

## TRADE MARKS ACT 1995

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

Re Opposition by Comité Interprofessionnel du Vin de Champagne to registration of trade mark application 1471878 (41) – **CHAMPAGNE JAYNE** - in the name of Rachel Jayne Powell

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<b>DELEGATE:</b>	<b>Robert Wilson</b> <b>Decision on the Written Record</b>
<b>DECISION:</b>	<b><i>Trade Marks Act 1995 (Cth) - Section 52 opposition: ss 42(b) and 43 considered – neither ground established – trade mark to proceed to registration</i></b>

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#### **Background**

1. This decision concerns an opposition brought by Comité Interprofessionnel du Vin de Champagne (**‘the Opponent’**) pursuant to s 52 of the *Trade Marks Act 1995* (**‘the Act’**)<sup>1</sup> to registration of the trade mark subject of the application detailed below in the name of Rachel Jayne Powell (**‘the Applicant’**):

Application Number: 1471878

Filing Date: 31 January 2012

Services : **Class 41:** Entertainer services; public speaking services; author services being the writing of texts (other than publicity texts); event management services (organisation of educational, entertainment, sporting or cultural events); master of ceremonies services  
**(‘the Applicant’s Services’)**

Trade Mark: **CHAMPAGNE JAYNE** (**‘the Applicant’s Trade Mark’**)

2. On 2 August 2012 the application’s acceptance for possible registration was advertised in the *Australian Official Journal of Trade Marks*. The Opponent filed a Notice of Opposition (**‘the NOO’**) on 1 November 2012. The NOO raised grounds of opposition pursuant to ss 39, 41, 42, 43, 44, 58, 58A, 59, 60, 62 and 62A.

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<sup>1</sup> The filing date of the application precedes the amendments made to the Act and the *Trade Mark Regulations 1995 (Cth)* (**‘the Regulations’**) which occurred as a result of the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* and the *Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No.1)*. Consequently, much of the opposition has been conducted in accordance with the Act and the Regulations as they were at the filing date.

## Evidence

3. The Opponent filed the following Evidence in Support of its opposition ('EIS'):
  - Statutory Declaration made on 20 April 2013 by Jean-Luc Barbier, the Director-General of the Opponent, with Exhibits JLB-1 to JLB-8 ('**the Barbier declaration**');
  - Statutory Declaration made on 1 August 2013 by Elisabeth Drysdale, the Director of the Champagne Bureau of Australia, with Exhibits ED-1 to ED-13 ('**the Drysdale declaration**'); and
  - Statutory Declaration made on 1 August 2013 by Fiona Joy Lander, an employee Corrs Chambers Westgarth the legal representatives of the Opponent, with Exhibits FJL-1 to FJL-12 ('**the Lander declaration**').
4. The Applicant filed the following Evidence in Answer ('EIA'):
  - Statutory Declaration made on 22 April 2014 by the Applicant, with Exhibits RJP-1 to RJP-4 ('**Powell 1**').
5. The Opponent filed the following Evidence in Reply ('EIR'):
  - Statutory Declaration made on 22 April 2014 by Stephen Marcus Stern, a partner at Corrs Chambers Westgarth, with Exhibit SMS-1 ('**Stern 1**').
6. The Opponent filed the following Further Evidence ('FE'):
  - Statutory Declaration made on 7 July 2016 by Stephen Marcus Stern, with Exhibit SMS-A, and SMS-1 to SMS-8 ('**Stern 2**').
7. The Applicant filed the following in response to the FE:
  - Declaration made on 27 September 2016 by the Applicant, with Exhibits RJP-A to RJP-E ('**Powell 2**').
8. During the evidence stages, and at the request of the Opponent, the Registrar issued a Notice Requiring Production of a Document or Article ('**the Notice to Produce**') pursuant to s 202(c) of the Act. The Opponent confirmed by correspondence dated 4 June 2014 that the Notice to Produce had been served on the Applicant. The Notice to Produce required that the Applicant deliver to the Registrar the following:

Any documents, images, video clips or audio clips (whether in hard copy or electronic format) in your possession, power, custody or control evidencing your use of the mark the subject of the Application in connection with non-Champagne wines (including the presentation, tasting, promotion, or endorsement of, or mere reference to non-Champagne wines) including but not limited to:

1. wine lists, tasting notes, and/or menus you have used or prepared for events which you have hosted, appeared at or have otherwise been involved in;

2. photographs or video clips from events which you have hosted, appeared at or have otherwise been involved in; and
3. documents posted on the internet (whether on the website [www.champagnejayne.com](http://www.champagnejayne.com), on Facebook, Twitter, YouTube or otherwise),

where "non-Champagne wines" mean wines which are not sparkling wines originating in the Champagne region of France, made in accordance with French laws and entitled under such laws to use the name "Champagne".

