



Australian
Competition &
Consumer
Commission

Certification trade marks—the role of the ACCC



Australian Competition and Consumer Commission
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Important notice

Please note that these guidelines are a summary designed to give you the basic information you need.

Because they avoid legal language where possible, there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act.

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ROLE

The role of the Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (the Act) (formerly cited as the *Trade Practices Act 1974*). The objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Under the *Trade Marks Act 1995*, the ACCC must be satisfied that certain criteria are met before certification trade marks (CTMs) can be registered.

The ACCC is required to have regard to the principles relating to competition, unconscionable conduct and consumer protection concerns set out in the Act.

This publication describes the process the ACCC follows in assessing CTM applications.

THE ACT

The Trade Marks Act

Various types of trade marks, including CTMs, can be registered under the Trade Marks Act, which sets out and protects the rights provided by registration. In particular, registration provides CTM owners with the exclusive right to use and to allow other persons to use the CTM.

The Registrar of Trade Marks administers the Trade Marks Act. The registrar is an officer of IP Australia, the Australian Government agency that administers Australia's intellectual property system for patents, trade marks and designs.

Terminology

CTM

Certification Trade Mark

CTM owners

businesses or organisations which own CTMs

CTM applicants

businesses applying to a CTM owner to use a CTM

CTM users

businesses granted permission to use a CTM by the CTM owner

CTM rules

CTM rules are the documentation that governs the use of the CTM and contains the information required by section 173 of the Trade Marks Act. This includes standards that goods or services must meet and the process used by the CTM owner or CTM assessor to decide whether these standards have been met.

CTM standards

the standards (including requirements) that goods and services must meet to display a CTM

CTM assessors

CTM owners need to assess whether goods and/or services meet their CTM standards. They (or their employees) might make this assessment or arrange for other businesses with relevant expertise to do this. These businesses are known as CTM assessors. Sometimes CTM owners make the final decision on whether to allow a CTM to be used on goods or services themselves, but base this decision on the advice of CTM assessors.

CTM

Certification trade marks

Businesses use ordinary trade marks to distinguish the goods or services they sell from those of other businesses. In contrast, a CTM indicates to consumers that a product or service meets a particular standard. For example, a CTM might indicate that a product:

- is of a particular quality
- has been manufactured in a particular location or by using a particular process
- is made from particular materials or ingredients
- is suited to a particular task.

In most cases, a CTM is a visual graphic or logo that can be applied to packaging or in associated promotional and advertising material.

Why are certification trade marks important?

In some circumstances, the use of a particular CTM on a product or service may confer a marketing advantage. This will be the case if prospective consumers are familiar with the mark and consider that it denotes a certain standard or quality and as a consequence may be more likely to purchase the product or service than if the CTM were not present.

This potential impact on consumers' behaviour highlights the need for CTM rules to be structured so that they ensure that products bearing the CTM meet the requisite standards. In situations where the CTM rules are not designed to ensure that the CTM standards are being met there may exist the potential for consumers to be misled by the presence of a CTM on a product or service.

Registering a certification trade mark

Businesses wishing to register a CTM must first apply to the Registrar of Trade Marks at IP Australia.

Along with their CTM application they must provide a set of rules governing the use of the CTM. These rules must be filed with the registrar with the application or as soon as possible thereafter. The content of CTM rules is discussed below.

The registrar assesses CTM applications against general trade mark requirements. If an application complies with these requirements, the registrar sends it, along with the CTM rules, to the ACCC for consideration.

Further information about the Registrar's role in assessing CTM applications or how to lodge a CTM application is available at IP Australia's website (www.ipaustralia.gov.au.)

The ACCC's process

The ACCC has a number of steps in its process:¹

- 1. Receipt of application.** Upon receipt of a CTM application from the Registrar of Trade Marks at IP Australia, the ACCC will write to the applicant providing them with information about the ACCC's assessment process, including an indicative timetable, and, if relevant, seeking further information in support of the application.
- 2. Initial assessment of the application.** The ACCC is required to make an initial assessment of a CTM application as soon as practicable after receipt. Given the time required to complete the first step above, this process usually takes around three months from the time of receipt of the application. However, this timeframe is dependent on applicants responding to information requests or issues raised by the ACCC in a timely fashion. See the outline of information typically required by the ACCC below.

