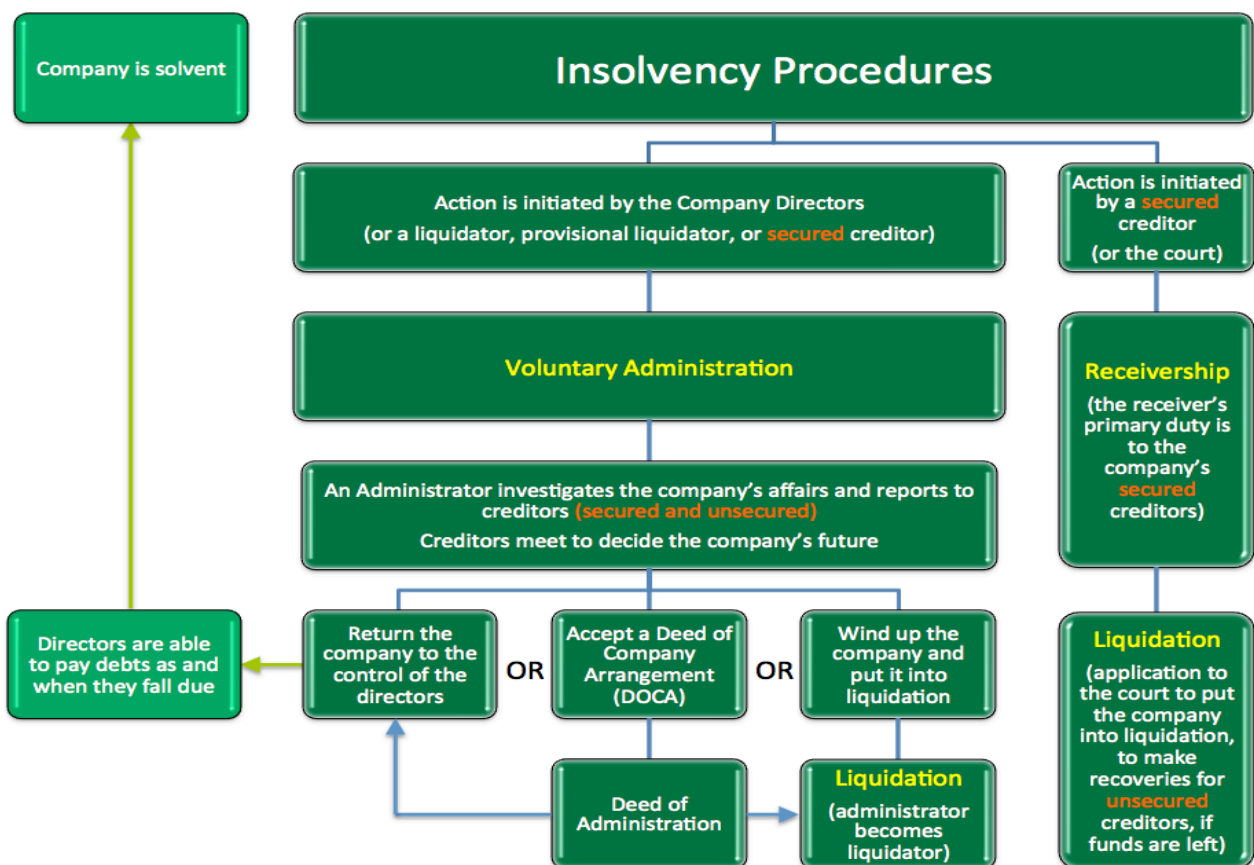
It is possible for a company to be in receivership and either administration or liquidation at the same time. These terms are explained below.

### *Voluntary administration*

If a company is in financial difficulty, the director may choose to place it in voluntary administration. This provides the company with breathing space while the company's future is resolved, and decisions are made which are in the best interest of the company and its creditors. Banks often use voluntary administration as the preferred way of resolving a company's future quickly, rather than appointing a receiver.

The directors of the company can initiate voluntary administration along with its creditors, by entering into a binding agreement called **'Deed of Company Arrangement' (DOCA)**, which governs how the company's affairs will be dealt with. An independent and suitably qualified person (voluntary administrator) can then take full control of the company, to try and work out a way to save either the company, or the company's business. If this isn't possible, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had been placed straight into liquidation.

For more information go to the ASIC website [www.asic.gov.au](http://www.asic.gov.au) and search for 'Voluntary administration – a guide for creditors'.



**Figure 2:** Options available to grape growers once insolvency procedures have commenced.

### Liquidation

In the event of liquidation an independent and suitably qualified person takes control of the company so that its affairs can be wound up for the benefit of its creditors. The duties of a liquidator include selling assets, enquiring into the failure of the liquidated company, and reporting any alleged misconduct to the Australian Securities and Investments Commission (ASIC).

A liquidator also distributes the proceeds of asset sales. It is important to note that wine grape growers are unsecured creditors and, therefore, have a lower ranking than secured creditors in terms of any dividends that may be distributed by the liquidator (if there are funds left to distribute). It may be possible for grape growers to gain a greater level of security (improved rights as a secured creditor) under the new Personal Properties Securities Act that comes in to effect in May 2011.

For more information go to the ASIC website at [www.asic.gov.au](http://www.asic.gov.au) and search for 'Liquidation – a guide for creditors'. For information about the PPSA, go to [www.lavanlegal.com.au](http://www.lavanlegal.com.au) then go search for 'Personal Property Securities Act' or 'wine law publications'.

### Receivership

A company is said to be in receivership when a 'secured' creditor appoints a receiver because the company has defaulted on a loan repayment. The receiver can choose to continue running the business, close it down, or sell it off. It is important to note that their principal task is to realise sufficient funds to repay the secured creditor. They are not there to deal with claims from unsecured creditors, in this case grape growers, who may be owed money for their grapes. For this to occur, an unsecured creditor would need to make application to the court to have the company put into liquidation on the basis of an unpaid debt, in an attempt to recover any monies owed if there are any funds left to extract.

For more information go to the ASIC website at [www.asic.gov.au](http://www.asic.gov.au) and search for 'Receivership – a guide for creditors'.

## APPENDIX 1

### Terminology and further information

Term	Definition
<b>Administrator</b>	An external administrator appointed to carry out the administration of a company.
<b>Alternative dispute resolution (ADR)</b>	The process for resolving disputes outside of the court system. Examples of Alternative Dispute Resolution (ADR) include mediation, expert determination, and arbitration.
<b>Agreement</b>	Agreement occurs when one person accepts the other person's offer, so there has been both an offer and acceptance of that offer. This may or may not be legally binding. For more information about a legally enforceable agreement, see 'contract'.
<b>Arbitration</b>	An ADR procedure for resolving disputes that involves less formality than a court hearing but is still legally binding.
<b>Bankruptcy</b>	An insolvency procedure that applies to an individual person, not to a company.
<b>Bilateral contract</b>	Bilateral means a contract is binding on both sides.
<b>Breach of contract</b>	The failure by one of the parties to a contract to satisfactorily perform the service or action agreed to in the contract.
<b>Code Administration Committee</b>	'The Code' Administration Committee is charged with managing the operation of the Australian Wine Industry Code of Conduct. The Secretariat (The Accord Group) can be contacted on, Phone: (02) 9264 9506, Fax: (02) 9264 8268, Email: <a href="mailto:secretariat@wineindustrycode.org">secretariat@wineindustrycode.org</a>
<b>Contemporaneous notes</b>	Notes taken at the time, or shortly after an event or incident, while the relevant details are fresh.
<b>Contract</b>	To form a contract, there are three requirements: an agreement (offer and an acceptance of that offer), an intention to create legal relations, and consideration (an agreed price).
<b>'Cooling off' period</b>	The time during which a purchaser can withdraw from a contract after signing.
<b>Creditor</b>	You are a creditor of a company if the company owes you money. Usually, a creditor is owed money because they have provided goods (such as wine grapes) or services, or made loans to the company and have not yet received payment.
<b>Debtor</b>	A person who owes a debt to another person or entity.
<b>Expert determination</b>	An independent and suitably qualified person is engaged to make a determination (decision).
<b>Insolvent</b>	A company is unable to pay all debts when they fall due for payment.
<b>Legally binding</b>	Able to be enforced by law.
<b>Letter of demand</b>	A notice from a creditor that legal action will be taken if the debt is not paid.
<b>Liquidator</b>	A natural person appointed to administer the liquidation of a company.
<b>Mediation</b>	A form of ADR where an impartial third party helps communication and negotiations between the parties, but does not decide the dispute. The outcome is not legally binding.
<b>Receiver</b>	An external administrator appointed by a secured creditor to realise enough of the assets subject to the charge to repay the secured debt. Less commonly, a receiver may also be appointed by a court to protect the company's assets or to carry out specific tasks
<b>Secured creditor</b>	A 'secured' creditor is someone who the company has given a 'charge', such as a mortgage over all or part of its assets in return for value, usually loan funds.
<b>Solvent</b>	A company is able to pay all debts when they fall due.
<b>Unconscionable conduct</b>	Unconscionable conduct is unfair or unreasonable conduct in business transactions that goes against good conscience. The exact meaning of 'unconscionable conduct' is not specifically defined in Australian consumer law. However, there are several factors that the court considers when deciding if a party has acted unconscionably. For more information about unconscionable conduct and a list of the factors which a court may take into account when determining whether unconscionable conduct has occurred, an electronic copy of 'Guide to Unconscionable Conduct' can be downloaded from the ACCC website, go to <a href="http://www.accc.gov.au">www.accc.gov.au</a> and search for 'unconscionable conduct'.
<b>Unsecured creditor</b>	An 'unsecured' creditor is a creditor who does not have a charge over the company's assets. For example, a grape grower who has sold their grapes to a grape purchaser but has not received payment is referred to as an unsecured creditor.
<b>'Winding up' order</b>	A court order for the 'winding up' of a company. The first step in court liquidation. Usually made after an application by a creditor.

