

## TRADE MARKS ACT 1995

### DECISION OF A DELEGATE OF THE REGISTRAR OF TRADE MARKS, WITH REASONS

Re: Opposition by Delta Mortgage Group Pty Ltd to registration of trade mark applications 1102179(36) and 1102181(36) - **AUSTRALIAN COMMONWEALTH etc (in CHINESE CHARACTERS)** - filed in the name of OZ Finance Professional Pty Ltd

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<b>DELEGATE:</b>	Terry Williams
<b>REPRESENTATION:</b>	<b>Opponent:</b> Conrad Cheng, General Manager, Dennis Kerr, marketing manager <b>Applicant:</b> Erik Young of counsel, instructed by Lyon Lawyers
<b>DECISION:</b>	2009 ATMO 08 S52 opposition: s 44 established, registration refused.

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#### Background

1. This opposition matter comes about because of a falling-out between former directors of Delta Mortgage and Finance Pty Ltd (“DMF”), a company that is now in liquidation. The bad feeling between former directors has led to an unfortunate business decision and results, as I will explain below, in the refusal of the two trade mark applications. One of the former directors of DMF is Oliver Zhang. Mr Zhang has since become a director of OZ Finance Professional Pty Ltd (“the applicant”).
2. On 7 March 2006 the applicant filed the two applications detailed below:

	<i>Application 1102179</i>	<i>Application 1102181</i>
Trade mark	澳洲聯邦集團	澳洲聯邦理財
Trans-literation and translation	AO ZHOU LIAN BANG JI TUAN AUSTRALIAN COMMONWEALTH MORTGAGE GROUP	AO ZHOU LIAN BANG LI CAI AUSTRALIAN COMMONWEALTH FINANCIAL PLANNING
Services	Financial advisory services; financial consultancy; financial planning; financial services	Financial advisory services; financial consultancy; financial planning; financial services; mortgage banking

3. After examination at the Trade Marks Office, the applications were advertised as having been accepted for possible registration. This, however, is opposed by Delta

Mortgage Group Pty Ltd (“Delta”). The general manager of Delta, Conrad Cheng, is another former director of DMF.

4. Delta filed and served, as evidence in support of its opposition, a total of 9 declarations. These include the declaration of Mr Cheng, with exhibits CC1-CC18. In answer to this, the applicant relies on 18 declarations, to which Delta replied with a further declaration by Mr Cheng.
5. Ultimately, the matter was set down for hearing and I was assigned to hear and decide it, under delegation from the Registrar of Trade Marks. At the hearing, the applicant was represented by Erik Young of counsel, instructed by Lyon Lawyers. While Delta had previously been represented by a firm of patent and trade mark attorneys, it was self-represented at the hearing, with Conrad Cheng, who is also its General Manager, and Dennis Kerr, its marketing manager, appearing on its behalf.

#### **Issues and decision**

6. At the heart of Delta’s opposition is the use and registration of the following trade marks (“Delta’s registered trade marks”):

	<i>Registration 988725</i>	<i>Registration 1094422</i>
Trade mark	<b>聯 邦 信 貸</b>	<b>聯 邦</b>
Transliteration and translation	LIAN BANG XIN DAI GROUP OF STATES MORTGAGE	LIAN BANG GROUP OF STATES
Services	Insurance, financial affairs, monetary affairs and real estate affairs; financial and monetary affairs, including financing services, loan financing, lending against security, mortgage broking ...; leasing and lease financing ...; insurance services ...; investment services; and real estate affairs	Financial and monetary affairs, including financing services, loan financing, lending against security, mortgage broking ...; leasing and lease financing ...; insurance services ...; investment services; and real estate affairs

7. At the hearing, Delta did not explain precisely which of the allowable grounds of opposition nominated in its notice of opposition were the ones it relied upon. Delta provided a summary of argument, from which it is clear that the matter at issue is the

presence, in the applicant's trade mark, of the characters LIAN BANG. Translation is not a precise science, but there is abundant evidence that LIAN BANG may be appropriately translated as either "commonwealth" or "group of states" or perhaps "federal".

