

Wine Grape Council
South Australia

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

*Information for Wine Grape Growers
and Purchasers*



Original concept and material provided by:
Barossa Grape & Wine Association



Supported by

Government of South Australia

Primary Industries and Regions SA

TABLE OF CONTENTS

| | |
|---|-----------|
| A GUIDE TO NEGOTIATING THE SALE OF WINEGRAPES IN SOUTH AUSTRALIA..... | 4 |
| Acknowledgements..... | 4 |
| WHAT IS COVERED IN THE GUIDE? | 5 |
| Flowchart 1 – Negotiating the sale of wine grapes..... | 6 |
| SECTION 1 – PREPARING TO ENTER INTO AN AGREEMENT | 7 |
| What should I do before entering into a grape sale agreement?..... | 7 |
| Governing law and Code of Conduct..... | 8 |
| Flowchart 2 – Growing and delivering wine grapes to specification | 10 |
| SECTION 2 – WRITING CONTRACTS | 11 |
| What is the difference between an agreement and a contract?..... | 11 |
| What to look out for in contracts: problematic language and clauses..... | 13 |
| Securing payments | 14 |
| Other things for growers to consider when negotiating agreements | 15 |
| Wine grape contract checklist..... | 17 |
| Flowchart 3 – Receiving payment for your grapes..... | 20 |
| SECTION 3 – NAVIGATING YOUR WAY THROUGH A DISPUTE..... | 21 |
| Documentation..... | 21 |
| Independent assessment | 21 |
| Alternative dispute resolution options | 22 |
| SECTION 4 – PAYMENT PROBLEMS | 25 |
| What can a grape grower do if they have not received payment for their grapes? | 25 |
| What is the grape grower’s position if a grape purchaser becomes insolvent?..... | 27 |
| Voluntary administration, liquidation and receivership | 27 |
| APPENDIX 1 | 29 |
| Terminology and further information | 29 |
| Useful websites and contact details..... | 30 |
| Appendix 2 | 31 |
| Sample Personal Property Security Interest clauses for inclusion in grape and wine contracts...31 | |
| Personal Property Security Register Terminology | 32 |
| Appendix 3 | 33 |
| Vineyard access considerations | 33 |
| Appendix 4 | 35 |
| Marketing your winegrapes | 35 |
| Appendix 5 | 39 |
| Improving your negotiation outcomes..... | 39 |
| Appendix 6 | 43 |
| Sample wine grape purchase agreements | 43 |
| Appendix 7 | 45 |
| Wine Industry Code of Conduct | 45 |

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

This document is based on a publication originally produced by the Barossa Grape and Wine Association. The material has been reformatted and updated with their support and kind permission. The BGWA gratefully acknowledges the assistance of Mary Retallack from Retallack Viticulture in the preparation of the original booklet.

Production of updated version supported by funding provided by Primary Industries and Regions (SA).

Editing and updating by:

Peter Hackworth and Sandy Hathaway
Wine Grape Council of SA

The following people contributed to the original document:

Elise Heyes and Sam Holmes
Barossa Grape & Wine Association

Lawrie Stanford
Wine Grape Growers' Australia

Stuart Andrew
Stuart Andrew, Solicitor

Disclaimer

WGCSA has made every attempt to ensure the accuracy of this information. However WGCSA expressly disclaims any form of liability to any person in respect of anything done or omitted to be done that is based on the whole or any part of the contents of these worksheets.

These materials are provided for discussion and illustration purposes only. They cannot substitute for individual legal advice or the need to draft legal provisions in light of particular business agreements and the distinct interests of each party to an agreement. No legal representation or warranty as to suitability for specific contracts by WGCSA may be assumed or implied by the use of these materials.

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 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 (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 (search for 'Wine Grapes Industry Act 1991') or from 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 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.

| | |
|---|--|
| Complicated sub-clauses | 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 |
| Non-specific dates | 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). |
| Zero/No minimum price contracts | 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. |
| Payment terms | Ensure the minimum grape payment terms (schedule of payments) specified in the South Australian Wine Grapes Industry Act 1991 are adhered to (<i>See Section 4</i>). Be cautious of accepting payments in equal monthly payments, if selling grapes outside of SA. |
| Bi-lateral agreement | Ensure that the agreement may only be amended in writing and executed by both parties |
| Consequential loss | 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. |
| Force majeure | 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. |
| Sole discretion | 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’. |
| As determined by the grape purchaser | 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. |
| Controlling interest | 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. |
| Non-performance | 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>). |
| Vineyard practices | 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

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

| | |
|--|---|
| 8. Harvest, delivery and freight | ✓ 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? |
| ✓ Is there a force <i>majeure</i> clause in place to protect either party equally? | |
| 9. Title in wine grapes | ✓ 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? |
| | ✓ Does the Wine Grape Sale Agreement include a 'Retention of Title' clause? |
| 10. Terms of payment, GST and levies | ✓ 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? |
| | ✓ What are the taxes and levies involved? |
| 11. Duration of contract | ✓ Will the contract be for one sale, one year, or multiple years? |
| | ✓ Are specific commencement and expiry dates defined? |
| 12. Reasonable time | ✓ Has reasonable time been allowed to read and understand the document and obtain independent advice before entering into the Agreement? |
| 13. Signatures | ✓ Did everyone sign in a representative capacity (name and title)? |
| | ✓ Did everyone date the contract? |
| 14. Sale of a vineyard | ✓ 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? |
| 15. Termination of contract | ✓ 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)? |
| 16. Liability limitations | ✓ Has consequential loss been excluded? |

| | |
|--|--|
| 17. Indemnifications | <ul style="list-style-type: none"> ✓ 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? |
| 18. Governing law | <ul style="list-style-type: none"> ✓ Do the laws of South Australia and the Commonwealth of Australia govern the agreement? Which courts will have jurisdiction? |
| 19. Dispute resolution clause | <ul style="list-style-type: none"> ✓ Has a process been identified for resolving a dispute? ✓ Does it comply with the Code of Conduct? ✓ What steps are identified? |
| 20. Is the grape purchaser a signatory to the Australian Code of Conduct? | <ul style="list-style-type: none"> ✓ If so, familiarise yourself with the requirements under 'the Code'. ✓ Ask Signatories to 'the Code' to include a copy of 'the Code' and Secretariat contact details with the wine grape sale agreement. |

**** 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). 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

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.