9. The Applicant delivered a number of documents to the Registrar in response to the Notice to Produce. A delegate of the Registrar decided that the Applicant had complied with the Notice to Produce; however, the Opponent considered that there were deficiencies in the documents produced and requested to be heard on the issue. A number of hearings were scheduled and adjourned. One of the reasons for adjournment was that a hearing in the Federal Court was scheduled which involved the parties to this opposition. The documents which the Opponent sought to have the Applicant produce were associated with the proceeding in the Federal Court and required the Applicant's consent before they could be used by the Opponent in the present matter. The Applicant declined initially to provide the necessary consent. In the end, a hearing regarding the Notice to Produce did not occur.
10. On 16 April 2015 the Applicant indicated that she was prepared to provide the necessary consent on condition that *all* documents from the Federal Court proceeding were made available in this opposition. The Opponent agreed to these conditions and the Registrar agreed to consider the documents. The documents include:
  - The decision handed down by Beach J in the Federal Court proceeding;<sup>2</sup>
  - The orders made by Beach J in the Federal Court matter.
  - The following affidavits;
    - Charles Jerome Albert Goemaere sworn 22 October 2014;
    - Charles Jerome Albert Goemaere sworn 20 November 2014;
    - Stephen Marcus Stern sworn 30 January 2014;
    - Stephen Marcus Stern sworn 1 September 2014;
    - Stephen Marcus Stern sworn 26 November 2014;

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<sup>2</sup> *Comité Interprofessionnel de Vin de Champagne v Powell* [2015] FCA 1110.

- Stephen Marcus Stern sworn 4 November 2015;
- Elisabeth Anne Drysdale sworn 23 October 2014.

11. By letter issuing from IP Australia on 29 November 2016, the parties were notified that as neither party had requested a hearing the matter would be given to a Delegate of the Registrar for a decision based on the written record. The parties were given an opportunity to provide written submissions. On 22 December 2016 the Applicant provided her written submissions. On 23 December 2016 the Opponent provided written submissions by its representatives, Corrs Chambers Westgarth Lawyers. On 3 January 2017 the Applicant provided additional submissions in response to the Opponent's submissions. The Opponent provided additional submissions on 20 January 2017.
12. I am a delegate of the Registrar of Trade Marks and I am to decide the opposition as required by s 55 of the Act which provides that, unless the proceedings are discontinued or dismissed, the Registrar must, at the end, decide:
- (a) to refuse to register the trade mark; or
  - (b) to register the trade mark (with or without conditions or limitations) in respect of the goods and/or services then specified in the application;
- having regard to the extent (if any) to which any ground on which the application was opposed has been established.

### **About Champagne**

13. A background to the term Champagne and the protection it is afforded in connection with wine is useful at this point. The Opponent's submissions contain the following information, none of which is controversial:

In addition to being a region in France, the name 'Champagne' is a French AOP (created in 1936) for sparkling wines produced within a defined part of the Champagne region and in accordance with strict controls imposed under French law. Prior to the creation of AOPs, the name 'Champagne' was protected as an AO (Appellation of Origin) and an AOC (Controlled Appellation of Origin) ...

The terms AO, AOC and AOP (and some of the concepts which they represent) are not part of Australian law. However, Part VIB of the [*Australian Grape and Wine Authority Act 2013* (Cth) ('**AGWA Act**')] contains a regime for the protection of both Australia and foreign 'geographical indications' for wine. In section 4 of the AGWA Act, the term 'geographical indication' is defined as follows:

... in relation to wine goods, means an indication that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographic origin.

The name 'Champagne' is, and has since 1994 been, a registered geographical indication under the AGWA Act.

## **The Opponent**

14. The Opponent's submissions provided the following background of the Opponent:

[T]he Comité Interprofessionnel du Vin de Champagne, translates in English to the 'Interprofessional Committee of Champagne Wine'. In France, the term 'interprofession' is used in the wine sector to describe an association of growers, producers, and sellers connected with particular wines or groups of wines. [The Opponent] is the interprofessional association for all growers, producers, and sellers of Champagne wines, representing the interests of these growers, producers, and sellers worldwide (including Australia).

