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Intellectual Asset Management

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Motivating to innovate in the post-resources boom economy

In this issue:

Key Points -

- **Building on the foundation that the mining boom created, research and innovation could see Australia, and in particular Western Australia, become an important player.**

There are few who would dispute that the ride that has been the resources boom, whilst perhaps not quite over, is now far removed from the giddying heights of its peak. Whilst those days are over for the foreseeable future, the capabilities and capital (both intellectual as well as physical) gained from the experience can potentially be the enabler for Australian SMEs to emerge as important players in research and innovation, steering the economy towards becoming a 'smart' economy.

The way forward surely lies in capacity for innovation - which is commonly regarded as one of the biggest potential sources of current and future economic growth - and capability to monetise that innovation. In fact, a healthy appetite and capacity for innovation will be fundamental to the survival of a good number of SME's in post boom-times.

We often talk of the importance of capturing and protecting innovation, and certainly this is fundamental in leveraging maximum value from innovations. But first there needs to be something to capture and protect, and this 'something' typically comes from the intellectual capital of employees. In times of increasing financial hardship, when some businesses are struggling simply to keep cashflow positive and the future of an organisation may be uncertain, how can it motivate to innovate, particularly when there are little or no resources available to provide financial incentives for doing so?

A hint to a possible solution may be found by observing almost any research team after achieving a 'breakthrough'. The sense of elation and heightened morale experienced following a success drives work further and provides resilience against future setbacks. This is the power of progress, which is fundamental to research and innovation, and fundamental to human nature.

Research indicates that the ability to make progress in meaningful work is an important driver of employee productivity and creativity, essentially meaning that more will be done, and perhaps more importantly, creativity will flow more freely and innovations develop when employees feel happier and are intrinsically motivated by the work itself.

This seems logical, but few organisations understand this or know how to use the concept to motivate to innovate. In the post-boom environment, where organisational resources are becoming increasingly scarce, managers themselves can become the resource that is needed to make this happen. A shift in managerial mindset and willingness to support staff by providing them with meaningful goals and

making it clear how employee efforts contribute to these goals, can encourage heightened productivity and creativity, foster ownership of organisational goals and drive innovation, without the need to spend funds that simply aren't available. Simple changes in managerial practice, ideally rooted in a sound innovation policy that also includes mechanisms for effective capture, protection and commercialisation of resulting innovations, may not only permit SMEs to merely survive in the post-boom era, but to flourish and compete in the global market by exporting high value offerings and solutions.

By Carol Kane
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Getting your R&D Tax Incentive claim ready for the end of the 2015 financial year

For companies with a 30 June 2015 financial year end, and those who have undertaken R&D activities during this year, now is a good time to prepare your registration form for the R&D tax incentive program.

Apart from it being a lot easier to access information and organising contemporaneous documentation whilst close to the activities and preparing final accounts, there is also a substantial advantage for some companies to get an early refund of the R&D offset from the Australian Tax Office.

Companies with an aggregated annual turnover of less than $20 million are eligible for the refundable 45% R&D tax offset rate. Companies in this position, particularly if they are in losses, should investigate their financial position to determine whether they are eligible to receive a refund cheque equal to 45% of some or all of their R&D expenditure, effectively cashing out their losses.

Putting in an early Tax Return with a claim for the R&D tax incentive can provide cashflow for a cash-strapped business early in the new financial year.

Companies with an aggregated turnover in excess of $20 million are eligible for a 40% non refundable tax offset for their R&D expenditure. Whilst this level of support is not refundable, it is still easier to register R&D activities as close to the time they were performed as possible. Early registration provides a contemporary account of R&D activities whilst relevant staff members are available and avoids the rush to register near the 30 April 2016 deadline.

Categories of expenditure which may qualify for the incentive include:

- Salary expenditure - this covers salary, wages, allowances and on-costs directly incurred as part of carrying out R&D activities.
- Contracted expenditure - this encompasses those payments made to companies with Research Service Provider (RSP) status provided that the expenses were incurred in relation to eligible R&D activities.
- Other expenditure - this category covers a broad range of expenses that companies may incur in the course of carrying out any R&D activities such as material, parts, and travel costs.