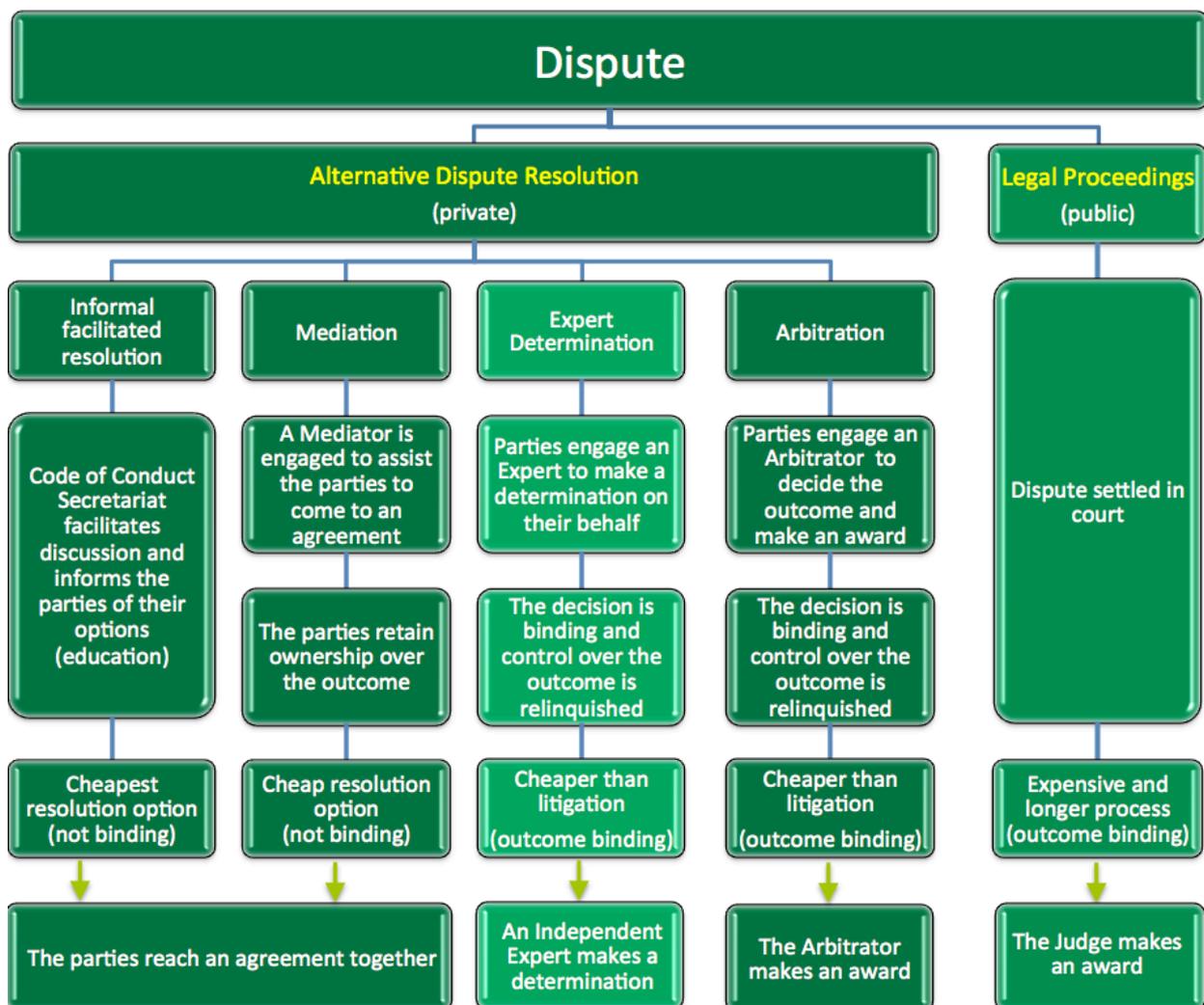


Figure 1: Alternative dispute resolution versus legal proceedings.

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

Another more recent option is to use the mediation services of the SA Small Business Commissioner, 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

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 or at 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

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.

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) 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> | First payment | Second payment | Third payment |
|------------------------------|---|-----------------------|----------------------|
| 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/ (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 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 and search for 'Voluntary administration – a guide for creditors'.

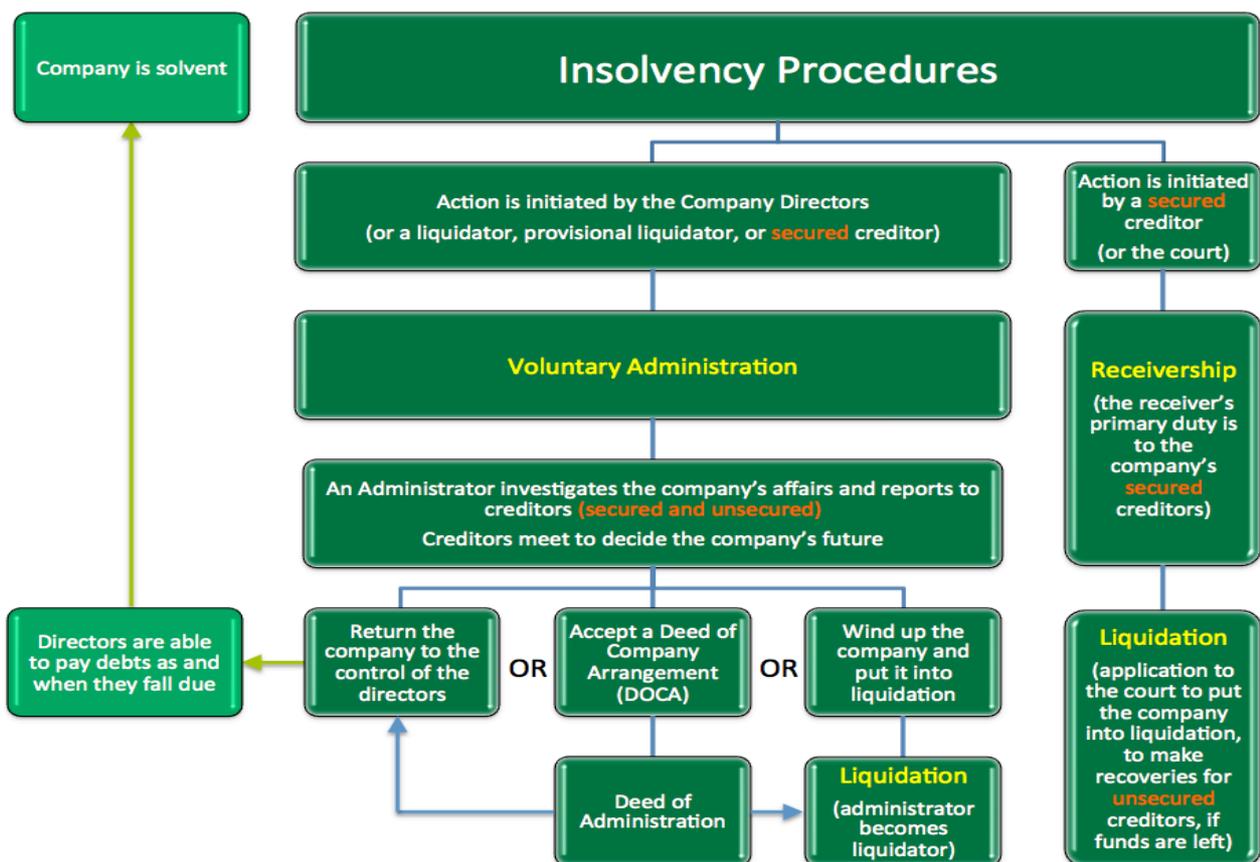


Figure 2: Options available to grape growers once insolvency procedures have commenced.