[The Opponent] is a semi-governmental authority of the Republic of France responsible for, among other things, the protection of the 'Appellation d'Origine Protégée' or protected appellation of origin ('AOP') 'Champagne' both in France and internationally.

[The Opponent] has taken, and continues to take, a systematic approach to preventing the registration of trade mark applications that contain, are derived from, or are a variation of the name 'Champagne', which it considers should not be registered based on one or more grounds of opposition set out in the Act.

15. The Barbier declaration provided detailed information about the long history of French wine appellations, the development of the French law surrounding them, and the investment that the 'interprofession' has made in Champagne wines. While interesting, it is not necessary that this information is reproduced here. Mr Barbier, however, gave some insight into the Opponent's motivation for opposing the application:

When I learned ... that the Applicant herein seeks to register a trade mark which incorporates the name 'Champagne' it was obvious to me that [the Opponent] should take all necessary steps, including opposing the application to protect the Champagne AOC.

In my view it is pointless for the Champenois to invest so heavily in the uniqueness of Champagne wines and in the distinctiveness of its AOC but then to allow another person to use such a name or let another person take advantage of our reputation. In addition, to allow use of a name which is identical to the Champagne AOC would substantially dilute the value of the Champagne AOC and eventually make it indistinguishable from names that have no connection to the French patrimony or heritage or to Champagne itself. ...

Champagne is at least in part sold on the cachet of its name and exclusivity, as distinct from its excellence as a product (which over the years has established that cachet). Thus anything which detracts from the exclusivity of its image is a small step on the path of gradual dilution of the image, leading ultimately to the

total destruction of the distinctiveness, and thus of the marketing value, of the Champagne appellation.

The abuse by the Applicant in this case is of course not subtle or hard to discern. The choice and use of the mark CHAMPAGNE JAYNE entails an inherent and straightforward ride on the coattails of the Champagne appellation of origin, in order to benefit from its significant power of attraction, reputation and imagery and all the positive characteristics which it projects. ... The designation CHAMPAGNE JAYNE thus operates as an engine to gain a certain (and entirely undeserved) competitive advantage. ...

If the Applicant is permitted to offer [the Applicant's Services] under the name 'CHAMPAGNE JAYNE' and, a fortiori if she is granted registration of the mark containing the name 'CHAMPAGNE', then what is to prevent any and every service provider from making free use of our name?

## **The Applicant**

### 16. The Applicant provided the following background in Powell 1:

I possess a bubbly, effervescent character, which led to me being given the nickname 'Champagne Jayne' in my university undergraduate years, and I developed a particular interest in wines, a fondness for champagne, and became a Francophile quite early on in life.

My early career was in publishing, which evolved into a focus on wines and in particular on champagne wines. I saw that I had a future in commentary on matters associated with champagne wines. The moniker 'Champagne Jayne' stuck, and it seemed like an entirely natural name to use to take my business and my career forward. ...

I have appeared in the Australian print, electronic and television media (including Channels 7 and 9) on many occasions, and in 2011 I authored and published a book entitled 'Champagnes...Behind the Bubbles' under my 'Champagne Jayne' moniker. The book was the winner of the Gourmand 2011 Best French Wine Book (Australia) Award.

I regularly hold masterclasses to help educate the public about champagne wines and sparkling wines.

I have also developed an international reputation for my advocacy for champagne wines, and have spoken and appeared in the media extensively in Europe.

In recognition of my advocacy for champagne wines, I was given the prestigious award of Dame Chevalier de L'Ordre des Coteaux de Champagne in 2012 by the champagne industry in France.

I also contributed to The Champagne Summit 2012 held in London in February 2012 ... where I spoke on the expert panel debate, and hosted the forum's inaugural global champagne social media masterclass. At this event I won the title of 2012 Harpers Champagne Educator of the Year. ...

I have been an ambassador for champagne wines for many years. I do not sell, export or import champagne wines, but I do act as a commentator, writer, educator, advocate and enthusiast on and for champagne wines.

'Champagne Jayne' is my identity and my livelihood, and central to the reputation I have established over the last decade.

