

TRADE MARKS ACT 1995

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

Re: Application by Ross Lawrence and Veronica Lawrence to register application 989416(33) FEET FIRST and grounds for rejection.

DELEGATE:	Ian Thompson
REPRESENTATION:	Applicant. David Stewart instructed by Bronwyn Edwards of Minter Ellison - Perth
DECISION:	Endorsement as to origin of wines in First wine growing sub-region of Germany not required. Trade mark to be accepted

Background

1. Ross Lawrence and Veronica Lawrence have applied to register the following trade mark:

Appn No: 989416
Priority Date: 27 July 1990
Goods: **Class 33:** Alcoholic beverages including wine
Trade Mark: FEET FIRST

2. The word FIRST is a name which exists on the Register of Protected Names under the *Australian Wine and Brandy Corporation Act 1980* as being a sub-region within the Einzellagen wine growing area within Germany. The examiner has requested the applicants' consent to an endorsement, on the trade mark registration to possibly issue, to the effect that the trade mark will be used only in relation to wines originating from the FIRST sub-region and the examiner has observed that the use of the trade mark otherwise would, in view of the penalties prescribed in the *Crimes Act 1914*, be contrary to law.
3. The term 'contrary to law' is contained within section 42 of the *Trade Marks Act 1995*, ('the TMA'). Section 42 provides:

42 Trade mark scandalous or its use contrary to law

An application for the registration of a trade mark must be rejected if:

- (a) the trade mark contains or consists of scandalous matter; or
- (b) its use would be contrary to law.

4. Following the decision in *Advantage Rent-A-Car Inc v Advantage Car Rental Pty Ltd* (2001) 52 IPR 24, the Registrar and her delegates have been obliged to consider whether use of a trade mark would be contrary to a law other than the TMA.
5. The applicant made representations concerning the examiner's requirement and, when the requirement was maintained, applied to be heard before me, as a delegate of the Registrar of Trade Marks, at a hearing in Perth. The hearing was on Friday, 18 August 2005 and David Stewart instructed by Bronwyn Edwards of Minter Ellison Perth represented the applicant.

Issues and discussion

6. Mr Stewart's presentation had a number of different headings; the most fundamental of which is that the examiner's request is based upon office practice which has grown out of a misapprehension about the current import of the *Australian Wine and Brandy Corporation Act 1980* ('the AWBC Act') and an ensuing misapplication of the decision of the Court in *Comite Interprofessionnel des Vins Cotes de Provence & Anor v Stuart Alexander Bryce & Anor* [1996] 742 FCA 1 (the '*La Provence*' case). The AWBC Act has been amended since the *La Provence* case and one of the concepts involved therein has given way to fresh terminology; viz, the word 'knowingly' has been replaced with the word 'intentionally' in sections 40C and 40E. The *La Provence* case should thus be approached with some caution as it relates to the use of the word 'knowingly'.
7. It is convenient now to adopt Deputy Registrar Hardie's exposition concerning the legislative background and framework of the AWBC Act (with adjustments for statutory amendments and the issue before me). In *Southcorp Wines Pty Ltd* [2000] ATMO 34, the Deputy Registrar said:

The AWBC Act was amended in 1993 for the purpose of implementing an agreement on trade in wine between Australia and the European Union (formerly the European Community)¹. The agreement provided, *inter alia*, for the mutual protection of each party's geographical indications used in respect of wines.

Under section 4 of the AWBC Act, the section dealing with interpretation, there are the following definitions of "geographical indication" and "registered geographical indication".

4 Interpretation

(1) In this Act, unless the contrary intention appears:

geographical indication, in relation to wine, means:

- (a) a word or expression used in the description and presentation of the wine to indicate the country, region or locality in which the wine originated; or
- (b) a word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word or expression.

registered means included in the Register.

registered geographical indication means a geographical indication that is included in the Register in relation to a particular country.

The Register referred to in these definitions is the Register of Protected Names set up under section 40ZC of the AWBC Act. It is divided into several parts including a part that contains German geographical indications. The word *FIRST* was registered in this part of the Register as the geographical indication of a region in Germany.

