Dear Dr Chadwick

RE: Certification Trade Mark No. 1252568 – Australian Organic Ltd

I refer to your letter dated 30 July 2013.

Your letter noted that Australian Organics Ltd has applied for a certification trade mark (CTM) for organic produce and asked for information from interested parties in relation to this application.

Objections to the Australian Organics CTM Application

The Department of Agriculture, Fisheries and Forestry (DAFF) has two primary objections to the proposed registration and use of the Australian Organics Ltd CTM. These are that:

- use of the CTM in accordance with the proposed rules (Australian Certified Organic Standard 2013) would be likely to mislead and/or deceive consumers; and
- use of the CTM on organic products which are exported may be contrary to law.

We have discussed these points in further detail below.

DAFF's Role in Certifying Organic Produce – the National Standard

DAFF's Organic and Bio-Dynamic Program provides policy advice and verification services to the organic and bio-dynamic export sector in Australia.

As part of this, DAFF administers the Export Control (Organic Produce Certification) Orders (the orders). These orders prohibit the export of produce described as organic, bio-dynamic, biological, ecological or any other word of similar import, unless an organic produce certificate (OPC) has been issued. The purpose of this restriction is to protect Australia’s reputation in export markets.

The National Standard for Organic and Bio-Dynamic Produce (the National Standard) administered by DAFF details the minimum standards for production, processing and labelling of organic produce that must be met in order for organic produce to obtain an OPC. The National Standard has been based on relevant international standards.

Currently, seven organisations are approved by DAFF to inspect organic produce and issue OPCs. There is scope for further organisations to be approved by DAFF. In short, whilst exporters must obtain certification, there is competition amongst the bodies that provide this certification.
The Australian Standard

Standards Australia released its standard AS6000-2009, the Australian Standard for Organic and Biodynamic Produce (the Australian Standard), on 9 October 2009. This standard was developed by a committee comprising organic industry stakeholders, including representatives of organic retailers, manufacturers, producers, certifiers, consumer groups, the Organic Federation of Australia and relevant government agencies. The Australian Standard was initially based on edition 3.4 of the National Standard.

DAFF has continued to be involved in maintenance of the Australian Standard through its membership on the appropriate Standards Australia committee, FT-032.

Is the proposed CTM likely to be misleading and/or deceptive?

DAFF believes that use of the CTM proposed by Australian Organics Ltd is likely to be misleading or deceptive.

DAFF is concerned about use of the words ‘Australian Certified’ as part of the CTM.

Whilst DAFF recognises that use of the word ‘Australian’ does not necessarily indicate the mark is backed by the Australian Government, this may be a reasonable inference by domestic consumers, and more particularly by consumers in other countries.

These words may cause consumers to incorrectly believe that:

- the Australian Government has certified the product as organic or has authorised the certification
- Australian Organics Ltd is the peak industry body and/or that its private standard, being the Australian Certified Organic Standard 2013, is a widely accepted industry standard.

Also, the words ‘Australian’ and ‘Australian Certified Organic’ are currently used in the organic market to certify compliance with the National Standard. In particular:

- a mark bearing the words ‘Australian Certified Organic’ is approved as an official mark under the Export Control Act 1982 (Cth)
- in addition to providing an export certificate, DAFF approved certifying organisations can authorise producers to attach an ‘Australian Government Certified’ mark (Annexure A) to their produce. This mark is attached on a voluntary basis, but assists producers to demonstrate that their organic and bio-dynamic produce has been certified as meeting the National Standard. While this mark is primarily intended for goods that will be exported, products bearing this mark are routinely sold in the domestic market.

DAFF also believes that use of the CTM proposed by Australian Organics Ltd is likely to be misleading or deceptive because:

- in addition to various overseas standards and the private standards used by certifiers, there are already two national standards: the Australian Standard and the National Standard. The proposed CTM effectively seeks to establish a “standard” that is different from both the National Standard and the Australian Standard, but represents itself as having national significance
- when DAFF conducts audits of approved certifying organisations (and some other operators), DAFF assesses compliance for export eligibility against the National Standard, not the proposed Australian Organics Ltd standard.
consumers may incorrectly believe that products endorsed with the CTM meet the requirements for certification under either the National Standard and/or the Australian Standard.

Is the proposed CTM likely to have competition concerns?

DAFF believes that if consumers are misled, as discussed above, this could undermine the competitiveness of a significant number of competitors in the market.

Perceptions that the CTM, and underpinning (private) standard, implies government involvement in the certification process could unreasonably advantage Australian Organic Ltd to the detriment of its competitors. This is particularly the case as Australian Organic Ltd is one of the two large organic certifiers in Australia. Smaller certifiers may not have the resources to compete or to address the misperceptions of consumers relating to the CTM.

Is the proposed CTM likely to have other concerns?

Unconscionable conduct

DAFF understands that, in the past, Australian Organic Ltd (formerly Biological Farmers of Australia) has certified product other than to standards that may reasonably be accepted as organic, for example, certifying bottled drinking water. Attention would need to be given to ensuring the proposed CTM was not misused or used deceptively.

Public detriment

DAFF has no comment on public detriment matters beyond those discussed above.

Product safety and information

Organic and biodynamic food products sold in Australia must, like any other food whether produced domestically or imported, comply with the Australia New Zealand Food Standards Code. It is therefore unlikely that the CTM would be applied to domestically produced and certified foods that fail to meet relevant food safety standards.

However, a question may arise as to whether the proposed standard meets consumer expectations of organic foods. Is this a consideration for the ACCC? Also, what would be the requirement for Australian Organic Ltd to inform the ACCC if it was to amend its standard? For example, to allow certification of bottled drinking water, which is not permitted under the National Standard or the Australian Standard.

Is the proposed CTM contrary to law?

Section 14 of the Export Control Act 1982 (Cth) states that:

(1) A person shall not, in contravention of the regulations:

(a) manufacture, have in his or her possession, apply, alter or interfere with an official mark;

(b) manufacture, have in his or her possession or apply a mark resembling, or apparently intended to resemble or pass for, an official mark; or

(c) manufacture or have in his or her possession an official marking device.

Penalty: Imprisonment for 5 years.
In subsection (1), strict liability applies to the physical element of circumstance, that the person’s conduct contravenes the regulations.

Official Marks for organic produce were declared under the 2003 Instrument of Approval. This instrument is continued in force under Section 18.02 of the Export Control (Prescribed Goods- General) Order 2005.

DAFF’s view is that there is a clear resemblance between the proposed CTM and the Official Marks.

Accordingly, to the extent that the Australian Organics Ltd CTM is used on export produce, any use of the proposed CTM may constitute an offence under section 14 of the Export Control Act 1982 (Cth).

Whilst use of the proposed trade mark for goods that were solely for sale within Australia would not breach section 14, producers often do not know when producing goods whether they will be exported or sold within the domestic market.

Please feel free to contact Mr Chris Medwin or Mr Ian Lyall on (02) 6272 3630 if you would like to discuss any of the matters raised in this letter.

Yours sincerely

Colin Hunter
Assistant Secretary
Food Exports Branch

30 August 2013
ANNEXURE A – Australian Government Certified Mark