
**Independent report on the effectiveness of the Trans-Tasman
regulation of patent attorneys and related matters**

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EXECUTIVE SUMMARY

This is an independent report on the effectiveness of the trans-Tasman Arrangement for the regulation of patent attorneys for use by IP Australia in a five-year bilateral review of the arrangement. This report also looks at regulation of the trade marks profession in Australia.

The key findings are:

1. Currently available data and anecdotal information do not confirm the prediction by some stakeholders that there would be a significant decrease in the number of attorneys in New Zealand following the implementation of the Arrangement.
2. The institutional arrangements are generally working well although there could be a greater diversity of skill and experience on the Trans-Tasman IP Attorney Board (the Board), and the Board should ensure that it has clear public guidelines for managing conflicts of interest.
3. The Board should engage more with the profession and actively support compliance with the Code of Conduct.
4. Compliance costs for Australian attorneys have decreased marginally while New Zealand attorneys face higher costs, with particular concerns about the costs of education.
5. There are limited providers of accredited courses. While intervention is not warranted at this stage, the situation should be monitored closely.
6. While the course costs are significant, they are not out of line with other courses that pave the way to a respected and well-paid profession.
7. There does not seem to be a large mismatch between the number of candidates and available positions except in certain areas of technology.
8. While foreign-qualified attorneys face barriers to entry to the profession, this is not an issue that should be solved by further intervention by government.
9. There is a need for businesses to be better informed about the registered patent and registered trade marks attorney professions and trans-Tasman arrangements, and how the regulation of the profession ensures a high level of professional standards.
10. There are significant concerns about the Board's processes for handling disciplinary matters.
11. The current regime is directed to the discipline of attorneys. It does not provide a mechanism for the resolution of disputes between attorneys and clients. It is not consistent with modern regulatory regimes.
12. The report proposes some broad principles to guide reform of the disciplinary process and suggests how these principles might be implemented. Key changes could be:
 - Triaging and early dispute resolution by public servants for simple matters.
 - The Board to decide on matters that do not meet the current Tribunal threshold but are suspected breaches of the Code of Conduct.
 - Providing the Board with powers to sanction.
13. Given the small number of cases, it would be premature to change the current jurisdiction for the Tribunal for more serious cases at this stage.
14. The Board and Tribunal should have the discretion whether to commence or continue with disciplinary proceedings in the event that an attorney voluntarily withdraws their registration.
15. The limited amount of data available in the short period since implementation indicates that the trans-Tasman Arrangement may have increased competition in the marketplace although this is

probably not the primary cause for the increase in the number of firms; the re-structuring of the profession with the rise of listed entities, mergers and acquisitions is also relevant.

16. There is currently uncertainty about who might provide trade marks services for gain in light of the reserve of legal practitioners. This should be resolved.
17. The issue of providing exclusive rights to practice to trade marks attorneys requires further exploration. Data should be collected to ascertain whether the use of unqualified unregistered practitioners significantly affects the interests of trade mark applicants.

The report makes 21 recommendations to improve the effectiveness of the regime.

LIST OF RECOMMENDATIONS

1. IP Australia and MBIE should ensure that any nominations to responsible Ministers for Board appointments should include a diverse range of individuals with skills and experience that are relevant to the role and functions of the Board and complement the skills and experience of existing Board members.
2. The Board should publish comprehensive information about how conflicts of interest are identified and managed.
3. The Board should finalise and implement its communication strategy. The Board should evaluate the success of the strategy by seeking feedback from registered attorneys 12 months after implementation.
4. IP Australia and MBIE should review the requirement in section 203 of the *Patent Act 1990* to have a registered patent attorney in regular attendance at an office and in continuous charge of the patents work done at that office or place.
5. IP Australia and MBIE should clarify with IPONZ how an Australian attorney can remove their address for service from an application in New Zealand without cancelling the application.
6. IP Australia and MBIE should continue to monitor the availability of accredited courses to assess the level of risk of particular topics not being available and determine whether any intervention is required.
7. The Board should consider obtaining independent expert advice about course accreditation and contemporary educational methodology if it does not have a member with experience in course development and teaching in the tertiary education sector.
8. IP Australia and MBIE should consider whether the requirement for a technical qualification to register as a patent attorney should be broadened to include 'potentially patentable subject matter in Australia, New Zealand or overseas'.
9. The Board should review the 2016 curriculum of studies to ensure it reflects current law and practice and contains sufficient details in all topics to facilitate candidates seeking exemptions.
10. IP Australia and MBIE should review the requirement in regulation 20.10 of the Patent Regulations 1991 to establish whether a period of employment outside of Australia or New Zealand, but under the supervision of an Australian or New Zealand patent attorney, should be included.
11. The Board should develop a targeted campaign for SMEs to promote confidence and awareness in the registered patent and registered trade marks attorney professions and trans-Tasman arrangements. The campaign should explain how the regulation of the profession ensures a high level of professional standards.
12. The Board should clarify the appropriateness of the use of the term 'Trans-Tasman IP Attorney' and advise the profession accordingly.
13. The Board should explore ways to facilitate and promote a greater range of continuing professional education on topics that are not covered in the courses of study and not delivered by existing providers.
14. The Board should consider facilitating and endorsing training on professional conduct matters including the Code of Conduct and professional ethics.

15. IP Australia and MBIE should review the disciplinary and complaint-handling regime increasing the focus on the resolution of complaints. This review should be based on the following principles:
 1. Complaints should be triaged initially according to the alleged conduct with a focus on early resolution.
 2. Investigations should be actively case managed and investigated to ensure prompt resolution.
 3. Decisions should be made at the most appropriate level.
 4. A range of appropriate remedies and sanctions should be available.
16. IP Australia and MBIE should review whether existing powers available to the Board to obtain information are sufficient. At the same time, the question of retaining professional privilege over material disclosed to the Board should also be considered.
17. IP Australia and MBIE should review the ability of the Board to initiate disciplinary proceedings against an incorporated attorney and propose legislative amendment if appropriate.
18. IP Australia and MBIE should propose legislative amendments to allow the Board and Tribunal discretion whether to commence or continue with disciplinary proceedings in the event that an attorney voluntarily withdraws their registration.
19. IP Australia and MBIE should consider whether the Board should have any role or powers to set up arrangements to ensure that the practice of a registered attorney who is temporarily incapacitated should be taken over for a period of time to ensure that the IP rights of clients continue to be safeguarded.
20. IP Australia should clarify the extent to which individuals who are not legal practitioners can do trade marks work in light of the reserve of legal practitioners at a state or territory level, and inform applicants and registered attorneys of the outcome of this review. Depending on the outcome of this exercise, IP Australia should also clarify the current provisions relating to the scope of work that can be done by trade marks attorneys.
21. IP Australia should investigate the experiences of trade mark applicants who have used unqualified and unregistered practitioners to determine if further regulation of the profession is required. This could be achieved, for example, by way of a quantitative and qualitative survey of trade marks clients after opposition proceedings to ascertain the extent to which the advice of unqualified and unregistered practitioners was considered by clients to have adversely affected their interests.