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 and search for 'Liquidation – a guide for creditors'. For information about the PPSA, go to 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 and search for 'Receivership – a guide for creditors'.

APPENDIX 1

Terminology and further information

| Term | Definition |
|---|--|
| Administrator | An external administrator appointed to carry out the administration of a company. |
| Alternative dispute resolution (ADR) | The process for resolving disputes outside of the court system. Examples of Alternative Dispute Resolution (ADR) include mediation, expert determination, and arbitration. |
| Agreement | 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'. |
| Arbitration | An ADR procedure for resolving disputes that involves less formality than a court hearing but is still legally binding. |
| Bankruptcy | An insolvency procedure that applies to an individual person, not to a company. |
| Bilateral contract | Bilateral means a contract is binding on both sides. |
| Breach of contract | The failure by one of the parties to a contract to satisfactorily perform the service or action agreed to in the contract. |
| Code Administration Committee | '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: secretariat@wineindustrycode.org |
| Contemporaneous notes | Notes taken at the time, or shortly after an event or incident, while the relevant details are fresh. |
| Contract | 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). |
| 'Cooling off' period | The time during which a purchaser can withdraw from a contract after signing. |
| Creditor | 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. |
| Debtor | A person who owes a debt to another person or entity. |
| Expert determination | An independent and suitably qualified person is engaged to make a determination (decision). |
| Insolvent | A company is unable to pay all debts when they fall due for payment. |
| Legally binding | Able to be enforced by law. |
| Letter of demand | A notice from a creditor that legal action will be taken if the debt is not paid. |
| Liquidator | A natural person appointed to administer the liquidation of a company. |
| Mediation | 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. |
| Receiver | 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 |
| Secured creditor | 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. |
| Solvent | A company is able to pay all debts when they fall due. |
| Unconscionable conduct | 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 www.accc.gov.au and search for 'unconscionable conduct'. |
| Unsecured creditor | 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. |
| 'Winding up' order | 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
- › Wine Grapes Industry Act 1991 Terms and conditions of payment - 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
- › Phylloxera and Grape Industry Board of South Australia South Australian Wine Grape Crush Survey - www.phylloxera.com.au/statistics/utilisation/
- › Wine Australia Winegrape Purchases Price Dispersion Reports 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
- › SAWIA's Employment Handbook - 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
- › Wine Grape Growers' Australia - www.wgga.com.au
- › Barossa Grape & Wine Association - www.barossa.com
- › Winemakers' Federation of Australia - www.wfa.org.au
- › South Australian Wine Industry Association - www.winesa.asn.au
- › PIRSA Grape and Wine - www.pir.sa.gov.au/wine
- › Phylloxera and Grape Industry Board of South Australia - 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 (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 growers¹ 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,
- ✓ early ripening,
- ✓ quality,
- ✓ a special clone or variety,
- ✓ location,
- ✓ vineyard protection protocols,
- ✓ the family history....?

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.

¹ 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 newsletter² 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?

² 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

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

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.au for more information.



The Australian Wine Industry Code of Conduct

November 2011

Australian Wine Industry
CODE OF CONDUCT

wfa Winemakers'
Federation of
Australia

WGGA
Wine Grape Growers' Australia

The Australian Wine Industry Code Of Conduct

The Australian Wine Industry Code of Conduct was officially launched on Friday 19 December, 2008.

With the exception of Part 2 (Winegrape Purchase Agreements), the Code took effect on 1 January 2009 and was revised following its formal review in 2010. Signatories are only required to comply with Part 2 for all new Agreements entered into after 1 January 2009 in relation to supply of winegrapes for vintage 2010 onward. With respect to existing Agreements, each Signatory agrees to offer to its winegrape grower(s) to:

- apply the Code (with the exception of Part 2) with effect from 1 January 2009; and
- bring existing Agreements in line with the provisions of Part 2 of the Code at the time of any Material Variation to the Agreement or Associated Documents (as defined in the Code definitions).

The Code does not, by itself constitute, amend or replace any Agreement.

The aim of the voluntary Code is two-fold: firstly to establish a common Australian winegrape supply contract framework and secondly, to provide a dispute resolution system to manage disagreements which exist over price or quality assessments.

The Code has been developed by Wine Grape Growers Australia (WGGA) and the Winemakers' Federation of Australia (WFA) in the interests of a sustainable Australian wine industry and follows a recommendation by a Federal Senate enquiry in 2005. The research and development of the Code has been supported by the Federal Government Department of Agriculture, Fisheries and Forestry.

Signed in Agreement on the 24 November 2011



Mr Peter Schulz
President, Winemakers' Federation of Australia



Mr Vic Patrick
Chairman, Wine Grape Growers Australia



Mr Stephen Strachan
Chief Executive, Winemakers' Federation of Australia



Mr Lawrie Stanford
Executive Director, Wine Grape Growers Australia

DISCLAIMER:

WGGA, WFA, the Committee, their employees, officers and agents do not accept any liability for the results of any action taken in reliance upon, based on or in connection with this document. To the extent legally possible, WGGA, WFA and the Committee and its employees, officers and agents, disclaim all liability arising by reason of any errors and omissions contained in this document.

LEGISLATION:

All references to legislation are current at the date of the Code's release. Capitalised words used in the Code have the meaning assigned to them in Appendix 1.