Under the AWBC Act, the word "originate", used in the definition of a geographical indication, has a specific meaning in relation to wine. This was defined in section 5D of the AWBC Act and the same definition was included in section 15 of the TM Act. The definition in the AWBC Act has been amended for the purposes of clarification and now reads:

5D Where wine originates

For the purposes of this Act:

- (a) a wine is taken to have originated in a foreign country or Australia only if the wine is made from grapes grown within the territory of that country or of Australia, as the case may be; and
- (b) a wine is taken to have originated in a particular region or locality of a foreign country or of Australia only if the wine is made from grapes grown in that region or locality.

¹ As observed by Justice Heerey in his decision in the *La Provence* case [1996] 742 FCA 1, this was the Agreement between Australia and the European Community on Trade in Wine, and Protocol, Australian Treaty Series 1994 No 6, which entered into force on 1 March 1994.

The words “description and presentation”, which also appear in the definition of a geographical indication, have the meaning given in section 5C of the Act:

5C Meaning of description and presentation

In this Act, a reference to the description and presentation with which wine is sold, exported or imported is a reference to all names (including business names) or other descriptions, references (including addresses), signs, designs and trade marks used to distinguish the wine and appearing:

- (a) on the container (including on the device used to seal the container or on a label affixed to the container), on any tag attached to the container or, if the container is a bottle, on the sheathing covering the neck of the bottle; or*
- (b) on protective wrappings (such as papers and straw envelopes of all kinds), cartons and cases used in the packaging of the wine or the transport of the wine; or*
- (c) in documents relating to the transport of the wine or in other commercial documents (for example, invoices or delivery notes) relating to the sale or transport of the wine; or*
- (d) in advertisements relating to the wine.*

According to section 5C then, virtually everything that appears on a bottle or other container in which wine is sold, imported or exported or which appears on other material used in connection with those activities, is part of the “description and presentation” of that wine. In the introductory words of the section, there is specific reference to the fact that any trade marks used to distinguish the wine are encompassed by the expression “description and presentation”.

Part VIB of the AWBC Act provides for the protection of geographical indications and certain other names and expressions that are registered in the Register of Protected Names. Under section 40C it is an offence to intentionally sell, export or import wine with a “false description and presentation”. Under section 40E it is an offence to intentionally sell export or import wine with a “misleading description and presentation”. A penalty of 2 years imprisonment is prescribed for either of these offences.

The circumstances under which the description and presentation of a wine is either “false” or “misleading” are set out in sections 40D and 40F respectively. Section 40 D reads:

40D Meaning of false description and presentation

- (1) This section has effect for the purposes of section 40C.*
- (2) Subject to this section, the description and presentation of wine is false if:

 - (a) it includes the name of a country, or any other indication that the wine originated in a particular country, and the wine did not originate in that country; or**

- (b) *it includes a registered geographical indication and the wine did not originate in a country, region or locality in relation to which the geographical indication is registered; or*
 - (c) *it includes a registered traditional expression and the wine did not originate in a country, region or locality in relation to which the expression is registered; or*
 - (d) *it includes a registered ancillary protected expression and the wine did not originate in a country, region or locality in relation to which the expression is registered; or*
 - (e) *it is not in accordance with such provisions (if any) relating to the description and presentation of wine as are prescribed for the purposes of this paragraph.*
- (3) *Subsection (2) does not limit what, apart from that subsection, is a false description and presentation of wine.*
- (4) *For the purposes of subsection (2), a registered geographical indication, a registered traditional expression or a registered ancillary protected expression is taken to be included in the description and presentation of wine even if the indication or expression is accompanied by another word or expression such as “kind”, “type”, “style”, “imitation” or “method”, or any similar word or expression.*
- (5) *If:*
 - (a) *the description and presentation of wine includes a word or expression that is a registered geographical indication, a registered traditional expression, or a registered ancillary protected expression, in relation to a country, region or locality; and*
 - (b) *the wine originated in that country, region or locality; and*
 - (c) *the description and presentation indicates that the wine originated in that country, region or locality;**the description and presentation is not false merely because the word or expression included in the description and presentation is also a registered geographical indication, a registered traditional expression, or a registered ancillary protected expression, in relation to another country, region or locality.*
- (6) *The description and presentation of wine is not false merely because it includes:*
 - (a) *the name of an individual who manufactured, sold, exported or imported the wine; or*
 - (b) *if an individual who manufactured, sold, exported or imported the wine lawfully carries on business under the name of another individual who previously carried on the business—the name of that other individual; or*
 - (c) *the address of the winery at which the wine was manufactured.*

