



# Protecting food brands in China

**Exporting food to China**





**The Exporting Food to China report series** is published by Australian Centre for Sustainable Business and Development, Agricultural Value Chains team. Read together, the reports serve as a valuable decision support tool that covers the full length value chain journey. Packaged beef from Queensland is used as an example in the reports. However, the principles discussed will be relevant to decision makers in most agricultural export industries. The series provides essential information for Australian businesses looking to enter the lucrative Chinese market.

The Australian Centre for Sustainable Business and Development (ACSBD) is a research centre of the University of Southern Queensland, Toowoomba, Queensland, Australia.

The ACSBD Agricultural Value Chains team is led by Professor Alice Woodhead. The team works with local and national industries to better understand critical infrastructure, product development and export opportunities, risks, pathways and consumer purchasing preferences.

The value chain research is founded in systems thinking. This enables the team to make sense of the complexity and emerging issues that define our agricultural and food systems and export markets.

The team works closely with a broad range of stakeholders with the aim of developing targeted and practical strategies and decision support material.

#### Project and steering committee

The project 'Facilitating the transformation of Queensland's agricultural value chains' is funded by Queensland Government and University of Southern Queensland.

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## PROTECTING FOOD BRANDS IN CHINA

Discusses product integrity and counterfeiting issues and the responses available to businesses.

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## Introduction

This report is part of a series on the export of Australian food to China. The purpose of this report is to provide answers for Australian businesses looking to protect their brands in China. It discusses trade marks law addressing registration and the various options for enforcement available in Mainland China.

This report is supported by the others in the series. Considered together, these reports provide a picture of the supply chain from Australian farm gates to Chinese consumers. Developing a greater understanding in this area will enable new and expanding exporters to take the best possible advantage of the Asian food boom.



## Background

China is among the main sources of the world's counterfeit products. Intellectual property (IP) infringement in China is one of the biggest sources of tension with its major trading partners. Counterfeits and IP infringements spread from goods, services, ideas and technologies. The common examples of IP violations in China include use of identical or similar words, graphics or packaging, or similar website styles and domain names, sales of look-alikes, and free riding or actual sale of counterfeits. This issue paper focuses on the protection of trademarks, which is one of the common types of IP. The trademark protection laws and policies focus on protecting signs, symbols, and logos etc.<sup>1</sup> They also cover the protection of translations and domain names of foreign brands which are used to distinguish one product from the competing products.

The recent signing of the China-Australia Free Trade Agreement (ChAFTA) provides more opportunities for Australian companies to do business with/in China. It is expected the landscape of IP claims would expand. It is essential for Australian businesses to know how the trademark law works in China and how to protect business brands before entering into the Chinese market.

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<sup>1</sup> According to Article 8 of China's Trademark Law, the following may be the subject of an application for trademark: any word, device, any letter of the alphabet, any number, three-dimensional symbol, colour combination and sound, or any combination.

## Cases on foreign trademark infringement in China

Recent development has seen increasing trademark infringement cases in China concerning foreign brands. This is largely because foreign brands have higher recognition and profit margins compared with domestic brands. Some foreign companies even found pirated copies of their products or similar business names which have already been registered in China before they even engage with the Chinese market. For instance, before *Facebook* started registering its trademark in China, various trademarks reflecting the Chinese translation of the brand have already been registered.<sup>2</sup>