## Useful websites and contact details

The following sources of information have been identified for use by, grape growers and grape purchasers, to ensure they are well informed about entering into wine grape sale agreements. Click on the following links or enter the search phrase into your internet search engine to find out more.

- The Australian Wine Industry Code of Conduct - [www.wineindustrycode.org](http://www.wineindustrycode.org)
- Wine Grapes Industry Act 1991 Terms and conditions of payment - [www.pir.sa.gov.au/wine/legislation/terms\\_and\\_conditions\\_of\\_payment](http://www.pir.sa.gov.au/wine/legislation/terms_and_conditions_of_payment)
- Australian Securities and Investments Commission (ASIC), Insolvency information sheets - [www.asic.gov.au/insolvencyinfosheets](http://www.asic.gov.au/insolvencyinfosheets)
- Phylloxera and Grape Industry Board of South Australia South Australian Wine Grape Crush Survey - [www.phylloxera.com.au/statistics/utilisation/](http://www.phylloxera.com.au/statistics/utilisation/)
- Wine Australia Winegrape Purchases Price Dispersion Reports [www.wineaustralia.com](http://www.wineaustralia.com) (Go to Winefacts and search for Price Dispersion reports)
- Winegrape Assessment in the Vineyard and at the winery - [www.wineindustrycode.org/Winegrape\\_Assessment.pdf](http://www.wineindustrycode.org/Winegrape_Assessment.pdf)
- SAWIA's Employment Handbook - [www.winesa.asn.au](http://www.winesa.asn.au)

The following organisations and key contacts may be able to provide advice and assistance on a range of industry related issues:

- Wine Grape Council of South Australia - [www.wgcsa.com.au](http://www.wgcsa.com.au)
- Wine Grape Growers' Australia - [www.wgga.com.au](http://www.wgga.com.au)
- Barossa Grape & Wine Association - [www.barossa.com](http://www.barossa.com)
- Winemakers' Federation of Australia - [www.wfa.org.au](http://www.wfa.org.au)
- South Australian Wine Industry Association - [www.winesa.asn.au](http://www.winesa.asn.au)
- PIRSA Grape and Wine - [www.pir.sa.gov.au/wine](http://www.pir.sa.gov.au/wine)
- Phylloxera and Grape Industry Board of South Australia - [www.phylloxera.com.au](http://www.phylloxera.com.au)

## APPENDIX 2

### Sample Personal Property Security Interest clauses for inclusion in grape and wine contracts

#### (1) Where Grapes or Wine are Sold with Credit Extended (i.e. typical arrangement)

##### Agreement to create the Personal Property Security Interest

"The (*supplier/distributor etc*) claims a purchase money security interest, as defined in the Personal Property Securities Act 2009 (Commonwealth) in the (*Description of goods, i.e. grapes*) so as to secure payment of the full purchase price of such items as are delivered from time to time".

##### Acknowledgement by the Customer

1. The Customer grants to the (*supplier/distributor*) a PMSI in the Personal Goods and any proceeds of their sale to secure payment of the purchase price of the Personal Goods delivered from time to time.
2. The Customer agrees not to do or permit anything to be done that may result in the PMSI granted to the (*supplier/distributor*) to rank or to be subjected to priority to any other Personal Property Security Interest in favour of any other party.
3. The Customer agrees to take such further steps which may be required by the (*supplier/distributor*) to take additional or better security under the PPS Act over the Personal Goods and the proceeds of their sale, or to maintain the ability to claim and realise the Security Interest, including its priority, pursuant to the PPS Act or by reason of the financing statement (in order to avoid any doubt, this obligation on the part of the Customer includes obtaining written consents, supplying information, signing forms, executing documents, whether on the part of the customer, any financier to the Customer, a lessor or landlord of the Customer or any third party having a claim or interest over land or a building in respect of which the Personal Goods are located at present or at any time in the future.
4. The Customer agrees to provide to the supplier when requested all details of the location of the Personal Goods.

#### (2) Where Bulk Wine is placed on Consignment

"In consideration of the agreement on the part of the Supplier to supply and to continue to supply Personal Goods to the (*dealer/customer/distributor etc*) in accordance with these terms of trade the (*dealer/customer/distributor*) agrees and acknowledges the consignment Personal Goods delivered into its possession and the proceeds of the sale constitute collateral in respect of which the supplier is entitled to a Personal Property Security Interest until such time as the supplier receives payment in full on account of each such supply of collateral or the proceeds of its sale".

NB The descriptor terms of the parties used in the clauses will need to be varied to fit in with the language used in the grape or bulk wine contract

## Personal Property Security Register Terminology

**"Grantor"** - A person that you sell goods to which a security interest has been registered (i.e. they grant you permission to register an interest).

**"Personal Goods"** - this now reads for words such as "chattels", "choses in action", "shares", "paper securities", "Personal Goods" and many more.

**"Personal Money Security Interest"** - known by the acronym "PMSI". In relation to PPSR there are four types of PMSI:

1. retention of title clauses which are relevant to grape growers and people or entities dealing in bulk wine;
2. where a financier provides funds to a customer to enable the purchase of plant, equipment or other Personal Goods (i.e. personal property) over which the financier takes security;
3. a leasing arrangement or a commercial bailment where the term exceeds three months in the case of motor vehicles, boats and aircraft, or exceeds one year for other types of personal property;
4. Personal Goods made available on consignment which is relevant to people or entities dealing in bulk wine..... The same situation applies to the vendor of bulk wine consignment arrangements exist.

**"Personal Property Security Interest"** - this means an interest in Personal Goods over which a security interest is claimed.

**"Perfection"** - this is the act of registration

**"Financing Statement"** - this in effect means entering a security interest on the register and obtaining confirmation of this. In effect, this is evidence of the registered security.

**"Collateral"** - the personal property that is the subject of a security interest. For farmers this includes crops or livestock.

**"Proceeds"** - means the proceeds of the sale or other dealing in the collateral.



## APPENDIX 3

### Vineyard access considerations

Grape growers should have clear vineyard access protocols in place for grower liaison officers, winemakers, viticulturists and other industry personnel who may wish to enter their vineyard. A visitor sign-in sheet is an important first step in establishing and maintaining protocols for visitors. It is good practice to require that all visitors report to an office or person on arrival and prior to gaining access to a vineyard, at which time they can be required to fill in a sign-in sheet.

#### Visitor 'sign in' sheets

A 'sign in' sheet enables you to:

- ★ Alert visitors to potential risks such as the application of chemicals in the vineyard, re-entry periods etc.
- ★ Explain the communication requirements (mobile phone, UHF radio) if visitors are working alone in remote parts of the vineyard
- ★ Provide relevant information or instructions necessary to ensure appropriate first aid is provided without delay and the location of first aid kits
- ★ Ensure visitors adhere to the Phylloxera protocols and maintain vineyard hygiene to stop the introduction of key vineyard pest and weed species, and
- ★ Trace back, to locate a particular visitor or contractor who may have entered the property if any issues arise in the future.

