The business of intellectual property

At the Foster's Group, intellectual property is embedded into the corporate DNA. For IP director Owen Malone, this approach reflects the global trend towards recognising the commercial role that intellectual property plays

By **Trevor Little**

In May 2010 the Foster's Group announced its intention to pursue a structural separation in order to create distinct stock exchange listings for its beer and wine businesses, with each boasting separate boards geared towards developing individual business strategies. For some trademark teams, such corporate restructuring might create uncertainty as to their future. However, Owen Malone, the group's IP director, is playing a proactive role in shapng the future — a direct result of the value that the company places on the IP function.

For many trademark counsel, lobbying for senior management support and wider business understanding, let alone helping to plot the direction of the business, can be a daunting task — in the last *WTR* Global Trademark Survey, one-fifth of in-house counsel stated that they wanted more support from the board. However, when creating the role of IP director 12 years ago, the Foster's Group had a clear strategy — to position the role at executive level, with clear accountability, responsibility and transparency. The decision effectively embedded intellectual property into the DNA of the group and has yielded a number of clear benefits for the company.

Malone, who has held the role of IP director since its creation, explains: "The IP function is a peer to legal, tax, investor relations, government relations, insurance and risk management, finance and so on. Consequently, it shares similar accountabilities, delegations, reporting requirements and management initiatives. So there is a strong and ongoing liaison, almost daily, with other key players in the company."

The IP function reports to board sub-committees on significant litigation and also on risk, via a formal risk register mechanism which operates across the business. The department, like others, is also required to undertake controlled self-assessment and engage in full reporting of IP processes. "In short, intellectual property is very plugged into the general business and has been so since the position was created", he observes. "The emphasis is strongly placed on speaking and communicating in business language, ensuring that all IP practices are consistent with the broader business processes and subject to the same level of scrutiny."

This approach generates a strong understanding of IP issues across the Foster's Group and encourages the right levels of involvement, at the right time: "Our primary strategy is to deeply embed IP considerations into normal business practices, ensuring that our staff have a very sound knowledge of the business and that internal processes mandate early IP involvement."

Foster's Group IP structure

Malone has more than 30 years' experience in intellectual property, in both industry and government. His first foray into the world was as a patent examiner, before moving to the business sector as an IP manager. Between 1989 and 1995 he was general manager, intellectual property, at

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Telstra Corporation, with overall responsibility for the company’s IP policies, management and practices. He then joined Freehills to act as executive director for Freehills Technology Services Pty, a company which was established to provide IP commercialisation consultancy services.

In 1998 he made the move to the Foster’s Group to take up the newly created position of IP director, with overall responsibility for the group’s global IP assets.

While the position entails oversight of all issues relating to IP globally, he notes: “Obviously in a brand company, the core component is responsibility for the trademark portfolio as well as patents, designs and domain names. The major requirements of the position in general terms are responsibility for Foster’s IP policy, practices and processes; responsibility for the management of all IP portfolios; responsibility for the management of all IP-related disputation; ensuring the close alignment of the IP function with business operations and strategic business issues (a key priority in the Foster’s IP model); operating an IP advisory service for all management and staff regarding the IP issues which arise in day-to-day activity; and managing external stakeholder relationships with government, industry and IP decision makers.”

Malone likens the structure of these activities to a pyramid – at the base lies the security of the group’s IP assets, including portfolio management, watching services, dispute management and governance issues. On top of this lies the operations layer, including “support for commercial activities through new product development, licensing and internal IP consultancy”. Finally come strategic issues and “support for new business initiatives to leverage IP assets to generate growth and returns”.

Managing in excess of 5,000 trademarks across approximately 100 countries, a three-strong team is based at the group’s head office in Australia, supported by legal counsel in each of the major regions. These local counsel play a key role in coordinating business IP issues, with trademark prosecution work carried out by external service providers.