8. Mr Young conceded, for the applicant, that this opposition would involve issues under sections 44 and 60 of the *Trade Marks Act 1995* ("the Act"). His written submissions also envisaged that I might be prepared to consider the matter in terms of s 43. I am not. Section 43 deals with trade marks that have a misleading or confusing connotation, but this must be a connotation inherent in the trade mark, not a confusion arising because of a resemblance to a trade mark used by another, see *Pfizer Products Inc v Karam* (2006) 70 IPR 599. See also *Big Country Developments Pty Ltd v TGI Friday's Inc* (2000) 48 IPR 513 and *McCorquodale v Masterson* (2004) 63 IPR 582. The applicant, in other words, has no case to answer under s 43.
9. Of the others, I will deal first of all with the s 44 matter. It will not be necessary to set the elements of s 44(2), the relevant subsection, out in full. To be successful under this ground Delta must rely on registered or pending trade mark(s) which:
  - has/have an earlier priority date than the priority date of the opposed trade mark application,
  - is/are substantially identical with, or deceptively similar to, the opposed marks, and
  - is/are for, relevantly, similar services.
10. Both of Delta's registered trade marks have earlier priority dates than do the opposed applications. I acknowledge the applicant's evidence to the effect that a mortgage broker cannot give financial advice unless licenced to do so. However, I am satisfied that the applicant's and Delta's services, as listed in their respective applications and registrations, are all "of the same description", in the sense in which that term has been defined over time by the courts, and therefore, per s 14, similar. Mr Young did not argue otherwise.
11. The necessary elements are therefore all present, with one possible and obvious key exception. This is the issue of deceptive similarity between the applicant's trade marks and either of Delta's registered trade marks.

12. It is, I think, very arguable that the competing trade marks are neither visually nor conceptually substantially identical. On the other hand, there is no doubt that the trade marks have some degree of similarity. However, in terms of deceptive similarity, the relevant test is defined by s 10:

For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or cause confusion.

13. The method of comparison of the trade marks to determine deceptive similarity was discussed by the Full Court of the Federal Court in *C A Henschke & Co v Rosemount Estates Pty Ltd* (2000) 52 IPR 42 at paragraphs 40–42 , as follows:

There is no room for doubt, in general terms, about the test to be applied. In *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 658, Dixon and McTiernan JJ described it as follows:

"But, in the end, it becomes a question of fact for the Court to decide whether in fact there is such a reasonable probability of deception or confusion that the use of the new mark and title should be restrained.

In deciding this question, the marks ought not, of course, to be compared side by side. An attempt should be made to estimate the effect or impression produced on the mind of potential customers by the mark or device for which the protection of an injunction is sought. The impression or recollection which is carried away and retained is necessarily the basis of any mistaken belief that the challenged mark or device is the same. The effect of spoken description must be considered. If a mark is in fact or from its nature likely to be the source of some name or verbal description by which buyers will express their desire to have the goods, then similarities both of sound and of meaning play an important part. The usual manner in which ordinary people behave must be the test of what confusion or deception may be expected. Potential buyers of goods are not to be credited with any high perception or habitual caution. On the other hand, exceptional carelessness or stupidity may be disregarded. The course of business and the way in which the particular class of goods are sold gives, it may be said, the setting, and the habits and observation of men considered in the mass affords the standard. Evidence of actual cases of deception, if forthcoming, is of great weight."

Equally well known is the following passage from the judgment of Windeyer J in *The Shell Company of Australia Ltd v Esso Standard Oil (Australia) Ltd* (1961) 109 CLR 407 at 415:

"On the question of deceptive similarity a different comparison must be made from that which is necessary when substantial identity is in question. The marks are not now to be looked at side by side. The issue is not abstract similarity, but deceptive similarity. Therefore the comparison is the familiar one of trade mark law. It is between, on the one hand, the impression based on recollection of the plaintiff's mark that persons of ordinary intelligence and memory would have; and, on the other hand, the impressions that such persons would get from the defendant's television exhibitions."

Windeyer J added, at 416, that "[the] deceptiveness that is contemplated must result from similarity; but the likelihood of deception must be judged not by the degree of similarity alone but, by the effect of that similarity in all the circumstances". Thus, for instance, although the present *Trade Marks Act* contains no analogue of s 66 of the *Trade Marks Act 1955* (Cth), it is still true that questions of deceptive similarity must be considered against the background of the usages in the particular trade.

