



**Australian
Competition &
Consumer
Commission**

Final Assessment of Certification Trade Mark Applications 1531943, 1531945 & 1531949 – lodged by Infrastructure Sustainability Council of Australia

The Australian Competition and Consumer Commission (the ACCC), in accordance with the requirements of the *Trade Marks Act 1995*, has completed its Final Assessment of the above Certification Trade Mark (CTM) application.

The ACCC’s Final Assessment is that it is satisfied that:

- (a) the approved certifiers demonstrate the attributes necessary to competently certify the goods and/or services in respect of which the CTM is to be registered;
- (b) the rules governing the use of the CTM would not be 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* (the Act) and the principles relating to unconscionable conduct (Part 2-2), unfair practices (Part 3-1), and safety of consumer goods and product related services (Part 3-3) in Schedule 2 (Australian Consumer Law) of the Act.

Signed..... *Mickal Slaper* (Deputy Chair)
Date..... *05 April 2016*



Our ref: 55477
Contact officer: Luke Griffin
Contact phone: 02 6243 1114

23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

tel: (02) 6243 1111

fax: (02) 6243 1199

adjudication@acc.gov.au

www.accc.gov.au

7/04/2016

The Registrar of Trade Marks
IP Australia
PO Box 200
WODEN ACT 2606

By email: fep@ipaaustralia.gov.au

Dear Registrar

**Certification Trade Mark Application Nos. CTM1531943, CTM1531945 and CTM1531949
lodged by the Infrastructure Sustainability Council of Australia**

The Australian Competition and Consumer Commission (the ACCC), in accordance with the provisions of the *Trade Marks Act 1995*, has completed its final assessment of Certification Trade Mark (CTM) Nos. CTM1531943, CTM1531945 and CTM1531949.

A certificate detailing the ACCC's assessment is attached, as well as a certified copy of the rules. The applicant has been notified.

If you have any queries on this matter, please contact Luke Griffin on 02 6243 1114.

Yours sincerely

Darrell Channing
Director
Adjudication Branch



**Infrastructure
Sustainability
Council of Australia**

**INFRASTRUCTURE SUSTAINABILITY COUNCIL OF AUSTRALIA
IS RATING TOOL: CERTIFICATION TRADE MARK RULES**

Dated: 8 July 2014

**Prepared by:
Infrastructure Sustainability Council of Australia
Suite 6.05, 220 George Street
Sydney NSW 2000**



**Certified copy
pursuant to section 175(2)(b)
of the Trade Marks Act 1995**

A handwritten signature in black ink, appearing to read 'M. Glavin'.

Commissioner

05 April 2016
Date

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1. Introduction

1.1. Background

The Infrastructure Sustainability Council of Australia (ISCA) is a member based, not-for-profit industry council that was formed to advance sustainability outcomes in infrastructure. ISCA's vision is "Enhancing the liveability and productivity of our major cities and our regional communities through advancing sustainability in infrastructure planning, procurement, delivery and operation". ISCA will recognise and reward organisations and their projects/assets which deliver good practice sustainable solutions in the design, construction and operation of infrastructure in Australia through the development and facilitation of an industry-complied voluntary sustainability rating scheme (IS rating scheme).

The IS rating scheme can be applied across all aspects of infrastructure. It can be formally applied to obtain the following types of Certified Ratings:

- Design Rating
- As Built Rating
- Operation Rating

It can also be informally applied, however, this will not result in achievement of a Certified Rating.

The IS rating scheme applies to the following infrastructure types:

- Transport
 - Roads and bridges
 - Bus and cycleways
 - Footpaths
 - Ports and harbours
 - Airports
- Water
 - Water storage and supply
 - Sewerage and drainage
- Energy
 - Electricity transmission and distribution
- Communication
 - Communication transmission and distribution

The IS rating tool is comprised of:

- IS Technical Manual
- IS rating tool Scorecard
- IS Materials Calculator

1.2. Purpose of Certification Trade Marks

The purpose of the CTM is to identify, distinguish and promote infrastructure projects or assets which have achieved an IS certified rating and also the level at which they have been certified. IS ratings and the Certification process are facilitated by the Infrastructure Sustainability Council of Australia (ISCA).