The need to substantiate and document your R&D activities is paramount so lodging the registration close to when the activities occur will make the process easier.

If you'd like to discuss your 2015 claim with us and ensure you have all the information needed to prepare and lodge your 2015 claim, please contact Kate or Cleo at Watermark Advisory Services.

By Kate Mahady and Cleo de la Harpe

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New Zealand is not Australia

Key Points -

- **Australia and New Zealand's legal system have many similarities however, Australian businesses need to be aware of the differences, subtle or otherwise.**

New Zealand and Australia have a close history, and to the outside observer it can sometimes be difficult to tell the two apart. In the author's experience, it is not uncommon to be asked, "you're from New Zealand? I would love to see a kangaroo one day!" It is perhaps because the countries are so similar that extra vigilance is required in order to avoid embarrassing and, especially in business, costly mistakes.

This is true when considering Intellectual Property. New Zealand and Australia share a common British heritage in their IP laws, however over the years divergences mean that you cannot take for granted that advice applicable to one country applies equally in the other, even if a majority of the time the advice would be the same either way. The trick is to know when the differences are going to create a problem.

This is illustrated in the recent appeal decision in New Zealand, Jeanswest Corporation (New Zealand) Limited v G-Star Raw C.V. [2015] NZCA 14, where primary copyright infringement was found in respect of jeans that Jeanswest imported into New Zealand. These jeans were imported from Australia, and were very similar to those of Jeanswest competitor, G-Star Raw.

It was generally accepted that the Jeanswest jeans did not infringe the intellectual property rights of G-Star in Australia. Under Australian law, protection for the design of the jeans could only have been obtained via a design registration. However, under New Zealand IP laws; it is possible for a product to be protected by either one or both of a design registration and copyright. Jeanswest, in not taking into account the New Zealand legal position, found itself infringing G-Star's copyright.

New Zealand and Australia are bringing aspects of their IP regimes into closer alignment. For example, the Single Economic Market agreement we described in a previous journal article will ultimately result in a single application process for patent rights in the two countries. Despite this however, the laws of the two countries will continue to have differences which can easily trip up the unwary.

The moral of the story is: New Zealand is not Australia, and you should always make sure that the advice you receive is correct for the country in which you are doing business!

By Jeremy Robinson

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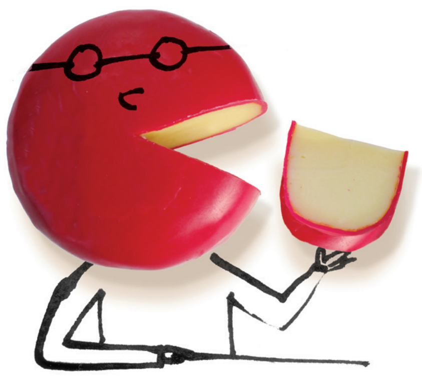
Geographic Indications and their Implications



Key Points -

- **Understand the interplay between GIs, trade mark law and consumer law locally and overseas.**
- **Don't assume you have the freedom to do as you wish with a GI just because it is from overseas.**
- **Align your marketing strategy for both local and overseas markets, acknowledging the complex interplay between GIs, trade marks, consumer law and international obligations.**

Heard in restaurants across the country:

Diner: 'Can I have a glass of Australian Champagne please?

Sommelier: 'I'm sorry, but do you mean a glass of Australian sparkling wine?'

This diner is clearly unaware of Geographic Indications (GIs)!

A GI is a name that may be protected under various national laws and international treaties if a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin. It is an intellectual property right in a placename where there is a particular association with the goods (typically agricultural products and foods) that originate in specific geographic locations.

Australia's wine industry has a GI scheme in place. The Australian Register of Geographic Indications lists Australian and agreed European wine GIs, as well as traditional expressions used in the wine and spirit industries.

Australia does not yet have a system for the registration of other GIs, such as foods and handicrafts. But as a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Australia is required to provide minimum alternative legal protection mechanisms. Currently this obligation is fulfilled via consumer law, mandatory food standards and the trade marks system.

