

Inspire

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intellectual property

Double-walled coffee pot design
considered distinctive over
predecessor

Federal Court smashes
Bohemia Crystal monopoly

Innovation patents on the ropes,
but not the canvas.

**The Carbon XPRIZE and CSIRO:
CO₂ mitigation technology in
Australia and beyond.**

Patents

Trade marks

Designs

IP research

Legal services

Editorial

This edition of *Inspire* is all about change. Andrew Massie reports on the ongoing saga of the Australian Innovation Patent system. Having received submissions on the draft legislation for implementing the Productivity Commission's recommendation that the system be abolished, the Government has now indicated that it will undertake further consultation with SMEs prior to any final decision on the future of the system. Whether this reprieve is short lived or results in the system being retained, perhaps in a modified form, remains unclear.

In the context of changes to our natural environment, Matthew Overett speaks to Paul Feron and Jim Patel of POF client CSIRO about some of the CO2 mitigation technologies vying for the COSIA Carbon XPRIZE. Paul and Jim also discuss the work of CSIRO in carbon capture and storage including the successful pilot of a patented amine absorption system in Victoria.

The recent decision of the Full Federal Court in *ESCO v Ronneby road* has provided clarification of sorts with respect to the law of utility. The appeal affirmed the legal approach taken by the court below, holding that a patent claim will lack utility if it fails to meet one

element of a composite promise made in the patent specification. However in applying that principle to the patent in issue, the Full Court came to a different conclusion, allowing ESCO's appeal.

Also in this edition, Anita Brown reviews the decision to revoke trade mark registrations for BOHEMIA and BOHEMIA CRYSTAL, Russell Waters looks at the influence of heraldry on Trade Mark law, Duncan Joiner and Alexis Keating analyse some recent Designs and Trade Marks Office decisions, and we celebrate World IP Day with our publication of "Women in Innovation".



Adrian Crooks, Partner

BEng(Civil)(Hons) LLB LLM FIPTA

@ adrian.crooks@pof.com.au

POF Partners clean up in recent awards

It has been a successful quarter for POF with the firm receiving accolades from several leading industry organisations, and a nomination for Lawyer's Weekly's *Partner of the Year* award.

Most notably, we are delighted to announce that POF Partner Dr Edwin Patterson was awarded the 'Most Client-Focused IP Specialist', in addition to the award for 'Best Professional' at this year's Financial Review *Client Choice Awards*. These are very significant achievements as the Client Choice Awards recognise the individual achievements of professionals across the entire professional services industry including accounting, engineering and financial services, as well as intellectual property. Ed's award for the 'Best Professional' recognised him as the most client-focused professional across all professional services firms in Australia – an amazing achievement! It was a great night for POF overall, as we were also nominated as a finalist for 'Best IP Specialist Firm'.

Separately, POF's Managing Partner, Ross McFarlane, has been nominated as a finalist in the Intellectual Property category for the 2018 Lawyer's Weekly's *Partner of the Year Awards* are now in their third year, and showcase

finalists with impressive leadership, technical expertise, mentorship and business development skills across 23 categories.

POF's former Managing Partner, Graham Cowin was recognised at this year's Annual Meeting of the Institute of Patent and Trade Mark Attorneys of Australia (IPTA) and elevated into the position of Distinguished Fellow of IPTA. Very few members of the Institute are recognised in this way, and it follows Graham's contributions to IPTA that spanned almost 20 years and included a period as President. Graham follows in the steps of other Phillips Ormonde Fitzpatrick leaders to have been recognised this way, including David Fitzpatrick, Malcolm Royal and Terry Collins.

Finally, both Edwin and Ross, alongside POF Partners, Alyssa Telfer, Michael O'Donnell and Russell Waters have all been listed as IP Stars in this year's Managing Intellectual Property *IP Stars handbook* – a fantastic achievement for all five.

We congratulate all of our winners on their respective awards.



Innovation patents on the ropes, but not the canvas.

The Australian innovation patent system has been in the news recently as a result of the Australian Government's intention to abolish the system. This decision followed the general inquiry made by the Productivity Commission into Australia's intellectual property (IP) system. The expectation within the IP industry was that abolition of the innovation patent system would occur sometime in 2018.