Section 40F sets out non-exclusive circumstances under which a description and presentation of wine is misleading. It reads as follows:

40F Meaning of misleading description and presentation

- (1) *This section has effect for the purposes of section 40E.*

- (2) *Subject to subsection (7), the description and presentation of wine is misleading if:*
- (a) *it includes a registered geographical indication, a registered traditional expression or a registered ancillary protected expression; and*
 - (b) *the indication or expression is used in such a way in the description and presentation as to be likely to mislead as to the country, region or locality in which the wine originated.*
- (3) *Subject to subsection (7), the description and presentation of wine is misleading if:*
- (a) *it includes a translation of a registered geographical indication, of a registered traditional expression or of a registered ancillary protected expression; and*
 - (b) *the inclusion of the translation is likely to mislead as to the country, region or locality in which the wine originated.*
- (4) *Subject to subsection (7), the description and presentation of wine is misleading if:*
- (a) *it includes a word or expression that so resembles a registered geographical indication, a registered traditional expression or a registered ancillary protected expression as to be likely to be mistaken for the registered geographical indication, the registered traditional expression or the registered ancillary protected expression, as the case may be; and*
 - (b) *the wine did not originate in the country, region or locality in relation to which the indication or expression is registered.*
- (5) *The description and presentation of wine is misleading if:*
- (a) *it includes:*
 - (i) *the name of an individual who manufactured, sold, exported or imported the wine; or*
 - (ii) *if an individual who manufactured, sold, exported or imported the wine lawfully carried on business under the name of another individual who previously carried on the business—the name of that other individual; or*
 - (iii) *the name or address of the winery at which the wine was manufactured; and*
 - (b) *the name or address, as the case may be, is used in such a way in the description and presentation as to be likely to mislead as to the country, region or locality in which the wine originated.*
- (5A) *The description and presentation of wine is misleading if it is not in accordance with such provisions (if any) relating to the description and presentation of wine as are prescribed for the purposes of this subsection.*
- (6) *Subsections (2), (3), (4), (5) and (5A) do not limit what, apart from those subsections, is a misleading description and presentation of wine.*
- (7) *If:*
- (a) *the description and presentation of wine includes a word or expression that:*

- (i) is a registered geographical indication, a registered traditional expression, or a registered ancillary protected expression, in relation to a country, region or locality; or*
- (ii) is a translation of an indication or expression referred to in subparagraph (i); or*
- (iii) resembles an indication or expression referred to in subparagraph (i); and*

(b) the wine originated in that country, region or locality; and

(c) the description and presentation indicates that the wine originated in that country, region or locality;

the description and presentation is not misleading merely because the indication or expression referred to in subparagraph (a)(i) is also registered in relation to another country, region or locality.

8. The word FIRST is a geographical indication on the Register of Protected Names as being a geographical locality within Germany which is a party to an agreement relating to trade in wine that is in force between the European Union and Australia.

9. With words such as ‘Auen’ or ‘Domberg’, included on the Register of Protected Names as localities in Germany where wines originate, there is no problem in viewing these as geographical indications as opposed to others where difficulties might be encountered where the word is also one in the English language. However, words which include WICKER, FIRST, DOCTOR, SAND, WOLF, HORN and LUMP are words which have ordinary English significations and which are also included in the Register of Protected Names as being German localities or regions in which wines are grown. There is a tension where Australian traders wish to use such words for the sake of their ordinary English significations and the words are on the Register of Protected as being the names of localities in other parts of the world where wines are grown.

10. In addition, if section 40F(3)(a) were to be strictly applied, problems might be implied for Australian traders who wished to use such English words as (for example) SAFE, HELL or ABRUPT for the sake of their ordinary significations as these are English translations from the German registered geographical indications HEIL, HÖLLE and STEIL. Stranger even than this, as section 40F(3)(a) does not nominate English as the language of translation, problems might potentially exist for the equivalents of those words in **any** language used in respect of wines in Australia.