Protection for GIs relating to food products is most commonly addressed through the Australian trade marks system. For example, recognised GIs, such as Grana Padano (for cheese originating in the Italian Pianura Padana valley region), are often protected by collective and/or certification trade mark registrations managed by regional companies or collectives

How does this affect local food and wine manufacturers?

Unfortunately the answer is not straightforward. It is an offence in Australia, and many overseas jurisdictions, to use a registered GI or a registered trade mark without authorisation, or to pass your product off as something it is not. If a product is incorrectly labelled there can be significant penalties, as well as the potential damage to your own brand and reputation. Helpfully, Wine Australia has a comprehensive compliance guide and labelling integrity program, detailing the requirements for local sale, export and the use of GIs on wines and spirits. For other food products, however, due diligence is key:

- before you commit to a new local product label, make sure you are fully aware of the competition and conduct trade mark and GI searches in Australia; and
- before exporting your product, you should undertake foreign searches – not merely for trade marks, but also GIs and traditional expressions, and any other national requirements, including those that might be subject to agreements between trading partners.

For example, exporting a blue cheese product to France under the brand name 'Rob's Aussie Stilton' would be prohibited because 'STILTON' is a recognised GI in Europe. Less obviously, exporting a cheese labelled 'Feta' to South Korea or Peru would be prohibited because both countries have reciprocal GI rights agreements with Europe, where 'FETA' is a recognised GI.

The complexities of the international arrangements make GIs a minefield for the unwary. Before you launch your new product, whether in Australia or overseas, it is important to do your due diligence and to seek appropriate input from your professional advisors.

By John Golding

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Protecting a Plant Variety in Australia beyond PBR

Key Points -

- **Commercial agreements have a significant role in the protection and commercialisation of a new plant variety.**
- **The Australian patent system and trade mark registration system can also play a part in the protection of a new plant variety in addition to the Australian Plant Breeder's Rights regime.**

A local breeder/owner of a new plant variety who has plans to cultivate and commercialise the plant variety in Australia may protect this intellectual asset using the Australian Plant Breeder's Rights (PBR) regime. The plant variety may also be eligible for protection under the Australian Patent System if the plant variety meets the patentable invention criteria and the name to be used for the promotion and sale of the plant variety may be protected as a registered trade mark.

However there are many other aspects to the management of the new plant variety and the IP, that are not always transparent. For a local breeder/owner these may include:

The Appointment of a Qualified Person (QP): A QP typically has an agricultural or horticultural background and is skilled in designing and overseeing growing trials that may be required in Australia to demonstrate the distinctiveness, uniformity and stability of the new plant variety. The QP also prepares the description of the new plant variety which is a requirement for obtaining PBR's in Australia. An agreement should be used to formalise the appointment of the QP, the agreed scope of works of the QP as well as setting out confidentiality obligations and regulations around access to the plant material when on trial.

The Appointment of a Genetic Resource Centre (GRC): The plant material of a new variety protected by PBR's must be held in a GRC in Australia. An agreement which nominates the GRC should cover ownership of the plant material, the rights and responsibilities of any appointed custodian of the stored plant material and the maintenance and security of the plant material.

A Multiplication and Propagation Services Agreement typically appoints a commercial nursery to multiply and propagate the plant material in Australia. Similarly, such an agreement should cover ownership of the plant material, quality specifications for the propagated material and requirements for labelling the plant material as well as the handling and destruction of plant material under specified circumstances. The agreement will also include commercial terms around the number/volume of plants propagated and other commercial performance criteria.

A Growing Services Agreement typically appoints a third party on an exclusive or non-exclusive basis to grow and wholesale/retail the plant material. This type of agreement will include product specifications, packaging and labelling requirements for commercial sale, a license to use any registered trade mark, criteria for destruction of product if not to specification, conditions around the sale of product (price, volume, territory, royalties) and commercial performance criteria.

It is the combination of these various agreements and the formal PBR's that allow the breeder/owner of a new plant variety to control and manage its assets for commercialisation in Australia.

Further, if the local breeder/owner is looking to export plant material of a new variety overseas then obtaining PBR's or the equivalent in export countries should be part of the commercialisation strategy. Equally there should be agreements behind these formal PBR's to control ownership of the plant material, movement and use of the plant material and related trade marks and the sale of the plant material.

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