But just when it was thought that the innovation patent system was to be abolished, there is now a slight possibility that it might be retained. As we previously reported on 28 March 2018, IP Australia indicated that "the Government has decided to undertake further consultation targeted at better understanding the needs of innovative SMEs before the phase out of the innovation patent occurs". This statement followed submissions that were made in relation to the public consultation that was undertaken by IP Australia to the *Draft Intellectual Property Laws Amendment Bill 2017*.

Various public submissions were made in relation to the Amendment Bill, which argued that the innovation patent system remained an important form of protection for local Australian innovators. They also stated that the reasons given by the Productivity Commission were not sufficiently persuasive for the system itself to be completely abolished.

It is generally accepted that the current provisions relating to the grant of innovation patents should be revised. There is almost universal agreement that the

rights provided to patentees by innovation patents are too great, and that many of the negative issues relating to the innovation patent system arise because of this. Thus, those that argue in favour of retaining an innovation patent system generally agree that the system should be revised to provide a better balance between the rights of the patentee and the rights of competitors, and that this can be at least partly achieved by raising the threshold upon which a valid innovation patent can be granted.

Currently, an innovation patent can be validly granted to an invention that is obvious, but amendments to the relevant legislation could increase the 'innovative step' threshold so that this could no longer occur. Further revisions could include that examination of an innovation patent would become compulsory at some stage during the life of the patent, so that clearly ineligible innovation patents would be removed from the patent register.

While it is not clear why the Government has decided to review its position in relation to abolition of the innovation patent system, there is a possibility that the abolition will now be delayed, or in fact not occur at all. Likewise, it is not clear at this stage when the Government will release any further findings regarding the further industry consultation it is to undertake. We will have to wait and see.



Andrew Massie, Partner

BEng FIPTA

@ andrew.massie@pof.com.au



The Carbon XPRIZE and CSIRO: CO₂ mitigation technology in Australia and beyond

The NRG COSIA Carbon XPRIZE seeks to incentivise development of carbon capture and utilisation (CCU) technologies that convert carbon dioxide (CO₂) into useful products while mitigating climate change. Ten finalists (carbon.xprize.org/teams) were selected to compete for a USD\$20 million pot, by demonstrating their technologies at pilot scale using power station flue gas as the CO₂ source.

The teams propose a diverse range of solutions for upgrading the famously stable CO₂ molecule. Some seek to entrap CO₂ as metal carbonate in concrete or other materials useful in construction. Other approaches rely instead on renewable energy inputs to manufacture commodities such as methanol or hydrocarbon feedstocks, or high value specialities such as carbon nanomaterials, composites and bioplastics.

A government-administered prize scheme is proposed by some theorists as an alternative to monopoly rights under a patent system. However, the private XPRIZE Foundation does not limit the IP rights of contestants, and most rely on patent protection as part of their commercialisation strategy. The largest company in the competition, Carbon Cure from Canada, has at least 11 patent families underpinning its commercialised retrofit technology for CO₂ curing of Portland cement. At the opposite end of the scalability spectrum, the US-based start-up C2CNT has a small patent portfolio related to the synthesis of tailored carbon nanotubes, via solar-powered electrolysis of CO₂ in molten carbonate salts.

Paul Feron and Jim Patel from CSIRO Energy spoke to us about the Carbon XPRIZE, and more generally about current approaches to CO₂ mitigation within CSIRO and beyond.

Paul emphasised the primary goal of CO₂ mitigation technology: deployment at sufficient scale in order to limit global temperature increases to 2°C (ideally

well below this). As such, his team remains focused on carbon capture and storage (CCS), which the IEA considers essential to meet Paris Agreement commitments. However, Paul acknowledges that “in CCS you capture CO₂ and transport it to a storage location. This requires a sizable infrastructure – a big bottleneck as it means large up-front investments where there is not yet a market.”

Smaller-scale CCU projects – such as those competing for the XPRIZE – thus have a part to play, particularly when implemented at the CO₂ source. However, it remains critical “to conduct an in-depth lifecycle analysis to ensure that you actually reduce CO₂ emissions.” Paul commented favourably on CO₂ mineralisation in concrete, as proposed by several XPRIZE finalists, as a means to indefinitely sequester significant quantities of carbon in a saleable product that can offset costs.