#### Vineyard protection and Phylloxera prevention protocols

*The following information has been summarised from the Phylloxera and Grape Industry Board of SA (PGIBSA) 'Vineyard Protection and Phylloxera Prevention Protocol 2010'.*

PGIBSA recommends that all grape growers apply the strategies contained in the 'Vineyard protection and Phylloxera prevention protocol' to safeguard their vineyard from phylloxera and other pests, diseases and weeds.

#### General guidelines for restricting vineyard access:

- ★ **Controlled entry point** – Have one entry point to your vineyard and forbid unauthorised entry or entry when the property is not supervised.
- ★ **Signs** – Use signs to advise conditions and restrictions on entry to the property (including contact phone number for people to ring if access is required).
- ★ **Restrict entry** – Don't encourage unnecessary visits to the block itself. Prohibit entry to vine rows as much as possible.
- ★ **Check recent vineyard visits** – Ask all potential visitors about recent visits to vineyards – particularly in other regions, states or countries.
- ★ **Fences and gates** – Physically restrict access to your vineyard as much as possible with fences and (closed) gates.
- ★ **Clean footwear and equipment** – Ensure visitors arrive with clean boots and/or tools. Prepare a chlorine dip daily for visitors to use.



For more information and to view the current Phylloxera vineyard protection protocols, visit [www.phylloxera.com.au](http://www.phylloxera.com.au) (resources section).

#### Public (or legal) liability insurance

Public liability insurance (also known as 'legal liability' insurance) covers your potential liabilities to third parties for personal injury or property damage, should you or your business be found to be negligent (having breached its 'duty of care'). It is important to maintain your insurance to cover your business in such an event.



## **APPENDIX 4**

### **Marketing your winegrapes**

*Provided by Wine Grape Growers Australia.*

# Improving your winegrape sales in a difficult market

## *Guidelines for growers*

*These guidelines have been produced by WGGA based on conversations with a number of growers<sup>1</sup> from different regions, who have found ways to be successful sellers in a “buyers’ market”. The common theme is finding ways to add value, rather than being a “price-taker”. Whether you are growing high yield, commercial quality fruit or low yield, premium fruit, whether you are in a warm inland region or a cool/temperate region, most of these guidelines can be applied.*

*Please note that this document does not constitute specific marketing advice, and may not suit every grower. The experiences of other growers are shared to offer others something to try.*

### Assess your position first

Before you spend time and money on marketing your grapes, take a good hard look at the block to see if it is worthwhile marketing it. Alternatively, would it be better to top-work or remove the block altogether, rather than wasting more resources on it? Ask yourself the following questions:

- ✓ Is the vine and trellis health good enough in this block for say the next 5-10 years - that is, am I making a long-term investment in a long-term product?
- ✓ Is this variety right for my area and soils – that is, will there be a good customer base for it?
- ✓ On basic analysis of my costs, can this block be profitable at reasonable market prices?

### Stand out from the crowd

Find your point of difference and emphasise it. Is it ....

- |                               |                                  |
|-------------------------------|----------------------------------|
| ✓ consistency,                | ✓ location,                      |
| ✓ early ripening,             | ✓ vineyard protection protocols, |
| ✓ quality,                    | ✓ the family history....?        |
| ✓ a special clone or variety, |                                  |

Look for opportunities to enhance your business by creating and building on a point of difference.

### Market your product

Sell an “image” or brand – rather than just grapes. For example, consider creating a name and a logo and then display it on your vehicles, shirts, hats etc. A professional appearance sells the message that you are a professional supplier. For a relatively small investment, you can get assistance to create a website with the same brand image and information about your grapes, your vineyard, its history and its owners. You can include the names of wine that the fruit has gone into or anything else that contributes to your story. Don’t get carried away, though – it is important to set a realistic marketing budget and stick to it.

<sup>1</sup> WGGA would like to thank Anthony Scholz and Bob Reichstein in particular for sharing their experiences.

## Collect and provide information

- ✓ Keep maturity testing results for each block over time and turn them into graphs and tables.
- ✓ Create a short information sheet or even a newsletter<sup>2</sup> on your vineyard: location, soil type, varieties grown, management methods... everything you have.
- ✓ Bring in an independent assessor to give you a quality assessment at vintage time (this can also be useful in the case of a dispute).
- ✓ Consider using computer software such as GrowData or VineBiz to keep records of your vineyard performance – eg irrigation, fertigation, cash costs, yield, prices paid – over time.

## Invest in technology

Take the “guesswork” out of growing grapes by investing in technology and equipment such as soil moisture monitors, or even a weighbridge. The benefits and savings will justify the investment, as well as providing you with a point of difference that can help you impress potential buyers and stay ahead of your rivals.

## Actively seek out potential buyers

- ✓ Don't wait for buyers to come to you. Work out who you want to sell to and contact them.
- ✓ Spread your risk: try to secure at least three regular buyers. Look for wineries that have signed the Code of Conduct and are known to be fair to their growers and willing to work as partners with them.
- ✓ Face-to-face contact is very important. Be prepared to put in time and money initially to knock on doors. If they aren't interested, leave them a card, resume, newsletter or information sheet and follow up later.
- ✓ Even if a winery isn't looking for your product, you can still invite them out to your vineyard to see for themselves how the vineyard is run and what practices are been adopted. They still may not buy your grapes in the short term, but you are building a relationship for the long term.
- ✓ Be persistent: you need to allow up to several years to build relationships with purchasers – it will not happen overnight.
- ✓ Once you do find someone who is interested, you can expect to start with one year contracts, and to have a less strong bargaining position; keep an eye on the future and be willing to make some concessions initially while you build trust and familiarity.

***Aim to put yourself in a position where the winery wants you – not the other way around.***

## Build and maintain relationships with your customers

Be willing to work with your winery. Use the principles of good customer service.

- ✓ Prove yourself accessible and pleasant to deal with – responsive to winery's requests and willing to discuss things openly.
- ✓ Fill in your spray diary on time and get your Entwine certification.
- ✓ In terms of vineyard management, different wineries may want things done differently. Insist on clear, consistent guidelines but then be willing to follow them (within reason!) and help the winery to achieve its objectives. Discuss with your off-taker how your effort will be rewarded.
- ✓ Follow up with the winery after vintage and get feedback on how things went from their point of view. Make this a part of your normal business practice.
- ✓ Think smart: how can you add value that is greater than the cost?

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<sup>2</sup> The Barossa Grape & Wine Association has a template available that growers can personalise.

## Make it a partnership

- ✓ Wineries are also finding marketing tough in the current environment. Challenge the traditional demarcation that is expected between the grower and the winemaker and work with your winery to achieve the finished product.
- ✓ Try to have some understanding of what happens to your fruit once it arrives at the winery – eg by participating in wine tastings, winery visits and grower days.
- ✓ Get to know the different winery representatives: winemakers, viticulturists, GLOs.

## Get involved in your region

Join committees, promotional or special interest groups in your region, attend workshops and participate in field days to get known and meet potential buyers – as well as improving prospects for your region as a whole. You will be seen to be someone proactive, willing to learn and willing to contribute. The information you receive helps you stay ahead of the game, while getting away from the vineyard can also help you to keep your spirits up in difficult times.

## Stay positive

Sometimes when things are really tough it is hard to motivate yourself to keep going in the face of knock-backs. Someone on the sidelines cheering you on can make all the difference. This could be a professional – eg a local consultant, a mentor within the industry such as an industry association officer or GLO, or a trusted friend/family member.

***Believe in what you are doing and be serious about doing the best you can. The rest should follow.***

## APPENDIX 5

### Improving your negotiation outcomes

*Provided by Wine Grape Growers Australia.*

# Improving your negotiation outcomes

## *Guidelines for growers*

*As a grape grower, it is likely you will need to negotiate with a winery or winemaker regarding the purchase of your fruit. You may also need to negotiate with contractors, suppliers, employees and people in other areas of your life. Sometimes, a dispute arises and you may be negotiating in a conflict situation. Growers may be afraid that holding out for a reasonable price or “standing up for themselves” will lead to retaliation by the winery and loss of business. Good negotiation skills are about getting the best outcome for yourself, without compromising your relationship with the other party. A good negotiation has a win-win outcome.*

### Step 1: Preparation

Successful negotiation is 80% preparation. Consider:

- ✓ **Get advice first!**  
It's pretty much useless getting advice once you've reached an agreement. If you are unsure of your position, your rights, or the normal or usual terms of a grape sale agreement, get professional advice BEFORE you start discussions.
- ✓ **Do some research**  
How good is your fruit? It is essential to have an idea as to how good your fruit quality is and how large your crop is likely to be.  
  