CODE SECRETARIAT:

The Accord Group, Level 2, 370 Pitt Street, Sydney NSW 2000

Telephone: 02 9264 9506 **Facsimile:** 02 9264 8268

Email: codedisputes@accordgroup.com.au

Contents

| | | | |
|---|----------|--|-----------|
| PART 1 – PRELIMINARY | 5 | PART 3 – DISPUTE RESOLUTION | 11 |
| Title and Commencement of the Code | 5 | Purpose | 11 |
| Intention | 5 | Powers of Independent Expert | 11 |
| Industry Endorsement | 5 | Information provided to the Independent Expert | 11 |
| Signatories to the Code | 6 | 3.1 Disputes over Winegrape Price | 12 |
| Horticulture Code of Conduct | 6 | 3.2 Disputes over Downgrades and Rejections in the Vineyard | 13 |
| Administration of the Code | 6 | 3.3 Disputes over Downgrades and Rejections at the Weighbridge | 14 |
| Review | 6 | 3.4 Legal Proceedings | 14 |
| Performance Targets | 6 | PART 4 – BREACHES OF THE CODE | 15 |
| PART 2 – WINEGRAPE PURCHASE AGREEMENTS | 7 | 4.1 Complaints | 15 |
| 2.1 Application of Code | 7 | 4.2 Removing a Signatory from the Code | 16 |
| 2.2 Parties to an Agreement and Term of the Agreement | 7 | 4.3 Cost Recovery | 16 |
| 2.3 Pricing Methods | 7 | PART 5 – ADMINISTRATION OF THE CODE | 17 |
| 2.4 Price Notification | 7 | CONTACTS | 18 |
| 2.5 Price Adjustment | 8 | APPENDIX 1 | 19 |
| 2.6 Terms of Payment | 8 | | |
| 2.7 Tonnage and Vineyard Details | 8 | | |
| 2.8 Winegrape Standards, Assessment and Harvest | 8 | | |
| 2.9 Delivery and Freight | 9 | | |
| 2.10 Title in Winegrapes | 9 | | |
| 2.11 Force Majeure | 9 | | |
| 2.12 Assignment and Sale of Vineyard | 9 | | |
| 2.13 Professional Advice | 9 | | |
| 2.14 Dispute Resolution Clause | 9 | | |
| 2.15 Reasonable Time | 9 | | |
| 2.16 Variations | 10 | | |
| 2.17 Failure to Comply | 10 | | |

Part 1: Preliminary

TITLE AND COMMENCEMENT OF THE CODE

The Code is to be titled the Australian Wine Industry Code of Conduct. This is a non-prescribed, industry voluntary code. Winegrape purchasers who elect to become Signatories will be governed by the Code in their commercial dealings with winegrape growers.

The Code has been developed for the Australian wine industry by the Wine Industry Relations Committee (WIRC), as a joint committee of the Winemakers' Federation of Australia (WFA) and Wine Grape Growers Association (WGGA). The Executive Councils of WFA and WGGA have endorsed the Code.

With the exception of Part 2 (Winegrape Purchase Agreements), the Code took effect on 1 January 2009. Signatories are only required to comply with Part 2 for all new Agreements entered into after 1 January 2009 in relation to the supply of winegrapes for vintage 2010 onwards. With respect to existing Agreements, each Signatory agreed to offer to its winegrape grower(s) to:

- apply the Code (with the exception of Part 2) with effect from 1 January 2009; and
- bring existing Agreements in line with the provisions of Part 2 of the Code at the time of any Material Variation to the Agreement or Associated Documents (as defined in the Code definitions).

Except as expressly set out in the Code, the provisions of the Code are subject to all applicable Commonwealth, State and Territory laws and common law rights and obligations.

INTENTION

The intention of the Code is to set minimum standards for Agreements between winegrape growers and winegrape purchasers. The Signatories acknowledge that providing a framework for fair and equitable dealings between Signatories and winegrape growers and an impartial, cost effective dispute resolution scheme is important for harmonious relations.

Signatories to the Code acknowledge their existing legal obligations (for example, under the Competition and Consumer Act 2010) not to engage in misleading or deceptive behaviour or unconscionable conduct.

INDUSTRY ENDORSEMENT

Signatories agree to be bound by the provisions of the Code in their commercial dealings with winegrape growers. Signatories commit to adopt the principles set out in the Code in their dealings with winegrape growers, and to provide the winegrape grower with a copy of the Code whenever a winegrape grower signs a new Agreement.

The register of Signatories will be maintained and available on the Australian Wine Industry Code of Conduct, the WFA and WGGA websites:

- www.wineindustrycode.org
- www.wgga.com.au
- www.wfa.org.au

Signatories also commit to promoting the adoption of the Code. WGGA and WFA also agree to publicise and promote the Code and its Dispute resolution procedures, and to work to maximise its adoption within the industry.

SIGNATORIES TO THE CODE

A winegrape purchaser may become a Signatory to the Code by providing a written notice to the Committee.

A winegrape purchaser may cease to be a Signatory by lodging a written notice advising the Committee they no longer wish to be a Signatory. In these circumstances, the winegrape purchaser will cease to be a Signatory on the date that their notice is received by the Committee, however, they remain bound by the provisions of Agreements entered into before that date which incorporate the Code either expressly or by reference.

Signatories to the Code agree that the Committee may publish their names as Signatories and may also publish the details of any Code breaches which the Committee has found applies to that Signatory at the time of the publication of the annual report and which have not been resolved by the Signatory. Signatories agree to release the Committee and each member of the Committee from any liability to the Signatory as a result of the publication of these details, provided all published information is accurate. However, details relating to any Dispute between a Signatory and a winegrape grower(s) which are notified to the Committee in accordance with Part 3 of the Code will remain confidential and may only be disclosed by the Committee in aggregate form (without the parties being named or specific details of the Dispute being disclosed).

HORTICULTURE CODE OF CONDUCT

Some transactions in the winegrape supply industry are subject to the mandatory Trade Practices (Horticulture Code of Conduct) Regulations 2006. When Signatories to the Code participate in a transaction covered by the Horticulture Code of Conduct, the Horticulture Code of Conduct will prevail over the Code to the extent of any inconsistency.

ADMINISTRATION OF THE CODE

The Code will be managed by the Committee, in accordance with Part 5.

REVIEW

A formal review of the Code took place in June 2010 and subsequent reviews will be conducted by the Committee not less than every three years thereafter.

The objectives of the review of the Code shall be to:

- (i) Assess the extent to which the Code has reduced Disputes;
- (ii) Assess the effectiveness of the Dispute resolution system;
- (iii) Assess the performance of the industry against the performance targets contained in the Code, and recommend new performance targets as required; and
- (iv) Recommend any amendments to the Code required to address any problems or issues identified during the review process.

It is intended that this review will be completed by 30 June in the relevant year.

PERFORMANCE TARGETS

Performance will be measured by the total numbers of Signatories. The targets are:

- 25% of the top 100 Australian wine producers by tonnes processed by 31 December 2012.
- 50% of the top 100 Australian wine producers by tonnes processed by 31 December 2013.

Code performance will be reported annually on a regional basis including number of Signatories, the number of Disputes notified to the Committee and resolved under the provisions of the Code, as well as the number of breaches of the Code, reported and resolved under the provisions of the Code.

