

Fineprint

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Madrid Trade Mark System

WHAT DOES IT MEAN FOR THE HEALTH OF YOUR INTELLECTUAL PROPERTY?

Having waited in the wings for years, by Christmas New Zealanders should be able to use the Madrid system to seek international registration of trade marks. This is a great step forward, making it much easier to protect New Zealand's intellectual property.

The Madrid system will also make it much easier for overseas applicants to extend their trade mark protection here, making the risk of infringement and potential loss of rights far more likely for those who are lax in looking after their intellectual property.

It's time to check the health of your trade mark protection, both nationally and internationally.

What is the Madrid system?

The Madrid system offers a simpler and more cost-effective means of securing worldwide protection for brands.

Organisations will now be able to file one trade mark application and pay one set of filing fees.

Renewals, assignments, changes of address/names and other trade mark matters for International Registrations

can all be dealt with easily under the Madrid system.

The Madrid system does not, however, supplant local trade mark laws. Nor will it circumvent local requirements, such as the need in the US to show use of a trade mark before registration will be granted.

Like any system, there are traps for the unwary and it will not always be best suited for your individual requirements.

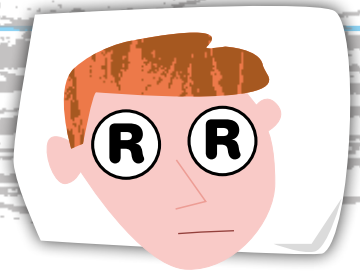
The New Zealand government adopted the Madrid Protocol in 2011, but the regulations needed to allow New Zealanders to use the system are not expected to be in place until September this year. The Intellectual Property Office of New Zealand (IPONZ) should be ready to process international applications using the Madrid system by Christmas.

How will it work?

An application for International Registration can be filed in the name of a legal entity or by a natural person. However, the applicant must:

- Be a New Zealand national, or otherwise be domiciled in New Zealand, or have what is referred to as 'a real and effective industrial or commercial establishment' in New Zealand





- Have a New Zealand application or registration for its trade mark, covering the relevant goods and services. This is commonly referred to as the 'Basic Application' or 'Basic Registration', and
- Select one or more member countries in its application for International Registration (other than New Zealand). The standard rules regarding trade mark priority apply, so where possible it's advisable to file an international application within six months of a Basic Application.

The Madrid system will not automatically be a good fit for you, particularly if you work for an international organisation in which different companies within the group are to own the trade marks overseas. Consult an IP law specialist to help you carefully assess the above requirements.

Ensuring you end up with the protection you need also requires some expertise. Your international application is still filed via IPONZ, which will certify it and forward it on to the World Intellectual Property Organization (WIPO) for examination. WIPO then checks the application for compliance with formalities, fees, and classification of goods and services. Any irregularities raised are most likely to relate to the goods and services covered by your application or their classification.

The way in which you have described your goods and services may seem mundane; these goods' descriptions will determine the scope of protection for your trade mark. Answering objections based on goods and services can be costly, so care must be taken to ensure:

- The goods and services covered by your international application fall within the scope of your Basic Application or Basic Registration. If not, you may need to file an additional application in New Zealand before filing your international application
- The classification of your goods and services are checked using WIPO's online classification services, as well as those provided by the US Patents and Trade Marks Office, and the Office of Harmonisation for the Internal Market in Europe, and
- Whether a more refined description of your goods and services is required for certain selected countries, such as the US and China who usually only accept narrow descriptions.

Once the formalities are done with, your application is published in an International Gazette and a 'Certificate of Registration' is issued. This use of the term is unfortunate, as it contributes to the misconception that the Madrid system allows you to avoid the cost and delay of prosecuting your trade mark in each individual country; this is not the case. An International Registration is neither governed by a single body of law, nor effective in any local jurisdiction. To have any teeth, your application must still pass national examination in each of your selected countries.

National examination

Each country designated in your application will examine the application to ensure compliance with their trade mark law. Each country can refuse to grant protection of your mark without impacting grants of protection by other selected countries.

Generally, the grounds of refusal are based on:

- Objections your mark is not distinctive, is generic, laudatory or descriptive of your goods and services
- The mark is misleading, contrary to public order or honest practices

- The goods and services specified in your international application breach local requirements, and
- Your mark is same or confusingly similar to an earlier mark.

You should have appropriate clearance searches carried out by an IP law specialist in each particular country before seeking to protect your trade mark overseas. You should also budget for costs associated with the prosecution of your mark through to registration in each particular country.

This stage of examination doesn't involve WIPO. If a refusal is issued in respect of a particular country, local representation will need to be appointed to respond to the refusal.