Paul is also excited about political developments in the United States, where a tax credit enacted this year provides USD\$50 per ton of CO₂ stored underground, or USD\$30 for CO₂ utilised industrially. This meaningful incentive has provoked considerable renewed interest in CCS projects, and Paul is optimistic that CSIRO’s world-leading CO₂ capture technology will have a role to play. The CSIRO technology, based on a patented amine absorption system, has been successfully piloted at the AGL Loy Yang power station in the Latrobe Valley, Victoria.

One XPRIZE finalist, India’s Breathe, proposes catalytic conversion of CO₂ to methanol using renewable hydrogen. Supporting this concept in principle, Paul and Jim both highlighted the potential of captured CO₂ as an energy carrier and chemical feedstock in a future hydrogen economy. Hydrogen can be produced from renewable power via electrolysis of water, yet cannot readily be transported or converted to commodity chemicals as fossil fuels currently are. However, renewable hydrogen may be reacted with CO₂ to form conventional chemicals and hydrocarbon fuels, but with a low carbon footprint. Jim noted that this is already technically viable, but reduced electrolysis costs and improved overall efficiencies are critical targets for success.

In the Australian context, our abundant solar and wind power generation potential far exceeds domestic electricity needs, and the government aims to nurture a renewable power export industry. CSIRO is pursuing various technologies to achieve this goal, via the multidisciplinary Future Science Platform on Hydrogen Energy Systems. Under this banner, Jim and Paul are collaborating on technology for hydrogenating captured CO₂ emissions to produce methane, which could then be consumed or exported using existing pipelines and LNG infrastructure.

Mitigating the climate impact of carbon emissions in our atmosphere remains an enormous challenge, particularly given the current inadequacies of market incentives for CO₂ storage and utilisation. Nevertheless, it is encouraging that private and government organisations, such as the XPRIZE Foundation and CSIRO, are seeking to unlock the technologies needed for a prosperous, low carbon-emission future.

“... Paul is optimistic that CSIRO’s world-leading CO₂ capture technology will have a role to play. The CSIRO technology, based on a patented amine absorption system, has been successfully piloted at the AGL Loy Yang power station in the Latrobe Valley, Victoria.”

Dr Paul Feron leads CSIRO’s CO₂ capture program.

Dr Jim Patel leads CSIRO’s Process Intensification and Integration Team in the Oil, Gas and Fuels Program.

Phillips Ormonde Fitzpatrick proudly works with Paul and Jim to protect CSIRO’s intellectual property.



Dr Matthew Overett

PhD (Chemistry) MIP

@ matthew.overett@pof.com.au



ESCO digs itself out of utility hole

One of the requirements for a patent to be valid is that the invention as claimed must be useful. Traditionally, utility has been assessed by asking whether the subject matter of a claim meets the promise of the invention.

The promise of the invention is to be determined from the specification and may arise from statements as to the objects the invention sets out to achieve or advantages asserted over the prior art. The fact that specifications may include multiple objects or purported advantages raises the question of whether a claim must meet every promise made in order to be valid. The recent decision of the Full Federal Court in *ESCO Corporation v Ronneby Road Pty Ltd* [2018] FCAFC 46 has provided an answer of sorts although as ever, areas of grey remain.

In *ESCO*, the Full Court has confirmed that if a patent specification contains a composite promise for an invention, a failure to attain any one of the elements of the composite promise in any claim will render that claim lacking in utility. However, while the decision confirmed the legal approach adopted by the judge below, its application of that test resulted in a finding that the claims in issue did not lack utility such that *ESCO*'s appeal on this ground was upheld.

The Full Court examined the legislative history of the utility requirement and also reviewed a number of UK and Australian decisions dealing with the test for utility. Having noted a degree of conflict between the leading authorities, the Full Court ultimately concluded that if, properly understood having regard to the whole of the specification including the claims, a patent contains a 'composite' promise, a claim must meet each element of that composite in order to be useful. The question then was – what is the promise for the invention?

The judge below had held that paragraph 6 of the specification contained a composite promise by stating that:

"The present invention pertains to an improved wear assembly for securing wear members to excavating equipment for enhanced stability, strength, durability, penetration, safety and ease of replacement."

The Full Court found that this language was used to recite those things to which the invention related, identifying the topics or subject matter of the invention rather than 'promises' for it. It placed significance on the fact that none of the paragraphs of the specification describing various embodiments of the invention sought to come to grips with describing aspects that captured each and every one of the features recited in paragraph 6.

