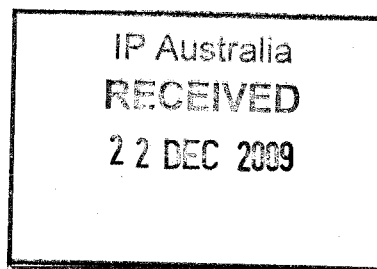


TXR
TSD

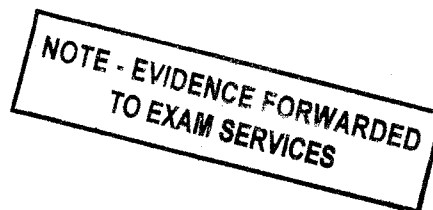


Registrar of Trade Marks

22 December 2009

Madam

Australian Trade Mark Application No. 1280838
Mark: PINK LADY
Class: 31
Applicant: Apple and Pear Australia Limited
Our Ref: LS:T79560.AU



Receipt is acknowledged of the first official report, and to the subsequent telephone discussions between Mr Kumudu Ramasundara, Deputy Registrar, and Ms Anne Makrigiorgos of our firm in June of this year.

We understand that the action to immediately start rejection proceedings if the Applicant does not agree to certain restrictions is withdrawn.

We note that the Examiner has rejected the application pursuant to two grounds under the Act – ss. 41 and 43. Dealing with each ground of rejection separately, we make the following submissions.

Section 41
Legal principles

The relevant date for assessing a trade mark's capability to distinguish is the priority date of the trade mark application.

Austereo Pty Ltd v DMG Radio (Australia) Pty Ltd (2004) 61 IPR 257 at [33]; Thompson v B Seppelt & Sons Ltd (1925) 37 CLR 305 at 312; Chocolaterie Guylian N.V. v Registrar of Trade Marks [2009] FCA 891 at [54].

Evidence of use subsequent to the priority date is admissible where the capability of a mark to distinguish is in issue. Although the relevant date for determining whether a trade mark satisfies the requirements of s. 41 of the Act is the priority date of the application, matters occurring after the priority date are relevant as they allow rational inferences to be drawn as to trade mark's inherent adaptation to distinguish, and capability to distinguish, at the priority date.

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Lahore, *Patents, Trade Marks and Related Rights* [54,210]; *Shanahan's Australian Law of Trade Marks and Passing Off* [25.660] (4th ed, 2008); *Austereo supra*. at [32]; *Pound Puppies Trade Mark* [1988] RPC 530 at 533; *Unilever (Aust) Ltd v Societe des Produits Nestle SA* (2006) 69 IPR 255 at [46] [49]; *Guylian supra* at [54]. .

An assessment of the inherent adaptability of the mark requires a consideration of the descriptive qualities of the mark. Section 24(1)(d) of the *Trade Marks Act* 1955 provided that a mark was registrable if it contained or consisted of:

"a word not having direct reference to the character or quality of the goods or services in respect of which the registration is sought"

The word "direct" was introduced into the Australian *Trade Marks Act* in 1912. As noted by the High Court in *Mark Foy's Ltd. v. Davies Coop and Co. Ltd.* (1956) 95 CLR 190 at 195 per Dixon CJ:

"The reason for introducing the word "direct" into [the Australian Act] was to check the tendency which had been disclosed by certain decisions to find a sufficient reference to the character or quality of the goods and expressions from which it could only be spelled out."

Both the object and effect of introducing the word "direct" to qualify the word "reference" was to extend the class of registrable words. See *Mark Foy's supra* at p. 199 per Williams J.

Direct reference corresponds in effect to aptness for normal description. See *American Screw Co.'s Appn* [1959] RPC 344 at 346. A combination of words which are not apt for normal description, or which do not consist wholly of a sign ordinarily used to indicate the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristics of the goods or services, will have some inherent adaptation to distinguish. See note 1 to s. 41 of the Act.

Words which may describe the character of the goods or services, but are not the only or natural words which would or could be chosen for that purpose will have some degree of inherent adaptation to distinguish. See *"Sheen Trade Mark"* (1936) 53 RPC 355 at 380.

An absence of evidence that other traders in the relevant market have used a word (or a combination of words) to describe the particular goods or services, particularly before use of the word by the trade mark owner, is a basis for finding that a descriptive word has some inherent adaptation to distinguish. See *"Chunky Trade Mark"* [1978] FSR 322 (Ch.D).