BACKGROUND

The *Arrangement between the Government of Australia and the Government of New Zealand relating to Trans-Tasman regulation of Patent Attorneys* (the Arrangement) is a bilateral agreement entered into in March 2013 that establishes a regime relating to the registration, governance and discipline of patent attorneys.

Consistent with the Arrangement, legislation was passed by the Australian Government creating a joint patent attorney profession, as well as establishing the Trans-Tasman Attorneys Board (Board) and Disciplinary Tribunal (Tribunal). The New Zealand Government similarly passed legislation supporting the joint regulation of the profession as set out in the Arrangement, including recognising the Board and the Tribunal. The regime commenced on 24 February 2017.

The objectives of the Arrangement are to:

- A. strengthen the relationship between Australia and New Zealand;
- B. provide a joint regulatory regime for patent attorneys in Australia and New Zealand;
- C. allow economies of scale in institutional arrangements;
- D. minimise regulatory and business compliance costs;
- E. increase business confidence in the quality and standard of service provided by patent attorneys; and
- F. facilitate competition in the market for patent attorney services.

The Arrangement requires that a review of its effectiveness with a view to deciding on and implementing any necessary improvements is carried out no later than five years after it has taken effect. In November 2021 IP Australia and the Ministry of Business, Innovation and Employment New Zealand (MBIE) jointly published a consultation paper seeking submissions for that review. In September 2021 IP Australia commissioned this independent report on the effectiveness of the Arrangement and recommendations for improvement for IP Australia's use in the bilateral review.

This report was required to assess submissions received as part of the public consultation, conduct desk research, and conduct further direct engagement as part of the review. The report considered the written public submissions made in response to the consultation paper (listed at Appendix A) and held consultation meetings, by videoconference, with a range of stakeholders (listed at Appendix B). These included:

- The Director General of IP Australia
- Professional bodies
- Registered patent and trade marks attorneys in Australia and New Zealand (including incorporated patent attorneys)
- Current providers of accredited courses in Australia (universities)
- Current and former members of the Trans-Tasman IP Attorneys Board
- Current members of the Disciplinary Tribunal
- A major user of the patent system with in-house attorneys.

Stakeholders were asked for their views about the following general areas:

- The efficiency and effectiveness of the trans-Tasman Arrangement, and the way the Board operates
- The availability of attorney services in Australia and New Zealand
- Qualifications and training requirements for attorneys, and associated processes
- The disciplinary regime including the Code of Conduct, disciplinary processes, and the Tribunal
- Competition in the market and the cost of attorney services

- Regulation of the trade marks attorney profession in Australia.

Discussions were also held with Government officials from two regulatory bodies:

- The Office of the Migration Agents Registration Authority (OMARA); and
- The Tax Practitioners Board (TPB).

STRENGTHEN THE RELATIONSHIP BETWEEN AUSTRALIA AND NEW ZEALAND

The consultation paper notes that the Arrangement is part of the Single Economic Market outcomes framework, which aims to create a seamless trans-Tasman business environment. Both countries intend the arrangement to continue.

No submissions addressed this issue and this report makes no comment on it.

PROVISION OF A JOINT REGULATORY REGIME FOR PATENT ATTORNEYS IN AUSTRALIA AND NEW ZEALAND

The Arrangement resulted in the creation of a joint registration scheme for patent attorneys in Australia and New Zealand with the Board as a single statutory body responsible for the regulatory and disciplinary regime for patent attorneys in Australia and New Zealand. Similarly, the Tribunal hears and determines disciplinary proceedings commenced by the Board against patent attorneys in Australia or New Zealand. The Designated Manager, currently the Director-General of IP Australia, has responsibility for registering patent attorneys and maintaining the register under the regime.

Impact on the distribution of patent attorneys

Prior to the introduction of the Arrangement there was widespread concern about the potential for a significant decrease in the number of New Zealand registered patent attorneys. This review received a range of views about the impact of the change on the distribution of patent attorneys in Australia and New Zealand.

The consultation paper suggests that the relatively small size of the cohort of registered patent attorneys in Australia and New Zealand and the short time since implementation, including the impact of Covid-19 pandemic, make it difficult to reach conclusions on how the distribution of patent attorneys across Australia and New Zealand has been impacted by the joint registration scheme based on data only.

From 24 February 2017 to 1 July 2021 the number of registered patent attorneys in New Zealand decreased from 229 to 205, whilst during the same period the number of Australian patent attorneys increased from 753 to 797. After an initial dip in registrations from New Zealand following the implementation of the regime and the imposition of higher fees and CPE requirements in 2017 and 2018 respectively, there was a net increase of 13 New Zealand attorneys from 2019, a higher rate of growth compared to a net increase of 25 Australian attorneys in the same period.

The consultation paper notes that more registered attorneys have changed their address from Australia to New Zealand than vice-versa and suggests that there is no evidence for any hollowing out of the profession in New Zealand.

The New Zealand Intellectual Property Attorneys Inc (NZIPA) expressed concern pointing to the net loss of 19 patent attorneys but also noted the distorting affect that the transitional arrangements might have on the data and suggested that this might have masked a downward trend. NZIPA also expressed concern about demographic trends in the profession and how that might affect the availability of

patent attorney services into the future. It would appear that a similar consideration might also affect the Australian profession.