It was also noted that in order to determine the promise of the invention, it may be necessary to have regard to the claims to determine which promise found in the specification was relevant to those claims. This was particularly so where the specification described a number of aspects of an invention, only some of which were the subject of the claims. The Full Court identified statements in paragraphs 15 and 16 of the specification which it found contained the promises relevant to the aspect of the invention as claimed.

Although the decision permits a more flexible approach to determining the promise of an invention by reference to the claims, patentees must continue to take care in describing outcomes said to be achieved by their inventions.



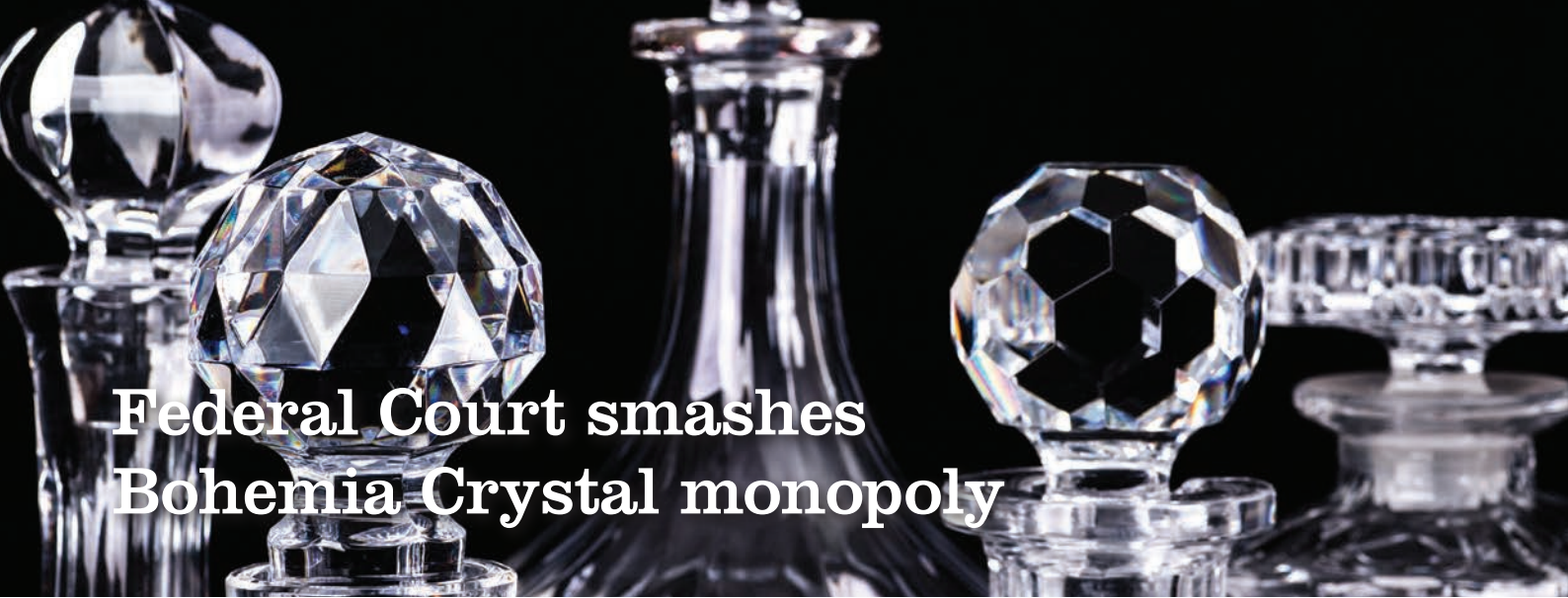
Adrian Crooks, Partner

BEng(Civil)(Hons) LLB LLM FIPTA

@ adrian.crooks@pof.com.au

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Federal Court smashes Bohemia Crystal monopoly

Crystal from Bohemia has a long history of recognition for its high quality of craftsmanship and innovative designs. Chances are you've probably noticed it gathering dust on your grandma's mantelpiece. However, in Australia, it has been involved in a trade mark tussle resulting in the marks BOHEMIA and BOHEMIA CRYSTAL being struck off the Register.

Bohemia Crystal Pty Limited (BCP) had registered the trade marks BOHEMIA and BOHEMIA CRYSTAL (the Marks) in relation to various glassware and crystal products in the early 2000s.

