

Burger Wars: The big Beef Between McDonald's and Hungry Jack's – McD Asia Pacific LLC v Hungry Jack's Pty Ltd [2023] FCA 1412

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In *McD Asia Pacific LLC v Hungry Jack's Pty Ltd* [2023] FCA 1412, fast-food giant McDonald's and Australian dinner-time rival Hungry Jack's faced off in the Federal Court of Australia over their burger names BIG MAC vs BIG JACK and MEGA MAC vs MEGA JACK.

McDonald's issued proceedings against Hungry Jack's for trade mark infringement and, among other claims, alleged Hungry Jack's engaged in misleading and deceptive conduct in breach of the *Australian Consumer Law* by misrepresenting to consumers that its BIG JACK burger contains 25% more Aussie beef than the BIG MAC.

Justice Burley dismissed McDonald's infringement claim on the basis that BIG JACK and MEGA JACK were not deceptively similar to BIG MAC and MEGA MAC.

The Court held that when comparing marks, the Court must assess the likelihood of consumer confusion resulting from the actual use of the impugned trade mark having regard to only the notional use

of the registered trade mark. In doing so, the Court was required to disregard the effect of any reputation in the BIG MAC mark based on actual use by McDonald's, but also the broader context of use by Hungry Jack's. This meant that use of disclaimers or the HUNGRY JACK'S trade mark alongside BIG JACK were not relevant to whether the marks were deceptively similar.

The Court also clarified that the intentional **adoption of a similar mark** to a rival's to deceive or confuse consumers is relevant to assessing the reasonable probability of confusion. Justice Burley ultimately found that Hungry Jack's did *not* intend to mislead consumers by adopting a similar mark for its BIG JACK burger. Rather, its purpose was "to invite comparison and contrast" and this was permissible.

The Court then concluded that consumers were unlikely to be confused into thinking BIG MAC and BIG JACK burgers came from the same trade source. This was primarily because BIG was a descriptive term while the words MAC and JACK were phonetically, visually and conceptually distinct.

Beyond the trade mark battles, the Court determined that the "25% more beef" claim was accurate based on uncooked weight. However, expert evidence suggested the weight of cooked beef in Big Jack burgers exceeded that in Big Mac burgers by 12-15%. Hungry Jack's ads depicted burger patties at an advanced cooking stage, culminating in a final image of a ready-to-eat hamburger meal. These visual cues, according to Justice Burley, would lead consumers to infer that the "25% more beef" claim referred to cooked weight and so this was misleading.

The key "takeaways" (or "takeouts" for our North American audience):

- **By using the word "beef" in the "25% more beef" claim, Hungry Jack's misled consumers into believing that the claim referred to cooked weight, which was not the case.**

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