



23 May 2019

Final Assessment Statement of Reasons - Certification Trade Mark application 1852562 lodged by OxoPak Pty Ltd

Summary of Final Assessment

1. In accordance with the *Trade Marks Act 1995* (**TMA**) and the Trade Marks Regulations 1995 (**TM Regulations**), the ACCC has made a Final Assessment approving certification trade mark application 1852562 lodged by OxoPak Pty Ltd (**OxoPak**). CTM 1852562 is governed by the 'Certification Rules for Planet OxoPositive Logo' (**Rules**).
2. On 22 November 2018, the ACCC issued an Initial Assessment proposing not to approve this Certification Trade Mark (**CTM**) and three other related CTMs. This prompted Oxopak's to withdraw three of the four CTMs for which it had originally sought approval, and to substantially revise the Rules for the remaining CTM. For the reasons set out below, following these changes the ACCC is now satisfied that the concerns we identified in our Initial Assessment have been addressed.
3. CTMs can provide consumers with certainty about the particular characteristics of, or standard met by, a product or service. The ACCC's role in assessing CTMs involves considering and approving rules for the use of the CTM. The ACCC assesses whether CTM rules meet the requirements set out in the TMA and TM Regulations, including in relation to competition and consumer protection principles set out in the *Competition and Consumer Act 2010* (*Cth*) (**CCA**).
4. A number of interested parties raised concerns about the CTM, including some who continue to be concerned despite the changes OxoPak made following the ACCC's Initial Assessment. In particular, these parties have fundamental concerns about the environmental impact of certain types of plastic, and they are concerned that consumers who see the CTM may consider that the products bearing the mark provide an environmental advantage over other products, which these parties believe is untrue.
5. The ACCC has considered these submissions as part of its Initial and Final Assessments of the CTM and its associated Rules.
6. Many consumers consider the environmental impacts of products they use and as such they look for products which are in some way 'environmentally friendly'. The question of whether consumers may be misled by the mark is an important aspect of the ACCC's assessment of this CTM application.
7. In light of substantial changes made to the Rules following the Initial Assessment, the ACCC now considers that what is being tested under the certification regime – that plastic packaging meets specified standards of 'oxo-biodegradability' – is consistent with what the CTM represents to consumers.

8. In addition, the Rules require that details about the certification standards must be displayed in conjunction with the mark, and promotional materials associated with the packaging displaying the mark must state that the packaging is 'environmentally preferable'. These changes further reduce the risk that the ACCC raised in its Initial Assessment that consumers may be misled by the marks, including because the original CTMs included explicit or implicit claims about marine life safety, food safety, and 'land zero waste' properties.
9. The ACCC is satisfied that the Rules governing CTM 1852562 dated 3 April 2019 fulfil the requirements under the TMA and TM Regulations.
10. The ACCC is also satisfied that the Rules dated 3 April 2019 are unlikely to be misleading or anti-competitive, and that OxoPak, as the approved certifier, has the attributes necessary to competently assess whether a product meets the certification requirements.
11. Therefore, the ACCC has decided to issue a Final Assessment approving CTM 1852562.
12. Importantly, the ACCC's assessment has focussed on whether consumers are likely to be misled by the CTM and has not sought to form a definitive view about the attributes of oxo-biodegradable plastics, or about regulation of plastics more broadly.
13. In this context, the ACCC observes that many businesses, industry groups and governments are considering or introducing waste prevention and management strategies designed to encourage the consumption of more sustainable and environmentally friendly products (such as strategies to reduce the use of single-use plastic products). The ACCC's approval of this CTM does not prevent such strategies or initiatives.

14. OxoPak's CTM applications

15. OxoPak lodged CTM applications 1852559, 1852561, 1852562 and 1852563 on 17 June 2017. IP Australia forwarded the CTM applications to the ACCC in September and October 2017.
16. Prior to the ACCC's Initial Assessment, the ACCC received four submissions from interested parties, raising concerns about the CTM. The submissions are available on ACCC's website and were taken into account in the ACCC's consideration of the assessment of this CTM application.
17. On 22 November 2018, the ACCC released an Initial Assessment proposing not to approve CTMs 1852559, 1852561, 1852562 and 1852563. The Initial Assessment was published by IP Australia in the Official Journal of Trade Marks and also published on the ACCC's Consultation Hub. Interested parties were invited to make submissions and, or, request a conference in relation to the ACCC's Initial Assessment. At that time, there were no submissions made and a conference was not requested.
18. On 8 March 2019, OxoPak advised that it has elected to withdraw CTMs 1852559, 1852561 and 1852563, and made submissions with respect to the remaining CTM (CTM 1852562).
19. On 3 April 2019, OxoPak provided revised Rules for use of the remaining CTM illustrated below (CTM 1852562).