It alleged that Host Corporation (Host) infringed these registrations through its use of marks, including BANQUET BY BOHEMIA in relation to supply of glassware to the hospitality industry.

Host successfully cross-claimed for revocation of the Marks arguing that:

- > they were not capable of distinguishing as they comprised a geographic name or a geographic name and a descriptor, and
- > there was insufficient evidence of use before the filing dates to establish the Marks distinguished BCP's goods.

Following recent authority¹, the Court applied the test for determining whether a sign is inherently adapted to distinguish. It was not, as BCP had submitted, what ordinary consumers would consider the mark to mean. Rather, it was the meaning or the 'ordinary signification of the words' considered by ordinary consumers and traders.

The Court dismissed BCP's evidence that 'Bohemia' referred to those living an unconventional artistic lifestyle. On the evidence, it found the word 'Bohemia', when used in relation to glassware, would ordinarily signify to traders, and to many consumers, a region

where glassware is made. It was not disputed that glassware was made in the region, known as Bohemia, for many years before World War 1 and that this tradition continues in that region, now part of the Czech Republic.

Having found the Marks had no inherent adaptation to distinguish, the Court considered whether they had become capable of distinguishing through use. BCP's evidence was found to be deficient on this point and its registrations invalidated as:

- > a lot of the evidence showed use of a composite mark, rather than the Marks as applied for;
- > there was a lack of evidence **prior to the filing date**; and
- > it was vague and general.

However, if the Marks had been valid, the Court considered Host's use of Bohemia would infringe BCP's registrations and that the defence under s.122(1)(b) was not made out. Host argued it had used the marks in good faith to denote 'Bohemia' as the place of origin of the goods. The Court did not consider the words '**by** Bohemia', (unlike '**from** Bohemia') to denote a geographical location.

This case illustrates that adoption of a mark incorporating a geographical reference or other non-distinctive element can be problematic. It is also a reminder that evidence of use must be clear, specific and from the relevant period.

Reference

- 1 *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2014) 254 CLR 337.



Anita Brown, Senior Associate

BA LLB MIPLaw

@ anita.brown@pof.com.au

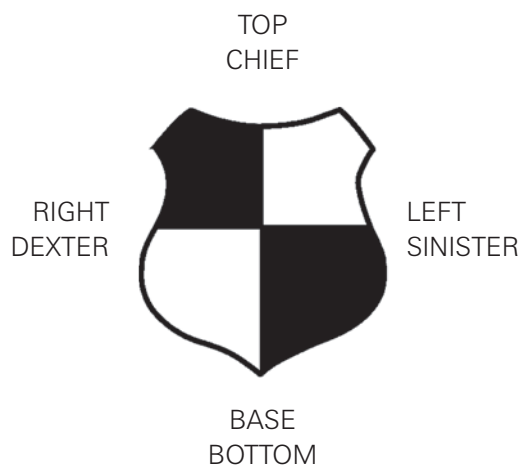


Blazoning the way: heraldry and trade marks

In the modern battlefield of intellectual property, a trade mark attorney might be compared to one of the knights of old; carrying a shield bearing their client's mark into battle. Whilst this may seem like a fanciful comparison, you may be surprised at the similarities between modern trade mark law and the old rules of heraldry.

A trade mark is sometimes referred to as a *badge of origin*. The term *badge* in this context dates back to medieval times, when coats of arms were used to distinguish between mounted knights on the battlefield, and *badges* derived from those coats of arms were used to distinguish the servants or goods of one knight from another's. In the same way, trade marks today distinguish the goods or services of one trader from those of another. Elaborate rules of heraldry determined what could and couldn't be used in a badge or coat of arms, and the College of Heralds ensured that the rules of heraldry were met and that no two coats of arms were too similar – much as the Registrar does with trade marks today.

The rules of heraldry are incredibly involved (like some sections of the *Trade Marks Act*) and involve a range of *tinctures* or *stains* (colours), *metals* and *furs*. Each of these has a special heraldic term, so *red*, *green*, *blue* and *black*, for example, become the heraldic tinctures *gules*, *vert*, *azure* and *sable*. In addition to the heraldic colour system, there is an involved way of identifying different parts of the shield (see diagram). Note that left and right refer to the shield as you are *holding* it, so are reversed if you are looking at the shield.