Watch out

As with any system, the Madrid system has its downsides. These include:

- **Central attack:** Your International Registration is dependent on your basic mark for a period of five years from the date of International Registration. If your basic mark ceases to exist, either from being challenged by a third party or failing to proceed to registration, your International Registration will collapse. All is not lost, however, there's provision to transform all or part of your rights into a national application or registration, provided you do so within three months from the cancellation date of the International Registration
- **Ownership:** The dependency on the basic mark means your International Registration has a five-year period of vulnerability; this vulnerability is independent of any changes of ownership. Given this, any assignments or sale agreements involving the basic mark within this five-year period must include appropriate warranties so that the action or inaction of the new owner doesn't jeopardise the International Registration
- **Non-use:** Once the five-year period of vulnerability has expired, you still need to ensure you make consistent and appropriate use of your mark in each designated country. Otherwise, you could find your rights in a particular country challenged on the basis of non-use, and
- **Subsequent designation:** You can add other countries to your International Registration at a later date. This is a great advantage if your markets of interest suddenly expand. However, unless filed within six months of your Basic Application, any additions will be accorded a separate filing date. The 10-year lifespan of your registration will also continue to run from the date you filed the original application. Once this 10 years is up, renewal fees will be payable for all countries – including those late additions.

The introduction of the Madrid system in New Zealand reflects the international nature of today's commercial environment. It's not appropriate for all businesses, but its implications domestically and internationally need to be acknowledged.

The Madrid system can open the door to worldwide protection, yet it is still not the 'golden ticket' some wish it was.

Competition in New Zealand's brand space is likely to heat up as more overseas trade mark owners use the Madrid system choose to protect their marks in New Zealand. Smart IP strategies will be crucial. ■

Winter Feed for Dairy

MAKING SURE THERE'S ENOUGH FEED WHEN YOU BUY

Farming has changed, it's no longer a lifestyle decision, if it ever was; farming is a commercial business. This reality has been recognised by dairy farmers for some time. Land and feed can be seen as inputs, to be used and harnessed, to generate a profitable output.

Farms however, particularly dairy farms, differ from other businesses in that their production cycle is seasonal. Dairy farm sales, share milking and employment contracts revolve around 1 June – the start of winter; sheep and beef farms revolve around 1 April, the start of the financial year and, more practically, late summer.

Unlike a sheep and beef farmer, when you walk onto your new dairy farm on 1 June, you know the grass won't grow before spring. It's therefore crucial that your winter feed needs are already in place. If not, quantity and quality of supplementary feed may be variable and, depending on the season, may be in short supply. While feed can always be purchased, it may come at a premium cost which gnaws away at the bottom line.

HAVE A MEASURABLE QUANTITY OF GRASS

To have certainty of feed when buying your dairy farm, a standard clause is usually included in the Agreement for Sale & Purchase. This clause provides that a measurable quantity of grass will be left on the farm for your arriving stock. It's important that you first consider what quantity of grass you will need for your on-going farming operation, be it the maintenance of your stock until spring or to ensure there's sufficient feed for winter milk supply. Grass is measured in kilograms of dry matter (kg/dm) using a rising plate meter, a device that looks like an oven tray mounted to a polo stick. Invariably, it's wielded by an independent farm consultant. These measurements provide an average quantity of feed over the effective pasture area of the farm. These calculations factor in the effect of the farm's feed wedge (read *Fineprint* Autumn 2012 for more on this), the diagrammatic concept of the pasture length over the entire farm on a field by field basis that results from rotational grazing.

FEED NOT AVAILABLE?

Difficulties arise, however, when the feed isn't available, either through grazing practices or the season. Unlike other businesses where you only pay for what stock is present on settlement, as determined by a stock take on the last day, the seller must leave a certain quantity of grass while, at the same time, continuing to feed their own stock until they are removed from the farm.

If there's a shortage in feed, depending on the Agreement's wording, the seller must compensate you for the feed shortage. It's usual for the seller then to provide a similar quantity of feed, measured in dm/kg, of silage or grain, or its cash equivalent as the shortfall.

Unfortunately the amount of feed to be left is agreed upon a number of months, if not seasons, before settlement day. Seasonal fluctuations such as a poor summer, followed by a wet autumn, may result in a shortage of pasture, and supplement feed may only be available at a premium cost. A possible outcome may be for the seller to use the pasture for his or her own stock and willingly pay you a compensation price for a feed shortfall if the previously agreed price for supplement feed is less than the then market rate for such feed. This makes perfect commercial sense.

