

Federal Court of Australia - recent decision

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Nutrientwater Pty Ltd v Baco Pty Ltd [2010] FCA 2 - The case involved two competitors in the enhanced water products industry. Both parties compete in manufacturing, promoting and selling their respective ranges of enhanced water beverages in Australia ('Nutrient Water' and 'Grassroots').

The case deals with the similarity between the appearance of not only the packaging of the products, but the products themselves, being brightly coloured beverages. While the colours and the labelling of the two product ranges were similar, the judge accepted that the white banding on the labels, along with the bright labels that matched the colour of the beverage itself (visible through the clear plastic bottles) had become indicative of an enhanced water product in general, rather than any particular brand or source by the time the respondent's product had reached the market. The judge also found that there was no actual consumer confusion between the two product ranges, nor was there any evidence that the respondent had misrepresented its products as that of the applicant.

In concluding, the judge found that the applicant had failed to establish that it had a specific reputation in the features that the respondent allegedly copied on its own products and that there were sufficient differences between the packaging and branding

of the two products to differentiate the two products. As such, the claims of passing off and breaches of the Trade Practices Act failed.

This case illustrates the need for specific evidence regarding confusion (or likelihood of confusion) within a discrete market sector. Strong similarities (products and packaging) may tend to encourage would-be plaintiffs who are 'first in time' to pursue an aggressive approach, however those facts must be placed squarely in context by evidence. More broadly the case may be seen as an example of rapid market segment development whereby the marketing 'commons' (get up etc) available for use by all producers is quickly established through rapid entry and use by several players. From a marketing strategy perspective (particularly for FMCGs) this requires similarly rapid decisions about the extent and timing of release of products involving significant 'common elements'.