Part 2: Winegrape Purchase Agreements

As a minimum, all Agreements must:

- 1 be in writing, contain the elements set out in clauses 2.1 to 2.15 and be entered into and, if applicable, varied in accordance with clauses 2.16 and 2.17;
- 2 appropriately refer to any other important elements of the Agreement; and
- 3 be clear and concise and in plain English.

2.1 APPLICATION OF CODE

- 2.1.1 Each Agreement must contain a statement that the parties to the Agreement agree that it is governed by the Code and that, in the event of any inconsistency, the provisions of the Code in force on the date that the Agreement was entered into will prevail and will apply as if they formed part of the Agreement. If there is a change to the Code, each Signatory must make an offer to its winegrape grower(s) to amend existing Agreements to reflect that change within three months of the date of endorsement of the change in accordance with clause 5.1.6.

2.2 PARTIES TO AN AGREEMENT AND TERM OF THE AGREEMENT

- 2.2.1 All parties involved in the winegrape purchase arrangements are to be identified in the Agreement including the winegrape purchaser, the winegrape grower and any landowner or lessee (if applicable).

All Agreements must specify the duration of the Agreement including commencement date and expiry date, or the termination mechanism (including applicable notice periods) where there is no fixed expiry date.

2.3 PRICING METHODS

- 2.3.1 All Agreements must contain a fixed price and/or a clear statement as to how the final price payable will be determined.

2.4 PRICE NOTIFICATION

- 2.4.1 Where the Agreement requires a price offer or a negotiation as part of the calculation of the price for the winegrapes, the winegrape purchaser must, unless prevented due to unforeseen and extraordinary reasons:
 - 2.4.1.1 by 15 December each year – provide to its winegrape grower(s) in the Hunter Valley, Riverina, Murray Darling/Swan Hill and Riverland regions Indicative Regional Prices for each variety of winegrape.
 - 2.4.1.2 by 15 January each year – use its best reasonable endeavours to provide to its winegrape grower(s) in all other regions Indicative Regional Prices for each variety of winegrape.

If an Agreement does not exist on the relevant date but is subsequently entered into prior to the vintage period (for example, an Agreement entered into in February), then the winegrape purchaser must provide the Indicative Regional Prices referred to above to the winegrape grower at the time the Agreement is entered into, unless the actual price offer is made at that time.

2.4.2 Notwithstanding clause 2.4.1, in all regions where the relevant Agreement requires the price to be agreed between the parties, any winegrape price offer required under the Agreement must be made:

- (a) if the winegrape purchaser undertakes a pre-vintage vineyard inspection prior to making a final winegrape price offer – as soon as practicable and, at the latest, prior to the anticipated harvest date for those winegrapes; and
- (b) in all other cases – at least 10 Business Days prior to the anticipated harvest for those winegrapes.

2.5 PRICE ADJUSTMENT

2.5.1 Any provision for price adjustment must be clearly spelt out and specify in a transparent manner any bonuses or penalties and the mechanism(s) used to determine bonuses/penalties.

2.6 TERMS OF PAYMENT

2.6.1 The terms of payment are to be clearly stated and, unless otherwise agreed by the parties to the Agreement, shall be consistent with the industry standard of:

2.6.1.1 1/3 at the end of the month following the month of delivery;

2.6.1.2 1/3 at the end of June; and

2.6.1.3 balance at the end of September of the year that the first payment commenced.

2.6.2 The payment terms for any price adjustment or payments based on wine assessment shall be specified in the Agreement.

2.6.3 Any penalties for late payments shall be stipulated in the Agreement.

2.7 TONNAGE AND VINEYARD DETAILS

2.7.1 The Agreement must state whether the amount of winegrapes to be purchased is “area-based” or “specified tonnes” and must stipulate the area and/or the tonnes as the case may be.

2.7.2 The Agreement must clearly describe the winegrapes to be purchased.

2.7.3 Where relevant, the Agreement must specify the vineyard details such as patch/block number identification, identification of clones and rootstocks when required, or a vineyard map showing vineyard details for the vines to which the Agreement pertains.

2.8 WINEGRAPE STANDARDS, ASSESSMENT AND HARVEST

2.8.1 The Agreement must state any quality standards which apply to the winegrapes being purchased, including specifying any minimum requirements for maturity, purity and condition, relevant to the region and variety.

2.8.2 The Agreement must describe any method for vineyard or weighbridge winegrape assessment which will apply under the terms of that Agreement if that method is directly inconsistent with the methods described in “Winegrape Assessment in the Vineyard and the Winery, compiled by Wendy Allen” (as amended from time to time and endorsed by WGGA and WFA).

2.8.3 The Agreement must specify the process for determining the harvest time(s) for the winegrapes.

2.9 DELIVERY AND FREIGHT

- 2.9.1 The Agreement must state the delivery point for the winegrapes and identify which party bears the costs and associated risks of freight.

2.10 TITLE IN WINEGRAPES

- 2.10.1 The Agreement must state when title in the winegrapes passes from the winegrape grower to the winegrape purchaser. The Agreement must also specify the point at which the winegrape purchaser accepts or rejects the winegrapes.

2.11 FORCE MAJEURE

- 2.11.1 If there is a force majeure clause in the Agreement, it must be clearly specified.

2.12 ASSIGNMENT AND SALE OF VINEYARD

- 2.12.1 The Agreement must clearly specify any restrictions imposed by the winegrape purchaser on the rights to transfer possession or ownership of the relevant vineyard.
- 2.12.2 The Agreement must clearly specify any obligations on the winegrape grower upon the sale or disposal of possession of the relevant vineyard.

2.13 PROFESSIONAL ADVICE

- 2.13.1 An Agreement must contain a prominent statement that the winegrape grower signing the Agreement should seek independent legal, financial and taxation advice. This statement must appear just above the winegrape grower's signing provisions.

2.14 Dispute Resolution Clause

- 2.14.1 The Agreement must include a Dispute resolution clause that is consistent with Part 3 of the Code.

2.15 REASONABLE TIME

- 2.15.1 A Signatory may only enter into an Agreement with a winegrape grower after providing the Agreement and any Associated Documents to that winegrape grower and allowing the winegrape grower a "reasonable period" to read and understand the document and obtain independent advice before entering into the Agreement. For an Agreement which incorporates an obligation to buy and sell winegrapes from more than one vintage, a "reasonable period" is 15 Business Days from the date of receipt by the winegrape grower. For all other Agreements other than Spot Market Purchases, a "reasonable period" is 7 Business Days from the date of receipt by the winegrape grower. For Spot Market Purchases, a "reasonable period" will depend on the circumstances and may be a relatively short period (for example, less than one Business Day if harvest is imminent).

