

Casey Martone: Good afternoon everybody. Welcome to today's webinar on intellectual property. Today we're going to be doing kind of 101 of IP, help you all understand what intellectual property is, how it applies, and in the context of what we do here at IP Australia, how we can support you to make decisions about your IP. Today I'm joined by Matt Lee. Welcome Matt.

Matthew Lee: Hi.

Casey Martone: Matt and myself, I'm Casey, we work in the startup and small business engagement team. This is one of our activities that we undertake quite regularly to help Australian businesses understand what IP they've got in their business and how they can make the most use of it.

Casey Martone: Let's get started. In the control panel that you'll see on your screen, you'll obviously have a questions dashboard there. If you have a question throughout the session, please pop that into the questions box. Either Matt or myself will do our best to answer it as we go along. If there's anything that people want to ask at the end, we'll stay online for probably an extra 10 to 20 minutes, just to field any kind of last questions that may come in at the end of the session.

Casey Martone: All right. Today's session is definitely targeted at small businesses, and those who are really new to IP. This probably won't be as helpful for anyone who's applied for an IP right with us before, or who is an attorney. Yeah, let's get underway. Okay.

Casey Martone: IP Australia, we are the federal government agency based predominantly in Canberra, but we have quite a number of offices around the country, and a lot of staff working around the country. Our role is to I suppose administer the IP rights system in Australia. What that means is we take applications for patents, trademarks, designs and plant breeder's rights. We make an assessment on those applications to see if those applications meet the test of the law that's applicable to them. If they do, we grant an ownership over that particular IP right.

Casey Martone: When we talk about intellectual property, we talk about it in various forms. We say intellectual property, intellectual property right. We use patents, trademarks, designs and plant breeder's rights. Matt, talking about what IP really is at the heart for someone first up to this, I suppose this is how we best describe what is IP, and what is it actually in someone's business?

Matthew Lee: Okay. A lot of people will, obviously you've heard people discuss intellectual property as a concept. The way that we like to define it is it's the application of the mind to create something new and original. However, it can take many different forms, and some that you wouldn't normally think about as well.

Matthew Lee: For example, a new invention, brand design and artistic creation, but what are sort of other forms that you might encounter from day to day? Take for

example the contact list on your phone, that's valuable intellectual property. Certainly if a company were to get their hands on it, it would be of great value to them as well. You are surrounded all the time by various forms of intellectual property that you might not even think about too. Any of those endeavours where somebody's got that intellectual idea, and realised it in the real world in some shape or form, that is intellectual property.

Casey Martone: What we're seeing a lot of at the moment, particularly with a bit of a tech startup thing happening across the country, everyone's doing some kind of software as a service type of activity. We're just seeing a lot of data based or ICT based technology. Things that we probably as an office don't interact with as frequently, but data lists, as you said, phone call lists, customer data is really quite valuable to business these days. It's their kind of competitive edge in their marketing sense.

Matthew Lee: Absolutely, and that also includes all of the know how that you build up in your business as well. Whether it's just the methods and processes that you use on a daily basis within your business, or other types of innovation that you create too. Again, that could probably be classified as intellectual property.

Casey Martone: Okay.

Matthew Lee: Just to kind of demonstrate some of the intellectual property types that we deal with here at IP Australia. As Casey mentioned before, we administer the registered intellectual property system. For all of these different types of intellectual property, patents, trademarks, designs and plant breeder's rights, you have to apply to IP Australia before you're actually granted that right and can start enforcing it.

Matthew Lee: This on the slide is a Victa lawn mower, and it's actually got all of these types wrapped up into this one product. To take you through them one by one. First of all we start with patents. Victa developed a new and original recessed cutting disc. This at the time was something that nobody had seen before, and they were able to apply successfully for a patent on this particular piece of technology. We'll go into the details of each of the types of intellectual property a little bit later on, as well as some of the requirements. Suffice to say, because they came up with this new invention, that they were able to get protection over that particular aspect of the lawnmower.

Matthew Lee: They also got protection over their brand via trademark. The Victa lawnmower is protected as a trademark for that name, as well as the way that it's written there as a logo too. When we're talking about trademarks, we're talking about protection for brands and the way that you market yourself and differentiate yourself from other competitors out there in the same marketplace too.

Matthew Lee: There's a registered design on the Victa lawnmower, in particular for the shape of that engine. When we're looking at designs, we're looking at the aesthetic

look of a particular piece of property, I guess, so this particular apparatus, for example, has a unique smooth shape. Most of the time when you think about lawnmowers, they'll have a blocky construction made with sharp angles. Victa actually invested the time and effort to create this particular unique looking lawnmower, and because it has that unique appearance, we're able to get a registered design for the appearance of that engine block.

Matthew Lee: Finally in here we've also got the grass. Yes, it's not exactly part of the lawnmower itself, but it's the thing that it goes over, and that is what's protected by plant breeder's rights. In Australia, if you come up with a new variety of plant species, you can actually apply to IP Australia to get protection for that new variety of plant species as well. Walter Turf is the grass that's in the picture here for you. Again, because that was a unique plant species, they were able to get protection for that as something new.

Casey Martone: When we talk about registered rights and making an application, we're talking about giving you an IP right, giving you an ownership over these things. In the case of Victa here, there are three IP rights on this particular lawnmower. Each of those IP rights has different time lengths that it's owned by Victa. Basically what that means is it allows Victa to stop other people in the landscaping market copying what they're doing. Because if they do copy, Victa has a legal right to be able to stop them. That's I suppose the essence of what registered IP, or IP more broadly, is all about. It's about taking ownership of what you've created, and allowing you to stop others from copying what you're doing, and kind of edging in on your competitive advantage.

Matthew Lee: not only that. I guess the other thing that it demonstrates is that often when you come up with a new idea and you want to implement it in some way, such as creating a new lawnmower, is that it's not just one type of intellectual property that's going to apply to your product. There's going to be a whole suite of options that you may have available to you that you can get protection for. In this case, again, the new technology, underlying it was a patent, the branding was a trademark, the appearance was a design, and again the grass, if they were in that particular type of business, would be a plant breeder's rights too.

Matthew Lee: Now this isn't the end of the story Casey, though, is it?

