

Choc shock as Cadbury claims ownership of colour purple

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A YEAR ago Cadbury Schweppes commissioned an independent research company to hold what seemed to be a straightforward market test. Consumers were presented with two 250g blocks of chocolate, one wrapped in purple and the other in lime, neither with any other identifiable markings. The survey asked them to identify which brand the colours evoked. Without any prompting, more than 80 per cent responded that the purple block was a Cadbury brand.

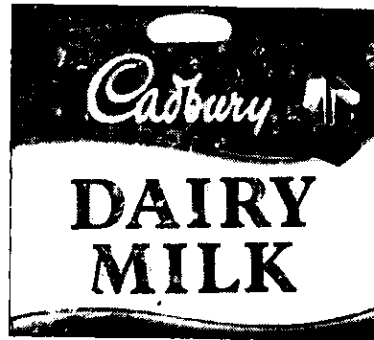
This may not sound so remarkable as companies conduct all kinds of consumer research to help them market their products. The interesting thing is that the survey results were used to support Cadbury's application to register the colour purple as a trademark. Its efforts, which began in November 1998 when the application was first filed, appear to be paying off. On September 18 last year, the chocolate giant's dark purple colour was advertised in IP Australia's Official

Journal of Trade Marks as accepted as a trademark in the chocolate category. But the confectioner had only cleared the first hurdle.

Late last year two chocolate makers opposed IP Australia's acceptance of Cadbury's purple as a trademark. Opposition is a mechanism that provides people with the opportunity to dispute that the trademark should be registered.

If the opposition is unsuccessful, Cadbury's trademark will proceed to registration and bar its competitors from using its eight shades of purple in a form that would be considered deceptively similar as a trademark for their own chocolate.

Cadbury's purple trademark is one of a spate of colour registrations. Changes to Australia's trademark laws in 1996 allowed companies to protect shapes, sounds, colours, scents and aspects of packaging. In reality, anything distinctive had always been capable of registration as a trademark, but IP Australia was reluctant to register anything other than words or logos, pictures and drawings. The law was updated to



clarify the situation.

The acting registrar of trademarks at IP Australia, Michael Arblaster, says: "Traders are beginning to recognise that they can use colour to establish a link in the minds of consumers between themselves and their products.

"Since 1996 some 98 colour marks have been registered, with another 158 pending. Some 352 applications have been unsuccessful over that time." Companies that have secured rights include Veuve Clicquot's orange, Australia Post's red and Kraft's (cream cheese) silver. Per-

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Corrs Chambers Westgarth

haps one of the more unusual registrations is that owned by the Eagle Boys pizza chain, which has obtained trademark registration for the pink glowing lights on its shop fronts. But where does Cadbury's situation leave other confectionery makers that want to use purple for their own chocolate?

Stephen Stern, Melbourne partner at law firm Corrs Chambers Westgarth, who acts for Cadbury, says: "If Cadbury's trademark proceeds to registration, this will not mean that Cadbury can, or indeed will want to, stop incidental use of the colour purple by other traders. But it would prevent traders from using it as a distinctive or identifying element of their packaging for chocolate or related goods."

Cadbury has taken legal steps to prevent other companies from using purple, the latest being

against rival Darrell Lea. In its statement of claim in February last year, Cadbury claimed that Darrell Lea was misleading and deceiving consumers by using a strikingly similar wrapper and passing off its product as a Cadbury product. In its defence, Darrell Lea pointed out that Cadbury uses colours other than purple for its chocolate wrappers, such as on Cherry Ripe and Picnic bars.

More recently, Darrell Lea has struck back and, along with Nestle, has opposed registration of Cadbury's purple.

So, does this mean that anyone can register the colours they use for their own chocolates as trademarks? What about red for Kit-Kat or black for a Mars bar? The answer would depend on whether the trademark applicant could show that its colour trademark has

been used so extensively and over such a length of time that it now functions as a "badge of origin" and has become synonymous with the brand. In the case of Cadbury, Arblaster is satisfied this prerequisite has been met.

Cadbury Schweppes's corporate communications manager, Karina O'Meara, says: "We have applied for a trademark on eight different shades of what we call 'Cadbury purple', which covers the purple shades we have used over the last 80 years. We've invested many millions of dollars in building this intellectual property, so naturally we want to protect it."

The impact of this investment is hardly subtle. Cadbury television ads are drenched in the colour and shop displays, delivery vehicles, trams and even a set of boom gates have been plastered in purple.

But not every colour can be registered as a trademark. Celia Cumming, partner at Freehills Carter Smith Beadle, who is helping another chocolate maker with its colour trademark, warns that "it

can be difficult to obtain a trademark registration where the colour is required by other traders". Red for strawberry or green for mint flavour would be examples.

There is an argument that granting businesses a monopoly over a specific colour restricts competition. Purple is, after all, an ordinary colour in common usage.

The possibility of registering colour trademarks without providing evidence of use will concern those who are afraid of corporations gaining monopolies over colours. These fears of opening up the floodgates are often exaggerated. In a world where there is so much saturation and communication from companies to consumers, visual cues can function as a brand. The Cadbury argument would be that this is really no different than the use of ordinary English words, such as Flake and Picnic, as trade marks. These words are registered. Why should colour be any different? In Britain, Cadbury has succeeded in registering its purple. It will be interesting to see how its Australian application evolves.