The fact that words may be capable of being used in a descriptive sense does not deprive them of a capacity to distinguish goods or services. There is no true dichotomy between words capable of being used as a badge of trade origin and words that are descriptive. Words which, devoid of any context or which in one particular context, may be understood to be descriptive, may nonetheless be used as a trade mark. See *Johnson and Johnson* (1991) 30 FCR 326 at

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347 per Gummow J. and at 339 per Lockhart J. See also *Aldi Stores Ltd Partnership v. Frito-Lay Trading Company GmbH* (2001) 54 IPR 344 per Hill J. at [23] and per Lindgren J. at [60]; *Unilever Aust Ltd v. Karounos* (2001) 52 IPR 361 per Hill J. at [44-46].

If the Registrar finds that the mark has some inherent adaptation to distinguish but is unable to decide the question of whether the applicant's trade mark is capable of distinguishing the applicant's designated goods on the basis of the trade mark's inherent adaptation to distinguish alone, the Registrar is directed by s. 41(5) to consider the use, or intended use, of the trade mark by the applicant.

The capability which s. 41 (5) addresses has been described as a test of "fitness for a future role". Although this criterion is forward looking, the required capability must be possessed by the mark at the priority date.

Ocean Spray Cranberries Inc v. Registrar of Trade Marks (2000) 47 IPR 579; *Oxford University Press v Registrar of Trade Marks* (1990) 171 IPR 509 at 525-526; *Austereo supra* at [30]; *Unilever v Nestle supra* at [54].

In determining whether a sign is being used as a trade mark, the context in which the mark may be used is all important. See *Shell Company of Australia Ltd. v. Esso Standard Oil (Australia) Ltd* per Kitto J. at 422. See also *Aldi Stores Ltd Partnership supra* per Lindgren J at [62], per Hill J at page 353; *Johnson and Johnson supra* per Gummow J. at 347; *Kenman Kandy (Aust) Pty Ltd v. Registrar of Trade Marks* (2002) 52 IPR 137 per Lindgren J at [84].

The importance of relevant consumers being educated to understand that a sign is being used as a trade mark – that is, as a badge of origin, has been emphasized by the Courts on a number of occasions. *Unilever plc's Trade Mark Applications* [2003] RPC 35 at [37]; *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281.

In *Burger King Corp v Registrar of Trade Marks* (1973) 128 CLR 417 at [6] Gibbs J. stated:

"Similarly, I consider that "capable of becoming distinctive" in s. 25 (1) means in the Australian market, but I see nothing in his Lordship's remarks to cause me to depart from the view that evidence that a mark has become distinctive in an overseas market will be admissible as tending to show that the mark is capable of becoming distinctive in Australia, provided at least, as I have said, that there is some similarity in the conditions of the two markets."

Submissions

In support of the following submissions, enclosed is a Statutory Declaration by Mr Jon Durham, General Manager of Apple and Pear Australia Limited (APAL) and Annexures A – T.

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The Examiner's attention is drawn to the following Annexures:

Annexure A

Attaches the Licence Agreements entered into by the Applicant with users of the **PINK LADY** trade mark. The agreements provide for quality control of product bearing the **PINK LADY** mark—see for example paragraph 10 and schedule 4 of Trade Mark Master Licence Agreement.

Annexure B

Attaches details of the International Pink Lady Alliance and the management chart for the control of the **PINK LADY** trade mark and the Cripps Pink variety.

Annexure C

Attaches a transcript from *Questions on Notice* from the Legislative Council of the Parliament of Western Australia on 15 October 1998 in which the Hon. M. J. Criddle states: *this question cannot be answered because **PINK LADY** and **SUNDOWNER** are trademarks and not apple varieties. The apple varieties upon which the trademarks may be applied are CRIPPS PINK and CRIPPS RED respectively.*

Annexure D

Documentation and publications prepared by Apple and Pear Australia Limited ('APAL') regarding the correct use of the trade mark **PINK LADY** and clearly differentiating the **PINK LADY** trade mark from the *Cripps Pink* varietal name.

Annexure E

Trade Mark details for the **JAZZ** trade mark from Australia and New Zealand.