Casey Martone: No. There are also other types of IP that you probably have heard about and are more familiar about. These are I suppose my favorite because they're relatively free or low cost to manage. The first one I want to talk about is copyright. Copyright, on the slide that Matt's presented earlier, was talking about artistic creations, literary works. Basically copyright is something that when you produce content, say you've written a story, you've published content on your website, you've taken a picture. The moment that that content becomes public, or is published, you have an inherent copyright from that time.

Casey Martone: There are so many small businesses around this country that are doing a lot of digital media for their business. They are using social media, using their website to really promote their brand. They have such value in their copyright assets in that sense. It's very important to consider, okay, how are you creating your copyright? Do people know it's your copyright? How are you treating it and managing it?

Casey Martone: Some of the examples that we use is simple things to alert people that you own the copyright. Something like a simple web statement on the bottom of your website might be a way to treat that. I like to use the example, Ash Newland, who is the inventor of the Scrubba Wash Bag. Ash has a wonderful way that, on his website he looks at all of the things he puts out in the marketplace through various platforms, and he says, "You can absolutely use my content, but you have to ask, and you must be using it in a way that I deem appropriate." Which is selling his product as an on seller or a retailer. Different ways you can, I suppose think about copyright, and use that as a way to manage your assets in your business.

Matthew Lee: Now, I know that copyright applies a lot to artists and to people who work in the creative industry as well. Are they the people only who are going to be using copyright?

Casey Martone: No. Obviously too is obviously talking about our tech startups and our digital creatives, is computer code. You know, if you're out there and you're developing code for a web based product, a software product as it would be, that code, if you create it from scratch and you're creating it on your own, you are the copyright owner of that code. It's not just visual elements that everyone can see at the surface level. It does obviously go below the surface with that computer code.

Matthew Lee: Yup, and I think they're treated just the same as authors. The computer code is actually treated as a literary work, so if you're somebody writing a book, or you're somebody writing computer code, you can choose the language that more suits you, and that will also be protected by copyright.

Casey Martone: The other unregistered IP right that I want to talk about is trade secrets. This is I suppose a low cost management strategy that small businesses should consider. When we talk about trade secrets, I've got an example of Coca-Cola on the screen. Everyone knows Coke. Everyone has obviously probably had a drink of Coca-Cola in their lifetime, but many people don't know that it's actually a really good case study in how a company manages and treats their intellectual property.

Casey Martone: What many people don't know is that the recipe for Coke could have been patented many years ago, which would have given them a 20 year ownership over the recipe and the method for producing that recipe. In doing so, they would have had to expose that recipe to the world. Coke obviously looked at

their business model and where they wanted to be in the market at that time, and thought, no, this is some pretty significant intellectual property. This is the essence of what we're doing, and we don't want that IP out in the marketplace.

Casey Martone: They have, I suppose, the use of a trade secret strategy, and they employ very strict confidentiality processes and contracts within their organisation to protect that recipe so it doesn't get out. Unfortunately, I think it was around 2006 time frame, there was a breach in that practice within the Coke enterprise, where two employees tried to leave with the recipe and sell it to Pepsi.

Matthew Lee: Oh man.

Casey Martone: I suppose to Pepsi's credit, they obviously understand the value of intellectual property, they actually alerted the Coke officials and the matter was settled obviously for an undisclosed sum. One can only assume that was quite a significant breach of the contracts that were in place to protect that secret.

Casey Martone: As a business, it's also very important to think about this as a strategy. You may have something that you think, "Okay, I might patent that, or I might look at how I can use that as my competitive advantage." You need to think about what benefits are against the different ways that you can manage your IP. In some instances, things like the data list that we spoke about before, using trade secret strategies within your business to keep that information within your business might actually be a really great option for you, particularly in your early stages when you're starting out and you're trying to obviously understand your commercial viability.

Matthew Lee: Okay. We just had a few questions come in. The first one was the name of the person who had the website copyright. The name of that person was Ash Newland. His product is called the Scrubber Bag, which he developed as a bit of a side hustle to his regular job as a attorney. You can go and have a look at the details of that product online. We also got another question, which was that, if you work in the business as a coder and create copyright material that's published, who owns the copyright, the coder or the company?

Casey Martone: That's a great question. That's something that we've recently done a bit of work on, Matt, in your patch.

Matthew Lee: Yeah, so my background is I've worked in the computing field as patent examiner for about seven years or so here at IP Australia, before moving in to work with Casey in the engagement team in communications. To look at that, it's a bit of a complicated question simply because of it depends a lot on the relationship that you have with the company in the first place, as well as the circumstances of how you created that code.

Matthew Lee: Generally speaking, to be brief on this point, is that if you happen to be working in an employment relationship and your code was developed as part of that

employment relationship, then the IP sit with the company and they will be the owners of the copyright in that code. However, by default in Australia, if you don't have a written agreement which says otherwise, if you are an independent contractor and you do work on behalf of a contracting company, that if you haven't got an agreement which explicitly sets out ownership of the copyright, then you as the contractor will actually own the copyright in that software code by default as well.

Matthew Lee: Again, there's a lot of different factors which may kind of play into this, but that is the simplest explanation I guess for those situations as well. Good questions though.

Casey Martone: Yeah. Great questions. All right, let's continue and move a little to our next slide. Why register, and why not register? Matt, I mean, this is the question we always get while we're out and about.

Matthew Lee: Absolutely. Look, the most obvious reason that you would want to get your intellectual property registered is from a protection standpoint. You have invested all the time, effort and resources to develop a new idea, take it to market and try and get some traction with it, and the last thing that you want is for somebody to come along and take that away from you, or for you to lose control over the thing that you've developed as well. There's plenty of other reasons why you might want to think about getting some protection onto your intellectual property, again, via the registered rights, or maybe even the unregistered rights too.

Matthew Lee: For example, if you have some level of protection over your intellectual property, sometimes that can actually create more opportunities for you later down the track. If you want to collaborate with somebody else to work together on the project, bring somebody into your business or company, then you can more freely share your ideas by having that protection in place so that you don't need to worry about the worst situations where they decide to take your idea and run off with it themselves.

Matthew Lee: On top of that, there are also other opportunities to create new revenue streams through things like licensing. If you have a piece of technology that another company might want to have a part of, but they don't want to necessarily have ownership or control over it, you can keep control as the owner of that intellectual property, license it out to them, and just receive royalties instead. All of a sudden you've turned a potential competitor into a partner, and you've also opened up that revenue stream in addition too.

