DEAKIN LAW SCHOOL RESEARCH REPORT

No 5/15 March 2013

**Recent publications**

**Congratulations to the authors of the following recent publications:**

**Pieter Badenhorst,** ‘Large scale expropriation of mineral rights in South Africa: The Agri South Africa fiasco’, (2012) 31 (3) *Australian Resources and Energy Law Journal* 205-220.

Olivier NJ, Williams C, and **Badenhorst, Pieter J,** Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC)’, (2012) 15 *Potchefstroom electronic law journal*, 538-565, North-West University, Potchefstroom, South Africa.

**RESEARCH IMPACT**

**JUDICIAL CITATIONS**

**Pieter Badenhorst**:

(1) *Minister of Minerals and Energy v Agri South Africa* 2012 (3) SA 1 (SCA) (Supreme Court of Appeal of South Africa):

Works cited with approval:

**Badenhorst P**, “Towards a theory of mineral rights” 1990 *Journal of SA Law* 239;

**Badenhorst P**, “The re-vesting of state held entitlements to exploit minerals in South Africa: privatisation or deregulation?” (1991) *Journal of SA Law* 113;

**Badenhorst P**, “Artikel 5(1) van die Mineraalwet 50 van 1991: ŉ herformulering van die gemenereg?” (1995) 58 *Journal of Contemporary Roman-Dutch law* 1;

**Badenhorst P**, and Malherbe “The Constitutionality of the Mineral Development Draft Bill 2000 (Part 2)” 2001 Journal of SA Law765;

**Badenhorst P**, *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (1992)(Doctoral thesis).

Earlier decision of the court *a quo*:

(2) Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as *amicus curiae*) [2011] 3 All SA 296 (GNP)

**Badenhorst P**, and Mostert *Mineral and Petroleum Law of South Africa* (1994);

**Badenhorst P**, “Property and the Bill of Rights” in *Butterworth’s Bill of Rights Compendium*; Badenhorst P, “Die Vereistes vir ’n Geldige Onteieningskennisgewing” (1989) 52 *Journal of Contemporary Roman-Dutch law* 130.

**ADMINISTRATIVE OFFICER (RESEARCH)**

**Sheryl Pascoe**

I am pleased to announce that Sheryl Pascoe will be undertaking the role of Administrative Officer (Research) one day a week in a casual capacity from 18 March 2013 until approximately 15 April 2013. From mid-April, Sheryl will be solely dedicated to this role for the School of Law. She will report to the School Executive Officer, Jo Begbie, and work closely with myself to enhance the research activities of the School.

Sheryl’s role will be to develop administrative procedures for School research grant applications. It is envisaged that Sheryl will provide assistance to establish the budgetary aspects for the research grant application (the content of the application is the applicant’s responsibility); she will also provide administrative support for higher degree candidates to facilitate progress during their candidature.

Furthermore, Sheryl will be providing administrative assistance to the Associate Head of School (Research) in relation to the organisation of seminars, meetings and preparation of documentation; undertake monthly monitoring and reconciliation across all research accounts including notation and investigation of variances  and be the point of contact for research leave, conference and workshop attendance including travel, accommodation and reimbursement of appropriate expenses associated with the grant research activity.

I am very much looking forward to working with Sheryl.

**LAW SCHOOL RESEARCH SEMINARS SCHEDULE**

**Trimester 1**

**FRIDAY, 22 MARCH 2013 1.30 to 2.30pm**

**Rens Scheepers**

Scoping Session on Social Media: interface of information systems and the law

INTRA-SEMESTER BREAK

**FRIDAY, 19 APRIL**

**Danuta Mendelson**

Opioid Prescriptions and the Law

**FRIDAY, 26 APRIL**

**Benjamin Hayward**

**FRIDAY, 3 MAY**

**Samantha Hepburn**

The Property Implications of Geosequestration in Australia

**FRIDAY, 17 MAY**

**David H B Bednall**

‘In a Word: Applying Cognitive Interviewing Methods in Legal Market Research’

## Abstract

Registered trademarks can be worth hundreds of millions to their owners. Many elements of a brand can be trademarked including words such as Microsoft, symbols such as the Cadbury glass and a half mark and colours, such as a particular orange for Veuve Clicquot. The registration of a mark (word, symbol or colour) prevents competitors in that category of goods from using it – a considerable commercial advantage to the owner. Applications to register trademarks are therefore often fiercely contested in the courts. To support registration companies will typically adduce survey research. A key component of this research is to test whether the mark has acquired secondary meaning, that is, whether consumers or buyers of the product have learned that the mark stands for a single brand. In the US, where many of these surveys have taken place, legal precedent has been based on whether the mark is strongly associated with a specific company, product or brand and not strongly associated with any rival. As Bednall et al. (2012) have argued, the test of association can be misleading. First the word “association” is symmetric – Cadbury is associated with purple and purple with Cadbury. Yet the appropriate legal test is whether the mark (colour in this case) takes the person to the brand, a non-symmetric relationship. Second although one mark may be more strongly associated with a brand than others, this may simply be because the consumer cannot recall the other brands. A more appropriate word is "identification", a non-symmetric relationship that takes the consumer from the mark to the brand exclusively. Thus purple identifies Cadbury, but Cadbury does not identify purple. But this raises the research question, “Do consumers understand the word identification in the way intended and does this word have a different meaning to association?” Although the meaning of a single word is often not critical in most survey designs, in this case it is. In order to test the meanings of the two words, cognitive interviewing techniques Willis (2005) were employed. This involved administering a survey in the usual manner, then conducting an in-depth interview with the respondent immediately afterwards. In this interviewing, the meaning of words can be explored and the conscious thinking processes in arriving at the answer can be revealed. A study was made of fifteen males and females using a questionnaire that tested whether the colour purple (as opposed to a control colour lime) identified any particular “brands, products or companies.” It was found that the word identify mostly worked in the way intended, that it took the consumer to the source (Cadbury in the case of purple, no particular source in the case of lime) and that it was interpreted correctly. People could distinguish "identify" from "associate" though in a survey not all might do so. In a legal survey context, where the meaning of particular words is crucial, the cognitive interviewing method can help establish the validity of the particular words in a survey.

Associate Professor David Bendall has appeared as an expert witness, in several high-profile cases involving the use of market research.

**FRIDAY, 12 JULY**

**Prof Peter Hodgson**, Director of the Institute for Frontier Materials http://www.deakin.edu.au/research/ifm/staff.php?contact\_id=107&style=2

Lifting research standards to ERA Level 4 (or its equivalent)