

CLIENT INFORMATION SHEET - TRADE MARKS IN AUSTRALIA

**CLIENT INFORMATION SHEET - TRADE MARKS IN AUSTRALIA V131016**

Please find following our information sheet for trade marks in Australia.

The information sheet is not exhaustive but covers most common items incurred during filing.

Should you require additional information or if you have any questions then please let us know.

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**CLIENT INFORMATION SHEET - TRADE MARKS IN AUSTRALIA****PURPOSE OF THIS INFORMATION SHEET**

The purpose of this information sheet is to provide general information about trademarks to those with little or no relevant experience with trademarks so they can be aware of at least some of the fundamentals about trademarks and associated issues and considerations.

This information sheet should not be taken as being exhaustive in any sense however may help clarify, refine or articulate a novice's trade mark requirements in preparation of further consultation with trade mark practitioners such as our firm so that the novice can maximise the benefit from a further consultation in relation to the novice's specific trade mark requirements or issues.

We trust you find the information sheet helpful.

**WHAT IS A TRADE MARK**

As a consumer, we all use trademarks (even unknowingly) in the market place on a daily basis to help in our decision-making process when buying goods and services as we usually have a particular brand that we may prefer for a variety of reasons over other brands.

An example of some generally recognisable trade marks in Australia which most of us are already familiar with includes: HOLDEN & FORD (for cars); LEVIS & MAMBO (for clothing); WESTPAC & ANZ (for banking services).

As the owner of a business, the trademarks of a business are a potentially valuable asset of the business as it distinguishes that particular businesses products and or services in the marketplace from those of its existing or potential competitors.

Of course it is highly desirable that those potentially valuable trade mark assets be protected against others who may use the same or confusingly similar trademarks that may cause damage to the business or unfairly profit from any confusion in the marketplace caused by the use of the same or a confusingly similar trade marks in the market place.

One way of establishing rights in a trade mark and statutory ownership of the trade mark is to register the trade mark as a trade mark.

**BUSINESS & COMPANY NAMES & TRADE MARKS**

It is important to note that the registration of a trade mark in Australia is not to be confused with the registration of a business name that is registered with the Department of Fair Trading (or equivalent) and or a company name that is registered with the Australian Securities and Investments Commission ('ASIC') which are separate registration processes for separate purposes governed by separate laws.

In any event merely registering a business name with the Department of Fair Trading (or equivalent) or a company name with ASIC does not confer rights in the name to the registered owner which can be enforced against others who may use the same or a confusingly similar name in the marketplace.

In practice, a business or company may be prevented from trading under their newly registered business or company name by the owner of a conflicting registered or unregistered trade mark if the use of the business name or company name infringes the registered or unregistered trade mark. This, as you will appreciate, can be highly disruptive to business and usually a very costly exercise.

**CLIENT INFORMATION SHEET - TRADE MARKS IN AUSTRALIA****ESTABLISHING RIGHTS IN AND OWNERSHIP OF A TRADE MARK**

One way of establishing rights in a trade mark is to register the trade mark as a trade mark which generally confers exclusive national statutory rights to the trade mark that can be enforced against other parties and are commonly referred to as registered trade mark rights.

Some registered trademarks in the market place are commonly marked with an ® symbol or an equivalent notice indicating that the trade mark is registered however there is no requirement in law that requires such or any marking of a registered trade mark.

Not all trademarks are registrable and some marks may only be borderline registrable due to the nature of the trade mark, therefore, careful and informed selection of a trade mark may make it easier to obtain registration and save costs in the process, and importantly provide a potentially broader scope of protection.

Another way of establishing rights in a trade mark (other than by registering the trade mark as a trade mark) is by sufficient use of the trade mark in the market place. The use has to be sufficient to establish a requisite reputation in the trade mark which generally means that people in the marketplace recognise that trade mark as being connected or associated with you in some manner and these rights in the trade mark are generally referred to as unregistered trade mark rights.

