Dal Broi Wines Pty Ltd and Australian Grape and Wine Authority [2015] AATA 868 (30 October 2015)

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| Division | **GENERAL DIVISION** |
| File Number | 2015/4764 |
| Re | Dal Broi Wines Pty Ltd |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Egon Fice, Senior Member** |
| Date | **30 October 2015** |
| Date of written reasons | **11 November 2015** |
| Place | **Melbourne** |

The application for a stay in this proceeding before the Tribunal has been refused.

..........................[sgd]..............................................

Egon Fice, Senior Member

Catchwords

**ADMINISTRATIVE LAW** – Administrative Appeals Tribunal – procedure and evidence – application for stay of operation of decision – cancellation of grape export licence – public interest considerations – impact of stay order on wine industry – stay refused

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) s 41

Australian Grape and Wine Authority Act 2013 (Cth) ss 7 – 8, 39A, 39C, 39F, 39H, 40E

Australian Grape and Wine Authority Regulations 1981 (Cth) regs 9 – 10

Cases

Bryant v Commonwealth Bank of Australia (1996) 134 ALR 460

Re Alexander and Migration Agents Registration Board (1995) 40 ALD 99

Re Scott and Australian Securities and Investments Commission (2009) 51 AAR 114

# REASONS FOR DECISION

**Egon Fice, Senior Member**

**11 November 2015**

1. In a letter dated 19 May 2015 the Australian and Grape and Wine Authority (AGWA) informed Mr Andrew Dal Broi, a director of Dal Broi Wines Pty Ltd (Dal Broi Wines), that it intended to consider cancellation of the company’s licence to export grape products from Australia.
2. AGWA explained that it had evidence indicating that Dal Broi Wines had exported a grape product in contravention of the *Australian Grape and Wine Authority Act 2013* (the Act). According to AGWA, Dal Broi Wines had exported two parcels of wine, one to Canada in mid to late March 2015 and one to the USA in October 2014, which it described as 2014 Pinot Grigio. The label integrity program (LIP) records provided to AGWA indicated that the parcels were comprised predominantly of Semillon, Chardonnay and Colombard.
3. After giving Dal Broi Wines the opportunity to respond, on 21 August 2015 AGWA notified Dal Broi Wines that the AGWA Board had made a decision on 20 August 2015 to cancel the export licence held by Dal Broi Wines, effective immediately.
4. Dal Broi Wines lodged an application with the Tribunal on 10 September 2015 seeking a review of the AGWA Board decision. Regulation 10 (d) of the *Australian Grape and Wine Authority Regulations 1981* (AGWA Regulations) provides for applications to be made to the Administrative Appeals Tribunal for review of a decision of the Authority under regulation 9 to suspend or cancel a licence. Dal Broi Wines also lodged an application requesting a Stay Order pursuant to s. 41(2) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act). I heard the stay application on 30 October 2015 and determined that a stay should not be granted. These are the reasons for my decision.

# The making of stay orders

1. The Tribunal’s power to grant a stay order is found in s. 41(2) of the AAT Act. Relevantly, it provides (emphasis in original):

The Tribunal may, on request being made by a party to a proceeding before the Tribunal (in this section referred to as the **relevant proceeding**), if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

1. Downes J, in his capacity as President of the Tribunal, in the case *Re Scott and Australian Securities and Investments Commission* (2009) 51 AAR 114 (*Scott*), dealt with a stay application in the context of a banning order having been made against the applicant prohibiting him from managing a corporation for a period of 18 months. His Honour said, at 115:

In considering the application, it is appropriate for me to consider a range of matters, including:

1. The prospects of success.

2. The consequence for the applicant of the refusal of a stay.

3. The public interest.

4. The consequences for the respondent in carrying out its functions depending upon whether a stay is granted or not.

5. Whether the application for review would be rendered nugatory if a stay were not granted.

6. Other matters that are relevant, amongst which I would include the length of time that the ban has already been in place and the gap between today and the hearing of the application.

1. I should probably point out, merely as an observation, that the range of matters which should be considered in most administrative decisions may be greater than those where a court is required to consider a stay in matters between private parties. In private litigation, it would be rare for the public interest to be a relevant consideration, although it might in some cases. This was alluded to by Kirby J in *Bryant v Commonwealth Bank of Australia* (1996) 134 ALR 460 where his Honour said, at 464:

In the exercise of the jurisdiction to provide a stay, it has often been emphasised that cases involving a stay of the operation of the criminal law or of laws designed to protect the public (e.g. deregistration of a professional lawyer or medical practitioner) are in a class different from cases involving no more than the suspension of the operation of orders affecting two private litigants only.

