
Trade Marks Update

**IPSANZ Seminar
Melbourne 2 November 2018**

Ed Heerey QC, Nigel Bowen Chambers, Sydney

Ben Gardiner, Murray Gleeson Chambers, Brisbane

Lust**G**barristers

Flemington – hot mail

Victoria Derby

- Thinkin Big
- Stars of Carrum
- Mickey Blue Eyes



Melbourne Cup

- Yucutan (IRE)
- The Cliffs of Moher (IRE)
- Rostropovich (IRE)

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Anchorage Capital Partners PL v ACPA PL (2015) 115 IPR 67

- All parties involved in the business of raising money from investors, which they invest to make profit
- 2003: Anchorage Capital Group LLC (2nd Respondent) commenced business in New York
- Jan 2007: 2nd Respondent sent presentations to investors in Australia
- Later in 2007: Applicant commenced business in Sydney
- 2011: ACPA PL (1st Respondent) commenced business in Sydney as wholly owned subsidiary of 2nd Respondent
- 26 May 2011: Applicant registered TMs ANCHORAGE, ANCHORAGE CAPITAL and ANCHORAGE CAPITAL PARTNERS for financial fund management services, financial advisory services etc
- Applicant sued Respondents for TM infringement, passing off and misleading conduct

Anchorage Capital Partners PL v ACPA PL (2015) 115 IPR 67

Perram J, on cross-claim for cancellation under ss 88(1)(a) and 58:

- Applicant was not the owner of TMs, because Anchorage Capital Group LLC was first user of substantially identical TM in Australia
 - Jan 2007 presentations sent to potential institutional investors in Australia, soliciting investments in its managed funds
 - only slight use, but sufficient to establish prior ownership
 - *The Seven Up Co v O.T. Ltd (1947) 75 CLR 203*
- Court has power to remove Applicant's TMs from register, but also has discretion not to remove

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Nicholas, Yates and Beach JJ on cancellation under ss 88(1)(a) and 58:

- A small amount of prior use by a foreign TM owner may be sufficient to establish ownership against a local person: *Moorgate v Philip Morris*
- Not necessary to show any improper motive by the local person
- Perram J correctly held that Anchorage Capital Group LLC made first use of TM in Jan 2007; also made further uses in Sep and Oct 2007
- ANCHORAGE CAPITAL is substantially identical to ANCHORAGE CAPITAL PARTNERS and ANCHORAGE CAPITAL GROUP
 - Use of those TMs also constituted use of ANCHORAGE CAPITAL

Anchorage Capital Partners PL v ACPA PL (2015) 115 IPR 67

Perram J on discretion not to remove TM:

- Applicant's executives did not deliberately choose ANCHORAGE name knowing of Anchorage Capital Group LLC
- Applicant's founders initially came up with ANCHOR
 - But one founder's wife thought ANCHOR had an unfortunate rhyming connotation
- Perram J: *"In any event, they eventually settled on ANCHORAGE which, to my mind does not necessarily allay Ms Wong's concerns, although it potentially contributes a splendid new word to the language."*
- TM owner bears the onus of demonstrating some good reason why the Register should remain inaccurate
- Facts of this case did not support discretion to allow TM to remain

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Nicholas, Yates and Beach JJ on discretion not to cancel TM:

- Rejected an argument that there is no discretion under s 88(1) not to cancel a TM
 - Disagreed with Branson J in *EOS* that s 88 confers no discretion
- The party resisting cancellation bears onus to persuade the court that there is a sufficient reason not to order cancellation
- Perram J made no error in the exercise of his discretion to cancel TM
- TMs cancelled, thus infringement has no bearing on outcome of appeal
 - [NB - cancellation has retrospective effect, complete defence to past infringement, cf *Deckers v Farley*]

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Obiter: TM infringement

Perram J found no TM infringement:

- Respondents engaged in substantial investment activities after TM registration date, acquiring equity or debt interests in local businesses, but neither Respondent dealt with or provided any of their fund management services to anyone in Australia after TM registration date

Nicholas, Yates and Beach JJ, disagreeing:

- Perram J took too narrow a view of infringement
- Anchorage Capital Group LLC infringed by sending letters to Australia bearing ANCHORAGE TM and providing an overview of the firm
- There will be TM use if the TM is used in or about the soliciting of a supply of services

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Obiter: defence of use in good faith of own name under s 122(1)(a)(i)

Perram J:

- Anchorage Capital Group LLC would have been entitled to this defence for use of ANCHORAGE, ANCHORAGE CAPITAL and ANCHORAGE CAPITAL GROUP

Nicholas, Yates and Beach JJ, disagreeing in part:

- Anchorage Capital Group LLC would only have been entitled to this defence for use of ANCHORAGE CAPITAL GROUP
- Defence would not apply for ANCHORAGE or ANCHORAGE CAPITAL

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Obiter: defence that Anchorage Capital Group LLC would have been entitled to registration of TM under s 122(1)(f) and (fa)

Perram J:

- entitled to TM registration as first user of ANCHORAGE TM in Australia

Nicholas, Yates and Beach JJ disagreeing:

- Entitlement to registration for purposes of s 122(1)(f) and (fa) is determined as at the date of alleged infringing conduct, not earlier
- As at date of alleged infringement in mid 2011, ACPA PL had been carrying on business under ANCHORAGE for three years
- ACPA PL would have succeeded in s 60 opposition

Anchorage Capital Partners PL v ACPA PL (2018) 128 IPR 255

Obiter: defence of prior continuous use under s 124

Nicholas, Yates and Beach JJ:

- Anchorage Capital Partners LLC had made prior continuous use in US
- But s 124 requires prior continuous use in Australia
- Defence not made out

Anchorage Capital Partners PL v ACPA PL [2018] HCATrans 150

Application for special leave to appeal refused by Kiefel CJ and Keane J:

- Proposed special leave question: what conduct of a foreign trader amounts to use of a TM in Australia in relation to services such as to make the foreign trader the owner of that TM for those services, in circumstances where trader is unable to provide those services?
- Focussed on the fact that 2nd respondent was not licensed under the Corporations Act to provide its financial services until 2009, thus unable to provide such services when it sent presentations in Jan 2007

Keifel CJ: *“Well, that is to deny any form of conditional offer or offer to treat or – it is to circumscribe the intention, is it not, to immediate supply?”*

Keane J referred to the possibility that *“the impediment [to providing the services] can be overcome and it is obvious that there is a willingness and ability to overcome the impediment.”*

Primary Health Care Ltd v Commonwealth of Australia (2016) 117 IPR 73

- Since 1985 the Applicant has conducted a business operating medical centres; leasing and refurbishing premises, employing support staff and contracting health professionals (GPs, dentists, physios etc) to provide health care services
- In 2009 (before 2012 RTB amendments) Applicant applied to register PRIMARY HEALTH CARE in class 35 for “medical centre business management services” etc
- TMO upheld opposition by Commonwealth and all States and Territories
- Applicant appealed to Federal Court

Jagot J: rejected Applicant’s argument that “target audience” of TM is limited to health professionals

- business management services also provided to patients

Primary Health Care Ltd v Commonwealth of Australia (2016)
117 IPR 73

Jagot J at trial, upholding opposition under s 41:

- it is artificial to draw a distinction between provision of “medical centre business management services” and provision of “medical care”
- PRIMARY HEALTH CARE is directly descriptive of medical centre business management services
- Other persons might legitimately wish to use that phrase in connection with those services
- Applicant has not established basis for registration under ss 41(5) or (6)
- Difficulty in proving acquired distinctiveness comes back to the artificial distinction between provision of medical centre business management services and provision of medical care
 - those business administration services have no existence other than in the context of providing medical care

Primary Health Care Ltd v Commonwealth of Australia [2017]
FCAFC 174

Greenwood, Katzmann and Rangiah JJ dismissing appeal on s 41:

- Trial judge did not err in determining the target audience or the meaning of PRIMARY HEALTH CARE
- Inherent meaning of TM for s 41(3) cannot be changed by Applicant’s use (Gibbs J in *Burger King*)
- As to s 41(5) and (6), trial judge found that Applicant had used TM for the designated business management services, as an essential but limited part of operating medical centres
- Trial judge did not err in finding that such use of TM did not and would not distinguish the designated business management services
- In some cases, use of TM for a broad class of services may distinguish a narrow class within that broad class - a question of fact and degree

***Primary Health Care Ltd v Commonwealth of Australia [2017]
FCAFC 174***

Further comments by Katzmann J on s 41:

- It is of no consequence that the phrase PRIMARY HEALTH CARE does not appear in dictionaries
 - Nor does the phrase “ham sandwich”
- Ordinary meaning of phrase is derived from its component parts
- A phrase may have an ordinary meaning despite not being widely understood by the public – eg EUTECTIC

Further comments by Greenwood J on s 41:

- Factual findings only appellable if glaringly improbable or contrary to compelling inferences or incontrovertible facts or uncontested testimony
- Appellant wishes to argue that it only provides management services to healthcare professionals, but it in fact operates 71 PRIMARY HEALTH CARE medical centres

***Primary Health Care Ltd v Commonwealth of Australia (2016)
117 IPR 73***

Jagot J at trial, upholding opposition under s 43:

- PRIMARY HEALTH CARE has a clear connotation of first level or first contact health care, rather than connoting the Applicant as the source of medical centre business administration services
- Applicant does not provide clinical care – that is provided by contracted GPs - and clinical care is a key component of primary health care
- Far-fetched to expect that anyone other than a person familiar with the details of the Applicant’s business model would understand that PRIMARY HEALTH CARE identifies:
 - the source of the Applicant’s medical centre business administration services
 - but not the clinical care provided from the medical centre

Primary Health Care Ltd v Commonwealth of Australia [2017] FCAFC 174

Greenwood J on s 43 (Katzmann J taking a similar approach, Rangiah J dissenting):

- The statutory essence of a TM is that it means and says (that is, distinguishes or is capable of distinguishing), no more and no less than that the *applicant owner* is the *source* of the identified goods or services, rather than someone else.
- This is the “denotation” of the TM, because it is what the TM must be for the purposes of the Act.
- S 43 looks to whether TM has any secondary connotation besides this primary denotation.
- PRIMARY HEALTH CARE TM is likely to cause confusion because it connotes that the Applicant is the provider of first level health care, when in fact that is the one service it does not provide to patients.

