



Food and beverage law bulletin

AUGUST 2022

Our latest Insights: what's been happening in food and beverage law; M&A trends: ESG, innovative agriculture, craft beer and plant-based alternatives; an update on trade mark law in the food and beverage sector; and other key developments in 2022

What's been happening in food and beverage law

Nick Li, Alexandra Moloney

THE PAST 12 MONTHS, FROM 'CHICKEN' TO COMMON ADVERTISING PITFALLS

We unpack the most significant regulatory developments in the food and beverage sector over the past 12 months, as well as what's just over the horizon – including sugar regulation, country of origin labelling, geographical indications, the future of plant-based meat labelling, and recent Ad Standards decisions.

KEY TAKEAWAYS

- The future of labelling plant-based protein products with traditional meat descriptors has been cast into doubt by a Senate Committee Report, which may foreshadow regulation in the area.
- Food Standards Australia New Zealand (**FSANZ**) is set to commence consultation in September 2022 on its proposal for requiring added sugar to be quantified in nutrition information panels.
- Recent Ad Standards Community Panel decisions highlight social media and prevailing community standards as key risk areas for advertising in the food and beverage sector.
- Geographical indications have proved to be a key issue requiring further consideration in negotiations on the free trade agreement between Australia and the EU.
- Country of Origin food labelling is to continue in its current form, after a recent review found the reforms have effectively achieved their intended outcomes

THE FUTURE OF PLANT-BASED MEAT LABELLING

In June 2021, Nationals Senator Susan McDonald launched a Senate inquiry into the labelling of plant-based protein products with traditional meat descriptors such as 'chicken', 'sausage' and 'mince'. The Rural and Regional Affairs and Transport Legislation Committee [report](#), released earlier this year, states that the Committee is 'strongly opposed to the appropriation of animal protein descriptors and animal imagery by the plant-based protein sector'.

Most notable of its nine recommendations is the report's call for the Federal Government to adopt a mandatory regulatory framework for the labelling of plant-based protein products. The Committee also recommended that the **Australian Competition and Consumer Commission** (the **ACCC**) review the placement of plant-based protein products instore and online, as well as develop a National Information Standard that defines and restricts the use of meat terminology to animal protein products. It is unclear, at this stage, what the impact of the report will be on the Government's appetite for reform in this area (if any).

The report has come at a time that other countries are grappling with similar issues. From October 2022, France will ban the use of labelling plant-based protein products with meat terminology. This regulation will only apply to plant-based protein products made in France and will not apply to imported plant-based products. Similarly, in June 2022, the South African Government instructed South African food manufacturers and importers to stop using meat terminology on plant-based food products, with immediate effect.

SUGAR REGULATION IN THE SPOTLIGHT

In response to growing concerns about the content of added sugar in Australians' diets, FSANZ announced a proposal to evaluate whether additional information quantifying added sugars on the nutrition information panel of food labels ought to be required. Targeted consultation on the proposal is expected to take place in September 2022, with public comment being accepted from December 2022 to February 2023.

FSANZ's proposal is a result of its review into nutrition labelling for added sugars, completed in 2021, which found no technical barrier to quantifying added sugars in the nutrition information panel. The report rejected two other possible approaches, being:

- pictorial about sugar applied to sweetened beverages; and
- identifying sugar-based ingredients in the statement of ingredients.

The FSANZ proposal follows changes to the voluntary Health Star Rating System in 2020, which further penalised foods with high total sugar content.

In 2018 the UK introduced a tax on sugar-sweetened beverages, requiring manufacturers to pay a levy based on a tiered system. The intention was to encourage manufacturers to reduce or remove the sugar content of their beverages, to minimise their liability under the tax. A number of other countries have introduced some form of 'sugar tax' in recent years, and the topic continues to be a live issue in Australia. However, the proliferation of sugar-free or reduced-sugar beverage alternatives, and smaller serving sizes, combined with growing consumer awareness, may obviate the need for a 'sugar tax' in Australia.