2.16 VARIATIONS

2.16.1 It is recognised that variations to Agreements from time to time may need to be negotiated. Any variation to an Agreement must be:

2.16.1.1 clearly specified, and

2.16.1.2 agreed, confirmed in writing and signed by all parties to the Agreement.

Agreements must not contain a provision which allows one party to unilaterally amend the Agreement without the other parties' written consent to the specific amendment.

2.16.2 A Signatory may only vary an Agreement by providing that variation to the winegrape grower in writing and allowing the winegrape grower a "reasonable period" to read and understand the variation and obtain independent advice before signing their acceptance of the variation. For an Agreement which incorporates an obligation to buy and sell winegrapes from more than one vintage, a "reasonable period" is 15 Business Days from the date of receipt by the winegrape grower. For all other Agreements other than Spot Market Purchases, a "reasonable period" is 7 Business Days from the date of receipt by the winegrape grower. For Spot Market Purchases, a "reasonable period" will depend on the circumstances and may be a relatively short period (for example, less than one Business Day if the harvest is imminent).

2.17 FAILURE TO COMPLY

2.17.1 Failure to comply with clauses 2.1 through to 2.17, where applicable, will amount to a breach of the Code and may be referred to the Committee for disciplinary action.

Part 3: Dispute Resolution

PURPOSE

Disputes in the main occur over the perceived inadequacy of the winegrape price, or over an apparent failure to comply with specifications for winegrape maturity, purity or condition resulting in either price adjustments or rejection of the winegrapes.

This section is intended to help resolve Disputes between the winegrape purchaser and the winegrape grower in a timely and cost efficient manner to preserve the ongoing commercial relations.

The Code requires both parties to participate in the Dispute resolution procedure and to assist the Independent Expert by providing any information requested. Any Disputing Party who invokes the Dispute resolution process is agreeing to be bound by the Code in relation to the conduct of the Dispute, in particular, the clauses relating to defamation and cost recovery.

The existence of a Dispute does not relieve any party of their obligations under the Agreement.

POWERS OF INDEPENDENT EXPERT

Notwithstanding clause 2.1.1, the appointed Independent Expert will determine the Dispute by applying:

- the Code;
- the terms of the Agreement; and
- where necessary, the Independent Expert's own procedures;

but only to the extent that the Independent Expert's resolution procedures are not inconsistent with the terms of the Agreement or the Code. If the Agreement and the Code are inconsistent, then for the purposes of determining the Dispute, the Code will prevail to the extent of the inconsistency.

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.

Failure by a Signatory to comply with the determination of the Independent Expert will amount to a breach of the Code and the matter may be referred to the Committee for disciplinary action.

INFORMATION PROVIDED TO THE INDEPENDENT EXPERT

All communications brought into existence in relation to the Dispute and provided to the Independent Expert shall be in confidence and without prejudice.

No documents brought into existence by a disputant for the purpose of consideration by the Independent Expert may be tendered in evidence by a party other than that disputant in any litigation of the Dispute.

3.1 DISPUTES OVER WINEGRAPE PRICE

When a Dispute arises over a price offer made by a winegrape purchaser under clause 2.4.2 or, where no price offer is required to be made under clause 2.4.2, in relation to the calculation of the price in accordance with the Agreement, the parties agree to follow these resolution procedures:

3.1.1 Within 7 Business Days of:

- 3.1.1.1 the determination of the price in accordance with the Agreement being notified to the winegrape grower (but only where no price offer is required to be made under clause 2.4.2); or
 - 3.1.1.2 the date of the price offer being made by the applicable party under clause 2.4.2;
- the Disputing Party will inform the other party in writing of the background to the Dispute, the issue(s) in dispute and the outcome desired. This notice will be known as the "Notice of Dispute". A summary of the Dispute (notifying the parties, the category of Dispute, tonnage and region) is to be supplied to the Committee by the Disputing Party at the same time.

3.1.2 Within 7 Business Days of receiving the Notice of Dispute, the other party will respond in writing, indicating whether the desired outcome is agreed, and, if it is not, whether that party wishes to offer another outcome, and inform the Committee in writing that a response has been provided.

3.1.3 The Disputing Party and the winegrape purchaser have 14 Business Days from the issue of the Notice of Dispute to negotiate a mutually agreed outcome. If these parties have not resolved the Dispute within this 14 Business Day period, they must jointly appoint an Independent Expert to make a determination of price. The Disputing Party and the winegrape purchaser must be satisfied that the Independent Expert is impartial and qualified to rule on the matter(s) under dispute.

3.1.4 If the Disputing Party and the winegrape purchaser cannot agree on the selection of an Independent Expert within 21 Business Days of the issue of the Notice of Dispute, the Committee will appoint an appropriate Independent Expert from the panel of experts endorsed by the Committee upon application from either party. Such application is to be made within 28 Business Days of the issue of the Notice of Dispute.

3.1.5 The appointed Independent Expert will deliver a determination within 14 Business Days of the date of his/her appointment or, if the matter requires extensive research, submissions from the parties and/or investigation will provide a reasonable timeframe in which to complete the task.

3.1.6 The Disputing Party and the winegrape purchaser agree to be bound by the determination of the Independent Expert in the absence of manifest error or misconduct and to share costs equally.

3.1.7 The Independent Expert will be engaged under their normal terms of engagement and in any event will be indemnified by the parties as to their costs and expenses.

3.2 DISPUTES OVER DOWNGRADES AND REJECTIONS IN THE VINEYARD

A Dispute may arise if a winegrape grower disagrees with an assessment by the winegrape purchaser that the winegrapes have failed to meet agreed specifications contained in the Agreement and a financial penalty is imposed or some or all of the winegrapes are rejected.

If a Dispute in relation to a field assessment occurs, the matter needs to be resolved quickly, ideally before the expected date of harvest, and may in some cases need to be resolved within a few days to avoid deterioration of the winegrapes.

A winegrape grower will advise the winegrape purchaser within a reasonable time prior to harvest, of any change in the condition of the fruit that could result in a downgrade or rejection of the winegrapes under the terms of the relevant Agreement. The winegrape purchaser will notify the winegrape grower of any decision by the winegrape purchaser to impose a financial penalty and/or reject the winegrapes in accordance with the terms of the Agreement.