Primary Health Care Ltd v Commonwealth of Australia (2016) 117 IPR 73

Jagot J at trial, upholding opposition under s 42(b):

- Use of TM PRIMARY HEALTH CARE incorrectly represents that the Applicant:
 - 1: provides primary health care services; and
 - 2: is responsible for the health and medical services provided by practitioners within its medical centres.
- The Applicant is not the provider of clinical care – rather, that is provided by contracted GPs - and clinical care is a key component of primary health care
- Use of the mark amounts to conduct in trade or commerce that is or likely to be misleading or deceptive contrary to s 18 of the ACL.

Greenwood, Katzmann and Rangiah JJ: Jagot J erred re the second representation, but not the first; s 42(b) ground still made out.

Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

- Argan oil is the oil extracted from the nut of the argan tree
 - native to Morocco
 - used for centuries by Moroccan women as a hair and beauty product
 - reputedly rich in antioxidants, essential fatty acids and vitamin E
- Since 2007, MIL has made hair care products in Israel with argan oil
 - sold them in various countries including Australia
 - Originally sold as “Moroccan Oil”, then “Moroccanoil”.



Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

- MIL has two logo TM registrations in Australia for hair care products:
- Since 2008:



Since 2010:



- 7 December 2011: MIL applied to register the plain word MOROCCANOIL for hair care products
- Registration opposed by Aldi; TMO upheld opposition: [2015] ATMO 97
 - MOROCCANOIL is not inherently adapted to distinguish and has not acquired distinctiveness by use
- MIL appealed TMO decision to Federal Court
- MIL also claimed that Aldi infringed the registered logo TMs

Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

- MIL alleged TM infringement by a range of Aldi's products:



Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

Katzmann J, dismissing MIL's TM infringement claim:

- Aldi used "Moroccan Argan Oil" as TM
- But, "Moroccan Argan Oil" is not deceptively similar to either registered TM:



- MIL called evidence of actual confusion, but it had various problems and was given no weight
- Rejected argument that Aldi chose "Moroccan Argan Oil" dishonestly in an attempt to mislead consumers and take advantage of MIL's reputation in its TMs

Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

Katzmann J, rejecting Aldi's cross-claim to revoke MIL's registered TMs for invalidity:

- Registered TMs were inherently adapted at filing date to distinguish MIL's goods from those of other persons



- In any event, those TMs have been used sufficiently by MIL so as to distinguish its goods and services

But: TM registrations partially cancelled for certain goods never used by MIL

Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

Katzmann J, allowing appeal from TMO decision and allowing registration of plain word MOROCCANOIL:

- Considered conflicting evidence from expert lexicographers:
 - Accepted: Professor Zuckerman, Chair of Linguistics, University of Adelaide, that neither "Moroccanoil" nor "Moroccan Oil" was in use in Australia to describe hair care products before MIL began sales
 - Rejected: Ms Butler, editor of Macquarie Dictionary, who approved "Moroccan oil" for inclusion in that dictionary in 2011 after concluding that it had "gained currency" in Australia to describe argan oil
- Not satisfied that, at 7 Dec 2011, the ordinary signification of MOROCCANOIL was argan oil of or from Morocco
- But, unable to decide whether MOROCCANOIL is capable of distinguishing MIL's hair care products from those of other persons

Moroccanoil Israel Ltd v Aldi Foods Pty Ltd [2017] FCA 823

Katzmann J, allowing appeal from TMO decision and allowing registration of plain word MOROCCANOIL:

- MOROCCANOIL is “to some extent” inherently adapted to distinguish MIL’s hair care products from those of other persons
 - No evidence to suggest that single word MOROCCANOIL has an ordinary meaning to the Australian consumer, purchaser or trader
 - “Moroccan oil” could be descriptive, but it is not necessarily descriptive of the designated goods, hair care products
 - Oil is what people seek to remove from hair when washing, so honest competitors are unlikely to wish to use “oil” for hair care
- MOROCCANOIL has been used widely to distinguish MIL’s products
- Registration allowed under s 41(5) (pre *Raising The Bar* legislation)

Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018] FCAFC 93

Appeal heard by Allsop CJ, Perram and Markovic JJ:

- Upheld one of MIL’s misleading conduct claims against Aldi, re claimed performance benefits
- MIL did not appeal on TM infringement
- Only one TM issue appealed, by Aldi:
 - s 41 opposition to MORROCANOIL

Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018] FCAFC 93

Allsop CJ, Perram and Markovic JJ, allowing appeal on s 41:

- Katzmann J erred: should have found MOROCCANOIL is “not to any extent inherently adapted to distinguish”, then go to s 41(6) not (5)
- Necessary to consider not just the desire of traders to use MOROCCANOIL, but also words nearly resembling those words eg MOROCCAN OIL
- Once established that argan oil was sourced from Morocco and used in hair products, traders’ honest use of “Morrocan oil” is highly likely
- MIL did not establish actual distinctiveness in light of:
 - use by other traders of “Morrocan Argan Oil” and variants
 - the clear natural meaning of the words; and
 - the additional stylization in MIL’s use
- Endorsed Yates J’s analysis of s 41 in *Apple v Registrar*

JBS Australia PL v Australian Meat Group PL (2017) **128 IPR 398**

- JBS owns TMs in respect of meat for AMH and logo:
- AMG applied for and uses AMG and logos:



- JBS sued for TM infringement

Greenwood J:

- TMs not substantially identical
- Each of AMG’s TMs are deceptively similar to AMH TMs
- Appeal heard by Allsop CJ, Besanko and Yates JJ 28-29 May 2018, decision pending

Vokes Ltd v Laminar Air Flow Pty Ltd [2018] FCAFC 109

- Vokes was recorded in Register as owner of several TMs
- 17 August 2001: Registrar amended Register to record AES Environmental PL as owner pursuant to a change of name form submitted by AES
- In fact, Vokes had not changed its name; form was filed in error
- Oct 2005: assignmt of TMs from AES to Laminar recorded on Register
- Dec 2014: Vokes successfully applied to Registrar for correction of Register under s 81 to show Vokes as registered owner
- Laminar appealed to Federal Court
- Robertson J: Registrar erred in making correction under s 81
- Nicholas, Davies and Burley JJ: Robertson J was correct

Vokes Ltd v Laminar Air Flow Pty Ltd [2018] FCAFC 109

Robertson J at trial, upheld on appeal by Nicholas, Davies and Burley JJ:

- S 81: *“The Registrar may, on his or her own initiative, correct any error or omission made in entering in the Register any particular in respect of the registration of a trade mark.”*
- S 81 only applies to errors by the Registrar *“in entering”* particulars
 - error was in the particulars in the form submitted by AES
 - Registrar made no error *“in entering”* those particulars
- Registrar’s powers under s 81 are limited in scope, in contrast to broader scope of Court’s powers to correct an error in an entry in the Register under ss 85 or 88

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

- Frucor applied to register TM for energy drinks, described as:
 - “*The mark consists of the colour green (Pantone 376c), as shown in the representation attached to the application, applied as the predominant colour to the goods, their packaging or labels.*”
- Pre-RTB legislation applied
- Coca Cola successfully opposed: (2016) 121 IPR 52
 - TMO upheld s 41 opposition: not capable of distinguishing:
 - TM description is ambiguous: swatch colour is not Pantone 376c
 - Not inherently or actually distinctive: s 41(6)
 - TMO rejected alternative opposition under s 62(b) that Registrar accepted the application on the basis of false representations
- Frucor appealed s 41 decision to Federal Court

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

Yates J: what is the TM?