11. The words ‘description and presentation’ occur in sections 40C and 40E which proscribe the intentional dealing in wines with false (section 40C) or misleading (section 40E) ‘descriptions and presentations’ of wines. Sections 40D and 40F, respectively, define the terms ‘false description and presentation’ and ‘misleading description and presentation’. Sections 40C and 40D are thus paired sections, as are sections 40E and 40F.
12. Considering the question at face value, section 40E can be immediately dismissed from consideration as subsection 40F(2)(b) provides that the use of a geographical indication is misleading if the indication or expression is used in such a way in the description and presentation as to be likely to mislead as to the country, region or locality in which the wine originated. As the word FIRST within the trade mark FEET FIRST is not used in a way so as to mislead as to the country, region or locality where the wine originated, its use is not misleading.
13. Sections 40C and 40D appear, at first blush, to collectively constitute an absolute proscription which should prohibit and penalise the use of any word or expression which has been notified as being a geographical indication (and, hence, its registration as a trade mark as its use should be contrary to law under section 42 of the TMA as discussed above). However, the first leg of Mr Stewart’s submissions is that this conclusion is erroneous as it ignores the statutory definition of what constitutes a ‘geographical indication’ and hence puts the cart before the horse.

Submissions

14. The question facing me, says Mr Stewart, concerns whether the word FIRST, used in the context of the trade mark FEET FIRST, used or proposed to be used in relation to wine is, in terms of the statutory definition:
- (a) a word or expression used in the description and presentation of the wine to indicate the country, region or locality in which the wine originated; or
 - (b) a word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word or expression.

15. It seems to me that on one level, this definition operates so as to state what a geographical indication is, to enable these to be recognized, categorized as such and given statutory protection. On the another level, there is a potential that if the definition is literally and liberally applied, the definition could appear to apply to any particular wine under consideration and allow consideration of whether within the relevant contexts, the particular word or expression is a word or expression is used in the description and presentation of the wine to indicate the country, region or locality in which the wine originated.
16. It is thus submitted by Mr Stewart that, under the statutory definition, if a word or expression is used in the description or presentation of wine in such a way that it does not indicate the country, region or locality in which the wine was produced, it fails the statutory test of being a geographical indication. The statutory prohibitions and penalties should not therefore apply and the expression is not, thus, caught by section 42 of the TMA.
17. It is Mr Stewart's thesis that the words FEET FIRST should be considered as a contextual entity in which any possible denotation of the name of the locality in Germany is submerged or swamped by the English denotations of the colloquial expression. To jump into something 'feet first' is to undertake a precipitate or impetuous course of action. As Mr Stewart also observed, the expression additionally has some application in the removal of a deceased person 'feet first' or coffinwise. It is in this way, stated Mr Stewart, that, although the word might be a registered geographical indication, it does not so denote the geographical indication as to be likely to be taken for it and thus indicate the country, region or locality in which the wine originated.
18. In short, and I have some sympathy with this suggestion, the process of evaluation is, or should be, akin (subject to my comments, below) to the familiar one of trade mark law. In *Howard Auto-Cultivators Limited v Webb Industries Proprietary Limited* (the "Rohoe" Case) (1946) 72 CLR 175 Dixon J. said, at 181:

But the meaning of all words is governed by their context and how words are understood depends upon the universe of discourse. Here the scope of the use

of the word is settled by the application for registration, which is in respect of cultivating implements."

19. However, I will diverge here to observe that Heerey J cautioned in *La Provence*, above:

But although the regime established by Part VIB of the Act is based on registration of names, in my respectful opinion it does not follow that doctrines of trade mark law necessarily apply. Although comparisons may be made between some provisions in Part VIB and trade mark legislation, and between such provisions and some in Part V of the *Trade Practices Act*, the fact remains that in providing the "legal means" contemplated by Article 6.1 of the Agreement Parliament has chosen a means of enforcement which is sui generis. Part VIB is notably different from trade mark legislation and Part V of the *Trade Practices Act* in that it prescribes a sanction of imprisonment. There is no mention in the Minister's speech, the explanatory statement, or any other extrinsic material tendered in evidence in the present case as to why this was done. Presumably the sanction of imprisonment was the reason why contraventions of Part VIB must be made "knowingly" - again a matter of contrast with trade mark legislation and Part V. Ultimately what governs is the language of Part VIB of the Act, construed according to ordinary principles of construction.