Because of the 'first to file' system<sup>3</sup> with respect to trademarks in China, it is possible for one individual or company to apply for hundreds of trademarks. This has complicated the trademark protection of foreign brands in China. Some typical cases involving foreign firms fighting for trademark infringements in China are briefly summarised here. These cases highlight the importance of filing trademark registration early in China. In June this year, the well-known US sports brand *New Balance* lost its trademark case (with a \$16 million verdict) against a Chinese sports company over the use of the Chinese name 'Xin Bai Lun'.<sup>4</sup> In 2014, the owner of the popular *Penfolds* wine from South Australia was in legal battle over right to use its Chinese name 'Benfu', which has been registered by a rival wine company in China.<sup>5</sup> In 2012, *Apple* had to pay \$60 million to settle its iPad trademark dispute with the Chinese company Proview Technology, which registered the iPad trademark in 2001 in China.<sup>6</sup> Likewise, the US carmaker *Telsa* also settled the trademark dispute on financial terms to someone who had registered Telsa and its domain names in China before Tesla enter the Chinese market.<sup>7</sup> Consequently, in order to avoid costly litigation down the track, it is crucial for Australian businesses to take a proactive approach to protect their trademarks in China, whether they are planning to engage with the Chinese market or not.

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<sup>2</sup> Chris Chang, *Facebook Wants to Avoid Trademark Dispute in China* (17 February 2012) MIC Gadget <<http://micgadget.com/22165/facebook-wants-to-avoid-trademark-dispute-in-china/>>.

<sup>3</sup> That means that the person/company who files for registration first gets the trademark in China. This is different from Australia's trademark law where trademark recognition is granted to the actual user of the mark.

<sup>4</sup> Wilson Elser, *Chinese Court stuns New Balance with \$16 million verdict: lessons on doing business in China* (10 June 2015) Lexology <<http://www.lexology.com/library/detail.aspx?g=39f5743c-bca0-4e70-af5d-2964c468b610>>.

<sup>5</sup> Angus Grigg, 'Penfolds Suffers from China Squatters', *Financial Review (online)* 13 July 2014 <<http://www.afr.com/lifestyle/food-and-wine/wine-and-spirits/penfolds-suffers-from-china-squatters-20140713-j0swws#ixzz3mHRUrm5u>>.

<sup>6</sup> Melanie Lee and Samuel Shen, *Apple Pays \$60 Million to Settle China iPad Trademark Dispute* (2 July 2012) Reuters <<http://www.reuters.com/article/2012/07/02/us-apple-china-idUSBRE86104320120702>>.

<sup>7</sup> Alan Ohnsman, *Tesla Reaches Settlement to End China Trademark Dispute* (7 August 2014) Bloomberg <<http://www.bloomberg.com/news/articles/2014-08-06/tesla-reaches-settlement-to-end-china-trademark-dispute>>.

## Chinese regulatory framework on IP rights protection

China's IP rights regulatory framework includes three basic IP laws (*Copyright Law, Trademark Law and Patent Law*), and a range of administrative rules and regulations. Following China's accession to the World Trade Organisation (WTO) in 2001, significant changes were made to its IP laws to accommodate the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). IP protection rules of some international agreements, such as Paris Convention, Berne Convention, Patent Cooperation Treaty and Madrid Protocol, also apply in China due to China's membership of such agreements.<sup>8</sup>

- Trademark Law: First adopted in 1982 and subsequently revised in 1993, 2001 and 2014. The 2014 revision streamlines trademark registration procedures and strengthens the legal protection of trademarks in China in line with international standards.
- Patent Law: First enacted in 1984 and amended in 1992, 2000 and 2009.
- Copyright Law: First established in 1990 and amended made in 2001 and 2010.

Different from copyright, patent and trademark must be registered to gain enforceability in China. The following paragraphs look at what can be covered by the Trademark Law and how to register a trademark in China in order to gain protection.

According to Article 8 of China's Trademark Law, the following may be the subject of an application for trademark: any word, device, any letter of the alphabet, any number, three-dimensional symbol, colour combination and sound, or any combination. Such marks are eligible for application as long as they are distinctive, and do not infringe upon the prior legitimate rights of others or prohibited by the Trademark Law.<sup>9</sup>

Australian companies can register their trademarks within China or utilise the international agreements on IP rights of which China is a member. If the company has not established a physical presence in China, it must use a state-designated trademark agent to register its trademark. The Trademark Office of the State Administration for Industry and Commerce under the State Council is responsible for the registration and administration of trademarks in China.<sup>10</sup> The 'first-to-file' or 'first-to-register' system is adopted,<sup>11</sup> which prompts companies to register

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<sup>8</sup> According to the WTO website, China is a member of and has ratified the following agreements relating to trademark protection: Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (since 2001); Berne Convention for the Protection of Literary and Artistic Works (since 1992); Madrid Agreement Concerning the International Registration of Marks (since 1989); Paris Convention for the Protection of Industrial Property (since 1985) and Convention Establishing the World Intellectual Property Organisation (WIPO) (since 1980).