Matthew Lee: However, just don't think about, again, the registered intellectual property rights, there's also the other options of, whether you want to release it into the public domain, or opensource, and have other people use your intellectual property. I know that recently the Tesla company, Elon Musk, who's been in the news fairly frequently, has decided to release all of the patents that they

happen to have on the Tesla electric car technology as well. There are some times intellectual property strategies which involve doing other things, rather than keeping your IP locked down. Ultimately they will be up to you and the kind of objectives that you want to achieve.

Casey Martone: Okay. The next thing we're going to I suppose move onto is patents. I do want to just obviously let everyone know that's participating online today, we will do our best to obviously give you as much information as we can on each of the IP rights, but we can't really go into the depth of them. Patents, Matt, this is your forte. This is why you sit next to me in these sessions. What is a patent?

Matthew Lee: All right. A patent, as we mentioned before with the Victa lawnmower example, deals with inventions. When we talk about inventions, there's actually a pretty broad definition. Most people think of inventions as somebody tinkering around in the backyard, in the shed somewhere, with smoke billowing out everywhere, and that's true. You can have physical products, apparatus', or other types of things which are regarded as inventions.

Matthew Lee: However, inventions also cover methods and processes in Australia, as well as substances. For people working in the chemical engineering fields, for example, or pharmaceutical fields, if you come up with a substance, that in some circumstances can be regarded as a new invention.

Matthew Lee: For those particular products and inventions, what a patent does, it'll give protection over the function and features of that product, processes, and again as I mentioned, methods and processes which can be the underlying basis of business services as well.

Matthew Lee: The patent itself will give you a monopoly right, so you, as the owner, have control over that patent in terms of who sells it, manufactures it, and otherwise exploits it. The term of that protection will last for 20 years for what we call a standard patent, or eight years for an innovation patent.

Matthew Lee: Now the difference between a standard patent and an innovation patent is that, generally speaking, an innovation patent is easier to obtain, as we have a lower bar of entry compared to a standard patent. In return, we give you a shorter term of eight years protection. If you want further protection, then maybe the standard patent is the way to go instead.

Casey Martone: It's important to note too that at this time a lot of our small businesses who are really kind of discovering intellectual property for the first time, ask me the question, "So, 20 years around the world?" I suppose no. When we talk about patents in the context of what we're talking about today, we're talking about having a monopoly in Australia. IP Australia is only able to grant a patent within Australia. If you would like to seek a patent in other jurisdictions, such as maybe perhaps you'd like to export to the United States, you would obviously need to seek that same protection in the United States. There are mechanisms that this

office provides and some information on our website on how that might go about, but a really good patent attorney would be I suppose your best guide for that activity.

Matthew Lee: That's a great point. I guess that also leads into this particular question as to, is patenting the right way to go? If you decide to go down this path, what are the costs going to be? One of the things that we want to encourage here at IP Australia isn't to say to everybody that, "Yes, you need to go out and get a patency note, because that's the way to go." Because in a lot of circumstances that's not going to be the correct strategy.

Matthew Lee: One thing that you need to consider again is, what are the holistic costs that entering the patent is going to be? Filing, the fees for filing for a patent application are on our website, but you also need to consider whether you might need to seek legal advice or representation from a specific patent attorney, for example. If you get a patent attorney involved, then that's also going to increase the costs that you're going to face in either the drafting of the application, maybe even filing and prosecuting it further down the track too.

Matthew Lee: Once you have your patent, also think about what you're going to do with it. Are you simply going to let it sit there, maybe use it for those licensing or collaboration opportunities I mentioned before? If you actually have to enforce it, what's that going to cost you too? Taking it through the court system is a costly exercise, and something that you might need to be prepared for.

Matthew Lee: Similarly, if you also seek patents overseas, that's also going to cost you money as well. The more countries that you apply for, it's just going to multiply that cost out too.

Matthew Lee: One strategy that we've heard from some applicants, for example, is to just pick your markets, and pick the markets which are most important to you and focus your efforts in there, so that you're not necessarily applying for protection unnecessarily in lots of smaller markets which aren't going to bother you too much as well. There's lots of factors at play.

Matthew Lee: Again, we encourage you to go and have a good think about what you want to do, how you want to use your patent. Also think about the types of strategy that you want to employ for your business holistically, as well as seeking advice from professionals to give you the help that you need going forward.

Casey Martone: One of the products that our team developed just over 12 months ago now is the engaging an attorney toolkit. If you are inventing something, you feel that there's something in what you're doing that could be patentable, I would strongly encourage you to be able to jump onto our website in our patent section, and look for the engaging an attorney toolkit. This will be a really great resource to ask you those questions of what you need to do and how you can prepare before you meet with a patent attorney, so that when you walk into

that office and you're having a meeting, it's constructive, it's valuable, and you're prepared and can I suppose ask the right questions and really get value out of their time. They can also too, understand if you're a client they're able to support more easily.

Matthew Lee: yeah, and one of the aspect of that particular toolkit was that that was developed in consultation with the patent attorney profession too. This is information that we have both agreed, as IP Australia and the patent attorney profession, to say that this is useful to you as potential applicants. It's not something that we are trying to go and, say take away business from that profession, because they do have a really important role to play in providing you the help that you need. In certain circumstances there are quite a lot of steps that you can take to prepare yourself for those interactions as well. Definitely encourage you to check that out.

Matthew Lee: We do have a question which has come in, which saying that, if you have a patent and there's another company which has copied the business idea, do they just become, considered as a competitor in the market?

Casey Martone: If there is no patent in place, yes, I think is probably the basic answer. No one I suppose has ownership over that intellectual property if we don't, if we're unable to ascertain if it could be protected by a patent or not. If it isn't protected, then I suppose it's one for anyone to look at and use and implement in the way that may drive a commercial benefit in that business?

Matthew Lee: That's right. One of the rules of the patent system is that once something is out there and is publicly available, then someone can't subsequently come along at a later date and then apply for a patent themselves and lock it down. We only give patents to inventions which are new and inventive. That's for a standard patent. What we do is that we do have a look out there in the marketplace, look around the world to say, has somebody had this idea before and publicly disclosed information about it? Because you're already out there in the marketplace, this other competitor who comes along then can't claim themselves that they were the inventor of this particular idea, and then get a patent for it themselves because you have that publicly information available.