What is the current market price? How does your product compare with others? What can you find out about supply and demand, their business or other relevant factors?
- ✓ **What are my goals, and what is my 'least' position?**  
Be clear about what your objective is and what is the least acceptable price or terms that you will accept. Beyond this point, do not settle in any circumstances. Write it down so you can't revise it “in the heat of the moment”.
- ✓ **What could I trade?**  
If you have nothing to trade, you are not really negotiating. Take that into account when deciding your opening position. Identify the strengths and weaknesses of your position and be realistic about who has the most power.
- ✓ **How would the other side answer the above questions?**  
Think about the other party's position. What would they want to achieve? What might they be willing to compromise on? What are their strengths and weaknesses? The better you can anticipate their perspective, the better you can target your approach.
- ✓ **Who am I negotiating with?**  
How well do you know the people or person you will be negotiating with? Are there any cultural or personality factors that might affect their negotiation style? How can you adapt yours to best suit the situation?  
  
Make sure you will be negotiating with the decision-maker – not someone who has to refer back to an absent supervisor to authorise an agreement.
- ✓ **What can we offer each other and what relationship do we want?**  
The best approach is often not to “win at all costs” but to negotiate a “win-win” solution based on cooperation. This is easier if you can define a common goal with the other side (eg “increase sales of this wine in a particular market segment”). Remember: Your customer is not your enemy and a long term arrangement with a good winery will be a valuable asset to your business – it's worth working hard to create.



## Step 2: Negotiate

This stage is all about good communication skills

- ✓ **Be the “negotiation navigator”**  
If you take the lead, you will naturally be in a more powerful position to drive the discussion.
- ✓ **“Break the ice” and establish ground rules for the negotiation**  
A good atmosphere and mutual understanding will lead to a better outcome.
- ✓ **Listen, listen, listen**  
The more you listen and ask questions, the better you will understand the other person’s position, which will best enable you to respond. Invite them to state their opening position first.
- ✓ **Be assertive**  
This means clearly stating your own needs and being respectful of the other person’s needs and their right to have and to express them. It also means being open and honest and expecting the same of the other person.
- ✓ **Know your growing costs and overheads inside out**  
It’s more likely that your customer will understand your position if you are able to give him/her exact reasons why you need to achieve a reasonable price.
- ✓ **Think outside the square**  
Look for what is really important to the other side – maybe there are alternative ways to achieve their objective without sacrificing your own position.
- ✓ **Look out for ploys and negotiating tactics**  
These work by trying to distract or confuse you so that you lose track of your objectives, or railroad you into signing a deal before you are really happy with the terms. Recognising and countering ploys will help to negotiate around them and stay focused.

## Step 3: Strike a deal

- ✓ **Bid for the best bargain**  
Aim high with your proposals. Your concessions should be small and tentative but sufficient to encourage the other side to respond. Try to convince the other side that they are getting more of a concession from you than you are really giving.
- ✓ **Negotiate in small chunks**  
Negotiate the easiest wins first. Acknowledge and sign-off on “mini-deals” along the way. For example: “Okay – we’ve agreed on the payment schedule and basis for price determination – can we look at the price itself now?”
- ✓ **Propose solutions/options**  
Put forward options as questions or suggestions, not statements. For example: “If I agree to this price on the Chardonnay, will you agree to take the Shiraz at XX price?”
- ✓ **Take into account the context of the negotiation**  
Ask yourself if it is worth nailing the other party to the wall on this occasion if you wish to develop or continue to have an effective relationship with them in future?
- ✓ **Close the deal**  
Check that everyone has the same understanding of what has been agreed. End on a positive note regardless of how the negotiation has ended up. Put the deal in writing and get it signed so there is no misunderstanding.
- ✓ **Get advice (again)**  
If the terms are complicated, or you are not sure what has been agreed or how to write it down, get advice from your own accountant, solicitor or regional association.

## If the negotiations get stuck .....

- ✓ **Try changing negotiators**  
An independent third party might help – or a different representative on one or both sides.
- ✓ **Walk away without burning bridges**  
Emphasise the positive aspects of the discussion and hold open the possibility of future talks.

## Negotiating disputes

- ✓ **Make sure your negotiation is “without prejudice”**  
This is a legal term for statements that cannot be used in court if the discussions break down and it ends up in court. Any offers or discussion under these terms cannot be referred to in court. Take care that proposals or suggested compromises put in writing are clearly marked “without prejudice” if appropriate.
- ✓ **Keep emotion out of it**  
Try to avoid getting angry or showing frustration.  
Concentrate on the issue, not the person (“play the ball not the player”) and don’t take anything personally – it’s the deal, not the person, you are there for. If they are showing anger, it is really about the situation, not you.  
Go back to basics – listen, ask questions, clearly state your own and try to understand the buyer’s needs.  
If things are getting heated – request a break to help everyone calm down.

## If the negotiations break down completely.....

- ✓ **Refer to the Australian Wine Industry Code of Conduct**  
Follow the informal facilitated resolution process outlined in the Code
- ✓ **Bring in an expert determination**  
Where both parties agree *in advance* to be bound by the decision of an independent expert.
- ✓ **Consider a mediator**  
An independent and neutral third party to assist you to reach an agreement
- ✓ **Avoid litigation if possible**  
Only go to court as a last resort – as this will be expensive, protracted and will usually result in the permanent breakdown of the relationship between you and the other party.

## More information

### **Australian Wine Industry Code of Conduct**

Voluntary code of conduct providing a framework for winegrape supply contracts and dispute resolution process

[www.wgga.com.au/winegrape-sales/code2](http://www.wgga.com.au/winegrape-sales/code2)

### **A Guide to Negotiating the Sale of Wine Grapes in the Barossa**

Barossa Grape & Wine Association 08 8563 0650

Very comprehensive resource recommended for all grapegrowers. Can be ordered from

[www.mybookingmanager.com/grapebooklet](http://www.mybookingmanager.com/grapebooklet)

### **sa.gov.au – search for “negotiation skills”**

Good general guidelines on negotiation skills for small business owners.

### **Training in negotiation skills – search on the Internet for corporate training providers**

## APPENDIX 6

### Sample wine grape purchase agreements

*Currently under development. See WGCSA for updates.*



## APPENDIX 7

### Wine Industry Code of Conduct

See [www.wineindustrycode.org](http://www.wineindustrycode.org) for more information.



# Code of Conduct for Australian Winegrape Purchases

September 2020



FOR INDUSTRY, BY INDUSTRY

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## Preamble

### Background

This Code of Conduct for Australian Winegrape Purchases (**Code**) has been developed for the Australian wine sector by Australian Grape and Wine Incorporated (**AGW**) and its Code Management Committee (**Committee**), a committee with equal representation of winemakers and grape growers.

This Code is a non-prescribed voluntary industry code. Winemakers who elect to become Signatories will be governed by this Code in their commercial dealings with Growers. Where the Code is incorporated into a contract by reference, it will have contractual force.

### Principles

In developing this Code, the Committee reached mutual agreement on several important principles, including that the Code should:

- be practical and user-friendly;
- be written in plain English, avoiding ambiguity and vagueness;
- allow for appropriate levels of flexibility, whilst providing parties to a grape supply agreement (**Agreement**) with confidence and certainty regarding purchasing and pricing arrangements;
- require Signatories to deal with Growers in good faith, and with due regard to each party's legitimate business interests;
- require that, where pricing is not fixed, the mechanism for determining price be clearly stated in the Agreement;
- be supported by the provision of accessible, relevant and timely analysis of market trends, particularly in warm climates, to assist Grower decision-making and adaptation to changing market conditions;
- prevent Growers from suffering detriment for reasons other than those based on a failure to meet agreed specifications or other terms clearly outlined in their Agreement;
- prohibit unfair contract terms, including those involving unilateral variations;
- discourage lengthy payment terms; and
- introduce a dispute resolution process for parties to Agreements.