For each rating type, there are three possible levels which can be certified. Each level is represented by a different Certification Trade Mark. The three rating levels are shown below:

- Leading (score between 75-100)
- Excellent (score between 50-74)
- Commended (score between 25-49)

1.3. Types of Certification Trade Mark

The Certification Trade Marks are set out in schedule A and are owned by ISCA.

There are three different trade marks associated with various scores and levels certified (as shown above).

The Trade Mark is used in relation to the existing IS rating tool and will be used in relation to any rating tools that ISCA may develop in the future.

The Trade Mark is used for two purposes, namely:

1. By ISCA, to promote ISCA and the IS rating scheme; and
2. By Registrants and Licensees who are awarded a Certified Rating by ISCA, and therefore a licence to use the Trade Mark in relation to an aspect of a project/asset (e.g. its design, its design and construction, or its operation) to promote the Certified Rating.

The use of the Trade Mark Licence should be carried out in accordance with the IS Marketing Guide and the IS Rating Agreement.

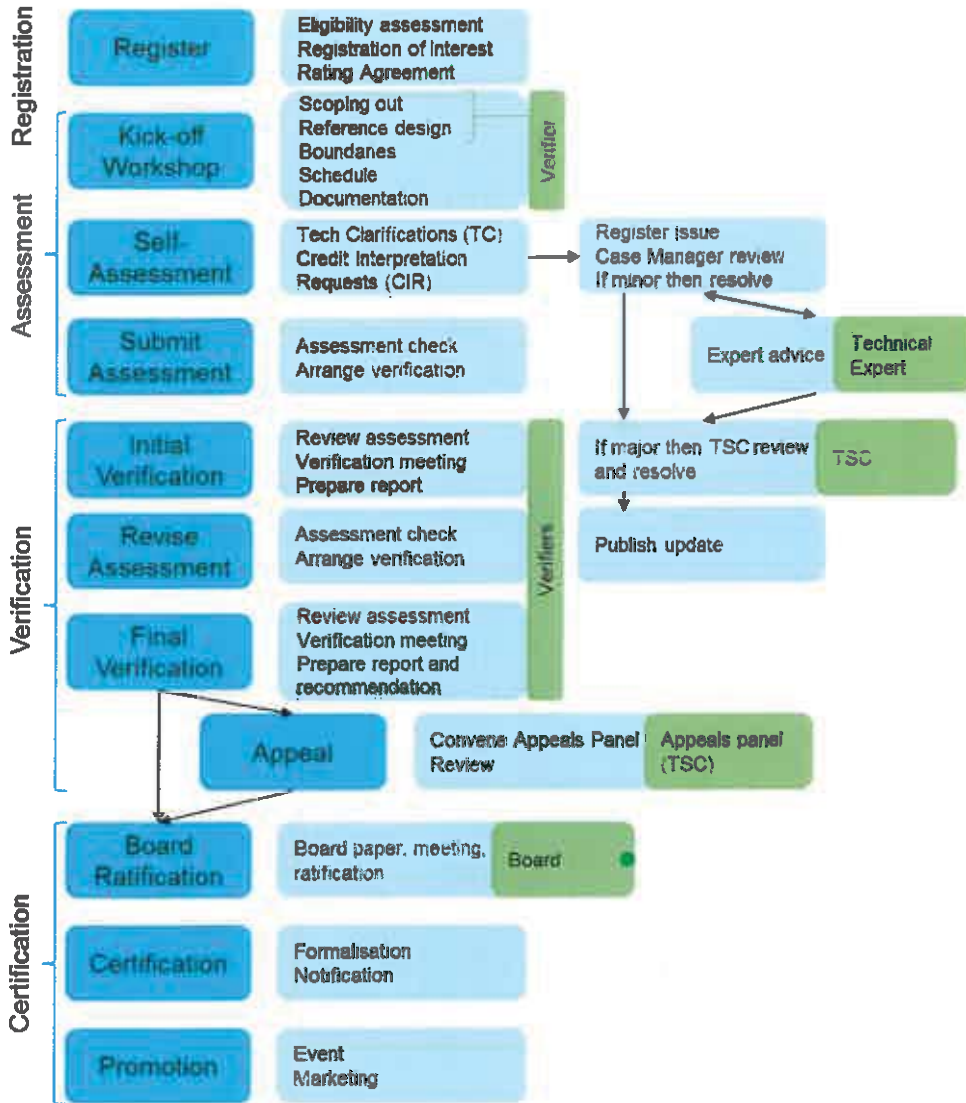
1.4. The Rating Process

The process which each registered project/asset must complete in order to achieve a Certified Rating and receive a Rating Certificate is shown in the figure below.