<sup>9</sup> Trademark Law of China, Articles 9-11.

<sup>10</sup> Trademark Law of China, Article 2.

<sup>11</sup> Trademark Law of China, Chapter 2.

their trademark with the Trademark Office at a very early stage (Chinese translations and domain names should also be registered in order to better protect the IP rights). The Trademark Office processes the largest number of trademark applications in the world. By the end of 2013, China had recorded a cumulative total of 13.24 million trademark applications and 8.65 million registrations, of which 7.24 million remain in force.<sup>12</sup> China has become Australia's No. 1 destination market for Australian trademark filers, overtaking the US and New Zealand.<sup>13</sup>

If Australian companies register their trademark outside China, they are not protected in China unless they have also registered in China. However, such companies are entitled to claim priority registration in accordance with the bilateral agreements or the international agreements on trademark protection to which both Australia and China are party, e.g. the Madrid Agreement.<sup>14</sup> This right is provided by s 25 of China's Trademark Law with the limitation to file the application in China within six months from the date on which the same mark in connection with the same goods was first filed in a foreign country. It has been reported that in 2013 alone, 20,275 international trademark applications designating China were received by the Chinese Trademark Office bringing the cumulative total number of applications designating China to 196,000.<sup>15</sup>

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12 World Intellectual Property Organization, *China's New Trademark Law* (September 2014) <[http://www.wipo.int/wipo\\_magazine/en/2014/05/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2014/05/article_0009.html)>.

13 As at 2011, more than 50 per cent of Australia's overseas trademark filings are in three countries: China 19 per cent, New Zealand 17 per cent and the United States 15 per cent. A further 20 per cent of filings are directed to other Asian countries. See Chuyang Liu, *Insight - Protecting intellectual property rights in China* (2015) Australian Trade Commission <<https://www.austrade.gov.au/Australian/Export/Export-markets/Countries/China/News-and-Insights/protecting-intellectual-property-rights-in-china>>.

14 See above n 9.

15 World Intellectual Property Organization, above n 13.



## Enforcing IP Rights in China

Despite of the above legislations in place, the enforcement of IP rights protection has long been an issue in China. It was a sticking point when China was seeking accession to the World Trade Organisation (WTO) in 2001. It is still one of the topics nowadays that attracts broad concerns among western countries. Various aspects contributed to the difficulties of China's IP rights enforcement, such as the special development stage of China, culture influence, economic benefits, and market support. While the explanation on such aspects is not the focus here, the following paragraphs discuss the three main options for enforcing IP rights in China.

The first action is to take *administrative action* against the IP infringers. This is done by the IP holders file a complaint at the local administrative trademark office, that is, the Trademark Division of each provincial and municipal Administration for Industry and Commerce (AIC).<sup>16</sup> The advantages of this option is that it only requires a few weeks for a determination of infringement or non-infringement. It is also easily accessible and does not need to hire a lawyer. However, significant preparatory investigations are required. More importantly, compensation is rarely awarded to the injured IP rights holders via this channel. The remedies, e.g. fines and confiscation and destruction of counterfeits goods and equipment, are normally not adequate to deter further infringements. Sometimes, it can be difficult to utilise this option or enforce the decision due to local protectionism and corruption.<sup>17</sup>

The second option is *civil litigation*. The Interpretation of the Supreme People's Court permits foreign IP rights holder to file a lawsuit within two years after the IP holders knew or should have known about the infringement.<sup>18</sup> It is normally heard by specialised IP tribunals in China's civil courts. Compared with the administrative action discussed above, civil litigation provides the option of compensation and stronger deterrent effect with injunctive relief.<sup>19</sup> It also offers the option to appeal. However, court process is usually costly and time-consuming, accompanied by

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<sup>16</sup> Trademark Law of China, Article 2.