The Institute of Patent & Trade Mark Attorneys of Australia (IPTA) advised that 'From the perspective of IPTA and its members, being almost exclusively Australian-based attorneys, the joint regulatory regime has not had a major impact on our relationship with our New Zealand-based colleagues practicing in patents and trade marks in Australia and New Zealand. There are some instances of IP attorneys based in Australia applying for positions in IP in New Zealand and vice versa, and the common regulatory arrangements support this.' Other anecdotal information indicates that some Australian attorneys moved to New Zealand to take up in-house roles.

In summary, the currently available data and anecdotal information does not confirm the prediction by some stakeholders that there would be a significant decrease in the number of attorneys in New Zealand following the implementation of the Arrangement.

ECONOMIES OF SCALE IN INSTITUTIONAL ARRANGEMENTS

The framework of institutional arrangements

The Board

The Board has responsibility for administering the patent attorney professions in both Australia and New Zealand, in addition to the trade marks profession in Australia. The Board consists of 7-10 members (including 2 ex officio members). All members, except the ex officio members, are appointed by the Minister for Industry, Science and Technology. The Board is required to comprise:

- a Chair;
- the Director General of IP Australia;
- the New Zealand Commissioner of Patents;
- at least two New Zealand patent attorney members; and
- at least two other members.

The other members are usually Australian patent attorneys and/or trade marks attorneys, but they could also be academics, or people experienced in public administration. All appointed members need to have substantial experience or knowledge, and significant standing.

The role of the Board is to determine:

- the academic qualifications required to become a patent attorney in Australia and New Zealand, and a trade marks attorney in Australia
- the knowledge requirements for patent and trade marks attorneys
- the accreditation of courses for attorneys that satisfy subject requirements under the regulations
- the exemptions from requirements of a topic group or groups based on prior study for attorneys
- the professional conduct of patent and trade marks attorneys
- the disciplinary matters including complaints procedure and the role of the Board in complaints' proceedings.

The Board typically meets three times per year. In addition to considering disciplinary matters, the Board considers at its meetings the following applications:

- accreditation of courses
- approval of qualifications
- approval of knowledge requirements
- exemptions from knowledge requirements.

The Tribunal

The functions of the Tribunal are to hear and determine disciplinary proceedings commenced by the Board. The Tribunal is required to comprise a President and at least two other Tribunal members. The President has to be a legal practitioner who has been enrolled for at least seven years, while the Tribunal members are current or former registered patent and/or trade marks attorneys who have been registered in Australia or New Zealand for at least five years.

The Tribunal's functions and powers are performed and exercised by a three-person Panel of the Tribunal and may be exercised in Australia or New Zealand. Importantly, at least one of the Panel members must be a resident of the same country as the attorney who is the subject of the disciplinary proceedings.

The secretariat

The Board, Tribunal and Designated Manager are supported by a small secretariat staffed by employees of IP Australia. The Secretary to the Board is the first point of contact for complaints and disciplinary issues.

Issues related to institutional arrangements

Issues raised in respect of particular functions of the Board and Tribunal are canvassed later in this report.

The skills and composition of the Board

A number of comments were made regarding the composition of the Board. While it was generally accepted that it was important to have members of the profession on the Board to understand the complexity of the issues that are raised, there was some concern that these members did not bring all of the skills and knowledge that are necessary for the Board to satisfy its role and functions. It was suggested that there should be a member with skills and experience in the tertiary education sector, including experience in course development and teaching, and also a member with skills and experience in professional conduct matters including investigation and discipline. It was also suggested that recently retired experienced attorneys could be approached to serve on the Board to reduce the potential for conflicts of interest in discipline matters. It was noted that currently there was a lack of independence from the profession.

There is ample scope within the existing framework to increase the diversity and range of skills on the Board.

Recommendation 1

IP Australia and MBIE should ensure that any nominations to responsible Ministers for Board appointments should include a diverse range of individuals with skills and experience that are relevant to the role and functions of the Board and complement the skills and experience of existing Board members.

Board governance

Some Board members commented that there was no proper induction for Board members and no Board Charter. Many Board members have little or no public sector experience and it is important to ensure that they have a good understanding of the responsibilities and duties that apply to statutory positions. There also seemed to be some uncertainty about the Board's relationship with 'management'. The Board is a little unusual for a Government Board in that it does not have any governance or oversight role in respect of IP Australia or the Intellectual Property Office of New Zealand (IPONZ) and senior managers of those agencies are, in fact, full members of the Board.

The Board secretariat advise that they are developing a Board Charter, Code of Conduct and induction pack. On the assumption that these will be finalised and adopted by the Board, this report makes no recommendation about Board governance.

Conflicts of interest

There were also some concerns about the real potential for conflicts of interest for Board members in discipline matters given the small size of the profession and the competition between firms. The Board's *Disciplinary guidelines for registered attorneys* contains the following statement:

Prior to the Board considering any complaint information, members of the Board must consider their ability to bring an impartial mind to making a decision in relation to the complaint. If a member of the Board identifies a conflict or is affected by apprehended bias, they will be excused from being part of any discussions or decisions relating to the complaint information.

This statement might not be sufficient to provide assurance to a registered attorney that is the subject of a complaint that all real and perceived conflicts are declared and managed at Board meetings. It does not state the test or threshold that should be applied and it appears that it is the individual Board member who makes the decision as to whether to excuse themselves (rather than the Chair making this decision). There is also no statement as to how any confidential information within the complaint will be handled in such circumstances.

Recommendation 2

The Board should publish comprehensive information about how conflicts of interest are identified and managed.

Communication with registered attorneys

A number of registered attorneys commented that they rarely interact with the Board apart from renewing their registration and reporting their continuing professional education (CPE). Board members also commented on their limited opportunities to engage with the profession.

IP Australia advised that a communications strategy is being developed for the Board with the aim of increasing engagement and providing more information Board activities. They have established TTIPAB LinkedIn account with weekly posts, are starting to publish the annual reports, and intend to publish updates after each Board meeting with a summary of the meeting, including a high-level summary of discipline matters. (This issue is discussed further below.)

Recommendation 3

The Board should finalise and implement its communication strategy. The Board should evaluate the success of the strategy by seeking feedback from registered attorneys 12 months after implementation.

REGULATORY AND BUSINESS COMPLIANCE COSTS

Costs of registration

The joint regime requires a single trans-Tasman registration for Australia and New Zealand and a single trans-Tasman address for service requirement across registrable IP rights. This should have reduced compliance costs because registered attorneys now have a single set of legislative requirements including one set of registration and renewal fees, one scheme for continuing professional development and a single Code of Conduct applying in Australia and New Zealand.