Annexure F

Abstract of trade marks registered in Australia in class 31 covering fresh fruit and vegetables. The Register reflects a trend to the use of trade marks in respect of fresh fruits and vegetables.

Annexure G

Examples of use of trade marks in class 31 covering fresh fruit and vegetables

Annexure H1

A print out from IP Australia's Media Centre in which it is stated: *The **PINK LADY** trade mark is one of the great success stories of the fruit industry....* In the same article, reference is made to *Cripps Pink apple variety*.

In this publication there is a clear and unequivocal distinction between the trade mark **PINK LADY** and the varietal name *Cripps Pink*.

In the *Plant Varieties Journals* reference is made to the varietal name *Cripps Pink*. There is no reference to the trade mark **PINK LADY**.

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Annexure JK

Across broad sections of the apple industry there is correct differentiation between the trade mark **PINK LADY** and the varietal name *Cripps Pink*.

Annexure L

Both Federal and State governments are aware of the difference between **PINK LADY** – the trade mark, and *Cripps Pink* – a varietal name

Annexure M

Media - The Examiner's attention is directed to INTERPOMA *Cripps Pink – the Tree*, **PINK LADY – the Apple** (1998), *Australia's 50 Most Beautiful Exports 2004*, as well as the transcript from the *Landline* programme - ABC 2 (June 2009).

The diligent work undertaken by APAL was rewarded last year when it won the Agribusiness Value Adding Award at the NAB Agribusiness Awards for Excellence for its development of the **PINK LADY** brand. The key selection criteria, was growth in sales of value added products, value adding through customer focus, value shared along the agribusiness chain, development of sustainable competitive advantage through value adding, and development of strategic alliances to assist value adding. Along with APAL, the finalists for this award were: Bega Cheese, Chefs Partner, The Merino Company and Murray Goulburn Co-operative Co.

The recognition by the agribusiness sector of the brand **PINK LADY** when applied to apples reinforces the fact that **PINK LADY** is recognized as a trade mark.

The genesis of the *Landline* programme was at the NAB Agribusiness Awards for Excellence which was covered by the ABC. John Cripps - now in his 80s – was in attendance, and accepted the award along with Jon Durham from APAL.

Annexure N

Australian Horticultural Yearbook 2003 refers to **Pink Lady**TM as a trade mark.

Flemings Nurseries Pty Ltd has been responsible for introducing many new fruiting and ornamental trees over four generations. They are also well-known for winning gold and silver medals for garden design at the Chelsea Flower Show in the United Kingdom.

Annexure O

The high profile of the McGrath Foundation [which uses the colour pink as part of its identity] ensures that awareness of the trade mark **PINK LADY** when applied to apples is disseminated throughout Australia

Annexure PQ

The various examples attached to this Annexure illustrate that the scientific community is aware of the difference between a trade mark, and a varietal name

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Annexure PQ

Attaches scientific publications evidencing a clear understanding between the **PINK LADY** trade mark from the varietal name.

Annexure R

Attaches a schedule of the **PINK LADY** trade marks owned by the Applicant.

Annexure S

Attaches sample labels affixed to the goods for export.

Annexure T

This Annexure provides an overview of the promotions campaign undertaken in Europe and the United Kingdom for the year 2004.

Submissions

It is submitted that on review of the evidence provided the objection that **PINK LADY** is the varietal name of an apple cannot be sustained.

The Examiner has rejected the application pursuant to s. 41 (6) of the Act. Accordingly, the Examiner has found that the mark has no inherent adaptation to distinguish the claimed goods and was not factually distinctive at the filing date of the application.

The relevant date for assessing the capability of the **PINK LADY** trade mark to distinguish the claimed goods is 14 January 2009.

It appears that the Examiner's objection is based primarily on a number of early instances of inadvertent and incorrect use of the **PINK LADY** mark as a varietal name many years before the filing date of the subject application.

The applicant takes issue with the finding that, on the basis of this evidence, the **PINK LADY** trade mark lacks any inherent adaptation to distinguish at the priority date of the application.

The words **PINK LADY** could not be said to be directly descriptive of the claimed goods. In particular, the term 'LADY' is not at all descriptive of the claimed goods. The origin of the name is from a cocktail from the novel '*Cruel Sea*'. [Durham para. 7]

The evidence establishes that **PINK LADY** is not the only term that is available to traders. Indeed, the evidence establishes that traders would understand that the appropriate descriptive term for the variety is *Cripps Pink*.

