

Intellectual Property Arrangements: Submission for the draft report

I would like to provide a submission on the Productivity's Commission's review into Intellectual Property Arrangements on draft recommendations 11.1 and 12.1. Specifically:

1.0 Amend s. 43 of the Trade Marks Act so that the presumption of registrability does not apply to the registration of marks that could be misleading or confusing (draft recommendation 11.1)

This recommendation is important and necessary, and will help reconcile Australia's trade mark and consumer laws. An example of the need to remove the presumption of registrability comes from misleading or deceptive trade marks that connote qualities of 'health'.

The following comments and arguments about the potential issues with misleading or deceptive 'healthy' trade marks are taken from 'Health Conscious and Confused: Why 'Healthy' Trade Marks Matter to Consumers', (2016) 39(2) *University of New South Wales Law Journal* (Jay Sanderson). Importantly:

- While Australia's food labelling and consumer protection laws go some way to address the problem of misleading and deceptive trade marks, 'healthy' trade marks have been overlooked. This is despite that fact that, in 2011, the 'Labelling Logic' report called for closer scrutiny of trade marks that infer health implications;¹
- The presumption of registrability has consequences for the way in which proposed 'healthy' trade marks are examined.² At the initial stage of examination, the applicant is not required to justify that the 'healthy' trade mark is registrable. Rather, the onus is on the Registrar to demonstrate that there are grounds to reject the 'healthy' trade mark. This means that a 'healthy' trade mark will be accepted by the Registrar unless the application has not been made in accordance with the

¹ Food Labelling Law and Policy Review Panel, 'Labelling Logic: Review of Food Labelling Law and Policy' (Final Report, 28 January 2011) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

² The presumption of registrability is not without its critics. See Robert Burrell and Michael Handler, 'Rethinking the Presumption of Registrability in Trade Mark Law' (2012) 38(1) *Monash University Law Review* 148.

Act or there are clear grounds for rejecting the applicant's mark. As a consequence, 'healthy' trade marks are not given the scrutiny required to assess unsubstantiated, exaggerated or misleading claims. For example, 'healthy' trade mark applications are not examined by the ATMO for their nutritional content or healthiness. It is, therefore, unlikely that misleading or deceptive 'healthy' trade marks will be rejected at the examination stage;

- Trade marks can be used to indicate something about the qualities or characteristics of food, or suggest something about the way in which the food is manufactured or produced. Trade marks, therefore, can influence the behaviour of consumers;³
- While the registration of 'healthy' trade marks is not a problem per se, if health claims are unsubstantiated, exaggerated or misleading, then 'healthy' marks have the potential to harm consumers. The Australian consumer group CHOICE, in 2012, published a review of various food products that carry 'healthy' trade marks.⁴ In finding that approximately half of those products reviewed were high in unhealthy ingredients, CHOICE acknowledged that food labelling and consumer protection laws prohibit health claims that might mislead consumers. According to CHOICE, however, Australian trade mark law contributes to consumer confusion and misinformation because it allows the registration and use of 'healthy' trade marks – such as 'healthy', 'natural' and 'fresh' – on products that have questionable health benefits at best, or detrimental effects on health at worst. Referring to the use of 'healthy' trade marks, and an earlier study conducted by the George Institute, the CHOICE report states:

Many products you'll find in the supermarket have connotations of being 'natural' by virtue of their trademarked brand names – for example, All Natural, Be Natural, Go Natural, Nice & Natural. The George Institute for Global Health's database lists close to 1300 products and brands that use the word 'natural' in their product name or package marketing – but in many cases the ingredients are far from it.

A 'natural' trademarked product might actually contain additives such as preservatives, and while others may be technically natural, they can still be laden with sodium and saturated fats.⁵

- Because 'healthy' trade marks are cues for fast and intuitive food choice decisions, words like 'natural', 'healthy' and 'fresh' act as shortcuts or heuristics, and provide simple processing cues of health or nutritional information.⁶ The effect of 'healthy' trade marks is perhaps exacerbated by the fact that people's

³ See, eg, Glynn S Lunney Jr, 'Trademark Monopolies' (1999) 48 *Emory Law Journal* 367; Robert G Bone, 'Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law' (2006) 86 *Boston University Law Review* 547.