The Committee identified a number of considerations that every party to a transaction involving the sale and purchase of Grapes should have had regard to, in advance of entering into an Agreement. The Code highlights these considerations, but does not preclude parties from reaching their own arrangements in relation to these issues.

### Purpose and Aim

The purpose of the Code is to:

- provide a framework to support fair and equitable dealings between buyers and sellers of Grapes;
- provide an effective, practical and equitable dispute resolution process for raising complaints and resolving disputes arising between Winemakers and Growers; and
- improve Grower–Winemaker relations in a manner consistent with commentary of the ACCC in its Final Report dated September 2019 resulting from its [Wine Grape Market Study](#).

The Code aims to provide a foundation for building relationships between Growers and Winemakers that are equitable and mutually beneficial. Successful partnerships promote successful and sustainable winegrape growing and winemaking businesses, underpinning the prosperity and longer-term viability of the entire wine sector. Successful partnerships rely on respect and trust on the part of both parties. As a supplement to the Code terms, the green boxes outline additional considerations for creating successful partnerships that industry has endorsed as 'best practice'.

AGW encourages all Winemakers to sign up to the Code. Signing the Code indicates a commitment to fair dealing with Growers, which should gain the respect of the Grower community and support the sustainability of the Australian wine sector as a whole. That is very much in the interests of individual Winemakers.

The Code Management Committee will have the responsibility of assessing the performance of the Code and making recommendations to improve its operation. This is just one step in the journey of ensuring better commercial relationships through the supply chain.

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**Tony Battaglione**

Chief Executive Officer

Australian Grape and Wine Incorporated

21 August 2020



## Operative Part

### 1. Preliminary

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#### 1.1 Becoming a Signatory to the Code

A Winemaker may become a Signatory by providing written notice to the Committee.

#### 1.2 Effect of becoming a Signatory

- (a) Signatories agree to adopt and be bound by the provisions of the Code in their dealings with Growers.
- (b) Signatories acknowledge that the Committee may publish their names as Signatories.
- (c) Signatories shall provide the Grower with a copy of the Code (in either hardcopy or electronic form) prior to entering into a new Agreement (except a verbal Agreement referred to in section 3.2).

#### 1.3 Transitional Provisions

The transitional provisions contained in Appendix 3 govern the transitional period from the 2008 Code to this Code, until 31 December 2021, and apply to:

- (a) signatories to the 2008 Code; and
- (b) winemakers who were not signatories to the 2008 Code, but become a Signatory to this Code on or before 1 July 2021.

#### 1.4 Amendments to the Code

If there is a change to this Code, each Signatory must make a written offer to its Growers, within three months of the change taking effect, to amend its existing Agreements to reflect that change.

#### 1.5 Ceasing to be a Signatory

- (a) A Winemaker may cease to be a Signatory by providing written notice to that effect to the Committee, in which case the Winemaker will cease to be a Signatory on the date the notice is received by the Committee.
- (b) A Winemaker, who ceases to be a Signatory, may remain bound by provisions of the Code incorporated into their Agreements expressly or by reference.

#### 1.6 Breaches of the Code

- (a) Signatories found to be in breach of the Code will be referred to the Committee for potential removal as Signatories.
- (b) Where there is a breach of the Code, the Committee may, in its discretion, refer the matter to the ACCC or another relevant regulatory authority.

## 1.7 Freedom of Association

Signatories must not intentionally:

- (a) provide an inducement to a Grower to prevent the Grower from:
  - (i) forming an association of Growers; or
  - (ii) associating with other Growers for a lawful purpose; or
- (b) discriminate against a Grower for:
  - (i) forming an association of Growers; or
  - (ii) associating with other Growers for a lawful purpose.

## 2. Interpretation

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In this Code:

**2008 Code** means "The Australian Wine Industry Code of Conduct" as published in 2008 and updated in 2014 available on AGW's Code website. [www.wineindustrycode.org/](http://www.wineindustrycode.org/)

**ACCC** means the Australian Competition and Consumer Commission.

**AGW** means Australian Grape and Wine Incorporated (ABN 45 903 873 163).

**Agreement** means a grape supply agreement between a Signatory and a Grower for the sale and purchase of Grapes.

**AWRI** means the Australian Wine Research Institute (ABN 83 007 558 296).

**Base Price** means the price payable for Grapes, subject to adjustment by reference to the MP&C Standards and/or by the payment of a bonus after the Grapes (or resulting wine) have been assessed (which could be a Grade Price).

**Code** means this Australian Code of Conduct for Winegrape Purchases (as amended from time to time).

**Committee** means the Code Management Committee established pursuant to AGW's constitution.

**Complainant** means a party to an Agreement raising a Dispute.

**Conciliation Body** means an accredited alternative dispute resolution body that is included on the Committee's "Register of Approved Conciliation Bodies" on AGW's code website (as amended from time to time).

**Conciliator** means a person included on the Committee's "Register of Approved Conciliators" on AGW's code website (as amended from time to time).

**Dispute** means a dispute between the parties to an Agreement, in relation to a matter arising under or relating to the Agreement or the sale and purchase of Grapes under it.

**Final Report** means the Final Report of the ACCC dated September 2019 resulting from its Wine Grape Market Study.

**Geographical Indication** means an area the subject of a geographical indication registered under the *Wine Australia Act 2013* (Cth).

**Grade Price** means the price payable for Grapes assessed as being of a certain quality grade (which could be subject to adjustment by reference to the MP&C Standards or by the payment of a bonus after the Grapes (or resulting wine) have been assessed).

**Grading** means the determination of a particular quality grade that should be ascribed to Grapes based on their inherent quality (assuming they are mature, pure and in good condition).

**Grapes** means winegrapes.

**Grower** means a Person who produces Grapes for the purpose of sale to a Winemaker.

**Independent Expert** means an Independent Pricing Expert or an Independent Technical Expert, as the case may be.

**Independent Pricing Expert** means a person included on the Committee's "Register of Independent Pricing Experts" on AGW's code website (as amended from time to time).

**Independent Technical Expert** means a person included on the Committee's "Register of Independent Technical Experts" on AGW's code website (as amended from time to time).

**Industry Endorsed Standard Procedures** means the "Industry Endorsed Standard Procedures", for the sampling and assessment of grapes, must and wine (as amended and approved by AGW from time to time).

**Industry Guidelines** means the industry guidelines published by the AWRI on or around the date of publication of this Code and appearing on AGW's code website (as amended from time to time).

**MP&C Standards** means the standards by reference to which Grapes are assessed to determine whether they are mature, pure and in good condition (which is not an assessment of their potential to deliver a certain Grade or wine style).

**Person** includes a natural person, partnership, joint venture or corporation.

**Price Deduction** means a deduction from the Base Price, as a result of the assessment of the Grapes against the MP&C Standards.

**Respondent** means a party to an Agreement with whom the Complainant raises a Dispute.

**Secretariat** means the "Code Secretariat" appointed by the Committee and published on AGW's code website at the time the relevant Dispute is raised.

**Signatory** means a Winemaker who is a signatory to this Code.

**Time-Sensitive Dispute** is a Dispute which is, by its nature (considering the imminence of harvest, the perishability of Grapes upon harvest and all other matters relevant to the Dispute), a Dispute that the parties need to resolve very quickly.

**Winemaker** means a party who purchases, or who may purchase, Grapes from Growers, whether or not that party processes the Grapes.



### 3. Grape Supply Agreements

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#### 3.1 Agreements must be in writing

Subject to section 3.2, all Agreements must be in writing and expressed in clear terms.

#### 3.2 Verbal Agreements and Spot Contracts

Where a Winemaker and Grower reach an Agreement in relation to the sale and purchase of Grapes, and the Agreement is not in writing, the Winemaker must:

- (a) where harvest of the Grapes is not imminent — as soon as is practicable to do so, but no later than 7 days prior to the intended harvest of the Grapes;
- (b) where harvest of the Grapes is imminent — as soon as is practicable to do so, but prior to the harvest of the Grapes; or
- (c) where harvest has occurred at the time the Agreement was reached — as soon as is practicable to do so,

make a written record of the contents of the Agreement (including the parameters referred to in section 3.5), provide a copy of that record to the Grower (including by email) and make all reasonable efforts to obtain from the Grower, as soon as practicable, a written acknowledgement (including by return email) that the record is a complete and accurate statement of the contents of the Agreement.