1. I make the above observation because there was some focus on court decisions regarding the basis for granting a stay. A more accurate guide to the operation of s. 41(2) of the AAT Act will be found in cases dealt with by this Tribunal.
2. As Deputy President BJ McMahon said in *Re Alexander and Migration Agents Registration Board* (1995) 40 ALD 99 (at 102 – 103), the purpose of the power contained in s. 41(2) is intended to preserve the situation prior to the reviewable decision. It is not intended to put an applicant in a different position from that which existed prior to the reviewable decision. It is designed to serve the purpose of securing the effectiveness of the hearing and the determination of the application for review. There is, implicit in the words of s. 41(2), acceptance that a refusal to grant a stay will cause harm or damage to an applicant. However, that by itself is insufficient to found a sound basis for making such an order. I need to take into account the interests of any persons who may be affected by the review and that assessment requires me to weigh up those matters described by President Downes J in *Scott*.

## Prospects of success

1. Just how the wine exported to Canada and the USA came to be incorrectly labelled is not clear from a brief examination of the material which I had before me. The transaction which led to the shipment of the offending wine is relatively complex. Dal Broi Wines is simply a broker. It is not a wine-maker or grower. According to Mr T Grundy, the solicitor acting for Dal Broi Wines, Wickham Hill Winery was the source of the wine which was blended in conjunction with Warburn Estate. Wickham Hill Winery onsold the blended wine to Cheviot Wines which in turn entered into an agreement to sell the wine to Wyadra Wines which then supplied the wine to Dal Broi Wines.
2. Part VIA of the Act deals with the LIP. The object of the program is stated in s. 39A as follows:

The object of this Part is to advance the objects of this Act by helping to ensure the truth, and the reputation for truthfulness, of statements made on wine labels, or made for commercial purposes in other ways, about the vintage, variety or geographical indication of wine manufactured in Australia.

1. The LIP applies to a person who supplies or receives wine goods (including a person who sells the wine goods wholesale or retail or who exports the wine goods) (s. 39C(1) (c)). It plainly applies to Dal Broi Wines. A person who is described as a *record keeper* must keep written records of, amongst other things, the vintage, variety and prescribed geographical indication of the wine goods received by the record keeper (s. 39F(1)(f)) and supplied by the record keeper (s. 39F(1)(k)). Section 39H(4) makes provision for wine which is a blend of wines of different vintages, varieties or prescribed geographical indications. Blended wine must show the proportions of the blend represented by each blended wine; and the vintage, variety or prescribed geographical indication of each blended wine.
2. It is a serious offence, subject to a penalty of imprisonment for two years, if a person sells, exports or imports wine in trade or commerce with a misleading description and presentation (s. 40E). That conduct constitutes an offence whether or not the person intended to mislead. Mr A Dillon of counsel, who appeared on behalf of AGWA, submitted that strict compliance with the statutory requirements for exporting wine product from Australia was essential to protect Australia’s international reputation in this trade. Failure to comply could have a long-lasting deleterious effect on the future export of this product.
3. While the reasons for Dal Broi Wines’ failure to comply with the Act are not immediately clear on the material thus far in evidence, of significance as far as the stay application is concerned, is an email dated 17 November 2014 from Mr Gavan Dowden, who describes himself as the Chief of Finance & Operations for the Dal Broi Group. Mr Dowden said:

Please find attached the only records that Dal Broi Wines have in relatiion [sic] to the Purchase of the Pinot Gris. Dal Broi Wines do not have an actual trail that can show that this was the actual parcel of wine at Warburn Estate. The attached is the only invoice on file apart from the Wyadra Wines consignment.

Dal Broi Wines do not have anything else available on file relating to the movements of the wine consignments or any records that would facilitate the identification of the wine consignments that have been sold to date.

I have been reading the requirements on the AWBC website and understand that Dal Broi Wines may have been a little remiss in the appropriate record keeping in recent times. I have only just come on board and have been working through a range of record keeping issues. Prior to my appointment Dal Broi Wines had been operating with a staff of one primarily focused on sales and cash flow and failing to ensure that the appropriate record keeping was in place.

I have now implemented a strict process of record keeping per wine consignment purchased which required the purchase of an inventory system to do so.

1. In a witness statement made by Mr Andrew Dal Broi on 29 October 2015, Mr Dal Broi said that Dal Broi Wines acknowledged the error made but that it was not the result of a deliberate plan or scheme to defraud customers. He then said:

… The issue has been addressed by putting in place procedures to audit and ensure that an error of this nature does not happen in the future.

1. With respect to Mr Dal Broi, I do not appear to have had in evidence a clear and concise statement from either Mr Dal Broi or Mr Dowden as to how Dal Broi Wines came to incorrectly identify the two parcels of wine which were exported to Canada and the USA, nor did I have any indication as to what had been done to make sure that this mistake does not recur.
2. On the evidentiary material thus far disclosed in this matter, it should be apparent that Dal Broi Wines’ chances of success in this application to the Tribunal cannot be said to be good. While it is of course possible that the appropriate sanction may be less than a cancellation of its export licence, that is something which can only be decided after a full hearing. A cancellation or suspension appears to be the only sanctions provided under Regulation 9 of the AGWA Regulations.

## Consequences for the applicant

1. In his witness statement Mr Dal Broi said that Dal Broi Wines markets wine in Australia and overseas. He said about 70% of its business was for the Australian export market. According to Mr Dal Broi, if a stay were not granted, there was a serious possibility that the company would fail. However, in a letter dated 1 June 2015 addressed to the Chief Executive Officer of AGWA, Mr Grundy said:

Further, whilst these issues have been pending DBW has not engaged in further wine exporting. It has, in effect, imposed upon itself a voluntary suspension until this matter has been resolved.

