



Initial assessment of Certification Trade Mark application CTM2078679 filed by AUS-MEAT Limited

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 2078679 (CTM Application) filed by AUS-MEAT Limited (AUS-MEAT).
2. The ACCC's initial assessment is that it is not satisfied that the Application meets the criteria set out in section 175(2) of the TMA and regulation 16.6 of the TM Regulations.
3. In particular, the ACCC is not satisfied that the rules governing the use of the CTM are satisfactory having regard to principles relating to unfair practices, because the ACCC considers that the rules would permit the Fodder Fed logo to be used on goods in circumstances in which its use may mislead or deceive consumers.
4. While the ACCC considers that the meaning of 'fodder fed' is likely not completely clear for consumers, it considers that a reasonable consumer is likely to expect beef marked as "fodder fed" to have been produced in a manner which is materially or relevantly different to other production methods. In addition, the ACCC considers consumers are likely to interpret the Fodder Fed logo as positively distinguishing the meat products to which it is applied from other meat products. The Rules of the Fodder Fed scheme do not ensure that the beef to which it permits the logo to be applied will meet these expectations. Given the consequent risk that consumers may therefore be misled by the use of the logo, the ACCC is not satisfied that the Fodder Fed logo is satisfactory having regard to principles relating to unfair practices.
5. The ACCC invited submissions in response to the application from a range of interested parties including industry groups, government, retailers, and consumer groups. Four public submissions were received in response, including supportive submissions from the Australian Lot Feeders Association and the Cattle Council of Australia, and two submissions which raised concerns (from NSW Farmers and an oral submission from a state Department of Agriculture (the state DoA)). On 21 October 2020, AUS-MEAT provided a submission in response to concerns raised. The issues raised in submissions are considered in the assessment section below. All public submissions are available on the ACCC website on the [public register](#).
6. Interested parties have one month from the date IP Australia publishes the ACCC's initial assessment in the *Official Journal of Trademarks* to lodge a submission and/or call a conference in relation to the initial assessment.

The CTM Application

The applicant

7. The Applicant, AUS-MEAT, is a provider of agribusiness auditing, certification and training services. It is jointly owned by Meat and Livestock Australia Limited (MLA) and Australian Meat Processor Corporation Limited (AMPC).
8. AUS-MEAT has been delegated, by the [Department of Agriculture], operational responsibilities for trade description (including animal raising claims) to ensure truth-in-labelling for meat for export. This means that AUS-MEAT defines the requirements for using trade descriptors for meat intended for export. These requirements are not compulsory for meat intended for the domestic market in Australia.

The CTM application

9. The Applicant filed the CTM Application with the Registrar of Trademarks (the Registrar) on 30 March 2020.
10. In accordance with section 174 of the TMA and regulation 16.2 of the TM Regulations, the Registrar of Trade Marks forwarded the CTM Application and relevant documents to the ACCC on 13 May 2020.
11. The mark the subject of the CTM Application is the “Fodder Fed” logo depicted below. The mark features the same symbol that is featured in other logos used by AUS-MEAT and its subsidiary AUS-QUAL, but features the words “Fodder Fed”.



12. According to the rules, the mark is intended to certify that goods marked with the trade mark have met a number of standards relating to systems management, product integrity, and environmental management. The mark is registered to be used on meat and meat products.
13. The requirements for goods to be certified are set out within the rules in Appendix 4 to the Rules, the Fodder Fed Accreditation Scheme Approved Standards (the Standards). The Standards set out (amongst other things):
 - systems management (staff training, auditing, record keeping)
 - product integrity (appropriateness of sites, induction of livestock to ensure traceability, nutrition, grading or carcasses)
 - environmental management (suitable environmental controls to support community amenity).
14. Relevantly, the Standards require that cattle are provided with unconfined access to graze grass/pasture, with unconfined access to a fodder diet in accordance with the *Minimum Standards for Fodder-Fed Beef* – that is, cattle have unrestricted access to both pasture and fodder. The ARC Framework indicates that this can be achieved through either feeding fodder with access to pasture, or through pasture grazing with access to fodder.
15. The *Minimum Standards for Fodder Fed Beef* is a single page document which requires that:

The cattle must have been fed in a Fodder Fed Accredited Facility during which time the cattle have ad libitum access to a combination of grass/pasture and a fodder-based diet as part of a defined feed program of no less than 30 days.