## **Grounds of Opposition, Onus and Standard of Proof**

17. As indicated in para 2 above, in the NOO the Opponent nominated a large number of grounds of opposition under various sections of the Act. The Opponent's submissions have addressed specifically only grounds of opposition pursuant to ss 42(b) and 43; consequently, I consider the remaining grounds abandoned, and will not discuss them further. However, should this decision be appealed it remains open to the Opponent to pursue any ground of opposition available to it under the Act in court.
18. The onus of proof in an opposition rests upon the Opponent.<sup>3</sup> The relevant standard of proof is the ordinary civil standard based on the balance of probabilities.<sup>4</sup> The date at which the rights of the parties are to be determined is 31 January 2012, being the filing date of the application ('**the Relevant Date**').<sup>5</sup>

## **Discussion**

### *Section 42(b)*

19. Section 42(b) of the Act is reproduced below:

#### **42 Trade mark scandalous or its use contrary to law**

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

- (a) ...
- (b) its use would be contrary to law.

20. The onus is on the Opponent to establish that use of the Applicant's trade mark would, rather than could, be contrary to law on the balance of probabilities.<sup>6</sup>
21. The NOO states no more in relation to this ground of opposition than 'use of the [Applicant's Trade Mark] would be contrary to law.' The Opponent's submissions state that the Opponent contends that the use of the Applicant's Trade Mark in Australia would constitute 'among other things'<sup>7</sup> a contravention of s 18 of the Australian Consumer Law which appears in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* ('**the ACL**'). Despite suggesting that the use of the Applicant's Trade Mark in Australia would be contrary to other laws, the Opponent has not specifically asserted in its submissions that the use would be contrary to any

<sup>3</sup> *Food Channel Network Pty Ltd v Television Food Network GP* [2010] FCAFC 58, [32].

<sup>4</sup> Following Gyles J in *Pfizer Products Inc v Karam* [2006] FCA 1663, [6]-[26].

<sup>5</sup> *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* [1954] HCA 82, [2] (Kitto J).

<sup>6</sup> *Advantage Rent-a-Car Inc v Advantage Car Rental Pty Ltd* [2001] FCA 683.

<sup>7</sup> Opponent's first submissions, [33].

laws other than s 18 of the ACL. I note, in particular, that the Opponent has not asserted that the use of the Applicant's Trade Mark in Australia would be contrary to the AGWA Act. Consequently, I will consider only whether use of the Applicant's Trade Mark would be contrary to s 18 of the ACL, which provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

22. The Opponent has submitted the following in respect of this ground:

There is no meaningful difference between the words and phrases 'misleading or deceptive', 'mislead or deceive' or 'false or misleading'.<sup>8</sup>

Where the issue is the effect of conduct on a class of persons such as consumers (rather than identified individuals to whom a particular misrepresentation has been made or a particular conduct directed), the effect of the conduct or representations upon ordinary or reasonable members of that class must be considered.<sup>9</sup> This hypothetical construct avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of person which are extreme or fanciful. Further, the objective characteristics that one attributes to ordinary or reasonable members of the relevant class may differ depending on the medium for communication being considered. There is scope for diversity of response both within the same medium and across different media.<sup>10</sup>

Conduct is misleading or deceptive or likely to mislead or deceive if it has the tendency to lead into error.<sup>11</sup>

If the Applicant were to use the CHAMPAGNE JAYNE trade mark for wine-related services which are not specifically relate to Champagne wines, such use would constitute misleading or deceptive conduct and would thereby be contrary to law. ...

By using the name 'Champagne' as part of [the Applicant's Trade Mark], the Applicant gives the impression of providing services solely relating to Champagne wines.

Therefore, when sparkling wines other than Champagne wines are promoted under the CHAMPAGNE JAYNE name, it is likely that Australian consumers will be misled or confused as to the origin of the sparkling wines.

Justice Beach found in the Federal Court proceeding that the submissions above are entirely correct, holding that [the Applicant's] conduct conveyed the following representations in respect of sparkling wines:

- (a) that the sparkling wines are or may be Champagne wines; and/or

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<sup>8</sup> *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, [14] (Gordon J); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2014] FCA 634, [40] (Allsop CJ); *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110, [170] (Beach J).

<sup>9</sup> *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12, [102], [103].

<sup>10</sup> *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110, [171].

<sup>11</sup> *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, [39]; *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110, [173].