The ACCC will notify the applicant and the Registrar of Trade Marks of its initial assessment on the application. A notice of the ACCC's initial assessment is gazetted by the Registrar of Trade Marks in the *Official Journal of Trade Marks*. The gazettal process is managed by IP Australia.

- 3. Written submissions and conference.** The CTM owner or any other person who objects to the initial assessment has one calendar month from the date of gazettal to lodge a written submission with the ACCC and/or request that the ACCC hold a conference to make an oral submission.
- 4. Final assessment.** After holding a conference (if one is called) and considering any written submissions, the ACCC will proceed to its final assessment.

If the ACCC is satisfied that the relevant criteria are met (see ACCC assessment below), the ACCC will provide a certificate stating that it is so satisfied to the CTM applicant and the Registrar of Trade Marks. A certified copy of the rules is also provided to the Registrar of Trade Marks.

If the ACCC is not satisfied that the relevant criteria are met, the ACCC must notify the CTM applicant and the Registrar of Trade Marks.
- 5. Application for review.** An application may be made to the Administrative Appeals Tribunal to review a decision by the ACCC to refuse to give a certificate.

The ACCC's assessment

The ACCC is required to make an initial assessment of a CTM application as soon as practicable after receipt. In practice, this process usually takes around three months from the time of receipt of the application. This timeframe may extend beyond three months in instances where the CTM owner does not provide requested information in a timely manner, consultation is undertaken on the CTM rules and/or the matter is particularly complex and raises a number of issues or concerns.

Consultation

Following legislative reforms introduced in 2007, copies of CTM applications and the CTM rules are available from IP Australia's website. Interested parties wishing to comment upon CTM applications are able to access this information and provide submissions to the ACCC. The ACCC may also seek the views of interested parties or parties that are considered likely to have expertise relevant to a CTM application. For example, for a CTM concerning building materials the ACCC may seek the views of the relevant authorities regulating and monitoring the building industry both at a state and Commonwealth level.

Assessment

The Trade Marks Act requires that the ACCC only approve a CTM application if it is satisfied that:

- (a) the attributes required of approved CTM assessors are sufficient to enable the person to competently assess whether goods and/or services meet the certification requirements and
- (b) the CTM rules would not be to the detriment of the public and are satisfactory having regard to the principles of competition, unconscionable conduct and consumer protection.²

The ACCC must be satisfied that a person or organisation that is granted approved CTM assessor status (this may include the CTM owner) will have the necessary qualifications, skills or abilities to competently assess whether or not a good and/or service meets the CTM requirements or standards set out by the CTM rules.

The ACCC will consider whether competition concerns may arise from the CTM rules by assessing whether they require or encourage the CTM user to engage in anti-competitive conduct. This may include provisions which restrict market entry, impose restrictions on advertising/marketing, establish prices for goods and/or services, impose geographical boundaries on the use of the mark or impose other restrictions that may adversely effect competition.

In assessing whether a CTM could be used in an anti-competitive manner, the ACCC will also consider the role of the CTM owner. A CTM owner that does not compete with the parties that seek certification from it is likely to have a low incentive to use the CTM in an anti-competitive manner.

The ACCC recognises that CTMs by their nature are intended to confer a degree of competitive advantage—by indicating that the goods and/or services that feature the mark meet a particular standard or set of requirements. The ACCC examines the degree of this advantage and whether it could be inappropriately denied to any businesses, thereby reducing the intensity of competition in the respective market(s) or area of competition. This is one of the reasons that the ACCC places weight on effective dispute resolution processes in CTM rules. A CTM that may confer a significant competitive advantage should have an independent dispute resolution process to provide comfort that a CTM applicant will not be denied certification for reasons beyond the CTM rules.