However, the nature and extent of these unregistered trade mark rights are contingent on many factors including the inherent nature of the trade mark and the territorial extent of any requisite reputation in the trade mark. Therefore an unregistered trade mark that only has a requisite recognition profile in the marketplace localised to a particular geographical area (eg state or territory, region, city, town, suburb or grouping of such) then the unregistered trade mark rights generally will be effectively limited to the geographical area where it can be established the unregistered trade mark has requisite reputation. Some unregistered trademarks in the marketplace are commonly marked with an ™ symbol or equivalent such as TRADE MARK which indicates that then owner of the trade mark is asserting that the trade mark is considered by them to be a trade mark, however, the ™ and TRADE MARK symbols remains silent about whether it is a registered or unregistered trade mark. In any event, there is no requirement in law that requires such or any marking of an unregistered trade mark.

If you are not already committed to a particular business name or are considering changing names for whatever reason then carefully informed selection of the new business name should mitigate any legal risks in adopting and using the name and also provide a name that can be more readily protected in the marketplace.

Therefore consideration should be given to selecting a business name as part of an overall business branding / trade mark strategy in consultation with us as having a carefully selected branding strategy can maximum the potential scope of protection that you can obtain for those potential valuable assets of your business and mitigate the legal risks associated with trading under a new name and or trade mark.

**TERRITORIAL EXTENT OF PROTECTION**

An Australian trade mark registration only has legal effect in Australia and generally is effective on a national basis. If registered trade mark protection is required in other countries then corresponding trade mark applications will have to be filed in the countries of interest.

**BENEFITS OF TRADE MARK REGISTRATION**

Once rights in a trade mark are established by registration then the registration can provide a relatively convenient and cost-effective way of protecting the trade mark in the marketplace.

The term of registration is initially for 10 years and renewable every 10 years thereafter.

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Registration of a trade mark provides the registered owner subject to some qualifications, the following additional benefits right across Australia:

- formal statutory conferred ownership of the trade mark;
- a statutorily conferred asset that can be sold like any other asset of a business;
- an exclusive right to use the trade mark in the Australian marketplace;
- an exclusive right to authorise the use of the trade mark in the Australian marketplace by others;
- a relatively costs effective method of deterring unauthorised use of a conflicting trade mark by innocent competitors or not so innocent opportunists;
- a relatively cost effective way to prove and enforce rights in the trade mark in comparison to proving and enforcing rights in an unregistered trade mark.

**TRADE MARKS - THE GOODS & SERVICES**

Trademarks are registered in relation to specific goods or services which are grouped into classes.

Once a trade mark application is lodged only limited amendments to the application are allowable and in particular the scope of the application cannot be increased by amendment. If goods and services not in the application as filed are required to be included then a fresh trade mark registration application must be lodged and official fees paid to include the additional goods and services.

Therefore it is important that the goods and services of interest to the trade mark applicant are properly identified, characterised and classified upfront to ensure that they are taken into account when formulating a trade mark application to ensure that the scope of the lodged application does cover the goods and services of interest to the owner of the trade mark and avoid additional costs that may be required to cover goods and or services in fresh trade mark applications that were omitted but could have been included in the first application.

The official fees that are due in the trade mark application are referable to and contingent on the number of classes in the trade mark application.

**TRADE MARK SEARCHES & INFRINGEMENT – AUSTRALIA**

Prior to the adoption and use of a trade mark (and business and company name) it is prudent to have searches conducted to establish whether the trade mark is available for use and registration. Such searches may identify prior conflicting trademarks owned by others that firstly may be problematic to your proposed use of the trade mark in the marketplace, and secondly may be an obstacle to the registration of your trade mark.

Preferably a search is conducted before you commit to a new trade mark, business or company name as the trade mark or business or company name you have in mind may be covered by an existing trade mark registration or trade mark application owned by another and you may be compelled to abandon your new trade mark or business/company name and may render to waste any costs associated with registering the trade mark, business or company name, business stationary, signage, packaging, advertising or promotional literature etcetera which uses the problematic trade mark or name or business or company name.