14. Delta, for its part, relies on its evidence in support and reply, of which Mr Cheng handed up an extract at the hearing. Mr Cheng, in his own declaration, notes the evidence of a translator, which he annexes, to the effect that the element that makes up the entire of trade mark 1094422, the Chinese characters LIAN BANG, can be translated as either "commonwealth" or "group of states". Mr Zhang's view is slightly different, but in substance there is agreement that the characters, in themselves, mean, roughly, "commonwealth" or "federal".
15. In his declaration, Mr Cheng argued that, however the trade marks comprising the entire of registration 1094422 are translated, they are the essence of the applicant's trade marks. As Mr Cheng argued it, the remaining parts of the applicant's trade marks were simply descriptive and ought to be "discounted". Mr Young, while accepting the basis of Mr Cheng's propositions, simply noted that there were considerable visual differences between the applicant's trade marks and those of Delta. Those differences would suffice, he argued, to allow the trade marks to coexist.
16. The remainder of Delta's evidence consists of declarations, identical in substantive matters, by Xue Wang, Christine Liu, Gregory Dzung, Kandy Zhae, Wei Liang, Ling Zhu and Kok Chea. These assert that the signatories speak and read Chinese and English. "I consider", says each declarant, "that the TM 1102179 and 1102181 are too similar in meaning and look the same to TM 988725 and 1094422". This is

apparently because “For English speaking Chinese ... the middle two characters (of the opposed applications) would be mostly focused upon”.

17. To this material, the applicant replied with a large volume of paper that tends to illustrate that its trade marks have been in use. Supporting this are declarations making assertions that go more or less counter to those relied on by Delta. I will come to the detail of this material in due course.
18. At the hearing, Mr Cheng was critical of these counter-assertions. He has declared, in his evidence in reply, that key declarants for the applicant were not at arms-length from that firm and were influenced by the payment to them of rebates from the applicant. This is a strong and quite repugnant claim which I am entirely unable to either verify or negate. Mr Cheng has attacked much of the applicant’s evidence on similar grounds. He asserts that dates have been falsely attributed, and that certain advertisements relied on by the applicant have been tampered with. There is no convincing proof that these things are so, but very little will turn on this part of the evidence, for reasons that will emerge.
19. On the other hand, I find it surprising that Mr Cheng has not provided a single declaration evidencing the “numerous instances of confusion” to which he refers in his evidence in reply. If it is the case that “most Chinese people believe My Company and Oz Finance are the same”, I would have expected that there would be some cogent first-hand evidence of actual confusion. The written declarations supporting the opposition are not evidence of confusion, they are mere speculation or assertion about the likely reactions of others.
20. The context for the comparison of these trade marks is the Chinese-speaking subset of the financial sector. The applicant’s case is that, within the relevant community, there is a significant quantum of difference to be seen and perceived between the trade marks of the applicant and of Delta. Mr Young argued that, in effect, the case put forward by Delta was more theoretical than actual.
21. If I return to the accepted broad principles of comparison of trade marks, I note the relevant decision of the Full Court of the Federal Court in *Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd* (2004) 63 IPR 38. The court’s decision was that the trade marks there at issue were deceptively similar – and hence

infringement had occurred. For convenience, I adopt the relevant headnote as a succinct appraisal of the facts:

The parties are publishers of rival Chinese community newspapers in Australia. Both papers are written substantially in Chinese characters and each carries a title logo in both English words and Chinese characters. This dispute concerns the title logos comprising the Chinese characters. Australian Chinese Newspapers Pty Ltd (ACN) is the owner of trade mark registration No 776305 (the trade mark). The trade mark consists of four Chinese characters set out in Li Shu style calligraphy which can be transliterated as “Oh Chow Sun Pao” and translated as “Australian New Report” or “Australian New Newspaper”. The other paper is published by Melbourne Chinese Press Pty Ltd and Chinese Times Newspaper Pty Ltd (collectively MCP). MCP’s title logo also consists of four Chinese characters. These can be transliterated as “Oh Chow Yat Pao” and translated as “Australian Daily Newspaper”. The MCP logo was originally set out in Xing-Shu or Hsing-Shu style calligraphy and was used this way for a number of years. The present dispute arose when MCP altered its title logo by rendering it in Li Shu style calligraphy. ACN objected to the new MCP logo on grounds that it was deceptively similar to its own logo and infringed the trade mark.

22. The decision in that case was based on evidence about how readers of Chinese characters perceive the characters as a whole, not on a character-by-character basis. No similar evidence is before me here but it seems a sound approach to adopt as a first principle. It would also be entirely consistent with the view that I accepted in *Sky Channel Pty Ltd v Celestial Pictures Ltd* (2006) 71 IPR 143:

In Chinese, it is possible to read two or more Chinese characters which appear together as one word. It is impractical and incorrect to translate into English each Chinese character appearing in a sentence or phrase without regard for the surrounding characters.