⁴ Elise Dalley, Healthy Labelling or Healthy Marketing? (4 September 2014) CHOICE <<http://www.choice.com.au/reviews-and-tests/food-and-health/labelling-and-advertising/nutritional-labelling/rise-of-nutritional-trademarking/page/compare%20the%20products.aspx>>.

⁵ Elise Dalley, Healthy Labelling or Healthy Marketing? (4 September 2014) CHOICE <<http://www.choice.com.au/reviews-and-tests/food-and-health/labelling-and-advertising/nutritional-labelling/rise-of-nutritional-trademarking/page/compare%20the%20products.aspx>>.

⁶ See Wim Verbeke, 'Agriculture and the Food Industry in the Information Age' (2005) 32 *European Review of Agricultural Economics* 347.

natural tendency is to create binary opposites, and to categorise food as either good or bad, healthy or unhealthy, natural or artificial.⁷ Research has shown, for example, that when choosing foods in the face of complex and confusing information, consumers will adapt information on the label to fit within decision frameworks that are familiar to them.⁸ Thus, while easy-to-understand information about the health and nutritional values of food may be missing, or is found in the nutritional tables on the back of the food packet, it is the front-of-package information that plays a central role in consumers' decision-making processes. This is particularly true for health-conscious consumers who notice and are influenced by front-of-package information including 'healthy' trade marks;⁹

- Studies indicate that misleading or deceptive 'healthy' trade marks can influence consumers' perceptions of healthiness, as well as their choice and consumption of food. This means that misleading or deceptive 'healthy' trade marks are problematic if food manufacturers and producers misuse them to make unsubstantiated, exaggerated or misleading claims about the health qualities or status of their food products. While the relationship between health claims and sales is not linear or straightforward,¹⁰ the market for food products with health benefits or properties is growing, and consumers are inclined to pay more for, and purchase and consume more often, foods carrying 'healthy' trade marks.¹¹ This provides an incentive for food manufacturers to use unsubstantiated, exaggerated or misleading 'healthy' trade marks.

2.0 The Australian Government should proceed without delay to implement the Advisory Council on Intellectual Property 2010 recommendation to amend the *Plant Breeder's Rights Act 1994 (Cth)* to enable essentially derived variety declarations to be made in respect of any variety (draft recommendation 12.1)

There are a number of potential issues with extending EDV declarations to any variety, whether protected by plant breeder's rights or not.

First, there is a question of balancing the interests of plant breeders, users of plant varieties and local/indigenous communities. There is little, if any, evidence that non-PBR varieties are being exploited; so extending EDV must be done cautiously and

⁷ Paul Rozin, Michele Ashmore and Maureen Markwith, 'Lay American Conceptions of Nutrition: Dose Insensitivity, Categorical Thinking, Contagion, and the Monotonic Mind' (1996) 15 *Health Psychology* 438.

⁸ Sally Eden, 'Food Labels as Boundary Objects: How Consumers Make Sense of Organic and Functional Foods' (2011) 20 *Public Understanding of Science* 179.

⁹ Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011), 50–8.

¹⁰ See, eg, Pierre Chandon, 'How Package Design and Packaged-Based Marketing Claims Lead to Overeating' (2013) 35 *Applied Economic Perspectives and Policy* 7.

