



06 July 2012

Baker & McKenzie  
27th Floor  
AMP Centre  
50 Bridge Street  
SYDNEY NSW 2000

Attention: Sir/ Madam

RE: Trade Mark No(s) 1241070 in the name of LION NATHAN AUSTRALIA PTY LIMITED.

The above trade mark is now registered. In order to reduce holdings of material at this office, we are now returning the evidence of use filed in support of the trade mark application.

The evidence consists of Annexure "EC-1" - "EC-14" to Statutory Declaration by Emma Croft and Exhibit "JG-1" - "JG-15" to Statutory Declaration by Josh Gaudry.

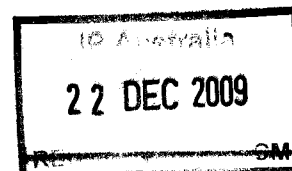
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TXR  
TSD



Confidential communication

Wendy Cooper, Examiner  
Registrar of Trade Marks  
IP Australia  
PO Box 200  
Woden ACT 2606

**NOTE - EVIDENCE FORWARDED  
TO EXAM SERVICES**

18 December 2009

Dear Examiner

**Lion Nathan Australia Pty Limited**  
**Trade Mark Application No. 1241070 for THE CLEAN CRISP TASTE in class 32**

A trade mark application for THE CLEAN CRISP TASTE in class 32 was filed in the name of Lion Nathan Australia Pty Limited ("Lion Nathan") on 15 May 2008. This application was filed as Trade Mark Application No. 1241070 (the "Application"). An Examiner's Report was issued in relation to the Application on 27 May 2008.

**1 Section 41 objection**

- 1.1 In the report dated 27 May 2008, the Examiner rejected the Application on the basis that other traders should be able to use the words "THE CLEAN CRISP TASTE" in connection with goods or services similar to Lion Nathan's (under s41 of the *Trade Marks Act 1995* (Cth) ("**Trade Marks Act**")). However, the Examiner also indicated that they may be willing to reconsider this objection if Lion Nathan were able to provide evidence of use and/or intended use and/or other circumstances under s41(5) of the Trade Marks Act.
- 1.2 In an effort to overcome the s41 objection and address the issue raised in the Examiner's Report, Lion Nathan has now compiled supporting evidence and respectfully requests that the Examiner consider the enclosed evidence, along with the submissions set out below.
- 1.3 In order to assist in establishing the inherent adaptability of THE CLEAN CRISP TASTE, we request that the goods be limited to the following goods in class 32:
- "Beers and ales."
- 1.4 In support of its Application, Lion Nathan relies on the following statutory declarations:
- (a) Josh Gaudry sworn 15 December 2009; and
  - (b) Emma Croft sworn 18 December 2009.

**2 The extent to which THE CLEAN CRISP TASTE trade mark is inherently adapted to distinguish Lion Nathan's goods**

2.1 The note to section 41 of the Trade Marks Act explains that trade marks which are not inherently adapted to distinguish are mostly those that consist of a sign ordinarily used to indicate:

- (a) the kind, quality, quantity, intended purpose, value, geographic origin or some other characteristic of the goods or services; or
- (b) the time of production of goods or of the rendering of services.

2.2 In *Kenman Kandy (Aust) Pty Ltd v Registrar of Trade Marks* (2002) 56 IPR 30, Stone J observed:

*"[145] Signs that are descriptive of the character or quality of the relevant goods or which use a geographic name in connection with them cannot be inherently distinctive because the words have significations or associations that invite confusion and because registration of a trade mark using such words would preclude the use by others whose goods have similar qualities or which have a connection with the relevant areas. This concern is to any of the elements referred to in the definition of sign and involves the courts in policy considerations inherent in trade mark law..."*

*[147] In my opinion it is the absence of these associations and significations that makes a sign inherently adapted to distinguish one trader's goods from those of another. In other words the concept is negative not positive."*

2.3 The Examiner has stated that the beverages Lion Nathan is claiming protection for in class 32 have a clean, crisp taste and has concluded that other traders should be able to use the words THE CLEAN CRISP TASTE in connection with goods or services similar to Lion Nathan's. We respectfully submit that the Examiner has erred in making this conclusion for the reasons set out below.

