

HEALTH CONSCIOUS AND CONFUSED: WHY 'HEALTHY' TRADE MARKS MATTER TO CONSUMERS

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I INTRODUCTION

Consumers increasingly seek out and pay more for foods with particular characteristics or qualities. Consumers, for example, often choose foods that are free-range or that are produced sustainably or come from a particular region. Many consumers also seek out 'healthy' foods. Indeed, the demand for 'healthy' foods has risen dramatically in recent years as consumers select foods that are healthy, natural, organic, fresh, paleo, whole or super. A 2015 global survey of over 30 000 individuals, for example, found that the health characteristics of foods are imperative to consumer choices, with over 80 per cent of respondents willing to pay more for products that claim health benefits.¹

One of the main ways in which consumers determine which foods are 'healthy' is through the information on the food labels.² Information on food labels is provided in different ways but commonly includes mandatory nutrition information panels, optional nutrition content claims and health claims.³ Consumers also get information from other aspects of food packaging and advertising, such as branding and trade marks. The information on food products regularly serves two associated (but at times inconsistent) goals. On the one

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1 The Nielsen Company, 'We Are What We Eat: Healthy Eating Trends around the World' (Global Health and Wellness Report, January 2015) 12 <<http://www.nielsen.com/content/dam/nielsen-global/eu/nielsen-insights/pdfs/Nielsen%20Global%20Health%20and%20Wellness%20Report%20-%20January%202015.pdf>>.

2 See, eg, Nadia Prinsloo et al, 'A Critical Review of the Significance of Food Labelling during Consumer Decision Making' (2012) 40 *Journal of Family Ecology and Consumer Sciences* 83.

3 Australian food labelling laws identify different types of health claims, including nutrition content (eg, 'good source of calcium'), general-level health claims (eg, 'calcium is good for your bones') and high-level health claims (eg, 'this food is high in calcium, calcium may reduce osteoarthritis'). See Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code*, 1 March 2016, standard 1.2.8 (Nutrition Information Requirements), standard 1.2.7 (Nutrition, Health and Related Claims) ('Standard 1.2.7').

hand, the information forms a central part of the communication between food manufacturers and consumers, and is used to help consumers identify, compare and choose food products.⁴ Consumers can, for example, use the information provided on food products to compare the salt, fat or other nutrient content of foods. On the other hand, health information is used by food manufacturers and marketers to increase the appeal and sales of food products.⁵ Because consumers are increasingly health-conscious, convincing consumers that foods are healthy has numerous benefits for food manufacturers and marketers, not the least because consumers increasingly choose and are willing to pay a premium for foods that claim health benefits.⁶ By depicting or describing foods as 'healthy', food manufacturers and marketers can tap into the burgeoning health food industry, which is estimated to be worth over \$1 trillion globally by 2017.⁷

One of the problems for consumers wanting to choose 'healthy' foods is that the quantity and quality of health information on and about food products is often confusing, misleading, or in some circumstances false. This creates a number of challenges for consumers. Studies indicate that consumers are often confused by the information used on food labels and typically have problems understanding food labels.⁸ In 2013, for example, research by Nutrition Australia Queensland found that 96 per cent of Queenslanders were confused by food labels and were incapable of telling the difference between unhealthy and healthy food.⁹

Due to the growing importance of 'healthy' foods and confusion around food labels, the Australian government and industry have taken a number of initiatives to protect consumers. One of the actions taken by the government was introducing *Standard 1.2.7* on nutrition, health and related claims. Among other things, the standard aims to ensure that health claims made of food products are based on one of the pre-approved food–health relationships or are self-substantiated.¹⁰ Another initiative was the introduction, in 2015, of a voluntary front-of-package health star rating scheme aimed at facilitating and simplifying

4 See Polymeros Chrysochou and Klaus G Grunert, 'Health-Related Ad Information and Health Motivation Effects on Product Evaluations' (2014) 67 *Journal of Business Research* 1209; Xiaoli Nan et al, 'A Current Appraisal of Health- and Nutrition-Related Claims in Magazine Food Advertisements' (2013) 18 *Journal of Health Communication* 263.

5 See Prinsloo et al, above n 2.

6 The Nielsen Company, above n 1, 7–8, 12–14.

7 Ewa Hudson, 'Health and Wellness the Trillion Dollar Industry in 2017: Key Research Highlights' on Euromonitor International, *News and Resources* (29 November 2012) <<http://blog.euromonitor.com/2012/11/health-and-wellness-the-trillion-dollar-industry-in-2017-key-research-highlights.html>>.

8 See, eg, Norman J Temple and Joy Fraser, 'Food Labels: A Critical Assessment' (2014) 30 *Nutrition* 257; Gill Cowburn and Lynn Stockley, 'Consumer Understanding and Use of Nutrition Labelling: A Systematic Review' (2005) 8 *Public Health Nutrition* 21.

9 Jacinda Tutty, 'Healthy Food Labels Blamed for Rise in Obesity as Queenslanders Fall into High Sugar and Fat Trap', *The Courier Mail* (online), 9 December 2013 <<http://www.couriermail.com.au/news/queensland/healthy-food-labels-blamed-for-rise-in-obesity-as-queenslanders-fall-into-high-sugar-and-fat-trap/story-fnihsrf2-1226778194400>>.

10 On 18 January 2013, *Standard 1.2.7* was introduced. It gave food businesses until 18 January 2016 to comply.

comparisons between similar foods.¹¹ In addition to government and industry initiatives to simplify, clarify and improve the information placed on food products, the Australian Competition and Consumer Commission (‘ACCC’) has prioritised what it calls ‘credence’ claims. According to the ACCC, credence claims are claims made on food products that suggest a premium or quality to that food.¹² In cracking down on credence claims, the ACCC has used a combination of warnings, negotiation, court enforceable undertakings and litigation to ensure that consumers are not misled or deceived about a range of food products including beer,¹³ ducks,¹⁴ honey,¹⁵ bread,¹⁶ eggs¹⁷ and water.¹⁸ Credence claims are a priority area for the ACCC largely because misrepresentations about food products allow companies to profit at the expense of both consumers and competitors, and may deprive consumers of the opportunity to make properly informed decisions about the food they are purchasing.¹⁹

While Australia’s food labelling and consumer protection laws go some way to regulate health claims, the issue of ‘healthy’ trade marks has been typically

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- 11 See Commonwealth of Australia, *Heath Star Rating Scheme* <<http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/home>>. On 21 July 2015, the Australian Government announced amendments to country of origin labelling laws: Tony Abbott and Barnaby Joyce, ‘New Country of Origin Food Labels’ (Media Release, 21 July 2015) <<http://minister.industry.gov.au/ministers/macfarlane/media-releases/new-country-origin-food-labels>>.
- 12 Australian Competition and Consumer Commission, *Advertising and Selling Guide: Premium Claims* <<https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/marketing-claims-that-require-extra-care-premium-and-credence-claims/premium-claims>>.
- 13 Australian Competition and Consumer Commission, *Competition and Consumer Act 2010: Undertaking to the Australian Competition & Consumer Commission Given for the Purposes of Section 87B by CUB Pty Ltd (t/a Carlton & United Breweries) ACN 004 056 106* (Undertaking, 29 April 2014).
- 14 *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] ATPR ¶42-455; *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] ATPR ¶42-441.
- 15 Australian Competition and Consumer Commission, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Basfoods (Aust) Pty Ltd ACN 115 242 281* (Undertaking, 20 June 2014).
- 16 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)* (2014) 317 ALR 73.
- 17 *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* [2014] ATPR ¶42-483.
- 18 In 2013, the ACCC negotiated with a number of water manufacturers to remove organic claims from labelling and marketing because organic is an agricultural term and, therefore, water cannot be organic: Australian Competition and Consumer Commission, ‘ACCC Negotiates Removal of Misleading “Organic” Water Claims’ (Media Release, 16/5/13, 16 July 2013) <<https://www.accc.gov.au/media-release/accc-negotiates-removal-of-misleading-%E2%80%98organic%E2%80%99-water-claims>>.
- 19 Sarah Court, ‘Enforcement Priorities at the ACCC’ (Speech delivered at the Commonwealth Club of Adelaide, 24 September 2013) <<https://www.accc.gov.au/speech/enforcement-priorities-at-the-accc>>.

overlooked by academics, lawyers and policymakers.²⁰ Yet the association between trade marks and health claims is increasingly relevant and important in Australia and globally. In Australia, the recently introduced *Standard 1.2.7* defines health claims as ‘a claim which states, suggests or implies that a food or a property of food has, or may have, a health effect’.²¹ Although trade marks are not explicitly mentioned in *Standard 1.2.7*, ‘healthy’ trade marks can ‘state, suggest or imply’ that the foods bearing them have a health effect. In Europe, for example, the German Federal Court of Justice held that the trade marks ‘Praebotik’ and ‘Probiotik’ were health claims under the relevant European regulation.²² More specifically, the German Federal Court of Justice interpreted the term ‘health claim’ broadly to include trade marks that suggest a connection between a characteristic or quality in food and consumer health.²³ Further, the issue of ‘healthy’ trade marks has caught the attention of consumers and consumer advocacy groups. In 2012, for example, consumer advocacy group CHOICE identified and reviewed some common food products that had ‘healthy’ trade marks including ‘Healthy Choice’, ‘All Natural Bakery Bars’, ‘Natural Cordial Company’, ‘Back to Nature’ and ‘Goodness Superfoods Cereals’.²⁴ In so doing, CHOICE made a number of observations about ‘healthy’ trade marks. First, many of the foods bearing ‘healthy’ trade marks contained unhealthy or artificial ingredients. Secondly, while consumer law goes some way to protect consumers against misleading health claims, Australian trade mark law does not.