Matthew Lee: The other thing to think about though, on the flip side, is that it's another really important consideration that before you enter into business and go and launch your product, is to do a search yourself to see whether there is a patent on the same technology out there that you really want to avoid. Because if it's enforced and affects your particular technology, then the last thing that you want to do is to find out that you're the subject yourself of an infringement lawsuit later on. Again, there's some tips in that engaging a patent attorney toolkit, which will tell you how you can do some basic searches yourself. Again, that could help you to save some headaches down the track.

Casey Martone: All right. Talking about technologies, or things that were not patented, this is our favourite case study.

Matthew Lee: Well favourite for unfortunately a bit of a sad reason. This is a power-board, which I think most people should have multiple devices of this type in their homes. Something which was developed quite awhile ago, I think it was in the '70s, by a gentleman called Frank Bannigan. He and his business partners were trying to solve a problem which is a fairly simple problem, if you think about it now, of connecting multiple devices to a single power source. They went to a workshop and developed this particular product, which is the Power-board that we see today.

Matthew Lee: However, because they thought it was such a simple device, they made the decision not to get any patent protection for it. Everybody knows the rest of the stories, because there wasn't any level of protection on it, that there were many other copies which were brought to market by rival companies to basically sell their own versions of the power-board themselves. If Frank and his team had gone and sought the patent for it, then maybe it would be a different world that we live in today.

Matthew Lee: The quote that you can see on screen is from him about the lost opportunity that he had because he didn't have that protection on there. Again, it's not necessarily about getting all the money flowing to you for a particular invention, but it's just about having that control over the future of the product by being able to obtain the patent as well. He would have had some semblance of control as to where that technology was going. In this particular case he does have regrets, which is a bit unfortunate, about that lost opportunity for developing what is now a ubiquitous invention as well.

Casey Martone: Yeah. My, kind of the moral to the story is, please think about what it is you have and what could be the commercial viability.

Matthew Lee: Even if it's a simple idea.

Casey Martone: Yeah. This is a very simple idea, isn't it? Please, don't do a Frank. All right, so we're going to move across to trademarks now. Before we start, I just want to run a little bit of a poll with you all. I'm just going to launch poll there. If you wouldn't mind telling me, who here has a registered business name already? I'll just keep this open for a moment.

Matthew Lee: Sure. While you're just thinking about that, and getting that information through to us, there's another just final question which has come through on patents. Again, keep your questions coming, they're great. I think it says, systems saying that, how long will it take to obtain a patent for a standards and innovation patents?

Matthew Lee: It'll take some time, and it varies depending on the technology because we have different numbers of applications coming in for different types of technology. We assign them to specialists who work in that field of technology as well to assess. Generally speaking, it can take anywhere between a year, two years, or three years in the extreme cases as well. I believe there's somewhere on our website which has the work fronts available to see.

Matthew Lee: As a general statement, probably on average would say probably two years. Again, that could be faster or slower, depending on the particular workload that we have at the moment. That applies both to innovation patents and standard patents. Innovation patents have a slightly different system because you don't actually have to get them through the examination process to actually get the innovation patent in the first place. It's only by the time that you want to enforce it, such as taking somebody to court, or using it to resolve a dispute, that that's when you need to get it examined as well. Again, more details about the operation and the differences between both standard and innovation patents on our website.

Casey Martone: Okay. We'll move along to trademarks now. We have seen that there's a few other questions that have popped in. We will do our best to answer those at the end of the session. All right, so I asked the question, who here has a registered business name? We've got about 65% of people who do and are about to register a business name, and about 35% of people who don't, so perhaps not ready for that yet or haven't really kind of given it that much thought at this time.

Matthew Lee: That said, it's good to have you in here early, which is great.

Casey Martone: Exactly. Let me teach you our wisdom. Trademarks, for those of you who is activating a business, who have a trading identity, I suppose a brand in the marketplace, trademarks is for you. Trademarks, it covers every business. Trademark at its fundamental is a sign used to distinguish the goods and services of one trader from those of another. Basically all that is saying to us is, I am company A, Matt you're company B. Company A is a sign that distinguishes my company. Company B is the sign that distinguishes Matt's company. You know, our consumers in the market will know what goods and services they get from me, and they'll know what goods and services they'll get from Matt.

Casey Martone: As we see each day, we know that Coles and Woolworths are two companies that meet this particular criteria. Woolworths, you know what you expect when you walk into that store, versus Coles, when you walk into the Coles supermarket. The same with Aldi. They each have, I suppose the same goods and services, but you know what it is, what their brand is I suppose so well known in the marketplace with their consumer base.

Casey Martone: In Australia, if you come to IP Australia and you select a trademark application, you'd obviously like to protect your brand. If it is I suppose accepted and it

meets our examination processes, we will give you a 10 year registration on that trademark. You'll own that brand and you will control that brand for 10 years. The great thing about trademarks, unlike patents, is that you can renew that brand indefinitely. Patents is a 20 year life cycle. Trademarks can go on as long as the company and the brand is active, and as long as the company wants to control that brand.

Matthew Lee: Now I see that there's a point there that you have about the R symbol as well. What's that all about?

Casey Martone: What we see a lot in the marketplace, and a lot of people don't know, is when you see that little R with the circle, it means that the brand is actually registered. It has come to IP Australia and has met the tests of the trademark act, and it has been given a registration.

Matthew Lee: If I haven't got a trademark, can I still use the R symbol? I mean, I've got a trademark which I reckon is pretty snazzy.

Casey Martone: Please do not. It is an offence to use the R if you do not have a registered trademark, if it hasn't made its way through the application process. However, as you can see, up here the little TM in the circle, the way that you can obviously tell people that you wish to claim trademark protection under common law, is to use a little TM in a circle. Basically what that's stating to the market is, "I have established this brand. I've established this identity, and I'm claiming it as my trademark." It hasn't either yet gone through the registration system, or maybe it doesn't quite make the full test of the registration system. You can use a common law provision. Over time ongoing use will build that value and that reputation, and it will become quite a valuable trademark, however not registered.

Matthew Lee: I can more freely use the TM symbol wherever I wanted?

Casey Martone: Yeah. Absolutely.

Matthew Lee: Great. My snazzy trademark, I'm going to TM it.

Casey Martone: You're going to TM it.

Matthew Lee: Excellent.