A shield may be divided in various ways so that the background is different colours. (The example above would be described or *blazoned* as being "divided quarterly, sable (black) and argent (white or silver)". In addition, various *charges* may be added. *Charges* may be creatures (such as lions, dragons, unicorns), astronomical features (sun, moon, stars), items from nature, (trees, flowers, waves) or man-made objects, (arrows, harps, guitar strings – the latter appearing in the arms of Sir Paul McCartney!). In addition to the shield itself, there are a range of supporters (such as the kangaroo and emu in the Australian coat of arms), crests and helms above the shield and *mantling*, which is fabric draped around a helm, which can be added to a coat of arms.

There are several aspects of the modern trade mark system that parallel the heraldic system and may even have been derived from it. For example, the term *device* used by trade mark attorneys to refer to the graphic component of a trade mark, is a term that is



also commonly used in heraldry to refer to an image or charge used to decorate a shield. As previously mentioned, trade marks and heraldry also both serve to allow viewers to distinguish between otherwise similar items, and both have a governing body that prevents arms or marks that are too similar from being granted.

A coat of arms may itself qualify as a *sign* under the *Trade Marks Act*, so many marks today still incorporate heraldic elements to a greater or lesser degree. Over 4.7 thousand marks on the Australian Register incorporate the image of a shield, ranging from simple shields such as the one below, left, (used on FIRESTONE tyres) to more elaborate shields with supporters and other heraldic elements such as the one below, right, (used on AKUBRA hats).



Coats of arms are commonly used today as the whole or as part of trade marks of educational institutions, hospitals, public service organisations, military units and sporting teams.

As with trade marks, legal actions could arise if coats of arms were not sufficiently different. In *Scrope v Grosvenor*, Baron Scrope took action before the

military Court of Chivalry against Sir Robert Grosvenor who used an identical shield to his. One of the witnesses in that case was the poet, Geoffrey Chaucer, who gave evidence that he had encountered the shield which he knew to be that of Baron Scrope outside an inn, and upon making enquires, was told that the inn was owned by Sir Robert. Whilst framed in terms of heraldry, the essence of the action appears to have been equivalent to modern day passing off.

Where a trade mark incorporates a shield, it is worth checking so see whether it is a prohibited mark, since many shields, like flags, are subject to prohibition as registered trade marks. For example, the badge used by the Special Air Service Regiment appears in the Australian Trade Mark Search database as application -9002473; a mark prohibited from use without the Minister's consent under s83 *Defence Act 1903*.

Outside of press reports that Megan Markle's father was granted arms so that his daughter would have hereditary arms to combine with those of Prince Harry, heraldry rarely impinges on modern consciousness. Nevertheless, the similarities between heraldry and trade marks still make at least a casual knowledge of heraldry worthwhile to trade mark practitioners.



Russell Waters

BSc LLB FIPTA

@ russell.waters@pof.com.au

Double-walled coffee pot design considered distinctive over predecessor

The recent decision of the Australian Designs Office in *PI-Design AG* [208] ADO 2 illustrates how relatively minor variations made to a product's appearance can support a valid Australian design registration.

Background

On 13 August 2015, Swiss design company PI-Design AG filed a first design application (AU201514163) for a single-walled coffee pot, shown below, left. On 14 October 2015, PI-Design filed a second Australian design application (AU201515424) for a double-walled pot, shown below, right.



Optional examination of the second application (the double-wall design) was requested and a first examination report was issued raising a prior art objection on the basis of PI-Design's first application (the single-wall design).

Notably, the first design was not published until *after* the second application was filed. However, the first design was validly cited against the second application under Section 15(2)(c) of the Australian Designs Act. This section provides that the prior art base includes Australian design applications which have a priority date that is earlier, but which are published by the Designs Office later than the priority date of the design under examination. Section 15(2)(c) codifies a principle similar to 'whole of contents' novelty established in patent law, which seeks to prevent the grant of multiple monopolies for a single innovation – even where the second innovation was created before publication of the first innovation.

PI-Design was unsuccessful in overcoming the prior art objection and subsequently requested a hearing before a Delegate of the Australian Designs Office.

Assessing distinctiveness

Section 15(1) of the *Australian Designs Act 2003* recites that a design is registrable if it is *new and distinctive* when compared with the prior art base for the design. It was not in dispute that the double-walled design constituted a 'new' design, and therefore the Delegate dealt only with the question of distinctiveness.