However, a search should at least be conducted before you commence using the trade mark business or company name in the marketplace because if your use amounts to an infringement or becomes an infringement of the other person's trade mark then you may be additionally liable for damages or an account of profits.

Consequently, a search should also be conducted in each country where you propose to trade and use the trade mark, and as a minimum, we recommend that a search of the trade mark office online records be conducted in each of those countries.

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We recommend the following minimum search strategy options in the case of the trade mark being used in Australia as follows:

1. The trade mark searches should at least include a search of the Australian trade mark office records for prior conflicting trademarks that exist and are either registered or are subject to a pending trade mark application, and this type of search is often referred to as an Australian trade mark register search;
2. The register search should include a search of the international trade mark register (under the Madrid protocol) which may include international trade mark applications which have designated Australia but not yet entered the Australian trade mark office system and records and therefore are not available to be searched by merely searching the Australian trade mark office records, and this type of search is often referred to as an international trade mark register search;
3. The trade mark searches should also include also conduct a brief search of the Australian marketplace for existing businesses whose trading name (or business name) may amount to an unregistered prior conflicting trade mark, and this type of search is often referred to as a common law trade mark search.

**SEARCH COSTS – AUSTRALIA**

The cost of trade mark searching is contingent on the types and extent of searching that is required and the results of the search. Searching is not compulsory but prudent.

The costs for conducting:

- a combined trade mark register search of the Australian and international trade mark registers which are the relevant registers for Australian trade mark use start from about \$1500 per trade mark;
- a search of the Australian trade mark register only will start from about \$1000 per trade mark;
- an Australian common law trade mark search is referable to the scope of search required and we recommend that at least \$1000 is set aside for such a search.

**TRADE MARK APPLICATION PROCEDURE & TIMING**

The various stages of the application/registration process can be described as the 'trade mark application' stage, the 'examination/prosecution' stage, the 'registration stage', and the 'renewal' stage.

**THE TRADE MARK APPLICATION**

Once a trade mark application is lodged and the official filing fees are paid provided all the requisite application formalities are in order the application will receive a filing date.

The official filing fees are contingent on the number of application classes required.

**EXAMINATION & PROSECUTION**

A filed trade mark application in the ordinary course of events will be examined in approximately 2 to 3 months after the application is filed. The actual commencement of examination is contingent the examiner's workload and applications generally are examined in the order they are filed in.

The trade mark application will be examined to see if the trade mark application meets the eligibility criteria in the Trade Marks Act including whether the application should be rejected due to the nature of the trade mark and whether the application should be rejected as the trade mark conflicts with an existing trade mark that is registered or is the subject of an earlier pending application identified by the examiner. If any objections against the application are raised then an adverse examination report will issue.

If an adverse examination report issues then all objections to the application raised by the examiner must be successfully overcome by submissions and or amendments or some other formal response before the application can proceed to acceptance.

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Generally an applicant will have up to 15 months from the date of the first adverse examination report to overcome all adverse objections and get the application in order for acceptance, otherwise, the application will lapse as a matter of course.

Therefore the careful initial selection of a trade mark in combination with pre-filing searches for the availability and use of the selected trade mark before an application is lodged may help avoid or minimise any adverse objections during the examination process.

**EXPEDITION OF EXAMINATION – OPTIONAL**

Examination may be expedited under limited circumstances for example if you have some commercial outcome depending on registration or a potential infringer is about to enter the market. An application may be examined as early as within 3 to 6 weeks of the relevant expedition request being lodged.

**ACCEPTANCE**

Once a trade mark application favourably passes examination then it will be formally accepted by the trade marks office and it will issue a formal notice of acceptance.

Acceptance means the trade mark office proposes to register the trade mark subject to two further matters being:

1. the trade mark application is not opposed by a 3<sup>rd</sup> party during a 3 month window of opportunity, or if it is opposed the opposition is ultimately concluded in the trade mark applicant's favour; and
2. that no later Australian trade mark applications are lodged by 3<sup>rd</sup> parties which conflict with your own trade mark application being applications that can claim under the PARIS CONVENTION an earlier priority date than your own trade mark application.