23. As to the decision in *Melbourne Chinese Press* above, I note that at [37] and following, the Full Court said (my emphasis added):

[37] It is clear beyond argument that **the first, second and fourth characters in the trade mark and the logo are largely identical but that the third character is different, both in appearance, sound and meaning. In many cases, such differences are likely to be fatal to a claim of deceptive similarity.** However, as it seems to us, two circumstances of the present case justify the primary judge’s conclusion.

[38] First, Conti J made a finding, which has not been challenged on appeal, that a Chinese reader, particularly in the circumstances of purchasing a newspaper, looks at the four characters as a graphic, as a single entity, and not word by word. His Honour said 48 [120]:

... a Chinese buyer tends to look at the impact of the image of the four characters, or their whole layout, such that they come together as one image or visual experience; thus the overall characters of the two logos look similar, especially when viewed “scantly”;

... the Chinese reader “look[s] at the whole thing as one piece of graphic” and not “word by word”; particularly is that so, when the Chinese viewer is engaged in making a fleeting glance at the masthead of a newspaper in the course of purchasing the same ...

[39] This unchallenged finding of fact reduces the significance of a word for word analysis.

24. Again, and highly relevant to Mr Cheng’s argument that descriptive material should be disregarded, the court continued:

[40] Cases like *Cooper Engineering*, *Coca-Cola Co* and *Sports Cafe*<sup>1</sup> do not support the proposition of Mr Catterns that non-descriptive words should be emphasised in considering deceptive similarity. In considering marks as a whole, where they contain common words, one should look primarily to those aspects of the marks that are not common: *Cooper Engineering* at 538–9. Where distinctive aspects of the marks are the aspects that would remain with a consumer, that is sufficient to avoid confusion: *Coca-Cola Co* at 134. Elements of the mark were not discounted in these cases because they were descriptive but because they were common to the two marks. In any event, in the present case there is no real distinction between the three common words, “O”, “Chau” and “Pao”, and the uncommon words “Sun” and “Yat”. The latter two words are no less descriptive than the common three words. Conti J did not discount elements of the mark on the basis that they were descriptive or non-descriptive. He took into account all elements of the marks in determining whether one was deceptively similar to the other.

25. In attempting to likewise take into account, but appropriately weight, all the elements of the marks in determining whether there is deceptive similarity in the present case, I cannot ignore the characters AO ZHOU which, in their context, mean “Australia” or “Australian”. While that element, in isolation, is descriptive, it is equally possible that, within the context of the applicant’s trade mark, it is part of the totality of “Australian Commonwealth”. It is here in the decision-making process that, as a person who neither speaks nor reads Chinese, I must carefully assess the declarations of the parties, to see what light they shed on the perceptions of the customers to whom these services will be directed. In doing this, I will need to return in greater depth to

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<sup>1</sup> *Cooper Engineering Co Pty Ltd v Sigmund Pumps Ltd* (1952) 86 CLR 536; *Coca-Cola Co of Canada Ltd v Pepsi Cola Co of Canada Ltd* (1942) 59 RPC 127 and *Sports Cafe Ltd v Registrar of Trade Marks* (1998) 42 IPR 552 respectively.

the aftermath of the failure of DMF, and the history of the dispute between the applicant and Delta.

26. Mr Zhang declares that, at the time he and Mr Cheng were directors of the former company, each had been using a logo identical to that which Delta has now registered as 988725. Mr Zhang declares that one of the reasons for the failure in the relationship between himself and Mr Cheng was that Mr Cheng set up a competing business, Delta.
27. Mr Zhang declares that “since our relationship broke up, I have continued using (the logo now registered as 988725)”. Mr Zhang further declares that he is aware that Delta has continued to use the same logo. This, not surprisingly, resulted in confusion. In an effort, he declares, to overcome this confusion, the applicant company started to use the applied-for trade marks. There is, as I have said, disagreement between Mr Cheng and Mr Zhang about when this usage commenced. According to Mr Zhang it was “since October 2003”, the date on which the applicant was incorporated. However, exhibit OZ-4, said to show this, contains no exhibits from 2003 or 2004, and one instance each from 2005 and 2006. These are described as “a seminar” and “a training workshop”. At most, the evidence of use before the filing of the opposed applications can be characterised as very slight.
28. According to Mr Zhang, after he adopted the opposed trade marks, whenever this may have been, there has been nothing further from his customers about confusion or of perceptions that there is a relationship between the applicant and Delta.
29. He declares, relevantly, that
  - (988725) means United Group Credit/loan advance or Federal Credit/loan advance or Commonwealth Credit/loan advance
  - (1102179) means Australian Union Group or Australian Commonwealth Group or Australian Federal Group
  - (1102181) means Australian Union of Financial Planning or Australian Commonwealth Financial Planning or Australian Federal Financial Planning
  - (another logo, comprising 1102181 with two additional characters) means Commonwealth Bank

It is my true belief that each of the above logos or marks is unique in its meaning and I do not believe that any one in the Chinese Community in Australia could be confused by them or at all.