16. “Fodder” is non-exhaustively defined in the document as follows:

Fodder refers particularly to food given to animals (including plants cut and carried to them) rather than that which they forage for themselves. Fodder includes hay, straw, silage, compressed and pelleted feeds, oils and mixed rations, and sprouted grains and legumes (such as bean sprouts, fresh malt, or spent malt)....

Types of fodder include conserved forage plants (hay and silage), compound feed and premixes, often called pellets, nuts or (cattle) cake, crop residues (stover, copra, straw, chaff, sugar beet waste), freshly cut grass and other forage plants, molasses, seaweed, seeds and grains, either whole or prepared by crushing, milling, etc., sprouted grains and legumes, yeast extract (brewer’s yeast residue), native green grass, bran, oilseed press cake (cottonseed, safflower, sunflower, soybean, peanut or groundnut), green maize, green sorghum and leaves from certain species of trees.

17. The Rules as currently drafted do not appear to set limits on what can be fed to cattle as “fodder” besides specifying that feed does not contain animal products (with the exception of exemptions that may be applied from time to time by statutory authorities), and that the fodder diet accessible to cattle “must have been formulated to ensure that appropriate and complete nutrition is provided throughout the feeding period”.

18. Also of significance is that the Rules do not include requirements for how cattle are fed or kept prior to the minimum 30 day “finishing period”.

Purpose of the Fodder Fed Accreditation Scheme

19. AUS-MEAT advises the Fodder Fed Accreditation Scheme is designed to protect: the interests of the Australian industry in relation to the sale, distribution and export of Australian meat and livestock; the reputation of AUS-MEAT; and the integrity of the AUS-MEAT language.

20. AUS-MEAT submits the Fodder Fed Rules are intended to provide a structured process for primary producers to have a common “middle ground” feeding system – between the established “grass fed” and “grain fed” standards – recognised. AUS-MEAT submits that the absence of a defined raising claim for this common production system “has the potential to undermine the well-established premium grain and grass-fed standards”.

21. AUS-MEAT advises that it developed the Fodder Fed Standards on behalf of the Australian Meat Industry Language and Standards Committee (AMILSC). AMILSC is responsible for the development, approval and maintenance of standards for trade description.

22. AMILSC is made up of representatives from:

- Australian Meat Industry Council
- Cattle Council of Australia
- Sheep Producers Australia
- Australian Lot Feeders Association
- Australian Pork Limited
- Australian supermarkets/independent retailers, and
- The Commonwealth Department of Agriculture and Water Resources.

23. AUS-MEAT advises that, in 2017, AMILSC approved the *Animal Raising Claim Framework for Beef Production Systems in Australia* (ARC Framework)¹ to define raising claims made in the trade description or export documentation about the animal or supply chain. The ARC Framework includes a range of claims including grain fed, grass fed, free range, and fodder fed. The development of the Fodder Fed raising claim was in recognition of the requirement for an accurate definition of the common feeding practices for cattle that did not meet the Grain Fed and Grass Fed criteria. The term “Fodder Fed” was incorporated into the suite of raising claims to acknowledge production systems using both grass and grain/fodder. The standards set out in the Rules for the CTM mirror those for Fodder Fed set out in the ARC Framework.