Casey Martone: All righty. When we talk about trademarks, we talk about brands, they are literally in our face every single day, and you probably don't realise. Then you look at the two products that we've got on screen here. We've got Vegemite and we've got Arnott's Choc Ripple Biscuits. Both of these brands have multiple trademarks. We know that Vegemite is now owned by Bega, so there's two trademarks in the Vegemite brand. Arnott's is a trademark. Choc Ripple is a

trademark. There are many different ways that brands apply and sub-brands apply, and all of these can be protected by a trademark.

Casey Martone: Basically again, what we were saying before is that it allows us to stop others from copying. As we know in Australia, there's only one Arnott's Company, and you will only see the Choc Ripple made by the Arnott's brand. There's many versions of, I suppose a Vegemite-esque substance, but there is only one Vegemite. Particularly if you're an Aussie, I think that's a given.

Matthew Lee: You mentioned that there's only one Arnott's. Now if let's say that my surname was Arnott's as well, and I wanted to go into business, but I didn't really want to do anything to do with Choc Ripple Biscuits. Maybe I want to go into a completely different industry instead, like fashion for example, is that going to be all right?

Casey Martone: It will be fine. What Arnott's have a trademark over is their brand is protected in the food industry, the confectionery industry. They make a series of food products, and they protect their brand in that marketplace. They don't have any interest in fashion, and if you're a consumer and you're looking at an Arnott's biscuit and an Arnott's dress, you wouldn't be confused that the source of those goods is the same person. You'd be like, "Oh no, that's the Arnott's Fashion Company and this is the Arnott's Biscuit Company."

Matthew Lee: Oh great.

Casey Martone: We will talk about how we classify trademarks not too far from now.

Matthew Lee: Although I'm not sure if Arnott's has ever thought about the fashion industry, because I know that my kid at the moment, just like when she's eating her breakfast, definitely likes to wear her Vegemite all over herself anyway. Maybe something for them to consider.

Casey Martone: A business name in Australia is required. You have to register a business name if you want to conduct business. That's a regulatory requirement. What a business name doesn't give you is any ownership over the use of that name in the marketplace. If you were to look on the business name registration database that's made available from the ABR website, you will see that you might find very similar business names to your business name.

Casey Martone: For example, if I was Casey's Cakes, I know there is Cakes by Casey. I know there is Casey and Jane's Cakes. There's similarities, but none of us have ownership to be able to I suppose stop others from using that name if it's just registered. If I wanted to have ownership over that name, and I wanted to stop others using that name in the marketplace, I would need to seek a trademark protection, because that gives me a legal right to do so.

Casey Martone: On the screen what I've got for you is just kind of a bit of a summary of the differences. As we can see in the Nestle example, Nestle has a company and a business name as Nestle and Nestle Group. They also have a domain name as Nestle.com.au. They have a trademark, Nestle, but they also have various other trademarks that are I suppose in their trading identity, their product identity art in the marketplace.

Casey Martone: Trademarks extends beyond a business name, and can be a variety of different identities and brands within the company. It can also be the company name as well.

Casey Martone: If you are I suppose thinking about your business name and you're thinking about your trademark identity or your brand exposure in the market, some businesses do not have any of these aligned. You could be ABC Proprietary Limited. Your business name might be Jumping Jacks, and your trademark might be Jumping Jack's Happy Holidays. I'm making stuff up as I'm going along here. There are different ways in which you can structure your business identity in order to be able to position yourself and your trademark strategy.

Casey Martone: I think we have got a question around our trade names. Can you read that one?

Matthew Lee: Yeah, so the question, or the comments just coming through is like, "We thought trade names are not legal because registered trademark." I guess again, what is the difference of those trademarks, registered trademarks compared to that trade name as well?

Casey Martone: I suppose it comes down to a legal ownership and a right to stop others. A trademark is the only way that you will be able to stop others using your identity in the marketplace. A business name, I think they used to be called trading names, was a regulatory requirement that the government asked, and that was probably more to align the corporate ownership of that entity for, I suppose any taxation purposes and the like. It's certainly nothing to do in the IP space. We want to demonstrate there's a very clear difference between the two. It's something many early stage businesses don't understand, and we don't want them to get in a pickle like that lady on the Shark Tank episode.

Matthew Lee: Again, as Casey mentioned in her example about Casey's Cakes, is that the trademark, the protection given to you by a trademark also extends to those similar trademarks as well as anything that people might get confused about. It's not necessarily only going to protect you for those things which are an exact copy of your trading name. If you have your trademark for your trading name, it will also cover any variants of it that people, again, might find similar by the time that they're shopping around and looking for you out there in the marketplace.

Casey Martone: Let me tell you a story. Tale of two fat ducks. This is kind of a classic, I suppose David and Goliath story, but it's also a really good example around the

similarities description that Matt was showing you there. Everyone knows Heston, he's the gentleman on the left, but what many people don't know is that Heston actually wasn't the first person in Australia to own the trademark Fat Duck. That was this lady over here on our right.

Casey Martone: She created a café, I think it was in Northern Melbourne, with her business partner, and named it The Fat Duck Café. They registered their business name. They searched on the Australian Trademark Register to see if the Fact Duck was I suppose taken and owned by any other company, and it wasn't. They activated their business. They did their due diligence. They thought, you know, we're going to be a small time café in the North of Melbourne. This is okay for us. We're happy. We're comfortable. We're going to take our step forward and open. They've done a good job.

Casey Martone: Unfortunately in this circumstance, probably around a six month period is overlapping these two instances, Heston, off the back of his Master Chef fame, brought The Fat Duck from the UK to the Australian market, and opened it at the Crown Casino in Melbourne.

Casey Martone: Now because obviously Heston has quite substantial financial resources behind him, he obviously sought the IP lawyers to go out and make sure that he can obviously operate in the Australian market, and to get all these registrations and business compliance underway. In that process Heston's company has sought to secure the trademark for The Fat Duck, and they had success and that mark was registered to Heston's company.

Casey Martone: What they I suppose then did is they sent a series of cease and desist letters around to people who they felt were infringing on Heston's registered IP. This lady here on the right, she and her business partner received a letter saying, "Please stop. You're using my registered trademark, and I need you to obviously not do that." They also sent letters to The Fat Duck, I think it was a pub in Sydney, and the Phat Duck, P-H-A-T, so a phonetic equivalent. They also had to change their brand.