#### EXPLANATORY NOTE

Section 3.1 states that Signatories' Agreements must be in writing. However, the nature of the wine sector is such that it is inevitable that many transactions are conducted in the "heat of vintage". These are sometimes arranged verbally, including by telephone.

Although verbal Agreements are enforceable as a matter of law, having a written record negates ambiguity, avoids the imperfection of human memory, promotes trust and fair dealing and helps ensure that Growers and Winemakers have transparency and certainty of their rights and obligations.

Accordingly, section 3.2 provides that Signatories, who reach verbal or "handshake" Agreements, must record the Agreement in writing and seek confirmation from the Grower as soon as practicable.

To make this process as simple and easy as possible, as a guide, AGW has developed a template (available on AGW's code website by clicking [here](#)) containing the key terms, which the Signatory can quickly complete and attach to an email to the Grower.

#### 3.3 Incorporation by Reference

- (a) Signatories' Agreements must contain a statement that the Code is incorporated into the Agreement by reference.
- (b) If the Code is incorporated into an Agreement by reference, and subject to clause 3.4 of this Code, to the extent of any inconsistency between the Agreement and the Code, the provisions of the Code, in force on the date that the Agreement was entered into, will prevail.

#### EXPLANATORY NOTE

Where a Signatory does not incorporate the Code by reference into its Agreements with Growers, it will be in breach of the Code.

Importantly, some transactions in the winegrape sector are subject to other laws that will prevail over the Code. Examples include the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*, the *Competition and Consumer Act 2010* (Cth) and, in South Australia, the *Wine Grapes Industry Act 1991* (SA).

### 3.4 Negotiated Alternative Arrangements

Where the Code mandates something, a Signatory may negotiate and agree an alternative position with a Grower, provided that position:

- (a) is negotiated in good faith and by mutual agreement;
- (b) leaves the Grower no worse off overall.

### 3.5 Elements of a Grape Supply Agreement

Signatories' Agreements must state:

- (a) the names of the parties;
- (b) the term of the Agreement, including any termination mechanisms;
- (c) the quantity, or any formula for determining the quantity (e.g. all Grapes from certain hectares), of Grapes being purchased;
- (d) a description of the Grapes being purchased (e.g. variety, Geographical Indication / region and/or vineyard sufficient to clearly identify those Grapes);
- (e) the price or pricing mechanism, consistent with section 4.1;
- (f) the payment terms, consistent with section 4.2,
- (g) the point of transfer of title;
- (h) the point of transfer of risk;
- (i) the process for determining the harvest/delivery time;
- (j) who bears responsibility for arranging, and paying the costs of, harvest and delivery;
- (k) the assessment requirements set out in section 5.1;
- (l) any additional material requirements of the Grower (e.g. relating to additives, documentation, container type, spray diaries, delivery directives, vineyard, grape, must or wine parameters, crop levels or handling of excess crop); and
- (m) any restrictions on the Grower relating to the assignment, leasing or other disposal of the relevant vineyard(s) or to a change in control of the Grower.



### BEST PRACTICE- HARVEST AND DELIVERY ARRANGEMENTS

Harvest and delivery of Grapes is highly time-sensitive and logistical challenges can be a common source of tension. The point at which risk in Grapes transfers from Grower to Winemaker is a key consideration of the Agreement.

Signatories must use their best endeavours to take delivery of Grapes as soon as possible after meeting agreed specifications (such as target Baumé, TA, pH or other analytical specifications). However, it should be acknowledged that, for logistical reasons or due to processing capacity constraints, they may not be able to take delivery of the Grapes immediately upon them attaining maturity.

As harvest delays can have serious yield and quality impacts, consideration should be given as to whether:

- viticultural risk should pass to the Winemaker after harvest is delayed for a material period of time due to a reason(s) within the control of the Winemaker; or
- the Grower should be compensated for prejudice to the crop due to a material delay in harvest outside of the control of the Grower.

## 3.6 Fair Dealing

- Signatories must deal with Growers in good faith, but they may have regard to their own legitimate business interests as well as those of the Grower.
- Signatories' Agreements should be clear, lawful and fair.
- Signatories' Agreements must not contain "unfair contract terms" (within the meaning of the *Australian Consumer Law*).

### EXPLANATORY NOTE

When entering into a new Agreement, Signatories should avoid presenting any offer on a "take it or leave it" basis. The Grower should be provided the opportunity to negotiate the terms of the Agreement and the Signatory should encourage them to seek legal advice.

Unfair contract terms are void under Part 2-3 of the Australian Consumer Law.

In its Final Report, the ACCC identified a number of terms of Agreements that may be unfair contract terms. These include:

- Right to renew clauses – the terms that require Growers to enter into new Agreements with Winemakers, upon expiry of their existing Agreements, but do not require Winemakers to match competitor offers.
- Ability to unilaterally vary Agreements – terms that give Winemakers broad unilateral discretion to vary terms of Agreements.
- Termination clauses – terms that allow Winemakers to terminate Agreements merely because Grapes become surplus to their requirements, at short notice.

Such terms need to be considered in the context of the Agreement as a whole, to determine whether they are unfair.

## 4. Grape Prices and Payment Terms

### 4.1 Agreements must set out price or pricing mechanism

- Agreements must clearly state one or more of the following:

- (i) the fixed price that the Signatory will pay for the Grapes;
  - (ii) the Base Price the Signatory will pay for the Grapes (subject to adjustment);
  - (iii) the Grade Prices the Signatory will potentially pay for the Grapes (whether or not subject to adjustment);
  - (iv) that the price payable for the Grapes will be the “fair market price” or the “weighted district average price” of the Grapes; or
  - (v) such other pricing formula that will be used to determine the price of the Grapes (which must be objective) and on what date the calculation will be made and notified to the Grower.
- (b) Signatories must not purchase Grapes on the basis of a pricing formula that gives the Winemaker the opportunity to substantially influence the price payable to the Grower.
  - (c) If the price of the Grapes (or Base Price or Grade Price) is to be the “fair market price” of the Grapes, the Signatory must notify the Grower of that price within the relevant time period set out in the Price Offer Notification Schedule.
  - (d) If an Agreement has not yet been entered into within the relevant time period set out in the Price Offer Notification Schedule, but is subsequently entered into, the Signatory must notify the Grower of the price of the Grapes (or Base Price or Grade Price), at the time the Agreement is entered into.

### Price Offer Notification Schedule

- (a) In relation to Grapes which are the subject of a:

- (i) GREATER PERTH (including SWAN VALLEY, SWAN DISTRICT, PERTH HILLS or PEEL);
- (ii) HUNTER VALLEY (including HUNTER, BROKE FORDWICH, POKOLBIN or UPPER HUNTER VALLEY);
- (iii) BIG RIVERS (including MURRAY DARLING, PERICOOTA, RIVERINA or SWAN HILL);
- (iv) NORTH WEST VICTORIA (including MURRAY DARLING or SWAN HILL); or
- (v) LOWER MURRAY (including RIVERLAND)

Geographical Indication, the Signatory must provide the Grower with the price offer under section 4.1(c) by close of business on the **second Wednesday of December** prior to vintage.

- (b) In relation to Grapes to which clause (a) of this schedule does not apply (i.e. Grapes grown in any other Geographical Indication), the Signatory must provide the Grower with the price offer under section 4.1(c) by close of business on the **second Wednesday of January** prior to vintage.

### EXPLANATORY NOTE

Pricing mechanisms should, to the extent practicable, be objective and remove the opportunity for a Winemaker to substantially influence the price payable to the Grower (except by assessments for Grading or bonus payments).

It is quite common for Agreements to provide for a “Base Price”, which may then be supplemented by bonuses (referable to the flavour and character of the Grapes) and from which Price Deductions might be made (by reference to the maturity, purity and condition of the Grapes). This Base Price might be fixed or might be determined by reference to the “Grade” ascribed to the Grapes or might be the “fair market price” or “weighted district average price” of the Grapes.

If, in a particular region, there are:

- a substantial number of Growers using “district weighted average prices”, “fair market prices” or some similar mechanism as the pricing formula under their Agreements; and/or
- only a small number of Winemakers purchasing Grapes,

then it is possible that a particular Winemaker's Grape purchase transaction may disproportionately skew the market price for Grapes in the district.