AD STANDARDS IN 2022

The new Australian Association of National Advertisers (the **AANA**) Food & Beverage Advertising Code (the **F&B Code**) came into effect on 1 November 2021, and seeks to ensure that advertisers maintain a high sense of social responsibility when advertising food and beverage products. In addition to the F&B Code, the AANA Code of Ethics provides an overarching set of principles that all advertising materials should comply with: namely, that the advertisement is legal, honest, truthful, fair, prepared with respect for human dignity and avoids harm to consumers.

Over the past year, the Ad Standards Community Panel has upheld a number of complaints in relation to advertisements in the food and beverage sector. Some significant ones are:

- The Panel concluded that the Heart Attacks Diner's website advertisement depicting a burger with eight patties, without any disclaimers, undermined the promotion of healthy balanced diets, by encouraging excess consumption through its representation of disproportionate serving sizes, in breach of the F&B Code.
- Grill'd was found to have breached the Code of Ethics in relation to television commercials, with an advertisement depicting two children being accosted by a clown in a trench coat in a dark alleyway. The Panel considered this was menacing and suggestive of sexualised violence, which was irrelevant and unrelated to the burgers being promoted.
- A television commercial for Jalna yoghurt was found to be contrary to prevailing community standards in its depiction of cyber bullying. This decision emphasises the need to consider the whole narrative in any advertisement – not merely the brand or product being advertised.
- An Instagram story showing a person using various protein powder products to make a smoothie was found not to have been sufficiently distinguished as advertising, in breach of the Code of Ethics. This decision serves as a cautionary tale for advertisers in the age of social media. The influencer in this case had been gifted the product by the advertiser and was not obliged to post about the product. Furthermore, the advertiser's hashtag had been applied throughout the advertisement.

While the Ad Standards Community Panel complaint resolution process is voluntary and its decisions are non-binding, failure to engage with the process can result in bad publicity or cause a complaint to be referred to a regulator, such as the ACCC.

The above Ad Standards decisions underscore common pitfalls for advertisers. Companies in the food and beverage sector should expect that their advertising will be subject to a high degree of scrutiny by consumers and competitors.

GEOGRAPHICAL INDICATIONS KEY FOR FREE TRADE AGREEMENT NEGOTIATIONS

As we reported in [2019](#) and [2020](#), the negotiation of the free trade agreement between Australia and the EU (the **A-EU FTA**) is ongoing. One of the key objectives the EU is seeking for the A-EU FTA is the protection of geographical indications (**GIs**) for food and drinks. A GI is a product name or term that identifies a good as originating in a specific location where a characteristic of the good is attributable to its geographical origin. The latest round of A-EU FTA negotiations took place in February earlier this year. While the parties have discussed individual issues, Australia has not committed to protecting EU GIs. It has taken a firm stance that it will only agree to protect EU GIs under the A-EU FTA if the overall outcome of the A-EU FTA is in Australia's interest, including market access.

Interestingly, on 30 June 2022, New Zealand and the European Union concluded negotiations on the EU-New Zealand trade agreement (the **EU-NZ FTA**). The EU-NZ FTA will protect the full list of EU wine and spirits (close to 2200 EU GIs), as well as 163 of the most well-known food GIs. In addition to protecting renowned EU GIs, the EU-NZ FTA will protect New Zealand's existing wine GIs, with the opportunity for both New Zealand and the EU to put forward further GIs for protection in the future.

EVALUATION OF COUNTRY OF ORIGIN LABELLING REFORMS

In July 2018, reforms to the Country of Origin Labelling (**CoOL**) scheme took effect. This year, a report commissioned by the Federal Government that evaluated the reforms was published.

The [report](#) on the Evaluation of Country of Origin Labelling found that the 2018 CoOL reforms were well implemented and effective, and recommended no major changes. This is reflected by the report's six recommendations, which seek continued monitoring of the CoOL scheme's effectiveness, as well as increased consumer and business understanding of CoOL.