- (b) that the sparkling wines have or may have some or all of the characteristics of a Champagne wine, including having been made in accordance with the strict rules governing the use of the name Champagne.<sup>12</sup>

As a result, it was held that [the Applicant's] conduct, carried out by her in the course of her business under the name CHAMPAGNE JAYNE, in her use of social media and her reference to sparkling wines was misleading and/or deceptive, and contravened section 18 of the ACL.<sup>13</sup>

The Applicant's use of the CHAMPAGNE JAYNE trade mark is likely to be misleading or deceptive or deceive or cause confusion. Accordingly, the CHAMPAGNE JAYNE trade mark Application should be rejected in accordance with section 42(b) ... of the Act.

23. In summary, the Federal Court case concerned particular actions the Applicant had undertaken, principally, on her various social media accounts. The names of those social media accounts were the Applicant's Trade Mark, or were derived from it. The court found that the Applicant had engaged in conduct that was misleading or deceptive by referring to wines which were not Champagne wines without clearly stating this to be the case. Beach J's orders did not include that the Applicant cease using the social media accounts altogether, only that the Applicant be permanently restrained from posting items on those accounts referring to wines which are not Champagne wines without clearly stating that they are not Champagne wines.
24. In her second submissions the Applicant submitted with respect to the Federal Court decision and orders:

The Federal Court's decision on the law was within a very narrow compass. Its ruling did not upset my ability to continue to carry on my core business which is the subject of my trade mark application, and which I have been engaged in for 13 years.

25. The Applicant also submitted:

During my presentations, it is true that both non-Champagne and Champagne sparkling wines are provided to my audience over the course of a one to two hour period. The purpose of doing so is to inform and educate, not to confuse members of the audience who have paid me to give them a greater understanding and appreciation of wine styles.

It is disingenuous in the extreme for the Opponents lawyers to suggest ... that simply because a non-Champagne sparkling wine may be served at the commencement of one of my presentations a 'consumer' would, as an inevitable consequence, be confused or misled.

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<sup>12</sup> *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110, [231].

<sup>13</sup> *Ibid* [275].

The serving of wine in that way is not an isolated action. It is either preceded by or succeeded with a commentary about the wine and its origin. ...

My audience members are not morons in a hurry – they are given time to listen and to understand, to ask questions and to engage, should they choose to.

There can be no misleading or deceptive conduct by me, or deception or confusion of my audience, in such circumstances ...

The very idea that no other beverage, or even a food, could be offered at an event which does not comprise or contain a component of the host's suite of products, without a consumer being sucked into a vortex of confusion, is [preposterous].

Could Carlton & United Breweries, for example, not be permitted to serve wine or soft drinks at an event it hosts, simply because its name contains the word 'Breweries'? On the Opponent's lawyers [sic] thesis, to do so would thereby immediately fall foul of [the ACL]. It beggars belief that any Court could or would countenance such a proposition.

26. The Barbier declaration describes a number of successful legal actions taken by the Opponent in a number of countries to protect the Champagne AOC. Where brief details of those actions are provided they related to non-Champagne wines being sold with some reference to Champagne. For example, 'Australian Champagne', 'A Champagne of Mineral Waters', 'Elderflower Champagne', 'Spanish Champagne' and 'Canadian Champagne'. The sale of non-Champagne wines in connection with such labels, descriptions or trade marks, is a quite different matter to the present case where the Applicant has adopted a name which includes the word 'Champagne'; and that name is to be used in connection with services.
27. It is clear that the Applicant's use of her trade mark could be contrary to law in certain circumstances. Indeed, instances of use were found to be so by Beach J in the Federal Court case involving the parties to this opposition.<sup>14</sup> What is equally clear is that the Applicant is able to use her trade mark in a manner that is not contrary to law. This includes, in my view, use of the Applicant's Trade Mark in connection with the Applicant's Services where wines which are other than Champagne wines are used for the purposes of providing the services but the fact that those wines are not Champagne wines is made clear.
28. I am not satisfied that the use of the Applicant's Trade Mark would—rather than merely could—be contrary to law. Consequently, the Opponent has failed to establish this ground of opposition.

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<sup>14</sup> *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110.

