

Being proactive to avoid disputes eventuating in the vineyard

This article is the third and final part of the series, 'What can be done in the vineyard to manage risk in difficult seasons?' by Mary Retallack, managing director, Retallack Viticulture, presented at Finlaysons Wine Roadshow XX at nine different venues around Australia between 30 July and 31 August 2012. In last month's *Grapegrower & Winemaker*, Retallack discussed fruit quality and the assessment of grapes in the vineyard.

AVOIDING VINEYARD DISPUTES is possible by taking a proactive approach to managing expectations and minimising risk. There are a number of things winegrowers can do to ensure they are on the front foot when managing risk and expectations: **Choose whom you do business with carefully.**

- Only do business with reputable fruit purchasers – do your homework!
- Carry out due diligence prior to entering into a grape sale agreement. This can help alleviate problems up front
- Take the time to understand your rights and responsibilities (contractual obligations, terms and conditions of payment) and the needs of your customer (supply fruit that is 'fit for purpose').
- Ensure there are clear channels for communication. Both parties should encourage frank and open discussion about any concerns that arise so they can be addressed quickly and don't fester into larger issues.

- Know who your key fruit purchase contact(s) are and develop a good working relationship with them. Involve them in discussions at the beginning of the season, encourage visits at strategic times throughout the season, and seek feedback about your fruit as it ripens in the vineyard and once it has been made into wine.

Don't sit back and wait for someone else to take charge.

- Arm yourself with the latest information (factsheets, weather reports), plan ahead, and have a plan for the best and worst case scenarios and be willing to act on them.
- Be realistic about the quality of fruit you have on offer, manage expectations, be clear about what is required to grow fruit that is 'fit for purpose', have a good understanding about what your fruit is worth in the marketplace and be equipped with the knowledge needed to successfully negotiate the sale of your winegrapes.

Work on the basis of a 'no surprises' approach.

- If there are any issues that arise during the growing season, raise them first and offer a solution at the same time as identifying the problem.
- Take out appropriate insurances. If the risk of an event is too high, it is likely the premium will be high also. However, this may provide peace of mind if something goes wrong.

Concentrate your efforts to achieve the best return with limited resources.

- Have a clear understanding of the fruit maturity, purity and condition schedule in your grape sale agreement.
- If you do not understand how particular parameters will be assessed, ask. If you are uncomfortable with the provisions outlined for the downgrade or rejection of fruit, or if this is not clear, negotiate their change.
- Ensure you produce fruit that is consistent with the maturity, purity and conditions you have agreed to. If an issue with fruit purity or condition arises, ensure it is addressed early, so



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you can keep your options open. Seek a second opinion if the assessment is contentious.

- Work closely with the fruit purchaser to facilitate the scheduling of fruit in a timely way that preserves fruit quality.

Seek constructive feedback at the end of the season. Accommodate reasonable suggestions that will result in improvements.

Rights and responsibilities

There are a number of ways the sale of wine grapes takes place, ranging from a verbal 'handshake' through to a carefully worded grape sale agreement that is legally binding, with variations in between.

For an agreement to become a contract it must have three identifiable features¹:

- 1 An agreement between the parties to do, or to refrain from doing, certain things
- 2 An intention to make the agreement legally binding, and
- 3 An exchange of value. This is known as consideration.

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

- An offer, and
- Acceptance of that offer.

Difficult questions don't tend to be asked while things are going well. But if the grape sale process falters it is important for both parties to have a clear understanding of their rights and responsibilities, and it is usually at this time that the terms of the agreement come under close scrutiny (sometimes for the first time). If the terms are not clearly defined then this makes it much harder for both parties to navigate the dispute to an acceptable end point. A clearly worded wine grape sale

agreement written in plain English will help to alleviate anguish when things go wrong.

Avoiding problematic language in grape sale agreements

Problematic language may appear in the grape sale agreement and if this does occur, ideally the terminology used will be renegotiated prior to signing the contract. In practice, this is quite difficult if one party does not understand their rights and/or forfeit their rights as they are unaware, unfamiliar or inexperienced in developing contracts.

Ignorance cannot be used as a defence. It is up to both parties to ensure they understand the terms of the agreement. If you feel uncomfortable with the wording in a contract, speak up or ask for clarification, as once you sign the contract it is a legally binding document.