There are four stages to the Rating Process: Registration, Assessment, Verification and Certification.

Certification is the stage in the rating process whereby a final decision is made on whether a registered project/asset should be awarded a rating and at which level the rating will be awarded - Commended, Excellent or Leading. Following the award of a rating the project/asset will receive a Rating Certificate.





2. The persons who may be approved for the purpose of certifying the sustainability performance of the Infrastructure Project/Asset

ISCAs Board of Directors (or representatives of the Board, e.g. the Technical Steering Committee) are approved for the purpose of certifying the project/asset. Their decision is primarily informed by the recommendation (whether to award a rating and what level the rating should be awarded) made by the Independent Verifier(s) responsible for verifying the rating submission. ISCA's Board of Directors is made up of 10 members who are either a director, senior executive officer or employee of a business organisation involved in infrastructure in Australia including:

1. contractors;
2. design consultants;
3. project managers;
4. infrastructure project owners;
5. infrastructure financiers;
6. infrastructure operators; or
7. any other organisation that provides services to infrastructure;

The Technical Steering Committee is a representative committee of the Board, where the board has delegated their powers to a committee consisting of members of the Board. The Technical Steering Committee was first established in June 2012 and its primary purpose is to:

1. Oversee the technical aspects of the operation and further development of the IS rating tool and IS rating process.
2. Fulfill the functions of the Technical Advisory Panel as outlined in the IS Rating Agreement.
3. Review rating appeals.
4. Make recommendations to the CEO and Board about technical matters

This relationship between the Independent Verifiers and the board's decision on Certification is described below.

- **Independent Verifiers:** ISCA maintains a panel of Independent Verifiers. These verifiers are independent experts and must be sufficiently knowledgeable in the design, construction and operation of infrastructure projects/assets as well as have experience in sustainability in the design, construction and operation of infrastructure. For each registered project/asset, ISCA assigns one or more Verifiers without any actual or perceived conflict of interest (this is checked and confirmed) to undertake the verification of the rating.
- **Verification:** To begin the Verification process, the Registrant will submit their assessment to ISCA at the end of major milestones for independent verification (Design, As Built and Operation). ISCA will review the submission to check that it conforms to submission requirements. If the quality of the submission is such that it would result in an excessive number of credits denied then a project/asset may be required to resubmit. ISCA will arrange independent verification by one or more verifiers. One round of feedback will be provided to Registrant so they have the opportunity to provide additional information to improve their potential Rating outcome. The Registrant may accept the results of the verification or update their submission. The Registrant may make a final submission and a final verification will take place.
- **Verifier Recommendation:** Following the completion of the final verification the Verifier(s) will make a recommendation to the ISCA Board regarding whether the project/asset should be awarded a Rating and at which level the Rating should be awarded - Commended, Excellent, or Leading.
- **ISCA Board Certification Approval:** The ISCA Board of Directors, or representatives of the Board (e.g. the Technical Steering Committee), are convened following receipt of the Independent Verifiers recommendations to make a final decision about the Rating for the registered project/asset. They assess information presented to them as part of a standard Certification Form and confirm their decision.

3. The cases in which the sustainability performance of infrastructure Projects/Assets will be Certified

ISCA will award a Certified rating and grant a right to use the Trade Mark (under a limited and non-exclusive and non-transferable licence on the terms set out in a relevant Rating Agreement) to Registrants who have entered into a Rating Agreement or Rating Licence with ISCA and where the sustainability performance of the subject infrastructure project/asset has been Verified and Certified through the appropriate processes outlined within the following ISCA procedures:

- Verification Procedure
- Certification Procedure

These procedures, along with the overall Rating Process may be updated as required. As such, the following information sets out the process for Verification and Certification at the time these rules were submitted for approval. For the most up to date information on procedures contact ISCA directly at info@isca.org.au.