Pricing formulae, which use the current vintage's prices (including average prices for a region) as a means for determining the price a particular Grower is paid for their Grapes in that same vintage, will not generally be capable of calculation until well after vintage because the relevant price data will not be reported until then (e.g., Wine Australia's *National Vintage Report* is not typically published until around July).

## 4.2 Payment Terms

- (a) Subject to the law, the following payment terms must be adopted as a *minimum* by all Signatories:
  - (i) one third by the end of the month following the month during which the Grapes were delivered;
  - (ii) one third by the end of June; and
  - (iii) the balance by the end of September.
- (b) Signatories should pay interest to Growers at commercial rates where Signatories fail to meet the agreed payment terms.

### EXPLANATORY NOTE

Payment terms are a matter for commercial decision-making between the parties to an Agreement, paying heed to the general principle that money is worth more the sooner it is received.

Signatories may negotiate different payment terms to those set out in section 4.2(a), provided that that alternative position is at least as attractive to the Grower.

According to the ACCC, lengthy payment periods in standard form Agreements may be considered "unfair" under the *Australian Consumer Law*. In its Final Report, the ACCC recommended that long term payment periods be phased out of standard form contracts. It considers best practice to be 30 days and that flexibility should not extend beyond 60 day payment terms.

Note that, in South Australia, the Ministerial order made under the *Wine Grapes Industry Act 1991 (SA)* mandates payment terms under South Australian Agreements.

## 5. Grape Assessment

### 5.1 Content of Agreements

All Agreements must clearly outline:

- (a) any MP&C Standards the Grapes will be assessed against;
- (b) any parameters / benchmarks against which Grading will be undertaken;
- (c) the methods the Signatory will use to assess the Grapes against the MP&C Standards;
- (d) any methods agreed between the parties for the Signatory to Grade the Grapes; and
- (e) at what point any assessments or Grading will be:
  - (i) made; and
  - (ii) the results notified to the Grower,

for the purpose of potentially:

- (f) determining the price of the Grapes;
- (g) applying Price Deductions to the Grapes;
- (h) making bonus payments in relation to the Grapes; and/or
- (i) rejecting the Grapes.

#### EXPLANATORY NOTE

Grapes are generally assessed, in the vineyard or at the winery, against MP&C Standards to determine whether they are mature, pure and in good condition.

They are also often assessed (although sometimes the resulting wine is assessed) to determine their inherent quality (assuming they are mature, pure and in good condition) in order to ascribe a particular "Grade" to them.

MP&C Standards, Grading parameters / benchmarks or other specifications or terms affecting price should be clearly communicated in Agreements. This extends to how Price Deductions or bonuses are to be applied. The timing and methodology of these assessments should be specified and, where an adverse assessment decision is made, evidence to justify the decision should be documented and be accessible to each party in the event of a dispute.

Objective measurements are impartial and credible and can be clearly described and accurately and consistently reproduced. They do not rely on subjective judgement by an assessor and they are able to be reliably carried out in the same way, with the same result, by different parties.

In contrast, subjective assessment techniques rely partly or fully on personal judgement may be considered ambiguous when they are not consistently and reliably reproducible by different assessors.

Signatories should clearly outline their methodology for subjective assessments (such as the Grading of Grapes or wine), and include it in their Agreements. If they do so, and Part 5 is complied with, the assessment of Grapes or wine by reference to purely subjective analysis is acceptable.

## 5.2 Grape Assessment Procedures

### BEST PRACTICE – GRAPE ASSESSMENT PROCEDURES

Signatories should involve their Growers as much as possible when it comes to vineyard assessments. They should encourage Growers to inform the Signatory as soon as they become aware of any change in the maturity, purity or condition of the Grapes that may result in a Price Deduction being applied to the Grapes or rejection of the Grapes.

Where practicable, Grapes should be assessed against the MP&C Standards and/or Graded prior to harvest, subject to final assessment post-harvest at the farmgate or the winery.

A Grower should always have the right to be present during a vineyard inspection and this should be encouraged. This is not just for the benefit of the relationship, but a reasonable requirement for managing biosecurity and relevant work health & safety risks.

It is essential that Signatories entering a Grower's property abide by relevant laws, including those relating to biosecurity and work health & safety. Growers' standards and protocols for managing risk may exceed the relevant legislative requirements and must be adhered to.

When assessing Grapes against MP&C Standards or grading them or otherwise making assessments of Grapes, Signatories must:

- (a) avoid the use of subjective measures to determine price, in circumstances where there are credible objective measures readily available to measure the same or similar characteristics;
- (b) where available, use Industry Endorsed Standard Procedures; and
- (c) clearly document their methodology and results, and retain that documentation.

### INDUSTRY ENDORSED STANDARD PROCEDURES

Agreements must clearly outline the sampling and testing methods that Signatories will use to assess Grapes.

Inconsistent or unexpected results can occur when testing methods are not objective or when testing is not carried out using accurate equipment and rigorous sampling and assessment procedures.

Industry Endorsed Standard Procedures (IESPs) have been developed by the AWRI, in consultation with AGW, to assist Winemakers and Growers to sample and make assessments as accurately as is practicable in the circumstances. The IESPs are available on [AGW's code website](#). They include methods for sampling and assessment of grapes, must and wine (accepted reference methods for a range of analytical measurements (e.g. total dissolved solids, colour and titratable acidity), criteria for validation of secondary methods, protocols for sampling, assessment of Grape purity and MOG, margins of error and retention of evidence).

The Industry Guidelines serve as an explanatory document to the IESPs as well as providing guidance on how to successfully apply them.

### 5.3 Price Deductions and Rejection

- (a) Unless the Grapes have failed to meet the MP&C Standards or other agreed specifications or terms contained in the Agreement:
  - (i) Price Deductions must not be imposed; and
  - (ii) Grapes must not be rejected.
- (b) A Signatory must notify the Grower of any decision to impose a Price Deduction or reject Grapes as soon as practicable following assessment, using its best endeavours to do so:
  - (i) within 72 hours of any pre-harvest assessment in the vineyard; or
  - (ii) within 4 hours of any post-harvest assessment at the farmgate or winery.
- (c) Notification under section 5.3(b):
  - (i) should be by email, SMS or other technology that gives the Grower an immediate alert (e.g. sound signal on their phone); or
  - (ii) may be verbal, but, if so, must be confirmed in writing in the manner set out in section 5.3(c)(i) within the relevant time period set out in section 5.3(b) where practicable.

#### EXPLANATORY NOTE

Where a Signatory seeks to apply a Price Deduction to Grapes, or reject the Grapes, evidence will generally be required to be produced in the event that the deduction or rejection is disputed by the Grower (including in accordance with Part 6). Such evidence might include retention samples, documentation evidencing compliance with sampling or assessment procedures, digital images, diary records or documentation to support analytical procedures.

## 6. Dispute Resolution

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### 6.1 Alternative Dispute Resolution Procedures

- (a) The parties to an Agreement must incorporate into their Agreement (by reference) the dispute resolution procedures set out in Appendices 1 and 2, unless they choose an alternative procedure (other than Court proceedings) that is at least as rigorous as the procedures set out in Appendices 1 and 2.
- (b) The parties to an Agreement may not commence Court proceedings in relation to a Dispute until they have exhausted the dispute resolution procedures in the Agreement.

### 6.2 Negotiation

- (a) Before commencing a formal dispute resolution process under section 6.3 or 6.4 below, senior representatives of the parties shall use their best endeavours to resolve the dispute by discussion and negotiation.
- (b) Upon the request of either party, the Secretariat may liaise with the parties, either individually or together, in order to facilitate an early resolution of the Dispute.

### 6.3 Expert Determination

- (a) A Dispute relating to a Grape price or rejection (other than a Dispute the subject of section 6.4) will be resolved in accordance with the procedures in Appendix 1, by either an:

- (i) Independent Technical Expert, if the Dispute relates to whether Grapes have been correctly assessed in accordance with the requirements set out in the Agreement; or
- (ii) Independent Pricing Expert, if the Dispute relates to whether the price for the Grapes has been properly determined (other than a dispute the subject of section 6.3 (a)(i)).

