



Barokes
WINES

BAROKES P/L ACN 079 714 579

10 August, 2005

Barokes Wines Vinsafe® Technology

1. Introduction

There is little doubt that the intention of the innovation patent legislation was to provide a cheaper costing patent system for lower threshold inventions. This was targeted towards SMEs such as Barokes Wines, a boutique wine company based in Victoria. However, because of some shortcomings in the legislation, Barokes' experience is that the innovation patent system may be misused by parties with large financial resources.

2. Background

Barokes Wines has patented its Vinsafe® technology, which is a complex three stage process that incorporates a number of vital elements to successfully deliver wine in a can, including :

1. wine construction,
2. can lining, and
3. filling specifications that enables premium quality, stability and longevity.

3. Current Patent Position

By the end of this year Barokes Wines will have been granted patents for its Vinsafe® technology in 30 countries, including 25 European countries, as well as Japan, Singapore, New Zealand and South Africa.

In Australia, Barokes Vinsafe® Technology has been granted an Innovation Patent which has been challenged by a large can manufacturing company. As the foundation of the challenge is unsubstantiated, the can manufacturer successfully employed delaying tactics to avoid a conclusive decision from the Patent Office for at least 18 months. The tactics amount to legitimately exploiting avenues available in the patent process and seem contrary to the spirit of the law and legislation, which was intended to protect the 'little person', develop Australia as a clever country and ensure the earnings from Australian ingenuity remain in the country. The recent delaying manoeuvre – which occurred close to the time after Barokes Wines lodged its detailed claim to its own expertise – conflicts with the can company's 6th July 2004 written submissions to the Patent office hearing in Canberra, wherein it stated:

...../2



“The public interest requires the expeditious resolution of all patent oppositions, and particularly innovation patent oppositions, in view of the principle and legislative intent identified...”

(Late note: Recent questioning in regards to the tactics employed by the can company on behalf of Barokes has coincided with a decision by the Patent Office to bring forward the hearing from the previous 18 month away date, that is, the end of August.)

4. Background to Patent Legislation

When the innovation patent legislation was introduced in May 2001, it was done amidst government concerns that Australian ideas were being lost to the rest of the world. Examples were cited of the Black Box Flight Recorder and gene technology, which were invented in Australia but developed overseas. Then there was the electrical power board, invented but not patented by Frank Bannigan, the managing director of Kambrook, who lost millions of dollars in earnings after companies around the world took the idea and made power boards of their own.

The patent legislation was said to stimulate research and development in small businesses by making patents cheaper and easier to get. At the time, ABS research found that 55% of businesses did not seek formal or informal protection for their innovations. This is worrying because as well as providing protection, patents also form a revenue stream through licensing to other companies (IBM earns US\$1.5 billion a year in licensing fees from patents).

Around the same time, the Government's innovation action plan, *Backing Australia's Ability* scheme, was also launched. The plan targeted the three key elements of the innovation system:

- ◇ Strengthening Australia's ability to generate ideas and undertake research
- ◇ Accelerating the commercialisation of ideas
- ◇ Developing and retaining skills

The delaying campaign Barokes Wines has faced is known colloquially as 'deep pocketing'. That is, a large company uses the considerable shareholder funds available to it to exploit legal processes and tie up the limited financial resources and time available to smaller, innovative companies.

The Barokes Wine example suggests that despite the intention of the legislation, small companies are prevented from using the patent system to effectively protect innovation because the process is too slow and too costly.



5. **Current Impediments in the Legislation**

The present innovation patent system provides that anyone may challenge or oppose the grant of the innovation patent at the Patent Office. While a challenge or opposition to an innovation patent is on foot, there is uncertainty about the validity of the patent and the practical effect is that it makes the enforcement of the patent much more difficult.

The procedures set down in the legislation enable a third party to challenge or oppose the grant of the patent at any time during its eight year term. This means that a third party could oppose a patent and drag out the proceedings, making the proceedings more expensive and the ownership of the patent less valuable. If the Patent Office or the patentee tried to stop this delaying strategy, the third party could simply file a new challenge or opposition at the Patent Office. This would recommence the proceedings.

6. **Barokes Example: A Risk to Australian Industry**

The Australian wine industry is drowning in an over supply of wine. This year it achieved a record vintage, with an estimated crush of 1.924 million tonnes. (That's 6% or 107,000 tonnes more than last year's record vintage of 1.817 million tonnes.)

The glut, combined with the strong Australian dollar, is expected to make it more difficult to export excess wine, resulting in price deflation and margin erosion for most Australian producers. Consequently commentators have been calling for innovative ways to sell wine to developing markets. As well, it is widely recognised that along with the over supply, the industry needs to tackle the problem of dwindling numbers of consumers. As wine drinkers age, their numbers are not being replaced with younger drinkers who, after formative years consuming sweet, carbonated soft drinks have graduated to canned, sweeter ready-to-drink mixed alcohol products. The key is to find ways to attract these drinkers to wine. To this end, Barokes range of wines has been specifically constructed by Master of Wine, Peter Scudamore-Smith, for the 'can generation' (18-39 year olds) and provides an opportunity for them to experience wine. This can only be good for the wine industry, as these new consumers will in time progress to more complex wines.

Not surprisingly there are major and well recognised Australian wine brands which are keen to use Barokes Wines' Vinsafe[®] technology and expertise. The uncertainty created by the can manufacturing company's legal tactics means this has been significantly delayed, thereby affecting Barokes' commercial viability. Clearly there needs to be a workable solution that frees the Australian wine industry to make use of Barokes Wines Vinsafe[®] expertise and take advantage of new and growing markets for Australian innovative technology. Barokes Wines have also been approached by a number of countries in wine producing regions (including South Africa, USA, New Zealand and Brazil) wishing to license the Vinsafe[®] technology, prior to Australian adoption.

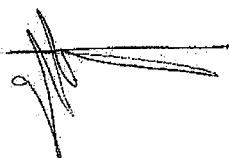


Barokes Wines is not simply a can filler. As a wine making company it has a vested interest in maintaining the quality of Australian wine at all stages of the production process. It understands the need to safeguard the integrity of the reputation of Australia's wine industry, as well as the unique historical, cultural and philosophical links our leading brand name industry has with wine packaging innovation. We should be concerned that attempts to prohibit this well credentialed wine company from protecting and licensing the Vinsafe® technology it developed puts the quality control aspects of this emerging market at great risk.

Further, the delay in having the patent matter resolved may force Barokes to shift operations offshore. Barokes is currently in discussions with overseas intermediaries.

7. Recommendation

To overcome the difficulties with the present legislation, we recommend that there be a window of six months from the certification of the innovation patent for a party to oppose or challenge the patent at the Patent Office. In this window period, any party may oppose the patent at the Patent Office. However, after the window period has expired, a third party would need to go to the court system if they wished to challenge the patent. This change would mean that a third party could not unnecessarily drag out proceedings as they would not then have the opportunity to file a new opposition or challenge at the Patent Office as the six month window would have shut. This change would also provide some greater certainty to the innovation patent owner. This change would also be likely to provide a speedier resolution of any patent opposition proceeding before the Patent Office as delaying tactics could be confronted by the Patent Office.



Greg Stokes
Chief Executive Officer
Barokes Wines