2.4 Lion Nathan launched TOOHEYS DRY in 1989, with the phrase "Cold Filtered for a Clean Crisp Taste" on packaging. This phrase was maintained through the re-launch of TOOHEYS DRY as EXTRA DRY. From 2003, the phrase "Cold Filtered for a Clean Crisp Taste" began to be shortened to THE CLEAN CRISP TASTE (Gaudry, para 8).

2.5 THE CLEAN CRISP TASTE is not descriptive of the goods claimed on the Application. The tagline change from "Cold Filtered for a Clean Crisp Taste" to "THE CLEAN CRISP TASTE" due to a marketing decision which Lion Nathan made in response to market research and insights that consumers held for the EXTRA DRY brand (Gaudry, para 9). The tagline was chosen as part of a brand re-focus in 2003 and was used as a punchier tagline. The tagline drew upon the use of the phrase "CLEAN

CRISP TASTE”, which had been used continuously by EXTRA DRY since 1989 (Gaudry, para 9).

### **3 Lion Nathan’s reputation in the name THE CLEAN CRISP TASTE**

3.1 Lion Nathan has established a significant reputation and goodwill in the phrase THE CLEAN CRISP TASTE when used in respect of beer having regard to its extensive promotion and sales of the product since 2003. From 2003, Lion Nathan has used THE CLEAN CRISP TASTE continuously across nearly all national television, print media, billboard and online advertising, promotional materials, promotional merchandise and on all packaging, labelling and internal and external communications relating to the EXTRA DRY beer brand (Gaudry, para 10).

3.2 Regard may be had to the combined force of the following factors:

- (a) The words THE CLEAN CRISP TASTE have been used by Lion Nathan in respect of beer since 2003 (Gaudry, para 8).
- (b) The words THE CLEAN CRISP TASTE are used prominently on the packaging and labelling for Tooheys EXTRA DRY. The words THE CLEAN CRISP TASTE are clearly used by Lion Nathan as a trade mark rather than a descriptor. The words THE CLEAN CRISP TASTE are in a large, white, block text in the bottom centre of the (usually) green label. For EXTRA DRY PLATINUM, the words THE CLEAN CRISP TASTE are similarly emphasised with white text on a black background. The position of THE CLEAN CRISP TASTE just below the Tooheys EXTRA DRY and Tooheys EXTRA DRY PLATINUM devices ensure that the consumers and trade recognise THE CLEAN CRISP TASTE as a brand identifying tagline of EXTRA DRY (Gaudry, para 13).
- (c) Since 2003, Lion Nathan has regularly advertised and promoted Tooheys EXTRA DRY with emphasis on the tagline, THE CLEAN CRISP TASTE. For example, in high-profile and well-known television commercials, including the “Tongue” campaign since 2003, the “Appliances” campaign since 2005 and “Harvested” campaign in 2006, THE CLEAN CRISP TASTE is featured as the closing message on-screen at the end of each advertisement (Gaudry, paras 15-17).
- (d) Consumer and the trade identify THE CLEAN CRISP TASTE as a distinctive reference to Tooheys EXTRA DRY beer. The sharp tagline, with emphasis on “clean” and “crisp”, with the use of the definitive article “The” is recognised as a reference to Tooheys EXTRA DRY, rather than a descriptive phrase about the beer. This is supported by qualitative market research (Gaudry, paras 32-33).
- (e) Lion Nathan’s overall annual sales figures of EXTRA DRY across the 2003-2008 period total an impressive [REDACTED] (see Gaudry Confidential Exhibit 14) and the sales volume of EXTRA DRY from 2003-2008 of [REDACTED]

litres (see Gaudry, Confidential Exhibit 15), which indicates a significantly strong market presence for EXTRA DRY in the national beer sales market. Lion Nathan has invested huge sums of money in promoting THE CLEAN CRISP TASTE in respect of the EXTRA DRY brand.