- Not disputed that the colour of the swatch is not Pantone 376C.
 - scanned from hard copy of NZ TM application, “distinctly different”
 - Court’s own untrained view: NZ swatch is not Pantone 376C
- Rejected Frucor’s argument that description of TM can be construed by reference to Pantone 376C in preference to swatch colour
- Reg 4.3 requires the application to include a representation of TM
- In that context, reg 4.3(7) requires a description of a colour mark, which means a description of TM *as represented*
- Legislation provides means for TM to be ascertained objectively
- The identity of TM is not ascertained by divining applicant’s subjective intentions or desires

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

Yates J, rejecting notice of contention by Coca Cola:

- Failure to comply with s 27(2)(a) does not provide a separate ground of opposition under s 57
- Coca Cola had contended that TM should be refused because application did not satisfy s 27(2)(a) and reg 4.3(7)
 - s 27(2)(a): application must be in accordance with the regulations
 - reg 4.3(7): application for colour, scent, shape, sound or aspect of packaging “*must include a concise and accurate description*” of TM

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

Yates J, upholding s 41 ground of opposition:

- Frucor accepts TM is not to any extent inherently adapted to distinguish
- S 41(6): onus on Frucor to establish that TM does distinguish because of extent of use of TM before filing date
- *Woolworths v BP*: it is the use of TM as applied for, as a TM, that determines what can be registered; the TM the subject of the application must conform to the TM used for purposes of s 41(6)
- Because TM is defined ambiguously and its features cannot be determined objectively (ie swatch or Pantone?) it is impossible for Frucor to establish s 41(6) by reference to its own particular use of colour green
- For this reason alone, registration should be refused

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

Yates J, upholding s 41 ground of opposition:

- Even if TM were unambiguously described as Pantone 376C:
 - Frucor's use of green was substantial, consistent and conspicuous
 - Those familiar with Frucor's "V" energy drinks would have associated "V" green as the colour of Frucor's product
 - But despite this, green did not function as a TM due to:
 - Consistent presence and dominating display of "V" logo
 - The relevant context: not just energy drinks but non-alcoholic beverages generally, in which colours are used to denote varietal differences within a range, eg "sugar free"
 - in this way green was descriptive not distinctive: it denoted the core product in the "V" energy drink range

Frucor Beverages Ltd v The Coca-Cola Co [2018] FCA 993

Yates J, upholding s 41 ground of opposition:

- Survey evidence did not show that green was used as a TM
 - association or identification of a colour with a particular product does not mean, without more, that the colour functions as a TM
 - need to understand how colour was used, in context and setting
 - use as TM is not a purely factual conclusion; requires understanding of what TM use means for the purposes of TMA
- Survey asked participants about colours which were not presented as brands but rather as colours identified with brands

Yates J, refusing applications to amend TM application to replace colour swatch with accurate Pantone 376C swatch:

- would substantially affect TM's identity and have no utility: still fails s 41

Bohemia Crystal PL v Host Corporation PL [2018] FCA 235

- Bohemia is part of Czech Republic, where glass and crystal are made



Bohemia Crystal PL v Host Corporation PL [2018] FCA 235

- BCP owns reg TMs BOHEMIA and BOHEMIA CRYSTAL
- BCP sued Host for TM infringement, misleading and deceptive conduct and passing off for importing, advertising and selling glassware under various uses of “Bohemia” and statements including:
 - “Banquet Crystal by Bohemia”
 - “Czech Crystal by Bohemia”
 - “Bohemia Flute”
 - “Bohemia Footed Beer” and
 - “Bohemia Whiskey”

Bohemia Crystal PL v Host Corporation PL [2018] FCA 235

Burley J, finding TMs invalid under s 41:

- BOHEMIA when used in relation to glassware would ordinarily signify to traders, and to many consumers, a region where glassware is made
- Inquiry of inherent adaption to distinguish is not limited to signification to consumers; also relevant to consider signification to traders: *Cantarella*
- Rejected argument that traders do not “need” to use BOHEMIAN CRYSTAL because they could use other terms eg CZECH CRYSTAL
- Question is not one of “need” but whether traders are likely, with no improper motive, to desire to use words for their ordinary signification
- BOHEMIAN CRYSTAL is also descriptive of a style of crystal
- Evidence of use does not establish actual distinctiveness for s 41(6)
- No sufficient reason to use discretion not to cancel the TM under s 88

Bohemia Crystal PL v Host Corporation PL [2018] FCA 235

Burley J on infringement (in obiter, if wrong about invalidity):

- “Banquet Crystal by Bohemia” and “Czech Crystal by Bohemia” would be use of BOHEMIA as a TM
- S 122(1)(b)(i) defence of use in good faith to indicate geographical origin would not apply
- “A question arises as to whether the defence under s 122(1)(b)(i) adds anything to the “trade mark use” issue under s 120.”
- S 122(1)(b)(i) calls for consideration not of whether there is trade mark use, but whether there is use in good faith.
- S 122 starts with “In spite of s 120”, which makes plain that an otherwise infringing use may be excused if s 122(1) is satisfied.
- Defence does not apply because Host did not choose “by Bohemia” to indicate geographical origin

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

- 1890s: Dunlop business in UK disposed of its Australian business
- Since, DUNLOP and  TMs separately owned in Australia and UK
- DATL owns DUNLOP branded aircraft tyre business in the UK
- Goodyear US owns Australian TMs, Goodyear AU uses under licence
- 1930-1987, Goodyear AU made DUNLOP aircraft tyres in Melb, but also imported DUNLOP aircraft tyres made in UK by DATL
- Since 1987: DATL has been sole maker of DUNLOP aircraft tyres
 - Goodyear AU imported all DUNLOP aircraft tyres from DATL
- Until 2008, Goodyear AU also re-treaded aircraft tyres under DUNLOP TMs in Melb; after 2008 aircraft tyres re-treaded by Goodyear Thailand
- 2009: DATL filed Aus TM appl'ns for DUNLOP and  for aircraft tyres
- March 2015: DATL withdrew supply to Goodyear AU

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

- 2015 ATMO 14: TMO upheld Goodyear US's opposition to DATL's Australian TM applications for aircraft tyres: ss 44 & 58
- 2015: DATL and Goodyear both appealed from TMO to Federal Court
- Goodyear US/AU sued DATL for TM infringement, passing off, ACL
- DATL sought removal of Goodyear US's TMs in relation to aircraft tyres:
 - for 3 years non-use: s 92(4)(b); and/or
 - Because use of TMs is likely to deceive or cause confusion: s 88(2)(a), (c) and (e)

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Nicholas J, on removal Goodyear US's TMs for non-use:

- Goodyear AU sold tyres from DATL, made under quality control of DATL, not Goodyear US
- But use of TM by Goodyear AU was approved and controlled financially by Goodyear US, which wholly owns Goodyear AU
- More difficult question: whether use made was use as a TM
- TM must act as badge of origin, indicating source or quality of goods
- If TM owner supplies goods with TM applied by 3rd party, where TM owner exercises no quality control, the TM is used as a TM even though there may be no relevant connexion between TM owner and the goods
- Absence of relevant connexion may have implications for validity of the TM, but does not preclude a finding that TM owner has used TM

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Nicholas J, on removal Goodyear US's TMs for non-use:

- Goodyear AU used DUNLOP TMs for aircraft tyres – not removed
- However, the DUNLOP TMs on re-treaded tyres were not used by Goodyear AU, Goodyear TH or Goodyear US to indicate any relevant trade connexion between their re-treading services and those tyres
 - Re-treaded tyres continue to bear DUNLOP TM affixed by DATL at time of first manufacture
- Use of combined GOODYEAR/DUNLOP TM is not use of TM substantially identical to DUNLOP TMs
- TMs for retreading services removed
 - Discretion under s 101 not exercised to maintain registration for re-treading services - use of TM would deceive by indicating that tyres had been re-treaded by original manufacturer of DUNLOP tyres



Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Nicholas J, ordering rectification of Goodyear US's TMs under s 88(2)(c):

- S 234 does not protect TMs registered under 1955 Act because TMs do not distinguish Goodyear US's tyres from DATL's tyres: s 234(2)(e)
- For many years purchasers of aircraft tyres in Aust have known that DUNLOP tyres supplied by Goodyear AU were made in UK by DATL
- Substantial number of purchasers of new DUNLOP aircraft tyres made by Goodyear AU or US would be led to believe that they had come from the same source as those previously supplied by Goodyear AU
- Goodyear US no longer has any sufficient trade connexion with the aircraft tyres which Goodyear AU supplied under the DUNLOP TMs
- Use of DUNLOP TMs on aircraft tyres made by Goodyear AU or Goodyear US, not DATL, would be likely to deceive or confuse

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Nicholas J, ordering rectification of Goodyear US's TMs under s 88(2)(c):

- Discretion under s 89 ought not be exercised to retain registration
- DUNLOP TMs have become deceptive as a result of Goodyear US's failure to exercise any quality control; quality control was left to DATL

Nicholas J, rejecting DATL's appeal from opposition:

- Evidence did not establish that Goodyear US had abandoned TMs
- Thus, Goodyear US remained the owner of TMs
- S 58 opposition upheld: DATL is not the owner of the TMs

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Nicholas J, on infringement:

- Rectification provides complete answer to infringement under s 120(1)
 - Cancellation not retrospective, but removes TM owner's entitlement under s 20 to obtain relief
- To the extent that s 120(2) applies, infringement fails because DATL's use was not likely to deceive or cause confusion
- Rejected s 122(1)(a) defence of good faith use of own name: its name is not Dunlop but Dunlop Aircraft Tyres
- Rejected s 122(1)(b) defence: DUNLOP and D logo do not merely indicate minimum regulatory standards; they indicate DATL as source
- Rejected s 122(1)(e) defence: DATL not entitled to registration
- Rejected other defences under ss 122(1)(f) and 123

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Net result, no winner:

- Goodyear US not entitled to retain its registration, and gets no relief for past infringement by DATL
- DATL not entitled to registration, because Goodyear US is owner
- Appeal filed but settled

Dunlop Aircraft Tyres Ltd v The Goodyear Tyre & Rubber Co
[2018] FCA 1014

Net result, no winner:

Nicholas J



DATL



Goodyear

Singtel Optus PL v Optum Inc [2018] FCA 575

- Optum applied to register OPTUM for various services relating to business management for healthcare
- Optus opposed under s 42(b), 44, 58 and 60
- TMO dismissed opposition: [2016] ATMO 11
- Optus appealed to Federal Court, pressing ss 44, 58 and 60 opposition
- Optum cross claimed for removal of various OPTUS TMs for non-use

Singtel Optus PL v Optum Inc [2018] FCA 575

Davies J, rejecting Optus's opposition under s 58:

- OPTUM is not substantially identical to OPTUS
- Difference between M and S is enough to make the words distinct from each other visually and by sound
- Aural difference is not slight, even with emphasis placed on first syllable
- Different meanings which the words evoke because of their different endings ("optimal" v "opt us") underscore how the different last letters render the marks sufficiently different from each other
- In any event, no prior use of OPTUS in respect of any services "of the same kind" as the services specified in the OPTUM TM application

Singtel Optus PL v Optum Inc [2018] FCA 575

Davies J, rejecting Optus's opposition under s 44:

- OPTUM is not deceptively similar to OPTUS
 - Aural and visual differences are such that there would be no likelihood of confusion
- A further consideration which adds weight to, but is not a necessary part of, the conclusion of no deceptive similarity is that the fame of the OPTUS TM reduces the chances of a consumer's imperfect recollection
 - OPTUS recognized as 8th most valuable Australian brand in 2011
- If TMs were deceptively similar, would allow registration under s 44(3)(b) for "other circumstances" :
 1. OPTUM is company's name;
 2. extensive overseas use;
 3. no evidence of confusion even after date of application

Singtel Optus PL v Optum Inc [2018] FCA 575

Davies J, rejecting Optus's opposition under s 60:

- Reputation of OPTUS did not extend beyond telecommunications
- Even if reputation of OPTUS extended to healthcare, still no likelihood of confusion because of the differences between the TMs and the nature of the reputation in OPTUS
- Differences in the TMs and the strong reputation of OPTUS in relation to telecommunications make it unlikely that consumers would be likely to be confused or deceived by the use of the OPTUM TMs

Davies J, on cross-claim to remove some services from OPTUS registrations for non-use:

- Allegation of non-use not rebutted for 4 designated services
- Parties agreed to file further submissions on discretion not to remove

Singtel Optus PL v Optum Inc (No 2) [2018] FCA 963

Subsequent decision of Davies J re discretion under s 101(3):

- Discretion exercised not to remove registration for advertising and marketing services, despite no use of OPTUS TM for those services in 3 year period:
 - Singtel has shown significant involvement in marketing and advertising activities shortly after and since the 3 year period
 - although no evidence that Singtel has used OPTUS TM for those services, it is reasonable to infer that it still has an intention to do so

Seiko Epson Corp v Calidad PL [2017] FCA 1403

- Seiko sells EPSON branded printer ink cartridges
- A Malaysian company obtains used EPSON cartridges, refills them, modifies them and sells them to Calidad who imports them into Australia
- Calidad competes with Seiko in Australia in supply of replacement ink cartridges for EPSON printers
- Seiko alleged infringing use of EPSON TM by Calidad on the integrated circuit chip of Calidad's products [and patent and other claims]

Burley J

- EPSON not used as a TM on circuit chip: very small font and partially obscured
- Even if consumers saw it they would not regard it to be used as a TM, but rather a product of Calidad to replace an EPSON cartridge

Seiko Epson Corp v Calidad PL [2017] FCA 1403

- Seiko sought an injunction and damages against Calidad for breach of statutory duty under s 148(1)(b)(iii):

"148. A person commits an offence if: (a) the person: (i) sells goods; . . . and (b) . . . (iii) a registered trade mark on the goods has been altered, defaced, added to, wholly or partly removed, erased or obliterated; © . . . without the permission of the registered owner . . .

Penalty: Imprisonment for 5 years or 550 penalty units"

Burley J:

- removal of EPSON from Calidad products was not removal of a TM, because EPSON never used as TM (badge of origin) on those products
- in any event, s 148 does not create a private right of action
 - private rights of TM owner provided by s 20 and part 12 (ss 120-130)

Hoser v Sportsbet Pty Ltd [2018] FCA 1557

- Mr Hoser conducts business as a reptile expert and government licensed wildlife demonstrator and owns registered TM SNAKEMAN
- He claims he is known as “Snakeman”
- He has webpages including snakeman.com.au



Hoser v Sportsbet Pty Ltd [2018] FCA 1557



© Is gambling a problem in your area? Call Gamblers Help 1800 888 888 or your local state gambling helpline. www.gamblinghelpline.org.au Gamble Responsibly

Hoser v Sportsbet Pty Ltd [2018] FCA 1557

- Mr Hoser sued Sportsbet for TM infringement and under s 18 ACL

Robertson J:

- The TVC was not a use by Sportsbet of SNAKE MAN as a TM
- 1st step is to identify goods/services to which TM is said to be applied, here online sports betting services
- 2nd step: consider whether TM was used so as to indicate a connection in the course of trade between those services and Sportsbet
- SNAKE MAN in the TVC did not indicate such a connection

Hoser v Sportsbet Pty Ltd [2018] FCA 1557

Robertson J, finding no use as a TM:

- SNAKE MAN has no connection with Sportsbet or the services offered
- SNAKE MAN is spoken when there is no other brand or sign on screen, before the subsequent sustained appearance of the SPORTSBET TM
- TVC divided into a narrative section at beginning and end, and a promotional section in the middle
 - Narrative section captures the viewer's attention and amuses
 - Promotional section offers the services and makes the connection between those services and Sportsbet
 - SNAKE MAN is confined to narrative section, absent from promotional section
 - SNAKE MAN used as an exclamatory tool to get audience's attention – merely introductory and transitory

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

- Trident Foods owns TRIDENT TMs for fish etc, registered since 1973 and 1983
- Since 2000, sales of TRIDENT goods were undertaken by Manassen Foods Australia PL, which owns 100% of Trident Foods
- Trident Seafoods established in US in 1973; has used TRIDENT in US and elsewhere but never in Australia
- 7 May 2013, Trident Seafoods applied for TRIDENT for seafood etc; blocked by Trident Foods' 1973 and 1983 registrations
- 7 Feb 2014, Trident Seafoods applied to remove Trident Foods' TMs for non-use
- 18 July 2014, Trident Foods applied for TRIDENT for fish etc; opposed by Trident Seafoods

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

Registrar's delegate, refusing to remove Trident Foods' TMs for non-use:

- Trident Foods failed to prove use of TMs in relevant period
- But, exercised s 101 discretion not to remove the TMs
- Trident Seafoods appealed that non-use finding to Federal Court

Registrar's delegate, dismissing opposition to Trident Foods' 2014 TM application:

- S 44: deceptively similar to Trident Seafoods' pending 2013 application
- But it is proper to allow registration under s 44(3)(b)
- S 59: Trident Seafoods had not proved that Trident Foods did not intend to use TM
- Trident Seafoods appealed that opposition finding to Federal Court

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

Gleeson J, finding that Trident Foods had not used TMs for 3 years, 7 Jan 2011 to 7 Jan 2014:

- “Fish” includes seafoods, including molluscs and crustaceans, and foods prepared from seafoods
- But: Tom Yum Goong Flavour Thai Noodle Soup with an oil sachet containing some fish sauce and dried shrimp is not a “fish product” without a greater fish content or use of “fish” in product name

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

Gleeson J, finding that Trident Foods had not used TMs for 3 years, 7 Jan 2011 to 7 Jan 2014:

- Use of TM by Trident Foods’ parent company Manassen was not use under the control of Trident Foods within meaning of s 8:
 - Ownership and common directorships do not create control by Trident Foods over Manassen, rather the converse
 - Director’s evidence about control was in the nature of assertion, without any particular illustration of actual control by Trident Foods
 - TM ownership notice on goods did not prove control
 - Not satisfied that there was an unwritten licence agreement in place
- Did not accept Trident Foods’ submission that ownership of IP by wholly owned subsidiaries was very common, and that a finding of no control would make a “mockery of the law”

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

Gleeson J, exercising s 101 discretion not to remove Trident Foods' TMs:

- After the non-use period, Trident used TMs on tinned tuna, mussels and oysters; that recent use was motivated by non-use application, but that does not reflect a lack of good faith; not a "colourable" use
- Trident Foods has developed an intention to use TM on tinned mackerel
- Trident Foods and Manassen have made a formal licence agreement to ensure Manassen uses TMs under the control of Trident Foods
- There has been long-standing use of TMs by Manassen with acquiescence of Trident Foods, members of same group of companies – public are likely to identify TRIDENT products as emanating from a single source which is, in fact, a member of the same group
- Use of TRIDENT by Trident Seafoods would create risk of confusion by association

Trident Seafoods Corporation v Trident Foods Pty Ltd
[2018] FCA 1490

Gleeson J, upholding opposition to Trident Food's 2014 TM application:

- At filing date in 2014, Trident Seafoods' prior 2013 application was pending; s 44(1) made out
- Not "proper" to accept for "other circumstances": s 44(3)(b)
 - s 44(3)(b) determined as at filing date: *Hills* per Lander J
 - It is a relevant "other circumstance" that Trident Seafoods' 2013 application might never achieve registration (blocked by Trident Foods' 2 earlier TMs) and had never been used in Australia
 - But, Manassen, not Trident Foods was using TM at 2014 filing date; Trident Foods did not have basis under s 27 to apply for registration
- S 59 opposition would also succeed: TM used by Manassen not Trident Foods until 2017 licence agreement, thus Trident Foods did not intend at 2014 filing date to use or authorise the use of the TM

Caesarstone Ltd v Ceramiche Caesar S.p.A. (No 2)
[2018] FCA 1096

- Ceramiche is an Italian ceramic tile manufacturer, has sold CAESAR tiles in Australia since 1988
- Caesarstone is an Israeli manufacturer of quartz surfaces, has sold CAESARSTONE slabs in Australia since 1998
- 2000: Caesarstone registered TM CAESARSTONE for bench surfaces, table tops etc
- 2004: Ceramiche registered TM CAESAR and device for tiles
- 2005, 2007: Caesarstone applied to register 2 CAESARSTONE TMs
 - TMO upheld oppositions by Ceramiche
 - Caesarstone appealed to Federal Court
- Ceramiche applied to Federal Court to cancel Caesarstone's registration of CAESARSTONE for certain services in classes 35, 37

Caesarstone Ltd v Ceramiche Caesar S.p.A. (No 2)
[2018] FCA 1096

Robertson J:

- CAESARSTONE is deceptively similar to CAESAR for s 44
 - CAESAR is distinctive and dominant; STONE is descriptive and so much the less distinctive part of the overall impression
- Caesarstone made prior continuous use of CAESARSTONE (s 44(4)), but Ceramiche made even earlier use of CAESAR (s 58A)
 - Caesarstone exercised control over use by its Australian licensees
- Caesarstone made honest concurrent use of CAESARSTONE to justify registration subject to a limitation of the goods as used
- Discretion under s 89 should be exercised to achieve a similar result for Ceramiche's application to cancel registration of CAESARSTONE – registration to remain subject to limitation of goods and services

PKT Technologies PL v Peter Vogel Instruments PL
[2018] FCA 1587

- Remitted by Full Court ([2016] FCAFC 172) for assessment of contract and copyright damages, and account of profits for TM infringement
- Full Court found infringing use by PVI of FAIRLIGHT TM for applications for use on iPads and iPhones etc - made available by PVI for download on Apple iTunes, purchased by customers in AU and other countries
- Total sales \$137,485 - but only \$9,808 to customers in Australia

Nicholas J, on assessment of account of profits for TM infringement:

- account of profits confined to sales made to Australian consumers
 - ss 20 and 120 operate within territorial limits
- no general business overheads deducted because PVI failed to show how and in what proportions various categories of overheads were attributable to the relevant profit

Autumnpaper Ltd v Metropolitan Investment Group PL
[2017] FCA 1578

- Autumnpaper is UK fashion business founded by Alexander McQueen
 - designed Catherine Middleton's wedding dress in 2011
- Autumnpaper applied in 2013 to register MCQUEEN for perfumes, glasses, watches, luggage, clothing, footwear, headgear, retail services
- TMO upheld opposition by Metropolitan: [2016] ATMO 115
 - s 41: MCQUEEN is common surname; insufficient use of MCQUEEN solus to justify registration under s 41(5)
- Autumnpaper appealed to Federal Court.
- Metropolitan took no part in the appeal.
- Registrar declined to play any active part in the appeal.

Lee J: no evidentiary basis to find that TM is not capable of distinguishing, hence no reason to uphold opposition.

Red Energy PL v Registrar of Trade Marks [2018] FCA 1449

- Red Energy applied for TM EVENPAY in classes 9, 16, 35, 36, 37, 38, 39, 40, 41 and 42
 - Delegate rejected TM: s 41(3). Red Energy appealed to Federal Court
 - Registrar did not oppose appeal; advanced no evidence or submissions
- Beach J, allowing appeal and ordering that the TM be accepted:
- In a *de novo* appeal where the Registrar does not seek to assert that there is any ground for rejecting the application, the presumption of registrability in s 33(1) has the result that the appeal should be upheld.
 - In any event, EVENPAY does not directly describe “the kind” of goods or services – too abstract to do that, even for financial services
 - EVENPAY is formed by combining 2 words in syntactically unusual way
 - EVENPAY is evocative not descriptive, has no ordinary meaning

Honest Reveira v Registrar of Trade Marks [2018] FCA 1122

- Honest Reveira applied to remove a TM for non-use
 - TM owner missed deadline to file notice of intention to oppose
 - 2 weeks after deadline, applied for extension; granted by Registrar
- Moshinsky J, rejecting an application for judicial review:
- Health issues may be “circumstances beyond the person’s control” for purposes of reg 9.11(4)
 - For a small company, such circumstances may be established by reference to situation of single individual; will depend on the facts

ATMO Decisions

Trade Marks Office decisions

Insufficiently distinctive – s 41

THE FRUIT BOX

Retailing, wholesaling, including of fruit and vegetables.

Fresh Venture Group Pty Ltd v Box Corporate Food Services Pty Ltd [2018]
ATMO 4

THE GREAT ALL ROUNDER

Extra-virgin olive oil, olives, prepared olives etc

Conga Foods Pty Ltd v Boundary Bend Olives Pty Ltd [2017] ATMO 114

Insufficiently distinctive – s 41

MEDIHEMP

Goods and services including multiple classes including pharmaceutical preparations.

Rebecca Ann McKean [2017] ATMO 147

FRANKLIN RIVER RAFTING

Organisation and provision of sightseeing tours and excursions, nature tourism, adventure tourism and water transport.

World Expeditions Travel Group Pty Ltd v Franklin River Rafting Pty Ltd [2017] ATMO 158

Insufficiently distinctive – s 41

MEDAL

Wine.

Australian Grape and Wine Authority v Yi Li [2018] ATMO 79

THOMAS

Vacuum pumps, air & gas compressors etc

Thomas Magnete GMBH v Gardner Denver Thomas, Inc. [2018] ATMO 95

Insufficiently distinctive – s 41

APP STORE

Online retail store for software

Apple Inc [2018] ATMO 36

NB Mark accepted for possible registration under s 41(3) for a limited range of services

EVENPAY

Multiple classes relating to payment methods and other services – evidence of other traders using the phrase “even pay”

Red Energy Pty Limited [2018] ATMO 66 – but overturned on appeal [2018] FCA 1449

Insufficiently distinctive – s 41

CAREER NAVIGATOR

Career counselling, job placement services etc.

Mt Shadwell Pty Ltd [2018] ATMO 25

SKINCARE FOR YOUR HAIR

Hair preparations etc.

Kevin Murphy Asia Pte Ltd v Lab Brands Limited [2018] ATMO 58

Insufficiently distinctive – s 41

FRUITS AND ROOTS

Non-alcoholic beverages, fruit juices, vegetable juices

Campbell Soup Company [2018] ATMO 28

ASSORTI

Various classes relating to food

Conga Foods Pty Ltd [2018] ATMO 56

Insufficiently distinctive – s 41



trektasmania

Arrangement of sightseeing tours etc

World Expeditions Travel Group Pty Ltd v Australian Wilderness Adventures Pty Ltd [2017] ATMO 141

Insufficiently distinctive – s 41

**Angel Gowns for
Australian Angel Babies
Australia**



Charitable services, namely distribution of goods such as foodstuffs, toys, clothing, furniture and household items.

Angel Gowns Australia Incorporated v Angel Gowns for Australian Angel Babies Inc [2017] ATMO 130

Insufficiently distinctive – s 41

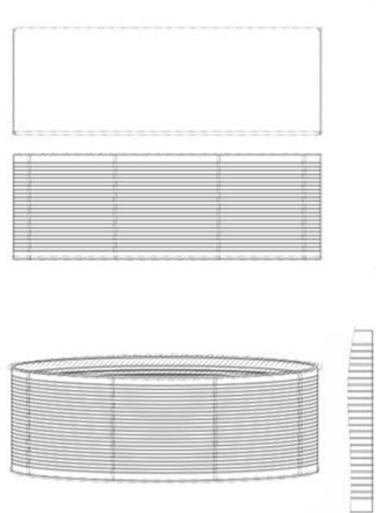


Description of mark: lampshade with stiches

Registration sought in respect of bedside lamps etc – acceptance revoked pursuant to s 38 TMA

Wendy Grey Reid [2017] ATMO 144

Insufficiently distinctive – s 41



Shape mark – consisting of shape of vertical wall of water tank
Registration sought in respect of water tanks of metal

Pioneer Water Tanks Pty Ltd [2018] ATMO 32

Insufficiently distinctive – s 41

TokenSecure

Electronic funds transfer services

IP Solutions International Pty Ltd [2018] ATMO 106

TACTICAL

Hand tools, protective wear, binoculars, navigation and measuring instruments, batteries, lighting and heating equipment

Spitfire Brands (Aust) Pty Ltd [2018] ATMO 126

Insufficiently distinctive – s 41

More Care 4! LESS COST

Retail, wholesale and prescription medicines, beauty and pharmacy
advisory services

P4L Corporation Pty Ltd [2018] ATMO 138

16/03/09

Sufficiently distinctive – s 41



Taxland

Accountancy; Business Consultancy; Bookkeeping; Tax Return Preparation;
Taxation Advice (accountancy)

Taxand Economic Interest Grouping v Rosa Westland & Graham Westland
[2018] ATMO 10

Sufficiently distinctive – s 41

THE CORNER

Various services in relation to entertainment and provision of food and drink

McD Asia Pacific LLC v Swancom Pty Ltd [2017] ATMO 149

AIRPANEL

Motor vehicles and parts thereof.

