Australian Competition and Consumer Commission  
Dr Richard Chadwick  
General Manager  
Adjudication Branch  

By email: Hannah.Ransom@accc.gov.au  

Dear Mr Chadwick,  

CERTIFICATION TRADE MARK APPLICATION NO 1265568 – LODGED BY AUSTRALIAN ORGANIC LTD  

We appreciate the opportunity to comment on the recent application by Australian Organic Ltd to register with the Australian Competition and Consumer Commission (ACCC) the Certification Trade Mark (CTM) No 1265568 (CTM Application).  

AUS-QUAL provides organic auditing and certification services to all sectors of the organic agricultural, processing and food handling industries. AUS-QUAL is accredited by the Australian Quarantine Inspection Service (AQIS) to audit the National Standard of Organic and Biodynamic Produce, which is the standard that AQIS and the organic industry has developed for the certification of organic products in Australia.  

For the reasons outlined in this letter, AUS-QUAL is strongly of the view that the CTM Application raises sufficient concerns, both from a consumer protection and competition perspective, that the ACCC could not be satisfied that the CTM Application meets the relevant criteria for approval.  

In particular, AUS-QUAL considers that, if approved, the CTM Application will lead to confusion both for businesses and consumers with regard to the proper certification of organic products in Australia. We believe that such a scenario will have a detrimental impact both on Australian consumers and on competition in the organic certification sector more broadly.  

1. Summary  

In our view the CTM Application will result in confusion for businesses and consumers with regard to the production and sale of organic produce for the following reasons:  

• The use of the ‘bud’ log with the words ‘Australian Certified Organic’ creates confusion for both wholesale and retail consumers of organic products as the combination of words and logo suggest that this mark is the national standard for Australian certified organic product in Australia. This is not the case: The “National Standard of Organic and Biodynamic Produce” (National Standard) is a separate document that was formulated by AQIS in concert with the organic industry in 1992. Further, ACO is not the single certifier of Australian organic products in Australia but one of seven certifiers of Australian organic produce in Australia.
• The use of the proposed CTM has already created confusion in the market with consumers and businesses under the impression that the ‘bud’ logo and the words ‘Australian Certified Organic’ represent the national mark for organic certification in Australia.

• The proposed CTM is being used by the proponent for products that are not ‘organic’ but are ‘allowed inputs’, such as agricultural inputs, water, salt, etc. It is AUS-QUAL’s view that the use of the proposed CTM for these non-organic ‘inputs’ creates ambiguity and confusion which could further mislead businesses and consumers of organic produce.

• We understand that the proposed CTM can and will be used as a certification mark on ‘organic’ products imported into Australia. AUS-QUAL considers that significant confusion will arise for Australian consumers with the use of the proposed CTM for imported ‘organic’ product. While the imported product may comply with Australian organic certification standards, the use of ‘Australian Certified Organic’ does suggest that the product is Australian, or at a minimum, has been independently certified as Australian organic in accordance with the National Standard.

• We also note that the ‘bud’ logo has already been approved for use by ACO as a collective mark for use by its members. AUS-QUAL considers that using the same mark to denote both a ‘collective’ mark and a ‘certification’ mark will blur the lines between businesses that produce products that have been certified organic and businesses that are simply ‘members’ of the ACO organisation. As far as AUS-QUAL is aware, there are currently no requirements for ACO members to comply with or abide by the certification procedures set out in the ACO’s rules.

Finally, we consider that the confusion created by the use of the proposed trademark as set out above will have a detrimental effect on competition in the organic certification sector in Australia. To the extent that businesses and consumers of organic material erroneously consider the proposed CTM as being the National Standard, other organic certifiers in Australia will be significantly disadvantaged in the market.

In summary, AUS-QUAL is strongly of the view that the proposed CTM is misleading, and that the confusion and misperceptions created by the use of the words ‘Australian Certified Organic’ will have a detrimental impact both for the organic certification sector and for organic businesses and consumers of organic produce in Australia. For these reasons, AUS-QUAL does not consider that the ACCC can be satisfied that the CTM Application meets the relevant criteria for approval.