CTM 1852562

20. Accordingly this final assessment applies only to CTM 1852562.

Submissions following Initial Assessment

21. Given that OxoPak withdrew three of the CTMs, and substantially revised the Rules from the remaining CTM, the ACCC invited submissions from interested parties in respect of the revised Rules.
22. In April 2019, the ACCC received submissions from the Boomerang Alliance, Planet Ark and APCO, and Australian Bioplastics Association¹ which broadly raised concerns including that:
 - consumers may still be misled by the claims of environmental benefits of the products bearing the mark
 - products bearing the mark may disintegrate under some conditions, and plastic fragments are a pollutant
 - products bearing the mark are not compostable
 - products bearing the mark biodegrade under specific controlled conditions, and will not biodegrade in the open environment
 - products bearing the mark may potentially contaminate and destabilise the stocks of recyclable material.
 - inclusion of the words 'environmentally preferable' in conjunction with the mark may still confuse consumers, as it does not explain what the product is preferable to.
 - consumers do not investigate the validity of claims, or understand the nuanced nature of different terminology
 - standards referenced in the rules are guides for comparing the performance of materials, rather than a performance or standard specification.

ACCC role in assessing CTMs

23. Certification trade marks are intended to indicate that a product or service meets a particular standard or has particular characteristics.
24. Broadly, the ACCC's CTM role involves assessing and approving rules for the use of CTMs and the attributes of the approved certifiers.
25. In particular, under section 175(2) of the TMA, the ACCC must be satisfied that the:

¹ The public submissions are available on the ACCC's website.

- (a) 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) rules are not to the detriment of the public. The ACCC considers, in this context, detriment to the public means ‘harm to the community in addition to the consumer protection concerns and competition concerns’²
 - (c) rules are satisfactory having regard to regulation 16.6 of the TM Regulations which requires the ACCC to have regard to the following criteria:
 - (i) the principles relating to restrictive trade practices set out in Part IV of the 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.
26. In assessing CTM applications, the ACCC may require amendments to the rules.
27. 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

28. In order to be eligible to display the mark, packaging must contain an oxo-biodegradable formulation that has been certified by an authorised authority to have the following characteristics:
- (a) A degradable plastic product containing an amount of the oxo-biodegradable formulation determined in accordance with the manufacturer’s recommendations will meet:
 - (i) American Standard ASTM D 6954 - Standard Guide for Plastics that Degrade in the Environment by a Combination of Oxidation and Biodegradation; or
 - (ii) British Standard 8472:2011 – Packaging – Method for determining the biodegradability, oxo-biodegradability and phyto-toxicity of plastics; and
 - (b) A degradable plastic product containing an amount of the oxo-biodegradable formulation determined in accordance with the manufacturer’s recommendations will meet regulatory requirements for food contact plastics as established by:
 - (i) EU Regulation No. 1935/2004 - materials and articles intended to come into contact with food; or
 - (ii) Australian Standard AS 2070-1999 – Plastic materials for food contact use; or
 - (iii) US Federal Food Drug and Cosmetic Act
- (‘Certified Characteristics’).³

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

Process for determining whether certification requirements are met

29. Applicants must provide OxoPak with the following:
- A certificate from an Approved Laboratory confirming that the oxo-biodegradable formulation contained in the packaging has the Certified Characteristics. An approved laboratory is a laboratory holding an ISO/IEC 17025 accreditation in the field of degradable plastics testing.
 - A report of test results carried out by an Approved Laboratory or a Registered Laboratory that confirms:
 - A representative test plastic film made with the oxo-biodegradable formulation does not contain heavy metals or other substances of concern.
 - The plastic film made with the oxo-biodegradable formulation undergoes significant molecular weight reduction in accelerated ageing or natural conditions.
 - The degraded residues of abiotic degradation undergo biodegradation.
 - The substrate and products of the biodegradation test (soil or compost and plastic degradation and biodegradation residues) demonstrate no significant eco-toxicological effect.
 - A registered laboratory is a testing laboratory registered by the National Association of Testing Authorities, or equivalent internationally registered laboratory.
30. If OxoPak is satisfied by the certificate issued by the Approved Laboratory, and the report of test results that the packaging contains an oxo-biodegradable formulation having the Certified Characteristics, and that the test results confirm that the product will undergo accelerated oxo-degradation followed by bio-degradation, OxoPak shall issue an OxoPak Certificate in relation to that packaging.⁴