GET A COMMERCIAL OUTCOME

Whilst dairy properties tend to change hands more frequently than sheep and beef farms, most farmers would admit that buying and selling properties is not something that they do that frequently. To get the deal that works best for you, talk with us before you sign the Agreement. This will ensure that together we determine what is important to your particular circumstances, how the stock will be dealt with and the best manner in which to approach the transaction. It's exactly the approach any commercially-focused business person would do in the circumstances. ■



Landowner Compensation Rights

PUBLIC WORKS ACT 1981

If the government or local authority wants to acquire your land for what they call public works, you're entitled to a range of compensation payments under the Public Works Act 1981. This article gives an overview on the various entitlements available to you during the acquisition process.

If your land is required for public works such as a new road, a dam, sewerage scheme or similar, the acquiring authority may take that land either by agreement with you, or by compulsory taking of your land. Whichever method is used to acquire the land, you're entitled to full, and fair, compensation. This is assessed on an objective, not a subjective basis.

The legislation states that only the owner may make a claim for compensation; however the definition of 'owner' extends to anyone who is occupying that land whether by lease, licence or a life tenancy.

Compensation: market value

Your compensation is calculated by assessing the amount the land would be expected to sell for if it were sold on the open market, by a willing seller to a willing buyer, on a specified date.

The question to be determined therefore, is the price that the land would obtain on the hypothetical open market. The subjective personal or emotional value of your property, or the value of the land, to the acquiring authority wanting to buy the land isn't relevant to the question of value.

Compensation should be fair and reasonable and equivalent to, but not more than, any loss you've sustained. You shouldn't receive compensation of such an extent that you end up in a substantially better position than you were at the date your land is taken or acquired. So there's no holding the acquiring authority to ransom!

In determining the market value of the land, you will be able to recover from the acquiring authority the reasonable costs of the professional advice that will be needed to negotiate and determine value, and your agreed compensation.

Disturbance payments

As well as compensation for land that is taken, you're also entitled to what the Act calls 'disturbance payments'. These payments cover all reasonable costs you incur in having to move from your acquired land to a new location. As well as your legal and valuer's fees (as mentioned in the above paragraph), these could also include the cost of moving your household effects to your new property.

Compensation for business loss

If you're a business owner, you've scope to claim compensation for disturbance to your business as well as a more general right of compensation for business-related loss.

Your losses must be a natural and reasonable consequence of the acquisition or taking, and you can recover the expenses of finding a new business premises, relocating, loss of profit and loss of goodwill.

Acquisition by agreement vs by compulsion

By agreement

You may of course agree to sell your land to the acquiring authority. In this case both parties must negotiate and agree on the appropriate terms and conditions including the amount of the compensation that's available under the Act. It's important to ensure that as much detail as possible, as to the type and extent of the compensation, is encapsulated in the signed agreement.

If you agree to the acquisition of the land but not the compensation that's being offered by the acquiring authority, the Land Valuation Tribunal may be used to decide your compensation.

Compulsory acquisition

Where voluntary agreement can't be reached on the purchase of your land, the Act provides for compulsory acquisition by the acquiring authority through the Minister of Lands. This power should only be exercised after the acquiring authority has made every endeavour to negotiate with you in good faith, but without success.

If the acquiring authority initiates steps to take your land, you may object under the Act. If you object to the acquisition, you have the right to have your reasons for such objection heard by the Environment Court.

Get professional help

There's a range of compensation options available if your land is required for public works. To get the most value from the process, make sure you engage valuation and legal professionals who are experienced in Public Works Act compensation matters. This will considerably enhance likely compensation outcomes. ■

Reprint
as at 1 May 2011



Public Works Act 1981

Public Act 1981 No 35
Date of assent 3 October 1981
Commencement see section 1(2)

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Who's my Daddy?

ESTABLISHING PATERNITY

For both children and parents, establishing who the father is, has significant emotional, legal and financial consequences.

The reasons why mothers, and sometimes their children, want to establish paternity are varied. Reasons can range from a mother wanting legal recognition of her child's father so she may claim child support or so she can receive her full entitlement under the Domestic Purposes Benefit, to a child wanting their paternity decided in order to claim a share of an estate. Men sometimes want to ensure that they are in fact the father of a child for whom they have been paying child support.

There are two main types of court applications used to determine paternity:

1. An Application for a Paternity Order under the Family Proceedings Act 1980, and
2. An Application for a Declaration of Paternity under the Status of Children Act 1969.