It was noted in the report, and the Government has acknowledged, there is a need to evaluate and address consumer and business confusion in relation to 'Made in' claims.

M&A trends in the food and beverage sector: ESG, innovative agriculture, craft beer and plant-based alternatives

Hannah Biggins, Jack Keleher and Mark Malinas.

KEY FACTORS EXPECTED TO ATTRACT FUTURE GLOBAL INVESTMENT

2021 was a record-breaking year for M&A transactions in Australia across almost all markets, and despite major disruptions caused by the pandemic and international supply shortages, deals within the food and beverage sector remained plentiful.

With ESG front of mind, we take a deep dive into some of the M&A trends within the food and beverage sector and outline some key factors that we expect will attract global investment in the years to come.

KEY TAKEAWAYS / HOW DOES THIS AFFECT YOU?

- 2021 was a record year for M&A deals in Australia and the food and beverage sector played a key role despite international disruption.
- A target's ESG-related risks, opportunities and practices continue to be a keen area of focus for potential bidders, especially within the food and beverage sector.
- Australian craft breweries and companies specialising in innovative agriculture continue to attract interest from foreign bidders.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal counsel; strategic management

THE 2021 M&A BOOM

2021 was a record-breaking year for M&A deals in Australia and that momentum certainly continued into 2022, including due to low funding costs, increased deal making demand after the pandemic and a strong economic rebound. Allens has been involved in some of Australia's largest and most complex M&A deals in the first half of 2022 – read more [here](#). Whilst activity levels will likely moderate over the remainder of the year as the market adjusts to higher interest rates and global inflationary pressures, we expect the Australasian M&A market will continue to perform strongly relative to global markets.

THE FOOD AND BEVERAGE SECTOR WAS ALSO IN THE CROSSHAIRS FOR M&A IN 2021

Headlined by the A\$9.65 billion acquisition of ASX listed Coca-Cola Amatil (ASX:CCL) by Coca-Cola Europacific Partners creating the world's largest Coca-Cola bottler, the sector saw immense growth across a variety of industries. Despite Russia's invasion of Ukraine hindering global grain and agricultural markets, we expect investment within the food and beverage sector to continue due to several growth opportunities, including the introduction of new free trade agreements between Australia and various countries, government and regulatory interest and investment in the sector (for example, the new ASX agribusiness index) and further easing of global pandemic related travel and employment restrictions.

ESG-RELATED PRESSURES IMPACTING M&A DEALS

A target's environmental, social and governance (**ESG**) credentials continue to be an important consideration for M&A transactions around the globe, as investors gain a greater appreciation for how robust ESG practices can create and drive sustainable value. In 2021, it is reported that global M&A transactions involving sustainable companies more than tripled 2020 levels. Broad ESG themes relevant for companies include climate-related risks, transparency of supply chains and ethical sourcing, animal welfare, as well as broader issues including social inequality and biodiversity.

International and private capital investors in particular have quoted ESG as a major driver in food and beverage related M&A deals.

Allens recently advised an Equilibrium Capital led consortium on their strategic investment in Perfection Fresh,

one of Australia's largest privately owned fresh produce businesses. The consortium understood that as the impact of climate change strengthens, consumers are demanding that agriculture companies shift away from reliance on land-based industry, where produce is too heavily weather and season dependant. Perfection Fresh's intentions to grow its controlled environmental agriculture into Asia (which reportedly produces 70% of the world's total vegetable production) was an important consideration in the consortium's investment. With this new strategic partnership by its side, Perfection Fresh recently acquired sustainable banana business, Pacific Coast Produce Marketing, another ESG-conscious acquisition. Perfection Fresh CEO Michael Simonetta stated the acquisition was innovation driven and 'very much in line with [their] sustainability approach'.



ESG stakeholder activism is also impacting M&A deals within the sector.