The Delegate noted the proposition that when the prior art base is well developed then smaller differences are more distinctive. The Delegate was satisfied that within the field of non-electric pour-over coffee makers, the sub-category to which the design belonged, there was a diversity of visual features which indicated a crowded prior art base. Additional significance was therefore given to smaller differences between the two designs.

In assessing the importance of the double-walled feature in the second design, the Delegate accepted that, in use, liquid would assume the shape of the inner wall and accentuate the visual effect of the double-wall. The feature also created a visually distinct illusion that fluids in the pot were 'floating'. The registration for the double-walled design was ultimately held to be sufficiently distinctive.

Conclusion

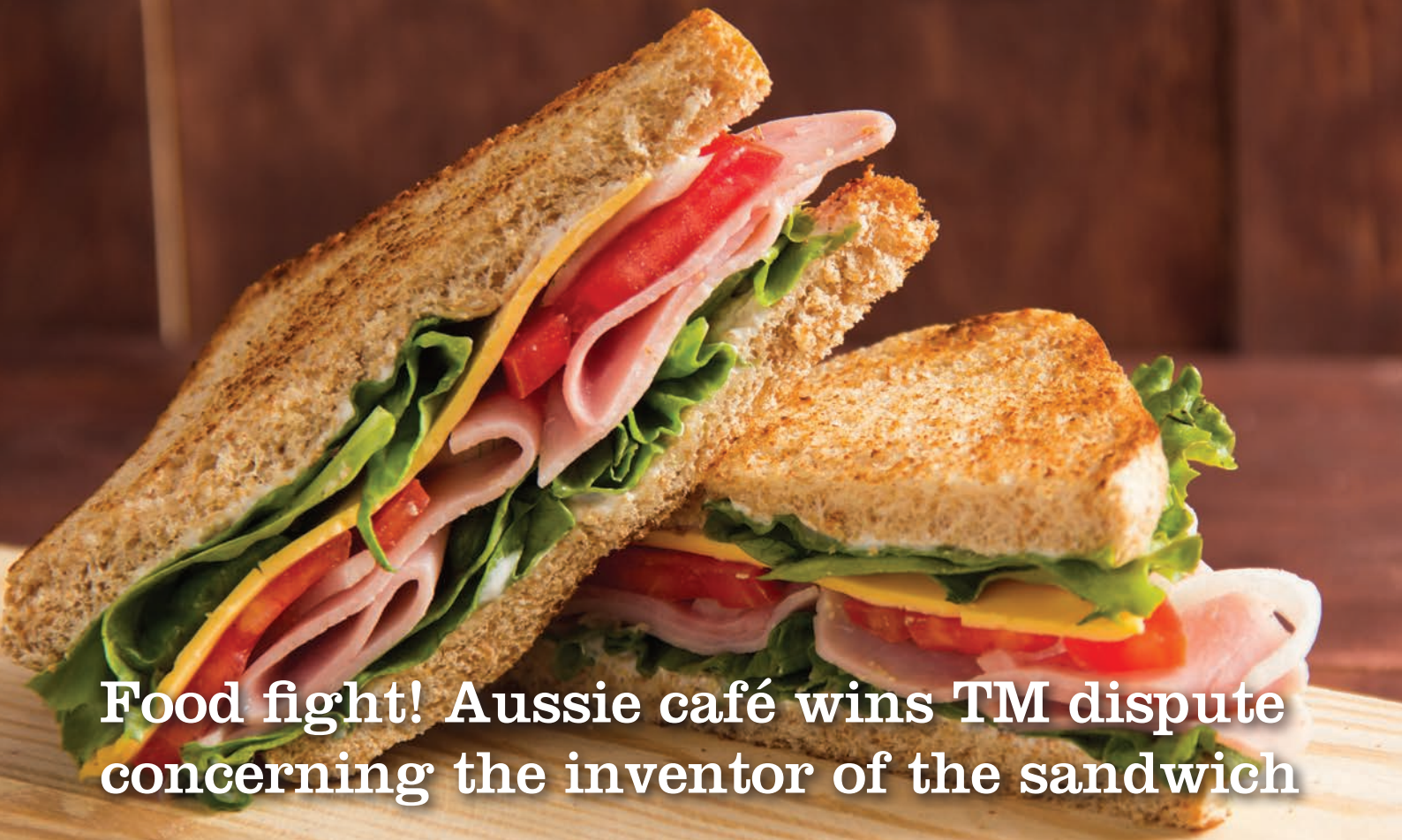
This decision confirms that even relatively small variations to a product's appearance may provide a basis for a valid Australian design registration. In a crowded field, a prior registration may not protect the new product, justifying a new design application.