- (f) Lion Nathan's overall marketing and promotional spend for EXTRA DRY across the 2003-2008 period totals an extraordinary [REDACTED] (see Gaudry Confidential Exhibit 13) which indicates an intensive marketing and promotion commitment likely to cement consumer awareness and recognition of THE CLEAN CRISP TASTE as the tagline for the EXTRA DRY beer brand.
  - (g) Although other traders in the alcohol beverages industry in Australia could be using "clean" or "crisp" to describe their product, it does not appear that any other traders are using the phrase "THE CLEAN CRISP TASTE" in the order used by Lion Nathan as a trade mark (Gaudry, paragraph 34).
  - (h) There is no evidence of other brewers using the name "THE CLEAN CRISP TASTE" in respect of beer in Australia (see Croft, paras 5-19). As an example, fourteen of the first twenty links of a search of "The Clean Crisp Taste" on Google refer to THE CLEAN CRISP TASTE as a trade mark for Tooheys EXTRA DRY (Croft, paras 5-19). We respectfully submit that no other trader, without improper motive, would have the need or desire to adopt THE CLEAN CRISP TASTE mark as a trade mark in relation to the class 32 goods applied for.
- 3.3 The question of whether a mark does distinguish is entirely one of fact (*Blount Inc v Registrar of Trade Marks* (1998) 83 FCR 50). We maintain that the factors listed in paragraph 3.2(a) - (h) above, including the sales and marketing, volume sales and promotion expenditure between 2003 to 2008 is more than sufficient to establish THE CLEAN CRISP TASTE as a well-known, distinguishing tagline for EXTRA DRY.
- 3.4 Furthermore, having regard to the authorities discussed below, we respectfully submit that the 6 years of use may be considered to have sufficiently established THE CLEAN CRISP TASTE as a distinctive of Tooheys' and is recognised as a Lion Nathan trade mark by both consumers and members of the trade.
- 3.5 See in particular the following cases on infringement of descriptive words that have been held to have acquired a secondary meaning:
- (a) **BM Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd** (1977) 51 ALJR 254 (Barwick CJ, Gibbs and Murphy JJ) (while the words "budget" and "rent-a-car" were ordinary words apt to describe particular services, the name "Budget Rent A Car" had become distinctive of the respondents' business through use);

- (b) **James Watt Construction Pty Ltd v Circle-E Pty Ltd** [1970] 3 NSW 481 (Hope J) (the words "Barrier Beam" had "ceased to be simply descriptive of a particular type of [electronic] machine guard", so that they meant the plaintiff's guard, and did not require the addition of the plaintiff's name to be so understood);
- (c) **Abundant Earth Pty Ltd v R & C Products Pty Ltd** (1985) 7 FCR 233 (Toohey, Morling and Beaumont JJ) (the words "Pure and Simple", although a common descriptive English phrase as a name for goods, had become distinctive of the respondent's product);
- (d) **LSK Microwave Advance Technology Pty Ltd v Rylead Pty Ltd** (1989) 16 IPR 107 (Burchett J) (injunction granted to restrain use of the words "Microwave Cuisine" which had become distinctive of the applicant's business of conducting microwave cooking classes);
- (e) **Roses Only & Lush Pty Ltd v Mark Lyons Pty Ltd** (1999) 47 IPR 593 (Sackville J) (interlocutory injunction granted following finding of serious question to be tried as to whether the name "Roses Only" had acquired a secondary meaning distinctive of the applicant's business);
- (f) **WMC Limited v Westgold Resources NL** (1997) 39 IPR 319 (North J) (even though the words "Western Mining" could be seen as merely descriptive, the applicant had established the name had become distinctive of its business so as to found an entitlement to injunctive relief); and
- (g) **Apand Pty Ltd v The Kettle Chip Company Pty Ltd** (1994) 52 FCR 474 (Full Ct) (word "Kettle", used in respect of batch cooked potato chips, had acquired a secondary meaning and was distinctive of applicant's product).

In **Philmac Pty Ltd v Registrar of Trade Marks** (2002) 126 FCR 525, evidence of substantial use and advertising for 4 years, with trade evidence was sufficient for acceptance under section 41(6) for registration of a trade mark described as "the colour TERRACOTTA as applied to the connecting insert of polypipe fittings".

In light of the matters referred to above, we request that the Examiner reconsider the section 41 objection and recommend the trade mark for acceptance.