For example, when JBS Australia sought to acquire Australia's second largest salmon producer, Huon Aquaculture, by way of scheme of arrangement, Tattarang (which at that stage held an 18% interest in Huon) publicly stated that it would vote against the scheme unless JBS 'declare[d] its unequivocal commitment to animal welfare and environmental sustainability'. Given the voting thresholds required to approve a scheme of arrangement (which includes 75% of the votes cast), Tattarang's opposition to the scheme put pressure on JBS Australia to launch a parallel off market takeover bid with a 50.1% minimum acceptance condition, circumventing the need for Tattarang's approval of the transaction.



ESG considerations are also relevant to regulatory bodies when assessing the character of foreign bidders.

In the above JBS/Huon deal, Tattarang publicly urged the Foreign Investment Review Board (**FIRB**) to closely examine JBS, citing bribery and corruption concerns and alleged animal mistreatment. The same issues were also relevant for FIRB when JBS [recently acquired integrated pork producers Rivalea Holdings Pty Ltd and Oxdale Dairy Enterprise Pty Ltd](#). We are also aware that FIRB has imposed ESG-related compliance conditions on foreign bidders. However, such compliance conditions tend to be imposed on targets who have had incidents in the past, rather than pro-active conditions requiring wholesale changes to be made to an industry or asset.

It is expected that ESG will continue to drive and impact deals, including as investors become better equipped to benchmark ESG performance between companies worldwide.



WHAT DO INNOVATIVE AGRICULTURE, PLANT-BASED FOOD AND CRAFT BEER HAVE IN COMMON?

Whilst M&A deals continued to surge in various food and beverage industries including dairy, fresh produce and ready-made meals – there are three particular subsectors that have continued to attract local and foreign investment and we expect will continue to do so in years to come.

INNOVATIVE AGRICULTURE

As a result of (among other things) supply shortages during the pandemic and ESG considerations, Australian food and beverage companies are increasingly turning to innovative operational and production processes. These innovative agriculture initiatives are catching the eye of investors. Key movements in this subsector include:

- Flavorite, the largest hydroponic grower of tomatoes in Victoria, merging with Murphy Fresh and Tatura Fresh in March 2021, who together are a leading tomato grower in Victoria operating a 15 hectare state-of-the-art hydroponic farm in Mansfield, Victoria;
- Costa Group acquiring leading fruit and vegetable wholesaler, Select Fresh, in June 2021, who specialise in the supply of fresh produce to Western Australia; and
- Sydney-based start-up, Vow Foods, raising US\$6 million to expand its portfolio of cultured meats in January 2021. Vow Foods specialises in lab-grown meat from the cells eleven different animals.

With the introduction of the ASX agribusiness index in July 2022, increased consumer demand alongside supply difficulties exacerbated by Russia's invasion of Ukraine, it is expected the market will continue to see value in investing in innovative agriculture.

PLANT-BASED ALTERNATIVES

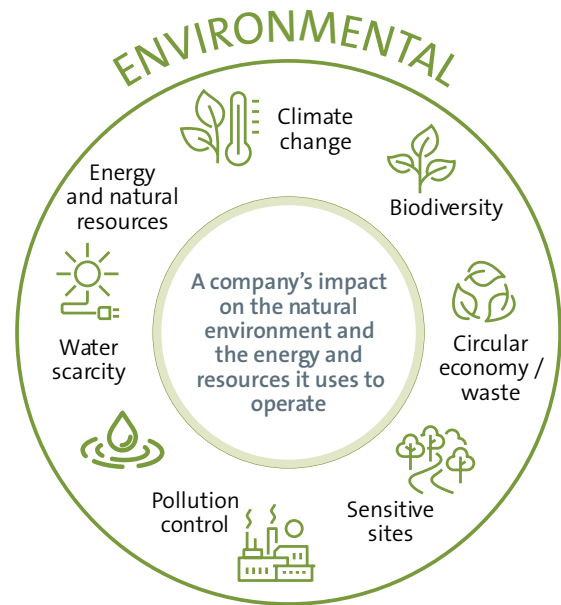
The last few years have also seen a consumer uptake in plant-based alternatives. For example, it is reported that in the last three years alone the number of vegan products listed on Woolworths' website has more than tripled. The rise in plant-based alternatives has not gone unnoticed by investors, leading to some major transactions in the last year, including:

- Pure Foods Tasmania acquiring both Lauds Plant Based Foods and plant-based ice cream business, The Cashew Creamery, in February 2021;
- Australian Plant Proteins, manufacturer of high protein plant-based powders from Australian grown legumes, receiving A\$45.7 million from Bunge for a minority stake in its company in May 2021; and
- plant-based meat company, Fable Foods, who uses shitake mushroom stems as a base ingredient, raising A\$6.5 million in seed funding from investors led by Blackbird Ventures in August 2021.

AUSTRALIAN CRAFT BEER

The Australian beer market has always been dominated by popular brands like VB, Carlton Draft and XXXX – but reportedly in the last decade alone the number of craft breweries has multiplied to almost 300 brands attracting plenty of local and foreign interest. It is reported that this year saw a 17.7% growth in total Australian craft beer revenue. Key deals in this subsector include:

- brewery investor, Fermentum, acquiring popular Melbourne-based brewery Two Birds in January 2021; and
- subsequently, big time beverage player, Lion, acquiring Fermentum in September 2021 in one of Australia's largest ever craft beer acquisitions, with industry experts estimating the deal was worth upwards of A\$300 million.



ACTIONS YOU CAN TAKE NOW

FOR COMPANIES WITHIN THE FOOD AND BEVERAGE SECTOR

- We recommend ensuring your ESG practices are in line with stakeholder expectations and legal requirements. For example, ensuring your board oversees ESG-related matters, complying with ESG reporting requirements, putting in place appropriate training for employees, managing ESG risks within your supply chain, considering the ESG practices of business partners and contractual obligations that you may impose on those third parties, engaging clearly and often with stakeholders regarding ESG risks and opportunities and ensuring any public ESG claims are accurate and well-founded.
- Learn more about ESG strategies, establishing an appropriate ESG policy and how to embed ESG best practice into your business on the [Allens ESG Hub](#).



FOR INVESTORS

- We recommend you undertake ESG-related due diligence on targets sitting within the food and beverage industry. For example, assessing the degree of alignment between the target and the bidder's ESG objectives, considering what value the target might bring to the bidder in terms of established ESG credentials and stakeholder sentiment towards the proposed target.
- In addition, undertaking due diligence regarding the target's climate-related risks, supply chains and ethical sourcing, animal rights risks, work health and safety risks and governance practices, as well as broader issues including social inequality and biodiversity.
- Learn more about ESG due diligence and things to consider with ESG-related investing on the [Allens ESG Hub](#).



An update on trade mark law in the food and beverage sector

Tommy Chen and Jess McKenna

GETTING PRESCRIPTIVE ON DESCRIPTIVE

Demonstrating the provenance and credence of a food or beverage product to customers is increasingly important. However, when words and logos that refer to a quality or characteristic are used on packaging or in promotion, it can be difficult to determine whether a sign has the quality of a trade mark or is merely descriptive.

In 2021, the Federal Court of Australia had occasion to consider two cases concerning this question. The first concerned alleged infringement of the 'Halal Certification Authority' logo as well as its validity as a trade mark, while the second concerned the registrability of 'a2 Milk' trade marks.

KEY TAKEAWAYS

- A trade mark intended to fulfill a certification function, rather than the 'badge of origin' function of an ordinary trade mark, should be registered as a certification trade mark.
- Terms that merely allude to, rather than describe, the nature or characteristics of a product may be capable of distinguishing goods and services and thus be registrable as a trade mark.
- A seemingly straightforward trade mark infringement claim may be defeated if the mark is not used as a trade mark. For example, a mark used in a way that conveys factual information, rather than the trade source of a product, is not being used as a trade mark.