**3<sup>RD</sup> PARTY OPPOSITION**

Once a trade mark application is formally accepted the trade marks office will advertise a public notice indicating that it is proposing to allow the trade mark to be registered inviting by public notice 3<sup>rd</sup> parties to formally oppose the proposed registration on limited grounds available in the Trade Marks Act.

The trade mark application will remain open to 3<sup>rd</sup> party opposition for a period of 3 months from the date of the public notice.

If the application is opposed by a third party then any such opposition must be successfully addressed and overcome before the application can proceed to registration.

In our experience, only a small percentage of trade mark applications are ever opposed, and even less of them successfully so.

**3<sup>RD</sup> PARTY CONFLICTING CONVENTION TRADE MARK APPLICATION**

It is important to note that Australia is a signatory to an international convention called the Paris Convention that has more than 170 other country members and is also a member of the World Trade Organisation that has over 164 member countries.

As a result of the international convention and organisation agreements a possibility exists that a 3<sup>rd</sup> party trade mark application may be filed in Australia up to 6 months after your own trade mark application that will prevent registration of your own trade mark because the 3<sup>rd</sup> party trade mark application conflicts with your own and has a better priority date than your own trade mark application even though it was filed after your own.

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Therefore if your own trade mark application has been accepted by Trade Marks office then registration of your accepted trade mark will be subject to any such 3<sup>rd</sup> party conflicting trade mark application coming into existence in Australia. Consequently, the earliest a trade mark can be registered in Australia will be strictly 6 months from the priority date of the application but more realistically 7 to 8 months from the priority date to allow for processing and administrative delays, as the trade marks office must wait out the expiry of the 6 month convention period.

In the case that such a 3<sup>rd</sup> party conflicting trade mark application does come into existence then while that 3<sup>rd</sup> party application remains pending or achieves registration it may prevent registration of your own trade mark.

**REGISTRATION**

If the accepted trade mark application remains unopposed for the duration of the 3<sup>rd</sup> party opposition period, or any 3<sup>rd</sup> party opposition is concluded in the trade mark applicants favour, and more than 6 months have elapsed since the priority of the trade mark application then the trade mark will be registered. Registration fees are no longer payable for applications filed after 10 October 2016.

Once registered a registration certificate will issue outlining the scope of the registered trade mark.

**RENEWAL**

The initial term of registration will be 10 years from the filing date of the trade mark application, and then the registration can be renewed for subsequent 10-year terms by the payment of an official renewal fee.

**FOREIGN SEARCH AND FILING STRATEGIES**

If corresponding trade mark registrations are required in countries other than Australia then corresponding trade mark applications must be initiated in all the relevant countries and the applicant may have several strategies as to how and when these are lodged.

The filing strategies include:

- national trade mark applications in each foreign country of interest, and or
- an international trade mark application (i.e. a Madrid Protocol application) to cover trade marks in countries of interest listed in Schedule 2 however please note additional countries are joining the Madrid Protocol all the time, furthermore a European Community Trade Mark (a 'CTM') application that collectively covers all the countries listed in Schedule 3 can also be included in a Madrid Protocol application; and or
- a European Community Trade mark application separate from a Madrid Protocol application to collectively cover all the countries listed in Schedule 3.

**CLAIMS TO PRIORITY**

In the case of foreign national trade mark applications for countries listed in Schedule 1, and a Madrid Protocol application for countries in Schedule 2 and a CTM application for countries in Schedule 3, these applications can all be deferred up to 6 months after the date the Australian trade mark application is filed and can still claim priority from the Australian application.

