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# Administrative Appeals Tribunal of Australia

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## The Hour Glass (Australia) Pty Limited and Minister for the Environment, Heritage and the Arts [2009] AATA 964 (17 December 2009)

Last Updated: 17 December 2009

### Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [\[2009\] AATA 964](#)

ADMINISTRATIVE APPEALS TRIBUNAL )

) No 2009/3015

GENERAL ADMINISTRATIVE DIVISION )

Re THE HOUR GLASS (AUSTRALIA) PTY LIMITED

Applicant

And MINISTER FOR THE ENVIRONMENT, HERITAGE AND  
THE ARTS

Respondent

DECISION

**Tribunal** The Hon. Brian Tamberlin QC, Deputy President

**Date** 17 December 2009

**Place** Sydney

**Decision** The Tribunal has jurisdiction to review the application.

.....[sgd].....The Hon. Brian Tamberlin QC Deputy President

## **CATCHWORDS**

*PRACTICE AND PROCEDURE – jurisdiction – application for multiple consignment permit to import CITES specimen – advice to applicant that only single use permits would be issued – offer to refund or credit fee paid – whether application was withdrawn – whether intermediate decision or final decision – whether decision to refuse made – whether deemed decision to refuse – Tribunal has jurisdiction*

[Administrative Appeals Tribunal Act 1975 s 25](#)

[Environment Protection and Biodiversity Conservation Act 1999 s 303CD, 303CE, 303CG, 303CI, 303GJ](#)

[Australian Broadcasting Tribunal v Bond \[1990\] HCA 33; \(1990\) 170 CLR 321](#)

## **REASONS FOR DECISION**

17 December 2009      The Hon. Brian Tamberlin QC, Deputy President

1. The Applicant (“Hour Glass”), by application of 2 July 2009, seeks review, in the alternative, of either a letter from the Department of the Environment, Water, Heritage and the Arts (“the Department”) of 19 June 2009, or of an email dated 19 February 2009. The basis of the application is that both or either of these items of correspondence

constitute a refusal of an application made under s 303CE of the *Environment Protection and Biodiversity Conservation Act 1999* (“the Act”) dated 21 January 2009 by Hour Glass for a multiple consignment permit (also known as a multiple use permit) to import a CITES (*Convention on International Trade in Endangered Species of Wild Fauna and Flora*) specimen. Importation of such a specimen in the absence of a permit granted under Part 13A of the Act, is an offence under s 303CD of the Act.

2. Prior to the application for the permit, Hour Glass held a six-month multiple consignment permit issued by the Minister under s 303CG(1) of the Act to import products including *alligator mississippiensis* (American alligator) watchstraps, which is a species listed under CITES.
3. On 22 January 2009, Hour Glass lodged the subject application for a multiple use permit to import wildlife products including American alligator watchstraps for a period of six months. It was stamped as having been received on 22 January 2009 and a receipt for the application fee of \$75 was issued to Hour Glass.
4. In order to obtain a permit, an application must be accompanied by the fee prescribed by the regulations. The relevant application fee for a multiple use permit is \$75 payable every six months. The Minister says that the power to issue or refuse a permit depends upon a valid application being before the Minister.
5. The Minister’s submission as to the absence of jurisdiction, on the ground there has been no decision to refuse, turns on the proper construction of an email sent by an assistant director, Michelle Scott, on 19 February 2009 to Hour Glass and on subsequent conduct of the parties. That email reads:

*Dear David*

*Thank you for discussing the issue of multiple use import permits with me on the phone this morning.*

*As discussed **staff from our Compliance team** (Permit Verification Scheme) **are currently undertaking a desk top audit** of The Hour Glass Australia Pty Ltd. Your [sic] were notified in writing of our compliance activity in a letter addressed to Mrs Alma Stanonik in October 2008. As mentioned in that letter, a Departmental Officer will contact you once the report is finalised to discuss the findings and you will be able to raise any concerns you may have.*

*In the interim, it has been decided to only approve the use of single use permits for The Hour Glass. The reason for taking this action is because Hour Glass have imported specimens ... which was not listed on your multiple use import permit.*

*The use of single use permits may be reviewed at the completion of the audit.*

*In the meantime, I would ask that you complete all the required sections of your application form that need to be completed for single use permits.*

*Could you please then re-fax your application, to my attention and clearly state on the fax that this application is not a new application but contains additional information.*

*I also note from our discussion that all permits and correspondence from this Department are to be sent directly to you ...*

*In relation to the payment for your permit, we have received \$75-00 (the fee required for a multiple use permit). As advised by you we will make a note in our system indicating that the remaining \$45-00 be used towards future permit application payments. Please make a note on your next application in the payment section that you have a credit of \$45-00 with the Department.*

*If you have any queries at all in relation to any of the above issues, please do not hesitate to contact me.*

*Kind regards*

*(Emphasis added.)*

1. Approximately one hour later, an email reply was sent by Hour Glass stating:

*Thank you for taking the time to listen to my concerns this morning.*

*With regards to some issues which led to the single permits only, would you be able to shed some light on some of the activities which has led to this? I have not heard or been contacted by the department at all with regards to the [species], so I am surprise [sic] there actually was an issue there. Any information you provide to us will be of assistance and see what we can do to rectify it.*