<sup>17</sup> The US-China Business Council, *Best Practices: Intellectual Property Protection in China* (2015) <<https://www.uschina.org/sites/default/files/USCBC%20Best%20Practices%20for%20Intellectual%20Property%20Protection.pdf>>.

<sup>18</sup> The Supreme People's Court "Several Questions on the Application of Law in Trial of Trademark Civil Dispute Cases" (2002 Interpretation), s18.

<sup>19</sup> According to China's Trademark Law Article 63, the amount of damages for infringing the exclusive right to use a trademark shall be actual losses that the right owner has suffered as a result of the infringement during the period of the infringement; where the losses suffered by the right owner cannot be determined, the amount of damages for trademark infringement shall be the profits that the infringer has earned as a result of the infringement during the period of the infringement; where the losses suffered by the right owner, or the profits earned by the infringer, cannot be determined, the amount of damages shall be determined based on a reasonable amount that would be paid for a licensing royalty for the trademark right. Where the actual losses suffered by the right owner, the profits earned by the infringer, or the licensing royalties of trademark infringement cannot be determined, a People's Court shall award damages up to RMB 3,000,000, depending on the facts of the case.

greater bureaucracy.<sup>20</sup> Sometimes, it can be very difficult for the plaintiff to get outside evidence admitted to the court.

In circumstances where trademark infringement is 'so serious as to constitute a crime',<sup>21</sup> Article 61 of Trademark Law require the AIC to promptly report the case to the judicial department to be dealt with.<sup>22</sup> However, the law does not define the 'seriousness' rather than some indications on the amount of illegal gain and the quantity of infringing products produced. The case will be heard by the criminal tribunals in the courts after first investigated by local public security bureaus (PSBs). It can not only stop infringement but also impose fines and imprisonment based on China's Criminal Law.<sup>23</sup> However, such criminal actions

are difficult to proceed because they can only be transferred from local AIC if infringement value meets minimum thresholds.<sup>24</sup> Such thresholds can be extremely difficult to meet in practice. In addition, sometimes local AIC is reluctant to report the infringements for criminal prosecution due to financial incentive (any administrative fined paid by the infringers go to the coffers of the AIC).<sup>25</sup>

China's *Customs* provides another option for foreign IP holders to combat trademark infringement. The registration with the General Administration of Customs allows the IP holders to have their trademarks monitored by the Customs in case of any violation. This provides the chance to stop goods in transit. However, the Customs only inspects a limited percentage of the exported goods and it heavily relies on the intelligence it receives to intercept fakes on export or import.<sup>26</sup> This can be very useful if IP holders can provided detailed information and cooperate with Customs.

## **IP protection for Australian brands under the China-Australia free trade agreement**

The China-Australia Free Trade Agreement (ChAFTA) was signed on 17 June 2015. Its Chapter 11 is exclusively on promoting IP rights protection, which provides Australian businesses, particular those with valuable IP assets, greater confidence of improved IP protection and enforcement in China.<sup>27</sup> Under the Agreement,

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20 The US-China Business Council, above n 18.

21 Trademark Law of China, Article 67.

22 Trademark Law of China, Article 61: 'The administrative authority for industry and commerce is authorized to investigate any conduct infringing upon the exclusive right to use a registered trademark. Where a crime is suspected to have been committed, the administrative authority for industry and commerce shall promptly turn over the case to the judicial department to be dealt with in accordance with the law.'

23 Article 140 of Criminal Law of China provides various criteria to determine length of imprisonment and amount of fines that should be applied. Maximum two years' imprisonment applies if the earnings from sales are between RMB50,000-RMB200,000. 15 years imprisonment or life sentence could be applied if the earnings of illegal sales is more than RMB2 million.