# MALLESONS STEPHEN JAQUES

IP Australia - Trade Marks Office

18 December 2009

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Yours sincerely



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**Australia**

**Trade Marks Act 1995**

**IN THE MATTER OF** Trade Mark  
Application No 1241070 for THE CLEAN  
CRISP TASTE in the name of Lion  
Nathan Australia Pty Limited (the  
“Applicant”)

**STATUTORY DECLARATION**

*Statutory Declarations Act 1959 (Cth)*

I, EMMA CROFT, of 1 Farrer Place, Sydney, NSW 2000, solicitor, make the following declaration under the *Statutory Declarations Act 1959*:

- 1 Mallesons Stephen Jaques (“**Mallesons**”) has been instructed by the Applicant to represent the Applicant in this matter. I am an employee of Mallesons and, subject to the supervision of a partner of Mallesons, I am authorised to make this declaration on behalf of the Applicant.
- 2 I am making this declaration as part of the evidence in support of Application No 1241070 (the “**Application**”).
- 3 On 14 December 2009, I was instructed by Scott Bouvier, a Partner in the Intellectual Property and Technology department of Mallesons, to conduct searches of the world wide web to ascertain the extent to which other traders aside from the Applicant are using the words “THE CLEAN CRISP TASTE” in connection with goods or services similar to the Applicant’s.
- 4 In this declaration I use the term “Google search” to refer to my online searching of the world wide web using the Google search engine located at [www.google.com.au](http://www.google.com.au). That webpage provides, among other services, the facility to search Google’s index of webpages. More information about Google can be found on the webpage <http://google.com.au/about.html>.



## **“The Clean Crisp Taste”**

- 5 On 18 December 2009 I conducted a Google search for “The Clean Crisp Taste”. Attached at Annexure “**EC-1**” is a copy of the Google results page displaying the first 20 links after typing “The Clean Crisp Taste” into the Google search.
- 6 The first three links lead to websites for the Applicant in relation to the Applicant’s beer brand Tooheys EXTRA DRY (“**EXTRA DRY**”) or websites about EXTRA DRY. The first link is to <http://www.tooheysextradry.com.au>. The second link is to a fashion website that is advertising an EXTRA DRY “Clean Crisp Taste” competition and the third website is another EXTRA DRY website, <http://thecleancrisptaste.com.au>. There are references to “THE CLEAN CRISP TASTE” throughout these three websites as the tagline for EXTRA DRY. Attached at Annexure “**EC-2**” is a copy of the extracts from these websites.
- 7 I then clicked on the fourth link and was taken to the “Aussie Beer” section of the website “MadeinOz” at <http://madeinoz.com/beer.html>. Attached at Annexure “**EC-3**” is a copy of the extract from that website link. The only reference to “the clean, crisp taste” on this website is in relation to the description of EXTRA DRY, as stated on the website “...Following the infamous “The Quest” ad which featured a tongue with a serious thirst, the new ad makes a splash with three household appliances battling it out for the clean, crisp taste”.
- 8 Clicking on the fifth link of my Google search, this went to a website called “B&T” at <http://www.bandt.com.au/articles/F8/0C0299F8.asp>, which is described as a website about marketing, advertising, media and PR. The web page describes a new outdoor campaign for EXTRA DRY and states that the campaign demonstrates “the “clean, crisp taste” of the beer in a very untraditional ways [sic]”. There is a quote on the web page from the EXTRA DRY marketing manager Ben Slocombe which states that the advertising agency “developed a campaign that is very single minded and simple, capturing perfectly the Tooheys Extra Dry tone of voice and product proposition of the clean crisp taste”. The image attached to this article is of two bottles of EXTRA DRY in a shower with the words, “THE CLEAN CRISP TASTE”. Attached at Annexure “**EC-4**” is a copy of an extract from that website link.
- 9 I then clicked on the sixth link of my Google search and was taken to a website for the Applicant at <http://www.lion-nathan.com.au/GetFile.aspx?nodeguid=4A802D26-D11A->

4538-902C-32064A77FFDE. The website link is to a media release describing a new EXTRA DRY television commercial, "HarvesTED". The two page media release references "the clean crisp taste" five times. At the start of the article is a logo for EXTRA DRY, with "THE CLEAN CRISP TASTE" written as the tagline under EXTRA DRY. Attached at Annexure "EC-5" is a copy of the media release reached from clicking on the sixth link of the Google search.