**NATIONAL FOREIGN TRADE MARK APPLICATIONS**

Furthermore in the case of foreign national trade mark applications a national trade mark application procedure is initiated and executed before the individual trade mark offices of each country of interest in accordance with the requirements and laws of each relevant country where the filing requirements for each country can vary on a country by country basis. In any event the act of filing the required trade mark application is duplicated by the applicant in each country where trade mark protection is sought and therefore the costs likely to be incurred

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generally are contingent on and loosely proportional to the number of national trade mark applications filed however the costs of a national trade mark application another country.

**INTERNATIONAL TRADE MARK APPLICATION (MADRID PROTOCOL)**

In contrast, a Madrid application can be a very cost-effective way of seeking trade mark protection for countries of interest in Schedule 2 and can provide long-term costs savings in maintaining and renewing the registration through the centralised administrative features of the international trade mark registration regime.

**COMMUNITY TRADE MARK APPLICATION (EUROPEAN COMMUNITY)**

Similarly, a CTM application is a cost effective way of seeking trade mark protection in countries in the European Community as listed in Schedule 3. In our experience, the costs of a CTM application for a strong trade mark is approximately equivalent to the costs of three to four individual national trade mark applications for the same trade mark in countries in the European Community.

Furthermore, the application and registration costs are not contingent on the number of countries in the European Community as the CTM if successfully registered covers all the countries in the European Community.

Therefore unless a good reason exists preferable consideration should be given to a CTM application rather than individual national trade mark applications for countries in the European Community. However please note that a CTM application can be designated in a Madrid application as the CTM is a regional member of the Madrid Protocol system.

**FORMULATING A SEARCH AND FILING STRATEGY**

The trade mark application filing strategy that may best suit an applicant's needs is contingent on the specific countries of interest to the applicant where trade mark protection is required and the nature of the trade mark. Each available strategy has its advantages and disadvantages and consequent costs implications.

Typically consideration should be given to protecting your trade marks in the major markets and potential markets where the trade mark will be used, and possibly the major manufacturing countries if applicable where relevant branded products are made or are to be made.

In the case of trademarks that include letters or words of a spoken language then consideration should also be given to seeking registration of a version of the letters or words in the trade mark translated into the national language or corresponding national language characters or symbols of the country where registration of the trade mark is sought potentially providing you with the broadest possible scope of protection where national language variations to your trade mark may be available to compete with your own trade mark.

Therefore if relevant it would be prudent that you discuss with us as soon as possible your proposed or existing use of your trade marks in other countries so we can in consultation with you formulate a multi foreign country application search and filing strategy for your consideration and or approval preferably in good time before you commit to using your trade mark in other countries and before any relevant time limits that may apply expire prejudicing your ability to get the benefit of priority from any Australian trade mark application that may exist or be filed.

**INFORMATION REQUIRED TO PREPARE A TRADE MARK APPLICATION IN AUSTRALIA**

The information required to prepare a trade mark application in Australia is set out on our website or click the following link]. [www.spc.com.au/auftrm.htm](http://www.spc.com.au/auftrm.htm)

Please take the time to peruse the requirements.

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**SCHEDULE 1 – CONVENTION COUNTRIES FOR AUSTRALIA**

A foreign country that is a signatory to the Paris Convention for the Protection of Industrial Property of 20 March 1883, as in force from time to time. For signatories to the Paris Convention for the Protection of Industrial Property, see [www.wipo.int](http://www.wipo.int). Total Contracting Parties : 176. (Contracting Parties - Paris Convention)

A foreign country that is a full member of the World Trade Organization. For full members of the World Trade Organization, see [www.wto.org](http://www.wto.org). 164 members since 29 July 2016. (WTO membership)