Background

Grass fed and grain fed cattle

24. Beef products have been marketed in Australia using ‘grass fed’ or ‘grain fed’ claims for some time.² There are a number of certification systems and standards in Australia in relation to these claims, and general agreement within industry as to the meaning of these terms, but there is currently no prescribed standard for grain fed or grass fed production systems concerning beef cattle raised for domestic consumption.
25. In Australia, beef marked as ‘grain fed’ comes from animals which are fed grass for most of their lives and then transition to grain-based diets for the remainder of their lives (known as a finishing period), while confined within feedlots. The number of days during which they are confined varies, the average being between 50 and 120 days. A grain-based diet is higher in energy and growth tends to be faster in grain fed cattle compared to grass fed cattle. The nutritional content of grain-based feeding regimes is prescribed, and overseen by veterinarians and animal nutritionists. Grain finishing cattle can result in increased animal size and the characteristics of the meat produced may differ from grass fed beef (for example, fat content and distribution, flavour and colour, and consistency of beef produced using this method), which is preferred by some consumers and some overseas markets.
26. Beef marked as ‘grass fed’ is sourced from cattle who have been on pasture their entire lives and not confined for the purposes of feeding. Cattle which have entered the feedlot sector at any point in their lives are not eligible for a ‘grass fed’ claim. AUS-MEAT’s standard for ‘grass fed’ beef permits cattle to be fed particular kinds of fodder: grass (annual and perennial), legumes, brassica, browse and cereal grain crops in the vegetative (pre-grain) state, hay, silage, crop residue without grain and other roughage sources are also acceptable. Animals cannot be fed grain or grain by-products.
27. Beef labelled as ‘grass fed’ is generally more expensive than other beef, such that Australian consumers who choose beef labelled as ‘grass fed’ generally pay a premium for this product. Consumers may have a range of reasons for doing so based on their understanding of the raising method and its effects on meat, including perceptions of health benefits,³ the influence of feed type on flavour and meat characteristics, and animal welfare concerns.

¹ https://www.ausmeat.com.au/WebDocuments/Animal_Raising_Claims_Framework_for_Beef_Production_in_Australia.pdf

² Background information is drawn from a range of sources including: Meat and Livestock Australia (mlahealthymeats.com.au/faqs/grassfed-and-grainfed/); Australian Lot Feeders’ Association (feedlots.com.au/faq); and <https://www.farmingahead.com.au/beef/news/1330411/defining-different-beef-finishing-systems>.

³ For example: “The type of feeding regimens used in beef cattle production can influence the level of essential fats in red meat, *due to variations in the fatty acid composition of diet*. Red meat from cattle and sheep fed grain is often perceived as not healthy due to presence of relatively high levels of fat in meat cuts, particularly

5.

28. The ACCC understands that a large proportion of beef cattle in Australia are fed grain while finished on pasture, as a result of a range of factors including feed availability, drought, and to assist them to reach finishing weight before slaughter. Beef from cattle which have been finished on pasture with grain feed does not meet the criteria for either a 'grain fed' or a 'grass fed' claim to be applied to it. There has been debate within the industry for some time as to whether, and how, beef produced using this hybrid method should be labelled or certified. The ACCC understands that much of this debate has been around how to truthfully label such products without damaging or impinging upon the premium claims "grass fed" and "grain fed" used by producers utilising these systems. The ACCC is not satisfied that, as submitted by AUS-MEAT, the absence of a labelling system for this "middle ground" hybrid method undermines the "grass fed" and "grain fed" standards.

Previous relevant CTM applications

29. AUS-MEAT and interested party submissions have referred to a previous CTM application lodged by Ceres Agricultural Company Pty Ltd and approved by the ACCC, which was intended to provide a certification system for beef from cattle which had been raised in a free range environment, and fed on a combination of grain and grass (with a view to ensuring optimal performance as well as animal health and welfare outcomes).
30. The CTM application [1839112](#), lodged by Ceres, was approved by the ACCC in 2018. A number of marks were registered – all contained the text "Certified Free Range Grain and Grass Fed". There were requirements for stocking density, and (after an initial socialisation period of up to 20 days) cattle were required to have been allowed to roam free. The Rules included a range of animal welfare requirements as to how the animals would be handled.
31. A number of industry participants – including AUS-MEAT - objected to the Ceres CTM at the time of the ACCC's assessment, on the basis that the definitions of 'free range', 'grain fed' and 'grass fed' were not consistent with those which had been or were being developed by other industry stakeholders.
32. The mark did not make any representations referring to "fodder". The ACCC approved the mark on the basis that it considered that the mark conveyed that cattle had been free to roam in open pastures most of the time while consuming a mixed diet of grain and grass, and that the rules were structured to ensure that beef bearing the mark met this standard. The ACCC noted it was open to other industry participants to develop their own CTMs and set out requirements for those who wish to use them, provided those CTM rules and marks meet the legal tests under the *Trade Marks Act*.