Given that food manufacturers and marketers may use trade marks to ‘health wash’ their products by making unsubstantiated, exaggerated or misleading claims about the health qualities or status of their food products, this article examines ‘healthy’ trade marks.²⁵ More specifically, this article argues that ‘healthy’ trade marks matter, and that the issue requires further attention. To make this argument, the article has three Parts. The article begins by examining

20 The association between trade marks and health claims has been discussed in relation to the European Union and the United States: see, eg, Michael W Rafter et al, ‘Trademarks That Make Health and Nutrition Claims under US and EU Food-Labeling Regulations’ (2013) 68(6) *INTA Bulletin* <<http://www.inta.org/INTABulletin/Pages/TrademarksThatMakeHealthandNutritionClaimsUnderUSandEUFoodLabelingRegulations.aspx>>. In Australia, the issue of provenance and trade marks has generated some attention: see, eg, William Van Caenegem, ‘Quality Local Food Products – Some Aspects of Trademarks Law and GIs’ [2015] *Corporate Governance eJournal* <<http://epublications.bond.edu.au/cgej/35/>>.

21 *Standard 1.2.7* cl 1.2.7-2 (definition of ‘health claim’).

22 *Bundesgerichtshof* [German Federal Court of Justice], I ZR 178/12, 26 February 2014, applying *Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on Nutrition and Health Claims Made on Foods* [2006] OJ L 404/9. See also *Deutsches Weintor eG v Land Rheinland-Pfalz* (Court of Justice of the European Union, C-544/10, 6 September 2012).

23 *Bundesgerichtshof* [German Federal Court of Justice], I ZR 178/12, 26 February 2014, 10 [18].

24 Elise Dalley, ‘Healthy Labelling or Healthy Marketing?’, *Choice* (online), 4 September 2014 <<http://www.choice.com.au/reviews-and-tests/food-and-health/labelling-and-advertising/nutritional-labelling/rise-of-nutritional-trademarking/page/compare%20the%20products.aspx>>.

25 Borrowing from the language of scholarship on using green or environmental claims on products: see Eric L Lane, ‘Greenwashing 2.0’ (2013) 38 *Columbia Journal of Environmental Law* 279; Matthew Rimmer, ‘Sorting the Green from the Wash’ (2012) 23(2) *WME* 28; Christine MacDonald, *Green, Inc: An Environmental Insider Reveals How a Good Cause Has Gone Bad* (Lyons Press, 2008).

the nature and prevalence of ‘healthy’ trade marks, and their potential to affect consumers – particularly consumers’ perceptions of healthiness and their purchase and consumption of food products. The article then examines the most relevant procedural and substantive provisions of the *Trade Marks Act 1995* (Cth), namely section 33 (the presumption that a trade mark is registrable), sections 57 and 84A (opposition, challenge and revocation of trade marks), section 43 (the use of the trade mark would be likely to deceive or cause confusion), section 41 (the trade mark is not capable of distinguishing the applicant’s goods or services from the goods or services of other persons), and section 42(b) (the trade mark is contrary to law).²⁶ The article concludes by arguing that – given the current public anxiety and social concern around food, diet-related illnesses and the confusion over food labels – the problem of ‘healthy’ trade marks is clear. Although, the question of what can be done about ‘healthy’ trade marks is more complicated. Currently, the most relevant grounds for opposing or challenging ‘healthy’ trade marks is on the basis they are likely to deceive or cause confusion under section 43. To this end, the article suggests that the ability to challenge and oppose problematic ‘healthy’ trade marks is a potent public policy weapon, and proposes increased involvement from regulators, health promotion groups, consumer organisations and professional bodies in the opposition to, and challenge of, ‘healthy’ trade marks.

II WHY ‘HEALTHY’ TRADE MARKS MATTER

This Part examines the nature and prevalence of ‘healthy’ trade marks and their potential to affect consumers.²⁷ Trade marks can be used to indicate something about the qualities or characteristics of food, or suggest something about the way in which the food is manufactured or produced. Trade marks, therefore, can influence the behaviour of consumers.²⁸ The importance of trade marks in consumer decision making is clear from the relevant second reading speeches, including that made by Mr Lee in the House of Representatives:

Because consumers make purchasing decisions based on the trade marks associated with goods and services, trade marks legislation, as well as trade practices and related legislation, provides appropriate checks and balances to ensure that use of trade marks do [sic] not deceive or confuse consumers. Quite obviously, trade marks are a vital link between the owner of the trade mark, the owner’s products, and consumers.²⁹

26 There are also possible issues of infringement for other traders using, or wanting to use, ‘healthy’ trade marks under *Trade Marks Act 1995* (Cth) s 122(1)(b)(i).

27 I have intentionally used ‘affect’, rather than effect, to acknowledge more than the isolable and measurable impact of trade marks.

28 See, eg. Glynn S Lunney Jr, ‘Trademark Monopolies’ (1999) 48 *Emory Law Journal* 367; Robert G Bone, ‘Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law’ (2006) 86 *Boston University Law Review* 547.

29 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1995, 1910 (Michael Lee).

Because of the potential of trade marks to influence consumer behaviour, they are increasingly prevalent,³⁰ and a quick search on the Australian Trade Marks Online Search System reveals how widespread ‘healthy’ trade marks are. Limiting the search to classes 29, 30 and associated classes – which include flour and preparations made from cereals; bread, pastry and confectionery; sugar, honey, treacle; yeast, baking-powder³¹ – a large number of trade marks include the words (or derivatives of the words) ‘health’, ‘natural’ or ‘fresh’. For example, searching ‘healthy’ returned 320 registered trade marks, ‘natural’ 651, ‘nature’ 245, and ‘fresh’ 820.³² Registered ‘healthy’ trade marks include word marks such as ‘HealthWise’,³³ ‘Healthy Choice’,³⁴ ‘Healthybake’,³⁵ and ‘Naturally Yours’,³⁶ and composite marks such as ‘Go Natural’ and ‘Nature Valley’.³⁷

While the registration of ‘healthy’ trade marks is not a problem per se, if health claims are unsubstantiated, exaggerated or misleading, then ‘healthy’ marks have the potential to harm consumers. As noted in Part I, the Australian consumer group CHOICE, in 2012, published a review of various food products that carry ‘healthy’ trade marks.³⁸ In finding that approximately half of those products reviewed were high in unhealthy ingredients, CHOICE acknowledged that food labelling and consumer protection laws prohibit health claims that might mislead consumers. According to CHOICE, however, Australian trade mark law contributes to consumer confusion and misinformation because it allows the registration and use of ‘healthy’ trade marks – such as ‘healthy’, ‘natural’ and ‘fresh’ – on products that have questionable health benefits at best, or detrimental effects on health at worst. Referring to the use of ‘healthy’ trade marks, and an earlier study conducted by the George Institute, the CHOICE report states:

Many products you’ll find in the supermarket have connotations of being ‘natural’ by virtue of their trademarked brand names – for example, All Natural, Be Natural, Go Natural, Nice & Natural. The George Institute for Global Health’s database lists close to 1300 products and brands that use the word ‘natural’ in their product name or package marketing – but in many cases the ingredients are far from it.

30 According to the anthropologist John Sherry, we are living in a ‘brandscape’: John F Sherry Jr, ‘The Soul of the Company Store: Nike Town Chicago and the Emplaced Brandscape’ in John F Sherry Jr (ed), *ServiceScapes: The Concept of Place in Contemporary Markets* (NTC, 1998) 109.

31 *Trade Marks Regulations 1995* (Cth) sch 1 pt 1.

32 Searching using a wildcard (*) produces an even greater number of results: eg, health* (945 results) and natur* (1465 results).

33 Societe des Produits Nestle SA, ‘HealthWise’ (Australian Trade Mark Class 30, No 793230, entered on register 21 July 2000).

34 McCain Foods (Aust) Pty Ltd, ‘Healthy Choice’ (Australian Trade Mark Classes 29, 30, No 913985, entered on register 22 June 2004).

35 HealthyBake Pty Ltd, ‘Healthybake’ (Australian Trade Mark Class 30, No 969896, entered on register 17 May 2004).

36 Santos Food Co Pty Ltd, ‘Naturally Yours’ (Australian Trade Mark Class 30, No 488834, entered on register 22 July 1992).

37 Go Natural Australia Pty Ltd, ‘Go Natural’ (Australian Trade Mark Class 29, No 1149067, entered on register 16 July 2007); General Mills Inc, ‘Nature Valley’ (Australian Trade Mark Class 30, No 1237372, entered on register 8 December 2008) respectively.

38 Dalley, above n 24.

A 'natural' trademarked product might actually contain additives such as preservatives, and while others may be technically natural, they can still be laden with sodium and saturated fats.³⁹

While 'healthy' trade marks are being put on different food products, the prevalence and relevance of such claims may depend on the type of food. Indeed, studies on the effects of health claims more generally indicate that the impact of such claims depends on the kind of food on which the claim is made. In 2013, Hughes et al examined the number and healthiness of claims in three categories of food product: cereal bars, breakfast cereals and non-alcoholic beverages.⁴⁰ Scrutinising a total of 1028 products in three large city supermarket chains in Sydney, the researchers found that two-thirds of products carried at least one health claim. Further, after conducting nutrient profiling of the food products, it was found that, while the number of unhealthy food products carrying health claims is relatively low (at around 10 per cent of all products included in the study), approximately one-third of those carrying health claims did not satisfy the nutrient profiling criteria, and were, therefore, potentially misleading.⁴¹ The prevalence of health claims was not the same across types of food products, with cereal bars the most likely to carry health-related claims.

