



22 November 2018

## **Initial assessment Statement of Reasons - Certification Trade Mark applications 1852559, 1852561, 1852562 and 1852563 lodged by OxoPak Pty Ltd**

### **Summary of initial assessment**

1. In accordance with the *Trade Marks Act 1995* (TMA) and the Trade Marks Regulations 1995 (TM Regulations), the ACCC has made an initial assessment of certification trade mark applications 1852559, 1852561, 1852562 and 1852563 (CTM applications) lodged by OxoPak Pty Ltd (OxoPak).
2. The ACCC's initial assessment is that it proposes **not** to approve the CTM applications.
3. CTMs can provide consumers with certainty about the particular standard a product or service meets. In this case the ACCC is concerned that there is a disconnect between what is being tested under the certification regime – that plastic packaging meets specified standards of 'oxo-biodegradability' – and what the CTMs may represent to consumers.
4. In particular, the four marks provide an impression about the net positive impact of the plastic product on the land and marine environment and food safety, compared to plastics that are not oxo-biodegradable. For the purpose of assessing these CTMs the ACCC has focussed its assessment on whether consumers would be misled by the food safety and environmental claims made by the marks.
5. Additionally, some key certification requirements are not specified within the CTM Rules or are subject to the discretion of OxoPak. It is important that certification requirements are clear, unambiguous and specified within the CTM Rules, as discretionary or ambiguous criteria leave open the risk that consumers could be misled about the certification process and standards.
6. OxoPak and interested parties have one calendar month from the date IP Australia publishes the ACCC's initial assessment in the Official Journal of Trademarks to lodge written or oral submissions and/or call a formal conference in relation to the initial assessment. OxoPak is able to respond to the ACCC within this period, including by amending the CTM Rules to satisfy the ACCC's concerns. However, the ACCC's concerns are partly based on the impression created by the marks themselves, which cannot be modified under the current applications.

### **OxoPak's CTM applications**

7. OxoPak lodged the CTM applications on 17 June 2017. IP Australia forwarded the CTM applications to the ACCC in September and October 2017.
8. The marks the subject of the CTM applications are as follows:

CTM 1852559



CTM 1852561



CTM 1852562



CTM 1852563



9. In April 2018, OxoPak provided revised CTM rules for the ACCC's consideration. A copy of OxoPak's proposed revised rules are attached.
10. The rules are identical for each mark.
11. In June 2018, the ACCC commenced a public consultation process in respect of OxoPak's proposed revised rules.<sup>1</sup>
12. The ACCC received four submissions, all of which are available on the ACCC's online hub. Broadly, each interested party raised concerns that the CTMs may mislead consumers about the nature or quality of the products bearing the marks.
13. OxoPak responded to the interested parties' submissions. Among other things, OxoPak submitted that the CTMs are only intended to certify that products are 'oxo-biodegradable'. OxoPak stated that it is important to distinguish 'oxo-biodegradable' technology (the subject of the certification standards) from 'oxo-degradable' plastic technology.
14. While there are a range of oxo-biodegradability standards and technologies, in general oxo-biodegradable plastics can be characterised as plastic products containing additives which are designed to accelerate the deterioration of the plastics through a two-stage process. Firstly, the plastic materials fragment into very small pieces, triggered by UV radiation or heat exposure (**oxo-degradation phase**). Secondly, under certain conditions, the fragments are further broken down by micro-organisms, potentially all the way down to leaving minimal residues or plastic fragments behind (**oxo-biodegradation phase**).

### ACCC's role in assessing CTMs

15. Broadly, the ACCC's CTM role involves assessing and approving rules for the use of CTMs and the attributes of the approved certifiers.
16. In particular, under section 175(2) of the TMA, the ACCC must be satisfied that:
  - (a) the attributes a person must have to become an approved certifier are sufficient to enable the person to assess competently whether goods and/or services meet the certification requirements
  - (b) the rules are not to the detriment of the public (in this context, the ACCC considers detriment to the public means 'harm to the community in addition to the consumer protection concerns and competition concerns')<sup>2</sup>
  - (c) the rules are satisfactory having regard to regulation 16.6 of the TM Regulations which requires the ACCC to have regard to the following criteria:

<sup>1</sup> <https://consultation.accc.gov.au/mergers-and-adjudication/oxopak-pty-ltd-certification-trade-mark-applicatio-1/>

<sup>2</sup> See *Certification trade marks – the role of the ACCC* (2011) p 8.

- i. the principles relating to restrictive trade practices set out in Part IV of the *Competition and Consumer Act 2010* (CCA)
  - ii. the principles relating to unconscionable conduct set out in Part 2.2 of the Australian Consumer Law as contained in Schedule 2 to the CCA (ACL), and
  - iii. the principles relating to unfair practices, product safety and product information set out in the ACL.
17. In assessing CTM applications, the ACCC may require amendments to the rules.
18. More information about the ACCC's role in the CTM approval process can be found in the ACCC's publication [Certification trade marks: the role of the ACCC](#).