In addition to examining the potential competition implications of the CTM application, the ACCC assesses it from a consumer protection perspective. In particular, the ACCC will consider whether the CTM raises misleading or deceptive concerns, including the following:

- the CTM indicates to consumers that a good and/or service meets a particular standard, but the certification requirements in the rules do not reflect this standard or the process for determining whether these requirements or standards have been met is not reliable or
- while the CTM rules are consistent with what the CTM purports to indicate to consumers, the mark itself is ambiguous, confusing or misleading—that is, it might be interpreted by consumers to mean that a good and/or service complies with a different standard.

Finally, the ACCC will also examine whether the CTM rules:

- raise unconscionable conduct concerns—for example, if the rules require CTM users to implement business practices that could constitute unconscionable conduct (conduct is unconscionable when, for example, a party to a transaction takes unfair advantage of another party's special disability of which it is aware or otherwise acts in a manner showing no regard for conscience)
- generate other public detriment—that is, harm to the community in addition to the consumer protection and competition concerns discussed above.

Examples of the ACCC's approach to assessing CTM applications are provided at the end of this publication.

Amendments

Under the Trade Marks Act the ACCC has the power to require the CTM applicant to make amendments or modifications to the CTM rules.

The ACCC prefers to raise issues with CTM applicants and provide them with an opportunity to resolve concerns about CTM rules. While the ACCC may compel changes to rules, in general amendments to rules are made by CTM applicants on a voluntary basis.

In circumstances where the ACCC requires amendments or modifications to CTM rules it will notify the CTM applicant and will prescriptively set out the required changes to the rules. The ACCC will also set a date by which the CTM applicant must amend the rules and provide a revised copy of the rules to the ACCC.

Information required by the ACCC

It is the responsibility of applicants to provide sufficient information to enable the ACCC to make an assessment in accordance with the relevant test set out in the Trade Marks Act.

In general, the information required by the ACCC to conduct its assessment of a CTM is not solely restricted to the CTM rules. In many cases information such as secondary documents referred to in the rules, materials used to promote the CTM and website links will contain information pertinent to the operation of the CTM and the ACCC's assessment.

For example, it is common that the fee schedule or required fees for use of a CTM are listed in a separate document or on the CTM owner's website. The applicant should provide a copy of such documents as part of the CTM application.

Background information on the company or organisation that is the CTM owner should be provided in addition to a concise explanation of what the CTM is intended to certify or represent.

CTM rules

The Trade Marks Act sets out the types of information the CTM rules must specify:

1. the requirements (the certification requirements) that goods and/or services must meet for the certification trade mark to be applied to them;

For example, the certification requirements may be a defined standard, a particular process, or production occurring in a particular region.

2. the process for determining whether goods and/or services meet the certification requirements.

For example, this may include the method for assessing compliance with the Australian standard or the audit procedures for determining if a particular process has been followed.

If a CTM informs consumers that a good or service meets a particular Australian standard, the assessment may require the provision of test reports and for random testing to occur.

If the CTM indicates that a good is produced following a particular process, the assessment may include audits, inspections or reviews of the process. In some instances, the provision of a statutory declaration by the approved user to the CTM owner/CTM assessor may be sufficient to satisfy the requirements of this provision.

The process should be thoroughly documented in the CTM rules.

3. the attributes that a person must have to become a person approved to assess whether goods and/or services meet the certification requirements (an approved user).
4. the requirements that a person, who is a CTM owner or a CTM user, must meet to use the certification trade mark in relation to goods and/or services;

The CTM rules must detail how the CTM owner ensures that the products displaying the CTM continue to meet the relevant CTM requirements or standards. This may include regular or random audits and/or inspections. There may also be a requirement that the CTM user notify the CTM owner of any change in circumstances that affects the operation of the CTM.

In addition, the ACCC requires information on whether the licence to use the CTM is time-limited and if there is a recertification process conducted on the respective products at the end of the time period.

In some cases, a CTM owner will appoint another company or organisation to conduct the assessment of the product seeking certification against the CTM requirements or standards. For example, a CTM that is based on scientific or technological requirements may often have the products seeking certification tested by an accredited laboratory.

In these instances, the CTM rules should document the attributes that assessors are required to have to be appointed as CTM assessor, the process by which they are appointed and any monitoring that occurs of the CTM assessors.