24 The US-China Business Council, above n 18.

25 Ibid.

26 Ibid.

27 Liu, above n 14.

China agrees to establish and maintain transparent IP systems and promote adequate IP rights enforcement.<sup>28</sup> In addition, China has to provide Australia businesses with no less favourable treatment than is provided to Chinese nationals in terms of IP rights protection.<sup>29</sup> To improve transparency, China also agrees to publish and make its IP databases available online.<sup>30</sup> This would assist Australian businesses to tackle any inappropriately granted trademarks which might be registered by taking advantages of the existing Australian brands. Trademarks that are specifically protected under ChAFTA include visual and sound signs, well-known trademarks, certification and collective trademarks, and geographical indications.<sup>31</sup>

With respect to the IP enforcement, Article 11.21 of the Agreement requires China to implement effective IP enforcement systems, particularly to criminalise certain acts at least in cases of willful trademark counterfeiting on a commercial scale. Imprisonment or/and significant monetary fines should be imposed to provide a deterrent. However, obligations to enforce IP rights protection under the ChAFTA are minimum obligations only.<sup>32</sup> China is not obliged to provide more extensive enforcement of IP rights than what is required. It is also free to determine the appropriate methods to enforce IP protection with its own legal system and practice. Whether ChAFTA could significantly improve the IP rights protection and enforcement for Australian businesses remains to be seen.

It should be noted that under the ChAFTA, Australian businesses are also provided with a right to enforce their IP rights via international arbitration, apart from the options of administrative actions, civil litigations and Customs protection discussed above. This is because of the inclusion of the investor-State dispute settlement (ISDS) mechanism under this Agreement.<sup>33</sup>

The ISDS permits foreign investors to bypass the courts of their host States and make direct claim against the host States through international arbitration institutions. That means, Australian businesses can utilise this mechanism to sue Chinese government if their IP rights are affected by any government measures or actions which constituted a breach of the Agreement and the breach incurred loss or damages to them. Likewise, Chinese investors are also entitled to exercise this right granted by the ISDS to sue Australian government. (To date, the only such claim ever brought against Australia is the Philip Morris case.<sup>34</sup>)

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28 China-Australia Free Trade Agreement, Article 11.1 (a).

29 China-Australia Free Trade Agreement, Article 11.5.

30 China-Australia Free Trade Agreement, Article 11.6.

31 China-Australia Free Trade Agreement, Articles 11.12-11.15.

32 China-Australia Free Trade Agreement, Article 11.3.

33 China-Australia Free Trade Agreement, Chapter 9 Section B.

34 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

# Tips for trade mark protection in China

## Self Help Measures

**Registration:** Due to the 'first-to-file' system adopted by China, Australian businesses should file the application to register their trademarks with China's Trademark Office as early as possible, ideally long before they are entering the Chinese market. Registration should broadly include the brand's logos signs, symbols, English name, domain names and Chinese names (including Chinese pinyin, Chinese characters as well as similar or identical translations and pronunciations). The case of New Balance discussed above demonstrates the importance of choosing proper Chinese translations to reflect business brands. When filing, companies should also carefully select product categories as well as sub-categories in which to file.<sup>35</sup> This is to avoid others to register a similar trademark in a different product category.