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**SCHEDULE 2 – MADRID PROTOCOL COUNTRIES AS OF SEP 2016**

- |  |   |  |
|--|---|--|
| 1. African Intellectual Property Organisation (OAPI)               | 33. Ghana                               | 66. Poland                                       |
| 2. Albania   | 34. Greece                              | 67. Portugal                                     |
| 3. Algeria   | 35. Hungary                             | 68. Republic of Korea                            |
| 4. Antigua and Barbuda   | 36. Iceland                             | 69. Republic of Moldova                          |
| 5. Armenia   | 37. India                               | 70. Romania                                      |
| 6. Australia   | 38. Iran (Islamic Republic of)          | 71. Russian Federation                           |
| 7. Austria   | 39. Ireland                             | 72. Rwanda                                       |
| 8. Azerbaijan  | 40. Israel                              | 73. San Marino                                   |
| 9. Bahrain   | 41. Italy                               | 74. Sao Tome and Principe                        |
| 10. Belarus  | 42. Japan                               | 75. Serbia                                       |
| 11. Benelux * (Belgium<br>Luxemburg Netherlands –<br>Europe Terr.) | 43. Kazakhstan                          | 76. Sierra Leone                                 |
| 12. Bhutan   | 44. Kenya                               | 77. Singapore                                    |
| 13. Bosnia and Herzegovina   | 45. Kyrgyzstan                          | 78. Slovakia                                     |
| 14. Botswana   | 46. Lao People's Democratic<br>Republic | 79. Slovenia                                     |
| 15. Bulgaria   | 47. Latvia                              | 80. Spain  |
| 16. Cambodia   | 48. Lesotho                             | 81. Sudan  |
| 17. China  | 49. Liberia                             | 82. Swaziland                                    |
| 18. Colombia   | 50. Liechtenstein                       | 83. Sweden                                       |
| 19. Croatia  | 51. Lithuania                           | 84. Switzerland                                  |
| 20. Cuba   | 52. Luxembourg                          | 85. Syrian Arab Republic                         |
| 21. Cyprus   | 53. Madagascar                          | 86. Tajikistan                                   |
| 22. Czech Republic   | 54. Mexico                              | 87. The former Republic of<br>Yugoslav Macedonia |
| 23. Democratic People's Republic<br>of Korea                       | 55. Monaco                              | 88. Tunisia                                      |
| 24. Denmark  | 56. Mongolia                            | 89. Turkey                                       |
| 25. Egypt  | 57. Montenegro                          | 90. Turkmenistan                                 |
| 26. Estonia  | 58. Morocco                             | 91. Ukraine                                      |
| 27. European Community (i.e.<br>CTM) ***                           | 59. Mozambique                          | 92. United Kingdom                               |
| 28. Finland  | 60. Namibia                             | 93. United States of America                     |
| 29. France   | 61. Netherlands                         | 94. Uzbekistan                                   |
| 30. Gambia   | 62. New Zealand                         | 95. Viet Nam                                     |
| 31. Georgia  | 63. Norway                              | 96. Zambia                                       |
| 32. Germany  | 64. Oman                                | 97. Zimbabwe                                     |
|  | 65. Phillipines                         |  |

**NOTES:**

\* Belgium, Luxembourg and the territory of the Kingdom of the Netherlands in Europe have a unified legislation on trademarks and a common Office for the registration of trademarks under that legislation (Benelux Office). Under the Madrid System, protection shall be requested as if they were one country (Benelux). Their designation shall be subject to payment of a single complementary or individual fee.

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**SCHEDULE 3 – COMMUNITY TRADE MARK COUNTRIES AS OF SEP 2016**

- |                   |                 |                      |
|-------------------|-----------------|----------------------|
| 1. Austria        | 11. Germany     | 21. Poland           |
| 2. Belgium        | 12. Greece      | 22. Portugal         |
| 3. Bulgaria       | 13. Hungary     | 23. Romania          |
| 4. Croatia        | 14. Ireland     | 24. Slovakia         |
| 5. Cyprus         | 15. Italy       | 25. Slovenia         |
| 6. Czech Republic | 16. Latvia      | 26. Spain            |
| 7. Denmark        | 17. Lithuania   | 27. Sweden           |
| 8. Estonia        | 18. Luxembourg  | 28. United Kingdom   |
| 9. Finland        | 19. Malta       | (total of 27 states) |
| 10. France        | 20. Netherlands |                      |