Having shown that there are a significant number of 'healthy' trade marks, some of which are used on foods that have questionable health and nutritional benefits, the remainder of this Part argues that 'healthy' trade marks influence consumers. To make this argument, I draw upon scholarship from psychology, marketing and food studies that show how health claims affect consumer behaviour, particularly consumers' perceptions of healthiness and the purchase and consumption of foods. While this research does not look specifically at trade marks, parallels can be drawn between health claims and 'healthy' trade mark affects. But before we look at how 'healthy' trade marks may influence consumers, it is necessary to say something about the way in which humans think and make decisions more generally.

Cognitive and behavioural psychologists have long known that humans employ two fundamentally different modes of thought, and more often than not, humans are not rational decision-makers. In *Thinking Fast and Slow*, Daniel Kahneman identifies two systems of thought that, for simplicity and ease of reference, he calls System 1 and System 2.⁴² System 1 is fast, intuitive and associative. It is unconscious and cannot be turned off. According to Kahneman, System 1 is the 'secret author of many of the choices and judgments [we] make'.⁴³ By contrast, System 2 is logical, deliberate and slow. System 2 tires easily and, perhaps most importantly, it tends to accept what System 1 tells it. Explaining the differences between System 1 and System 2, Kahneman argues

39 Ibid.

40 Clare Hughes et al, 'Regulating Health Claims on Food Labels Using Nutrient Profiling: What Will the Proposed Standard Mean in the Australian Supermarket?' (2013) 16 *Public Health Nutrition* 2154.

41 Ibid 2158.

42 Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

43 Ibid 13.

that System 1 jumps to intuitive conclusions based on heuristics and shortcuts, while System 2 tends to endorse or rationalise ideas and decisions. For the most part, it is sufficient to rely on System 1 because it is sensitive to subtle environmental cues, signs of danger and other similar factors. Kahneman observes that relying on System 1 is 'efficient if the conclusions are likely to be correct and the costs of an occasional mistake acceptable, and if the jump saves much time and effort'.⁴⁴ It is System 1, therefore, that tends to enable consumers to make decisions about food products.⁴⁵

Thus, while individuals can take time to evaluate the health or nutritional attributes of food, people tend to make decisions quickly, sometimes with little more than a glance. This is an efficient way to make decisions and has not been lost on judges and lawyers. Chief Justice Allsop, for example, observed:

the ordinary or reasonable person may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will be likely affected by an intuitive sense of attraction rather than by any process of analytical or logical choice.⁴⁶

Because 'healthy' trade marks are cues for fast and intuitive food choice decisions, words like 'natural', 'healthy' and 'fresh' act as shortcuts or heuristics, and provide simple processing cues of health or nutritional information.⁴⁷ The effect of 'healthy' trade marks is perhaps exacerbated by the fact that people's natural tendency is to create binary opposites, and to categorise food as either good or bad, healthy or unhealthy, natural or artificial.⁴⁸ Research has shown, for example, that when choosing foods in the face of complex and confusing information, consumers will adapt information on the label to fit within decision frameworks that are familiar to them.⁴⁹ Thus, while easy-to-understand information about the health and nutritional values of food may be missing, or is found in the nutritional tables on the back of the food packet, it is the front-of-package information that plays a central role in consumers' decision-making processes. This is particularly true for health-conscious consumers who notice and are influenced by front-of-package information including 'healthy' trade marks.⁵⁰

'Healthy' trade marks affect consumers in different ways. Motivated in part by the 'obesity paradox' in which there has been a parallel increase in obesity

44 Ibid 79.

45 Klaus G Grunert and Josephine M Wills, 'A Review of European Research on Consumer Response to Nutrition Information on Food Labels' (2007) 15 *Journal of Public Health* 385.

46 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)* (2014) 317 ALR 73, 81–2 [43].

47 See Wim Verbeke, 'Agriculture and the Food Industry in the Information Age' (2005) 32 *European Review of Agricultural Economics* 347.

48 Paul Rozin, Michele Ashmore and Maureen Markwith, 'Lay American Conceptions of Nutrition: Dose Insensitivity, Categorical Thinking, Contagion, and the Monotonic Mind' (1996) 15 *Health Psychology* 438.

49 Sally Eden, 'Food Labels as Boundary Objects: How Consumers Make Sense of Organic and Functional Foods' (2011) 20 *Public Understanding of Science* 179.

50 See also Kahneman, above n 42, 50–8.

rates and popularity of healthier foods,⁵¹ a range of studies have examined how health claims placed on foods affect consumers. These studies suggest that 'healthy' trade marks will affect consumers in different ways, and are influenced and complicated by numerous factors including gender, age, education, income and marital status.⁵² Another factor that may influence the effect of 'healthy' trade marks is the kind of food to which the trade mark is attached. For example, 'healthy' trade marks used on foods that are clearly not healthy (for example, chocolate or biscuits) will have less impact on consumer choices.⁵³ Where 'healthy' trade marks might have the greatest impact is on foods whose health characteristics or properties are equivocal and confusing, such as breakfast cereals and bars.

The way in which 'healthy' trade marks affect consumers is complicated.⁵⁴ Nonetheless, 'healthy' trade marks have the potential to affect consumers in three main ways.⁵⁵ One of the ways in which consumers are affected by 'healthy' trade marks is perceptions of healthiness. Foods carrying 'healthy' trade marks are generally perceived to be healthier than the same foods not carrying the trade mark. One study, for example, showed that consumers tend to perceive foods labelled as natural or organic as healthier than those that are not.⁵⁶ More specifically, Teratanavat and Hooker conducted an experiment in which a novel food (tomato juice containing soy) was presented to consumers in different ways. Notably, consumers valued the novel food more when it was labelled as natural and healthy. Another study showed that labelling the same food as 'salad special' versus 'pasta special', or as 'fruit chews' versus 'candy chews', increased consumers perceptions of the healthfulness of the foods with the healthy-sounding names.⁵⁷ Yet another study found that food labelled '75% fat-free' is

51 Adrian F Heini and Roland L Weinsier, 'Divergent Trends in Obesity and Fat Intake Patterns: The American Paradox' (1997) 102 *American Journal of Medicine* 259.

52 John A Bower, Mohammad A Saadat and Catherine Whitten, 'Effect of Liking, Information and Consumer Characteristics on Purchase Intention and Willingness To Pay More for a Fat Spread with a Proven Health Benefit' (2003) 14 *Food Quality and Preference* 65; Marika Lyly et al, 'Factors Influencing Consumers' Willingness To Use Beverages and Ready-To-Eat Frozen Soups Containing Oat β -glucan in Finland, France and Sweden' (2007) 18 *Food Quality and Preference* 242; Jonathon Blitstein and Douglas Evans, 'Use of Nutrition Facts Panels among Adults Who Make Household Food Purchasing Decisions' (2006) 38(6) *Journal of Nutrition Education and Behavior* 360.

53 Moira Dean et al, 'Consumer Perceptions of Healthy Cereal Products and Production Methods' (2007) 46 *Journal of Cereal Science* 188.

54 Nocella and Kennedy claim that 'there is a surprising lack of systematic research aimed at evaluating to what extent the "average consumer" is able to understand health claims that are "unqualified" (highest level of scientific evidence) and "qualified" (lower level of scientific evidence)': Giuseppe Nocella and Orla Kennedy, 'Food Health Claims – What Consumers Understand' (2012) 37 *Food Policy* 571, 571.

55 Health claims may also influence consumers' expectations of taste, satiety and weight gain: Michael E Oakes, 'Filling Yet Fattening: Stereotypical Beliefs about the Weight Gain Potential and Satiation of Foods' (2006) 46 *Appetite* 224.

56 Ratapol Teratanavat and Neal H Hooker, 'Consumer Valuations and Preference Heterogeneity for a Novel Functional Food' (2006) 71 *Journal of Food Science* S533. See also Artur Kraus, 'Development of Functional Food with the Participation of the Consumers: Motivators for Consumption of Functional Products' (2015) 39 *International Journal of Consumer Studies* 2.

57 Caglar Irmak, Beth Vallen and Stefanie Rosen Robinson, 'The Impact of Product Name on Dieters' and Nondieters' Food Evaluations and Consumption' (2011) 38 *Journal of Consumer Research* 390.

perceived to be leaner and healthier when compared to the same food labelled as '25% fat'.⁵⁸

A second way in which 'healthy' trade marks may influence consumers is in the choice and purchase of food products. Consumers whose purchasing decisions are motivated by health and wellness may base their purchasing decisions at least in part on the product's 'healthy' trade mark. And, rather than looking at the ingredients list on the back or side of the package, consumers will often choose foods quickly, based on the simplest information available.⁵⁹ Bui et al, for example, examined the effects of front-of-package labelling on parents' food choices for their children and found that simpler messages were more effective in influencing consumer choices.⁶⁰ As noted earlier, 'healthy' trade marks act as heuristics and cues that play a pivotal role in people's decision-making processes, particularly when other health and nutrition information is ambiguous and confusing.

