



21 December 2018

Initial assessment Statement of Reasons - Certification Trade Mark application 1845132 lodged by Tobacco Free Portfolios Limited

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 application CTM 1845132 (the **Tobacco-Free CTM**) lodged by Tobacco Free Portfolios Limited (the **Applicant**).
2. The ACCC's initial assessment is that it proposes to approve the CTM application.
3. The ACCC's role involves assessing 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)* (the **CCA**).
4. Certification trade marks are intended to indicate that a product or service meets a particular standard or has particular characteristics. Therefore, a key consideration for the ACCC in the assessment of the Tobacco-Free CTM application is whether the CTM and its rules are structured to ensure that financial entities and products using the mark meet the standard indicated.
5. In this case, the Tobacco-Free CTM applies to entities that are responsible for the investment and management of money (such as financial institutions, superannuation funds and other fund managers). It is intended to certify that the relevant funds or specific investment products that an entity manages do not include investments (or indirect investments) in companies involved in the manufacture and/or production of tobacco products, or that the entity has made a clear and unequivocal commitment to divesting such investments within a specific time period.
6. The Tobacco-Free CTM is governed by the *Regulations for the Use of the Certification Trade Mark 1845132 in the name of Tobacco Free Portfolios Limited* (the **Rules**).
7. The Applicant has made several changes to the Rules (outlined below) and the ACCC considers that the amended Rules fulfil the requirements under the TMA and the TM Regulations.
8. The ACCC is satisfied that the amended Rules governing the use of the Tobacco-Free CTM are unlikely to be misleading or anti-competitive, and that the Applicant, as the approved certifier, has the attributes necessary to competently assess whether a financial entity or product meets the certification requirements.

Background

9. The Applicant is a public company incorporated in Australia and is a charitable organisation registered with the Australian Charities and Not-for-profits Commission. Its mission is to '*inform, prioritise and advance tobacco-free finance by eliminating tobacco from investment portfolios across the globe*'.¹

¹ [Tobacco Free Portfolios website](#)

10. The Rules define tobacco-free as the exclusion from investment portfolios of all securities issued by businesses involved in the manufacture and/or production of tobacco products, including subsidiaries and joint ventures. This does not include tobacco growers and/or businesses that transport or retail tobacco products.
11. As such, the Tobacco-Free CTM certifies that an organisation's funds or specific financial products are free from investment in any company that is involved in the manufacture of tobacco products (in accordance with a list of companies and other businesses that must be excluded from portfolios which is maintained by Tobacco Free Portfolios) or that an organisation has demonstrated a clear and unequivocal commitment to divesting such investments within 24 months from the date of making a written commitment.
12. This means, for example, that investing in retailers that sell tobacco products, such as the major supermarkets, does not preclude a fund from using the Tobacco-Free CTM.
13. Organisations responsible for the investment and management of funds, such as superannuation funds, can apply to use the Tobacco-Free CTM to publicly declare their tobacco-free position so that investors that do not want to invest in the tobacco industry can identify suitable investment funds and products to invest in.
14. The Applicants will be audited prior to being certified to use the Tobacco-Free CTM and, once certified, on-going use of the CTM will be subject to regular audit against the Rules.
15. There are three variations of the Tobacco-Free CTM representing different categories, each distinguished by wording and colour (the use of which is specified in the Rules). The three Tobacco-Free categories are:
 - (a) Verified Tobacco-Free (dark green)
 - (b) Verified Tobacco-Free Product (for specific funds only) (medium green)
 - (c) Verified Tobacco-Free Commitment (funds in transition to Tobacco-Free) (light green).
16. The three variations of the mark are illustrated below (incorporating the associated wording and colours required under the rules):



17. In acknowledgment of the complexity of financial markets, any residual tobacco holdings held by a certified financial institution must be less than 0.1 per cent of total investments managed by the institution, with an intention to becoming completely tobacco-free as financial products become available and are considered suitable by the financial institution.

Amendments to the Rules

18. The Applicant has made several changes to the Rules, reducing the likelihood of confusion regarding the CTM. The changes now reflected in the amended Rules include:
 - (a) Use of a ‘tagline’ beneath the CTM logo to make it clear which ‘Verified Tobacco-Free’ category is applied to the fund or product, as displayed in the three images above.
 - (b) A clear definition of ‘Verified Tobacco-Free’ and why the definition is appropriate.
 - (c) Clarification that certification of an organisation applying to use the Tobacco-Free CTM will involve assessment of any indirect exposure that fund has to tobacco companies.
 - (d) Improvements to the processes for resolving disputes and mediation.
 - (e) Clarification of the audit process.

ACCC role in assessing CTMs

19. Broadly, the ACCC’s CTM role involves assessing and approving CTM Rules and the attributes of approved certifiers.
20. In particular, under section 175(2) of the TMA, the ACCC must be satisfied that the:
 - (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’
 - (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.