Examples of problematic language are outlined in the publication *A guide to growing winegrapes in the Barossa*² and may include:

- Complicated sub-clauses. Be aware of complicated sub-clauses that relate to another part of the contract, they can be confusing to follow and understand. You may end up forfeiting your rights if a particular clause is negated by a sub-clause located elsewhere in the contract.
- Consequential loss. Grapegrowers 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.
- Sole discretion. The term 'sole discretion' by either party should be avoided and only used in cases where its application is truly justified. Consider substituting the concepts of 'reasonable judgment' or 'good faith' in lieu of 'sole discretion'.
- 'Zero/minimum price' contracts. Ensure that you have a clear understanding of what you will be paid for your grapes and that a minimum or fixed price is stated, or if a 'market price' is specified, that the agreement states clearly how the price is to be determined.
- Controlling interest. Be aware of statements that imply the grape purchaser wishes to have a controlling interest in future vineyard management decisions, the appointment of a vineyard manager, your assets, or your vineyard finances.
- Force majeure. The lack of production capacity for the grape purchaser should never be considered a force majeure (an extraordinary event or circumstance beyond the control of the parties) and able to absolve the grape purchaser of responsibility for taking the grapes.
- Non-performance. Be aware of clauses that entitle the grape

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purchaser to recover losses sustained by them and any processor as a result of the grape grower's failure to deliver (where the grapegrower is not liable for any loss due to force majeure).

- Vineyard practices. Be aware of clauses that state that if a grapegrower 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. Similarly, the grape purchaser will not be liable for any loss incurred by the grapegrower as a result of any advice provided by the grape purchaser.

If a dispute does occur and parties are reaching for their grape sale agreements, it is usually a pretty good sign that negotiations have started to break down. If the foundations of the grape sale agreement are lacking or expectations have not been met, this can add to the confusion of achieving an outcome that is acceptable to both parties.

Alternative dispute resolution (ADR) and legal recourse

There are a number of avenues available for parties to navigate their way to an acceptable solution if there is a dispute, including:

- Discussions directly between the parties to reach a suitable resolution,
- Seeking the assistance of an independent third party, such as a mediator (informally or formally with a non-binding or binding outcome) to facilitate the discussion process so each party can reach a suitable outcome,
- The engagement of an independent expert who can provide a technical assessment of fruit quality, expert determination, or navigate the application of the grape sale agreement,
- Resolution through the mechanisms outlined in the Wine Industry Code of Conduct (should the winery be a signatory),
- Arbitration where your dispute is referred to an independent umpire for determination, or
- Litigation through the court system.

Each option differs slightly in its approach. It is good practice to include a dispute resolution clause in the grape sale agreement so there is agreement 'up front' about the avenues the parties are willing to explore if there is a dispute, and whether the decision reached through ADR is binding on both parties.

Mediation and arbitration

A mediator can be employed to facilitate discussion between two parties to jointly

explore and attempt to reconcile their differences, and reach what they consider is a workable outcome. A mediator has no authority to pose settlement and the parties retain control over the outcome. This approach can be particularly useful in complex matters when the parties have an ongoing contractual relationship and they would like to preserve the relationship.

Arbitration is a formal dispute resolution process governed by the Commercial Arbitration Act in which two or more parties refer their dispute to an independent third person (the arbitrator) for determination. The result of the arbitration, known as the Award, is enforceable in the same manner as a court judgment.

To search for a mediator or arbitrator, visit the Institute of Arbitrators and Mediators (IAMA) website, <http://iama.goia.com.au/index.php/search/>

Expert determination

An expert determination is normally carried out by a suitably qualified third person for disputes that are essentially technical in nature. The expert retains their independence and has a duty to act fairly and impartially between the parties, giving each party a reasonable opportunity to present his or her case.

Do your homework if you wish to engage the services of an independent expert, they vary in expertise, reputation, location and cost. It is common practice for both parties to agree on the appointment of an independent expert and to split the cost of their services. It is up to the parties and the expert to ensure that there are no 'conflicts of interest' prior to proceeding on a job.

It is incumbent on the independent expert to present their findings in a clear and concise way and to provide reasons for their determination. The 'losing' party often seeks this detail so they can understand why a determination did not go their way.