In particular, the ACCC looks closely at the qualifications, skills or abilities that make up the attributes necessary to be a CTM assessor. For example, if the CTM indicates that a particular good meets technical standards, the CTM assessor may be required to test samples of the good. In these circumstances the CTM rules would need to stipulate the minimum technical qualifications of a CTM assessor, such as a laboratory holding a certain certification.

5. the other requirements about the use of the certification trade mark by a person who is the owner of the certification trade mark or an approved user;
The CTM rules should set out any other conditions or provisions imposed upon the CTM users. This may include required fees or restrictions on the use of the CTM on certain promotional materials.
6. the procedure for resolving a dispute about whether goods and/or services meet the certification requirements;
7. the procedure for resolving a dispute about any other issue relating to the certification trade mark.

The CTM rules must set out a dispute resolution process. This process should cover disputes about whether goods and/or services meet the certification requirements or any other issue relating to the CTM. Generally, the ACCC considers whether the CTM rules contain a process of internal review along with the ability to seek some form of independent review. In instances where there is not an independent review or appeal option as a component of the dispute resolution process, the internal review should be well documented, including details of the staff that will be handling or adjudicating on the disputes.

8. The rules must also include any other matter the ACCC requires to be included and may include any other matter the ACCC permits to be included.

Three examples of the information that is required to be included in CTM rules are provided at the end of this publication.

Variation of rules

CTM rules may only be varied with ACCC approval.

An application to vary CTM rules must be made in writing to the ACCC (not the Registrar of Trade Marks, although the ACCC will inform the registrar when it receives an application). An application to vary the CTM rules must include a copy of the CTM rules with the proposed variations clearly marked—that is, with all deleted and new text clearly marked.

CTM owners must also provide an additional copy of the CTM rules as amended without the proposed variations being marked (that is, a clean copy of the ‘new’ CTM rules to allow the ACCC to provide a certified copy of the CTM rules to the Registrar of Trade Marks).

The ACCC undertakes the same assessment process (outlined above) in considering a proposed variation of CTM rules.

Assignment of certification trade marks

CTMs may not be assigned—for example, sold—to new owners without ACCC approval.³

The registered CTM owner must apply in writing to the ACCC (not the Registrar of Trade Marks, although the ACCC will inform the registrar when it receives an application). The application must provide the name, address and address for service of the organisation to which the CTM is proposed to be assigned. The application must state whether the prospective assignee proposes to apply the same CTM rules and, if it does not, state any variation of the CTM rules and a copy of the CTM rules that the prospective assignee proposes to apply after assignment.

The ACCC may refuse to issue a certificate if concerns arise that the organisation is not competent to administer the CTM. Consequently registered CTM owners should provide information about the competency of the organisation to which the CTM will be assigned.

The ACCC is only required to make a final decision on applications to assign a CTM (and is not required, for example, to make an initial assessment for public consultation).

However, if an application to assign a CTM also involves a change to the CTM rules, then the full process for assessing CTM rules applies. That is, the ACCC must be satisfied that:

- (a) the attributes required of approved CTM assessors are sufficient to enable the person to competently assess whether goods and/or services meet the certification requirements and
- (b) that the CTM rules would not be to the detriment of the public and are satisfactory having regard to competition, unconscionable conduct and consumer protection concerns.

Review of ACCC decisions

The Trade Marks Act allows applications to the Administrative Appeals Tribunal (AAT) to review ACCC decisions to:

- refuse to issue certificates for CTMs
- approve or not approve variations to CTM rules
- refuse approval to the assignment of a CTM.⁴

Cancellation of a CTM

The Registrar of Trade Marks must cancel a CTM if requested to do so by the CTM owner.

An aggrieved person may apply to a prescribed court to have a CTM cancelled or an entry in the register removed or amended on the grounds that:

- the CTM owner (or CTM assessor) is no longer competent to assess whether goods or services meet the relevant CTM standards;
- the CTM rules are detrimental to the public; or
- a CTM owner (or CTM user) has failed to comply with a provision of the CTM rules.⁵

The rules may also be varied by a prescribed court on application by an aggrieved person.⁶

ASSESSMENT

ACCC assessment—examples

Consumer protection concerns

Example 1

A CTM indicates to consumers that clothes are made from one type of fabric only.