21. In assessing CTM applications, the ACCC may require amendments to the Rules.

22. 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 the Tobacco-Free scheme

23. A copy of the current proposed rules is available on the ACCC’s [Consultation Hub](#).

Requirements and process for certification

24. The three categories of certification have the following requirements:
 - (a) Verified Tobacco-Free—the financial institution does not hold any investments in any company involved in the manufacture and/or production of tobacco products in accordance with the definition in section 4 of the Rules.
 - (b) Verified Tobacco-Free Product—for the specific products offered and managed, the financial institution does not hold any investments in any company involved in

the manufacture and/or production of tobacco products in accordance with the definition in section 4 of the Rules.

- (c) Verified Tobacco-Free Commitment—the financial institution has made a written commitment to achieve a tobacco-free portfolio, which includes a reasonable plan to become tobacco free within 24 months from the date of the commitment. It must regularly update Tobacco Free Portfolios on its progress towards becoming tobacco free.
- 25. Financial institutions seeking certification must submit with the application form a sworn statutory declaration committing to fulfil the requirements of the CTM Rules, pay all relevant fees, and allow an external auditor to assess the organisation.
- 26. Financial institutions seeking certification under the Tobacco-Free Commitment category must submit with the application form a written commitment to become tobacco-free that includes a reasonable plan for achieving this within 24 months.

Approved certifier

- 27. Tobacco Free Portfolios is the only approved certifier of the Tobacco-Free CTM.
- 28. Tobacco Free Portfolios is responsible for carrying out or arranging certification activities including evaluations and audits, and for maintaining the list of tobacco manufacturers that must be excluded from portfolios.

Additional requirements for approved users

- 29. In addition to the requirements for organisations seeking certification, as set out above, the Rules set out a number of requirements about the use of the CTM by approved users, such as using the associated tagline when displaying the CTM and using the CTM only in conjunction with the products and services specified by Tobacco Free Portfolios.
- 30. Approved users will be advised of any updates to the list of tobacco manufacturers and will be given a reasonable time to adjust their portfolios.
- 31. Approved users must advise Tobacco Free Portfolios if they are no longer tobacco-free as defined in the Rules. The user's licence to use the CTM will be revoked in cases where the status change is intentional. If the change is unintentional, the licence will be adjusted to the Tobacco-Free Commitment category until the tobacco-free position is restored.

Dispute resolution

- 32. The Rules set out the process for resolving a dispute about whether an organisation qualifies to use the CTM and any other issue relating to the CTM.
- 33. 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 provide evidence.
- 34. Within 14 days of the written notice, the parties must convene at least one meeting to seek to resolve the dispute in good faith.
- 35. If the dispute is not resolved within 30 days of the notice, the parties must jointly appoint a mediator. The parties may apply to the President of the Law Institute of Victoria for appointment of a mediator.
- 36. If the dispute is not resolved within 14 days of appointment of a mediator, or any other period agreed to by the parties, the mediation ceases and the parties may take such action as permitted by law and to commence legal proceedings.

Initial assessment

- 37. The ACCC's initial assessment is that it proposes to approve CTM 1845132.

38. The ACCC considers that entities should be able to compete by differentiating themselves by establishing, adopting and/or promoting different standards, provided that the Rules accord with consumer expectations about what the Tobacco-Free CTM means.
39. In this case, the ACCC considers that the certification requirements and process are such that the institutions or financial products bearing one of the three variations of the CTM with the associated tagline will meet the standards it is intended to convey.
40. Accordingly, the ACCC considers that the representations conveyed by the use of the Tobacco-Free CTM are unlikely to be misleading or deceptive. The ACCC also considers the amended Rules are satisfactory having regard to principles relating to restrictive trade practices, unconscionable conduct, unfair practices, product safety and product information.
41. The ACCC considers that the approved certifier demonstrates the attributes necessary to competently certify the goods in respect of which the CTM is to be registered and the amended Rules governing the use of the CTM would not be to the detriment of the public.
42. Accordingly, the ACCC considers that the amended Rules comply with the criteria in section 175(2) of the TMA.

Next steps

43. The ACCC now invites submissions in response to the initial assessment. In addition, the Applicant or any other interested person who wishes to comment on the initial assessment may request that the ACCC hold a formal conference to discuss the initial assessment.
44. Submissions may be sent to ctms@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 *Australian Official Journal of Trade Marks* (see also [IP Australia Trade Mark Search 1845132 > View details > History](#)). Parties will have one calendar month from that time 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 Application, the ACCC must provide to the Applicant a copy of each public submission received 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 requested), 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 Applicant and the Registrar.
49. If the ACCC is not 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 *Australian Official Journal of Trade Marks* in accordance with the TM Regulations.
50. An application may be made to the Administrative Appeals Tribunal to review a decision by the ACCC not to give a certificate.