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.

Australian Wine Industry Code of Conduct

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.

Details about the Australian Wine Industry Code of Conduct can be found



at <http://www.wineindustrycode.org/> and a current list of independent experts can be found here <http://www.wineindustrycode.org/Independent%20Expert%20Panel.pdf>.

Documentation

If problems start to arise take notes. 'Contemporaneous' notes is a legal term used for simply taking notes as events occur; that is, if something happens that you may rely on at a future date, write a note or collate documentation at the time that it occurs and while the details are fresh in your memory.

This may include notes after a vineyard visit or activity, emails, photographs etc. Remember to date each entry and include other relevant details such as who were the parties to the conversation etc. If you have been verbally communicated of a downgrade or rejection of fruit, ensure this is stated in writing. You may wish to retain a fruit sample (placed in the freezer) as evidence in case it is needed in the future.

If there is poor documentation this makes it hard to reconstruct or demonstrate the sequence of events that may be required to substantiate a claim made at a later date.

Conclusion

Disputes can be stressful, time consuming and costly, regardless of the outcome. By following the points outlined in this

article it may be possible to alleviate a dispute eventuating in the first place. If a dispute does occur, keep a cool head, be firm in exerting your rights and follow the avenues outlined above.

Seek advice if you are unsure of the best way to proceed. Assistance can be sought from your local, state, or national body (Wine Grape Growers' Australia) that represents the needs of wine growers, local consultants, independent experts or your legal advisor.

A number of publications, tools and technologies are available to help wine growers navigate their way through the growing and selling of wine grapes and these resources are outlined below.

Resources

Publications, practical tools and latest technologies

A guide to negotiating the sale of winegrapes in the Barossa

BGWA have developed a booklet that can be used to assist growers and purchasers to navigate their way through each stage of a wine grape sale transaction. Chapters in the booklet include:

- Things to know and do before selling wine grapes

- Contractual obligations
- Wine grape sale checklist
- Examples of problematic language and clauses
- Vineyard access protocols
- Navigating your way through a dispute
- Alternative dispute resolution
- Grower options if grape payments are outstanding, and
- Insolvency procedures to assist their members in successfully negotiating the sale of winegrapes.

For more information, see: www.mybookingmanager.com/grapebooklet

Wine Grape Growers Australia – winegrape sales grower resources

The following resources that can help growers to negotiate with grape purchasers are posted on the WGGA website:

- Guidelines for marketing winegrapes,
- Guidelines for negotiating grape supply contracts,
- Sample spot purchase winegrape agreement,
- Winery checklist for negotiating grape supply contracts,
- A guide to negotiating the sale of winegrapes in the Barossa, and

- Australian Wine Industry Code of Conduct.

For more information, see: www.wgga.com.au/winegrape-sales/winegrape-contracts-resources-for-growers

Websites

The following additional resources may be useful in navigating the successful sale of wine grapes.

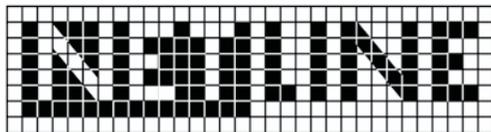
Wine Grapes Industry Act 1991 Terms and conditions of payment, see www.pir.sa.gov.au/wine/legislation/terms_and_conditions_of_payment,

Phylloxera and Grape Industry Board of South Australia South Australian Wine Grape Crush Survey for 2012, see: [www.phylloxera.com.au/resources/sa-winegrape-crush-survey/Wine Australia Winegrape Purchases Price Dispersion Report 2012](http://www.phylloxera.com.au/resources/sa-winegrape-crush-survey/Wine%20Australia%20Winegrape%20Purchases%20Price%20Dispersion%20Report%202012), visit: www.wineaustralia.com/en/Winefacts%20Landing.aspx and click the link, 'Grape and wine production' to find the link to the report. **GW**

References

^{1, 2} Modified from Retallack, M (2011) A guide to growing winegrapes in the Barossa, Barossa Grape and Wine Association, Nuriootpa.

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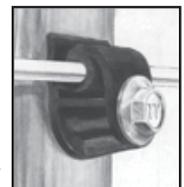
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