To optimise this division of labour, the trademark portfolio is carefully structured so that the local hubs can operate to maximum efficiency. Malone explains: “We have two key external service providers, one for wine and one for beer, cider and spirits (BCS), each operating as a central hub for the global management network. There is then a network of overseas agents, common to both wine and BCS activity, who act on the instructions issued by the respective hubs. All the global data is supplied through this network, consolidated by the hubs, and then ‘dumped’ into Foster’s IP management system on a monthly basis.”

Critical to success, then, is proactive management of the relationship with the local hubs. To achieve this, the company places “very strong emphasis on relationship-based (as opposed to transactional-based) interaction with our hubs and with overseas agents in key territories, where we collectively work to develop best practice and business-based work processes in terms of daily interaction, billing, cost management and general efficacy”.

This highly developed structure should mean that any changes required after the possible demerger will pose the IP department no significant problems. Planned for the first half of 2011, and subject to both board approval and a



60-second interview

What aspects of your job do you find the most challenging?
Making sound strategic and analytical judgements with regard to enforcement activity in jurisdictions where you are faced with problematic legal systems, very different cultures and counterintuitive processes.

What aspects do you find the most rewarding?
Contributing to success in our major business ventures. Also, engendering awareness in the IP community both in Australia and internationally to further the cause.

Who has been the greatest influence on your career?
Ann Dufty, who has now retired, was a partner at Mallesons Stephen Jacques and a university lecturer. She was a wonderful mentor to me.

If you could make one change to the international trademark world, what would it be?
It would be to have all countries join the Madrid system.

What career do you think you would have followed if not law?
Probably psychology, as I am fascinated by people and their behaviour. Alternatively, photography, which is a real favourite of mine.

As IP counsel in a company that specialises in beer, wine, spirits and ciders, do you have a favourite drink?
Carlton Draught beer is my staple and Penfolds my wine of choice if money is not an issue.

shareholder vote, a demerger would likely require each organisation to have its own IP function. In some respects, this is already in place as the group retains two distinct primary service provider hubs – one for BCS and non-alcohol, and one for wine – with a common overseas agent network. Therefore, Malone observes, "the division of the internal IP function into two offshoots would be a relatively straightforward task and would not have a major impact on day-to-day duties or the underlying management philosophy. The main issues would be ensuring that there is adequate resourcing (people and spend) for each business".

Same sector, different problems

Although closely related, the beer and wine sectors vary – hence the need for developed expertise in both areas. "The beer business is essentially a domestic operation (where we are the dominant players), with overseas activity in terms of export and other ventures with Australian beer brands. In contrast, wine is essentially a global business with IP and brand generation occurring across Europe, North America and Australasia", explains Malone. Another difference between the two industries is the culture and behaviour: "a factor of considerable importance in effectively dealing with protection strategies and dispute resolution."

However, there are some common management and protection issues, especially in relation to emerging markets, where Malone feels "the law can be a little problematic, and where our business processes and resource commitments are still in a development stage".

In enforcement terms, counterfeiting issues, mimicking and "brand squatting" are the ever-present dangers faced across the two sectors. Similarly, the IP challenges intersect when it comes to acquisitions and brand launches – at present, new product development and M&A activity account for up to one-quarter of the internal IP resource's time.

When M&A activities commence, such as the 2005 acquisition of the Southcorp wine business, the department gets involved at an early stage, enabling it to contribute to preliminary due diligence and to strategies for utilising the new IP assets. Similarly, explains Malone, when brand launches are planned, "Foster's operates a formal staged gate approval process with IP involvement mandated at concept stage and its approval necessary for a project to proceed beyond the second gate (final concept development) to commercial scoping and execution. These processes provide discipline around IP issues and represent a good example of its integration into the group's standard business processes".

Shaping policy

With this structure in place, Malone has also been able to concentrate significant efforts towards the external IP environment: "Foster's maintains a very active external involvement with government and industry policy issues, which account for around 10% of my time. This comprises involvement in industry policy groups, government committees and training activities."