Daimler AG [2017] ATMO 116

Sufficiently distinctive – s 41

STATE OF ORIGIN

Textile & textile goods, manchester, games and playthings etc...” all of the foregoing goods promoting or marketing or otherwise relating to or associated with or indicating a connection with the game or sport of rugby league”

Hearing Officer Adrian Richards: “...*the Applicant has provided overwhelming and continual evidence of use of the Trade Mark from well before the Relevant Date. This evidence is of such an extent that it establishes in fact that the Trade Mark distinguishes the Applicant’s Goods from the goods of other traders. An endorsement to this effect will be added to the Register.*”

Australian Rugby League Commission Ltd v Enterprise Above & Beyond Ltd
[2017] ATMO 150

Sufficiently distinctive – s 41

The logo for InlandRail, featuring a stylized grey swoosh above the word "InlandRail" in a bold, sans-serif font.

and **INLAND RAIL**

Data processing equipment etc, property management, construction, transport services including railway track use...

Australian Rail Track Corporation Limited [2018] ATMO 69

Section 41(4) TMA applied.

Sufficiently distinctive – s 41

AIRPORTLINKM7

Several classes rel to construction and operation of toll roads

APL Co Ltd [2018] ATMO 78

MULTI FOOD

Nutritional supplements; Dietary supplements; Herbal dietary supplements; Vitamin supplements;

ATP Institute Pty Ltd [2018] ATMO 94

Section 41(4) TMA applied.

Sufficiently distinctive – s 41



Business evaluation services, Business management, Business advice, event planning

Precedent Productions Pty Ltd v Interested in Business Pty Ltd [2018] ATMO 112

Sufficiently distinctive – s 41



Telecommunication devices and other electronic goods

Onkyo Kabushiki Kaisha Doing Business as Onkyo Corporation v Dynaudio Holdings A/S [2018] ATMO 120

Sufficiently distinctive – s 41

QLD MAROONS

Clothing, footwear, headgear, etc

Enterprise Above & Beyond Pty Ltd v Queensland Rugby Football League Limited [2018] ATMO 140

Sufficiently distinctive – s 41



Motor racing; Organisation of vehicle racing events; Advisory services relating to the organisation of sporting events;

Australian Professional Drag Racing Ltd v The Jamboree Aus Pty Ltd. [2018] ATMO 143

Contrary to law – s 42(b)



Crushed garlic, garlic puree etc

Copyright in mark owned by a party other than the applicant.

Just Foods Australia Pty Ltd v Just Foods Limited [2017] ATMO 159

NOT contrary to law or scandalous – s 42

BOROBI

Multiple goods and services across many classes

Jabree Ltd v Gold Coast Commonwealth Games Corporation [2017] ATMO 156

Likely to deceive or cause confusion: s 43

theforceawakens

Non-alcoholic beverages

Lucasfilm Ltd LLC v Stephen Muller [2018] ATMO 13

Opponent relied primarily on s 62A which was not considered.

Query whether s 43 applies in this case.

Deceptively similar TMs

THE BIG HIT v **HIT**

Isotonic drinks etc

v Non-alcoholic drinks & beverages

Gaseosas Lux S.A. v Chris Alexander Sanson [2017] ATMO 151

ProBurn v **BURN**

Multiple classes incl beverages

v Beverages

Energy Beverages LLC v M.D Visage Pty Ltd [2018] ATMO 53

Deceptively similar TMs

**MEDVISIT HOME
DOCTOR SERVICE v**
and



Medical services v Navigation systems, computer software design

Medvisit LLC v Medvisit Pty Ltd [2018] ATMO 80

Deceptively similar TMs

WONGLO v WONG LO KAT

Medicines, foods, beer etc v Chinese medicine, beverages etc

Multi Access Limited v Guanzhou Pharmaceutical Holdings Limited [2018] ATMO 41

Deceptively similar TMs

Tooshies by TOM v **Tushies**

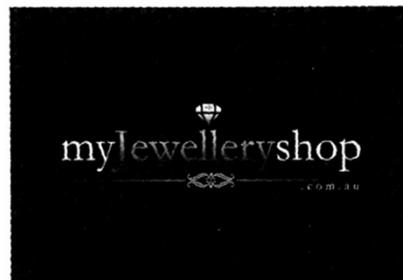
Disposable nappies & washcloths v Wipes, hygienic wipes etc

TOM Organic Pty Ltd [2018] ATMO 46

Deceptively similar TMs



v



Retail services v Jewellery, costume jewellery etc

Love Pomella Pty Ltd [2017] ATMO 115

Deceptively similar TMs

NATURAL HARMONY v *Harmony*♀

Pain relieving creams etc

v

Medicinal herbs etc

Martin & Pleasance Wholesale Pty Ltd v Biz-Oz Pty Ltd [2017] ATMO 148

(BUT s 44(3) applied – s 60 ground also unsuccessful).

Deceptively similar TMs

NEW BEGINNINGS v



Event management, entertainment

v

Charitable services, etc

SAPH Vision Quest Association Inc v Jacqueline Margaret Hendy [2018] ATMO 76

Deceptively similar TMs

RID-IT

v



Odour removers

v

Various classes including deodorisers

Thorleys Industries Pty Ltd v Hi Tech Pure Air Pty Ltd [2017] ATMO 137

Deceptively similar TMs



v

WARRIOR

Clothing rel to lacrosse & hockey

v

Gymnastic & sporting articles, clothing etc

Warrior Australia Pty Ltd v Warrior Sports Inc [2017] ATMO 120

Deceptively similar TMs



Accounting services etc v Multiple classes incl in rel to eyewear

BTA Vantage Pty Limited v BTA Accountants Pty Ltd as trustee for BTA Accountants Unit Trust [2017] ATMO 153

(BUT s 44(4) applied – prior continuous use – ss 58A & 60 grounds also unsuccessful)

Deceptively similar TMs



• v



Building maintenance services etc v Building construction services etc

Intact Projects Pty Ltd v Intact Consulting Pty Ltd [2018] ATMO 24

Deceptively similar TMs

ORION HEALTH v **ORION**

Various classes incl computer software v Computers and computer software

Interactive Engineering Pty Ltd v Orchestral Developments Limited [2018] ATMO 22

NUALTO v **NOALTA**

Pharmaceutical preparations v Pharmaceutical preparations

Biofarma v Paratek Pharmaceuticals Inc. [2018] ATMO 51

Deceptively similar TMs

BLACK SHEEP v



Restaurants, café services v Beverages, coffee products, coffee bar services

Chris Di Lorenzo & Dora Di Lorenzo v Denversian Pty Ltd [2018] ATMO 105

(BUT s 44(3) applied – ss 42, 58 & 58A grounds also unsuccessful)

16/03/09

Deceptively similar TMs

hbf
momentum
member benefits

v

Momentum

**Momentum Financial
Advice**

momentum
member benefits

v

...
MOMENTUM
wealth

**Momentum Private
Wealth**

Momentum

Software and Insurance Services v

Multiple classes included in relation
to software and services

(BUT Classes of the two different trademarks refined to reduce overlap – allowed
after specifications amended pursuant to HO' recommendations)

HBF Health Limited [2018] ATMO 109

Deceptively similar TMs

RICHMOND GROVE

**RICHMOND
PARK**

v



Wines, Spirits and Liqueurs

Pernod Ricard Winemakers Pty Ltd v Cracka IP Pty Ltd [2018] ATMO 110

Deceptively similar TMs



Footwear

v



VIKTORIA + WOODS

Footwear

Margaret Woods and Lisa Reynolds v Viktoria Teed [2018] ATMO 121

Deceptively similar TMs



T-Shirts & hooded jumpers

v



Clothing, headwear & footwear

Sebastiano John Amenta v Tina Estelle Lowe & Leroi Harlan Waddington [2018] ATMO 122

Deceptively similar TMs



Financial Credit Services services v Financial consultancy services

Chris Staats v Click Loans Pty Ltd [2018] ATMO 116

(BUT s 44(3)(b) applied – grounds based on ss 42(b), 60 and 62A also unsuccessful)

16/03/09

Deceptively similar TMs

AHMED KARACHI
HALWA MERCHANT v



Food products

Naurus Pvt Ltd v Ahmed Foods Pvt. Ltd. [2018] ATMO 123

(BUT s 44(4) applied – opposition unsuccessful)