A third way in which 'healthy' trade marks can affect consumers is by influencing food consumption. Researchers have found health claims on foods influence the quantity of food eaten. In one study, Chandon and Wansink found that labelling products as 'low fat' increased food consumption.⁶¹ According to the researchers, consumers believed that food labelled with health claims (for example, 'low fat') was better for them, and as a consequence, they tended to increase the amount of food they served themselves and consumed. In another study conducted by the same researchers, 'health halos' were created by both the name of fast-food restaurants and the name of the food available.⁶² For example, meals from fast-food restaurants viewed as healthy (for example, Subway) were perceived to contain fewer kilojoules than meals with the same kilojoules from a fast food restaurant that was generally perceived as unhealthy (for example, McDonalds).⁶³ Additionally, and somewhat alarmingly, the research indicated that consumers were more likely to order side dishes, drinks, and desserts if they perceived their main meal to be healthier.⁶⁴ Another study, published in 2014, by Faulkner et al found that participants selected larger portions of 'reduced fat'

58 Klaus Wertenbroch, 'Consumption Self-control by Rationing Purchase Quantities of Virtue and Vice' (1998) 17(4) *Marketing Science* 317; Irwin P Levin and Gary J Gaeth, 'How Consumers Are Affected by the Framing of Attribute Information before and after Consuming the Product' (1998) 15 *Journal of Consumer Research* 374.

59 Benjamin Scheibehenne, Linda Miesler and Peter M Todd, 'Fast and Frugal Food Choices: Uncovering Individual Decision Heuristics' (2007) 49 *Appetite* 578.

60 My Bui et al, 'Front-of-Package Product Labels: Influences of Varying Nutritional Food Labels on Parental Decisions' (2013) 22 *Journal of Product & Brand Management* 352.

61 Brian Wansink and Pierre Chandon, 'Can "Low-Fat" Nutrition Labels Lead to Obesity?' (2006) 43 *Journal of Marketing Research* 605.

62 Pierre Chandon and Brian Wansink, 'The Biasing Health Halos of Fast-Food Restaurant Health Claims: Lower Calorie Estimates and Higher Side-Dish Consumption Intentions' (2007) 34 *Journal of Consumer Research* 301. These results were replicated with other foods and restaurant brands: see, eg, Andrea Heintz Tangari et al, 'Weighing In on Fast Food Consumption: The Effects of Meal and Calorie Disclosures on Consumer Fast Food Evaluations' (2010) 44 *Journal of Consumer Affairs* 431.

63 Chandon and Wansink, 'The Biasing Health Halos', above n 62, 304–6.

64 Ibid 307–11.

coleslaw when compared with regular coleslaw.⁶⁵ It follows, then, that ‘healthy’ trade marks could promote inappropriate food selection and consumption in consumers.⁶⁶ Specifically, trade marks that indicate healthy characteristics or qualities are likely to be perceived as healthier, even when these foods have little, or no, health benefits and, consequently, consumers may consume these foods in greater quantities.

In summary, it is clear that ‘healthy’ trade marks matter. While most of the studies discussed above focus on health claims, rather than trade marks, they indicate that ‘healthy’ trade marks affect consumers in various ways. More specifically, these studies indicate that ‘healthy’ trade marks can influence consumers’ perceptions of healthiness, as well as their choice and consumption of food. This means that ‘healthy’ trade marks are problematic if food manufacturers and producers misuse them to make unsubstantiated, exaggerated or misleading claims about the health qualities or status of their food products. While the relationship between health claims and sales is not linear or straightforward,⁶⁷ the market for food products with health benefits or properties is growing, and consumers are inclined to pay more for, and purchase and consume more often, foods carrying ‘healthy’ trade marks.⁶⁸ This provides an incentive for food manufacturers to use unsubstantiated, exaggerated or misleading ‘healthy’ trade marks. And while Australia’s food labelling and consumer protection laws go some way to address this problem, ‘healthy’ trade marks have been overlooked. This is despite that fact that, in 2011, the ‘Labelling Logic’ report called for closer scrutiny of trade marks that infer health implications.⁶⁹ The remainder of the article examines the main grounds upon which ‘healthy’ trade marks can be rejected, opposed or challenged under Australian trade mark law.

III DECEPTIVE, DISTINCTIVE OR CONTRARY TO LAW

In Australia, trade marks are registered under the *Trade Marks Act 1995* (Cth).⁷⁰ While the Act does not explicitly deal with ‘healthy’ trade marks, they

65 G P Faulkner et al, ‘Perceived “Healthiness” of Foods Can Influence Consumers’ Estimations of Energy Density and Appropriate Portion Size’ (2014) 38 *International Journal of Obesity* 106.

66 Ibid 111.

67 See, eg, Pierre Chandon, ‘How Package Design and Packaged-Based Marketing Claims Lead to Overeating’ (2013) 35 *Applied Economic Perspectives and Policy* 7.

68 Rao Sanaullah Khan et al, ‘Functional Food Product Development – Opportunities and Challenges for Food Manufacturers’ (2013) 30 *Trends in Food Science & Technology* 27; Irmak, Vallen and Robinson, above n 57. For a comprehensive review of food marketing practices and its effect on food intake, see Pierre Chandon and Brian Wansink, ‘Does Food Marketing Need To Make Us Fat? A Review and Solutions’ (2012) 70 *Nutrition Reviews* 571.

69 Food Labelling Law and Policy Review Panel, ‘Labelling Logic: Review of Food Labelling Law and Policy’ (Final Report, 28 January 2011) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

70 For a history of trade mark law in Australia, see Robert Burrell and Michael Handler, *Australian Trade Mark Law* (Oxford University Press, 2010).

can be rejected, opposed, revoked or cancelled on numerous grounds. Before I consider the three main substantive grounds for challenging 'healthy' trade marks, it is important to outline the related procedural issues. Having an understanding of the pertinent procedural issues may prove to be decisive for those seeking to oppose or challenge 'healthy' trade marks in the future. It may also be relevant when looking for a solution to the problem of 'healthy' trade marks. Some of the procedural questions that are important and will be considered below are:

- How does the Australian Trade Marks Office ('ATMO') examine trade mark applications?
- Who can refuse, oppose or challenge trade marks?
- When and how can trade mark applications be opposed?
- When and how can a registered trade mark be removed from the register?

Once a 'healthy' trade mark application is lodged with the ATMO, it is assessed by an examiner to see if it meets the requirements of the Act.⁷¹ Perhaps most importantly, the presumption under the Act is that trade mark applications are registrable. Specifically, section 33(1) of the Act provides that the Registrar must accept a trade mark for registration unless satisfied that the trade mark application has not been made in accordance with the Act and the associated *Trade Marks Regulations 1995* (Cth), or that there are grounds for rejecting it. In his second reading speech for the Trade Marks Bill 1995 (Cth) in the House of Representatives, Mr Lee explained the presumption in the following way: 'if there is any doubt about whether a trade mark should be registered, that doubt will be resolved in favour of the applicant rather than against the applicant as is now the case'.⁷² The *Trade Marks Office Manual of Practice and Procedure*, which is used as a reference tool by trade mark examiners, clarifies that the registrar must be satisfied, on the balance of probabilities, that there are grounds for rejecting a trade mark application, and that any grounds for rejecting a trade mark are 'expressed in a specific and well documented manner'.⁷³ Furthermore, in 1998, in *Blount Inc v Registrar of Trade Marks*, Branson J said:

Where the Act requires the Registrar to be 'satisfied' of any matter, it is to be understood as requiring that he or she be persuaded of the matter according to the balance of probabilities. That is, that the Registrar be persuaded, having given proper consideration to those factors and circumstances that the Act requires him or her to give consideration to, that such matter is more probable than not.⁷⁴

71 *Trade Marks Act 1995* (Cth) s 31; *Trade Marks Regulation 1995* (Cth) s 4.8.

72 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1995, 1911 (Michael Lee). See also Commonwealth, *Parliamentary Debates*, Senate, 30 March 1995, 2590 (Nick Sherry).

73 IP Australia, *Trade Marks Office Manual of Practice and Procedure*, pt 24 (at 16 November 2015) [20.4] <http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm>.

74 (1998) 83 FCR 50, 56E.

The presumption of registrability has consequences for the way in which proposed ‘healthy’ trade marks are examined.⁷⁵ At the initial stage of examination, the applicant is not required to justify that the ‘healthy’ trade mark is registrable. Rather, the onus is on the Registrar to demonstrate that there are grounds to reject the ‘healthy’ trade mark. This means that a ‘healthy’ trade mark will be accepted by the Registrar unless the application has not been made in accordance with the Act or there are clear grounds for rejecting the applicant’s mark. As a consequence, ‘healthy’ trade marks are not given the scrutiny required to assess unsubstantiated, exaggerated or misleading claims. For example, ‘healthy’ trade mark applications are not examined by the ATMO for their nutritional content or healthiness. It is, therefore, unlikely that ‘healthy’ trade marks will be rejected at the examination stage.

Although the presumption of registrability means that many ‘healthy’ trade marks will be registered, this is not a guarantee of validity. ‘Healthy’ trade marks can be opposed or challenged at various times and on various grounds.⁷⁶ Broadly speaking, a ‘healthy’ trade mark may be opposed because it should not have been registered in the first place, or because changes in circumstances mean that it should no longer be registered. Specifically, section 57 of the Act states that ‘[t]he registration of a trade mark may be opposed on any of the grounds on which an application for the registration of a trade mark may be rejected under this Act, except the ground that the trade mark cannot be represented graphically’.⁷⁷ The relevant grounds for opposition or challenge of ‘healthy’ trade marks will be discussed in a moment, but in order to oppose an application, a third party must comply with the Act and regulations.⁷⁸ A third party wishing to oppose a ‘healthy’ trade mark must submit a notice of intention to oppose the application no later than two months from the day the acceptance of the trade mark is published in the *Official Journal*.⁷⁹ Then, no later than one month after submitting the notice of intention to oppose, the third party must submit a statement outlining the grounds upon which they are opposing the mark.⁸⁰ Taken together, the notice of intention to oppose and the statement outlining the grounds of opposition, comprise a valid notice of opposition to registration.⁸¹ But, who can oppose or challenge ‘healthy’ trade marks?