The use of the IS rating tool without registration with ISCA does not entitle the use or any other party to promote a Rating or to use the Trade Mark.

The IS Technical Manual and the IS rating tool scorecard, as part of the IS rating tool, are the formal ISCA documents which outline criteria and guidance relevant to achieving a Certified Rating. ISCA establishes a number of categories under which specific key criteria are grouped and assessed and these are set out in the Technical Manual.

The total points achieved for an infrastructure project/asset are calculated to determine at which rating level (Commended, Excellent or Leading) the infrastructure project/asset can be Certified.

The Certification of the Rating depends on approval from the ISCA Board of Directors (as described in Section [Error! Reference source not found.](#)~~Error! Reference source not found.2~~). The rated project/asset must achieve the minimum score required in order to progress to certification.

Each category is divided into a number of credits each of which addresses a specific aspect of sustainability performance within the category. This may relate to a mitigation or improvement initiative, or a process that supports achievement of sustainable outcomes. Some credits may not be applicable to all rating types.

Each credit has a reference which is a three letter abbreviation based on the category name and then a sequential number. Each credit has a title and an aim which describes what the credit is trying to reward or encourage. Credits can be scoped out if they are truly not applicable to the project or asset. They cannot be scoped out simply because they were outside the scope or very difficult to achieve. Note that for a certified rating, credits scoped out must be verified through ISCA. Scoped out credits assume a weight of zero and therefore do not contribute to the overall score.

Each credit:

- Has a series of benchmark performance levels which define increasing levels of performance for that credit from Level 1 to Level 3
- In some cases not all of the three levels are used.
- Requires evidence to demonstrate that a certain performance benchmark (Level) is being met.

Each credit has a weighting shown as the 'points per level'. The 'score possible' is the 'points per level' multiplied by the highest level available for that credit. Similarly the 'points achieved' is the 'points per level' multiplied by the 'level achieved' (as assessed and/or verified). Each credit weighting reflects its relative contribution to the sustainability performance of the overall project or asset. Note that credit weightings adjust when credits are scoped out. Weightings were determined through a weighting survey and study.

The category score is simply the sum of the 'points achieved' for each credit. The overall score is simply the sum of the category scores, giving a number of points where the maximum is 100.

4. The conditions under which an approved user is to be allowed to use the Trade Mark in relation to an infrastructure Project/Asset

With the exception of ISCA, no person may use the Trade Mark unless granted a licence by ISCA. ISCA at its discretion may grant, renew or refuse to grant a licence.

The Certified Rating is awarded to the defined infrastructure project or asset itself. The Registrants for the rating must be one or more of the key stakeholders in the project or asset. Key stakeholders typically include proponents, owners, operators, designers, and constructors. Following achievement of certification, Registrants will be able to publicly claim an IS rating for the infrastructure.

If a project/asset is awarded a Certified Rating by ISCA, the Registrant of that project/asset rating will be granted a non-transferable, non-exclusive licence, from the Rating Date, to use and display the relevant Trade Mark showing the rating in accordance with the IS Marketing Guide and the Rating Agreement. The Registrant will be granted the use of this licence until the end of the Rating Agreement, either through the expiration of the Agreement or by termination of the Agreement.

This licence may not be sub-licensed. In particular, the Registrant may not permit any third party, including without limitation any contractor or consultant or any related body corporate of the Registrant, to use the Trade Marks to promote its association with the Rating, except with the prior written consent of the Principal.

If a Registrant is not awarded a Certified Rating as a Commended, Excellent or Leading Rating that Registrant will not be granted a license to use the Trade Mark and will be prohibited from promoting a Rating.

A Licensee shall only use the Trade Mark or claim an entitlement to use the Trade Mark in relation to the project/asset covered by the license granted under the relevant Rating Agreement and only on the terms set out in that Rating Agreement, unless otherwise agreed in writing by ISCA.

Under the terms of the Rating Agreement entered into by the Registrant, the Registrant agrees that ISCA retains all copyright and other proprietary rights in the rating tools and that Trade Mark and agrees not to sell, modify, or use the Trade Mark except in accordance with the relevant Rating Agreement and the IS Marketing Guide.

4.1. Expiration of License

The Certified Ratings (and therefore any license to use the associated Trade Mark) are deemed to expire as follows:

Design rating – At or about the time the project reaches practical completion (at which point the rating must be converted to an As Built rating).