The only basis upon which the Examiner asserts that the mark is devoid of any inherent adaptation to distinguish is early incorrect use as a varietal name.

It is submitted that the evidence provided clearly demonstrates that consumers have now been (and were as at the priority date) educated to understand the clear distinction between

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the trade mark **PINK LADY** and the varietal name *Cripps Pink* and that this distinction is widely known throughout various demographics of the Australian population. The evidence demonstrates that, by the priority date, **PINK LADY** was understood as a trade mark, not a varietal name.

In particular, the Applicant submits that its education program has made a significant impact on correcting initial misuse during the early 1990s of the trade mark **PINK LADY** and the varietal name *Cripps Pink* by the Department of Agriculture Western Australia, and other persons.

The Applicant's educational activities in educating the market must also be considered in the broader context of the evolving practice of developing and using trade marks to promote fresh fruit and vegetables. Examples of such trade marks are JAZZ, KUMATO, BROCCOLINI, Sunny Days, CALYPSO and MIDNIGHT BEAUTY. [Durham para.18 and Annexures F, G]

This relatively recent practice also reflects a growing understanding of consumers that traders will use trade marks to distinguish their particular produce from similar foodstuffs produced by other traders.

In summary, applying the accepted principles, the **PINK LADY** mark has at least some inherent adaptation to distinguish.

This inherent adaptation to distinguish must also be considered in conjunction with the Applicant's use of the **PINK LADY** trade mark.

The evidence establishes highly significant use and promotion of the **PINK LADY** mark by the Applicant. [Durham paras. 24-28 and Annexure T]

The Applicant licences the mark and exercises quality control of the mark. [Durham paras. 10-12 and Annexure A]

The Applicant has acquired distinctive trade mark rights in equivalent markets overseas.

As noted by Gibbs J in *Burger King*, supra, evidence of acquired distinctiveness in equivalent overseas jurisdictions is relevant to the assessment of a marks capacity to distinguish in Australia. The equivalence of the markets that the Applicant operates in is highlighted by the fact that the Trade Mark Office has promoted the Applicant's success in these countries to users of the Australian registered trade mark system. [Durham para 20 and Annexure HI]

Furthermore, apples of the variety *Cripps Pink* which do not meet the strict criteria to enable them to be marketed under the trade mark **PINK LADY** are sold in Europe as *Cripps Pink* or *Flavor Rose*.

Finally, the Applicant notes the comments of French J in *Kenman Kandy* supra at [22] that:

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"The possibility of refusal after a contested opposition with evidence and closer scrutiny remains open. The acceptance stage is not the time for detailed adversarial examination of the application that might be involved in an opposition - Registrar of Trade Marks v Woolworths at 377. Acceptance for registration involves an initial screening process albeit it requires the application of statutory criteria and evaluative judgments by the Registrar and the Registrar's delegates".

Section 43

In relation to the objection based on section 43 of the Act, the Examiner is referred to the evidence noted above, and in particular the evidence of the clear distinction that exists between the **PINK LADY** trade mark and the *Cripps Pink* varietal name. In light of this evidence, the Examiner is respectfully requested to withdraw the objection.

Favourable reconsideration is respectfully requested.

Yours faithfully
GRIFFITH HACK



Lyn Stevens
Senior Associate
lyn.stevens@griffithhack.com.au

Commonwealth of Australia

Statutory Declarations Act 1959

IN THE MATTER OF Australian Trade
Mark Application No. 1280838
Mark: **PINK LADY**
Applicant: Apple and Pear Australia
Limited

STATUTORY DECLARATION

I, **JON DURHAM** of [REDACTED] Victoria, 3340, Australia, make the following declaration under the *Statutory Declarations Act 1959*:

1. I am a General Manager of Apple and Pear Australia Limited ("APAL"), and am authorised by APAL to make this Declaration on its behalf. I have been associated with APAL (and its predecessor – Australian Apple and Pear Growers Association Inc - AAPGA) since 1991.
2. I have extensive experience across the pome fruit industry gained through my ongoing involvement in family orchards (since 1967) and my roles in industry organizations - culminating as the Chief Executive Officer of AAPGA and then becoming the Managing Director of the company that replaced the AAPGA - Apple & Pear Australia Limited.