20. Thus, Mr Stewart says, while one of the contexts of the word here under consideration is that the word FIRST is used or proposed to be used in relation to wines, the other context is that it is part of the colloquial expression FEET FIRST and the more immediate impact on people seeing the trade mark or label for the first time is that it part of a colloquial expression which is distinct from any other denotation of the word – it does not indicate where the wine originated and thus fails the statutory definition.
21. Restating this potential conclusion in terms of the statutory definition of a geographical indication: the word FIRST within the expression FEET FIRST, although it is a notified geographical indication, is contextually not a word or expression used in the description and presentation of the wine (or the trade mark) to indicate the country, region or locality in which the wine originated.
22. There are, then, in Mr Stewart's submission, two ways of reading the definition of a geographical indication. The first is a strict and narrow way in that it only concerns the identification and systemization of geographical indications as opposed to a second more general reading in that it might allow the contextual consideration of

expressions to determine whether they are being used as a geographical indication or not before further consideration of the proscriptive sections 40C to 40E.

23. Additional strength for this viewpoint, Mr Stewart submits, may stem from the German Trade Marks Office which has registered the trade mark FIRST BROOK for wines which registration is owned by a South African firm. I also observe that the European Trade Marks Office has registered several trade marks for goods which include wines but whose owners are domiciled in countries other than Germany, trade marks such as FIRST RUN (owner within Australia), FIRST POINT (United Kingdom), FIRST IN THIRST (Spain) and FIRST BASE (United Kingdom). None of these registrations is apparently subject to a restrictive endorsement or a restriction as to the geographical area in which the goods are produced or special requirements as to labelling. In other words, the requirement for a limiting endorsement in Australia addresses concerns about a geographical indication of a locality within a jurisdiction (or jurisdictions) where those concerns are not shared.
24. Mr Stewart also drew my attention to issues which arise from the use of the word ‘intentionally’ within section 40C(1): ‘A person must not, in trade or commerce, intentionally sell wine with a false description and presentation’ (in this instance a registered geographical indication). The word ‘intentionally’, is not defined within the AWBC Act. In cases where the word is used in a context where its denotation as a geographical indication is submerged into English idiom, or is otherwise contextually divorced from its significance as a geographical indication, it is most difficult, if not impossible, to assess what intention the person selling the wine bearing the geographical indication might have in the absence of evidence of their state of mind or business dealings. In instances such as the present trade mark, a trade mark application is subject to negative review by a trade mark examiner and an adverse conclusion involves a necessary consideration and adverse findings concerning the motives of a trade mark applicant in a legislative environment where there is, under section 33 of the TMA, a presumption of registrability of trade marks (and therefore ‘clean hands’ on the part of applicants for trade mark registration as regards their *bona fides*).

Reasons

25. I agree with Mr Stewart that, under some circumstances, the definition of what constitutes a geographical indication might be read liberally rather than prescriptively. The AWBC Act itself contains a number of such instances – as in, for instance, where the geographical indication is contained in the name of an individual who manufactured, sold, exported or imported the wine. It is unlikely, under such circumstances, that the AWBC Act was intended to be an absolute bar to the use of geographical indications under circumstances where the use of a geographical indication was innocent and unlikely to be taken for such a use.
26. Further, ‘intention’ is not a concept foreign to the TMA. Section 59 of the TMA provides a basis of opposition on the ground that the applicant does not intend to use the trade mark. Section 61(3)(b) provides a defence to grounds under section 61 (that trade marks contains or consists of a false geographical indication) based on the way that the trade mark is used or intended to be used. Section 92(4)(a) provides for the removal of a trade mark on the basis that the owner had no intention in good faith to use that trade mark. In each of these instances the intention of the person concerned is established via evidence which affirmatively demonstrates the intention. The onus in proceedings is on the person who seeks to have the intention considered.
27. However, in applications for registration such as the instant case, there is no evidence before a trade mark examiner regarding the intention of the applicant. Accordingly, a finding, in the absence of evidence, that the applicant intends to use the trade mark to intentionally sell wine with a false description and presentation is obviously fraught with difficulties.
28. I would conclude that, given the context of the use of the word FIRST in the trade mark FEET FIRST in juxtaposition to both the goods and the statutory definition of what constitutes a geographical indication, it is difficult to infer any intention other than that related to what is denoted or connoted by the images raised by the use of the term in its ordinary significations.