The ACCC's role in assessing CTM applications

33. Broadly speaking, the ACCC's role is to promote competition, fair trading and regulate national infrastructure for the benefit of all Australians.
34. Under section 175(2) of the TMA, if the ACCC is satisfied that:
- the attributes a person must have to become an approved certifier are sufficient to enable the person to assess competently whether the goods and/or services meet the requirements to become certified; and
 - the CTM rules:
 - i. would not be to the detriment of the public; and

2. _____

3.

- ii. are satisfactory having regard to the criteria prescribed in the TM Regulations, being:
 - o the principles relating to restrictive trade practices set out in Part IV of the Competition and Consumer Act 2010 (CCA);
 - o the principles relating to unconscionable conduct set out in Part 2-2 of the Australian Consumer Law (ACL) (as contained in Schedule 2 to the CCA); and
 - o the principles relating to unfair practices, product safety and product information set out in Parts 2-1 and 3-1 and Part 3-3 of the ACL respectively,⁴

the ACCC must give a certificate to the CTM applicant to that effect.

35. Section 173(2) of the TMA requires CTM rules to specify:

- the requirements that goods and/or services must meet for the CTM to be applied to them
- the process for determining whether goods and/or services meet the certification requirements
- the attributes that a person must have to become a person approved to assess whether goods and/or services meet the certification requirements
- the requirements that a person, who is the owner of the CTM or an approved user, must meet to use the CTM in relation to goods and/or services
- the other requirements about the use of the CTM by a person who is the owner of the CTM or an approved user
- the procedure for resolving a dispute about whether goods and/or services meet the certification requirements, and
- the procedure for resolving a dispute about any other issue relating to the CTM.

36. Regulation 16.3 of the TM Regulations requires the ACCC to make an initial assessment of an application as soon as practicable and:

- a) notify the CTM applicant and the Registrar of the initial assessment; and
- b) state in the notice to the CTM applicant that:
 - i. the initial assessment will be advertised in the Official Journal (Advertisement); and
 - ii. the CTM applicant or another person may respond in writing to the ACCC (Response) or request the ACCC in writing to hold a conference in relation to the initial assessment (such response/request to be made within 1 month of the advertisement).

37. The ACCC must give the CTM applicant a copy of any Responses and invite the CTM applicant and each respondent to make a written submission on each such Response.

⁴ The reference to the *Trade Practices Act 1974* (C'th) in the TM Regulations have been read as references to the Competition and Consumer Act 2010.

38. If a person makes a written request for a conference on a matter included in the ACCC's initial assessment, the ACCC must hold a conference and invite any person who has responded in writing to attend.⁵
39. In considering a CTM application for the purposes of making a decision on the application, the ACCC must have regard to:
- a) the initial assessment;
 - b) any Response that is relevant;
 - c) any relevant submission that is made to the ACCC in writing about the initial assessment, whether or not the submission is made in relation to a conference;
 - d) any relevant oral submission made during a conference; and
 - e) any other relevant matter.⁶
40. If the ACCC is not satisfied of the matters in section 175(2) of the TMA, it must notify the CTM applicant and the Registrar of its decision not to give a Certificate and the Registrar must advertise the matter in the *Official Journal*.⁷
41. Regulation 16.7 of the TM Regulations sets out matters which must be included in the advertisement by the Registrar, including a statement to the effect that the decision may be appealed to the Administrative Appeals Tribunal (AAT).
42. For more information about the ACCC's role in the CTM approval process, refer to Attachment A or the publication *Certification Trade Marks - the role of the ACCC* available at www.accc.gov.au.

