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19 September 2017

Dear Sir/Madam

**Certification Trade Mark Application No. 1784876 lodged by K.F McCosker and L.A McCosker – ‘Pasture Raised on Open Fields’**

The Australian Competition and Consumer Commission (the ACCC), in accordance with the provisions of the *Trade Marks Act 1995* (TMA), has completed its initial assessment of the abovementioned Certification Trade Mark. The ACCC's initial assessment is that it proposes to **approve** the CTM application.

Further details about the CTM application and the ACCC's assessment process are outlined below.

**ACCC's role**

The ACCC's role involves assessing and approving rules for the use of CTMs. In general terms, the ACCC is required to assess whether a CTM raises consumer protection, competition or associated concerns. In addition, the ACCC will assess the requirements that goods or services must meet in order to have a CTM applied to them.

More information about the process and the ACCC's role in assessing CTMs can be found in the ACCC's publication [Certification Trade Marks – the role of the ACCC](#).

**The CTM**

Broadly, the CTM is intended to certify that products bearing the mark are derived from livestock raised in a production system that provides unrestricted daytime access to actively managed, pastured range areas in an environment that encourages purposeful use of those areas.

The CTM Rules comprise a set of general requirements, and four separate guidelines which set out the requirements for relating to the pastured production of cattle, pigs, poultry and sheep under the CTM Rules.

**Consultation**

In May 2017, the ACCC commenced a public consultation process about the CTM application. Copies of public submissions received as part of this process are available at:

<https://consultation.accc.gov.au/mergers-and-adjudication/pasture-raised-on-open-fields-proof-ctm-1/>.

In undertaking its initial assessment, the ACCC had regard to submissions received in relation to this application, as well as submissions received in relation to PROOF's previous, related CTM application (CTM 1635381<sup>1</sup>).

The ACCC raised a number of areas of concern with the Applicants, including from submissions by interested parties. The Applicants provided a detailed response, which is available from the above link, and a revised set of Rules.

### **Revised CTM Rules**

In August 2017, PROOF provided revised CTM Rules in response to concerns raised by the ACCC and in response to submissions received as part of the public consultation process.

Key changes to the CTM Rules include that:

- the initial accreditation process includes an independent, third party onsite audit by an inspector appointed by PROOF
- 'unscheduled audits' will be carried out without notice if concerns arise about the compliance status of any licensee (rather than with seven days written notice)
- the wording of the Standards are more concise and clear, and are focussed on animal welfare and the farm environment only so far as it relates to pastured animals, without direct references to sustainability, ethical farming, environmental management or monitoring of animal welfare.

A copy of the revised CTM Rules is available at <https://consultation.accc.gov.au/mergers-and-adjudication/pasture-raised-on-open-fields-proof-ctm-1/>.

### **Summary of assessment**

***The Rules are complete given the criteria in section 173(2) of the TMA.***

We have assessed the CTM Rules and consider that they address the requirements under section 173(2) of the TMA. Specifically, we consider that the Rules sufficiently specify the following information.

#### *Certification requirements*

To be eligible to use the CTM, approved users must comply with the Certification Rules and the requirements of the relevant category of livestock standard.

Across each category of livestock, a key requirement is that:

*[a]ll livestock are raised outdoors with continuous and unrestricted daytime access to paddocks that are suitable for grazing and are provided with shade and shelter. All animals must use the paddocks each day unless: they choose to shelter because of inclement weather, short term confinement for veterinary treatment or when giving birth. Feed supplements are available to ensure all their nutritional needs are met. Animals are kept at a stocking intensity that will ensure forage is always available in an actively managed rotational grazing system. Exception:*

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<sup>1</sup> CTM1635381 was withdrawn by PROOF in 2015. See further: <https://consultation.accc.gov.au/mergers-and-adjudication/proof-pasture-raised-on-open-fields-ctm/>.

*young birds that are not yet fully feathered and poultry that must be protected from predation at night.*

For each of the livestock categories, the standards provide requirements in terms of the following areas.

- Cattle Standard:
  - All cattle are able to range in open fields or paddocks
  - All cattle are kept at stocking densities that will ensure access to forage and grazing
  - All cattle are able to interact with the herd and to carry out natural behaviours
  - Cattle will not be kept in crates or stalls
  - Densely confined production systems and feed lotting are not permitted
  - All cattle will be protected from predation
  - All cattle will be fed to meet their nutritional needs as well as production requirements
  - Record keeping.
  