Duncan Joiner, Associate

BAeroEng(Hons) BLaw(Hons) MIPLaw

@ duncan.joiner@pof.com.au



Food fight! Aussie café wins TM dispute concerning the inventor of the sandwich

The Trade Marks Office recently handed down a decision to register a trade mark for the name of the inventor of the sandwich. What follows is a tale of 18th century aristocrats, US chain restaurants and an independent, Aussie café.

Flashback: the year is 1792 and nobleman Lord John Montagu, 4th Earl of Sandwich, is playing cards at the *exclusive* London Beef Steak Club. It's a conservative era, so civilised dining among aristocrats typically calls for the use of cutlery. The audacious Earl, however, instructs his valet to fetch him some salted beef tucked between two slices of toasted bread – a notably fork-free dining experience. The Earl's buddies immediately recognise the convenience of this carb-cloaked culinary delight and soon people began to request "the same as Sandwich" or just a "sandwich".

And so began the beloved institution that is the 'sanga'.

Flash forward to 21st century: Lord Montague's descendant, the 11th Earl of Sandwich ('the Opponent'), owns a chain of restaurants in the US and internationally, trading as the EARL OF SANDWICH. The Opponent's menu includes a sandwich called the FULL MONTAGU, a nod to the 11th Earl's ancestor.

Meanwhile, in Woolloomooloo NSW, an independent café, 'the Applicant', trades under the name JOHN MONTAGU, also named after the legendary inventor.

Here is where things got messy.

In 2014, the Applicant filed for registration of the following trade mark, the 'JM mark', in respect of cafes in class 43:

JOHN MONTAGU.

The Opponent subsequently filed its own application for registration of the mark MONTAGU in class 43. The Opponent opposed the application for the JM mark.¹

In a classic tale of David and Goliath, the Trade Marks Office found that the Opponent failed on all of its grounds of opposition. This was, in part, due to the Opponent's failure to establish that the MONTAGU mark had acquired a reputation in Australia, before the filing date for the JM mark. Costs were awarded against the Opponent.

Reference

- 1 Grounds of opposition were made under ss 42(b), 43, 44, 58, 60 and 62A of the *Trade Marks Act 1995* (Cth).



Alexis Keating, Lawyer

LLB (Hons), BSc

@ alexis.keating@pof.com.au



World IP Day: Celebrating the achievements of women in IP

The 26th of April 2018 marked World Intellectual Property Day, a day where we celebrate the role intellectual property (IP) plays in encouraging innovation and creativity around the world. This year's theme was 'Powering change: Women in innovation and creativity, celebrating the brilliance, creativity, passion and courage of the women in IP'.

More than ever before, women are leading the way to drive change and shape the innovation agenda. Patent applications including at least one female inventor have been on a consistent upward trend over the last few years. But while there has been significant progress in recent decades, there is still a lot more to be done. WIPO's latest data indicates that only 30.5% of the international patent applications filed included at least one female inventor. While it is encouraging

that the number of PCT applications with at least one female inventor has nearly doubled since 2007, gender parity is yet to be achieved.

With a view to achieving gender parity, it is important we do as much as we can to increase the participation of women in innovation and creativity. To support this focus, POF has created a booklet, *'Women in Innovation'*, to highlight and celebrate the collective experiences of women who are powering change in IP. The booklet showcases women in IP from around the world, highlighting their contributions, observations and insights through a collection of short interviews.

Head to the 'News' section on our website, www.pof.com.au, to read the 'Women in Innovation' booklet. We encourage you to share this booklet with your networks to support the recognition of women in innovation.



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Melbourne

Level 16, 333 Collins Street
Melbourne VIC 3000 Australia
Phone: +61 3 9614 1944
Fax: +61 3 9614 1867

Sydney

Level 19, 133 Castlereagh Street
Sydney NSW 2000 Australia
Phone: +61 2 9285 2900
Fax: +61 3 9614 1867

Adelaide

Level 5, 75 Hindmarsh Square
Adelaide SA 5000 Australia
Phone: +61 8 8232 5199
Fax: +61 3 9614 1867

pof.com.au