ACCC assessment

43. The ACCC has considered the CTM Application and all documents and information provided by Applicant and interested parties and is not satisfied of the matters set out in section 175(2) of the TMA and regulation 16.6 of the TM Regulations. In particular, the ACCC is not satisfied that the Rules are satisfactory having regard to the principles of unfair practices set out in the ACL.
44. Nor does the ACCC consider that the rules adequately specify the matters required in section 173(2) of the TMA, relating to:
- the requirements that goods must meet for the CTM to be applied, and
 - the procedure for resolving a dispute about any other issue relating to the CTM.

Principles relating to unfair practices: s 175(2)(b)(ii)

45. The ACCC is not satisfied that the rules are satisfactory having regard to the principles relating to unfair practices under the ACL. In particular, the ACCC is concerned that the rules permit the Fodder Fed logo to be applied to products in circumstances where its use may mislead or deceive consumers.
46. As the Fodder Fed logo is apparently intended for use on the retail packaging of beef products, representations conveyed by the Fodder Fed logo can be expected to be directed to the public at large.

⁵ Regulation 16.4, TM Regulations.

⁶ Regulation 16.5, TM Regulations.

⁷ Section 175(4), TMA.

47. Accordingly, the ACCC has considered:

- what an ordinary or reasonable consumer is likely to understand by the Fodder Fed logo when applied to beef products, and
- whether this accords with the standards imposed by the Rules on the goods and services to which the Fodder Fed logo is attached.

48. Broadly, the ACCC considers that many consumers:

- are likely to make purchasing decisions in relation to meat based on a range of factors, including some who will choose to pay a premium based on perceptions of quality, flavour, health benefits or animal welfare⁸
- may not have an accurate or in-depth understanding of feeding programs for cattle generally,⁹ or of the impact of these on the meat produced, and therefore may have a low awareness of the precise meaning of most meat claims
- are likely to understand the placement of a certification mark on meat product packaging to indicate the product is in some way positively distinguishable from other meat products due to its quality, flavour, health benefits or animal welfare (even if they do not fully understand the claim), therefore to expect a certified product to be worth paying a higher price for,¹⁰ and
- in particular it appears that a raising claim generally raises the value of meat in the view of consumers.¹¹

49. Assessment of whether the Rules are satisfactory having regard to the principles in relation to unfair practices requires the ACCC to consider consumer perceptions of the meaning and implications of “fodder fed”, and in particular in the context of a certification mark placed on meat packaging, and whether these align with the standards in the Rules.

50. The ACCC considers that consumers are likely to understand from the use of the Fodder Fed logo that the meat on which the logo is displayed:

- comes from cattle which were raised in a particular way (the Raising Claim), and
- has attributes which positively distinguish it from meat products to which the logo is not applied (the Beef Attributes Claim)

51. These representations are discussed in further detail below.

Raising Claim

52. The ACCC considers that consumers are likely to expect that beef displaying the ‘Fodder Fed’ logo has been produced in a specific manner, including that it is from cattle which have been fed a specific diet.

⁸ Morales, Emilio L. et al, “Characteristics of Different Consumer Segments in the Australian Beef Market”, [Australian Agricultural and Resources Economics Society 53rd Annual Conference](#), February 2009.

⁹ Malek, Lenka et al, “Segmentation of Australian meat consumers on the basis of attitudes regarding farm animal welfare and the environmental impact of meat production”, *Animal Production Science*, 2018, 424-434.

¹⁰ Malek, Lenka et al, “Consumer valuation and attitudes towards farm animal welfare claims”, *Proceedings of the 31st Biennial Conference of the Australian Society of Animal Production*, Adelaide, 4-7 July 2016.

¹¹ For example, the then Chairman of the AUS-MEAT Language and Standards Committee was quoted in 2016: “There is a fairly strongly held view around the language and standards group table, that a raising claim is a means of adding value to that ‘middle ground’ product.... If you can call it something, and hold your hand on your heart and back it up with a system that is true-to label, there is a group that believes that there is a certain amount of value yet to be extracted from that ‘middle ground’ (grain assisted beef).”
<https://www.beefcentral.com/news/are-definitions-raising-claims-coming-for-grain-assisted-and-grassfed-cattle/>

53. Without determining precisely what a reasonable consumer is likely to understand 'fodder' to mean, the ACCC considers that consumers: :

- may understand "fodder fed" cattle to have been fed a diet with particular characteristics, which includes hay and similar products but does not include grain, and
- associate 'fodder fed' with 'grass fed' or 'pasture fed' beef, and
- expect that that "fodder fed" cattle have been fed fodder for their entire lives, or for a significant period prior to slaughter.