As Built rating – This rating is indefinite.

Operation rating – After approximately five years following award of the certified rating (at which point the rating must be renewed).

4.2. Termination of License by ISCA

ISCA may terminate any license granted under a Registration Agreement, by terminating the relevant Rating Agreement and all the Registrant's rights arising under it, by giving the Registrant a written notice, if the Registrant:

- (a) (misleading or deceptive conduct): engages in any conduct in relation to the relevant rating tool, the relevant Independent Assessment of Certification Panel Assessment, as the case may be, or the Trade Mark which in ISCA's reasonable opinion is likely to, or does, mislead or deceive;
- (b) (transfer without approval): sells, transfers, assigns or otherwise disposes of its right or obligations in relation to the Building the subject of the relevant Certification Agreement, without obtaining ISCA's prior written approval for the assignment of relevant rights and obligations to the purchaser or transferee of the rights or obligations in relation to the Building; or

Or any of the following events occur by or in relation to the Registrant:

- (a) (performance default): any default under the relevant Rating Agreement resulting from failure by the Registrant to perform any provision of, or liability under, the relevant Rating Agreement, except for a rectifiable default, which is rectified within 30 days following written notice from ISCA requiring rectification;
- (b) (misrepresentation): material non-compliance by the Registrant with or the fact of material inaccuracy of any representation made or deemed to be made or repeated by the Registrant in the relevant Rating Agreement, or in any document delivered to ISCA under or in connection with the relevant Rating Agreement;

4.3. Termination of License by the Registrant

The Registrant may terminate any licence it has been granted to use the Trade Mark by terminating the relevant Rating Agreement at any time giving 30 days written notice to ISCA. Upon termination of the Rating Agreement, the Registrant shall immediately cease any and all use of the Trade Mark and do such further things as may be reasonable required by ISCA to protect ISCA's right, title and interest in the Trade Mark.

5. The use of the Certification Trade Mark by ISCA or any other approved user

ISCA will use the Trade Mark for promotion of the rating tool/s and for general promotion of ISCA.

The use of the Trade Mark by ISCA may include, but is not limited to:

- Publishing the Trade Mark in documents produced by ISCA or produced for ISCA by an external party.
- Publishing the Trade Marks on the ISCA website, or on the websites of our members,
- Displaying the Trade Marks on signs, banners, on print media,
- Including the Trade Marks in multi-media presentations, or on television commercials

ISCA may also at its absolute discretion, grant licences to Registrants to whom ISCA awards a certified rating, to use the Trade Mark in accordance with the relevant Rating Agreement entered into between ISCA and the Registrant and the IS Marketing Guide that will be issued to successful Registrants.

ISCA may also grant licences to other third parties to use the Trade Mark for purposes consistent with the objectives and mission of ISCA and for the promotion of the rating tool/s and for the general promotion of ISCA.

6. Dispute Resolution in relation to a refusal by ISCA to grant a Certified Rating and to allow the use of the Trade Mark

In the event that the Registrant may want ISCA to reconsider a decision by ISCA in relation to a Rating Certification (including a decision to refuse to grant a Certified Rating) or the use, or display, of a Trade Mark (including a decision by ISCA to refuse to allow the use of a Trade Mark for any reason), the following procedure applies:

- A notice of dispute in respect of a decision by ISCA in relation to a Rating, or the use or display of a Certified Trade Mark, shall be served by the Registrant to ISCA within 30 days of the Registrant receiving ISCA's decision, and shall outline the Registrant's concern and the reasons why the Registrant believes ISCA should reconsider the decision.
- For each and every notice of dispute the Registrant submits, ISCA may deliver to the Registrant a Payment Claim for the Ratings Dispute Fee, and the payment of the Ratings Dispute Fee to ISCA by the Registrant is a condition precedent to the processes outlined in Section 6 of these rules.



- If the Registrant does not respond to the Payment Claim for the Ratings Dispute Fee, the Registrant will be barred from disputing a decision by ISCA in relation to a Rating or a Trade Mark.
- Within 30 days of receipt of a notice of dispute, ISCA shall present the notice of dispute to its Board of Directors (or a representative of the Board).
- The Registrant will be afforded an opportunity to participate in the presentation to the board of Directors (or a representative of the Board). They shall also comply with any reasonable request by ISCA in relation to this presentation.
- ISCA shall give written notice to the Registrant of the decision of the board of directors, which shall be final and binding on both parties.