Casey Martone: What we can tell from this kind of case study is that we take a number of lessons. I do want to really kind of has home that Heston actually isn't a bad guy. It sounds like he is, however, he's just doing what every Australian IP owner has the right to do, and that is to stop others from copying or using their registered trademark.

Matthew Lee: Again, I think there's one point to note as well, is that his team actually did a search of the trademark register to see beforehand, was there any business out there on the trademark register which had a registered trademark for The Fat Duck? Maybe it's the case that you can hypothesise that if they had registered the Fat Duck trademark and had it on the register, by the time that Heston did a search and said, "Oh, there is something on the register." He might have instead gone and said, "All right, somebody's got the trademark for the restaurant

business in Australia. I still really want to come to Australia. How about I pay you to take ownership, or maybe just have a license for The Fat Duck trademark?"

Casey Martone: It gives you a seat at the table to negotiate when you own the IP.

Matthew Lee: Yeah.

Casey Martone: What we can detect, I suppose, is a bit of a cost/benefit analysis on this. Is that this lady obviously had to change the branding. She lost goodwill. There was uniform changeover, not to mention legal fees to seek advice about how she might navigate this situation.

Casey Martone: We put a bit of a ballpark figure of at least \$10,000, possibly a lot more. We don't run commercial businesses. We wouldn't know the full cost that would be associated with that. Had she and her partner come through the system, it would have cost them about \$500 at the most to secure the IP right for The Fat Duck trademark. You know, sometimes it could probably act as an insurance, and as Matt said, and give you a seat at the table in that particular discussion.

Matthew Lee: Now one thing also to kind of mention before we move on as well is that the ladies who ran The Fat Duck Café have some kind of rights under common law for what is otherwise known as a common law trademark. There is some recourse that they could have had to actually take on Heston and defend their territory.

Matthew Lee: Common law trademarks have quite a few tricky hurdles to jump over to establish the fact that you have a trademark or not, such as saying, have you got a built up reputation and the like as well? It's much simpler to simply go and get your trademark registered, again, for a pretty small fee in the big picture of things. In that particular instance it could have changed the whole situation as well. In the end they didn't go down that path after getting some advice about it, and decided that the best thing that they could do is, rather than have that dispute with Heston, is to just change the name of their brand, which again, has those costs involved.

Casey Martone: Okay. Sorry.

Matthew Lee: Now I do know that there are quite a few questions coming in. We have seen those, as well as the questions before about patents as well. I do promise that we will get to those questions at the end of the session as well.

Casey Martone: What I want to do is I want to exit our slide deck just for a moment Matt, and I want to bring up our website. I'm just making sure that everyone can see that. I want to jump onto [IPAustralia.gov.au](http://IPAustralia.gov.au). Many of you have probably already visited this site because you've come onto our site to get into this webinar.

Casey Martone: If you're a business and you're thinking about, "Okay, I've got a brand. I think it's a pretty snazzy brand. I don't want others to be using it, or I want to check if others are using it." I just wanted to give you a few quick tips before we progress, on how we might do that. Unfortunately, we do not have time to go into the depth of it today, because we've got a bit more coverage.

Casey Martone: I do want you to go into our search section here, and what you will see on our website is that we will have obviously our Upskill program will give you a little bit more of a step by step process. We also have the Australian Trademark Search System. What you'll be able to do is type in some search terms into that system and check what else is on the register.

Casey Martone: Matt and I have been talking quite a lot today about what in marketplace, so what are these people doing and what are they requiring? You will just need to make sure that if you do find something that's the same or very similar to your trademark, have a look about what they are covered for. That will be in what we call the classes or classification section. You'll be able to see if it's food, if it's mechanics, if it's software, and make a bit of a decision about that.

Casey Martone: We do have an upcoming webinar on trademarks, and we also have some content available on our previous webinar stage, if you would like to take a little bit more time to get familiar with trademarks in the next day or two. I definitely recommend that you jump into Upskill. It's a step by step process. It's five short modules, and most people that are going through this program are getting through the program within three to four days, and are coming out the other end I suppose a little bit more confident about how to apply for a trademark.

Casey Martone: All right, we will jump back to our slide deck. Designs.

Matthew Lee: No worries. Again, we'll try and, I'm just mindful of the time. Keep your questions coming. We'll definitely, if you stick around, get to answering those questions shortly.

Casey Martone: We've only got four slides to get through. I promise.

Matthew Lee: Okay. The design system, turning back to the Victa lawnmower as I mentioned before, looks at the visual aesthetic of a particular physical product. In that case they had a smooth curved engine block for the lawnmower. When we're talking about designs, we're talking about that particular type of thing. We're not really talking about blueprints and schematics, which some people kind of think about when they hear the word design instead. Instead it's really the kind of shape, or pattern, or limitation of that product instead.

Matthew Lee: Now as you can imagine, this is going to be very useful to certain industries, such as the fashion industry. Also to other types of industrial products that you might not consider, such as simple things like toothbrushes and the shape of a toothbrush, or even the pattern that you might find on a tire tread as well.

Anything with that unique aesthetic look is possibly going to be eligible for design protection.

Matthew Lee: Again, something to think about too is that if it's got some kind of functional aspect, that might fall into the patent category instead, which is looking at inventions. If it's really just there so that it looks a certain way, then design might be the way to go.

Matthew Lee: Registration lasts for five years, and then you can also renew it up to a maximum 10 year period too. One thing that's really important about the design system, which is a bit unique to the design system in Australia, is that you have to be careful about what information that you publish and release publicly about your design. Because we have a very strict rule that if you happen to exhibit your design, or publish it somewhere that people can see it, then it'll actually prevent you from getting registration for that design later down the track.

Matthew Lee: If you happen to work in those industries, or maybe you're a student who wants to exhibit your designs somewhere, think about whether you want to put in an application for your design before you go and release it publicly. Because unfortunately, there's also no exceptions to this as well. You can't come to us later and say, "Oh, I didn't know about it." Or, "I really wanted to just put in my application the next day." If that design has been published, unfortunately we draw a line in the sand and say, "Sorry, you can't apply for design protection on that thing that you publicly demonstrated after that particular date."

Casey Martone: Again, we do have a very in depth webinar on designs. If you are a designer and you're working in a product development space, we strongly encourage you to join us on that. We do have qualified design examiners who come and host that session, and you can ask a lot of in depth questions about designs and get really familiar with the process so that you're informed and aware about how you might approach that.