For Australian patent attorneys who had not previously registered to practise in New Zealand, the implementation of the joint registration regime should have had minimal impact on their regulatory and business compliance cost to continue practising. This was because the scheme largely mirrored the existing Australian national registration scheme.

Submissions made to this review confirm that the joint regime has not made any significant difference to compliance costs in Australia. IPTA advised that the joint registration scheme provided a small reduction in business compliance costs and said that ‘across the Australian attorney profession as a whole, the cost and compliance time savings are worthwhile, albeit modest’.

Implementation has had a significant impact on the regulatory and business compliance costs for the minority of New Zealand patent attorneys who were only concerned with practising in New Zealand. The discussion paper notes that, although New Zealand patent attorneys now face higher costs to practise in New Zealand, their costs would have been significantly increased as a result of the New Zealand Government’s decision in 2007 to modernise the national registration scheme by closely aligning it with the Australian registration regime.

Comments from New Zealand attorneys also commented that qualification costs for New Zealand based attorney firms and their trainees increased significantly ‘but without any clear indication of an improvement in standards overall’. The issue of education costs is discussed further below.

Attendance at patent attorney’s office

According to section 203 of the *Patent Act 1990* a registered attorney commits an offence if they practise, act, or holds themselves out as practising or acting, as a patent attorney, at an office or place of business where documents are prepared for the purposes of this Act; and there is not an individual who is a registered patent attorney in regular attendance at that office or place; and in continuous charge of the patents work done at that office or place.

One registered attorney suggested that many would already be in breach of this provision and questioned the requirement to have a physical office staffed by a patent attorney.

Many attorneys and their staff have not been able to attend offices because of Covid-19. In the future, remote work and remote supervision are likely to remain common and acceptable work practices. It can be expensive, especially for small firms, to retain offices that will be used less frequently. It is questionable whether this provision is reasonable, or whether it adds an unnecessary business compliance cost to registered attorneys.

Recommendation 4

IP Australia and MBIE should review the requirement in section 203 of the *Patent Act 1990* to have a registered patent attorney in regular attendance at an office and in continuous charge of the patents work done at that office or place.

Registering changes of representation in New Zealand

An Australian attorney raised concerns about difficulties with removing themselves as address for service from an application in New Zealand. IPONZ requires both an address in New Zealand as well as a power of attorney. The attorney advised that if a client wants to stop using a particular firm it is very difficult to remove their address for service without deleting the whole application because the address needs to be replaced by another address in New Zealand. This situation may amount to unnecessary regulation and cause an unnecessary business compliance cost to clients of Australian attorneys who file in New Zealand and wish to change representation.

Recommendation 5

IP Australia and MBIE should clarify with IPONZ how an Australian attorney can remove their address for service from an application in New Zealand without cancelling the application.

BUSINESS CONFIDENCE IN THE QUALITY AND STANDARD OF SERVICE

The joint regime seeks to support the quality and standard of service provided by patent attorneys by:

- prescribing qualifications and training prior to registration;
- setting standards of conduct and ethical practice for the profession;
- requiring ongoing professional development; and
- providing a complaints and disciplinary process to address breaches of required standards of conduct and ethical practice.

Qualifications and training requirements to register

Availability of accredited courses

Candidates applying to register as patent attorneys are required to complete an accredited course of study covering nine topic groups. As of 1 March 2022:

- University of Melbourne is accredited to offer all topic groups
- University of Technology Sydney is accredited to offer all topic groups
- University of Auckland is accredited to offer three of the nine topic groups
- Victoria University in Wellington is accredited to offer two of the nine topic groups.

The accredited courses are generally offered as part of a post-graduate program of study, Masters of IP (MIP), on a full cost recovery basis. Like many other post-graduate professional qualifications, there is little or no government support for candidates.

Universities may not actually offer all courses for which they are accredited every year. The number of potential students is not large and is expected to remain constant. Although the current level of courses appears sustainable, some courses are offered by only two institutions and this presents a level of risk. Based on current demand, it is unlikely that the number of providers will increase significantly. There would have to be a compelling business case for additional universities to offer courses in the current economic and educational policy environment.

NZIPA expressed concern that it is currently not possible for New Zealand trainees to complete all papers for the qualification through a New Zealand educational service provider. Some stakeholders suggested that it would be prudent for the Board or the professional associations to consider offering courses, in particular the practice subjects; however, any action that decreased the number of potential students would only serve to threaten the viability of the existing university-offered courses. The

practice subjects are taught by practitioners and have a very limited market. They are selected only by aspiring attorneys – not the broader cohort. The provision of additional courses by the Board would seem to be premature at this time.

Recommendation 6

IP Australia and MBIE should continue to monitor the availability of accredited courses to assess the level of risk of particular topics not being available and determine whether any intervention is required.

The accreditation process

Current and former Board members as well as the educational providers questioned some aspects of the current accreditation process.

There was some concern about the quantity of content that was required to be included in the courses and the prescriptive nature of the courses. The knowledge requirements that define the core of what attorneys need to know and the core has not changed much over the last 20 years. Eight subjects equates to a very full master's degree and so aspiring attorneys have no opportunity to select non-accredited subjects. There is limited or no exposure to public policy issues including traditional knowledge, commercialisation issues, innovation and entrepreneurship. Generally these limitations were accepted as the cost of a purely vocational course and it was suggested that individuals could study this content by other means including CPE as is discussed below.

The Board is also prescriptive in setting the requirements as to how the content is delivered, seeking specific details as to how the course contents maps to its requirements. The Board requires details of the methods of assessment, particular assessment tasks as well as the CVs of individual lecturers. The Board has, on occasion, questioned the level of experience of tutors, the contents of case law lists and course material including tutorial slides. One person described the Board as having a 'rather old-fashioned view of assessment which might not be in line with current educational thinking'. Some stakeholders queried whether the Board was in a position to be questioning the universities' delivery and assessment to such an extent. It was suggested that academics in universities are in a better position to determine proper methods of assessment than the Board. One person – not from a university – suggested that after the Board sets the syllabus, the university and course convenor should be left to run the courses to their own standards and satisfaction.