75 The presumption of registrability is not without its critics. See Robert Burrell and Michael Handler, ‘Rethinking the Presumption of Registrability in Trade Mark Law’ (2012) 38(1) *Monash University Law Review* 148.

76 Once an application has been accepted by the Registrar, it is published in the *Official Journal: Trade Marks Act 1995* (Cth) ss 30–1; *Trade Marks Regulations 1995* (Cth) reg 4.7.

77 A trade mark can be opposed on other grounds: *Trade Marks Act 1995* (Cth) ss 58–62A.

78 The onus of establishing the grounds of opposition is with the opponent: *Trade Marks Act 1995* (Cth) ss 52–62A; *Pfizer Products Inc v Karam* (2006) 219 FCR 585.

79 *Trade Marks Act 1995* (Cth) s 34(b); *Trade Marks Regulations 1995* (Cth) regs 5.6, 17A.33(1). However, this can be extended in some circumstances: at regs 5.9, 17A.34C.

80 *Trade Marks Regulations 1995* (Cth) reg 5.7(1).

81 *Trade Marks Regulations 1995* (Cth) regs 5.5, 17A.32. Once an opposition has been made, the Registrar gives the notice of intention to oppose and the statement of grounds to the trade mark applicant who is then required to file a notice of intention to defend their trade mark: *Trade Marks Act 1995* (Cth) s 52; *Trade Marks Regulations 1995* (Cth) regs 5.5(3), 5.8(5), 5.14.

While anyone can file an opposition, it is often done by a person who will be affected by the trade mark in some way. An example of a third party opposing a food-related trade mark application is the Quaker Oats Company which unsuccessfully opposed the trade mark application for 'MyOatmeal' in the United States. Quaker Oats opposed the application on the basis that '[t]he word oatmeal is a generic for the identified goods in the application' and '[r]egistration of the application should be refused in order to maintain freedom of the public and opposer to use the descriptive and or generic language included in the application'.⁸² In regards to 'healthy' trade marks, it might be public health promotion groups, consumer organisations or professional bodies that decide to initiate opposition proceedings. We already see this in other areas of intellectual property law including patents and copyright. The Public Patent Foundation, for example, attempts to limit the deleterious impact of the United States patent system by opposing and challenging 'unmerited' and 'excessive' patents.⁸³ To this end, the Public Patent Foundation (which has been involved in challenging patents related to breast cancer genes, human stem cells and genetically modified seeds)⁸⁴ provides a model or framework from which health groups or other bodies can oppose unsubstantiated, exaggerated or misleading trade marks.

Concerned health groups and bodies can also challenge 'healthy' trade marks after they have been registered. Indeed, once registered, a trade mark may be challenged by an 'aggrieved person'.⁸⁵ An 'aggrieved person' is interpreted broadly so as to exclude only 'busybodies or "common informers or strangers proceeding wantonly" or persons without any interest in the Register or the functions it serves beyond gratifying an intellectual concern or reflecting "merely sentimental motives"'.⁸⁶ When challenging a registered trade mark, an aggrieved person must show that they are 'appreciably disadvantaged in a legal or practical sense' by the maintenance of the registration.⁸⁷ One example of this in relation to food products comes from the United States, where the United States Department of Agriculture challenged the truthfulness of a trade mark, Creamo, which was used on margarine products that did not contain cream.⁸⁸

82 Bill Donahue, 'Brand Battles: USPS, Major League Baseball, Quaker Oats', *LAW360* (online), 25 April 2014 <<http://www.law360.com/articles/531839/brand-battles-usps-major-league-baseball-quaker-oats>>.

83 Public Patent Foundation, *About PUBPAT* <www.pubpat.org/About.htm>.

84 Matthew Rimmer, 'Patent-Busting: The Public Patent Foundation, Gene Patents and the Seed Wars' in Charles Lawson and Jay Sanderson (eds), *The Intellectual Property and Food Project: From Rewarding Innovation and Creation to Feeding the World* (Ashgate, 2013) 201.

85 However, the Registrar is not compelled to consider whether to revoke a trade mark registration: *Trade Marks Act 1995* (Cth) s 84A(6).

86 *Health World Ltd v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590, 598 [27] (French CJ, Gummow, Heydon and Bell JJ) (citations omitted). For a historical discussion of 'aggrieved person', see Burrell and Handler, *Australian Trade Mark Law*, above n 70, 256–8.

87 *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158, 193F (McLelland J), quoted in *Kraft Foods Inc v Gaines Pet Foods Corporation* (1996) 65 FCR 104, 113F (Sackville J), quoted in *Health World Ltd v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590, 600 [33] (French CJ, Gummow, Heydon and Bell JJ).

88 *Brougham v Blanton Manufacturing Co*, 249 US 495 (1919).

In addition to opposition and challenge by third parties and aggrieved persons, ‘healthy’ trade marks can be challenged or revoked by the Registrar of Trade Marks. Section 84A of the Act sets out the circumstances in which the Registrar may revoke the registration of a trade mark. Under section 84A(1), the Registrar may revoke the registration of a trade mark if satisfied that:

- (a) the trade mark should not have been registered, taking account of all the circumstances that existed when the trade mark became registered (whether or not the Registrar knew then of their existence); and
- (b) it is reasonable to revoke the registration, taking account of all the circumstances.

Broadly speaking, the Registrar may only cancel, amend or remove a trade mark if it is in the ‘public interest’ to do so.⁸⁹ These provisions acknowledge that ‘[f]rom time to time, the Registrar registers trade marks that, for one reason or another, should not be registered’,⁹⁰ and are primarily intended to allow the Registrar to revoke the acceptance of a trade mark when it is reasonable to do so after taking into account all of the circumstances and it is in the public interest.⁹¹ Given the potential of misused ‘healthy’ trade marks to affect consumers’ perceptions, choice and consumption of food – and the public health problems associated with inappropriate and excessive food consumption – it is clearly in the public interest to revoke problem trade marks.

Having set out the procedural rules by which ‘healthy’ trade marks can be rejected, opposed, challenged and revoked, it is helpful to make some observations. Perhaps the most appropriate way to challenge problematic ‘healthy’ trade marks is through the opposition or challenge mechanisms. More importantly, the option to oppose or challenge misused ‘healthy’ trade marks is a potent public policy weapon in the hands of the community, or public health or consumer groups or regulators. Bodies or organisations who believe that misused ‘healthy’ trade marks have a significant effect on the public health need to be more active in opposing or challenging them. As Matthew Rimmer points out, ‘[t]he area of trade mark law could benefit from a publicly-spirited organization, which would test the validity of controversial trade marks’.⁹² These groups may include the Dieticians Association of Australia, the Public Health Association of Australia, Food Standards Australia New Zealand and the ACCC. The three main grounds for opposing or challenging ‘healthy’ trade marks are sections 43 (the use of the trade mark would be likely to deceive or cause confusion), 41 (the trade mark is not capable of distinguishing the applicant’s goods or services from the goods or services of other persons), and 42(b) (the trade mark is contrary to law). Each of these grounds will be considered in turn.

89 *Trade Marks Act 1995* (Cth) s 88A.

90 Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2006 (Cth) 24.

91 *Ibid* 26.

92 Rimmer, above n 84, 249.

A Are ‘Healthy’ Trade Marks Likely To Deceive or Confuse?

The most relevant ground for opposing or challenging ‘healthy’ trade marks is section 43 of the *Trade Marks Act 1995* (Cth). Generally speaking, section 43 does not allow the registration of trade marks that have a false connotation and are likely to deceive or confuse consumers. Specifically, section 43 of the Act provides that a trade mark ‘must be rejected if, because of some connotation that the trade mark or a sign contained in the trade mark has, the use of the trade mark in relation to those goods or services would be likely to deceive or cause confusion’. When deciding whether section 43 is a relevant ground for opposing or challenging ‘healthy’ trade marks, there are two principal considerations: first, there must be an inherent healthy connotation within the trade mark; and secondly, the connotation must be likely to deceive or confuse the relevant buying public.⁹³

Section 43 has similar aims to consumer legislation. It is intended ‘to prevent the public being deceived or confused as to the nature of the goods offered by reason of a secondary meaning suggested by the mark in question’.⁹⁴ The case of *Aktion Zahnfreundlich v Suntory Ltd* is a good example of the need for anyone opposing or challenging a ‘healthy’ trade mark to show the mark has real, tangible connotations of health.⁹⁵ In 2010, the ATMO Hearing Office considered an opposition to a smiling face of the tooth trade mark in part because the use of the trade mark indicated a ‘food that was good, or at least not injurious, for teeth’,⁹⁶ and that this would likely cause deception or confusion.⁹⁷ Hearing Officer Williams disagreed.⁹⁸ Taking into account various definitions of connotation and the relevant explanatory memorandum, Hearing Officer Williams outlined section 43 in the following way: ‘if a thing in a trade mark has a meaning – either explicit or implicit – that meaning must not be likely to deceive or cause confusion or there will be grounds for rejecting the trade mark at the examination stage’.⁹⁹ Going further, Hearing Officer Williams made it clear that section 43 was not ‘aimed at wishy-washy suggestions that depend on the beholder making an initial and quite conjectural assumption’.¹⁰⁰ According to Hearing Officer Williams, therefore, the smiling tooth mark did not have a ‘sufficiently tangible meaning, either explicit or implicit’,¹⁰¹ and therefore, did not connote that the foods bearing the mark were good for teeth.

93 IP Australia, above n 73, [29.3.1].

94 *Pfizer Products Inc v Karam* (2006) 219 FCR 585, 599 [53] (Gyles J).

95 (1998) 42 IPR 593.

