

Wine industry legal risks

Mark Hamilton, from Grope Hamilton Lawyers, presents a checklist of the financial and legal 'risks' facing business owners across the grape and wine community.

GIVEN THE UNPROFITABLE STATE of Australia's wine industry during the past 15 years or so, most wine producers and grapegrowers are or have been flat out attempting to survive. Money has been and remains at a premium.

In this environment, it is very easy and understandable to overlook the significant and ever increasing legal and financial risks faced by wineries and grape growers – many of which are in themselves fundamental to financial performance and long term survival. In hard times, these types of issues and marketing budgets take a hit.

To guarantee long term survival it is necessary to devote sufficient management time and expenditure to identify and address all financial and legal risks and requirements. Time spent now will save considerable negative time and expenditure later on and avoid having to involuntarily address problems identified by third parties, such as, in the above circumstances, the Environmental Protection Authority (South Australia) or the Australian Wine and Brandy Corporation.

A 'fingers crossed' approach may get by, but business failure can be the result if the odds go against you.

Previous press stories about fines imposed by environmental courts upon a large Australian wine producer and the suspension of an export licence of a Riverland winery, were salutary reminders of the reality that, to guarantee long term survival, it is necessary to devote sufficient management time and expenditure to identify and address all financial risks and requirements.

A BASIC CHECK LIST OF MORE OBVIOUS, OR TOPICAL, FINANCIAL AND LEGAL 'RISKS'

- **Financial failure:** An orderly and efficient debt collection system to preserve cashflow and to avoid extending credit to insolvent businesses.
- **Winery waste:** Identifying and implementing a waste management plan for your winery which both adopts "best practice" and which complies with all relevant environmental, planning and other legal requirements. Whilst recently constructed wineries are presumably likely (but not certain) to comply with these requirements, long established wineries should not assume that they are exempt by virtue of having been built at some earlier point in time. There is a positive obligation to comply with many of these requirements – whenever wineries were built. Get some advice.
- **Label integrity:** Identifying and implementing practices, procedures and record keeping for the wineries grape intake, winemaking and finished goods production to ensure that, firstly, all finished wine products are "true to label" - that they comply with domestic and international labelling and packaging requirements, and secondly, so as to ensure that the winery can immediately establish compliance with these matters by reference to easily accessible, centrally located records. If your winemaking records and systems are a priority then this will also act to guard against the likelihood of honest mistakes being made and remaining undetected and unremedied during the grape intake and value adding process.

Putting deliberate label 'fraud' to one side, you do not wish to have your export licence suspended while you spend two frenetic, stress filled weeks collating the relevant information.

- **Managing insurance risk and exposure:** Reviewing insurance arrangements, policy documents and fine print is not a particularly attractive proposition for most of us, except perhaps the guy on TV who during one season kept on interrupting Port Adelaide AFL matches to extol the virtues of barcodes. This is however a significant risk area for the financial health and existence of your business. Make sure you get the right person in your organisation to take responsibility for this and ensure that you identify all pertinent risks. If you are in doubt, or do not have someone within your organisation with the requisite skills, then consider getting in an outside consultant to conduct an insurance review in the first year which will then set you on the right course for future years. This could prove to be money well spent.
- **Export credit insurance:** This should include, if you are exporting, such things as product liability insurance which operates in your export markets, and credit insurance (through organisations such as EFIC) so as to insure your export order payments. Remember the basic rule that if you cannot get credit insurance on a customer, then it is not worth doing business with the customer.
- **Unregistered vehicles:** other traps like using unregistered vineyard plant and equipment on public road, and inadequate public liability cover, require careful consideration.
- **Export orders:** Ensuring that you have clear written agreements with importers regarding product specifications and labelling is vital given the potential for disputation in relation to what was ordered and what was delivered.
- **Preparation of food at cellar door sales outlets:** Food must be prepared in accordance with all relevant health and planning requirements, and all necessary food preparation facilities must be provided to avoid food health risks. Insurers must be on notice of food preparation and sale activities. Consider the implications of uninsured, food poisoning claims, and the attendant publicity.
- **Brand protection:** Ensure that you have applied for all relevant trademark protection over your brand both in Australia and overseas wine export markets where you market or intend to market your brand. By seeking trademark protection, you will quickly identify whether you are able to secure a long term right to market wine under that brand in a particular market place. There is little or no point in developing a brand where you do not have a monopoly over the words constituting the brand.
- **Registered Purchase Money Security Interests:** It is appropriate that you review your arrangements with wineries and distributors, both in Australia and overseas, and with the retail trade if you sell direct, to ensure that you include properly drafted clauses on appropriate contractual documentation and invoices, entitling you to register Purchase Money Security Interests. This is to provide that, in the event that a liquidator or receiver and manager is appointed to a customer, you have security over

the goods for the unpaid purchase price.

- Occupational health and safety risk: A great starting point for ensure compliance with all occupational health and safety requirements is to get a qualified occupational health and safety consultant to conduct a full review of your business. This will enable you to address or identify major obvious risks immediately, and to fix them, and to draft a plan for “continuous improvement”.

Appoint someone suitable on your staff as the OH&S officer for this purpose. Given the numerous occupational health and safety requirements, it is virtually impossible for any individual – except for a specialist – to be sufficiently familiar with all the requirements to do this without outside assistance. To proceed without outside assistance is to assume risk as it is not good enough that you are trying. You must get it right. Improvement is a possibility here.

- Foreign exchange risk: Ask your banker to refer you to the experts within their organisation for information and advice regarding management of your foreign exchange risk if engaged in wine export. This is a specialist area riddled with risk. You may well choose to do nothing but live with the vagaries of currency fluctuation but it is a good idea to understand the issues and what – if any – mechanisms are available to manage your downside risk without exposing you to unacceptable risks.
- Grape contracts: Given the current grape oversupply situation, it is necessary to carefully read and potentially get some legal advice regarding the meaning and your position under grape contracts before discussing issues arising under contracts with wineries. This may save problems later if wineries know that you understand the parties’ respective rights and

obligations when holding discussions. Do not assume that these wineries will have read your contract before holding discussions with you. Be prepared.

- SARS and War: Unfortunately, with the onset of special acute respiratory symptoms disorder not subsided, and the Iraq and Syria wars, we are reminded that the safety of marketing and business personnel travelling overseas is something to be considered. Common sense is probably the best indicator of action here, however, insurance arrangements for employees engaged in these activities must be considered.
- This is not going to get any better!: These matters are but the tip of a very large and ever increasing iceberg, and are as important to your business as the manufacture and sale of wine products or grapes.
- Are you the right person to manage risk?: One other type of “tip” – if you can’t bring yourself to deal with these issues because (for example) you are a marketing or sales type, then do yourself a favour and get someone who can, or sub-contract the task out. A good test is whether you can bring yourself to read through and carefully study the fine print of an insurance policy.

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