## Operation of OxoPak's CTM scheme

### **Certification requirements**

19. To be eligible to use the CTMs, an applicant must be able to demonstrate compliance with an applicable standard. Under the rules, this involves either providing evidence of any test results or certifications, or if Oxopak requires, testing by a laboratory according to a recognised method of measuring the oxo-biodegradability of plastic against one or more of the following standards:
  - a. American Standard ASTM D6954-04 – Standard Guide for Plastics that Degrade in the Environment by a Combination of Oxidation and Biodegradation
  - b. British Standard 8472 – Packaging – Method for determining the biodegradability, oxo-biodegradability and phyto-toxicity of plastics
  - c. French Accord T51-808 Plastics assessment of oxo-biodegradability of polyolefin materials in the form of films
  - d. Swedish Standard SPCR 141 Polymeric waste degradable by abiotic and subsequent biological degradation – requirements and test methods
  - e. UAE Standard 5009:2009 Standard & Specification for Oxo-Biodegradation of Plastic bags and other disposable plastic objects
  - f. ISO 17556 Plastics – determination of the ultimate aerobic biodegradability in soil by measuring the oxygen demand in a respirometer or the amount of carbon dioxide involved; and/or
  - g. any other Standard determined by OxoPak to be a legitimate Standard of Degradability, Biodegradability and Eco-Toxicity.
20. Applicants must also comply with other requirements, not specified within the CTM Rules, including: 'Guidelines for OxoPak Approval', 'OxoPak Marketing Guidelines', and any other OxoPak policies relevant to the certification scheme, including any amendments made to those documents.
21. OxoPak, in its discretion, may permit sub-licensing of the marks. A sub-licensee must comply with the Rules in the same way as a licensee.

### **Process for determining whether certification requirements are met**

22. An applicant must lodge an application with OxoPak and include any test results and certifications that demonstrate compliance with the applicable standard. If OxoPak requires, the applicant must submit samples of the product to enable laboratory testing to establish if the product is oxo-biodegradable in accordance with one or more of the applicable standards.

23. OxoPak will grant a licence if it is satisfied, either on submission of relevant documents without testing or after testing, that the product meets the requirements.

### ***Ongoing compliance***

24. To maintain certification, licensees must:
- comply with OxoPak's policies and any changes to the policies required by law and any new or amended OxoPak policies
  - immediately comply with any directions or instructions from OxoPak regarding non-compliance with an OxoPak policy
  - respect the aims and objectives of OxoPak and not act in a manner adverse to the interests of OxoPak or bring the CTMs or OxoPak into disrepute
  - not engage in any misleading or deceptive conduct in relation to the trade marks or OxoPak.
25. OxoPak will provide to the Registrar of IP Australia upon request, and will make available to the public by appointment on a confidential basis, copies of the Guidelines For OxoPak Approval and OxoPak Marketing Guidelines and any other OxoPak Policies relevant to the certification scheme, including any amendments made to those documents.

### ***Other requirements approved users must meet***

26. In addition, approved users must, amongst other things:
- pay a licence fee
  - ensure the product meets the requirements of all applicable regulations that are not subject of the standard, including quality, safety, health and environmental regulations.

### ***Dispute resolution***

27. The rules require that written notice must be given to the party (or parties) in connection with a dispute over the rules. The written notice must specify the nature of the dispute and upon receipt of the notice, the parties must attempt to agree upon a procedure for resolving the dispute.
28. If the dispute is not resolved or a procedure is not agreed to, the dispute is referred to the Resolution Institute (Victoria) for mediation in accordance with the Institute's Mediation Rules. If within ten business days the parties have not agreed upon the mediator or any other relevant matters, these matters will be determined in accordance with the Institute's Facilitation Rules.
29. These steps must be taken before any initiation of court or arbitration proceedings (other than for urgent interlocutory relief).

## **ACCC's Initial assessment**

### ***What the marks mean to consumers***

30. Whether consumers may be misled by the marks is an important aspect of the ACCC's assessment of these CTM applications. Many consumers place value on products which are 'environmentally friendly' or are positive for the environment. Environmental claims can be a powerful marketing tool, as companies are increasingly using environmental claims in an attempt to differentiate themselves and their products from their competition.