¹¹ Rao Sanaullah Khan et al, 'Functional Food Product Development – Opportunities and Challenges for Food Manufacturers' (2013) 30 *Trends in Food Science & Technology* 27. For a comprehensive review of food marketing practices and its effect on food intake, see Pierre Chandon and Brian Wansink, 'Does Food Marketing Need To Make Us Fat? A Review and Solutions' (2012) 70 *Nutrition Reviews* 571.

with consideration of any unintended consequences. Plant breeding is an incremental and iterative process, and plant breeders use and build upon the work of previous plant breeders, and rely on existing plant varieties for the initial source of genetic variation. However, the breeder's exception has, in combination with other provisions of the plant breeder's rights (e.g. distinctness), caused troubles for plant breeder's rights holders and concerns for UPOV Member States and breeder organisations, particularly during the 1980s. Leading in to the UPOV Diplomatic Conference of 1991 there were concerns amongst plant breeders and UPOV Member States that the when combined with the low threshold of distinctness and limited infringement provisions in UPOV 1978 the breeder's exception allowed, or even encouraged, copying and plagiarism in plant breeding.¹² The combination of which resulted in an unfair advantage to second and subsequent plant breeders, and weaken plant variety protection.¹³ These concerns were exacerbated by the advent of molecular plant breeding techniques in the 1970s and 1980s as well as unfavourable comparisons to patent law; which did not have a comparable breeder's exception. One of the specific reasons given for introducing the concept of EDVs was to prevent the exploitation of mutations of protected varieties and varieties that had undergone a minor or trivial change in relation to the initial variety, for example by using biotechnology, without the first plant variety rights holder being able to share in the profits.¹⁴

A second group of issues of extending EDV relate to evidence, proof and who has the onus of declaring a variety essentially derived. Indeed, since the introduction of EDVs, the identification and examination of EDVs has been elusive and remains one of the key issues for UPOV and national plant breeder's rights offices. Potentially, this would make determination and declaration, by the PBRO or a court, an uncertain and costly exercise. And, therefore, has the potential to make the plant breeder's rights scheme less effective and efficient.

The difficulties of assessing EDV have been outlined previously.¹⁵ That said, the concept of EDVs occupies a legal space and raises distinctly legal issues such as what is the standard of proof and who has the burden of proving that a variety has been essentially derived.¹⁶ Consequently, EDVs cannot and should not be examined and identified purely on quantitative grounds, 'cultural and practical values' are also

¹² For example, the International Seed Federation (ISF) defines plagiarism as 'any act or use of material/technology in a breeding process that purposely makes a close imitation of an existing plant variety': ISF, *ISF View on Intellectual Property* (ISF, 2012), p. 19.

¹³ UPOV, *Records on the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants 1991*, Publication No. 346(E) (UPOV, 1992), pp. 338-334.

¹⁴ UPOV, *Fourth Meeting with International Organizations: Revision of the Convention*, IOM/IV/2 (UPOV, 1989), pp. 10-12; See also WIPO, *Introduction to Plant Variety Protection under the UPOV Convention* (2003), WIPO/IP/BIS/GE/03/00, [53]–[57].

¹⁵ See, Jay Sanderson 'Essential Derivation, Law and the Limits of Science' (2006) 24(1) *Law in Context* 34. Similar issues remain almost a decade later: see, Charles Lawson, 'Plant Breeder's Rights and Essentially Derived Varieties: Still Searching for Workable Solutions' (2014) 32(8) *European Intellectual Property Review*, 499.

¹⁶ *Danziger v. Astée* 105.003.932/01, Court of Appeal, The Hague (2009); *Danziger v. Azolay* 1228/03, District Court, Tel-Aviv-Jaffa (2009).

important when examining and identifying EDVs.¹⁷ Perhaps, then, EDVs are best viewed as ‘agreed facts’, in which adopted guidelines and arbitration are crucial to the examination and identification of EDVs.

Perhaps, then, more work needs to be done to identify the varieties for which EDV (particularly for non-PBR varieties) is problematic. For these varieties, and where the guidelines are available, agreed values and traits of EDVs can be identified and agreed upon in advance.

Yours sincerely,

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¹⁷ This is the language used by the Netherland’s Court of Appeal in The Hague: see *Danziger ‘Dan’ Flower Farm v. Astée Flowers B.V.* 105.003.932/01, Court Appeal, The Hague (2009), [21].