*Thanks for your help.*

*Kind regards*

*David Lau*

1. The Minister points out that this latter communication from Hour Glass did not query the suggestion of resubmission of the application as a single use permit application or the crediting of the application fee, but it queried the alleged past non-compliance with the terms on which previous permits had been issued.
2. The Minister submits that it is clear from the correspondence and subsequent conduct of Hour Glass that upon being informed that it was unlikely that the application for a multiple use permit would succeed, Hour Glass *elected* to withdraw the application, take a credit for the application fee and proceed by way of application for a single use permit. The Minister submits, in any event, that once the application fee had been reallocated, there was no longer any valid application before the Minister for a multiple use permit capable of being refused. The Minister submits that the above conclusion as to the withdrawal of the application and its cessation as a pending application is supported by internal records and notes of Departmental officers, and reference is made to notes on the database relating to an application of 27 January 2009 stating that the delegate had spoken to Hour Glass and requested that it resubmit the application as one for a single import permit. There is a note “awaiting response.” This note in my opinion does not carry the matter any further. It is an internal record and in effect only an interpretation of the legal position by an officer and it does not clearly state that the application was agreed by Hour Glass to be withdrawn as a multiple use application.
3. The Minister also refers to a further entry in the database notes, stating that the delegate had spoken with Hour Glass and that the delegate had requested a resubmission of the application as a single use permit and that the “permit” was to be cancelled and a credit held of \$75 for future use. Again, this is an interpretation by an officer and is not conclusive as to the legal effect of the correspondence and events that have taken place.
4. The Minister also refers to Hour Glass having submitted an application for a single use permit on 12 March 2009. Again, this is not of importance, in my view, in deciding whether there has been a refusal or a reviewable decision. The Minister also relies on a subsequent entry in the Department’s database by one of its officers dated 16 April 2009, but again this does not carry the matter any

further. It is simply an assertion by an officer that the application has been withdrawn and this is a conclusion that must be considered by this Tribunal having regard to all the correspondence, communications and circumstances.

5. Having regard to the above records and events, the Minister contends that there was never any “refusal” of the application for a multiple use permit and the true position is that after 19 February when Hour Glass agreed that the \$75 application fee should be credited, there was no longer any valid application before the Minister. It is said that Hour Glass had in substance elected not to proceed with the application in the light of the information provided on 19 February 2009, but to withdraw it. Therefore any action by the Minister or the Department was not a decision required or authorised by s 303CG, but was an intermediate decision, and not a final decision on an application as described in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 336-7. The Minister contends that the crediting of the application fee and the above entries in the database are conclusive on this question.
6. Accordingly, the Minister’s position is that no application for review by the Tribunal can be brought under s 303GJ and also that the Tribunal has no power to review the decision under s 25(4) of the *Administrative Appeals Tribunal Act 1975* (“the AAT Act”).
7. I note that the position of the Department is inconsistent on the question of jurisdiction and the issue of “refusal” because in a letter dated 19 June 2009 to the Solicitors for Hour Glass, the Assistant Secretary of the Approvals and Wildlife Division of the Department states that:

*Having assessed the request for a multiple use permit, the decision was made not to issue a multiple use permit as your client has had the following non-compliance with previous permits ...*  
(Emphasis added.)

1. The letter of 19 June 2009 proceeds to specify the details of the non-compliance incidents relied on. The letter also records that Hour Glass was advised verbally and in writing on 19 February 2009 “that they would *not be issued* with a further multiple use permit at this time” (emphasis added) and that Hour Glass responded to the email and “was advised that they could apply for as many single use

permits as they required.” This letter asserts that Hour Glass was offered the option of a refund or a credit towards other permit fees and that it indicated that it wished to have a credit.

## **REASONING ON APPLICATION FOR REVIEW**

1. In my view, it is clear from the email of 19 February 2009 from Michelle Scott, the Assistant Director that the application for a multiple use permit by Hour Glass was *refused* at that time. In terms the letter expressly states that “it has been decided to *only* approve the use of single use permits for The Hour Glass” (emphasis added). The reason given is the importation of specimens not on a multiple use import permit. In my view, this letter clearly amounts to an operative refusal of the application. The reference to a “desk top audit” of Hour Glass being conducted does not mean that the letter did not amount to a refusal. The notification of a decision to only approve the use of single use permits for the specific Applicant, namely Hour Glass, is the clearest indication that the application for a multiple use permit would not be granted. Given the mandate of this Tribunal (under s 2A of the AAT Act) to carry out its review in a manner that is economical, informal and quick it is important to direct attention to the substance of the communications between the parties when deciding questions of jurisdiction and not to focus unduly on technicalities as appears to have been the position in this case. Therefore, in my view, as from that date there was an operative refusal from which an appeal could be taken. Subsequent notification from the Applicant on 19 February does not change this position.
2. The notification in the letter of 19 February 2009 is one for which provision is made under a statute and it is a decision that is final in a practical sense of deciding the matter falling for consideration: see *Bond* at 337.
3. Independently of the above reasoning, under s 303CI of the Act, the Minister must make a decision within 40 days after receipt of a permit application. Under s 25(5) of the AAT Act, if the application is not decided within that time, the Minister is deemed to have refused it. This is a further basis on which jurisdiction must be

upheld in the present case because if the application made in this matter was not dealt with within the prescribed period, there had been a deemed refusal which gives rise to a right of review in the Tribunal.

## **CONCLUSION**

1. The correct and preferable decision in this matter is that the Tribunal has jurisdiction to review the application.

I certify that the 18 preceding paragraphs are a true copy of the reasons for the decision herein of The Hon. Brian Tamberlin QC, Deputy President

Signed: .....[sgd].....

Associate

Date of Hearing: 1 October 2009

Date of Decision: 17 December 2009

Applicant representative: Mr M Butt, Church & Grace Solicitors

Applicant counsel: Ms V McWilliam

Respondent representative: Ms B Griffin, Australian Government Solicitor

Respondent counsel: Ms K Stern