

23 September, 2005

Collison & Co
GPO Box 2556
ADELAIDE
SA 5001

Application No: 1063359
Applicant: The Hamilton Wine Group Pty Limited
Trade mark: MARION VINEYARD
Your ref: 55158DIV JOM:MN

Report No. 1

I have examined your application to register this trade mark. At present I cannot accept the application. My reasons are set out in the following pages.

You can call me at any time during business hours and I will be happy to discuss the application with you.

You have up to **23 December 2006** (15 months from the date of this report) in which to resolve all the issues I have raised, unless the application is withdrawn or rejected before that date. As I need time to process your response to this report please submit your written response, including any submissions in support of your application for registration, any time up to **three weeks** before the above date. If you require more time to finalise the application you must apply for an extension of time before the final date and pay the fee of \$100 per month.

I look forward to hearing from you.

Beverly Philip
Trade Mark Examiner
(02) 6283 2668

Trade Marks likely to be needed by other Traders

A trade mark is a sign used commercially to distinguish the goods or services of one trader from those of another in the marketplace.

Therefore a trade mark can be difficult to register if its main feature is a letter, word, phrase, name, number, device, shape, colour, sound, scent or symbol commonly used by other traders in a similar field.

(Section 41 *Trade Marks Act 1995*)

My reasons for not accepting your application:

Your trade mark contains the word MARION. This is the name of a suburb in Adelaide, South Australia. The only other material present in the trade mark is term VINEYARD which just indicates something of the nature of the goods.

My research on the Internet indicates that there is a vineyard in this area, even though it is a suburb of Adelaide. I gather the applicant is associated with this vineyard, however the use of MARION here is still indicating the geographical source of the goods.

I have enclosed copies of some extracts from my Internet research.

The action you can consider:

You can address this matter if you:

- Provide me with evidence of use and/or intended use and/or other circumstances under subsection 41(5) of the Trade Marks Act 1995.

Due to the nature of the trade mark you will need to provide substantial, persuasive evidence of use before your trade mark can be accepted.

PLEASE NOTE: Before deciding whether to provide evidence you should carefully consider the following:

- Gathering and compilation of this information can be time-consuming and costly.
- The evidence you provide **may not be sufficient** to overcome the problem.

You can telephone me at any time during business hours to discuss the type of evidence that would be required.



TXR
TSD

COLLISON & CO

Patent & Trade Mark Attorneys
Established 1877

Your Ref:
Please quote our reference
Our Ref: 55158DIV JOM:AC

**NOTE - EVIDENCE FORWARDED
TO EXAM SERVICES**

15 December 2006

THE REGISTRAR OF TRADE MARKS
WODEN ACT 2606

IP Australia
18 DEC 2006

Madam

**DIVISIONAL Trade Mark Application No. 1063359
MARION VINEYARD in Class 33
LECONFIELD WINES PTY LTD**

We thank the Examiner, Beverly Philip, for the first official examination report issued on this application dated 23 September 2005.

We note the comments made by the Examiner that the word "Marion", as it is a suburb in Adelaide, may make it conjusive to the establishment of vineyards and the like.

Still further, the Examiners own research on the internet indicated that there is a vineyard in this suburb of Adelaide.

With the greatest respect to the Examiner, if research of the collected material were undertaken, it would have shown that all the information provided for relates, in fact, to the applicant of this trade mark.

Still further, had the articles themselves been read they would have seen that the vineyard the council was referring to produce wine by the applicant.

Still further, as the examiner has pointed out, Marion is a suburb of Adelaide. Though people who live outside of South Australia believe Adelaide to be a little more than a country town, from a point of fact, this is not the case. Adelaide suburbs are like any other city suburbs across Australia, including those in Canberra, Melbourne and Sydney. Is it really plausible to establish vineyards and the like in suburbs close to the CBD in other states, we do not think so, nor is it the case in South Australia. Nonetheless, the applicant has decided not to become involved in a protracted argument with the Examiner as for the significance or otherwise of the term "Marion" as being a geographical descriptor. The evidence attached herewith which also includes all the information provided for by the Examiner shows that well of the applicant company, and whatever association the word "Marion" may have had as to a suburb in Adelaide this is been overwritten by its now recognized meaning in the wine industry across Australia and also various global markets overseas.

Partners

Howard K. Schulze^{1,2}
B.Tech (Elec.)
Notary Public

John M. O'Mahoney^{1,2}
B.Sc. (Chem.)