Deceptively similar TMs



v

QUANTUM

QUANTUM GROUP

Taxation and Business Services

v

Financial services and taxation advice

Andrew Thompson v Quantum Group Holdings Pty Ltd [2018] ATMO 128

NOT deceptively similar TMs

3VOLV

v

VOLVO



Hire of transport vehicles etc

v

Motor vehicles, parts etc

Volvo Trademark Holding Aktiebolag v 3VOLV Pty Ltd as trustee for the 3VOLV Trust [2018] ATMO 8

(ss 42(b) & 60 grounds also unsuccessful)

NOT deceptively similar TMs

PIRATE BAY v **PYRAT**
RUM COMPANY

Alcoholic beverages v Alcoholic beverages

Patron Spirits International AG v Fernbrew Pty Ltd [2018] ATMO 87

(ss 42(b) and 60 grounds also unsuccessful)

NOT deceptively similar TMs

QANTAS ASSURE v **ASSUREPLUS**
and other marks including
the word “ASSURE”

Multiple classes relating to financial, business consultancy services etc

Ingeus Australia Pty Ltd and Ingeus Pty Ltd v Qantas Airways Limited [2018]
ATMO 23

(ss 42(b) and 60 grounds also unsuccessful)

NOT deceptively similar TMs

TRUMAX v **TRUMATIC**
TRUMA

Apparatus for heating and cooling devices etc v ventilation units for a/c, valves,
electronic control sets etc

Geratetechnik v Actron Engineering Pty Ltd [2018] ATMO 85

NOT deceptively similar TMs

RYLAN v **RLYIN**

Clothing, footwear etc + retailing v Clothing, footwear etc + retailing

Austin Austen Pty Ltd v Brooke Testoni [2018] ATMO 68

Note HO considered opponent's mark likely to be pronounced "Are Lyin"

EASER v **KAESER**

Construction, mining, vehicles etc v Multiple classes relating to
machinery etc

Kaeser Kompressoren SE v Atlas Copco Drills AB [2018] ATMO 77

NOT deceptively similar TMs

**MAD ABOUT
FISHING** v



Fishing apparatus etc

Madfish Gear Ltd v David Lawrence [2017] ATMO 146

(ss 42(b), 58A and 60 grounds also unsuccessful)

NOT deceptively similar TMs

greencar Quattro v **GREENCARE**

Car care products incl shampoos v various household cleaning products

Jalco Australia Pty Limited v Autotech Group Australia Pty Ltd [2018] ATMO 70

NOT deceptively similar TMs

NEXT

v



*Wide variety of goods and services some of which were found to be similar:
apparatus for recording, transmission or reproduction of sound or images;
magnetic data carriers, recording discs; computers;*

Intercast Europe Srl v Next Holdings Limited [2018] ATMO 1

(ss 60 and 62A grounds also unsuccessful)

NOT deceptively similar TMs

PRIVACY PLEASE v



Clothing

v

Clothing etc

Imperial S.p.A. v Alliance Apparel Group, Inc. [2018] ATMO 62

(ss 58, 42(b), 60 and 62A grounds also unsuccessful)

NOT deceptively similar TMs



Taxland

Tax & financial advisory services

• v



Taxand Economic Interest Grouping v Rosa Westland & Graham Westland [2018]
ATMO 10
(Section 41, 42(b), 60 grounds also unsuccessful)

NOT deceptively similar TMs



v **BEACHES & BUSH**

Real estate services

v Real estate services

Beaches and Bush Properties Pty Ltd v Beaches and Bush Properties Pty Ltd
[2018] ATMO 6

(Grounds based on ss 42(b), 60 and 62A also unsuccessful).

NOT deceptively similar TMs

SIGBOX

• v



Computer software etc v Multiple classes incl in rel to software

Box Inc v Macquarie Telecom Pty Limited [2017] ATMO 136

(Section 60 ground also unsuccessful)

NOT deceptively similar TMs

SUMO

v

**SUMOL
PORTUGAL**

Salads, dressings, drinks, retail services etc v Coolers and fruit juices

Sumol Compal S A v Sumo IP Holdings Pty Ltd [2018] ATMO 81

(Section 42(b) and 60 grounds also unsuccessful)

NOT deceptively similar TMs

ATOMIC

ATOMIC v ATOMIC

Various classes rel to coffee & cafes
v stove top coffee maker



HO Smith: It is highly unlikely that a coffee shop or restaurant would be involved in the manufacture and/or retail of a machine for making coffee and consumers would not perceive it to be the case. At best the Opponent's Goods are products used by restaurant and coffee shops to supply their services, but merely being an input into the supply of a service does not render a good closely related to that service

Irene Notaras v Barcelona Pty Limited [2018] ATMO 12

NOT deceptively similar TMs



v • **iGuard Pty Ltd**

Services for the protection of
property and individuals

v

Services for the protection of property
and individuals

iGuard Pty Ltd v iGuard Australia Pty Ltd [2018] ATMO 91

(Section 60 grounds also unsuccessful)

NOT deceptively similar TMs

PFB

v



Bearings, gears, belts for machines v Bearings for use in the automotive industry

Perfect Fit Industries, Inc v Domingo So Pensaloz and Rong Ping Tang
[2018] ATMO 111

(Section 60 and 62A grounds also unsuccessful)

16/03/09

NOT deceptively similar TMs



v

EB & IVE

Women's clothing

v Apparel (clothing, footwear, headgear)

The Kindred Co Pty Ltd v ZW Family Pty Ltd as Trustee for ZW Family Trust
[2018] ATMO 113

(Section 42(b), 60 and 62A grounds also unsuccessful)

NOT deceptively similar TMs

DIG&FISH v **FISH**

Business advice relating to marketing v Marketing services, brand recognition services etc.

Elmwood Design Limited v Dig & Fish Pty Ld [2018] ATMO 114

(Section 42(b), 60 and 62A grounds also unsuccessful)

16/03/09

NOT deceptively similar TMs



v



and other related marks

Alcoholic and Non-Alcoholic Beverages

Loco Liquor PL v 4 Brothers Brewing PL [2018] ATMO 119

(Section 42(b) grounds also unsuccessful)

16/03/09

NOT deceptively similar TMs



Dynamic Audio
Amplification

v

DYNAUDIO

Telecommunication devices and
other electronic goods

v

Device for recording video and
sound and other electronic
goods

Onkyo Kabushiki Kaisha Doing Business as Onkyo Corporation v Dynaudio Holdings A/S [2018] ATMO 120

NOT deceptively similar TMs



v



Multiple financial services

v

Financial derivative services

IG Group Limited v International Capital Markets Pty Ltd [2018] ATMO 132

(Section 60, 42(b) and 62A grounds also unsuccessful)

NOT deceptively similar TMs

REAL BEAST v

UNLEASH THE NITRO BEAST!
 UNLEASH THE ULTRA BEAST!
 REHAB THE BEAST!
 PUMP UP THE BEAST!
 UNLEASH THE BEAST!



Alcoholic Beverages v Energy Drinks and other products

Monster Energy Company v Fernbrew Pty Limited [2018] ATMO 125
 (Section 60 and 42(b) grounds also unsuccessful)

Monster Truck Destruction v **MONSTER MONSTER ENERGY**

Children's Toys, Clothes and Entertainment Products v Energy Drinks and Other Products

Monster Energy Company v Fernbrew Pty Limited [2018] ATMO 125
 (Section 60 and 42(b) grounds also unsuccessful)

NOT deceptively similar TMs



Footwear

v



Footwear

Kenny Ng & Peter Wu v Aussie Dazzling Life Pty Ltd [2018] ATMO 136



Promotional marketing v Clothing and footwear and
associated services

The Polo/Lauren Company LP v Horse Australia Pty Ltd [2018] ATMO 150

Grounds provided by ss 42(b) and 60 also unsuccessful.

TLS v **XLS**
XLS MEDICAL

Dietary Food Supplements v Pharmaceuticals and Food Supplements

Omega Pharma Innovation & Development NV v Market Australia Inc. [2018]
ATMO 152

Confusion likely: s 60

MONECOR v MONEYCORP

Financial services etc

TTT Moneycorp Limited v Monecor (London) Limited [2017] ATMO 132

SO COUTURE v SO...? (series)

Make-up preparations v perfumery, cosmetics etc

Debonair Trading Internacional Lda v LOreal SA [2017] ATMO 134

Confusion likely: s 60

**FRANK/E v FRANKIE4
FRANKIEB**

Athletic shoes etc

Urban Shoemakers Pty Ltd v All Podiatry Pty Ltd [2017] ATMO 135

Confusion likely – s 60

ABEL TASMAN v ABEL'S TEMPEST

Wine v Wine

Southcorp Brands Pty Ltd v Casella Wines Pty Limited [2018] ATMO 35

Confusion likely – s 60

DAVID JONES PHARMACY v DAVID JONES

Retail pharmacy services etc v Retailing

David Jones Pty Ltd v Pharmaline Pty Ltd [2018] ATMO 60

Confusion likely – s 60



v



Wide variety of goods & services

v

At least some overlapping goods

Red Bull GmbH v Bullsonne Co., Ltd [2017] ATMO 121

Confusion likely – s 60



v



Real estate & associated services
services

v

Real estate advertising

REA Group Limited v realestateasia.com.au Pty Limited [2018] ATMO 49

Confusion likely – s 60

Meenyminy v



eeni
meeni
miini
moh.