- Pigs Standard:
  - Pigs are able to range in open fields or paddocks
  - Pigs are kept at stocking densities that will ensure access to forage and grazing
  - Pigs are able to interact with the herd and to carry out natural behaviours
  - Pigs will not be kept in crates or stalls
  - Densely confined production systems and feed lotting are not permitted
  - Pigs will be protected from predation
  - Pigs will be fed to meet their nutritional needs as well as production requirements
  - All pigs will be inspected daily
  - Record keeping.
  
- Poultry Standard:
  - All poultry are able to range in open fields or paddocks
  - All birds are kept at stocking densities that will ensure access to forage and grazing
  - Birds are able to interact with their flock and to carry out natural behaviours
  - Birds will not be kept in cages
  - Densely confined production systems and feed lotting are not permitted
  - All birds will be protected from predation

- Birds will be fed to meet their nutritional needs as well as production requirements
- All birds will be inspected daily
- Record keeping.
- Sheep Standard:
  - All sheep are able to range in open fields or paddocks
  - All sheep are kept at stocking densities that will ensure access to forage and grazing
  - Sheep are able to interact with their flock and to carry out natural behaviours
  - Densely confined production systems and feed lotting are not permitted
  - All sheep will be protected from predation
  - Sheep will be fed to meet their nutritional needs as well as production requirements
  - Record keeping.

*Process for determining whether certification requirements are met*

Under the CTM Rules, an applicant must apply for a Licensing Agreement and complete a self-assessment and declaration questionnaire. This is followed by an on-farm audit conducted by an inspector appointed by PROOF.

PROOF will then complete a review of the applicant's management system, including a specific review of monitoring and performance improvement activities in response to any instances of non-compliance identified in the audit process.

PROOF will assess whether the applicant complies with the PROOF Standards.

*Approved certifiers*

The ACCC must assess whether or not the rules adequately specify the attributes that a person must have to become a person approved to assess whether goods and/or services meet the certification requirements.

Under the CTM Rules, all auditors must:

- a. be approved by PROOF
- b. be an independent third party and may be an individual engaged by PROOF or a person authorised to act on behalf of PROOF
- c. provide evidence of qualifications as a Lead Auditor of Quality Management or Food Safety systems
- d. satisfactorily demonstrate a practical understanding of the livestock industry or systems they will be auditing
- e. satisfactorily demonstrate a practical working knowledge of the PROOF Standards and any other standards relating to livestock or systems to be audited

- f. be capable of carrying out the obligations of an Auditor under the PROOF system
- g. be registered as an auditor with Exemplar Global or an Authorised Authority.

#### *Ongoing compliance*

To maintain certification, the operator shall be subject to the following monitoring and audit mechanisms:

- Annual internal audit for farms: All farm operators will conduct a self-assessment each year, prior to the renewal of the License Agreement. As part of this self-assessment, licensees will address each area of the PROOF Standard applicable to the licensees' operation.
- Annual external audit for food processors: For licensees that are food processors, an annual audit will be undertaken by an auditor appointed by PROOF.
- Random audit: At a minimum, PROOF will carry out an on-farm audit of 20% of all licensed operators each year (with operators selected at random). PROOF will provide seven days written notice of such an audit.
- Unscheduled audits: PROOF will conduct unscheduled audits without notice, if concerns arise about the compliance status of any licensee.

PROOF may employ satellite, aerial or drone photography to monitor a farm remotely.

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

Approved users must, amongst other things:

- notify PROOF of any deviation from the applicable Standard
- ensure compliance with special conditions or directives as specified in license agreements or stemming from correspondence with PROOF
- pay relevant annual licensing fees as specified by PROOF's Licensing Agreement
- ensure compliance with regulatory requirements, including but not limited to, biosecurity, animal welfare and health requirements for food quality and safety.

#### *Dispute resolution*

The ACCC must assess whether or not the rules adequately specify (a) the procedure for resolving a dispute about whether goods and-or services meet the certification requirements and (b) the procedure for resolving a dispute about any other issue relating to the certification trade mark.