### Section 43

29. Section 43 provides:

An application for the registration of a trade mark in respect of particular goods or services must be rejected if, because of some connotation that the trade mark or a sign contained in the trade mark has, the use of the trade mark in relation to those goods or services would be likely to deceive or cause confusion

30. In *McCorquodale v Masterson* the court found:

In an opposition to registration, s 43 of the Act requires an opponent to show that: (1) there is a connotation in the proposed trade mark or in a part of it; and (2) because of this connotation, the use of the proposed mark would be likely to deceive or cause confusion. The connotation must be contained within the mark itself.<sup>15</sup>

31. Similarly in *Pfizer Products Inc v Karam Gyles J* said:

‘Connotation’ is a secondary meaning implied by the mark. The likelihood of deception or confusion must flow from the secondary meaning inherent in the mark itself. It is apparent that the underlying purpose of s 43 is a similar purpose to that lying behind ss 52, 53 and 55 of the *Trade Practices Act 1974* (Cth). It is to prevent the public being deceived or confused as to the *nature* of the goods offered by reason of a secondary meaning connoted by the mark in question, rather than, for example, deception by reason of similarity with other marks ... Section 43 might well prevent the registration of HERBAGRA for classes of goods with no connection with herbal ingredients.<sup>16</sup>

32. The Opponent submitted the following in respect of this ground:

The purpose of a predecessor provision to section 43 (from the 1883 UK Act) was set out by Lord McNaughten in *Env v Dunn*.<sup>17</sup> Lord McNaughten in that case said that a trade mark application should be refused if it consists of ‘words which involve a misleading allusion or suggestion of that which is not strictly true, as well as words which contain a gross and palpable falsehood’<sup>18</sup> and also made the extremely important point that the mark in issue (containing FRUIT SALT) was ‘not perhaps the less misleading because it is vague and indefinite, and incapable, it may be, of bearing the very slightest examination’.<sup>19</sup>

The meaning of connotation for the purpose of section 43 of the Act was well summarised by Hearing Officer Williams in *Aktion Zahnfreundlich v Suntory Limited*, where – after considering dictionary definitions for ‘connotation’ and the explanatory memorandum – he stated that:

[T]he matter can be put simply, as follows: if a thing in a trade mark has a meaning—either explicit or implicit—that meaning must not be likely to deceive or cause confusion or there will be grounds for rejecting the trade mark ...<sup>20</sup>

<sup>15</sup> (2004) 63 IPR 582, [25].

<sup>16</sup> (2006) 70 IPR 599, [53] (emphasis added).

<sup>17</sup> (1890) 1b IPR 391.

<sup>18</sup> *Ibid* 397.

<sup>19</sup> *Ibid* 398.

<sup>20</sup> (1998) 42 IPR 593, 596.

*Connotation of 'Champagne'*

The trade mark CHAMPAGNE JAYNE contains a clear connotation of the appellation of origin, 'Champagne'. The name 'Champagne' will be associated with the region of Champagne and the sparkling wines which originate there. The verbal element 'Jayne' will be widely recognised throughout Australia as a female given name. The combination of CHAMPAGNE + JAYNE is unlikely to be perceived as a meaningful expression that confers any concept on the opposed mark as a whole; rather it will be viewed as a random combination of the female name 'Jayne' and the appellation of origin, 'Champagne'. The opposed mark will be conceptually linked to the appellation of origin 'Champagne' owing to the presence of the concept of 'Champagne'.

*Likely to deceive or cause confusion*

The use of the word 'Champagne' in the CHAMPAGNE JAYNE trade mark is likely to deceive or cause confusion. In the context of the Services, it gives the strong impression of services relating solely to Champagne wines.

If the Applicant were to use the CHAMPAGNE JAYNE trade mark for wine-related services which are not specifically related to Champagne wines, due to the connotation that the trade mark has, such use of the trade mark would be likely to deceive or cause confusion amongst consumers.

33. At para 70 of its submissions the Opponent submitted.

A reasonable person would have a legitimate expectation that at an event having a name which includes the word 'Champagne', hosted by 'CHAMPAGNE JAYNE', the wines served would be exclusively Champagne wines. In such circumstances, there is a strong likelihood of attendees being misled into thinking that all of the sparkling wines served are Champagne wines, when they are not.

34. The Applicant's submissions include the following:

The word 'Jayne' clearly does not offend against this section, as it simply says to the public that the service is provided by a person whose name is Jayne.

As I have noted above, paraphrasing Beach J, the word 'champagne' is not the subject of any monopoly enjoyed by the Opponent.

The word 'champagne' has a number of meanings, including 'effervescent or bubbly in character ...

It is also a reference to a colour, namely a pale yellow or a straw colour.

It also has a laudatory connotation.

It also refers to a wine which originates from the Champagne region of France.

Because its meanings are numerous and so diffuse, it cannot fairly be said that the use of the combination 'Champagne Jayne' in respect of the services applied for could be such as to be likely to deceive or cause confusion.