**Assessment and audit:** Before entering into Chinese market, think about the vulnerability of your brands and have some relevant safeguards in place to avoid the infringement. It is recommended for Australia businesses to conduct an IP audit to determine the value of their brands and to mitigate against potential risks.<sup>36</sup>

**Using technologies:** Use technologies and techniques during the production process to improve the level of protection of business brands. Make sure there are no loopholes in packaging the products so the real packages won't be used by counterfeiters. Such technologies include e.g. labels, inks, foils, chemicals, stamps and threads.<sup>37</sup> A good example to ensure brand integrity is the use of the traceability system by the Australian milk production companies *Norco and A2*. A unique barcode is attached to each product offering brand owners an effective way to trace and deter counterfeits. By scanning the products with the free smartphone App, Chinese consumers can easily check product authenticity and safety. This traceability system adopted by Norco and A2 also facilitates the compliance of the new Chinese Food Safety Law (taking effect on 1 Oct

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<sup>35</sup> <https://www.uschina.org/reports/best-practices-intellectual-property-protection-china>

<sup>36</sup> Chuyang Liu, *Insight - Protecting intellectual property rights in China* (2015) Australian Trade Commission <<https://www.austrade.gov.au/Australian/Export/Export-markets/Countries/China/News-and-Insights/protecting-intellectual-property-rights-in-china>>.

<sup>37</sup> The US-China Business council, above n 18.

2015), which establishes China's first food recall system requiring the traceability and serialisation of imported food products.<sup>38</sup> More importantly, such a system also helps identify accountability in the distribution chain in case of e.g. products becoming rancid due to improper cold chain transportation.<sup>39</sup>

This is done by the use of the temperature loggers incorporated in the system. This is of particular importance with respect to chilled agricultural products exported from Australia to China. *Monitor*: Proactively monitor the internet, particular the e-commerce websites such as Alibaba and Taobao, for any counterfeits of your brands. It is increasing common for companies to send representatives to trade shows and trade fairs, e.g. the Chinese Export Commodities Fair, to look for counterfeiters.<sup>40</sup> *IP Protection Policies*: Have clearly written IP protection policies to ensure all aspects of protecting business brands. In case of trademark infringement disputes, such policies can play a very important role.

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<sup>38</sup> Food Safety Law of China, Article 105.

<sup>39</sup> Paul O'Brien, *Harness China's Demand For Safe Foods and a Traceable Food Supply Chain* (27 August 2015) <<https://food.chemlinked.com/news/food-news/harness-chinas-demand-safe-foods-and-traceable-food-supply-chain>>.

<sup>40</sup> The US-China Business Council, above n 18.



## Others measures

- *Online protection:* Make use the IP protection mechanisms provided by the e-commerce platforms. Given Alibaba, Taobao and JD are the most popular platforms of e-commerce in China and provide efficient channels for IP protection, it is important for Australian businesses to collaborate with these websites and get familiar with their systems on how to file IP claims to remove infringing goods or pirated materials. With both Alibaba and Taobao, Australian businesses can use the online report system to request takedown of any allegedly infringing listings. Documents such as proof of identity and IP rights ownership are required. If substantiated, penalties such as removal of listing, posting restrictions, account suspension, and termination of account will apply.<sup>41</sup>
- *Build good relationships with local government officials and agents:* Understand the importance of personal relationships/connections in the modern Chinese society. Good relationships significantly facilitate the actions against IP infringements. Given the important role of Trademark Office/local AIC, it is worth building good relationships with them before any infringements arise.

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<sup>41</sup> *Intellectual Property Rights (IPR) Protection Policy* (10 February 2014) Alibaba.com <<http://rule.alibaba.com/rule/detail/2049.htm>>.

- *Seek assistance from professionals and industry associations:* Professionals like investigative firms or IP service providers could assist to collect evidence and identify any IP enforcement resources to maximize the effect of deterring future infringement. In addition, industry associations might be able to provide some best practices for IP protection in the industry and sometimes may be able to develop collective strategies to advocate on concerns.<sup>42</sup>
- *Use infringement letter:* Such letter can be an effective tool to stop IP infringement in some cases, in particular where there are small infringers.
- *Be prepared to enforce your IP rights:* In cases where action is necessary, make sure to have all your IP documents ready and weigh various options available to tackle the infringement. To determine the best option, it is necessary to consider company's own circumstances and the strengths and weaknesses of administrative actions and civil litigation discussed above.

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<sup>42</sup> The US-China Business Council, above n 18.



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