and other related marks

Apparel, clothing etc v Various goods including clothing, footwear

Philip Desmond Cowley and Elizabeth Ann O'Connor-Cowley v Kelli Jane Marchewka [2018] ATMO 50

Confusion likely: s 60

**BED BATH
& BEYOND** v



BED BATH N' TABLE

Retail store, mail order etc of homewares v Retailing of homewares etc

Bed Bath N' Table Pty Ltd v Liberty Procurement Co. Inc. [2017] ATMO 108

Confusion likely: s 60



v



BIO LIVING

Chemical preps for household use v Health and wellbeing products

Bio Living International Pty Ltd v Deborah Ann Cardona [2018] ATMO 100

Confusion likely: s 60

OPTISLIM v OPTI LEAN

Nutritional and weight-loss supplements

Opti Licences Pty Ltd v M.D. Visage Pty Ltd [2018] ATMO 20

OTTO KEUNIS v KEUNE

Hair care preparations

Keune Haircosmetics Manufacturing BV v Guangzhou Hodm Professionals Cosmetics Co Ltd [2017] ATMO 143

Confusion likely: s 60

GECORP v many marks including “**GE**”

Business consultancy & administration v wide variety of goods and services

General Electric Company v Gecorp Pty Ltd [2017] ATMO 162

WEALTH STREET JOURNAL v **THE WALL STREET JOURNAL**

Newspapers rel to business etc

Dow Jones & Company Inc v Wealth Street Pty Ltd & Michael Safar [2017] ATMO 139

Confusion likely: s 60

Intuiit v **INTUIT**
intuit.

Lamps, lighting, other devices etc v computer software etc

Intuit Inc v Guangzhou Dasen Lighting Electronics Limited [2017] ATMO 128

Confusion likely – s 60

**PLANET
FITNESS**



v

**PLANET
FITNESS**



Clothing

v

Operation of fitness centres and related services + use on sports clothing sold by the opponents

Planet Fitness Pty Ltd v PFIP LLC [2018] ATMO 11

Confusion likely – s 60

**WALDORF
APARTMENTS**

v

WALDORF

Multiple classes

Hilton Worldwide Inc v Waldorf Australia Group Pty Ltd [2018] ATMO 86

Confusion likely – s 60



MONSTER ENERGY

v



Alloy wheels for automobiles v Various uses (mainly energy drinks)

Monster Energy Company v Rodney Jane Racing Pty Ltd as Trustee of the Rodney Jane Racing Trust [2018] ATMO 57 (appeal pending – for hearing March 2019)

Confusion likely – s 60



v



Organic formulated cleaning products v Wholesale distribution services

Bio Living International Pty Ltd v Deborah Ann Cardona [2018] ATMO 100

Confusion likely – s 60

DUROFLAM v **DURO-TUSS
DIFFLAM**

Medical lozenges etc v Pharmaceutical preparations

Rajendra Patel v iNova Pharmaceuticals (Singapore) Pte [2018] ATMO 124

16/03/09

Confusion likely: s 60

apple juice v **APPLE**
& associated marks

Solar panels, solar lighting etc v portable communication and media devices,
computers and associated accessories

Apple Inc. v Meracomm Pty Ltd [2018] ATMO 154

Confusion likely: s 60



v

**BRILLIANCE
PUBLISHING**

**BRILLIANCE
AUDIO**

Electronic publications,
Audiobooks, printed matter etc

Brilliance Publishing, Inc v My Brilliance Pty Ltd [2018] ATMO 144

Confusion likely: s 60

**SELECT DATE
SELECT DATE LEASE**

v

SET DATE

Real estate consulting and advisory services v Real estate consulting

Barry Plant Holdings Pty Ltd v Naked Real Estate Pty Ltd [2018] ATMO 151

Confusion NOT likely – s 60



FRENCH BLUE
FLOWERS

v

French Flowers

Florist

v

Florist

Morgan & Hassam Investments Pty Ltd v French Blue Pty Ltd [2018]
ATMO 141

Confusion NOT likely: s 60

MONSTER STRIKE v



Downloadable computer games etc

v

primarily energy drinks, clothing,
headgear etc

Monster Energy Company v Mixi, Inc [2017] ATMO 119

Opposition based on s 42(b) TMA also unsuccessful.

Confusion NOT likely: s 60



v **SYDNEY ZOO**

Amusement and recreation services provided in connection with the operation of zoological parks

"...no evidence that the term 'Sydney zoo' is in use as a trade mark ..."

Taronga Conservation Society Australia v Sydney Zoo Pty Ltd [2017] ATMO 155

Confusion NOT likely: s 60



v

BANJO



Finance, commercial loans, computer programs v Downloadable apps

Banjo Inc v FundIT Technology Pty Ltd [2017] ATMO 129

Marks accepted to be "*essentially identical*" and "*similar*" but no likelihood of confusion due to lack of proved reputation.

Confusion NOT likely: s 60

KMC v KMC

Specialised car and motorbike wheels v Bicycle chains

Wheel Pros LLC v KMC Chain Industrial Co Ltd [2018] ATMO 88

No likelihood of confusion due to lack of proved reputation in Australia in the relevant market.

Opposition based on s 42(b) TMA also unsuccessful.

Confusion NOT likely: s 60

Juice Farmacy v Juice Generation Inc

Beverages (fruit and vegetable juice etc.), food production, food consultancy services etc.

Juice Generation Inc v Jateen Mistry [2018] ATMO 99

The opponent did not establish that its trade mark had any reputation in Australia

Opposition based on ss 42(b) and 62A TMA also unsuccessful.

Confusion NOT likely: s 60



v



Business evaluation services, Business management, Business advice, event planning

“any confusion arises out of the inherently unadapted nature of the words ‘Local Business Awards’”

Also unsuccessful under s 42(b)

Precedent Productions Pty Ltd v Interested in Business Pty Ltd [2018] ATMO 112

Confusion NOT likely: s 60



v



Discounted party supplies

Satnam Imports Pty Ltd v Simon Walter Sharpe [2018] ATMO 130

A degree of confusion may arise however Opponent’s marks doesn’t have the “requisite reputation contemplated by s 60 amongst potential consumers

(Section 42(b) grounds also unsuccessful)

Bad faith: s 62A

Hoeslandt**HOSLAND**

Applicant sought to register marks (on left above) in respect of various goods including baby food. Opponent was the registered owner of the mark HOSLAND in respect of baby food. Applicant had knowledge of Opponent's business in China.

Geo-Poland SP. z o.o. v Huijing Group Co., Ltd [2017] ATMO 103

Bad faith: s 62A

HEMOSTYP

Registration sought in circumstances where *"the evidence establishes that the Applicant was a former distributor of the Opponent's HEMOSTYP wound dressing product sold under the HEMOSTYP Trade Mark"*.

Critical Health Products Pty Ltd v Westcoast Surgical and Medical Supplies Pty Ltd [2017] ATMO 80

Bad faith: s 62A

OCHRE EARTH CHILD

Registration sought in respect of alcoholic beverages.

Applicant knew of the Opponent's RED EARTH and RED EARTH CHIILD brands. Following a previous dispute, the Applicant had given undertakings not to use any mark similar to RED EARTH.

Ceravolo Premium Wines Pty Ltd v MA KIRKBY TRPL PTY LTD [2018] ATMO 43

Bad faith: s 62A

LITTER BUSTER v



Registration of word mark (above left) sought in circumstances where opponent had engaged the applicant to develop a smart phone app for its litter reporting and waste removal services which were provided under the logo mark (above right)

City of Rockingham v Diesel Rocket Fuel Pty Ltd [2017] ATMO 122

Bad faith: s 62A

奔 富
RUSHRICH

Alcoholic beverages

Chinese character in the applicant's mark are pronounced Ben Fu – applicant asserted that this is then translated as RUSH RICH but Hearing Officer accepted that Ben Fu is the phonetic equivalent of PENFOLDS in English, a mark that the opponent uses in relation to its Penfolds wines
SouthCorp Brands Pty Limited v Eastern Tomorrow Jinjiang Import and Export Co Ltd [2018] ATMO 38



Further marks were later also refused on the same grounds

Southcorp Brands Pty Limited v Eastern Tomorrow Jinjian Import & Export Co Ltd [2018] ATMO 118

Bad faith: s 62A

Fashion show services, etc.



Opponent had operated fashion shows under the name PACIFIC RUNWAY – applicant was aware of this use – prior business relationship between opponent and applicant – application made shortly after disagreement had arisen between them.

Jannike Seiuli v Failepou Peni [2018] ATMO 101 and 102

NOT in Bad faith



v

• Escape Room Geelong Pty Ltd

Arranging of entertainment etc.

Applicant aware of the opponent's business at the time of making the application – no bad faith as the applicant's motivation in applying for the TM was the desire to protect the branding of its business in response to a perceived threat from the Opponent.

Escape Room Games Pty Ltd v Escape Room Geelong Pty Ltd [2018] ATMO 93

NOT in Bad Faith

Van Diemen's Land Milk Van Diemen's Land Dairy

As at the filing date, there was no evident prior use of the Trade Marks or of "Van Diemen's Land" as a TM – therefore the allegation that the A had acted in bad faith in filing them, because it knew the Opponent owned them, falls away.

(ss 58, 42(b) and 60 grounds also unsuccessful)

Moon Lake Investments PL v TasFoods Ltd [2018] ATMO 104