Consumer expectations of a 'fodder' diet

54. AUS-MEAT submits that the term 'fodder' is commonly associated with a broad definition, consistent with the fact that a wide range of feed type is commonly used to supplement or finish animals as part of this production system. However AUS-MEAT's submission references a range of definitions of fodder, most of which do not include, or specifically exclude, grains. Those which define fodder more broadly are non-industry, generalist sources (such as the Collins Dictionary).

55. Other publicly available industry sources seem generally to refer to "fodder and grain feed" (implying that fodder is not inclusive of grain feed). The Australian Fodder Industry Association considers fodder to include various hay, straw, and silage products, and does not include grains.¹² The Meat and Livestock Australia refers to fodder as being hay or silage.¹³

56. The state DoA submits that 'fodder' generally implies a plant based diet, such as grazed crop or pasture, silage or hay, noting that Standards Australia and the relevant ISO standard refer to fodder to mean plants, explicitly excluding grains. The state DoA submits that the definition of fodder in the scheme rules is so broad it would effectively encompass everything that cattle are being fed across Australia.

57. In making its assessment, the ACCC considers what reasonable consumers are likely to understand as being conveyed by the logo. Whatever the understanding of "fodder" within the industry, the ACCC is not aware of any study into the meaning attached by consumers to the word 'fodder' or how consumers may interpret the use of a certification trade mark featuring the term "fodder fed" on the packaging of meat products. Consumer perceptions of "fodder fed" may or may not be based on or influenced by definitions used within the industry.

58. However, the ACCC is concerned that consumers are likely to understand "fodder" to mean something more specific than the very broad, non-exhaustive definition contained in the Rules.

59. In particular, the ACCC is concerned that many consumers would understand fodder to refer to hay and similar products (along the lines of the recent Buy a Bale charity drive), and not expect 'fodder' to include grain.

¹² The AFIA defines fodder as the growing, manufacturing and marketing of cereal hay (oats, wheat or barley), straw (the dried yellow stems of cereal crops), pasture hay which may comprise any number of grass varieties including rye grass or clover, Lucerne hay, vetch hay, and silage (fodder prepared by compressing and fermenting green forage crops under anaerobic conditions). <https://www.afia.org.au/index.php/about-afia/strategic-plan>

¹³ <https://www.mla.com.au/research-and-development/Grazing-pasture-management/forage-crops/management/fodder-conservation>

60. AUS-MEAT's submission seems to acknowledge some of this uncertainty:

In recognising that the general public has donated monies to purchase fodder for producers in drought affected regions through campaigns such as "Buy a Bale" it is equally important to note that hay and straw (as commonly donated) is not the only type of fodder that is commonly fed to livestock.

61. This seems to indicate that consumers have a more limited impression of what constitutes "fodder" than the wide range of products that are permitted under the Fodder Fed scheme. In particular, the ACCC considers that consumers are unlikely to expect that 'fodder' in this context includes grains.

Associations with pasture-raised cattle

62. Submissions from NSW Farmers and the state DoA raised concerns that consumers were likely to associate 'fodder fed' with 'grass fed'. The state DoA submits that consumers are likely to associate 'fodder fed' with 'grass fed'. NSW Farmers submits it is highly probable that consumers would purchase 'fodder fed' beef on the assumption that it was produced on broad-acre property.

63. The ACCC considers that consumers may associate a "fodder fed" claim with a "grass fed" or "pasture fed" claim, because of an association of fodder with broadacre farms (and the feeding of fodder to 'grass fed' cattle) and an understanding of "fodder" as including hay, straw and/or silage.

64. However, the Rules simply require cattle to have been provided with access to both pasture and any of wide range of other feed for a minimum period of 30 days. They do not impose requirements similar to those applied under "grass fed" or "pasture fed" standards.