In the context of the services applied for, insofar as they may relate to wine, my goal is to inform the public about wine, and to compare and contrast wine styles, their origins and their characteristics in an entertaining manner.

It serves no purpose for me to misinform the public about the origin of sparkling wines. During my presentations, it is true that both non-Champagne and Champagne sparkling wines are provided to my audience over the course of a one or two hour period. The purpose of doing so is to inform and educate, not to

confuse members of the audience who have paid me to give them a greater understanding and appreciation of wine styles. ...

The Opponent's lawyers [sic] thesis at [para] 70 of its submissions<sup>21</sup> is therefore preposterous and is itself misleading. The very idea that no other beverage, or even a food, could be offered at an event which does not comprise or contain a component of the host's suit of products, without a consumer being sucked into a vortex of confusion, is an indictment on the Opponent's lawyers assessment of the intelligence of the Australian community and further, a bald-faced misrepresentation of the law. ...

It would therefore be most concerning if an administrative authority was to interfere with my application on the basis of a fanciful, speculative assertion by the Opponent's lawyers for which no evidence has been put.

This ground must be rejected as baseless.

35. Case law which considers s 43 where registration of the challenged trade mark was sought in respect of goods is common. Where registration was sought in respect of services the case law is rather less common. In *Primary Health Care Limited v Commonwealth of Australia*, Jagot J found that the trade mark PRIMARY HEALTH CARE applied for in respect of services which included *medical centre business management* was

likely to deceive and cause confusion to any person who is not privy to the applicant's particular business model. This is because the Services are part only of primary health care and the applicant is not providing or responsible for the clinical components of primary health care from its centres whereas by use of the marks, given their descriptive meaning, there is conveyed the false impression that the applicant is providing and/or is responsible for the first level or first contact care.<sup>22</sup>

36. The nature of the Applicant's Trade Mark is quite different to PRIMARY HEALTH CARE. That particular trade mark contains a strong connotation with respect to the services. It is useful to consider what the Applicant's Trade Mark is not. It is not, for example, JAYNE'S CHAMPAGNE CLASSES, JAYNE'S CHAMPAGNE TASTING or JAYNE'S CHAMPAGNE LECTURES: all trade marks which may have strong connotations in relation to entertainer and event management services. CHAMPAGNE JAYNE, on the other hand, is likely to be seen simply as a person's name. Specifically, it's likely to be seen as a nickname along the lines of, say, Buffalo Bill. That particular gentleman was famous in his day for slaughtering thousands of buffalo—or more correctly 'bison'—but he was also a scout and showman. It seems extremely unlikely that when Buffalo Bill put on a show that his customers were

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<sup>21</sup> Provided at para 33 above.

<sup>22</sup> [2016] FCA 313, [171].

deceived or confused into thinking that all they were going to see or hear about were bison. Here, the Applicant is merely saying, my name is 'Champagne Jayne' and I provide a number of services under that name.

37. After considering the particular nature of the Applicant's Trade Mark and a notional fair use of it in relation to the Applicant's Services, I am not satisfied that the Applicant's Trade Mark has a connotation such that its use in relation to the Applicant's Services would be likely to deceive or cause confusion. Consequently, the Opponent has failed to establish this ground of opposition.

### **Decision**

38. The Opponent has failed to establish a ground of opposition. Application 1471878 may proceed to registration after one month from the date of this decision. If the Registrar has been served with a notice of appeal before that time, I direct that registration shall not occur until either the appeal is withdrawn or a court so orders.

### **Costs**

39. The Applicant has sought an award of costs in her favour. I see no reason to depart from the general rule that costs follow the event. As the Opponent has failed to establish a ground of opposition, I award costs against the Opponent. The Applicant sought an award of costs 'above the usual scale' on the basis of the 'vexatious nature' of the opposition. The Act allows only the award of costs 'in the respect of the matters, and in the amounts, provided for in the regulations'.<sup>23</sup> In any event, I do not consider that the opposition was without some merit, or that it was vexatious. I therefore award costs against the Opponent as per Schedule 8 of the *Trade Marks Regulations 1995*.



Robert Wilson  
Hearing Officer  
Trade Mark Hearings  
4 April 2017

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<sup>23</sup> *Trade Marks Act 1995* (Cth) s 221. The only exception to this being s 105 which provides for a certificate of use of a trade mark in non-use proceedings. However, this is not applicable here.