A decision not to grant a license shall be reviewed by PROOF if requested in writing, indicating the grounds of dissatisfaction. In a case where a decision is based on an audit report and where PROOF believes there are reasonable grounds for a review exist, PROOF shall seek the advice of the auditor who conducted the Audit and issued the Audit Report and thereafter may seek further advice of a more senior third party auditor and act on that advice when reviewing the decision.

This process will be managed by the PROOF Chief Executive Officer or their nominee with input from the PROOF Executive and/or a Committee appointed by the PROOF Executive for that purpose. Any decision will be in line with the auditor's final recommendation.

In the event that PROOF maintains the decision to refuse a license, the aggrieved party may apply for a review to be conducted by an arbitrator appointed by mutual agreement or by the Chartered Institute of Arbitrators.

In case of a dispute relating to any other issue, the CEO of PROOF will seek to resolve such a dispute within 30 days. If a resolution cannot be reached, the CEO will present the issues to the PROOF Executive or a Committee appointed by the PROOF Executive for that purpose, to seek resolution of the dispute. If the dispute remains unresolved after 60 days, the aggrieved party may apply for a review to be conducted by an arbitrator appointed by mutual agreement or by the Chartered Institute of Arbitrators.

Matters arising in relation to the Rules shall be governed and determined in accordance with the laws of the State of Queensland.

***The Rules satisfy the criteria in 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.<sup>2</sup>

*We consider that the attributes set out in the revised Rules are sufficient to ensure assessors are suitably qualified.*

- (b) the 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.'<sup>3</sup>

*The ACCC considers this CTM seeks to provide a basis for smaller scale producers to differentiate to consumers their less intensive livestock production systems from more intensive, larger scale production systems. We consider that the rules are not to the detriment of the public.*

- (c) The Rules are satisfactory having regard to regulation 16.6 of the Trade Marks Regulations 1995 (TM Regulations) which requires the Commission to have regard to the following criteria:<sup>4</sup>
  - (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.

*We consider that the rules do not raise competition or unconscionable conduct concerns or concerns in relation to unfair practices, product safety and product information.*

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<sup>2</sup> Section 175(2)(a) of the *Trade Marks Act 1995*.

<sup>3</sup> Section 175(2)(b)(i) of the *Trade Marks Act 1995*. *Certification trade marks – the role of the ACCC* (2011) p 8.

<sup>4</sup> Section 175(2)(b)(ii) of the *Trade Marks Act 1995*.

*Registration of the CTM does not prohibit other entities from developing their own marks and registering their own CTM's in relation to the 'pasture raised' livestock production methods.*

*As revised, we consider that the certification requirements and certification process are sufficiently robust such that products bearing the CTM mark will be in accordance with the standards the CTM is intended to convey.*

- (d) The Rules (given the length of certification granted by the CTM owner, dispute resolution procedures and audit procedures) are sufficiently complete and objective taking into consideration the likely industry importance and impact of the CTM and the cost and complexity of gaining certification.<sup>5</sup>

*We consider that the revised rules are sufficiently complete and objective.*

### **Conclusion**

We consider that the Rules comply with section 173(2) of the TMA and satisfy the criteria in section 175(2) of the TMA since the Rules are unlikely to raise concerns regarding misleading and deceptive conduct, competition concerns or concerns under other aspects of the CCA.

The ACCC's initial assessment is that having considered the revised CTM Rules, it proposes to approve the 'Pasture Raised on Open Fields' CTM application 1784876.

### **Next steps**

The ACCC's initial assessment will be published by the Registrar of Trade Marks in the *Official Journal of Trade Marks*. As provided for under the Trade Marks Regulations 1995, the applicant or another person may:

- i. respond to the initial assessment in writing to the ACCC; or
- ii. request that the ACCC hold a conference in relation to the initial assessment, not more than one month after the initial assessment is published in the *Journal*.

If you have any questions about this matter, please contact Elizabeth Batten at [CTMs@acc.gov.au](mailto:CTMs@acc.gov.au) or on (02) 6243 1359.

Yours sincerely



David Hatfield  
Director  
Adjudication

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<sup>5</sup> Incomplete (including Rules which are 'to be settled'), subjective or otherwise unsatisfactory Rules may raise concerns of misleading and deceptive conduct or unconscionable conduct.