During my time as Chief Executive Officer, and Managing Director of the peak industry body, I have played a key role in raising the international and national profile of the Australian apple and pear industry. I have extensive training in production horticulture, including plant physiology and management, irrigation, pest and disease control, post harvest storage, and packaging. In addition I have been a member of trade delegations to Taiwan, Korea, Japan, and China and have extensively travelled in fruit production regions and markets in North America, South America, Europe, South Africa, New Zealand and Asia.

Furthermore, I have regular contact with growers and retailers, have contributed to marketing committees, and been involved in industry reviews.

I have managed the international development of the **Pink Lady™** apple business, both strategically and operationally. In early 2008 I took on the role of General Manager of the Intellectual Property Division of APAL. This Division is charged with managing the **Pink Lady™** business but also with providing fee-for-service consulting related to the commercialisation of plant varieties.

3. The information contained in this Declaration is from my own knowledge, or has been extracted from the records of APAL, and its predecessor, to which I have full access.
4. Any financial information and/or business relationships detailed in this Declaration is confidential to APAL and is commercially sensitive. It is requested that the Registrar maintains the confidentiality of such information, and discloses it only to those persons connected to the present matter.
5. APAL applied for registration of the trade mark **PINK LADY** on 14 January 2009 under No.1280838 in class 31 in respect of *Agricultural and horticultural products, including fruit, grains, plants and trees; apples and apple trees* ('the goods').

History of the variety of apple - *Cripps Pink*

6. In 1973 the hybridisation of two apple varieties, *Golden Delicious* and *Lady Williams* occurred. The work was carried out by John Cripps, a plant breeder for the Department of Agriculture Western Australia ('DAWA'). Between 1978 and 1983 resultant seedlings were selected for further trial and evaluation as orchard trees and grafting was carried out. In 1984 following this long selection process, cold storage and tasting of the resultant apples, the best two apple varieties were selected as possible candidates for further development and marketing. One of these was the apple variety that went on to be designated *Cripps Pink*, and which was named after John Cripps. In August 1984 DAWA decided to trial the new variety *Cripps Pink* with various orchards in the south west of Western Australia to determine its maturity index, growth habits and the effect of the environment on its development. Between 1986 and 1990 research by DAWA continued in relation to the *Cripps Pink* apple variety at the Manjimup Horticultural Research Centre in

Western Australia. This research involved the testing and evaluation of *Cripps Pink* in comparison with varieties already accepted in the market place. In about August 1995 twelve *Cripps Pink* apple trees were distributed to selected nurseries and orchards for trial and evaluation purposes.

Trade mark PINK LADY

7. **PINK LADY** was selected as the trade mark by John Cripps and was named after a beverage cocktail of the same name - Pink Lady - which was the cocktail drunk by a character in Mr Cripps' favourite novel – *The Cruel Sea* by Nicholas Monsarrat.
8. In early 1998 DAWA assigned to APAL's predecessor – Australian Apple and Pear Growers Association Inc – rights to the control of the marketing of the variety *Cripps Pink* apples under the trade mark **PINK LADY** – both in Australia and internationally.
9. Through the late 1990s and the 2000s, APAL appointed master trade mark licensees in (9) major global territories. These companies were charged with the development of the **PINK LADY** trade mark within their own country, and internationally.
10. In Australia, APAL has in place a Trade Mark Master License Agreement for use of the trade mark **PINK LADY** on apples for export purposes, as well as a Trade Mark Licence Agreement for use of the trade mark **PINK LADY** for domestic use in relation to *fresh apples* of the *Cripps Pink* variety, as well as fresh apples of essentially derived varieties of the *Cripps Pink* variety as approved in writing by APAL. In addition APAL has three Trade Mark License Agreements for use of the trade mark **PINK LADY** for domestic use in relation to *pure apple juices and blends, containing, in whole or in part, juice extracted from the fruit of the variety Cripps Pink*. Marked **Annexure A** are examples of such license agreements.
11. In 1999 the International Pink Lady Alliance Ltd (IPLA) was formed. IPLA provides APAL with a sounding board on policy development for the **PINK LADY** trade mark. Marked **Annexure B** is a chart showing management of the *Cripps Pink* variety and **PINK LADY** trade mark, including details of IPLA.