Other stakeholders applauded the level of rigour and scrutiny that was applied by the Board and suggested that this was needed to ensure the high standard of courses and graduates. There was a suspicion that the high pass rate of the current courses when compared to the low pass rate of the Board exams implied a significant decrease in the standard required.

The Board accreditation processes were also seen as a little opaque. It was suggested that in some instances a discussion with providers could be more productive than a formal letter through the secretariat. The current system of annual returns and five-yearly accreditation process were seen as not excessive.

This report has also noted the suggestion that there should be a person with skills and experience in the tertiary education sector, including experience in teaching, on the Board. It would be preferable if that person did not come from a legal faculty so as to avoid a real or perceived conflict of interest. A suitable person might come from, for example, an accounting or engineering faculty with experience in the development and delivery accreditation of professional courses. In the absence of such a Board member, the Board should consider seeking independent expert advice.

Recommendation 7

The Board should consider obtaining independent expert advice about course accreditation and contemporary educational methodology if it does not have a member with experience in course development and teaching in the tertiary education sector.

Qualification in a field of science or technology that contains potentially patentable subject matter

A person cannot register as a patent attorney unless they satisfy the academic qualification requirements. The qualification must be a Level 5 or higher qualification under the Australian Qualifications Framework (AQF) or the New Zealand Qualifications Framework (NZQF) (or an equivalent qualification from an overseas institution) that the Board is satisfied is in a field of technology that contains potentially patentable subject matter and involving a depth of study that Board considers is sufficient to provide an appropriate foundation for practice as a patent attorney.

In practice the Board considers that depth of study requirement is satisfied by six semesters of study where each semester builds upon the knowledge of the previous semester. If a candidate's qualification does not satisfy this requirement they could, for example, undertake short courses or a higher degree or diploma to satisfy the requirement.

A small number of individuals questioned this requirement noting that lawyers did not require a technical background to provide validity and infringement advice work in the patents area. They suggested that the market would decide what level of technical skills were essential when an aspiring attorney applied for a position. These individuals also pointed to current registered attorneys who had qualified in New Zealand before a technical qualification was a requirement. They also noted that an attorney was not required to limit their practice to the area of their initial qualifications, but this report also notes the requirement in the Code that a registered attorney must have appropriate competency for the work that they undertake.

A greater number of attorneys considered this requirement to be appropriate and supported strict enforcement. One in-house attorney advised that they considered an attorney's academic qualifications and technical experience as a primary criterion when engaging them.

The requirement that the field of technology that contains potentially patentable subject matter is properly interpreted as 'potentially patentable in Australia'. This could limit access to registered patent attorneys by applicants who work in fields that are not patentable in Australia but might be patentable in New Zealand or overseas including, for example, some areas of mathematics and computer science. It was generally accepted that it would be helpful if this test could be applied as 'potentially patentable in Australia, New Zealand or overseas' although this could introduce some uncertainty because of the complexity of issues of patentability in other jurisdictions.

In summary, the technical qualification requirement provides the public with a high level of assurance that a registered patent attorney has the technical knowledge required to understand the area of technology of the invention and draft specifications; however, the requirement as currently drafted may prevent inventors in certain fields engaging properly qualified registered attorneys in Australia to advise them about inventions that are not considered to be patentable in Australia but may be patentable in New Zealand or elsewhere overseas.

Recommendation 8

IP Australia and MBIE should consider whether the requirement for a technical qualification to register as a patent attorney should be broadened to include 'potentially patentable subject matter in Australia, New Zealand or overseas'.

Knowledge requirements for patent attorneys

A person cannot register as a patent attorney unless the Board is satisfied that the applicant has the knowledge of intellectual property law and practice that is required for a person to practise as a patent attorney. Schedule 5 of the Patent Regulations set out a very brief description of the knowledge requirements of the courses of study. In 2016 the Board issued a curriculum of studies that will satisfy the knowledge requirements. As noted above, the core of the curriculum has been largely unchanged for the last 20 years.

The knowledge requirements can be satisfied by completion of a Board accredited course of study, or by gaining an exemption in relation to one or more topic groups. Before granting an exemption, the Board must be satisfied that the applicant has passed the course of study at a satisfactory level and that the course has outcomes that are the 'same as, or similar to, those of an accredited course for the knowledge requirement for which the exemption is sought'. Problems arise when a candidate claims that they have gained the knowledge otherwise than through a 'course of study', for example, a UK qualified attorney may have gained qualifications in practice subjects through in-house seminars or experience but finds it difficult to satisfy this requirement. (Other concerns raised by foreign-qualified patent attorneys about gaining trans-Tasman registration are discussed further below.)

The 2016 curriculum is detailed for the law subjects but very brief for the two practice topics. This makes it difficult for candidates seeking exemptions for these topics based on unaccredited courses. As exemptions are granted on a case-by-case basis there is limited guidance available for individuals in such circumstances.

Recommendation 9

The Board should review the 2016 curriculum of studies to ensure it reflects current law and practice and contains sufficient details in all topics to facilitate candidates seeking exemptions.

The Board does have the power to be satisfied that the applicant has the required knowledge by a means other than completing a course of study (Regulation 20.8(4)) but uses this provision rarely and on a case-by-case basis following receipt of a request.

Employment requirements for patent attorneys and the statement of skill

For registration as a patent attorney, a person must have been employed in a position or positions that provide experience in:

- searching patent records
- preparing, filing and prosecuting patent applications
- drafting patent specifications
- providing advice on the interpretation, validity and infringement of patents.

The person must also have been employed in the position or positions for at least two continuous years or a total of two years within five continuous years. In general, a candidate provides a detailed statement of skill from a registered patent attorney who has supervised the work of the candidate. This process provides assurance that the candidate has the requisite skills and experience to ensure that the public receives only high-quality services, especially with respect to the complex technical areas of patent drafting and prosecution.

There was general support for this two-year employment requirement. For example, NZIPA commented:

Requiring students to spend time in practice within firms, building skills and getting exposure to a variety of issues and projects helps students to form a sound base from which to perform the tasks of a patent or trade mark attorney. The role is not one for which adequate preparation can be obtained by simply completing a university qualification. Instead, the role requires years of practice and supervision to be able to develop the knowledge base and skills needed to address the varied and nuanced issues faced by IP attorneys. The time frame for training under the new regime is much the same as that under the previous regime and we do not see an issue with that.