Ongoing compliance

31. In order to maintain an OxoPak certificate, a Licensee must submit a monthly report signed by a Registered Laboratory in relation to packaging covered by an OxoPak Certificate, providing the following information:
- product description
 - production date
 - oxo-biodegradable formulation supplier
 - oxo-biodegradable formulation formulation/grade identifier
 - oxo-biodegradable formulation addition-rate
 - product polymer type/blend
 - date sample was received, and date tested
 - thickness of all test and control samples tested
 - description of the test equipment used
 - test conditions

³ See clause 4 of the rules.

⁴ Clause 6.

- test results.
32. If OxoPak is not satisfied with the information submitted, or it has cause to believe that products carrying the Certification Trade Mark may not have the Certified Characteristics, OxoPak may require that a sample be supplied to OxoPak for re-testing at a Registered Laboratory of OxoPak's choosing, at the cost of the Licensee.
 33. Where the required information is not submitted, or where a re-test shows that a sample does not have the Certified Characteristics, OxoPak shall suspend the OxoPak Certificate in relation to all relevant degradable plastic products until such time that the Licensee can produce certificates from a Registered Laboratory stating that the degradable plastic products meet the Certified Characteristics.⁵
 34. Should a Licensee not pay any fee owing to OxoPak within 90 days of the date of the invoice, OxoPak reserves the right to cancel any OxoPak Certificates held by that Licensee and to immediately terminate authorisation to use the Certification Trade Mark. Should a Licensee use the Certified Trade Mark on any degradable plastic packaging for which it does not hold a corresponding OxoPak Certificate, OxoPak reserves the right to cancel any OxoPak Certificates that are held by that Licensee and to immediately terminate authorisation to use the Certification Trade Mark.⁶
 35. In the event that authorisation to use the CTM is terminated in respect of the packaging, the Licensee must immediately recall those products displaying the CTM and arrange for them to be recycled.⁷

Other requirements approved users must meet

36. The CTM must be displayed along with details of the relevant certification standards.⁸
37. In addition, advertising and promotional materials and any labelling on or associated with the packaging must state that the product displaying the CTM are "environmentally preferable".⁹
38. Licensees must, amongst other things, pay a licence fee.¹⁰

Dispute resolution

39. Any disputes arising:
 - (a) in relation to whether an oxo-biodegradable formulation or specific products have the Certified Characteristics; or
 - (b) in relation to whether specific products are covered by an OxoPak Certificate

will not be subject to formal mediation or arbitration. Submissions may be made in writing to OxoPak, who will then review the request or specific packaging and will provide written reasons for their decision upon review. Any unresolved dispute with regard to a right to use the CTM in accordance with the Rules may subsequently be

⁵ Clause 7.

⁶ Clause 9(a).

⁷ Clause 9(b).

⁸ Subclause 5(b).

⁹ Subclause 5(c).

¹⁰ Clause 8.

referred to a single arbitrator appointed by the Arbitrators and Mediators of Australia.¹¹

ACCC's Final Assessment

Representation

40. Whether consumers may be misled by the use of the CTM is an important aspect of the ACCC's assessment of this application. Environmental claims can be a powerful marketing tool, and companies are increasingly using environmental claims in an attempt to differentiate themselves and their products from their competition.
41. In its Initial Assessment, the ACCC noted concerns about the environmental and other claims that were being made or implied in the four marks at that time, particularly given the context that the ACCC had been provided with conflicting information about the impact on the environment of oxo-biodegradable plastics¹².
42. Three of the four marks that were initially put forward have now been withdrawn, including the marks that included explicit or implicit claims about marine life safety, food safety, and 'land zero waste' properties. The withdrawal of these marks addresses a number of the ACCC's concerns.
43. Some submissions have raised concerns that the products bearing the mark are not compostable. However, the mark and the rules do not imply or claim that the products bearing the mark are compostable.
44. Some submissions have raised concerns that the products bearing the mark are not recyclable, and further that the mark may encourage littering. The ACCC shared the concern in relation to the CTM as originally submitted, including because it included the phrase 'Zero Land Waste'. However, OxoPak has made substantial changes, including the withdrawal of the CTM bearing those words.
45. OxoPak submits that the remaining mark is intended to be used on, and to promote, plastic products that are recyclable, but which are also oxo-biodegradable if they do end up in the environment as litter. The ACCC accepts that the revised Rules and the one remaining CTM are consistent with this intended use, such that consumers are unlikely to be misled.
46. Some submissions have raised concerns that the products bearing the mark may disintegrate into fragments which are harmful to the environment. OxoPak submits that oxo-biodegradable plastics have improved degradability compared to plastics that are only oxo-degradable, in that, once the polymer chains have been sufficiently reduced in length by oxidation, they can be attacked by natural microorganisms to further break down the plastic into carbon dioxide, water and non-toxic residues.
47. OxoPak submits that the certified products are less harmful to the environment than products which are not oxo-biodegradable, and therefore use of the CTM on such products will not mislead consumers. However, as an additional measure to ensure that the CTM is not misunderstood, OxoPak's revised Rules require that the name of the applicable certification standards be displayed alongside the CTM, and that any associated advertising and promotional materials associated with the product must state that the product displaying the CTM has been certified as 'environmentally preferable'.
48. Therefore, taking into account:

¹¹ Clause 10.

¹² The marks at that time included explicit or implicit claims about marine life safety, food safety, and 'land zero waste' properties. Those marks have now been withdrawn.

- the withdrawal of three of the four original CTMs
- OxoPak's proposed amended CTM Rules (including that details of the certification standards be displayed alongside the CTM and that any associated advertising and promotional materials associated with the product must state that the product displaying the CTM is certified as 'environmentally preferable')
- the properties of oxo-biodegradable plastics (including that these products can be recycled, and that the products are less damaging to the environment than competing products when recycling does not occur)

the ACCC considers that consumers are unlikely to be misled by the CTM.

Unclear and/or discretionary criteria

49. In its Initial Assessment, the ACCC outlined concerns that a number of the rules governing eligibility to use the CTM were not sufficiently robust, were contained outside the rules and were subject to the discretion of OxoPak as the CTM owner and approved certifier.
50. OxoPak proposed amendments to its CTM rules including the following:
 - A person seeking certification must provide OxoPak with a certificate from an approved laboratory, stating that the oxo-biodegradable formulation used in the product meets regulatory requirements for food contact plastics, as well as meeting requirements for degradable plastic products according to stated international standards.
 - A person seeking certification must provide OxoPak with a report of test results confirming that a representative plastic film made with the certified oxo-biodegradable formulation meets the stated criteria in relation to degradability characteristics and lack of toxicity in the environment.
 - OxoPak's discretion to nominate any other standard it considers to be a legitimate standard of degradability, bio-degradability and eco-toxicity has been removed
 - OxoPak's discretion to nominate a reasonable period of time to rectify a breach of the rules has been removed.
51. The ACCC considers that the amendments proposed by OxoPak and set out in the revised Rules address those concerns.
52. CTMs are intended to indicate to consumers that a product or service meets a particular standard. Therefore, a key consideration for the ACCC is whether the CTM rules are structured to ensure that products bearing the mark meet the standard indicated by the CTM. It is not the ACCC's role to choose between sets of standards.
53. The ACCC notes that not all biodegradable products comply with compost standards, and that there is no legislative provisions requiring that biodegradable plastics comply with composting standards. In addition, OxoPak has put mechanisms in place to ensure that it is clear that products bearing the products are certified according to standards of oxo-biodegradability. This, combined with the use of the phrase 'environmentally preferable' below the CTM reduces the risk that consumers will be misled regarding the environmental benefit of the product certified.
54. The ACCC also notes that if OxoPak intends for the CTM to become more widely recognised in Australia it will need to promote the mark and the characteristics of

oxo-biodegradable plastics. OxoPak, as with all businesses, is required to comply with the CCA and ACL in its activities.

Final Assessment

55. The ACCC's Final Assessment is that it approves CTM 1852562.
56. The ACCC considers that the representations conveyed by the use of the CTM are unlikely to be misleading or deceptive. The ACCC also considers the CTM Rules are satisfactory having regard to principles relating to restrictive trade practices, unconscionable conduct, unfair practices, product safety and product information.
57. The ACCC considers that the approved certifier demonstrates the attributes necessary to competently certify the products in respect of which the CTM is to be registered and the Rules governing the use of the CTM would not be to the detriment of the public.
58. Accordingly, the ACCC considers that the Rules comply with the criteria in section 175(2) of the TMA.
59. IP Australia will publish a copy of the certified Rules on its website.