2. Background

Unlike the US and the European Union (EU), Australia does not have a single mark that certifies produce or products as being ‘organic’. Currently there are seven organisations accredited by AQIS to provide inspection and certification services for a range of organic or biodynamic commodities and production practices in Australia:\n
• AUS-QUAL;
• ACO – Australian Certified Organic;
• Bio-Dynamic Research Institute;
• NASAA – The National Association of Sustainable Agriculture Australia;
• OFC – Organic Food Chain;
• Safe Food Production Queensland; and
• Tasmanian Organic Dynamic Producers.

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1 http://www.daff.gov.au/biosecurity/about/contact/aco
Each of these seven certification organisations have their own marks which represent that a particular product has been tested by that organisation in accordance with its own rules. In contrast, the US has a single national seal (the USDA Organic seal). Likewise, the EU has adopted a single mark identifying organic produce across all member states.

As noted above, the National Standard document was formulated by AQIS in concert with the organic industry in 1992. The National Standard provides a framework for the organic industry covering the production, processing, transportation, labelling and importation of organic or bio-dynamic produce. While AQIS-authorised certifiers use a range of bespoke certification procedures, in practice the National Standard sets out the minimum requirements for organic or bio-dynamic products in Australia.

In Australia, AQIS is the controlling body for organic export certification and, importantly, it is under the National Standard that AQIS delegates the issuance of Organic Produce Certificates (OPC) to accredited organisations such as AUS-QUAL. All product that leaves Australia that is identified as organic or bio-dynamic must be accompanied by an OPC from an accredited organisation.

3. Misleading and deceptive

In its assessment of the CTM Application, the ACCC must, among other things, consider whether the CTM Application raises any concerns with regard to misleading and deceptive conduct.

As noted above, AUS-QUAL is of the view that the CTM Application raises a number of these concerns. In particular, we consider that the trade mark itself is ambiguous, confusing and misleading.

3.1 Confusion that the ACO proposed logo equates to Australia’s national organic seal

The CTM Application uses the ACO’s ‘bud’ logo with the words ‘Australian Certified Organic’. In AUS-QUAL’s view this has the potential to create the strong impression in consumers’ minds that Australian organic products in Australia must bear this mark before the products can be considered to be authentically ‘organic’. In a similar way that consumers may look for the “Australian Made” logo when looking for authentic Australian made products, the proposed CTM Application suggests there is a single mark for organic certification. This is not the case.

As set out above, unlike the US and the EU, Australia does not have a single national seal for the certification of organic products. As noted, in addition to ACO, there are six other certifiers in Australia - all with their own bespoke certification logos, none of which currently suggest that their own certification is the single national standard for certification in Australia or that it should be seen as the ‘national’ seal.

It is already the case that the use of the ‘bud’ logo and the words ‘Australian Certified Organic’ have had the effect of creating the impression that the ACO logo is the national seal for Australian organic products.

The entry for “organic certification” in Wikipedia includes national certification marks (such as that used in the USA and the EU) alongside the ‘Australian Certified Organic’ logo. While the marks used for the US and the EU are, in fact, each country’s respective national seals, the Australian ACO logo is not.

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Further, AUS-QUAL is also aware of anecdotal evidence from industry that exporters of Australian organic products are receiving pushback from buyers who are requesting the ACO logo on the incorrect assumption that it is the national seal and the national standard.

In addition to the confusion created by the proposed CTM, AUS-QUAL also considers that the rules that accompany the CTM create a further misperception. While the proposed CTM includes in its Application the certification rules called the “Australian Certified Organic Standard”, these rules are not, in fact, the National Standard. As set out above, the National Standard is a document developed by industry and the AQIS in 1992. AUS-QUAL is of the view that the combination of the words ‘Australian Certified Organic’ with the rules called the “Australian Certified Organic Standard” will give the strong impression that the proposed CTM is the national standard for certification in Australia with the effect of further misleading consumers and businesses.

Given this confusion, we do not consider that the ACCC could be satisfied that the proposed CTM or its rules are satisfactory, particularly on the grounds of consumer protection.