Similar comments were provided by other stakeholders. NZIPA did question whether experience gained as a patent examiner could count towards the qualifying period but others commented that it would be difficult to gain sufficient experience in drafting and prosecution in a reduced timeframe.

The Australian National Association of the International Federation of Intellectual Property Attorneys (FICPI Australia) questioned the requirements for the statement of skill. They wrote:

There seems to be a slight mismatch in training requirements being specified in the regulations as including certain types of work conducted over a specified period of time, without specifying how much of each type of work is required or that the work is to be of any particular level of competency, and yet statements of skill seem to be required to state how much of each type of work is conducted and it seems to be inferred from the quantity of work that there is a certain level of competency. Thus, in practice the requirements of a statement of skill seem to be higher than required by the regulations. FICPI Australia views the mismatch as needing to be remedied on the regulation side in order for the public to have confidence that newly registered attorneys are competent to practice without needing supervision. FICPI Australia believes that quantity of work in each area is not a reflection of competency of work in each area.

In practice, it is difficult to see how the supervising attorney could prepare a statement that a candidate has sufficient experience in the skills unless that candidate performs those skills competently. Competency is also assessed in the courses of study.

One submission proposed that the current employment requirement that a person is required to undertake (and does undertake) their duties in Australia or New Zealand, should be amended such that work performed while the candidate is located outside of Australia or New Zealand, but under the supervision of an Australian or New Zealand qualified patent attorney, should not be excluded. The person noted 'In this era of remote and flexible working, I believe that Regulation 20.10 is arcane and unfair ... I question if it was indeed the intent of lawmakers to preclude the gathering of experience and skills just because a person was not physically within the geographical borders of Australia and/or New Zealand'.

Australian and New Zealand firms are increasingly operating internationally. This attorney noted that attorneys increasingly leave Australia and New Zealand to set up new offices and during this time, mentor and train new trainees outside the geographical boundaries of Australia and New Zealand. They state that they are aware of other potential candidates who were interested in pursuing trans-Tasman qualifications but were dissuaded to do so due to their interpretation of the regulations as it stands.

As current work practices move away from face-to-face meetings and people meet remotely by videoconference even when both parties are in Australia or New Zealand it seems unreasonable that a candidate who is working overseas but gaining experience in Australian and New Zealand practice under the guidance of an Australian or New Zealand registered attorney should be so disadvantaged. It is possible that this requirement presents an unnecessary barrier to entry to the profession for those who seek registration and in all other ways fulfil the requirements but for their physical location at the time of acquiring the skills.

Recommendation 10

IP Australia and MBIE should review the requirement in regulation 20.10 of the Patent Regulations 1991 to establish whether a period of employment outside of Australia or New Zealand, but under the supervision of an Australian or New Zealand patent attorney, should be included.

Barriers to entry to the profession

Cost of courses and admission to the courses

The consultation paper notes:

The higher the educational and training standards required to qualify for registration and therefore practise as a patent attorney, the higher the cost to candidates to qualify and the fewer the number of candidates who achieve registration will be. This in turn will reduce competition in the market for patent attorney services, increasing costs to businesses and potentially creating a barrier for small businesses. Therefore, it is necessary to ensure an appropriate balance is struck which maintains sufficient quality of patent attorney services provided by those who are registered to practise whilst ensuring there is a sufficient number of registered patent attorneys to allow for competition in the market to keep costs of their services at an acceptable level.

The premise of this statement is disputed by a number of stakeholders. NZIPA suggests that, despite higher costs, the educational standards have not increased:

Yet despite the increased costs, we have yet to see any real improvement in the abilities of students sitting university-based exams compared to students who qualified under the previous regime. Under the new regime, students must still undergo significant training within firms to be capable of performing the tasks of a competent patent attorney. Although members of the profession no longer have to set and mark exams (as they did under the previous regime), the educational papers of the new regime appear to provide little or no real benefit to New Zealand students. Any benefit that may be obtained is likely far outweighed by the increased costs.

NZIPA express concern about the lack of courses New Zealand and the costs for candidates:

It is, however, currently not possible for New Zealand trainees to complete all papers for the qualification through a New Zealand educational service provider. In addition, given that the cost to qualify has increased from around \$150 per student to about \$42,000-46,000 per student, we expect to see a significant drop in the number of New Zealand trainees. These costs simply cannot be borne by smaller firms, and even larger firms now give very careful consideration as to which employees they will invest in and, therefore, which employees they will pay to qualify as patent attorneys. As a result, we understand fewer New Zealand students are being put through the qualification process.

NZIPA consider the cost of qualification and lack of qualification options in New Zealand is a barrier to entry to practice as a patent attorney.

This report notes that in the previous regime in New Zealand the actual cost to the students in firms was heavily subsidised by members of profession who provided tutorials and set and marked papers. The cost has now been shifted from the firm to the candidates (in line with many other professions). The previous system benefited those candidates who worked in attorney firms but ensured a high, if not insurmountable, barrier for other candidates to enter the profession.

Similar comments were made by other stakeholders that the courses were difficult and too expensive and therefore not accessible for those who are required to pay for themselves. The contrary view was also presented: that 'the course is expensive, but represents a significant improvement over the academy, who passed almost nobody'. Another person said that it is easier to join the profession with universities providing the education.

FICPI Australia also suggested that the current training and qualification requirements do not adversely impact those wanting to register and practice as a patent attorney. They said that the relatively expensive University fees which patent attorney candidates have to pay to meet knowledge requirements is the function of being part of the University system — the Patent Attorney profession is no different from any profession that values university higher education, noting that the person must already hold a suitable degree to be a candidate attorney.

In relation to admission to the courses, IPTA advised that it had 'received reports of impediments to obtaining places in the courses of study that are offered in Australia that trainee patent attorneys in firms would like to enrol in – for instance, students with only a master's in science (rather than a PhD) have been rejected from entry into Master of IP Law course at the University of Melbourne, and there are sometimes issues with clashing timetabling of subjects required for registration. This can create impediments to trainee patent attorneys completing the education requirements for registration in a timely manner, and can cause delays to the registration of those attorneys.'

Delays in registration caused by particular university timetabling are an inconvenience but do not represent a true barrier to entry to the profession. Admissions policies are a matter for each individual university to decide.

In summary, while the courses costs are high, they are not out of line with other courses that pave the way to a respected and well-paid profession.