When a Dispute arises in relation to the imposition of a financial penalty and/or rejection of the winegrapes as a result of a failure to meet agreed specifications contained in the Agreement, the parties agree to follow these resolution procedures:

- 3.2.1 The Disputing Party will, as soon as practicable, notify the winegrape purchaser in writing of the issue(s) in dispute and the outcome desired. This notice will be known as the "Notice of Dispute". A summary of the Dispute (notifying the parties, the category of Dispute, tonnage and region) is to be supplied to the Committee by the winegrape grower at the same time.
- 3.2.2 The winegrape purchaser will respond in writing to the Disputing Party within 48 hours from the time of issue of the Notice of Dispute, indicating whether the desired outcome is agreed, and, if it is not, whether the winegrape purchaser wishes to offer another outcome, and inform the Committee in writing that a response has been provided.
- 3.2.3 If after 72 hours from the time of issue of the Notice of Dispute the Disputing Party and the winegrape purchaser have been unable to resolve 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) under dispute.
- 3.2.4 If the Disputing Party and the winegrape purchaser cannot agree on the selection of an Independent Expert within 96 hours from the time of issue of the Notice of Dispute, the Committee will appoint an Independent Expert from the panel of experts endorsed by the Committee upon application from either party. Such application is to be made within 120 hours of the time of issue of the Notice of Dispute.
- 3.2.5 The appointed Independent Expert will deliver a determination within 48 hours of being appointed or, if the matter requires extensive research, submissions from the parties and/or investigations, will set a reasonable timeframe in which to complete the task.
- 3.2.6 The Disputing Party and the winegrape purchaser agree to be bound by the determination of the Independent Expert in the absence of manifest error or misconduct and to share costs equally.
- 3.2.7 The Independent Expert will be engaged by Disputing Party and the winegrape purchaser under their normal terms of engagement and in any event will be indemnified by the parties as to their costs and expenses.

3.3 DISPUTES OVER DOWNGRADES AND REJECTIONS AT THE WEIGHBRIDGE

Winegrape purchasers (or their agents/representatives) are encouraged to inspect the condition of winegrapes in the vineyard prior to harvest as a means of minimising Disputes at the weighbridge.

A Dispute can arise at the weighbridge if winegrapes are downgraded (resulting in a financial penalty) or rejected if, in the opinion of the winegrape purchaser, they have failed to meet stipulated specifications. The matter needs to be resolved quickly, ideally within 12 hours of delivery of the winegrapes. The winegrape grower will be notified as soon as practicable of a downgrade or rejection of their winegrapes. The winegrape grower or the winegrape grower's agent/representative (in the event of winegrapes processed at a distance from the vineyard) should be given the opportunity where practical to inspect the rejected or downgraded winegrapes (within a reasonable time of delivery) and to try and reach agreement with the winegrape purchaser on the nature and extent of the downgrade and any resulting price adjustment to allow the continued processing of the winegrapes or the rejection of the winegrapes.

For the avoidance of any doubt but without limiting the other obligations set out in this clause, the Code does not require an Independent Expert to resolve disputes over downgrades and rejections at the weighbridge.

3.4 LEGAL PROCEEDINGS

Unless, as required by law, the parties agree not to institute legal proceedings (except to obtain urgent interlocutory relief) or make any complaint to a regulatory authority other than the Australian Competition and Consumer Commission in relation to a Dispute covered by Part 3 of the Code until all avenues open to them under Part 3 of the Code have been implemented and, where relevant, a determination made. The parties may institute legal proceedings (or take any other action that they consider appropriate) in relation to any other type of dispute. Nothing in this clause affects or limits the operation of part 3 relating to the powers of the Independent Expert.

Part 4: Breaches of the Code

4.1 COMPLAINTS

- 4.1.1 A complaint of a breach of the Code by a Signatory must be referred to the Committee in writing.
- 4.1.2 Either a winegrape grower or a winegrape growers association may lodge a complaint with the Committee.
- 4.1.3 A Signatory cannot lodge a complaint against another Signatory, unless the complaint relates to conduct that will bring the wine industry into disrepute.
- 4.1.4 The complaint must:
 - 4.1.4.1 state the name of the Signatory and the party bringing the complaint.
 - 4.1.4.2 provide details as to the nature of the complaint by reference to the Code.
 - 4.1.4.3 specify what outcome the Complainant believes will resolve the issue.
- 4.1.5 If a complaint alleging a breach of the Code is reported to the Committee, the Committee must take the following action prior to making a determination:
 - 4.1.5.1 notify the Signatory within 7 Business Days that a complaint has been lodged with the Committee;
 - 4.1.5.2 provide to the Signatory the details for the complaint and Complainant and the outcome the Complainant requires to resolve the complaint;
 - 4.1.5.3 allow the Signatory 21 Business Days to respond to the complaint in writing;
 - 4.1.5.4 provide the Signatory's written response to the Complainant; and
 - 4.1.5.5 in the event that the Complainant is not satisfied with the Signatory's response, allow the Complainant 14 Business days to respond to the Committee.
- 4.1.6 If the matter has not been resolved in accordance with the procedure set out in clause 4.1.5, the Committee must sit and make a determination on the complaint.
- 4.1.7 A meeting of the Committee to rule on a complaint must occur within 30 Business Days from the date of the Complainant's final response.
- 4.1.8 If the Committee determines that no breach of the Code has occurred, the Committee is to write to the Complainant and the Signatory and provide its determination and reasons within 7 Business Days.
- 4.1.9 If the Committee determines that a breach of the Code has occurred then the Committee must write within 7 Business Days to the Signatory and provide the determination, reasons and remedy or penalty, if applicable.

- 4.1.10 If the Committee determines that a breach has occurred, the Committee may do any or all of the following:
- 4.1.10.1 notify the Signatory what steps it would be required to take to remedy the breach;
 - 4.1.10.2 warn the Signatory that they may be removed as a Signatory to the Code if they do not remedy the breach within a “reasonable period” (which must be specified in the notice) and/or if they commit future breaches of the Code; and/or
 - 4.1.10.3 subject to clause 4.2, remove the Signatory from the list of Signatories to the Code.
- 4.1.11 If, subsequent to a finding that a Signatory has breached the Code, that Signatory rectifies the breach in accordance with the Committee’s instructions, then the Committee must write to the Complainant within 7 Business Days and advise the Complainant that the Committee considers that the Signatory is no longer in breach of the Code.
- 4.1.12 In all cases, the Committee’s determination may only be challenged in the case of manifest error or proven misconduct.

4.2 REMOVING A SIGNATORY FROM THE CODE

- 4.2.1 In determining whether to remove a Signatory from the Code, the Committee must take into consideration the following:
- 4.2.1.1 the nature of the complaint;
 - 4.2.1.2 the conduct of the Signatory and the Complainant;
 - 4.2.1.3 the conduct of the Signatory in responding to the Committee;
 - 4.2.1.4 the systemic nature (if any) of the complaint;
 - 4.2.1.5 the number of complaints referred to the Committee against the Signatory;
 - 4.2.1.6 whether the complaints made against the Signatory are the same or otherwise;
 - 4.2.1.7 any previous breaches of the Code by the Signatory;
 - 4.2.1.8 whether the conduct brings the wine industry into disrepute; and
 - 4.2.1.9 any other matter that the Committee considers relevant.