- 10 I then proceeded to examine the seventh link on the Google search. This link at <http://www.refreshpurewater.com.au> is to the website of a company that sells purified water. Attached at Annexure "EC-6" is an extract from this website.
- 11 The eighth and ninth links on the Google search were to liquor retailer websites advertising EXTRA DRY. Both sites reference THE CLEAN CRISP TASTE, in advertising Tooheys products. For example, the first site, Bottlemart, advertises Tooheys 5 Seeds by stating, "From the brewers who bring you TOOHEYS EXTRA DRY, The Clean Crisp Taste has reinvented cider". Attached at Annexure "EC-7" are extracts from these websites.
- 12 The tenth link was another site in relation to "Refresh Pure Water", as described in paragraph 10 above. The eleventh link is also not related to the Applicant, as it is a customer review page of a Japanese restaurant. Attached at Annexure "EC-8" are extracts from these links.
- 13 I then clicked on the twelfth link on the Google search result page which took me to <http://www.beerguide.com.au/beer-reviews/Tooheys/Tooheys-Extra-Dry-Platinum>". That web page contained a review of EXTRA DRY PLATINUM. The tag line for the beer described it as "Triple Filtered Purity - The clean crisp taste". Attached at Annexure "EC-9" is a copy of that webpage.
- 14 The thirteenth link on the Google search is to a determination by the Alcohol Beverages Advertising Code ("ABAC") Complaints Panel. The determination which dismissed a complaint against an EXTRA DRY television commercial, notes in the description of the television commercial that the final scene of the television commercial is a man holding an EXTRA DRY with the tagline "The clean crisp taste" shown next to the product. The ABAC determination is attached at Annexure "EC-10".

- 15 I then clicked on the fourteenth and fifteenth links on the Google search. The fourteenth link is to the “North Ryder”, the online newsletter for the North Ryde RSL Community Club at [http://www.northrydersl.com.au/site\\_files/s1001/files/North-Ryder/NR%20Mar%2004,%202009.pdf](http://www.northrydersl.com.au/site_files/s1001/files/North-Ryder/NR%20Mar%2004,%202009.pdf). This newsletter contains articles including an article written about Asahi Dry, in which the journalist described the beer as having a clean, crisp taste. The fifteenth link is using the phrase, “the clean, crisp taste” on a blog in relation to bottled water. Attached at Annexure “EC-11” are copies of extracts from these website links.
- 16 The sixteenth link in the Google search is an article on the Sydney Morning Herald website, in relation to the EXTRA DRY “Tongue” television commercial. The article quotes the Applicant’s national marketing director, Margaret Zabel, who states “It was also important that we highlighted taste and drinkability - the clean crisp taste of Tooheys Extra Dry”. The article extracted from the website is attached at Annexure “EC-12”.
- 17 I then clicked on the seventeenth link on my Google search. This took me to a website in relation to homebrew which appears to be based in the United States. The words, “the clean, crisp taste” are used in a descriptive sense in relation to brewing. An extract from the website is attached at Annexure “EC-13”.
- 18 The last three links on the Google search went to links related to EXTRA DRY. The first link goes to the Tooheys section of the Lion Nathan website. There is a description of 5 Seeds beer, “From the brewers who bring you Tooheys Extra Dry, The Clean Crisp Taste has reinvented cider.” The second website describes the Billabong Winter Classic surfing contest where winners can win cases of “the clean crisp taste” of Toohey’s Extra Dry. The last website is an eBay listing, for a Tooheys EXTRA DRY bar mat. The wording on the bar mat states “THE CLEAN CRISP TASTE - TOOHEYS EXTRA DRY”. Attached at Annexure “EC-14” are copies of extracts from these website links.

## **Conclusion**

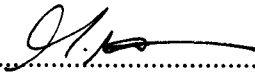
- 19 From these searches of an indicative sample of the first twenty hits on [www.google.com.au](http://www.google.com.au), it appears that use of “THE CLEAN CRISP TASTE” is only being used by the Applicant as a tagline in relation to the alcohol beverages industry in Australia. The first six links and fourteen of the twenty links in my Google search show use of THE CLEAN CRISP TASTE in relation to EXTRA DRY.

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the Statutory Declarations Act 1959, and I believe that the statements in this declaration are true in every particular.

DECLARED at SYDNEY )

on 18 of DECEMBER 2009 )

Before me: )

 )

Signature of person before whom declaration is made )

MELISSA MILLER )

Full name of person before whom declaration is made )  
(BLOCK LETTERS) )

1 PARKER PLACE, SYDNEY )

Address of person before whom declaration is made )  
(BLOCK LETTERS) )

SOLICITOR )

Qualification of person before whom declaration is )  
made (BLOCK LETTERS) )

 )

Signature of person making the declaration

Note 1

A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years - see section 11 of the *Statutory Declarations Act 1959*.