29. In this respect, I would distinguish this decision from that of Deputy Registrar Hardie in the *Queen Adelaide Regency* decision. At the time of her decision, the AWBC Act relevantly contained the word ‘knowingly’ rather than the word ‘intentionally’, which is now used in that legislation. In the context of a word which is a geographical indication but forms part of an idiomatic expression in English, whilst the *knowledge* that the objected to word is a registered geographical indication was previously brought to an applicant for trade mark registration at least by the examiner’s report, under the amended AWBC Act any consideration of a trade mark applicant’s *intention* to ‘sell wine with a false description and presentation’ is, in view of the statutory definition ‘a word or expression used in the description and presentation of the wine to indicate the country, region or locality in which the wine originated’, practically impossible.
30. It is no answer, I consider, to observe the statutory definition of a trade mark ‘is a sign used, or intended to be used’ and therefore the intention to use the geographical indication may also be implied. The geographical indication and the trade mark are distinct entities with different laws concerning their use. The intentions that may or may not lie as concerns their uses are, or may be, similarly distinct. A man may have, for example, an intention to use a spade to dig a hole; however, this does not necessarily indicate that he intends use the spade to tunnel into a bank. It may thus be an error to conflate the one intention into the other.
31. In the context of the applied for trade mark, this absence of evidence regarding an applicant’s intentions to sell wine with a false description and presentation, and the presumption of registrability embodied in section 33 of the TMA, combined with the fact that the EU and German Trade Marks Offices do not apparently view the issue as a problem, suggest that any reading of the definition of the word ‘geographical indication’ and interpretation of the word ‘intentionally’ within the AWBC Act should be liberal. The tests that I have posited, above, should apply to applications where the geographical indication is an ordinary English word used in a context where it forms a corporate identity or idiomatic expression which divorces it from any possible connection in the minds of ordinary people with the locality which the registration of the geographical indication is intended to protect.

32. Thus, I consider that where the context of a geographical indication makes it obvious that it is being used within a trade mark for the sake of its ordinary English signification as a word contained in an English dictionary, with no potential reference to the geographical location, it is appropriate that the application should be accepted for possible registration. Those people with interests in protecting a geographical indication are well-placed in the adversarial environment of opposition proceedings under the TMA (or appeals there from) to elicit and provide information about an applicant's intentions or *bona fides* in the use of the trade mark and/or geographical indication.
33. Such instances of foreign geographical indications where acceptance should ensue (if there are no other valid grounds for rejection) might include such examples as WICKER BASKET², TIMBER WOLF (but not WHITE WOLF³ or WOLF WHITE), RAM'S HORN (but not RED HORN or HORN RED), SAND CASTLE (but not SAND CHATEAU or CHATEAU SAND) or WITCH DOCTOR (but not DOCTOR GRAPE). Instances of Australian registered geographical indications where the contextual use of a word is within a commonplace expression or name and is such that it is apparently not the intention of the applicant to use it within the statutory definition of a geographical indicator include, for example ORANGE TREE (but not ORANGE VALLEY), APPLE PEEL (but not PEEL CREEK) or HAMLET, PRINCE OF DENMARK (but not DENMARK SWEET).
34. This principle should apply where the geographical indication forms a part of a known and commonplace English expression or name which has no reference to the geographical location. If the protected expression is not part of a known and commonplace English expression or name, such as, for example, WICKER WOMBAT⁴, or STONE DOCTOR, consideration will need to be given as to whether the term is being used for the sake of its ordinary English signification..

² The examples of geographical indications are underlined.

³ Here, the contextual use of the word WOLF is within well-known ordinary English expression but its juxtaposition with the word WHITE might be seen as referring to a white wine from the Wolf region.

⁴ Here the words, although ordinary English, are not commonplace expressions.

35. Finally, while I believe otherwise, it is possible that I am not correct this interpretation of the AWBC Act and its inter-relationship with the TMA. However, in terms of the decision of Madgwick J in *Advantage*, above, as it relates to section 42 of the TMA, the Registrar and her delegates have the consolation of considering whether the use of a trade mark *would* be contrary to law. Thus, in the alternative to my finding on the substantive issues, I consider that there is sufficient doubt as to the negative application of the legislation in this instance to render unsafe any conclusion that the use of the applied for trade mark *would* be contrary to law.

36. For these reasons, I will accept the application for possible registration.

Ian Thompson
Hearings Officer
Trade Marks Hearings
21 November 2005