Employment prospects

Educational providers described two types of students:

- one already with a firm working as a trainee/technical assistant
- the others have a technical background and are not yet associated with a firm, but apply to a firm before they start the practical subjects.

They said that while there seem to be fewer positions with the amalgamated firms the newer boutique firms provide an opportunity. While there were some individual comments that some candidates completed their qualifications but could not secure a position, educational providers had not heard of widespread concern about problems with students getting positions in the profession. A senior attorney commented that their firm preferred not to take candidates that had already completed their MIP: they preferred to train from scratch and pay accordingly. If they recruit a more senior person they would prefer to recruit someone who has experience from another firm rather than one with a MIP but no experience.

IPTA noted that the size of the profession in each country is continually evolving. Impediments to the addition of newly qualified attorneys into the profession (resident in Australia) include factors that have no relationship to the new joint regime, including the fact most new entrants to the profession seek a position as a trainee attorney in a patent attorney firm before commencing the courses for qualification as a patent attorney. There are few new positions opening over time for new trainee patent attorneys. Employers must invest considerable time and money to provide on-the-job training which limits the number of positions available within IP firms. On the other hand, some attorneys said that firms were having difficulty in attracting suitable candidates in particular technologies, particularly engineers.

In summary, there does not seem to be a large mismatch between the number of candidates and available positions. The mismatch likely occurs because of the areas of technology. The shortage of engineers in Australia and New Zealand is well-known but any Government response to this is outside of the scope of this review.

Foreign-qualified attorneys

A number of stakeholders commented on the barriers that foreign-qualified attorneys face when seeking trans-Tasman registration. When foreign-qualified attorneys enter Australia or New Zealand they have to start from scratch. At present there are no top-up courses or systems of recognition of prior learning (RPL) leading to an accelerated route. An example was given of a UK trained attorney with 20 years' experience who requalified at a cost of around \$20 000.

While there was some concern about this, there was also the broad recognition that there are nuances of Australian and New Zealand law and practice that need to be taught and, if the content is very similar, much less effort will be required for successful completion (albeit at a significant cost).

One foreign-qualified attorney commented that they might know far more about the commercial climate that the clients are going to have to operate in overseas, but that knowledge did not serve them well initially in Australia and they were paid as a trainee. On the other hand, a different attorney commented that this overseas experience was considered invaluable by some firms and clients and that market forces ensured that very attractive salaries could be available even before a person was registered in Australia and New Zealand.

It was also recognised that the cost of tailored individual RPL and a top-up system for key modules would not be insignificant for the small numbers involved in these cohorts. While universities could, in theory, set up such a scheme, it would reduce numbers in the existing courses and may not be commercially attractive. A reduction in number in the practice courses could also cause particular problems as these courses are not picked up by other law students.

One attorney pointed to Regulation 20.8(4) (see above) as a mechanism to address some criteria by experience. They describe it as 'frustrating at the time' but stressed that they understood that standards needed to be maintained.

In summary, while this review recognises the frustration of overseas qualified attorneys, this is not an issue that should be solved by further intervention by government largely because the numbers are so small and each case is different. The market will decide on the premium it will pay for overseas experience and existing provisions are available in certain cases.

Confidence in the profession's standards of service

Awareness of the profession and its regulation

The consultation paper notes that 'creating greater public awareness of the standards expected from the profession and the benefits of using a qualified patent attorney could serve to increase business confidence in the profession and encourage more businesses to use their services'.

This review did not meet with SMEs but obtained useful insights into the client perspective in Australia from AusIndustry reports: *AusIndustry Network Insight Business experience with patent and trade-marks attorneys*. These reports aggregate a wide range of AusIndustry advisers' clients (usually SMEs) experiences with patent and trade marks attorneys. The reports found that there is good awareness and understanding of the patent and trademarks attorney professions and the services they provide and that within this group public confidence was strong in the quality of patent and trademarks attorney services, and their standards of professional and ethical conduct, although other anecdotal evidence pointed to some limited examples of questionable practices. The reports also noted some concerns about costs, enforcement and commercial success in a global environment but these

comments might be reflective of the business environment. (Access to patent attorney services and costs is discussed further below.)

Notwithstanding these findings, a large number of comments made to this review indicated concerns about the widespread use of unqualified and unregistered providers of advice. The extent of this concern does tend to demonstrate that there is still some way to go before SMEs, in particular, routinely have a good understanding of the registered attorney profession. Options to address concerns about the risks to business of using unregistered and unqualified providers are discussed later in this report but a primary strategy must be to ensure that users understand what a registered attorney is, what services they can offer, and how they are regulated to ensure a high level of professional standards.

Submissions to this review suggested raising awareness of the profession is a joint responsibility of the Board and the profession – including the professional associations. In particular the Board could increase awareness of the regulation of the profession including the role of the Board, educational requirements, CPE, the code of conduct, complaints and the disciplinary regime to provide confidence to the public that standards are maintained. (The profession could provide information about attorney practice including how registered attorneys can assist clients to manage their IP portfolio.)

Businesses also need to be informed about the trans-Tasman regime and the ability to engage attorneys across both countries and the increased options this provides to consumers, as part of a wider suite of information provided to the community.

Recommendation 11

The Board should develop a targeted campaign for SMEs to promote confidence and awareness in the registered patent and registered trade marks attorney professions and trans-Tasman arrangements. The campaign should explain how the regulation of the profession ensures a high level of professional standards.

FICPI raised the issue of the use of the term ‘Trans-Tasman IP Attorney’ and whether this use is authorised by legislation (as opposed to as opposed to New Zealand Patent Attorney or Australian Patent Attorney). It appears to have been adopted by some attorneys based on the renaming of the Board, but does not seem to find any particular authorisation in legislation. A search of the term indicates that there is no official definition and its use could be confusing to consumers and may be unhelpful in building awareness of the professions of ‘registered patent attorney’ and ‘registered trade marks attorney’.

Recommendation 12

The Board should clarify the appropriateness of the use of the term ‘Trans-Tasman IP Attorney’ and advise the profession accordingly.