A member of the Australian Government's Advisory Council on Intellectual Property (ACIP) from 1996 to 2002, Malone also acted as ACIP chairman between 1998 and 2002. He is currently a member of the advisory board for the graduate programme in IP law at the University of Melbourne, chairman of the advisory board of the Intellectual Property Research Institute of Australia and a member of the Australian Wine and Brandy Corporation's Legislative Review Committee.

As well as enabling Malone to input into the legislative environment which directly affects his company, these roles have enabled him to develop a clearer understanding of the various actors that shape IP policy: "These roles have really had a profound influence by giving me first-hand exposure to IP reform issues, developing an understanding of the various stakeholders, experiencing the reality of government policy development and legislative processes, and through meeting a very diverse range of people with some interest in IP matters. In terms of impact on my view of the IP industry, it has simply reinforced the sense that we cannot afford to sit on the sidelines, but must actively engage with the broader community of users and understand the issues that are important or critical to them."

His level of involvement has been such that in April 2003 he was awarded the Centenary Medal by the Australian government for outstanding service to the advancement of Australian intellectual property.

Considering the development of the domestic IP environment over the past 15 years, he reflects: "Australia's national office has done a superb job in increasing the number and scope of IP users, enhancing

public awareness of intellectual property, contributing constructively at the international level and engaging major industry interest groups in reform agendas and issues. There have been understandable concerns by some stakeholders that we should not compromise the IP system by over-catering to uninitiated users and that reforms should not result in any lowering of standards. However, the integrity of the system in Australia remains very good by international standards and the improvements in accessibility are very impressive."

Opportunity and challenges in globalisation

In addition to engagement with the domestic IP scene, Malone has been a proactive player on the international stage, engaging in education and awareness programmes – particularly in Southeast Asia – with the World Intellectual Property Organisation and Asia-Pacific Economic Cooperation Forum.

Drawing on this experience, he considers the interplay between IP and business concerns to be the key challenge facing the international trademark community: "From a business perspective, it's about getting the balance right between the integrity of the trademark system and the necessary reforms to ensure that it meets contemporary needs. Specifically, we have to continue efforts to improve and harmonise the international trademark infrastructure to get a closer alignment with business needs and timeframes, and to better deal with the inherent tension between national laws and global markets. While the Madrid system may not be perfect, it represents an enormous step forward in terms of modernising international IP infrastructure to reflect the realities of business in the 21st century.

"On the other hand, we must also seek to maintain high standards for the trademark system, as it is the primary vehicle for securing brand protection. In business terms, uncertainty is a major source of risk and any serious decline in standards will place significant costs on business and undermine confidence in the integrity of the system. In particular, we need to be wary of changes driven by resource constraints or doubtful productivity measures which effectively transfer more risk to users of the system."

This focus on the relationship between business and intellectual property is unsurprising, given the emphasis that Foster's puts on the inherent interconnect between the two, and Malone notes that the functions are now more closely aligned than ever: "IP has moved significantly into mainstream business activity, forcing reconciliation with competition law and inevitably finding itself entangled in public policy issues – the price for its growing relevance and competitive importance."

Looking back over his career, Malone identifies a number of developments which have allowed intellectual property to creep up the corporate agenda: the expansion of the user base and general understanding of IP issues due to factors such as marketing and training initiatives offered by national offices, the advent of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the expansion of the Madrid system.

The driving force, however, would appear to be globalisation. "My perception is that this is probably the key factor. Companies that have direct global exposure have learned to understand that not only is intellectual property a primary mechanism for growth and value extraction, it is essential that it is managed properly, given the highly competitive and diverse global marketplace and the consequences of not having appropriate processes and skills in place.

"In turn, this has driven reform in the global IP system and in the IP services sector to modernise IP infrastructure and processes, to better align them with contemporary business standards and practices."

However, he concludes with a warning that more work is needed to integrate fully the business and IP worlds: "Conversely, where the influence of global markets is not present, there is still evidence of antiquated practices and a passive and legalistic approach to IP management.

"Additionally, in other areas, progression has been modest, in terms of both the profession and the number of companies that still have yet to modernise and prioritise the operation of IP in their businesses." *iam*