Note 2

Chapter 2 of the Criminal Code applies to all offences against the *Statutory Declarations Act 1959* - see section 5A of the *Statutory Declarations Act 1959*.

## **EVIDENCE SUMMARY SHEET - s41**

**TRADE MARK NUMBER: 1241070**

**s41(5)  s41(6)**

### **EVIDENCE SUMMARY & COMMENTS:**

Statutory Declaration made by Emma Croft, solicitor for Mallesons.

This declaration references the first 20 hits on Google conducted by the solicitor, for 'The Clean Crisp Taste' and includes Annexures from each of these web-sites showing the term.

The solicitor states that it is indicative from these first twenty hits on Google for the term, that use of the mark is only being used by the applicant as a tagline in relation to the alcohol beverages industry in Australia and that the first six links and fourteen of the twenty links in the Google search conducted show use of the term in relation to Extra Dry (mark owned by the applicant).

Statutory Declaration made by Josh Gaudry, Marketing Manager of Extra Dry at Lion Nathan Australia Pty Ltd.

### **DEVELOPMENT OF THE MARK**

The phrase 'Cold Filtered for a Clean Crisp Taste' used by the applicant from 1989, was refined to the shorter trade mark 'The Clean Crisp Taste' in 2003, a decision made by Lion Nathan in response to market research and insights that consumers held for the EXTRA DRY brand - Annexure JG-1: image of the TOOHEYS DRY label in 1989, which shows the words 'Cold Filtered for a Clean Crisp Taste'

The mark 'The Clean Crisp Taste' has been used continuously by the applicant in respect of beer since 2003 across nearly all national television, print media, billboard and online advertising, promotional materials, promotional merchandise and on all packaging, labelling and internal and external communications relating to the EXTRA DRY beer brand.

### **USE OF THE MARK**

Packaging -

- The range of goods in relation to which the mark has been applied from 2003 includes:
- Extra Dry bottle (345 ml, 696 ml and Extra Dry Platinum 345 ml bottle)
- Extra Dry can (375 ml and Extra Dry Platinum 300ml slimline can; and
- Extra Dry 49.5 litre keg cap

Annexure JG-2: examples of the Extra Dry packaging and labelling bearing the mark.

Television Advertising -

Lion Nathan has undertaken a wide range of television advertising on both 'free to air' and pay television to promote the EXTRA DRY brand across Australia.

Annexure JG-3: CD containing copies of advertisements which have been broadcast at various dates (once since 2005 and another in 2006). The closing message on-screen at the end of each advertisement is the slogan THE CLEAN CRISP TASTE.

Radio Advertising -

Annexure JG-4: copies of the transcripts for various national radio campaigns in 2004. Each of these radio campaigns make frequent references to THE CLEAN CRISP TASTE throughout the advertisements.

Annexure JG-5: copies of the national and state Big Day Out radio advertisements.

Outdoor Advertising -

Lion Nathan has also utilised outdoor advertising to promote its EXTRA DRY brand, using the mark THE CLEAN CRISP TASTE extensively - Annexure JG-6: photographs of outdoor advertising promoting EXTRA DRY, showing the mark THE CLEAN CRISP TASTE clearly emphasised.

Point of sale Advertising -

Annexure JG-7: samples of artwork used as point of sale items to advertise the EXTRA DRY brand, emphasising THE CLEAN CRISP TASTE as a trade mark.

Consumer promotions and competitions -

THE CLEAN CRISP TASTE has been used extensively as a trade mark in relation to consumer promotions - Annexure JG-8: sample of materials used to promote various EXTRA DRY consumer promotions, which prominently show THE CLEAN CRISP TASTE trade mark.

Website -

Lion Nathan has also engaged in significant online advertising for EXTRA DRY on their website, where THE CLEAN CRISP TASTE is used extensively - Annexure JG-9: bundle of extracts from the website.

Merchandising -

Lion Nathan has extensively used THE CLEAN CRISP TASTE on it's merchandising and promotional products including singlets and keychains - Annexure JG-10: samples of merchandise and promotional clothing containing THE CLEAN CRISP TASTE trade mark.

Sponsorship -

Annexure JG-11: images of THE CLEAN CRISP TASTE trade mark being used at sponsorship events including the Big Day Out and Splendour in the Grass.

