



# Update

Media, Entertainment & Communications

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## Mars Australia Pty Ltd v Société Des Produits Nestlé SA

Mars (producers of 'Whiskas' cat food), has successfully trade marked the shade of purple ('Whiskas purple') for cat food products.

Initially Nestlé had succeeded in blocking Mars' trade mark application, with the Registrar of Trade Marks ruling that although the public would associate Whiskas purple with Whiskas cat food it would not use the colour to distinguish the product or recognise it as a trade mark of Mars.

Mars appealed the initial decision, with the principal issues being; whether the mark (colour purple) satisfied the requirements of s 41 of the Trade Marks Act; and whether the application itself had been accepted by the Registrar of Trade Marks on the basis of false evidence.

An officer of Mars had, in submitting the application, declared "no other pet food manufacturer currently used the colour purple as the dominant colour indicating its brand of pet food." This was found not to be true as the colour purple was used on many petcare products including cat food products. However, following the withdrawal of the objection by Nestlé, the application was reconsidered with the false evidence found not to prohibit acceptance of the application given that there was other evidence provided at the time of the application, and the false evidence was not the reason that the application had been accepted. Moreover, Mars argued that while other traders do use purple in their advertising and packaging, such use was not shown to be 'trade mark' use.

The Federal Court ultimately found that the Whiskas colour purple was capable of distinguishing Whiskas cat food from other brands as it was an invented colour and designed specifically for the Mars cat food range. Further, the colour was used in the advertising and marketing of Whiskas cat food to create a stronger shelf-blocking effect when displayed which amounted to use as "a badge of origin by which consumers identified Mars' goods in contrast to the goods of other traders."

The decision confirms that you can successfully register a specific colour as a trade mark in Australia if the distinctiveness of your colour as a trade mark can be proved.

### Key Contacts

#### Melbourne

**Dan Pearce**, Partner  
T: +61 (0)3 9321 9840  
E: dan.pearce@holdingredlich.com.au

**Marilyn Awad**, Senior Associate  
T: +61 (0)3 9321 9850  
E: marilyn.awad@holdingredlich.com.au

#### Sydney

**Ian Robertson**, Partner  
T: +61 (0)2 8083 0401  
E: ian.robertson@holdingredlich.com.au

**Sonia Borella**, Partner  
T: +61 (0)2 8083 0412  
E: sonia.borella@holdingredlich.com.au

#### Brisbane

**Paul Venus**, Partner  
T: +61 (0)7 3135 0613  
E: paul.venus@holdingredlich.com.au