CERTIFYING PROVENANCE AND CREDENCE

Consumers are increasingly discerning about the provenance and credence of food and beverage products. One way to demonstrate the characteristics of a product is through certification: it is now common to see product packaging emblazoned with various logos indicating that it is 'certified organic', 'Vegan Australia certified', ticked as 'National Heart Foundation Approved', and so on.

In Australia, when words or logos are intended to indicate that a product has been certified as fulfilling some criteria as to its characteristics, rather than performing the 'badge of origin' function of a trade mark, they should be registered as *certification trade marks*. However, trade mark owners do not always do this, for various reasons. For example, they may not yet have established the rules of certification (required to be filed) when they apply to register the trade mark, they may intend the mark to be used both as a trade mark for their organisation and as a certification mark, or they may not be across the certification trade mark system.

Halal Certification Authority v Flujo Sanguineo Holdings [2021] FCA 1399 illustrates the uncertainties that can arise when a mark is registered as an ordinary trade mark but used as a certification mark. This case concerned an allegation of infringement of a trade mark (depicted below) registered by Halal Certification Authority Pty Ltd (**HCA**). HCA is a private company that provides services including certifying that certain goods are halal and is one of a number of providers of halal certification services in Australia. HCA alleged that the Flujo Group committed trade mark infringement, misleading or deceptive conduct and passing off by using the mark on product packaging without HCA's authorisation. In response, Flujo sought cancellation of HCA's trade mark registration on the basis that its use was likely to deceive or cause confusion. HCA failed to establish its causes of action, and the trade mark registration was cancelled. HCA has appealed this decision.



The registered trade mark (left) and one example of how it appears on the packaging in question (right).

ORDINARY TRADE MARK OR CERTIFICATION MARK?

HCA's trade mark consists of the word *halal* in Arabic script, in a roundel surrounded by the English text 'Halal Certification Authority Australia'. The mark had been registered as an ordinary trade mark in respect of services, and not as a certification mark.

Food businesses could apply to HCA to certify that particular products met the requirements for halal foods under Islamic religious law. In this case, the Flujo Group companies used toll manufacturers, who received certification from HCA for the products in question at various times. HCA provided the trade mark logo to the manufacturers in a variety of file formats.

Despite HCA's insistence to the contrary before the Federal Court, the court held that the evidence showed HCA at least implied to the Flujo Group's manufacturers that the mark could be used on product packaging to signify that the product had been certified halal, and that (given HCA was aware they were contract manufacturers on behalf of a client) this could be sub-licensed to the Flujo Group companies.

USE AS A TRADE MARK

The Flujo Group had continued using the mark on packaging after HCA's certification of the relevant product had expired. The court had to consider whether this was infringing use. It was not disputed that the products in question were *in fact* halal. HCA's contention was that the presence of the marks on the packaging indicated that the product was halal, 'or even that they were certified as halal by someone', and moreover that the trade source of the halal certification service was HCA.

The court was not persuaded. It noted the 'small display size and relatively obscure placement on the packaging' of the trade mark as against the 'large and dominant size' of the product marks ('Natvia' and 'Raw Earth') on the packaging. The court also observed 'most consumers or other casual readers would probably not even notice the logo was there'. The court also drew support from the Registrar of Trade Mark's view that, when HCA applied to register 'Halal Certification Authority Australia' as a word mark, this phrase was purely descriptive. The court concluded that the registered logo mark merely signified that the product was *in fact* halal, and perhaps that it was certified as such. This did not convey any information as to the trade source, and accordingly the mark was not being used as a trade mark. There was therefore no infringement.

CANCELLATION

The court also ordered that HCA's trade mark registration be cancelled because it was likely to deceive or cause confusion. Key to this finding was the use of the word 'authority' within the trade mark. HCA argued that the word was not a reference to it having any official status, but rather 'expressed a status as to knowledge'. The court was not satisfied, ultimately finding that if a person were to read the words 'Halal Certification Authority Australia' presented 'in the form of an official stamp or seal', they would 'most likely be left with the impression that there was some official, authoritative body that was saying that the goods were in fact halal, as opposed to the specific certification of a private company' – which was untrue. The court also held that the trade mark 'was not capable of distinguishing the service provided by HCA from a like service provided by anyone else'.