Matthew Lee: Okay. One example that we have left as a registered design is the KeepCup, which again is an Australian invention. With such a big movement away from disposable plastics and disposable materials, KeepCups were a great product which came into the market to say to coffee drinkers, and other people who drink beverages, "Here's a product that you can reuse multiple times." Not only does it have functional aspects, and yes, the KeepCup company did actually go and apply for patents for the innovations that they came up with in regards to this product. Also, spent some time to give it that unique look and feel. Because they came up with that unique design of the way that the KeepCup looks, they were also able to secure design protection for that as well. Again, you can see the quote from Abigail from KeepCup about that aspect.

Casey Martone: Yeah. Their whole brand premise with KeepCup is about the functionality and the aesthetic. I suppose they can obviously protect their brand not only with the

trademark, but that visual appearance. Like when you see the KeepCup, it's a KeepCup, everyone knows that. You just, the essence of what they're trying to do and how they're positioning their product as a whole, they've wrapped a really great boundary around that product with design rights, trademarks and patents to make sure that that unique aspect, their competitive advantage, what makes them popular, is kept within their company.

Matthew Lee: Yup. Absolutely. I think Francis has said this, does it apply for packaging? Absolutely.

Casey Martone: It does.

Matthew Lee: That's part of your product and it can apply to that aspect of your product as well.

Casey Martone: The last slide we want to cover, and we are going to spend just a short minute on it, is plant breeder's rights. The reason that we don't go too far into plant breeder's rights is that it's a very specific IP right. People who are in the horticultural industry generally speaking have access to qualified professionals to support applications.

Casey Martone: Just briefly. Kind of like an invention, if you come up with a new plant variety, you are able to come to IP Australia and seek an ownership over that for 25 years. It provides an exclusive right for you to grow, sell and export that, so you have control over that plant variety and you can make money through royalties or direct sales. It covers a variety of GM plants, trees, flowers, fruit, grape varieties as well. It's quite used I suppose in the wine industry as well.

Casey Martone: Okay, that's I suppose the summary of what we've got for you today. Just some resources for you that we'll send out. We'll have some handouts attached to this session. Those handouts will be I suppose attached to an email following. We strongly encourage you, if you are thinking about it, let's start with Upskill. Let's use the attorney's toolkit that we've developed. These will all be available via email.

Casey Martone: If you have any further questions, you want to learn further with Matt or myself or any of our team here, I strongly encourage you to subscribe to some of our upcoming webinars. For those of you who need to obviously get off and have a lunch break, we wish you all the best for the rest of your day. We'll stay on the line for another 10 minutes just to answer any questions that come through, and to catch up on some of the questions that we weren't able to get out of today.

Casey Martone: All right, so Matt, let's look at some of these questions.

Matthew Lee: All right, so one of the questions that we received on patents before was about, how can you actually check if there's patents out there that you might be

infringing upon? That's actually quite handy for us, because the next slide that we have available here is for the resource that we have for searching the patent database. This is a product called AusPat, which again is accessible via the IP Australia website. This is a search function similar to the trademark search that Casey showed you before, where you can look for patents in Australia that are registered, as well as maybe expired or pending, to see what is out there in the marketplace.

Matthew Lee: There's also other resources available, such as Google Patents is a very commonly used one as well. It looks exactly like Google, but instead searches the patents database for lots of countries worldwide. I think including Australia now, as well as the US, which is a big market for many people, and shows you what is out there for your technology. If you can have a go at those, that's a good starting point.

Matthew Lee: Again, in our engaging an attorney toolkit, which you can find under the patents section of our website, that will take you to a short tutorial, as well as the links to all of these tools to be able to search for those patents out there.

Matthew Lee: Now there's also another question about, business ideas can be patented? Yes, in certain circumstances. If you have an idea which involves some kind of technical process. For example, it's something that allows you to use machinery in a more efficient manner, or maybe a computer is storing data more efficiently, or something along those lines. Then absolutely those business ideas translated into those inventions can be protected as well.

Matthew Lee: However, pure business schemes and methods generally aren't going to be able to be protected via a patent because of a rule that we have in the patents world called manner of manufacture. Now it's a very complicated rule, which I'm definitely not going to go into the detail of now because you can spend an entire session talking about it. I encourage you to join us for our next patents webinar session where we'll go into that particular rule and the operation of it. If you have an idea, which again, is realised in some kind of form of invention, which may be as simple as a method and process which has those technical characteristics, then yes, you can obtain a patent for it in those circumstances.

Matthew Lee: Now finally there's also some more questions on, can you apply for an innovation patent in place while applying for a standard patent? There is a rule against double patenting. However, again, if you have particular strategies which involve getting an innovation patent in the first place, or something in place, one thing that I would consider for you to look at is the rules around what's called a provisional patent.

Matthew Lee: A provisional patent is generally the first step in both innovation and standard patents. When you apply for a provisional patent, it's almost like a marker. It doesn't give you any rights by itself, but it just sets a date for you where you say, "I'm going to reserve my spot in the cue." When you put in the provisional

patent, you get a date which is called a priority date. You have from that point, 12 months to decide what kind of patent filings that you want to make off the back of that as well for the same invention.

Matthew Lee: If you decide to go down the innovation patent route, you can file for an innovation patent after that 12 month period, and we'll actually back date the priority date to that original date that you filed the provisional patent, to be able to say, "Okay, is your invention new?" We assess it against that priority date that you established. Again, without going into too much technical detail, something that we cover in much more depth in our patents webinar as well, so that you can explore some of the options about your patent filing strategy.

Matthew Lee: Then finally, lastly on patents, and there are other questions on trademarks and designs. If an idea is already out in the world with a company overseas, can an Australian company patent a similar trademark in Australia?

Casey Martone: That's a great question. We get that quite a lot.

Matthew Lee: As I mentioned before, one of the things that we look for is to see whether your invention is new by the time that you file a patent, or this other company files for a patent instead in Australia. That's search for whether your idea is new actually goes worldwide. If somebody in the United States, for example, has got a business idea and it hasn't quite made it to Australia, somebody then can't patent that idea in Australia because the idea isn't new. Because we'll do a search, we'd say, "Oh, it exists in the United States already." Because that information is publicly available, therefore by the time you apply for your patent later on in Australia, we say, "No, you can't do that because your idea isn't new."