The CTM would mislead consumers if the CTM rules do not prevent the CTM being used on products that were not made exclusively from this fabric.

This could happen if, for example:

- the CTM rules only require that the fabric make up 90 per cent of the garment or
- while the CTM rules require that the fabric make up 100 per cent of the garment, the process for testing whether garments meet this standard is flawed, raising the possibility that garments that do not meet the standard would be allowed to display the CTM or
- while the CTM rules require that the fabric make up 100 per cent of the garment, and the testing process is reliable, the persons conducting the testing process are not competent, again raising the possibility that garments that do not meet the standard would be allowed to display the CTM.

Example 2

A CTM is intended to indicate to consumers that a retailer's customer service is of a high quality. The CTM rules specify appropriate customer service standards. The process for assessing whether these standards have been met is sound and the assessors are competent.

However, the actual trade mark itself is applied to the goods sold by the retailer and only uses the words 'high quality'.

This is misleading as consumers are likely to interpret it to mean that the products sold by the retailer are of a high quality, rather than the customer service.

Competition concerns

Example 1

The Act prohibits competing businesses from agreeing on prices. Competition concerns would arise if CTM rules were to require CTM users (which were competing businesses) to charge the same price for their goods or services.

Example 2

The Act prohibits agreements between competing businesses to limit the persons from whom they acquire goods or services (or to whom they sell goods and services). Competition concerns may arise if CTM rules prohibit CTM users (which were competing businesses) from acquiring goods or services from particular suppliers.

Example 3

The Act prohibits competing businesses from agreeing to act in a manner which substantially lessens competition. The ability to use a particular CTM owned by an industry association (that is, by existing competitors in an industry) confers a significant competitive advantage on businesses and, for some reason, it is not possible to establish a rival CTM.

Competition concerns could arise if it is possible for the industry association to inappropriately deny the right to use the CTM, thereby reducing the competitiveness of new businesses and the intensity of competition in the industry.

The potential for competition concerns in this situation increases if the standards that businesses must meet to use the CTM are subjectively expressed; if compliance with the standards is not assessed independently of the industry association; and if there is not an effective and fair appeals process.

Information required by the ACCC—examples

Generally, CTM rules must cover two broad areas.

First, CTM rules must specify the CTM standards—that is, the standards that the goods or services of CTM applicants must meet. The standards must include:

- all standards that the goods or services of CTM applicants must initially meet to use the CTM (and continue to meet as CTM users) and
- any additional standards or requirements that CTM users must meet while they are using the CTM.

Second, CTM rules need to detail the process used by the CTM owner (or CTM assessor) to decide whether these standards have been met.

The relevant standards and processes for assessing compliance with the standards must be included for all goods and/or services covered by the CTM.

It is important that CTM rules be in one document. The rules should be divided into clearly marked sections.

The examples below indicate in broad terms what the rules governing common types of CTMs would typically need to include. The examples are provided as a guide only.

Example 1

A professional or trade association owns a CTM informing consumers that members of their profession or trade are competent and ethical.

The CTM rules would typically need to specify:

- the standards required of CTM applicants—for example, specific educational or trade qualifications and/or specified periods of work experience
- if membership of the association is required to use the CTM, the requirements that CTM applicants need to meet to become a member of the association
- any ongoing requirements that CTM applicants need to meet once they are approved to use the CTM (that is, once they become CTM users)—for example, CTM users might be required to comply with a code of ethics and pay annual fees.

The CTM rules would also need to specify:

- the process used to assess whether CTM applicants meet these standards. In particular, the rules would need to specify:
 - the process for assessing whether a CTM applicant possesses the required qualifications or experience. This may simply be an evaluation of the information in an application. In these cases, the rules should indicate the information that the CTM applicant must provide
 - the process for becoming a member of the association—this may be similar to the process for determining whether a CTM applicant possesses the required qualifications and experience
 - how the code of ethics is enforced including, for example, how complaints are lodged and investigated; how alleged breaches of the code arising from a complaint are prosecuted; and the safeguards that ensure that persons alleged to have breached the code are treated fairly
 - processes available to appeal decisions that deny or revoke use of the CTM
 - the qualifications and experience required of decision-makers—for example, the members of committees assessing membership applications or alleged breaches of a code of conduct. The rules should not provide the actual qualifications and experience of existing members; they should specify the qualifications and experience generally required before a person would be appointed to a committee.