31. The ACCC considers that OxoPak's marks convey an impression to consumers that the certified products are good for the environment, marine life and food safety. In particular, that the plastic is certified as food safe and food grade, is harmless to marine fauna if it enters waterways (regardless of the state of the materials or any conditions required for deterioration), and has no harmful impact as land waste, regardless of the method consumers may use to dispose of it.
32. While OxoPak's CTM Rules indicate that users should ensure that their products meet regulations not covered by the Rules (including quality, safety, health and environmental standards), these attributes are not the subject of OxoPak's certification scheme and are not assessed or audited as part of the certification requirements.
33. The ACCC notes OxoPak's view that the CTMs show that certified plastic products comply with standards required for those products to be considered oxo-biodegradable. Oxopak's position is that oxo-biodegradable plastics meet higher standards of degradability, biodegradability or eco-toxicity than non-oxo-biodegradable plastic products and are therefore positive for the environment.
34. The ACCC is aware of conflicting information about the impact on the environment of oxo-biodegradable plastics. For example, a Report to the European Commission on the impact of oxo-biodegradable plastics on the environment found, among other things, that there is:
  - evidence that oxo-biodegradable plastics can biodegrade under certain circumstances, however there is still doubt as to whether they do so fully or within reasonable time periods in practice (due the significant effect of external factors such as heat, light and moisture on the level of biodegradation)
  - evidence that oxo-biodegradable plastics pose a risk to plastics recycling, as it is impossible to fully control the level of aging experienced by oxo-biodegradable plastics during the product use phase
  - insufficient evidence showing biodegradation of oxo-biodegradable plastic in the marine environment
  - insufficient evidence that in soil, fragmented and potentially partially degraded plastics and their additives pose no negative effects to soil quality or ecosystems.<sup>3</sup>
35. Even if it is accepted that oxo-biodegradable plastics break down more quickly than non-oxo-biodegradable plastics, there is still a period where the plastic bags and containers are dangerous to marine life and the environment. As noted, it is difficult to predict timelines for the process of biodegradation, due to the effect of external factors such as heat, light and moisture on the level and rate of biodegradation.
36. The ACCC considers that consumers are likely to be misled by the impression created by the marks and as such the CTMs and rules are likely to be of detriment to the public. In particular, the marks convey a positive value-statement in terms of environmental and food safety standards, however the rules provide a certification scheme that tests whether a product meets one of a number of national and international standards of oxo-biodegradability.

***Unclear and/or discretionary criteria***

37. It is important that certification rules comprise the requirements that potential and approved users must meet in order to be certified under the CTM Rules. Among other things, this allows the ACCC to assess whether the CTM Rules may raise

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<sup>3</sup> <https://publications.europa.eu/en/publication-detail/-/publication/bb3ec82e-9a9f-11e6-9bca-01aa75ed71a1>

consumer protection, competition or other public detriment concerns. It also provides transparency to consumers and potential users about the standards underlying the certification scheme.

38. In this case, the ACCC is concerned that a number of the rules governing eligibility to use the CTM are not sufficiently robust, sit outside the CTM Rules and are subject to the discretion of OxoPak as the CTM owner and approved certifier. In particular:
- It is unclear from the CTM Rules whether applicants (including sub-licensees) must always submit samples and/or evidence of testing, or whether (and in what circumstances) OxoPak will exempt users from submitting samples and/or evidence of testing.
  - OxoPak has the discretion to nominate any other standard it considers to be a 'legitimate Standard of Degradability, Biodegradability and Eco-Toxicity'. This leaves it open for OxoPak at its discretion to allow users to comply with a standard of oxo-biodegradation which may not conform to what consumers understand to be oxo-biodegradability and therefore consumers may be misled.
  - OxoPak, in its discretion, may nominate a reasonable period of time for users to rectify a breach of the Rules. This creates the risk that use of the mark may continue in circumstances where the certification requirements have not been met and consumers may be misled during this period.
39. The ACCC is concerned that a number of the CTM Rules governing eligibility to use the CTM are not sufficiently robust and/or are subject to the discretion of OxoPak. It is important that the certification requirements are clear, unambiguous and specified within the CTM Rules, as discretionary or ambiguous criteria leave open the risk that consumers could be misled about the certification process and standards. It is also important that the CTM Rules are clear and robust, as this is the basis against which approved certifiers assess whether products meet the certification requirements.
40. Accordingly, the ACCC is not satisfied that the CTM Rules are not to the detriment of the public or are satisfactory having regard to the principles relating to unfair practices, product safety and product information set out in the ACL.

## Conclusion

41. The ACCC's initial assessment of CTMs 1829559, 1852561, 1852562 and 1852563 is not to give a certificate under section 175(2) of the TMA.
42. Without a certificate from the ACCC, the Registrar of Trade Marks must refuse the CTM Application.

## Next steps

43. The ACCC now invites submissions in response to this initial assessment. In addition, OxoPak or any other interested person who wishes to comment on this initial assessment, may request that the ACCC hold a formal conference to discuss the initial assessment.
44. Submissions may be sent to [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au) or to:

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

45. IP Australia will publish the ACCC's initial assessment in the Journal of Trademarks (see also [IP Australia Trade Mark Search > CTM Application Number > View details > History](#)). Parties have one calendar month from that date to lodge a written or oral submission with the ACCC and/or request that the ACCC hold a formal conference.
46. Before making a final decision on the CTM Applications, the ACCC must provide a copy of each public submission to the Applicant and will invite the Applicant to make a submission in response.
47. After considering any written or oral submissions, and holding a formal conference (if one is called), the ACCC will proceed to make its final assessment.
48. If the ACCC is satisfied that the relevant criteria are met, the ACCC will provide a certificate stating that it is so satisfied to the Applicant and the Registrar. A certified copy of the rules will also be provided to the Registrar and the Applicant.
49. If the ACCC continues to not be satisfied that the relevant criteria are met, the ACCC must notify the Applicant and the Registrar of its decision not to give a certificate. The Registrar must publish the matter in the Official Journal in accordance with the Regulations.
50. An application may be made to the Administrative Appeals Tribunal to review a decision by the ACCC not to give a certificate.