4.3 COST RECOVERY

- 4.3.1 If the Committee determines a breach of the Code has occurred, the Committee may recover from the party in breach reasonable costs incurred by the Committee in determining the complaint.
- 4.3.2 Should a winegrape grower or winegrape grower’s association make a complaint alleging a breach that is subsequently found to be invalid, then the Committee may recover from the winegrape grower or winegrape growers association reasonable costs incurred by the Committee in determining the complaint.

Part 5: Administration of the Code

- 5.1.1 The Code will be administered by the Committee.
- 5.1.2 The Committee will comprise those members jointly agreed to by the Boards of the WGGA and WFA.
- 5.1.3 The Committee will be supported by the Secretariat (which will be jointly funded by WGGA and WFA) and the Committee may, in its sole discretion, delegate any of its powers or duties under the Code to the Secretariat. The Committee may appoint and remove the Secretariat by notice in writing.
- 5.1.4 A quorum will comprise the Chair of the Committee and two delegates nominated by WGGA and two delegates nominated by WFA.
- 5.1.5 All decisions of the Committee must be made by way of simple majority.
- 5.1.6 Any recommendation to amend the Code must be agreed in writing by WGGA and WFA in accordance with a resolution of their respective Boards. Any change to the Code which is endorsed will take effect on the date agreed between WFA and WGGA (such date to take into account a reasonable time period for Signatories to amend their Agreements, if applicable).
- 5.1.7 The Committee shall undertake the following roles:
 - 5.1.7.1 administer the Code, including the setting of reasonable fees to support the Dispute resolution system;
 - 5.1.7.2 manage the business operations of the Code including ensuring that suitable insurance arrangements are in place;
 - 5.1.7.3 produce an annual report to be published by 30 September each year, containing:
 - (i) a description of the nature and number of Disputes received and any other comments it wishes to make about conduct or trends in the industry; and
 - (ii) a report to the industry on the operations of the Code and the Committee and any matters requiring consideration by the industry arising from the activities of the Committee including the names of any parties removed from the Code.
 - 5.1.7.4 at the discretion of the Committee, maintain and publish a list of Code Signatories found to be in breach of the Code; and
 - 5.1.7.5 monitor the operation of the Code and, as appropriate, recommend any amendments to the Code that may assist in its operation, and consult with WGGA and WFA on any proposed amendments to the Code.

Contacts

WINE GRAPE GROWERS AUSTRALIA

National Wine Centre, Botanic Road
ADELAIDE SA 5000

PO Box 950
KENT TOWN SA 5071

T: (08) 8362-9802
F: (08) 8362-9804
E: info@wgga.com.au
W: www.wgga.com.au

WINEMAKERS' FEDERATION OF AUSTRALIA

National Wine Centre, Botanic Road
ADELAIDE SA 5000

PO Box 2414
KENT TOWN SA 5071

T: (08) 8222 9255
F: (08) 8222 9250
E: wfa@wfa.org.au
W: www.wfa.org.au

CODE SECRETARIAT

The Accord Group
Level 2, 370 Pitt Street
SYDNEY NSW 2000

T: (02) 9264 9506
F: (02) 9264 8268
E: codedisputes@accordgroup.com.au
W: www.accordgroup.com.au

APPENDIX 1

DEFINITIONS

| | |
|---------------------------|--|
| Agreement | an Agreement between a winegrape grower and a Signatory for the supply of winegrapes. |
| Associated Documents | all documents that are incorporated by reference in or which form part or purport to form part of an Agreement. |
| Business Day | a day other than a Saturday, Sunday, public holiday or bank holiday in the State in which the vineyard to which the Agreement applies is situated. |
| Code | this Australian Wine Industry Code of Conduct. |
| Committee | the Code Management Committee established to manage the operation of the Code in accordance with Part 5 – Administration of the Code. |
| Complainant | as applicable, a person, corporation or other body corporate: <ul style="list-style-type: none"> • raising a Dispute for determination under the Dispute resolution procedures of the Code; or • making a complaint to the Committee in accordance with Part 4 – Breaches of the Code. |
| Dispute | any disagreement between a Disputing Party and a Signatory which: <ul style="list-style-type: none"> • may be referred by the Disputing party for resolution in accordance with Part 3 of the Code; and • is in relation to a matter which is permitted under the terms of the relevant Agreement to be disputed by the Disputing Party. |
| Disputing Party | a winegrape grower who initiates a Dispute resolution process under clauses 3.1 or 3.2 of the Code and/or any other party who is authorised or permitted under the terms of the relevant Agreement to do so on behalf of or in association with the winegrape grower. |
| Independent Expert | an independent, qualified person/s appointed by the parties to a Dispute or by the Committee to make a determination on Disputes notified to them under the terms of the Code. |
| Indicative Regional Price | in relation to a variety of winegrape, an indicative fair market price for that variety of winegrape from that region for the next vintage which: <ul style="list-style-type: none"> • is not winegrape grower or vineyard specific; • is set by the winegrape purchaser acting reasonably; • is not an offer capable of being accepted by a winegrape grower or binding on the winegrape purchaser; and • is not a guarantee of the final price that will be offered to the winegrape grower. |

| | |
|----------------------|--|
| Material Variation | <p>any variation to an Agreement or Associated Documents whether as a unilateral variation permitted by the Agreement or by consent between the parties, other than a variation of the price or winegrape assessment methods already provided for in the Agreement. A Material Variation includes but is not limited to any variation of:</p> <ul style="list-style-type: none"> • The term of the Agreement including extensions; • Terms of payment; • Price adjustment criteria; • Winegrape assessments including winegrape standards (other than as provided for in the Agreement); • Specification of blocks, varieties and tonnages including production caps or quotas; • Delivery and freight arrangements; and • Dispute resolution procedures. |
| Notice of Dispute | a formal written notification between the parties to a Dispute. |
| Secretariat | an independent dispute resolution body or firm appointed by the Committee as the Code Secretariat from time to time. |
| Signatory | a winegrape purchaser who has notified the Committee that it will be bound by the Code. |
| Spot Market Purchase | an Agreement for the sale and purchase of winegrapes which is entered into between the parties less than 10 Business Days prior to the expected harvest date for those winegrapes (or, if there are more than one expected harvest date applicable to the Agreement, 10 Business Days prior to the earliest of these dates). |
| WFA | Winemakers' Federation of Australia. |
| WGGA | Wine Grape Growers Australia. |