Dr. Donald I. Angus^{1,2}
B.Sc. (Hons)
Ph.D. (Medicinal
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MBA, MIP

Consultant

Geoff E. Habel^{1,2}
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M.I.E. Aust., C.P. Eng.

¹ Registered Patent & Trade Marks Attorney in Australia and New Zealand.

² Member/Fellow of the Institute of Patent and Trade Mark Attorneys of Australia

³ Registered Trade Marks Attorney in Australia.

Patent and Trade Mark Attorneys

The applicant company has a connection with the Marion vineyards for a century, but at least since 1994 the trade mark Marion vineyards has been used extensively and continuously across Australia and overseas by the applicant.

As the attached Declaration points out, revenue generated from sales provided from selling quality products of wine in connection with the trade mark have been substantial over the last decade, and considerable large sums of money have been spent on the direct promotion and development of product identified by the trade mark with the purchasing public here in Australia in connection with wine.

Therefore, in light of the above and the attached Declaration we respectfully ask for a reconsideration of the application to proceed through to acceptance.

We also enclose herewith the fee of \$100 for a further one-month extension to give the Examiner ample time in which to consider this representation in response to the adverse report.

Yours faithfully
COLLISON & CO



JOHN O'MAHONEY
(Partner)

Enc. 1. Statutory Declaration

Fee \$100.00

(Confirmation By Express Post)

**AUSTRALIA
TRADE MARKS ACT 1995**

IN THE MATTER of
Trade Mark Application No. 1063359
For the Trade Mark MARION VINEYARD –
Class 33
in the name of
LECONFIELD WINES PTY LTD

STATUTORY DECLARATION

I, SIMON LINDEN of 135 South Terrace, Adelaide, South Australia, 5000, Australia, do solemnly and sincerely declare as follows:-

1. THAT I am employed by Leconfield Wines Pty Ltd, the applicant company in the matter of Australian Trade Mark Application No. 1063359 and as General Manager, I am authorized by my employing company to make this declaration on its behalf, and accordingly have been given access to all the records available to the company to verify the facts herein deposed.
2. THAT from hereon after I refer to Leconfield Wines Pty Ltd as “my company” for simplicity of terminology only.
3. THAT the trade mark MARION VINEYARD was first used in relation to wine by my company from as early as 1994, and since that time has been used extensively and continuously across Australia in connection with the goods listed in the application.
4. THAT the trade mark MARION VINEYARD derives its origins from a vineyard originally planted in 1907, which was part of the actual vineyard holdings established in that area in 1837 by the Hamilton family, of which my company as a successor in title associates itself directly with this origin as well as the successive change of ownerships thereafter, including that of the Hamilton Wine Group Pty Ltd.
5. THAT further to the preceding item the current CEO of the applicant company is in fact Richard Hamilton, the great great grandson of English settlers who first established the vineyards.
6. THAT attached herewith and marked Exhibit SL1 is a copy of one of the extracts the Examiner at IP Australia provided to my company as a means of showing that this trade mark was descriptive rather than distinguishable or distinctive of my company in relation to wine. That I point out herewith that extract SL1 and the information provided thereafter, relates entirely to my company, and if the Examiner went on to read the article they would have seen that the vineyard the Council was referring to produces wine by my company of which is then marketed as MARION VINEYARD.

7. THAT attached herewith and marked Exhibit SL2 is a further extract provided for by the Examiner at IP Australia, where the article in its complete entirety refers to my company's product.

8. THAT attached herewith and marked Exhibit SL3 and SL4 are further extracts that were provided for by the Examiner at IP Australia, which apparently provides evidence that the trade mark MARION VINEYARD is somehow descriptive, but I point out that both articles directly relate to my company's use of the trade mark and are not being used descriptively, but are in fact identifying a particular type of wine product which is supplied by my company.

9. THAT as exhibits SL1 through to SL4 point out, that even the Examiner's own searching has located a substantial amount of information and material which only associates use of the trade mark MARION VINEYARD with my company. Therefore, if there was any geographical association with the terminology back in 1907, this has now clearly been overridden by the reputation, goodwill and notoriety the trade mark has with my company as a distinctive identification mark to a particular brand of quality wine.