Matthew Lee: That said, it doesn't stop you from being able to conduct business in Australia. Because of the fact that, say that if the patent exists only in the United States, that protection only covers the United States. You wouldn't be able to internet market without negotiating with the patent holder, but if they don't have patent protection here in Australia, then it's basically open for business. You're able to take that technology and apply it here in the Australian marketplace as well. Always a good idea to check via AusPat, Google Patents, and some of those other databases too.

Casey Martone: Yeah. Certainly seeking advice from an attorney is absolutely recommended in the patent space. One thing that you want to be mindful of is that company may be using the United States market as their kind of starting point, and may leverage that patent and make the extension through the international system to other jurisdictions. If it's very early in the activities, certainly understand and consider what they might like to do with that patent and if Australia would be a place that they would consider that protection.

Matthew Lee: Okay, so quite a few questions on trademarks. I'm going to throw it to you Casey.

Casey Martone: Yeah.

Matthew Lee: There seems to be a little bit of confusion again about business names versus registered trademarks.

Casey Martone: Sure.

Matthew Lee: I guess just briefly again, what is the key difference between a business name and a registered trademark? Then should I then go and register my business name as a trademark?

Casey Martone: Okay. The key difference is there is no relationship between the two at the government level. Many people think that when they register a business name they can also tick another box and get trademark protection, and vice versa. That does not exist. They are completely independent systems. You have to register a business name in order to conduct business in Australia. I strongly encourage you to read the rules available on the business.gov.au website, and I suppose make a registration for the business name through them. That's a requirement, that's a regulatory requirement.

Casey Martone: If you want to protect that business name as a trademark, and you want to stop others from using that business name, you would need to seek trademark protection. Now there is a caveat on that. There is some tests that we apply under the trademark legislation, and we do go into these in quite some depth in the Upskill program and in our trademarks webinar.

Casey Martone: At a very basic level, if your business name is something that's very descriptive, so you're a drink bottle company and your company is named Drink Bottles, it is very unlikely that you'll be able to get a registered trademark. The test, generally speaking, does it already exist in the marketplace? Is there something the same or similar? Is the trademark being sought descriptive of the goods and services that the trademark is applied to? Generic trademarks are usually not allowed through. The examiners will apply two tests. Two different things.

Casey Martone: Yes, you can also apply for your business name to become a trademark. However, that business name needs to meet the tests of the Trademark Act.

Matthew Lee: Okay. Another question which has come through. Can you have the same business name, or name I guess, registered as a trademark in two different classes?

Casey Martone: Yes you can, absolutely. If you're selling products across a variety of different sectors, you would want to obviously make sure that your trademark applies to all of those different sectors. We call them classes. You may be in the drink

bottle industry. You may also be in the technology industry, selling phones or laptops. These are just two items that Matt and I have got in front. If you want protection to stop others in that industry copying what you're doing and using your brand or something similar, you can seek protection in both.

Casey Martone: We have 45 classes in which to seek protection. Generally speaking most early stage businesses need one, maybe two classes. That's really about they're starting doing one thing, and they will test that out and make sure that that's obviously what happens and their business is viable in that space. There's nothing to stop a business from coming back and seeking additional trademark protection for additional activities to expand their trademark protection longer term. Just because you come in once, you think, "Oh, I only got it for one thing." It doesn't mean you can't come back to us at a later date and reapply to have your trademark assessed against additional things to broaden that scope.

Matthew Lee: Okay. Excellent. I think the one example that I constantly come across as well is Dove chocolate and Dove soap.

Casey Martone: Yes, absolutely.

Matthew Lee: Which is absolutely two different companies, and I guess it's also easy to say that you're generally not going to find somebody who's going to get confused when they're going to go buy soap and end up in the chocolate aisle and end up buying the wrong thing. Maybe that does happen if you're getting those cravings as well. Probably not the other way around, if you're looking for chocolate and then end up buying soap instead.

Matthew Lee: All right, now just a final question that we've got here is that, if the trademark name is taken in the US, can you get protection in Australia?

Casey Martone: Yes, you can. When, again, when we look at intellectual property we talk about them in countries. If someone has a trademark in the US and they do not have that protection in Australia, and you would like to have that brand registered in Australia because you I suppose have a genuine use for that trademark, you can absolutely protect it in Australia.

Casey Martone: What we would obviously strongly encourage is that you don't just apply for the trademark to have it, to say, "When the Americans come in we'll sell it to them." Because if you're not using your trademark, there are actions under the Trademark Act that would allow a company to say take a non-use claim against you, to say, "Look, you're not using it in the course of trade, so you don't have a genuine intention." They would be able to seek, I suppose, an avenue through IP Australia to have that trademark removed from the register to allow them to register it. If you have a genuine use, you want to use it and you think, actually it's a really cool brand, I'm going to do that, I'm going to apply it here in Australia. Absolutely.

Matthew Lee: I think the other thing to think about too is just rather than considering the immediate present, is also think about your future use too. Because even though you have the ability to get your trademark registered in Australia, some customers may still end up on the dot com website of the US company instead and get a little bit confused too. Maybe it's a question of, think about your strategy in relation to that as well, because despite the fact that you're getting protection in Australia, it may not be the best route to go down. Maybe you can get some advice from a trademark attorney, or a brand adviser, as to the effect of that too. It might be the case where you have to go and re-brand, or choose a different name, simply because of that US competitor, despite the fact they're not even in your market as well. Lots of things to think about.

Casey Martone: Okay. As I said, that's all for us today. We want to thank everyone who participated, and we hope that you've learned something by hanging out with Matt and I for a lunchtime. Please, we strongly encourage you to subscribe to our future webinars. At the end of today's session you'll get an email with a short survey. We would be so grateful if you could help us, give us your feedback so that we can obviously improve these sessions, we can tailor our content better to the people it's intended to. If you like what we did, give us some information. It helps us kind of improve our service offering. All right everybody, have a wonderful day. We will leave you with obviously our phone number, our website, and if you're on social media, please be sure to connect and follow us so that you've got the latest information from our office to help you make the best decisions with your IP.

Matthew Lee: Don't forget about those upcoming webinars on those specific topics. Again, if you want more depth than that, and hopefully we'll see you there.

Casey Martone: All right. Take care. Bye.

Matthew Lee: Bye.