#### EXPLANATORY NOTE

Disputes over Price Deductions or rejections are often Time-Sensitive Disputes. In many cases, these Disputes need to be resolved within a few hours to avoid deterioration of the Grapes. It is important that the time-sensitive nature of the dispute is considered when determining the appropriate time frame for dispute resolution process as outlined in Appendix 1.

- (b) The parties shall be bound by an Independent Expert's determination, in the absence of manifest error or misconduct.
- (c) In making their determination, an Independent Expert shall be acting as an expert and not as an arbitrator.
- (d) Failure by a Signatory to comply with a determination made by an Independent Expert will amount to a breach of the Code (as well as a breach of the Agreement).

## 6.4 Conciliation

- (a) The parties will attempt to resolve a Dispute, in relation to whether an Agreement has been breached, by conciliation in accordance with the procedures in Appendix 2.
- (b) At a conciliation referred to in section 6.4(a), the parties may not have lawyers present in the room with the Conciliator, but they may take legal advice outside of the room during the conciliation.

## 6.5 Miscellaneous

- (a) If an Independent Expert or Conciliator is appointed to resolve, or assist to resolve, a Dispute, unless the parties agree otherwise, the parties shall:
  - (i) pay half of the Independent Expert or Conciliator's costs set by the Committee; and
  - (ii) otherwise each bear their own costs associated with the Dispute.
- (b) Any confidential information of parties to a Dispute, obtained by the Secretariat or the Committee, must be kept confidential, although it may be disclosed in aggregate form without identifying the parties.

#### ARBITRATION

The parties should consider what will happen if a conciliation fails. If they wish to avoid court proceedings, they could provide in the Agreement that the Dispute will be resolved by final and binding arbitration.



## 7. Review

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- (a) Code performance will be reported annually on a regional basis, along with the number of Signatories, the number of Disputes notified to the Secretariat and/or resolved under the provisions of the Code and the number of Signatories who have breached the Code.
- (b) A formal review of the Code will be conducted every three years or as otherwise considered appropriate by the Committee.





## Appendix 1: Independent Expert Determination

Step	Action	Time-frame	
		<i>Time-Sensitive</i>	<i>Non-Time Sensitive</i>
1	<p>(a) The Complainant must give notice in writing (including by email) to the Respondent (with a copy to the Secretariat) of the Dispute, specifying that the parties shall use the procedures contained in this Appendix 1 to resolve the Dispute (<b>Notice of Dispute</b>).</p> <p>(b) The Notice of Dispute must specify:</p> <ul style="list-style-type: none"> <li>(i) the nature of the Dispute with reasonable particulars;</li> <li>(ii) whether or not the Dispute is a Time-Sensitive Dispute (in the Complainant's reasonable opinion);</li> <li>(iii) the desired outcome of the Complainant; and</li> <li>(iv) reasoning as to why that outcome is just.</li> </ul> <p>(c) The Secretariat may liaise with the parties, individually or together, in order to facilitate an early resolution of the dispute.</p>	As soon as practicable and no later than 7 days of the determination being notified to the grower.	
2	If, following Step 1, there is no resolution of the Dispute, the Secretariat will, as soon as practicable, advise both parties whether the Dispute is Time-Sensitive and the parties will follow the following procedures within the specified time frames:	As soon as practicable	
3	<p>(a) The Respondent must give notice in writing (including by email) to:</p> <ul style="list-style-type: none"> <li>(i) the Complainant; and</li> <li>(ii) the Secretariat,</li> </ul> <p>specifying:</p> <ul style="list-style-type: none"> <li>(iii) whether or not the Complainant's desired outcome is agreed; and</li> <li>(iv) if the desired outcome is not agreed: <ul style="list-style-type: none"> <li>A. providing reasoning as to why the Complainant's claim is not just; and</li> <li>B. offering an alternative resolution (in the case where the Respondent wishes to offer another outcome).</li> </ul> </li> </ul> <p>(b) The Secretariat may liaise with the parties, individually or together, in order to facilitate an early resolution of the dispute.</p>	Within 48 hours from issue of the Notice of Dispute	Within 5 business days from date of issue of the Notice of Dispute
4	If, following Steps 1 to 3, the parties have not resolved the Dispute, the matter will be settled by an Independent Expert jointly appointed by them. They must be satisfied that the Independent Expert is impartial and qualified to rule on the matter(s) in Dispute.	Within 72 hours from issue of the Notice of Dispute	Within 10 business days from date of issue of the Notice of Dispute

Step	Action	Time-frame	
		<i>Time-Sensitive</i>	<i>Non-Time Sensitive</i>
5	If the parties cannot agree on the selection of an Independent Expert, the Secretariat will make the appointment, from the list of Independent Experts on AGW's code website, upon application of either party and after consulting with the parties.	Within 24 hours of receipt of an application from either party under this Step 5	Within 5 business days of receipt of an application from either party under this Step 5
6	<p>(a) The Independent Expert will determine their own processes and the parties will comply with them.</p> <p>(b) The Independent Expert will deliver a determination to the parties and the Secretariat or, if the matter requires extensive consideration, submissions from the parties, investigation or other evidence, will set a reasonable time-frame within which to deliver the determination (and subsequently deliver the determination within that time-frame).</p>	Within 48 hours of being appointed, or such other reasonable time-frame	Within 10 business days of being appointed, or such other reasonable time-frame

## Appendix 2: Conciliation

Step	Action	Time-frame	
		<i>Time-Sensitive</i>	<i>Non-Time Sensitive</i>
1	<p>(a) The Complainant must give notice in writing (including by email) to the Respondent (with a copy to the Secretariat) of the Dispute, specifying that the parties shall use the procedures contained in this Appendix 2 to resolve the Dispute (<b>Notice of Dispute</b>).</p> <p>(b) The Notice of Dispute must specify:</p> <ul style="list-style-type: none"> <li>(i) the nature of the Dispute with reasonable particulars;</li> <li>(ii) the desired outcome of the Complainant; and</li> <li>(iii) reasoning as to why that outcome is just.</li> </ul> <p>(c) The Secretariat may liaise with the parties, individually or together, in order to facilitate an early resolution of the dispute.</p>	As soon as practicable	
2	<p>(b) The Respondent must give notice in writing (including by email) to:</p> <ul style="list-style-type: none"> <li>(i) the Complainant; and</li> <li>(ii) the Secretariat,</li> </ul> <p>specifying:</p> <p>(c) whether or not the Complainant's desired outcome is agreed; and</p> <ul style="list-style-type: none"> <li>(i) if the desired outcome is not agreed: <ul style="list-style-type: none"> <li>A. providing reasoning as to why the Complainant's claim is not just; and</li> <li>B. offering an alternative resolution (in the case where the Respondent wishes to offer another outcome).</li> </ul> </li> </ul> <p>(d) The Secretariat may liaise with the parties, individually or together, in order to facilitate an early resolution of the dispute.</p>	Within 5 business days of receiving the Notice of Dispute	
3	<p>If the parties have not resolved the Dispute, the Secretariat will, upon application of either party (after consulting with the parties):</p> <ul style="list-style-type: none"> <li>(a) appoint an independent Conciliator from the list on AGW's code website; and</li> <li>(b) select a Conciliation Body to administer the conciliation from the list on AGW's code website.</li> </ul>	Within 3 business days from application of either party	
4	<ul style="list-style-type: none"> <li>(a) The Conciliator will determine the time and date for the conciliation.</li> <li>(b) The conciliation will be conducted under the administration of the selected Conciliation Body, in accordance with the conciliation rules of that body (as amended by the parties).</li> </ul>	Within 3 business days of the matter being referred to conciliation under Step 3, or within such other time-frame as the parties and the Conciliator agree.	
5	The parties shall endeavour to resolve the Dispute with the assistance of the Conciliator, in accordance with the conciliation rules.	Within the time-frame determined under Step 4.	

## Appendix 3: Transitional Provisions

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For the purposes of section 1.3 of this Code:

- (a) signatories to the 2008 Code shall automatically become Signatories to this Code, on the date one month after being notified by the Committee of the commencement of this Code, unless they notify the Committee to the contrary within that one month period;
- (b) each Winemaker, who becomes a Signatory to this Code prior to 1 July 2021, must comply with the Code from 1 July 2021, subject to section (c) below; and
- (c) each Signatory (including signatories to the 2008 Code) shall, within three months of becoming a Signatory, make a written offer to its Growers to amend its existing Agreements, to make them consistent with this Code, with effect no later than from 31 December 2021.