96 *Ibid* 595 (Hearing Officer Williams).

97 *Ibid*. Also see *Effem Foods Pty Ltd v Star-Kist Foods Inc* (2000) 50 IPR 121 (considering whether the use of the mark ‘meaty bone’ was misleading if used on bones that were not meaty).

98 However, the mark was rejected on the basis that there was an unacceptable risk of deception or confusion between a competitor’s mark under s 44(1) of the Act: *Aktion Zahnfreundlich v Suntory Ltd* (1998) 42 IPR 593, 599.

99 *Ibid* 596.

100 *Ibid*.

101 *Ibid*.

It is not enough, however, to merely show that a ‘healthy’ trade mark has a healthy connotation. The connotation must also be likely to deceive or confuse the relevant buying public.¹⁰² This means that there must be a real, obvious and immediate danger of the buying public being deceived or confused by the meaning within the ‘healthy’ trade mark.¹⁰³ In the often-cited case of *Re Joseph Crosfield & Sons Ltd*, the England and Wales Court of Appeal (Civil Division) stated that:

If the goods are wholly made of wool, the words are the natural and almost necessary description of them. If they are not wholly made of wool, it is a misdescription which is so certain to deceive that its use can hardly be otherwise than fraudulent. In either case the words are utterly unfit for registration as a trade mark.¹⁰⁴

The likelihood of a ‘healthy’ trade mark being deceptive and confusing is considered from the point of view of the ordinary consumer. In so doing, all of the ‘surrounding circumstances’ must be taken into account. Justice Kitto, in *Southern Cross Refrigeration v Toowoomba Foundry Pty Ltd*, stated that

it is sufficient if the result of the user of the mark will be that a number of persons will be caused to wonder ... It is enough if the ordinary person entertains a reasonable doubt. (iii) In considering the probability of deception, all the surrounding circumstances have to be taken into consideration. (This includes the circumstances in which the marks will be used, the circumstances in which the goods will be bought and sold, and the character of the probable purchasers of the goods ...¹⁰⁵

Thus, for a ‘healthy’ trade mark to be opposed or challenged on the ground of section 43, the mark must explicitly or implicitly have a meaning that suggests health. It is fair to say that ‘healthy’ trade marks that include the words (or derivatives of the words) ‘healthy’, ‘natural’ or ‘fresh’ connote that the food products bearing those trade marks are in fact healthy, natural and fresh. Trade marks including ‘healthy’ words suggest something about the ‘health’ qualities of foods bearing them. To use the words of Hearing Officer Williams in *Aktion Zahnfreundlich v Suntory Ltd*, to suggest that ‘healthy’ trade marks connote healthy characteristics in foods that bear them is not ‘wishy-washy’.¹⁰⁶ Further, there must be a ‘real tangible danger’ that ordinary consumers of products bearing the mark would be deceived or misled. Given the evidence in Part II about consumer decision-making, if ‘healthy’ trade marks are used on foods that are unhealthy or contain preservatives or other additives, there is a real danger that consumers would be deceived or confused by these trade marks. Assessing how ‘healthy’ trade marks affect ‘ordinary consumers’ requires consideration of the nature of the goods, broader marketing strategies targeted towards health and wellness, and practices of ordinary consumers.¹⁰⁷ Support for the argument that

102 IP Australia, above n 73, [29.3.1].

103 *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1954) 91 CLR 592, 594–5 (Kitto J).

104 [1910] 1 Ch 130, 150 (Fletcher Moulton LJ).

105 (1954) 91 CLR 592, 595 (citations omitted).

106 (2010) 42 IPR 593, 596.

107 See, eg, *Scotch Whisky Association v De Witt* (2007) 74 IPR 382, 387–8 (Sunberg J).

ordinary consumers are likely to be deceived or misled by unsubstantiated, exaggerated or misleading ‘healthy’ trade marks comes from the ‘surrounding circumstances’. Notably, many of the food products (for example, cereals and cereal bars) bearing ‘healthy’ trade marks are purporting to be healthy; they are purchased at supermarkets; the products are relatively inexpensive and often form part of a much larger grocery shop; food shopping decisions tend to be made quickly;¹⁰⁸ and the time spent evaluating food products is typically short.¹⁰⁹ Further, ‘healthy’ trade marks must be considered in light of the broader branding and advertising circumstances in which they are used. Generally, ‘healthy’ trade marks are not used in isolation but are used in conjunction with brand names, packaging and advertising that suggest health and wellness. This means that consumers often encounter trade marks as part of a broader health-and-wellness marketing strategy, making it more likely that ‘healthy’ trade marks will confuse or deceive health-conscious consumers.

B Are ‘Healthy’ Trade Marks Distinctive?

Another ground upon which ‘healthy’ trade marks can be opposed or challenged is that they are not distinctive. For example, words such as ‘real’ or ‘whopper’ cannot be registered trade marks because they are commonly used descriptive words.¹¹⁰ Section 41 of the *Trade Marks Act 1995* (Cth) provides that a trade mark must be rejected if it is not capable of distinguishing the applicant’s goods or services from the goods or services of other persons.¹¹¹ Section 41(1) states:

An application for the registration of a trade mark must be rejected if the trade mark is not capable of distinguishing the applicant’s goods or services in respect of which the trade mark is sought to be registered (the designated goods or services) from the goods or services of other persons.

In determining whether a ‘healthy’ trade mark is distinctive, the first step is to assess the extent to which the trade mark is inherently adapted to distinguish the applicant’s goods or services from other traders.¹¹² In *Clark Equipment Co v Registrar of Trade Marks*, Kitto J formulated the test of distinctiveness as

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- 108 Jeffery Sobal and Carole A Bisogni, ‘Constructing Food Choice Decisions’ (2009) 38 (Supplement 1) *Annals of Behavioral Medicine* S37. See also Claire Thompson et al, ‘Understanding Interactions with the Food Environment: An Exploration of Supermarket Food Shopping Routines in Deprived Neighbourhoods’ (2013) 19 *Health & Place* 116; Lynsey E Hollywood et al, ‘Healthful Grocery Shopping: Perceptions and Barriers’ (2013) 70 *Appetite* 119.
- 109 Malene Gram, ‘Self-reporting vs Observation: Some Cautionary Examples from Parent/Child Food Shopping Behaviour’ (2010) 34 *International Journal of Consumer Studies* 394.
- 110 *Unilever Australia Ltd v Karounos* (2001) 113 FCR 322 (where the marks ‘real’ and ‘real fish and chips’ were held to be descriptive); *Burger King Corporation v Registrar of Trade Marks* (1973) 128 CLR 417 (where the word ‘whopper’ was held to be descriptive).
- 111 For a detailed discussion of distinctiveness, see Michael Handler, ‘All That Glitters Is Not Gold: A Critical Assessment of Trade Mark Distinctiveness under Australian Law’ (Pt 1) (2015) 101 *Intellectual Property Forum* 14.
- 112 Although s 41 was amended by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) sch 6 item 113, the amendments do not change the key concepts or principles: Explanatory Memorandum, *Intellectual Property Laws Amendment (Raising the Bar) Bill 2011* (Cth) 146.

whether ‘other traders are likely, in the ordinary course of their businesses and without any proper motive, to desire to use the same mark, or some mark nearly resembling it upon or in connexion with their own goods’.¹¹³ More recently, in *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd*,¹¹⁴ the High Court of Australia interpreted the test of distinctiveness, and held that it is necessary to answer two questions: what is the ‘ordinary signification’ of the proposed trade mark to any person in Australia concerned with the relevant goods; and will other traders legitimately need to use the word in respect of their own goods?

Further support in applying section 41(4) is found in note 1 to that subsection, which offers examples of the types of trade marks that may be descriptive, including marks that indicate ‘the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristic, of goods or services’.¹¹⁵ This provides guidance on the kinds of trade marks that are considered prima facie descriptive, and thus incapable of distinguishing the applicant’s goods or services. This results in the possibility that ‘healthy’ trade marks may be opposed or challenged under section 41 if they are not invented words and refer directly to the kind (for example, healthy, natural or fresh) or quality (for example, super or whole) of the food products.¹¹⁶ In *Thorne & Co Ltd v Sandow Ltd*, the English High Court of Justice (Chancery Division) ordered the removal of the trade mark ‘Health’ for cocoa and chocolate because ‘it is a commendatory epithet’ and it is impossible ‘to say that “Health” is distinctive’.¹¹⁷ And in the often-cited case of *Burger King Corp v Registrar of Trade Marks*, Gibbs J found that the word ‘whopper’ was not registrable in respect of hamburgers because it is an ordinary English word that describes a characteristic of hamburgers, namely their size.¹¹⁸ Further, because of the ordinary signification of the word ‘whopper’, another trader might want to use ‘whopper’ to describe their own hamburgers. Therefore, because words such as ‘health’, ‘natural’ and ‘fresh’ are understood by ordinary Australians as having a direct and tangible reference to the quality or characteristic of the food products that bear them, they lack distinctiveness.

Aware of the problems that section 41 raises for descriptive marks, applicants tend to avoid applying for single word marks and instead use variations (for example, a different spelling), a combination of words (for example, HealthyChoice, HealthyBake or Naturally Yours) or composite marks that combine a word or phrase with devices, shapes or colours. This means that ‘healthy’ trade marks that use a combination of words or composite marks are more likely to be inherently adapted to distinguish, and therefore, will not trigger

113 (1964) 111 CLR 511, 514 (Kitto J).

114 (2014) 254 CLR 337, 362 [71] (French CJ, Hayne, Crennan and Kiefel JJ).