HCA has filed an appeal to the Full Court, so interested parties should stay tuned for further updates.

STEPS YOU CAN TAKE NOW

- If you participate in a certification scheme, ensure your rights to use any certification mark are clear and have been granted to the appropriate party.
- If you operate a certification scheme, be clear from the outset whether a mark is intended to be used as an ordinary trade mark or a certification mark.
- Consider other ways to control the use of a logo used for certification purposes, such as contractual terms or through copyright.

TRADE MARKS THAT ALLUDE TO CHARACTERISTICS

It is a basic principle of trade mark law that terms that are the ordinary name of, or descriptive of, a product or its quality or characteristics are generally not registrable. This is because all traders of the same goods or services are likely to use or wish to use such terms, and they are not inherently capable of distinguishing the goods or services of one trader from that of another.

The a2 Milk Company Limited v LD&D Australia Pty Ltd [2021] FCA 1515 illustrates the limits of this principle. In this case, the Federal Court of Australia considered whether the trade marks 'a2 Milk' and 'TRUE A2' had the inherent capacity to distinguish milk and milk products despite the obvious reference to the A2 beta-casein protein, which is present in all cow milk.

CIRCUMSTANCES LEADING TO APPEAL

At IP Australia, Lion Dairy & Drinks (**LD&D**) successfully opposed the applications for the 'a2 Milk' and 'TRUE A2' marks on the basis that the marks lacked capacity to distinguish a2 Milk Company's (**A2 Co**) products.

A2 Co appealed the decision to the Federal Court, however before the matter was heard the parties reached settlement and sought orders by consent that the applications proceed to registration. The Registrar of Trade Marks declined to provide a letter that she had no objection to the applications proceeding to registration as a result of the parties' agreement, and so the appeal was heard by the Federal Court on the basis of public interest to resolve uncertainty around the applications. Neither LD&D nor the Registrar participated in the appeal.

DESCRIPTIVE OR ALLUSIVE MARKS

In determining whether the marks were capable of distinguishing, the court noted that a sign with an allusive reference to goods or services is registrable as a trade mark. However, if the word or sign is understood by the target audience as having a 'directly descriptive meaning' in relation to those goods or services, then the sign will not be registrable.

While the court found the term 'A2' to be descriptive in relation to the A2 beta-casein protein, it was held that 'A2' was inherently capable of distinguishing different traders' milk or milk products

which contained A2 protein because neither 'a2' nor 'A2' were directly descriptive of milk or milk products – they were merely allusive to the quality of milk products having only A2 protein.

In reaching this decision, the court considered A2 Co's evidence of past use and intended continuing use of the marks to be sufficient to establish that the 'a2 Milk' and 'TRUE A2' marks distinguish A2 Co's products from those of competitors. The court also considered that competitors may use 'a2' to indicate that their product contains the a2 bovine beta-casein protein. However, any use of the term to 'do more' than that would not be 'properly motivated'. The potential desire for competitors to use the term was therefore not a reason to deny the applications for registration.

The court ordered that the appeal from the decisions of the Registrar of Trade Marks be allowed and that the trade mark applications for 'a2 Milk' and 'TRUE A2' proceed to registration.

STEPS YOU CAN TAKE NOW

- When creating a new brand, avoid using terms that describe the product or its quality or characteristic if possible.
- If you use or propose to use a trade mark that could be said to describe or allude to the quality or characteristic of a product, consider carefully whether it falls on the right side of the line between 'descriptive' and 'merely allusive'.
- Although an allusive term can be registered as a trade mark, honest use of the term by another trader in a descriptive way does not necessarily infringe the trade mark.

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