The CTM rules should also specify all initial and ongoing fees.

Example 2

An industry association owns a CTM informing consumers that a product is recyclable.

Typically, the CTM rules would need to specify the technical standards that the product must meet.

The rules would also need to specify:

- the corresponding technical or scientific processes for initially determining whether these standards have been met—this might include the nature of the testing process, where testing is to take place, the number of products tested and the proportion of these that must meet the required standards
- the processes for ensuring that products approved to display the CTM continue to meet these standards—for example, products might be tested periodically at scheduled times or random tests might be conducted, and/or the right to use the CTM might be for a limited period of time after which the CTM user must re-apply (and therefore have the products re-tested)
- processes available to appeal decisions that deny or revoke use of the CTM
- the qualifications and experience of CTM owners, if testing products themselves, or of the CTM assessors—the rules should specify the qualifications and experience that would generally be required of CTM assessors rather than the actual qualifications and experience of an existing CTM assessor.

The CTM rules should also specify all initial and ongoing fees.

Example 3

A company owns a CTM informing consumers that food products which display this mark are organically produced.

The CTM rules would need to specify the requirements of the production process.

For example, the CTM rules might require particular agricultural or horticultural methods to be used and/or prohibit the use of particular agricultural chemicals on the crop from which the food product is made.

The CTM rules would also typically need to specify:

- how the company initially determines whether, for example, the required agricultural or horticultural methods have been used—this might involve farm inspections and audits of farm records
- the scientific or technical process for initially testing to ensure that prohibited chemicals have not been used, including the nature of the testing process and where testing is to take place
- the processes for ensuring that food products approved to display the CTM continue to meet the required standards. For example, farms might be re-inspected periodically at scheduled times or regular random tests might be conducted. Scientific testing of food products might be required periodically. The right to use the CTM might be for a limited period of time, after which the CTM user must re-apply (and therefore be re-tested and re-inspected)
- processes available to appeal decisions that deny or revoke use of the CTM
- the qualifications and experience of CTM owners and, if used, CTM assessors (which again should be those generally required of assessors rather than those actually held by existing assessors).

The CTM rules should also specify all initial and ongoing fees.

END NOTES

Endnotes

- 1 Section 175 of the *Trade Marks Act 1995* and Regulations 16.2-16.5 of the Trade Marks Regulations 1995.
- 2 Section 178 of the *Trade Marks Act 1995* and Regulations 16.8-16.9 of the Trade Marks Regulations 1995.
- 3 Section 180 of the *Trade Marks Act 1995* and Regulation 16.11 of the Trade Marks Regulations 1995.
- 4 Subsections 175(5), 178(5) , 180(4) and 180 (4A) of the *Trade Marks Act 1995*.
- 5 Subsection 181(2) of the *Trade Marks Act 1995*.
- 6 Section 182 of the *Trade Marks Act 1995*.
- 7 Subsection 173(2) of the *Trade Marks Act 1995*.

MORE INFO

More information

While ACCC staff are pleased to discuss the ACCC's approach to CTMs, they cannot give you specific legal advice or make authoritative determinations of law. These are matters for your own advisers and the courts. Further information about your rights and obligations under the Trade Marks Act can be obtained from your legal adviser or trade marks attorney.

Contacting the ACCC

CTM correspondence

Mail

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Fax: (02) 6243 1211
email: adjudication@accc.gov.au

Other contacts

Infocentre: 1300 302 502

Small business helpline: 1300 302 021

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service: www.relayservice.com.au.

Voice-only (speak and listen) user—phone 1300 555 727 and ask for 1300 302 502.

Website: www.accc.gov.au

For other business information, go to www.business.gov.au.

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