Finishing period

65. As noted above the ACCC also considers that a reasonable consumer would understand the use of the Fodder Fed logo to convey that the cattle used to produce the meat to which it is applied were fed fodder for their entire lives (as is the case with 'grass fed' cattle) or, at least, for a significant period prior to slaughter. The ACCC is therefore concerned that the Rules permit the logo to be applied to beef produced from cattle subject to the fodder fed feeding regime for as little as only the 30 days prior to slaughter.

66. In relation to the 30-day minimum feeding period, AUS-MEAT submits that:

- this timeframe was identified as an appropriate minimum period adopted by many producers that supplement their livestock when finishing cattle prior to sale, and
- this period is consistent with other existing industry approved program feeding periods including Grain Fed Finished (35 days) for beef through the NFAS.

67. However, the Fodder Fed standards do not contain any requirements for how cattle should be raised prior to the minimum 30 day fodder feeding period. By contrast, AUS-MEAT requires 'grass fed' cattle to be on pasture their entire life (although cattle may have been confined for the purposes of husbandry and management activities).¹⁴ Therefore, to the extent consumers may associate "fodder fed" with "grass fed" or "pasture fed" (as discussed above), they are likely to be misled by use of the mark.

Beef Attributes Claim

68. The state DoA submits that the use of the 'Fodder Fed' logo may mislead consumers as it could result in perception that the meat was premium when in fact beef can be produced under the Fodder Fed scheme using feed approaches that are not consistent with premium meat products – in particular, that the scheme does not ensure cattle have been fed on premium products, that there is no research to demonstrate any premium qualities associated with fodder fed beef, and that it is not clear that the 30 day minimum period for fodder fed cattle is sufficient time for the feed to impact the quality of the meat.
69. While AUS-MEAT submits that the "Fodder Fed" logo does not make any specific quality claims, the ACCC considers that consumers are likely to expect that beef marked as 'fodder fed' has characteristics that positively distinguish it from meat products which do not bear the mark – for example, quality, flavour or health benefits of the meat.¹⁵ This is because:
- as discussed at paragraph 47 above, consumers are likely to understand the placement of a certification mark on meat product packaging to indicate the product is in some way positively distinguishable from other meat products due to its quality, flavour, health benefits or animal welfare (even if they do not fully understand the claim), and
 - consumers are likely to associate 'fodder fed' with 'grass-fed' or 'pasture fed' beef and to expect similar premium meat attributes (and, conversely, to expect 'fodder fed' beef not to have attributes associated with grain-fed beef).
70. However, no evidence has been provided of any impact on meat from the application of the Fodder Fed standards during the 30 day finishing period, and as discussed above the Rules do not require beef to meet the standards required for grass-fed or pasture-fed beef.

Concerns about accuracy of representations conveyed by Fodder Fed logo

71. As noted above, the ACCC considers that a reasonable consumer is likely to understand the Fodder Fed logo as conveying representations that beef to have been produced in a manner which is materially or relevantly different to other production methods, and has attributes which positively distinguish it from meat products to which the logo is not applied.
72. The ACCC is concerned that, given the broad range of feeding and raising methods which could be certified under the scheme, the Rules would permit the Fodder Fed logo to be applied to meat that has not been produced in a particular way and which does not have attributes to distinguish it from other meat products. Accordingly the ACCC is not satisfied that the Rules are satisfactory having regard to the principles relating to unfair practices.

Section 173(2) – matters to be specified in the rules

73. In addition to the concerns relating to unfair practices outlined above, the ACCC has some minor concerns in relation to procedural matters which are required to be specified in the Rules. The ACCC considers these matters could be easily remedied in the event the ACCC's substantive concerns above are addressed.

¹⁵ Bray, H.J. et al, "Consumers link 'better' farm animal welfare with better quality products", *Proceedings of the 31st Biennial Conference of the Australian Society of Animal Production*, Adelaide, 4-7 July 2016.