Recognition of the mark -

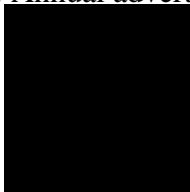
The Applicant claims that the rebranding of the trade mark to THE CLEAN CRISP TASTE has been very successful and that both consumers and the trade identify THE CLEAN CRISP TASTE as a distinctive reference to the TOOHEYS EXTRA DRY product rather than a descriptive reference to a quality or feature of the beer - Annexure JG-12: copy of survey results referring to this tendency amongst consumers.

The Applicant has stated that to the best of his knowledge and experience, the phrase THE CLEAN CRISP TASTE is not used as a trade mark by any other traders in the industry.

ADVERTISING/SALES FIGURES - Annexures JG-13,14,15: statements of annual advertising figures, sales figures and sales volumes for EXTRA DRY from 2003 to 2008.

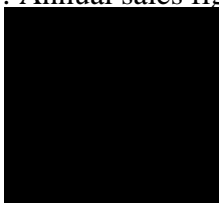
JG-13: Annual advertising and promotion expenditure:

2003  
2004  
2005  
2006  
2007



JG-14: Annual sales figures:

2003  
2004  
2005  
2006  
2007



JG-15: Annual sales volume figures (in million litres):

2003  
2004  
2005  
2006  
2007



CONCLUSION - Since its launch in 1994, EXTRA DRY has become a very well-known brand within the Australian alcoholic beverages industry. The Applicant claims that consumers and the

trade recognise THE CLEAN CRISP TASTE as a brand identifying tagline of TOOHEYS EXTRA DRY. The Applicant also believes that as a result of the widespread and innovative marketing of the EXTRA DRY brand and THE CLEAN CRISP TASTE trade mark through various media, THE CLEAN CRISP TASTE is now well recognised as being distinctive in the industry and among the general public in Australia and that when used in the context of beer, THE CLEAN CRISP TASTE functions as a trade mark.

**Have you considered:** Geographical/extent of use; duration; sales volume/turnover; advertising expenditure; first used; continuous use

**EXAMINER'S RECOMMENDATION/S:** s41      Applied       Not Applied:

**REASON/S:** Although the mark THE CLEAN CRISP TASTE is predominantly shown in combination with the applicant's more distinctive TOOHEYS EXTRA DRY mark, the evidence provided has shown use of the mark solus, functioning as a trade mark as well as in combination with other marks owned by the applicant, ie: EXTRA DRY PLATINUM and TED. It is clear from the evidence provided that the applicant has saturated the market place with use of the trade mark and through extensive advertising and promotion, has shown this descriptive phrase does have the capacity to distinguish. In applying the provisions of s41(5) I am satisfied that the applicant has shown through evidence that the mark has the capacity to distinguish. It should be noted that acceptance under the provisions of s41(5) applies to the mark THE CLEAN CRISP TASTE in its entirety. Consulted with CDC and MQB.

**S41 could be applied under the following conditions :**

**Examiner :** Wendy Cooper

**Date:** 24/02/2010

**SUPERVISOR'S/PRINCIPAL EXAMINER'S COMMENTS:**

**Supervisor :**

**Date:**

\_\_\_\_\_

**Principal Examiner :**

**Date:**

**REMINDER: ADD ENDORSEMENT**



## **BUSINESS RULES for EVIDENCE SUMMARY SHEETS**

### **s41**

1. Fill in the trade mark number
2. Indicate whether grounds for rejection are s41(5) or s41(6) by placing an "X" in the appropriate box
3. *Evidence Summary & Comments:* Summarise the evidence provided, and note the **location** of those paragraphs/submissions which have a bearing on the decision (eg *see sales figures*, p8)
4. *Examiner's Recommendations:* Indicate the recommendation by placing an "X" in the box marked "Applied" or "Not Applied"

*Examiner's Reasons:* Indicate why the recommendation was made - making reference to particular parts of the evidence submission , (it may only be necessary to state that the evidence overcomes the grounds for rejection through use, turnover, etc)

5. Enter examiner code or name, and the date
6. Save file to TRACS2
7. Hand file on to Supervisor, as appropriate
8. *Supervisor's/Principal Examiner's Comments:* supervisor to complete comments, enter code or name, and the date, and return to Examiner or pass on to Principal Examiner
9. Principal examiner to complete comments, enter code and date and return Evidence Summary to Examiner or Senior Examiner as appropriate