3.2 **The ACO proposed ‘Australian Certified Organic’ logo can be used for products that are not necessarily ‘organic’ or ‘Australian’**

In another misleading aspect of the proposed CTM, the ACO’s certification procedures include that the logo may be used for products that are not actually organic at all but are nevertheless ‘allowed inputs’. AUS-QUAL is of the view that the use of the proposed logo for products that are non-organic has the potential to mislead consumers.

As stated on the ACO’s own website, “*some products such as agricultural inputs, bottled water, salt and cosmetics cannot be certified organic*”. It is our understanding that the same ‘bud’ logo will be used for these products which AUS-QUAL considers would be very confusing for consumers. This is especially the case in circumstance where consumers may already be under the impression that the ACO logo is the national seal for organic produce in Australia.

Furthermore, it is AUS-QUAL’s understanding that the proposed CTM can and will be used as a certification mark on ‘organic’ products imported into Australia. As imported products are by their nature not ‘Australian Certified Organic’, AUS-QUAL considers that the use of the proposed CTM for this purpose will cause a great deal of confusion in the minds of Australian consumers.

While the imported product may broadly comply with ACO’s Australian organic certification rules, the use of ‘Australian Certified Organic’ does suggests that the product is either an Australian product or, at a minimum, has been independently and separately certified as Australian organic.

3.3 **The ACO proposed logo cause confusion as it can be used both for ‘collective’ and ‘certification’ purposes.**

As noted by the ACCC in its request for comment on the CTM Application (dated 30 July 2013), the ACCC has already approved a CTM for the ‘bud’ logo as a collective mark.

As a collective mark, the ‘bud’ logo may be used by ACO members when referring to their ACO membership. However, it is our understanding ACO membership does not require applicants to abide by any particular standards or procedures in relation to organic produce. As a result, AUS-QUAL is of the view that if the ‘bud’ logo is approved also as a certification mark, there will be a high level of confusion in the minds of both organic operators and consumers. That is, it will not be immediately obvious to many whether the ACO ‘bud’ logo denotes that a product is a certified organic product or simply that the seller of that product is simply a member of the ACO.

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4. **Competition concerns**

In its assessment of the CTM Application, the ACCC must, among other things, consider whether the CTM Application raises any competition concerns in relation to the use of the CTM.

AUS-QUAL considers that the CTM does raise the potential for anti-competitive effects in the certification sector in Australia.

As set out in the previous section, the use of the ACO ‘bud’ logo with the words “Australian Certified Organic” will clearly create some level of confusion for businesses operating in the organic industry and consumers of organic products. AUS-QUAL is strongly of the view that this confusion will have the direct effect of providing the ACO with an unfair competitive advantage in relation to certification services in Australia.

As set out above, unlike other jurisdictions, Australia does not have a single certification seal for organic produce. There are seven certification organisations that are authorised to administer certification – each with its own certification mark. As a result, to the extent that Australian consumers or business are under the impression that the ACO’s CTM is the national mark or seal for organic certification in Australia, the other Australian certifiers are put at a significant and unfair competitive disadvantage.

AUS-QUAL is of the view that if the ACCC approves the CTM the confusion with regard to organic certification process in Australia will only grow. To the extent that the ACO may benefit from that confusion, the other certification services in Australia will be harmed.

Further, AUS-QUAL is also of the view that, to the extent that the ACO is falsely considered to be the single ‘national certifier’, the ACO would be placed in a position of significant power in the market. In those circumstances, access to the ACO CTM would be highly sought after with many perceived benefits from those businesses seeking supposed ‘national’ certification. AUS-QUAL does not consider that market power built on a false premise is healthy for competition in the sector.

Given the competition concerns raised by the CTM Application, AUS-QUAL does not consider that the ACCC can be satisfied that the CTM meets the relevant criteria for acceptance by the ACCC.

We thank you again for the opportunity for AUS-QUAL to contribute to your processes in relation to this CTM Application and we look forward to hearing from you about its progress.

If there are any questions or if you would like AUS-QUAL to elaborate further on its view, please do not hesitate to contact me on the email or numbers below.

Yours sincerely

[Signature]

Jan C. King
Managing Director
AUS-QUAL Pty Ltd