115 See also *Ocean Spray Cranberries Inc v Registrar of Trade Marks* (2000) 47 IPR 579, 589 [30] (Wilcox J).

116 For example, *Burger King Corp v Registrar of Trade Marks* (1973) 128 CLR 417 (where the word ‘whopper’ was held to be descriptive).

117 *Henry Thorne & Co Ltd v Sandow* (1912) 29 RPC 440, 452 (Neville J).

118 (1973) 128 CLR 417, 425.

section 41. This will be the case unless it can be shown that the additional words, colours or images are insufficient to make the mark inherently adapted to distinguish the food products of the applicant.¹¹⁹

Even if a ‘healthy’ trade mark is not inherently adapted to distinguish, it may be distinct if it has acquired distinctiveness through use.¹²⁰ Put another way: although a ‘healthy’ trade mark may not be inherently adapted to distinguish, it may be distinctive if, at the file date, the public had come to regard the mark as a badge of origin. For example, despite being a geographical location, ‘OREGON’ is registered for chainsaw accessories; and despite being laudatory, ‘Beautiful’ is registered for perfume.¹²¹ Assessing whether a ‘healthy’ trade mark has acquired distinctiveness through use, or intended use, is a question of fact that depends on evidence and proof of the extent of use of the ‘healthy’ trade mark. Evidence to prove acquired distinctiveness may include annual turnover, advertising expenditure and consumer surveys.¹²² However, proving acquired distinctiveness through use is not easy because the trade mark must be extensively used. In *Ocean Spray Cranberries Inc v Registrar of Trade Marks*, for example, Wilcox J dismissed the applicant’s appeal against the ATMO’s decision to refuse its application for ‘classic’ in relation to cranberry juice.¹²³ In finding the mark not inherently adapted to distinguish, Wilcox J stated the term ‘classic’ was a common place laudatory term and it is ‘accurate to say that the word “classic” describes the kind or quality of the cranberry juice’.¹²⁴ Further, according to Wilcox J, the applicant could not demonstrate that ‘classic’ had been used extensively as a trade mark, nor that customers would view it as a badge of origin.

In sum, although section 41 is a ground upon which ‘healthy’ trade marks can be opposed or challenged, it is unlikely to be successful. This is because the majority of ‘healthy’ trade marks are not single word, descriptive marks. Instead, food manufacturers and producers tend to use unique spelling, a combination of words or composite marks to represent their ‘healthy’ trade mark. Further, and as will be seen in Part III(D), when a ‘healthy’ trade mark incorporates a descriptive or laudatory word – such as ‘natural’, ‘fresh’ or ‘pure’ – the ATMO can endorse the trade mark, making it clear that there is no right to the exclusive use of those words.

C Are ‘Healthy’ Trade Marks Contrary to the Law?

A third ground upon which ‘healthy’ trade marks can be opposed or challenged is that they are contrary to the law. Section 42(b) of the Act states that

119 See, eg, *Verrocchi v Direct Chemist Outlet Pty Ltd* (2015) 112 IPR 200.

120 *Trade Marks Act 1995* (Cth) ss 41(3)–(4). See also *Sports Warehouse Inc v Fry Consulting Pty Ltd* (2010) 186 FCR 519, 545–6 [110] (Kenny J).

121 *Blount Inc v Registrar of Trade Marks* (1998) 83 FCR 50; *Re Application by Estee Lauder Cosmetics Ltd* (2000) 50 IPR 131.

122 IP Australia, above n 73, pt 23 (at 1 September 2014) [23.3.4].

123 (2000) 47 IPR 579.

124 *Ibid* 589 [31].

‘[a]n application for the registration of a trade mark must be rejected if ... its use would be contrary to law’. In assessing whether a ‘healthy’ trade mark is contrary to law, the Registrar is obliged to take into account the operation of law and legislation other than the *Trade Marks Act 1995* (Cth),¹²⁵ and must be satisfied on balance that the use of the opposed trade mark would, rather than could, be contrary to law.¹²⁶ Most often, this will happen when the ‘healthy’ trade mark contains or consists of any sign that is explicitly prohibited by legislation, and generally speaking, a trade mark is contrary to the law if it is contrary to Commonwealth, state or territory legislation. Examples of legislation which may trigger the provisions of subsection 42(b) are listed in the annex A1 in part 30 of the *Trade Marks Office Manual of Practice and Procedure*.¹²⁷ These include the *Plant Breeder’s Rights Act 1994* (Cth), the *Australian Grape and Wine Authority Act 2013* (Cth) and the *Geneva Conventions Act 1957* (Cth). If a trade mark is contrary to legislation listed in annex A1 of the *Trade Marks Office Manual of Practice and Procedure*, there is no doubt that the application must be rejected. However, it is not merely the legislation listed that prohibits trade mark applications. For example, in *Re Application by Slaney*, a trade mark was found to be in breach of the *Health Insurance Commission Act 1973* (Cth) section 41C, as inserted by *Health Legislation Amendment Act 1983* (Cth) section 85,¹²⁸ and in *Re Application by Kelly*, it was found that a trade mark would infringe the *Advance Australia Logo Protection Act 1984* (Cth).¹²⁹

Most notably for ‘healthy’ trade marks, the *Competition and Consumer Act 2010* (Cth) is listed in annex A1 of the *Trade Marks Office Manual of Practice and Procedure*. As a consequence, it is possible that ‘healthy’ trade marks can be opposed or challenged because they are contrary to section 18 of the *Australian Consumer Law* – contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth) – which prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct.¹³⁰ As noted in Part I, the ACCC has used a combination of negotiation, court-enforceable undertakings and enforcement mechanisms to ensure that consumers are not misled or deceived by the claims or words used on food labelling. For example, the ACCC has successfully brought actions to stop the use of misleading depictions of fruit on juice, biscuits

125 *Advantage Rent-a-Car Inc v Advantage Car Rental Pty Ltd* (2000) 52 IPR 24, 31 [26] (Madgwick J).

126 *Ibid* 32 [28] (Madgwick J).

127 IP Australia, above n 73, pt 30 (at 1 September 2014) annex A1.

128 (1985) 6 IPR 307, 309 (Acting Chief Assistant Registrar Hanlon).

129 (1987) 8 IPR 667, 672 (Deputy Registrar Friemann).

130 For an example of a trade mark application being refused because it is contrary to s 18 of the *Competition and Consumer Act 2010* (Cth) see *Target Australia Pty Ltd v Catchoftheday.com.au Pty Ltd* (2015) 114 IPR 189. Conversely, registration of a trade mark does not permit the use of the trade mark in a way that is misleading or deceptive: *CIJI Family Pty Ltd v National Australian Nappies (NAN) Pty Ltd* [2014] FCA 79.

and cordial,¹³¹ and the claim that eggs are ‘free-range’.¹³² If the false or misleading claim being made is by, or is associated with, a trade mark, this is a ground upon which regulators or health groups or bodies can oppose or challenge ‘healthy’ trade marks. For instance, the ACCC initiated proceedings against Coles Supermarkets for misleading consumers to think that bread was made fresh daily in store when in fact, in some cases, the bread was partially baked months before in overseas factories.¹³³ The claims in question made by Coles included ‘Baked TODAY, Sold today’, ‘Freshly Baked’ and ‘Baked Fresh’. On 18 June 2014, the Federal Court of Australia ruled that Coles had engaged in misleading and deceptive conduct because, for example, ‘[t]o many reasonable and ordinary people, the phrase “baked today, sold today” in the context that Coles uses it in the evidence would convey that the baking process, not some heating or baking process, has taken place today’.¹³⁴ Coles Supermarkets Australia is the owner of the composite mark ‘Baked TODAY, Sold today’,¹³⁵ and while the ACCC prevents misleading or deceptive uses of the slogan and mark ‘Baked TODAY, Sold today’ in trade and commerce, it could potentially be challenged and removed from the Register because it is contrary to law.

It is arguable that some ‘healthy’ trade marks that make questionable associations to the health qualities of the food products bearing them are contrary to law. Nevertheless, there are a number of obstacles to relying on section 42(b) to oppose ‘healthy’ trade marks. In *Advantage Rent-A-Car Inc v Advantage Car Rental Pty Ltd*,¹³⁶ Madgwick J questioned the inactivity and reluctance of the ATMO to make decisions on the grounds of section 42(b), stating that the court could not condone ‘reticence on the part of an administrative decision-maker to express an opinion on a matter of law’.¹³⁷ As a result, the ATMO has to consider whether an applicant’s use of its trade mark would be in breach of any legislative provision. Yet the ATMO still clearly sees itself as an administrator rather than an arbiter of disputes over whether a trade mark is contrary to law. On this point, the ATMO states ‘[a]s the function of this office is administrative, rather than judicial, [section 42(b)] is only applied in what is clearly a breach of another Act’.¹³⁸ In addition to this, there are practical limitations to relying on section 42(b) to oppose or challenge ‘healthy’ trade marks. Notably, the trade mark

131 See, eg, *Australian Competition and Consumer Commission v Nudie Foods Australia Pty Ltd* [2008] ATPR ¶42-245; *Australian Competition and Consumer Commission v Arnott’s Biscuits Ltd* [2008] FCA 590; *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2004) 61 IPR 270.

132 *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [No 2] [2014] ATPR ¶42-483.

133 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (ACN 004 189 708) (2014) 317 ALR 73.

134 *Ibid* 97 [146] (Allsop CJ).

135 Coles Supermakets [sic] Australia Pty Ltd, ‘Coles Baked TODAY, Sold today’ (Australian Trade Mark Class 30, No 1414200, entered on register 25 November 2011).

136 (2001) 52 IPR 24.

137 *Ibid* 31 [26].