A Paternity Order is generally only available for children under the age of six years unless, at any time, the man has admitted expressly, or implied, that he is the father. Therefore, where a child is six years or older, their application is usually filed under the Status of Children Act. Fathers can apply for a Declaration of Paternity; they're unable to make an application for Paternity Order under the Family Proceedings Act.

Generally, a man is legally presumed to be the father of a child if:

- He's married to the child's mother at the time the child is born or if the child is born within 10 months of the marriage ending, or
- He's named as the child's father on the birth certificate.

ACKNOWLEDGING PATERNITY

There are various methods available to resolve an issue of paternity:

- The father can sign a Deed of Acknowledgment of Paternity; this will confirm that he is the father of a child. The child's mother also needs to sign this form. It's important the Deed is correctly prepared, signed and witnessed
- A father can sign a form requesting that the Registrar of Births, Deaths and Marriages record him as the child's father on the birth certificate (assuming no one else is named on the certificate as the father). The child's mother also needs to sign this form, or
- An application can be made by an eligible person to the Family Court for either a Paternity Order or a Declaration of Paternity.

The court also has the ability to make a declaration of non-paternity.

DNA TESTING

A DNA test can be performed to determine whether a man is the father of a child. Parents may consent to undertake these tests themselves. If there's a dispute the court can recommend the test be done once a paternity application has been filed. The test is simple and reliable, and Legal Aid may be available.

The parties to paternity proceedings aren't required to provide a sample for a DNA testing. If they refuse, however, the court can take this into account and may make a finding against them.

All children have the right to know their family identity, and to enjoy the emotional and financial support of both parents. Professional help is invaluable in guiding you through this process. ■

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 Till Henderson – New Plymouth & Stratford
 Wadsworth Ray – Auckland
 Wain & Naysmith Limited – Blenheim
 Walker MacGeorge & Co – Waimate
 Welsh McCarthy – Hawera
 Wilkinson Adams – Dunedin
 Woodward Chrisp – Gisborne

Postscript

Parental leave payments increased

On 1 July the maximum parental leave payment available to eligible employees, and the self-employed, increased from \$458.82 to \$475.16 a week. The minimum parental leave payment for the self-employed also increased from \$130 to \$135 per week.

The government has said that the increase to the parental leave payments matched the 3.6% increase in the average weekly wage. Under the Parental Leave and Employment Protection Act 1987, parents eligible for the scheme are entitled to up to 14 weeks paid leave at a rate calculated on the basis of their average weekly earnings. ■

Keep the home fires burning

For those of you who need a load of firewood for the winter, keep the following in mind and you won't be left out in the cold. Firewood can be sold by volume or description. Sometimes it's sold as a 'thrown measure' – as if it were thrown into a container and not stacked.

Quite often you buy a 'trailer load' of wood; you can easily see how much wood you're getting for the price you've agreed. If you buy firewood by volume, it should be measured in cubic metres. The Ministry of Consumer Affairs says that if you want to be sure, ask the firewood seller if they have a MAPSS certified measure. This is a measure approved by the Measurement and Product Safety Service (MAPSS); it's their job to make sure trade is based on fair and accurate measurement.

An approved measuring device will be marked with its volume in cubic metres, and have an identification and certificate approval number. It may also have a lead stamp imprinted with a Crown. Firewood invoices should state the true net weight or measure of the quantity supplied. If you think you've received less than you ordered, don't start using the firewood. Keep it in the safe place and contact MAPSS for advice on freephone 0508 MPASS Info (0508 627 774). ■

90-day trial period used to reduce employer risk

New research by the Department of Labour (dol.govt.nz) shows employers are using the 90-day trial periods to reduce the risk of taking on new employees. The research is based on the findings of the National Survey of Employers of around 2,000 employers and qualitative interviews with 53 employers in Hawke's Bay, Wellington, Auckland and Dunedin/Invercargill from the retail, hospitality, agriculture, forestry and fishing, and manufacturing industries. Some of the key findings are:

- Sixty percent of hiring employers in the survey have used the trial since its introduction, up from 49% in 2010. There's no significant difference between the level of use in SMEs and larger employers, and
- Employers use trial periods to address risk when hiring, for example:
 - To check an employee's ability for the job before making a commitment to employ permanently (66%)
 - To employ someone with the skills required but where the business is unsure about their 'fit' in the workplace (35%), and
 - To avoid incurring costs if staff are unsuitable for the job (13%). Trial periods improved employment opportunities – 41% of employers in the survey said they wouldn't have hired the most recent employee without a trial period.

From 1 March 2009, under the Employment Relations Act 2000 employers with less than 20 employees could use the 90-day trial period. From 1 April 2011, this was extended to all businesses hiring new employees. ■



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