Requirements that goods must meet for the CTM to be applied to them: s 173(2)(a)

74. The ACCC considers that the rules do not adequately specify the requirements that goods must meet for the CTM to be applied to them. Specifically, the ACCC considers it is unclear exactly which products the logo is intended to be applied to.
75. The application explicitly seeks registration to use the mark on meat and meat products, but the definition section and standards documents suggest that the logo is intended for use on beef and beef products. Further, it is unclear from the Rules whether the Fodder Fed logo is intended to be consumer facing (i.e. applied to retail packaging) or not (eg. applied at the wholesale level in marketing to retailers or food services businesses). The ACCC considers that it is important for any parties using the mark that it is clear the products to which the CTM is to be applied.

Procedure for resolving a dispute about any other issue relating to the CTM: s 173(2)(g)

76. While the Rules set out a dispute resolution procedure for applicants who are denied accreditation, there is no procedure outlined in the Rules as currently drafted for disputes about any other issue, as required by the TMA.

Conclusion

77. For the reasons outlined above, the ACCC does not consider that the rules adequately specify the matters required in section 175(2) of the TMA.
78. In particular, the ACCC is not satisfied that the rules are satisfactory having regard to principles relating to unfair practices set out in Parts 2-1 and 3-1 of the ACL, given that the rules would permit the Fodder Fed logo to be used on goods in circumstances where its use may mislead or deceive consumers.
79. Accordingly, the ACCC has completed its Initial Assessment of the CTM Application and does not propose to give a certificate under section 175(2) of the TMA.

Next steps

80. AUS-MEAT or any other interested person who wishes to comment on this initial assessment has one calendar month from the date the Registrar publishes the ACCC's initial assessment in the *Journal of Trademarks* to lodge a public written submission with the ACCC and/or request that the ACCC hold a conference to make an oral submission. Submissions may be sent to exemptions@accg.gov.au.
81. After holding a conference (if one is called) and considering any written submissions, the ACCC will proceed to make its final assessment.
82. 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 CTM applicant and the Registrar. A certified copy of the rules will also be provided to the Registrar.
83. If the ACCC is not satisfied that the relevant criteria are met, the ACCC must notify the CTM applicant and the Registrar of its decision.

84. An application may be made to the Administrative Appeals Tribunal to review a decision by the ACCC to refuse to give a certificate.

Dated this 19th day of January 2021

A handwritten signature in black ink, appearing to read 'Mick Keogh', written in a cursive style. The signature is positioned above a horizontal dotted line.

Mick Keogh

Deputy Chair

Australian Competition and Consumer Commission

Attachment A

The ACCC's role in assessing CTM applications

A Certification Trade Mark (CTM) certifies that a good or service is of a particular standard.

Before a CTM can be registered by the Registrar of Trademarks, the ACCC must be satisfied under section 175 of the *Trade Marks Act 1995* (TMA) that:

- a) the owner of the CTM or the approved certifiers demonstrate the attributes necessary to assess whether the goods/services in question meet the required standard; and
- b) the rules governing the use of the CTM are not to the detriment of the public; and
- c) the rules governing the use of the CTM are satisfactory having regard to the principles relating to restrictive trade practices set out in Part IV of the Competition and Consumer Act 2010 (CCA) and the principles relating to unconscionable conduct (Part 2-2), unfair practices (Parts 2-1 and 3-1), and safety of consumer goods and product related services (Part 3-3) in Schedule 2 (Australian Consumer Law) of the CCA.

Section 173 of the TMA specifies a number of matters which CTM rules must address, namely (in broad terms):

- a) the certification requirements that goods and/or services must meet for the certification trade mark to be applied to them;
- b) the process for determining whether goods and/or services meet the certification requirements and any ongoing requirements;
- c) the attributes that an approved certifier must have to assess whether goods and/or services meet the certification requirements;
- d) the requirements that a person must meet to use the certification trade mark and any ongoing requirements; and
- e) the procedure for resolving a dispute about whether goods and/or services meet the certification requirements or a dispute about any other issue relating to the certification trade mark.

In assessing CTM applications the ACCC has regard to whether or not the proposed rules meet these requirements. The ACCC may also require applicants to amend rules.