12. Only apples that meet set quality specifications can be marketed under the trade mark **PINK LADY**. This has resulted in consistently high quality – irrespective of the country in which the apple was produced. The quality specifications detail up to 10 major and 16 minor defect criteria and the allowable level and tolerance for each criteria. Major defects include criteria such as bitter pit, bruising, core rot, cracks, decay, scald and sunburn. Minor defects include criteria such as acid levels, blemishes, chemical burn, colour, disease damage, insect damage and mechanical injury.

13. The trade mark **PINK LADY** has been used continuously in Australia since at least 1994.

14. APAL has always used the words **PINK LADY** as a trade mark. There have been instances, in the past, where other parties have incorrectly used the trade mark as a varietal name. However as can be seen from **Annexure C** – from as early as 1998 the legislative council of the Parliament of Western Australia was aware that **PINK LADY** was the trade mark, and *Cripps Pink* the varietal name.

15. Since assuming ownership of the trade mark **PINK LADY**, APAL has undertaken an ongoing education program to correct misuse of the trade mark **PINK LADY** and the varietal name *Cripps Pink*. APAL has refined its education program over a number of years in striving to achieve correct use of the **PINK LADY** trade mark, and the *Cripps Pink* varietal name in all information that it disseminates to the Australian apple industry, as well as sectors of the broader community. APAL continues to write directly to key people to give information on correct use of the trade mark **PINK LADY** when instances of incorrect use are identified by APAL or brought to its attention. Marked **Annexure D** are examples of letters sent by APAL, copies of articles from various publications of APAL and its predecessor - Australian Apple and Pear Growers Association – as well as promotional materials.

Marketing Innovators

16. APAL was in the vanguard of organisations who undertook the ground-breaking step in the promotion of fresh fruits (and vegetables) by developing trade marks to be used in relation to fresh produce. The application of trade marks to fresh produce is a relatively recent innovation. Previously, fresh produce was sold by reference to its varietal name. In the case of apples for example – *Granny Smith, Red Delicious, and Fuji*.
17. An example of this new approach to marketing of fresh produce can be seen in **Annexure E**. The trade mark JAZZ has been registered in both Australia and New Zealand in respect of apples. The Intellectual Property Office of New Zealand features the trade mark JAZZ on its website.
18. Marked **Annexure F** are abstracts of trade marks registered in Australia in class 31 covering *fresh fruits and vegetables*. These include such trade marks as: SALADETTE, SWEETHEARTS, Zespri, Zespri device, Zespri Green, MIDNIGHT BEAUTY, Minicab, CRIMSON SNOW, Il Bello Rosso, Enchanted Gardens, PERFECTION FRESH, SABLE SEEDLESS, BELLA BLOOMS, QUKES, Rosey Red, KUMATO, BELLA BLOSSOMS, ROMA THERAPY, TRAFFIC LIGHT CAPS, Angels Kiss Tomatoes/Angel Kiss Tomatoes; PICCOLINI, Rainbow of Flavours, Bare Bites, absolutelypink, Ebony Aubergine, BROCCOLINI, Ebony and Ivory Aubergine, Cheruby, ENCHANTED, Flip Outs, Fruit Pops, Angels Kiss Tomatoes, TRAFFIC LIGHT CAPS, ZESPRI GREEN, SUNNY DAYS, . Marked **Annexure G** are examples of some of the marks in use in Australia at the time of making this Declaration, including in use in supermarkets: JAZZ, ZESPRI kiwifruit, BROCCOLINI baby broccoli SUNNY DAYS avocados, CALYPSO mangoes, KUMATO tomatoes, ROMA THERAPY baby Roma tomatoes, PICCOLINI cocktail tomatoes, MIDNIGHT BEAUTY seedless black grapes and MINI CAPS baby capsicums.
19. With being one of the innovators in the marketing of fresh produce comes the responsibility for educating and enlightening various sectors within a given industry, as well as consumers. Evidence of APAL's efforts to educate, and to prevent misuse of its trade mark **PINK LADY** as applied to apples is detailed in the following clauses.