138 IP Australia, above n 73, pt 30 (at 15 June 2015) [30.3.2].

owner may have already stopped using the mark in a misleading or deceptive manner.

D Endorsement of ‘Healthy’ Trade Marks That Are Deceptive, Distinctive or Contrary to Law

Finally, in summing up the issues of deception, distinctiveness and contrariety to law, it is worth making a number of observations about endorsements. A ground of rejection, challenge or opposition under sections 41, 43 or 42(b) may be overcome by the applicant agreeing to an endorsement: that is, a condition of registration limiting the use of the ‘healthy’ trade mark. The use of endorsements is of practical importance and means that it is possible to register ‘healthy’ trade marks that could potentially be deceptive, descriptive or contrary to law, provided an endorsement stipulates explicitly how and in what circumstances they can be used. ‘Healthy’ trade marks that use a combination of words and/or images, for example, are sometimes endorsed in a way that makes it explicit that the trade mark owner does not have an exclusive right over the single word such as ‘healthy’, ‘natural’ and ‘fresh’. Examples of this kind of endorsement include the composite mark ‘Pure & Natural’ which is endorsed with ‘this trade mark shall give no right to the exclusive use of the words PURE & NATURAL’;¹³⁹ and the mark ‘Naturally Yours’ which is endorsed with ‘this trade mark shall give no right to the exclusive use of the word NATURALLY’.¹⁴⁰

Another kind of endorsement could limit the products that ‘healthy’ trade marks can be attached to. While it is difficult to define and delimit terms like ‘healthy’, ‘natural’ and ‘fresh’, it is not impossible. And while the current front-of-package health star rating system has its critics, it is possible to align ‘healthy’ trade marks with the health star rating scheme being implemented from 2014–19. Most simply, then, a ‘healthy’ trade mark could be endorsed so that it is only used on foods that have certain health star ratings. There are other options available. Applicants of ‘healthy’ trade marks could be asked to establish a food–health relationship similar to the relationship required for health claims by *Standard 1.2.7* on nutrition, health and related claims, which, for example, requires health claims to be based on one of the more than 200 pre-approved food–health relationships or be self-substantiated in accordance with detailed requirements set out in the *Standard*.¹⁴¹ This is important in its own right as the relationships between trade marks and health claims are becoming increasingly relevant, and in need of discussion. As we saw in Part I, the German Federal

139 Pure & Natural Holdings Pty Ltd, ‘PURE & NATURAL FOOD CO’ (Australian Trade Mark Class 29, No 370445, registered from 14 January 1982).

140 Santos Food Co Pty Ltd, ‘Naturally Yours’ (Australian Trade Mark Class 30, No 488834, entered on register 22 July 1992).

141 The Health Claims Scientific Advisory Group provides scientific and technical advice to Food Standards Australia New Zealand in relation to health claims and matters relevant to *Standard 1.2.7*. See Food Standards Australia New Zealand, *Health Claims Scientific Advisory Group* (November 2015) <<http://www.foodstandards.gov.au/science/expertise/Pages/Health-Claims-Scientific-Advisory-Group.aspx>>.

Court of Justice held that the trade marks ‘Praeobotik’ and ‘Probiotik’ were health claims under *Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on Nutrition and Health Claims Made on Foods*, and, therefore, needed to comply with regulations on health claims. Yet another option would be to endorse ‘healthy’ trade marks so that they are not used on ‘discretionary foods’ as described by the *Australian Dietary Guidelines*: that is, ‘foods and drinks not necessary to provide the nutrients the body needs’, often ‘high in saturated fats, sugars [and/or] salt’ and ‘not a necessary part of the diet’.¹⁴² Using the category of discretionary foods is made easy because the *Australian Dietary Guidelines Summary* lists examples of discretionary choices as including sweet biscuits, cakes, desserts and pastries; ice-cream and other ice confections; confectionary and chocolate; potato chips, crisps and other fatty and/or salty snack foods; and sugar-sweetened soft drinks and cordials, sports and energy drinks and alcoholic drinks.¹⁴³ Finally, yet another kind of endorsement could be used on ‘healthy’ trade marks that are contrary to law. Here, endorsements could be placed on ‘healthy’ trade marks so that they are not used in misleading or deceptive ways. For example, the ATMO could endorse Coles’ ‘Baked TODAY, Sold today’ trade mark so that it can only be used on bread that is in fact baked on the day that it is sold.

IV CONCLUDING REMARKS

The trouble with misleading ‘healthy’ trade marks is clear. Trade marks are an important form of communication between food manufacturers and consumers but often serve two associated but inconsistent goals. On the one hand, ‘healthy’ trade marks are used to help consumers assess and compare the health and nutritional value of food products. On the other hand, they are used by food manufacturers and marketers to increase the appeal and sales of their food products. There is, therefore, an incentive for food manufacturers to misuse ‘healthy’ trade marks, and mislead or deceive consumers into believing that food products are healthier, fresher or more natural than they really are. Misleading ‘healthy’ trade marks, therefore, may adversely influence consumers’ perceptions of healthiness, as well as their choice and consumption of food. Put simply, consumers may regard foods bearing ‘healthy’ trade marks more favourably.

The more difficult question is what can be done about ‘healthy’ trade marks. Quite obviously, to combat the use of problematic ‘healthy’ trade marks, a range

142 National Health and Medical Research Council and Department of Health and Ageing (Cth), ‘Eat for Health – Australian Dietary Guidelines: Providing the Scientific Evidence for Healthier Australian Diets’ (Publication No N55, February 2013) 144 <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/n55_australian_dietary_guidelines_130530.pdf>.

143 National Health and Medical Research Council and Department of Health and Ageing (Cth), ‘Eat for Health – Australian Dietary Guidelines: Summary’ (Publication No N55a, February 2013) 27 <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/n55a_australian_dietary_guidelines_summary_131014.pdf>.

of solutions including education and regulation are required. Specifically, with regards to ‘healthy’ trade marks, the ATMO presumes that a trade mark will be used in an appropriate fashion. Therefore, as I have shown in this article, it is up to public health groups, professional bodies and regulators such as the Dieticians Association of Australia, the Public Health Association of Australia, Food Standards Australia New Zealand and the ACCC to oppose or challenge problematic ‘healthy’ trade marks. These groups may model their approach and strategy on other groups that have challenged other intellectual property law rights such as the Public Patent Foundation, which acts in the public interest and attempts to limit the deleterious impact of the United States patent system by opposing and challenging ‘unmerited’ and ‘excessive’ patents.

Once health groups and bodies decide to oppose or challenge ‘healthy’ trade marks, they need to decide which substantive grounds to rely on. This article has shown that perhaps the best way to oppose or challenge ‘healthy’ trade marks is on the basis of section 43. There is a ‘real tangible danger’ that consumers would be deceived or confused by unsubstantiated, exaggerated or misleading ‘healthy’ trade marks. Indeed, ‘healthy’ trade marks that include the words (or derivatives of the words) ‘healthy’, ‘natural’ and ‘fresh’ connote that the food products bearing those trade marks are in fact healthy, natural and fresh. Given the evidence that health claims affect consumer decision-making, there is a ‘real tangible danger’ that ordinary consumers would be deceived or confused by marks indicating health benefits, particularly if they are carried on foods that are unhealthy or contain preservatives or other additives. As we saw in Part III(A) of this article, many of the food products bearing ‘healthy’ trade marks (for example, cereals and cereal bars) are sold in circumstances that facilitate consumer confusion and error. They are, for example, claiming to be healthy, bought at supermarkets as part of a larger grocery shop, and the time spent appraising food products is normally short.

One of the biggest challenges for those wanting to oppose or challenge ‘healthy’ trade marks will be delimiting or defining what is ‘healthy’. While this will be a difficult task, it is not without precedent. And it may be that ‘healthy’ marks can be treated in a similar way as certification marks that require approved rules and standards, or that registered ‘healthy’ marks can be accompanied with relevant endorsements and assurances that they will not be used in misleading or deceptive ways. One way to do this is to match ‘healthy’ trade marks with the health star rating scheme being implemented in 2014–19. Most simply perhaps, a ‘healthy’ trade mark could only be used on foods that have a specified health star rating and/or meet other criteria. For instance, applicants of ‘healthy’ trade marks could be asked to establish a food–health relationship. Such food–health relationships already exist under *Standard 1.2.7*, which, as we saw in Part III(D), requires health claims to be based on pre-approved food–health relationships or be self-substantiated in accordance with the *Standard*.¹⁴⁴ Measures such as these would help reconcile Australia’s trade mark and consumer laws. In relation to the

144 See above n 142.

misuse of place names, William Van Caenegem has previously highlighted tensions between trade mark and consumer law, noting that while ‘consumer law aims at accuracy, and in particular, in relation to credence claims which consumers cannot readily verify, the trade marks law allows the registration of trade marks incorporating place names quite readily, on the basis of fairly sparse evidence’.¹⁴⁵

As a final point, more research into ‘healthy’ trade marks is needed. To date, studies in psychology, food studies and advertising have focused on the impact of health-related claims more generally. So, it is necessary to establish if there is a relationship between ‘healthy’ trade marks and consumer perceptions of health, food choice and consumption. Studies are also needed to determine the extent to which food manufacturers and marketers misuse ‘healthy’ trade marks on products whose health credentials are unverifiable, tenuous or non-existent. Given the significant public health issues associated with food-related diseases and confusion over food labels indolence is not an option. At the very least, the issue of ‘healthy’ trade marks requires further attention, and the building of effective relationships and communication between the ATMO and relevant regulators, health professionals and consumer groups.

145 Van Caenegem, above n 20, 8.