30. The additional declarations that make up the applicant's evidence in answer tend to support this sentiment. However, before I go to the detail of these, I pause to note that Mr Zhang does not give his opinion on whether the heart or essence of any of the trade marks to which he refers is in common. He declares that each is "unique in its meaning" and that therefore none of them can be confused. Mr Zhang's view of the matter is thus consistent with that of a man who adopts a trade mark different to that of a competitor in order to avoid using one that is the *same* as his competitor. It does not follow, however, that the degree of difference would preclude the opponent from establishing that the competing trade marks are deceptively similar in the way in which that term has been defined by the courts.
31. The remaining declarations on which the applicant relies also appear to be based on the extent to which the competing trade marks can be distinguished. Cammy Liu declares they "have different meanings". Olive Shen's declaration illustrates this even more clearly. She declares that the trade marks "have different meanings" but also that "It's like AMP, ANZ and AXA, they all contain the letter A". This statement is difficult to reconcile with the substance of the trade marks now before me. There is much more to the comparison of the marks before me than there is to issues involving just a common letter A in a number of three-letter trade marks in Roman script. In the present case, what is at issue is characters that are in common, and that make up, respectively, either half or the entire of Delta's registered trade marks, and that retain, so far as I can judge, their meaning as well as their visual appearance in the applicant's trade marks. They mean the same, they look the same, and what is at issue is the significance, to ordinary Chinese-speaking consumers, of those factors when one trade mark is, hypothetically, encountered in the absence of the other.
32. Clearly, Ms Shen's analysis does not give proper weight to the likely perceptions about the common element that makes up the entire of trade mark 1094422. Ms Shen has either simply misunderstood the issues that are before me for decision, or did not have them put to her in the first place. There are other declarations that repeat the explanation "its like AMP (etc)". I accept the honesty with which they have no doubt

been made. However, I cannot regard them as of great weight on the question of deceptive similarity in terms of the law of trade marks.

33. Similarly, Peter Lai declares that firms or entities with similar names coexist in the Sydney Chinese Gold Pages, a telephone directory. In that context, various “Commonwealth” names coexist. Zhiyao He, in a similar vein, says that he is not confused by the co-existence of similar names within the Sydney Chinese Gold Pages. However, that is a far cry from the principles of trade mark law, where considerable weight is given to the recall of trade marks in terms of their essential elements, absent the opportunity to compare the competing trade marks side by side. Clearly, since many names in a phone book would, were they to be used as trade marks, be deceptively similar if not absolutely identical, Messrs Lai and He have been asked to give evidence on something that is not directly relevant to the issue before me.
34. It is quite clear that the applicant’s declarants are familiar with the applicant, and some (but perhaps not all) are familiar with the opponent. However, the question that is posed for me is not, “Will the applicant’s business, and the opponent’s, conducted as they are now, under different trade marks, in Hurstville, NSW, be confused?”. Rather, the question is, “If these trade marks, Delta’s registered trade marks and the trade marks that the applicant now seeks to register, are used in the ordinary ways of traders in mortgage brokerage and/or financial advice, for any of the services specified in the respective applications, has the opponent satisfied me that there is a significant likelihood of deception or confusion?”.
35. In short, I do not find the applicant’s declarations to be relevant to the proper tests for deceptive similarity. They argue strongly that the trade marks are not substantially identical, using that term as considered in *Carnival Cruise Lines Inc v Sitmar Cruises Ltd* (1994) AIPC 91-049. None the less, I find that there is sufficient resemblance and that there is a real and tangible risk of confusion in the minds of a reasonable number of potential customers who, if both applied-for trade marks go into ordinary use, encounter either of the applied for trade marks in the absence of Delta’s registered trade marks. For precision, I find that both of the applicant’s trade marks are deceptively similar to each of Delta’s registered trade marks. The ground under s 44(2) is established.