20. Across many sectors there is knowledge of the correct differentiation between the trade mark **PINK LADY** and the varietal name *Cripps Pink*. The following Annexures cover a diverse spread of sectors - IP Australia, the apple industry, Federal and State Governments, media services, the nursery industry, retail sector, and the scientific community. It is clear from these Annexures that **PINK LADY** is recognized as the trade mark, and *Cripps Pink* as the varietal name:

- **Annexure HI** – IP Australia media centre; PBR Journal
- **Annexure JK** - apple industry
- **Annexure L** - Federal and State governments
- **Annexure M** - media
- **Annexure N** – nursery industry
- **Annexure O** - retail sector
- **Annexure PQ** - scientific community

21. Promotion has allowed the trade mark **PINK LADY** to grow and become prominent in the minds of consumers. APAL applies nearly two-thirds of the funds raised from trade mark royalties to promotion. The promotion budget in Continental Europe in 2008 for PINK LADY product was AU\$10million.

22. Not only is the trade mark **PINK LADY** well-known in Australia, but internationally as well. **Annexure R** is a schedule of countries in which the trade mark **PINK LADY** has been registered, or for which application has been made.

23. As noted above, APAL initiated the formation of an International alliance of growers and marketers to maintain high quality standards and to achieve reliable consistency of goods sold under the trade mark **PINK LADY**. The Alliance is known as the International Pink Lady Alliance Ltd. Australia is represented at the Alliance by APAL and Pink Lady Australia Limited (the company that co-ordinates the majority of Australian fruit destined for the export market).

24. The table below shows export sales of apples under the trade mark **PINK LADY** since 1995, as reported by Pink Lady Australia Limited.

Year	13 kg Cartons	Total kilograms
1995		
1996		
1997		
1998		
1999		
2000		
2001		
2002		
2003		
2004		
2005		
2006		
2007		
2008		
2009		

The trade mark **PINK LADY** is affixed to the goods prior to export from Australia. Marked **Annexure S** are sample labels applied to the goods prior to export.

25. During the period 2004 through to 2009, the estimated total volume of sales worldwide (excluding the USA, Canada and Mexico) of goods bearing the **PINK LADY** trade mark is estimated at [REDACTED] tons. In 2008 the total volume worldwide (excluding the USA, Canada and Mexico) of **PINK LADY** grade goods was [REDACTED] tons. An estimated total value of retail sales for the 5 years 2005 through 2009 for **PINK LADY** branded apples in the UK market alone (the major market for Australia) was AU [REDACTED]
26. Over the past three years Australia's apple exports have reduced dramatically from AU [REDACTED] (Pink Lady AU [REDACTED] in 2004/05 to AU [REDACTED] (Pink Lady AU [REDACTED] in 2007/08. The decline in export volumes from Australia in recent years has been due to the strong growth in the domestic market which has encouraged growers to sell their products within Australia and is consistent with trends in general for all apple exports from Australia.

27. Marked **Annexure T** are examples of advertising and promotional materials used in Continental Europe and United Kingdom which are illustrative of the extent of marketing of apples under the **PINK LADY** trade mark in that region.
28. The expansion of use of the trade mark **PINK LADY** as applied to apples is continuing. The initial focus on promotion of the trade mark was in association with the variety of apple known as *Cripps Pink*. However, APAL plans to expand use of the **PINK LADY** trade mark to apples other than from the variety *Cripps Pink*. Discussions with industry members are continuing, and it is planned to promote other varieties of apple under the trade mark **PINK LADY** and in particular the varieties Rosy Glow and Lady In Red.
29. In Europe – apples from the variety *Cripps Pink* and derived varieties are also being sold under various trade marks such as **FLAVOR ROSE**, and **CRIPS**.
30. It is APAL's strategy to consolidated the profile of the trade mark **PINK LADY** as applied to apples of various varieties with similar characteristics.

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 Melbourne
on 22 December 2009

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)
)

Jon Durham

Before me:

Lyn Stevens

**LYN STEVENS
GRIFFITH HACK**

**509 St. Kilda Road, Melbourne 3004
A Registered Trade Marks Attorney within the
meaning of the Trade Marks Act 1995**

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*.



17 May 2012

Griffith Hack
GPO Box 1285
MELBOURNE VIC 3001

Attention: Sir/ Madam

RE: Trade Mark No(s) 1280838 in the name of APPLE AND PEAR AUSTRALIA 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 A - T to Statutory Declaration by Jon Durham.

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