6.1. Precondition to legal proceedings

Neither party may commence legal proceedings in relation to a Dispute unless the parties have undertaken the process set out in this clause 6 and those processes have failed to resolve the Dispute, or one of the parties has attempted to follow these processes and the other party has failed to participate.

6.2. Summary relief

Nothing under this clause 6 shall prejudice the right of a party to institute proceedings to enforce payment due under the Agreement or to seek injunctive or urgent declaratory relief.

7. Notices

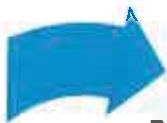
Any notice or other communication to be given or sent by ISCA to any person in relation to these rules shall be deemed to be duly given or sent if sent by post or email to the address last known to ISCA and shall be deemed to be given at the time when the same would ordinarily have been received depending on the method employed.

The address for notices to ISCA shall be:

Chief Executive Officer

The current postal address as nominated on the ISCA website (www.isca.org.au)

Email: info@isca.org.au






8. Glossary of terms used in these rules

- "As Built Rating" means a rating awarded at the end of construction of the infrastructure project/asset;
- "Assessment" means the product of the Registrant's self-assessment being the Rating Tool scorecard and the evidence demonstrating achievements described in the scorecard;
- "Credit" means a measurable aspect of sustainability performance within the IS Rating Tool;
- "Design Rating" means a rating awarded at the end of the design phase of the infrastructure project;
- "Independent Verifier" means any person authorised by the Principal to undertake Verification with respect to the Rating Tool;
- "IS Marketing Guide" means the guide for use of the Trade Marks published by the Principal from time to time;
- "Licensee" means an Applicant awarded a license to use the Trade Mark;
- "Operation Rating" means a rating awarded during the operation of the infrastructure asset;
- "Practical Completion" means the stage of an infrastructure project when works have been substantially completed except for minor defects;
- "Project/Asset" means the proposed infrastructure project or asset described in the Particulars;
- "Rating" means a rating awarded to the Registrant by ISCA under the Rating Agreement;
- "Rating Agreement" or "IS Rating Agreement" means any rating agreement, to pursue and use a certified IS rating, entered into between ISCA and a Registrant in relation to any of the rating tools, as varied from time to time;
- "Rating Certificate" means a certificate awarded to the Registrant by ISCA with respect to a Rating;
- "Rating Date" means the date of issue of a Rating Certificate to the Registrant;
- "Rating Licence" or "IS Rating Licence" means any rating licence, to use a certified IS rating, entered into between ISCA and a Licensee in relation to any of the rating tools, as varied from time to time;
- "Rating Tool" means the Principal's Infrastructure Sustainability (IS) Rating Tool details of which are available at the Website;
- "Registrant" means a person who has entered into a Rating Agreement with ISCA;
- "Registration" means the execution of this agreement to pursue an IS Rating;
- "Technical Manual" or "IS Technical Manual" means the version of the Rating Tool Technical Manual current at the date of execution of this Agreement, as varied from time to time;
- "Technical Steering Committee" means an advisory panel convened by ISCA and designated as the "Technical Steering Committee";
- "Trade Marks" means the Principal's trademarks and any marks set out in Annexure A to this Agreement;
- "The Board" means the Board of Directors of ISCA; and
- "Verification" means verification of the Project/Asset assessment by a Verifier with respect to the Rating Tool.



Schedule A

Trade Mark No	Mark	Classes & Services
1531943		<p><u>Class 37</u> Construction services including construction of infrastructure projects</p> <p><u>Class 42</u> Design services including design of infrastructure</p>
1531945		<p><u>Class 42</u> Design services including design of infrastructure</p>
1531949		<p><u>Class 37</u> Maintenance and repair services for infrastructure</p> <p><u>Class 38</u> Management and operation of electronic systems and infrastructure including telecommunications systems</p> <p><u>Class 39</u> Management and operation of infrastructure including bridges, tunnels, roads, airfields, water systems, dams, ports, railways, transport systems</p>