1. Despite that statement by its lawyer, in his witness statement Mr Dal Broi resiled from that position. He said:

… With respect, AGWA has stretched the meaning of that statement. DBW’s contract to provide wine to Constellation is an example of a contract that was on foot for past and future wine sales. Wine had been provided previously and there were future orders to be filled. As described above, that contract is now lost and the relationship with Constellation tarnished because of the immediate cancellation of DBW’s export licence.

1. It seems to me that Dal Broi Wines cannot have it both ways. While I accept that hardship will be caused to Dal Broi Wines were a stay not granted, given that about 30% of its market is within Australia, if this application is brought on for hearing in the near future, the damage will at least be minimised. It is inevitable that where a stay is not granted so as to maintain the *status quo ante,* there will be detriment to an applicant. However that needs to be weighed against the other factors which need to be considered in making a decision about the grant of a stay order.

## The public interest

1. Mr N Sinnathurai, a Senior Lawyer with the Australian Government Solicitor who acts on behalf of AGWA, submitted that there was a significant public interest in not allowing Dal Broi Wines to export wines in these circumstances. According to Mr Sinnathurai, to allow Dal Broi Wines to export wines pending determination of this matter could cause harm to the reputation and promotion of Australian wine.
2. Mr J A Ribbands of counsel, who appeared on behalf of Dal Broi Wines, submitted that while it was of obvious importance that the integrity of the wine labelling system be maintained, it should be put into context in the circumstances of this application for a review of AGWA’s decision. He said that in the absence of an allegation of some form of systemic and continuing abuse or failure, there are very few circumstances where the public interest will genuinely be compromised.
3. Mr Ribbands accepted that the export wine in question was inaccurately described regarding its content. He said Dal Broi Wines accepted that to be the case. However, he submitted that the *inaccurate* (incorrect) description arose earlier in the production chain and, as Dal Broi Wines did not grow, produce or blend wine, its culpability for the error was minimal. He also submitted that the prospect of the error re-occurring was almost non-existent.
4. With respect to Mr Ribbands, I cannot accept those submissions. While it is yet to be proved where precisely in the chain of production the error arose, that does not seem to be the point. Dal Broi Wines, as the exporter of wine goods, must comply with the LIP. Its failure to keep proper records, on its own admission, caused wine to be exported to Canada and the USA which was mislabelled. It is foreseeable that if Dal Broi Wines continued to export wine despite some damage which it may have already inflicted upon Australia’s wine export industry, very serious consequences could easily follow. That would affect all exporters of wine goods from Australia. In my opinion, until this matter is resolved, considerations of public interest must weigh against the grant of a stay order.

## The consequences for the respondent

1. Were a stay order granted, it is conceivable that the reputation of AGWA would be significantly tarnished. One of its functions listed in the Act (s. 7(f)) is to control the export of grape products from Australia. It has the power to control the export of grape products from Australia by determining the persons, other than the Authority, who shall be permitted to export grape products and the conditions under which such exports will be permitted (s. 8(2)(a)). Its failure to act positively in a situation where serious damage may be caused to the export industry is likely to have detrimental consequences for the future of the industry. Although Mr Ribbands submitted that it was all about preserving the regulator’s reputation, it is not simply about the regulator but rather the entire industry. In circumstances where the exporter has admitted that its record keeping is not up to standard, it would be inappropriate for the regulator to allow exports to continue.

## Would the review be rendered nugatory

1. In part, this question has already been answered by Dal Broi Wines indicating that it continues to operate in the Australian market albeit to a significantly less volume. Nevertheless, that may be sufficient to continue its operations until this matter is resolved. It is not clear from the evidence before me that Dal Broi Wines would collapse completely and have to cease operations. While there are some statements made by Mr Dal Broi regarding the hardship which the company will experience as a consequence of not being permitted to export wines, I did not have tangible evidence that a refusal to grant a stay would render this application nugatory.

## Conclusion

1. On balance, given the significance of Dal Broi Wines’ failure to comply with the LIP resulting in a large volume of wine being exported to Canada and the USA which was mislabelled, it is not in the interests of the Australian wine export industry to permit Dal Broi Wines to continue its export trade while the cause of the misstatement is unclear and, consequently, any rectification action already taken may not provide a solution. In the present circumstances, I cannot find that the grant of a stay order would be desirable.
2. The stay order must be refused.

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| I certify that the preceding 28 (twenty -eight) paragraphs are a true copy of the reasons for the decision herein of Egon Fice, Senior Member |

..............................[sgd]..........................................

Associate

Dated 11 November 2015

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| Date of hearing | **30 October 2015** |
| Counsel for the Applicant | **Mr J Ribbands** |
| Solicitors for the Applicant | **T F Grundy** |
| Counsel for the Respondent | **Mr A Dillon** |
| Solicitors for the Respondent | **Australian Government Solicitor** |