10. THAT the sales generated from wine products in the course of commercial trade that have been used in connection with the trade mark MARION VINEYARD over the last five years are as follows:

Year	Annual Sales in Cases
2002	
2003	
2004	
2005	
2006 (YTD)	

11. THAT the total advertising expenditure is hard to estimate as my company has a range of trade marks that normally fall within the same port folio of which advertising expenditure is determined in Australia. However, it can be approximately determined that the annual monetary expenditure in relation to direct advertising promotion of wine products associated with the MARION VINEYARD would be in the vicinity of [REDACTED]

12. THAT the direct advertising promotion of the wine products associated with the trade mark MARION VINEYARD would include such things as newspaper advertising, mail outs, signage, price lists, web site development and maintenance, catalogues, marketing photos, marketing staff and advertising payments to developers.

13. THAT attached herewith and marked Exhibit SL5 is information about scores of media releases that have been published in various print media across Australia, from as early as 1999 in connection with the MARION VINEYARD trade mark.

14. THAT as can be seen from Exhibit SL5 the trade mark MARION VINEYARD is continuously referred to by those in the wine industry without any qualification other than the words themselves in identifying a quality wine product labeled as MARION VINEYARD provided for by my company.

15. THAT attached herewith and marked Exhibit SL6 are representative examples of the kinds of point of sale promotional material my company makes available to the relevant members of the purchasing public in Australia associated with wine, to be informed about quality wine products which have been identified by the trade MARION VINEYARD, provided for by my company.

16. THAT as can be seen in the exhibit, in many instances the words MARION VINEYARD appear without further qualification, and therefore become particularly distinctive as terminology when describing a particular brand of quality wine to which my company produces and makes available to the relevant purchasing public here in Australia.

17. THAT attached herewith and marked Exhibit SL7 are labels, designed, marketed and researched, printed and prepared at significant financial cost that have since late 1990's identified, promoted and connected my company's quality wine products with the purchasing public here in Australia.

18. THAT quality wine products identified by the trade mark MARION VINEYARD and provided for by my company are distributed by domain wine shippers into Victoria, New South Wales, Queensland, South Australia and Western Australia with David Johnston Associates providing product to Tasmania and Options Wine Merchants (NT) providing the product identified as MARION VINEYARD to the Northern Territory.

19. THAT my company has worked diligently and successfully in a very difficult market to trade here in Australia, and has managed to expand and develop a particular brand of product which has been continuously identified by MARION VINEYARD to associate certain characteristic, and I believe that this particular quality wine product and the trade mark MARION VINEYARD have now become synonymous with the future success of this product relying on the foundation that has been created thus far.

AND I MAKE this solemn Declaration, by virtue of the Statutory Declarations Act, 1959 and subject to the penalties provided by that Act for making of false statements in Statutory Declarations, conscientiously believing the statements contained in the Declaration to be true in every particular.

Dated this 15th day of December 2006

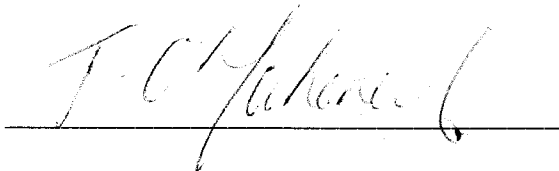
Declared at)

By SIMON LINDEN)



A handwritten signature in black ink, appearing to read 'Simon Linden', is written over a horizontal line.

Before me:



A handwritten signature in black ink, appearing to read 'J. O. ...', is written over a horizontal line.

A person registered as a Patent Attorney
under Chapter 20 of the Patents Act 1990
of 117 King William Street, Adelaide,
South Australia, 5000.

TSD
TXR**COLLISON & CO**Patent & Trade Mark Attorneys
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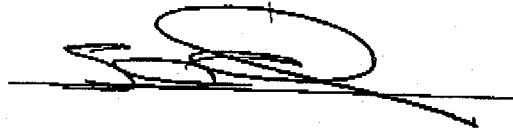
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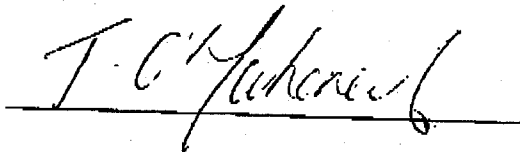
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Dated this 15th day of December 2006

Declared at)
By SIMON LINDEN)



Before me:



A person registered as a Patent Attorney under Chapter 20 of the Patents Act 1990 of 117 King William Street, Adelaide, South Australia, 5000.