36. A finding under s 44(2) would be subject to the terms of s 44(3) and (4). These were not discussed at the hearing, but read as follows, with my own parenthetical adaptation to the current case:

(3) If the Registrar in either case (*ie for present purposes, if s 44(2) is established*) is satisfied:

(a) that there has been honest concurrent use of the 2 trade marks; or

(b) that, because of other circumstances, it is proper to do so;

the Registrar may accept the application for the registration of the applicant's trade mark subject to any conditions or limitations that the Registrar thinks fit to impose. If the applicant's trade mark has been used only in a particular area, the limitations may include that the use of the trade mark is to be restricted to that particular area.

(4) If the Registrar in either case (*likewise*) is satisfied that the applicant, or the applicant and the predecessor in title of the applicant, have continuously used the applicant's trade mark for a period:

(a) beginning before the priority date for the registration of the other trade mark in respect of:

(i) the similar goods or closely related services; or

(ii) the similar services or closely related goods; and

(b) ending on the priority date for the registration of the applicant's trade mark;

the Registrar may not reject the application because of the existence of the other trade mark.

37. Were I satisfied that either of these provisions was applicable, they would preclude Delta establishing a ground under s 44, notwithstanding my finding under s 44(2). However, such an outcome is not open to me.

38. In brief, s 44(3) allows recognition of honest concurrent use or other circumstances that make concurrent registration of deceptively similar trade marks "proper". I would not want this decision to be seen as a finding of any dishonesty on Mr Zhang's part. It may be that Mr Zhang's motivation in knowingly using trade marks that are, in my view, deceptively similar to those registered by Delta is entirely honest. It is very likely that Mr Zhang feels that the registrations obtained by Delta are not legitimate, and that Mr Cheng, in causing them to be registered in the name of Delta, has acted in spite or in bad faith. None the less, these things are speculation, as Mr Zhang does not indicate when he first learned of the existence of Delta's trade mark registrations. On the evidence before me, his company's use of the applied-for trade marks in the face of Delta's registered trade marks appears to be more a matter of stubbornness than of common honesty.

39. Of the remaining factors that are relevant, reviewed in [9.50] to [9.90] of *Shanahan's Australian Law of Trade Marks and Passing Off*, 3<sup>rd</sup> edition<sup>2</sup>, the extent to which the applicant has used its trade mark, in terms of time, area and volume, is not at all clear from the evidence. There are no figures at all for turnover and advertising and it would appear that, at least until recent times, the extent of use can be characterised as slight at best. The scale therefore leans toward refusing to register the applications.
40. Nor am I satisfied that s 44(4) is applicable. The applicant is a corporation distinct from both Mr Zhang and DMF. Even if I do not dwell on the distinction between Mr Zhang and the applicant company, I am still not satisfied that either of them used either of the relevant trade marks before 13 February 2004, the priority date of 988725, the earlier-registered of Delta's registered trade marks. The earliest date that Mr Zhang would attribute to relevant usage is "since October 2003", but he does not provide any cogent evidence of use of either set of characters as a trade mark until, at the earliest, May 2005.
41. Such a date would be much more consistent with such specific dates as are mentioned by declarants such as Ms Shen, who declares that the applicant's first seminar was in March 2005. Again, Sunny Wu exhibits newspaper advertisements placed by Mr Zhang over time. The first appearance of either of the applied-for trade marks in these is in 2007. Were I to accept at face value one item in Mr Zhang's evidence, a reference to an earlier seminar held in Canberra, I would still find that the earliest evidenced date of usage of either of the applied-for trade marks is 20 Feb 2004, the date ascribed to what may have been a seminar given at "Conference Room at Federation of Chinese Community of Canberra". However, Mr Cheng, in his evidence in reply, has strongly attacked the provenance of documents relating to such Canberra seminar(s). Mr Zhang himself is somewhat ambiguous about this item and does not expressly refer to the date, nature or attendees of this event. In short, there is no evidence that would safely support a finding for the applicant under s 44(4).
42. Accordingly, Delta has established its s 44 ground.

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<sup>2</sup> Thomson Lawbook Co. 2003

**Conclusion and costs**

43. Given that Delta has established a ground of opposition, my decision is to refuse to register the applications. I award costs against the applicant to the extent of the scale in the regulations. The taxing of the costs in the second application is to be weighted as per *Hume Industries (Malaysia) Berhad v James Hardie & Coy Pty Ltd*, (2001) 53 IPR 591.

Terry Williams  
Hearing Officer  
29 January 2009