Complaint numbers

The discussion paper notes that complaints are a potential indicator of the community’s views and business confidence in the profession. The paper provides data to show that the number of complaints was roughly constant between 8 and 12 between 2017 to 2020. It is always difficult when assessing complaint numbers to know whether a low number of complaints is due to high standards in the profession, or poor awareness and accessibility to the complaints process. In any event, the low number of complaints, and the lack of any comparative data in New Zealand before the implementation of the joint regime, makes it difficult to draw any valid conclusions about confidence in the profession from this data.

Continuing professional education

Currently patent attorneys are required to complete 10 hours of Continuing Professional Education (CPE) activities per year (or 15 hours if also registered as a trade marks attorney). The Board has published guidelines regarding what activities are suitable, with the only strict requirement being that patent attorneys complete at least 1 hour of professional conduct or ethics activities, and 5 hours of activities relating to patents. Some suggestions are made regarding completing a variety of types of activities, but these are typically not strictly enforced.

Annual CPE audits are conducted by the Designated Manager. Attorneys are requested to list activities but no further checks are performed. The results that are published contain only general observations that do not seem to change from year to year. It is not clear whether the level of scrutiny is sufficient to ensure that the guidelines are followed.

Comments from attorneys indicated that the CPE requirements were generally regarded as flexible and not unduly onerous.

All attorneys commented that there were plenty of activities available to ensure that attorneys could maintain currency in general patent and trade marks law. This content was delivered by seminars arranged by professional associations, at conferences, and within firms.

There were a number of suggestions about emerging trends and topics that are currently not well covered in the initial IP curriculum. For example:

- The protection of indigenous knowledge and cultural expression, including the recognition of potentially offensive trade marks in Australia and New Zealand.
- Digital issues: for example, artificial intelligence as an inventor.
- Recent developments in the treatment of confidential information.
- HR practices: appropriate standards of personal conduct in the workplace, bullying and harassment, anti-discrimination, use of social media, mental health in the workplace.
- Practice management recordkeeping requirements, trust accounts.
- Ethics and conduct.

The current CPE Guidelines are flexible enough to accommodate these topics. While universities would be in a position to develop and deliver CPE in these subjects if approached, it is not clear whether the market demand would be sufficient to make them financially viable. It is possible that some intervention or sponsorship might be required. A number of these topics are already available through existing providers but attorneys may not be aware whether or not they satisfy CPE requirements.

Recommendation 13

The Board should explore ways to facilitate and promote a greater range of continuing professional education on topics that are not covered in the courses of study and not delivered by existing providers.

The role of the Board in supporting compliance with the Code

IPTA suggested that there should be better communication and presentations in relation to the types of issues that come to the Board's attention through complaints filed against registered attorneys. NZIPA similarly requested that far more detailed information should be published about complaints and disciplinary matters. FICPI Australia suggest that a summary should be published on each discipline case, with the outcome of the Board's consideration and, if appropriate, any recommendations to assist patent attorneys on how to avoid such complaints.

These suggestions should be considered in the Board’s communication strategy (see recommendation 3 above).

The Board does not currently have a role in CPE activities. In his health check on the Code of Conduct (see below), Professor Andrew Christie recommended that the Board should facilitate the provision of additional CPE on the Code, using formats complementary to those already provided by others. He also recommended that the Board should collaborate with IPTA and NZIPA to provide a resource, available to all attorneys, under which an attorney could confidentially (and, perhaps, anonymously) seek guidance from an experienced practitioner about professional conduct matters.

These proposals had a great deal of support from comments received for this report. FICPI Australia notes that ‘Small to medium-sized firms sometimes find it difficult to access professional conduct and ethics content suitable to be their attorney’s CPD requirements unless incurring some cost to pay for the delivery of such courses. Due to the universal nature of those topics and their importance to the stated objective of “increasing business confidence in the quality and standard of service provided by patent attorneys”, the board is urged to make structured CPD courses at no or low cost to the relevant professions.’ One patent attorney commented that it would be helpful for the Board to provide or facilitate training on ethics using case studies. They said that there was a high demand for such training – particularly by in-house counsel and that the training would be particularly useful if it was given by the body that regulates conduct.

Practically, it might be problematic for the Board to deliver the training content themselves but it would be sensible, and within their role, to facilitate such training including Board endorsed seminars and webinars.

Recommendation 14

The Board should consider facilitating and endorsing training on professional conduct matters including the Code of Conduct and professional ethics.

Professor’s Christie’s proposal to provide a scheme under which an attorney could seek guidance from an experienced practitioner about professional conduct matters could be very useful. It is less clear whether the Board should be involved in a scheme that seeks to provide advice about specific matters rather than general advice. It could be problematic if an attorney was given advice about a Code matter by such a Board-endorsed scheme, and then later was the subject of an investigation of that conduct by the Board. Similarly, it could be problematic for the Board itself to give advice on any specific set of facts.

The Code of Conduct

The Code of Conduct (the Code) sets the standard of practice for patent and trade marks attorneys that is established by the Board from time to time. The current version was established in 2018. In considering whether or not a registered patent attorney has been engaged in professional misconduct or unsatisfactory professional conduct the Board must consider whether or not the attorney has complied with the Code.

In 2021 the Board engaged Professor Andrew Christie, Chair of Intellectual Property at Melbourne Law School, to undertake a health check of the *Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018* (the Code). Professor Christie’s report was published in December 2021.

Professor Christie observed that:

- The Code has no major deficiencies, and there are no major problems with its provisions.
- Very few participants were aware of, or suspected, non-compliance with the Code.

Professor Christie made a number of recommendations to improve the Code, some of which are discussed elsewhere in this report. Given Professor Christie's comprehensive review, this report makes no further observations about the Code.

The disciplinary regime – framework

The TTIPAB website provides information about the complaints and disciplinary process. The process may vary depending upon particular circumstances but in general:

- Any person or body may complain or provide information to the Board concerning the conduct of a registered attorney, or the Board may initiate action of its own motion.
- Once a complaint has been filed, the Board Secretary informs the involved attorney, and usually sends them the information provided in the complaint, and invites an initial response. The complainant may be invited to comment on the attorney's response.
- The Secretary will then provide a written report to the Board setting out details of the complaint and any initial response from the attorney and complainant.
- The complaint may be investigated further by the Board requesting further information.
- The *Disciplinary guidelines for registered attorneys* set out the procedures that the Board will typically follow.
- If, following an investigation, the Board is:
 - satisfied there is a reasonable likelihood of the attorney being found guilty of Professional misconduct, it must commence proceedings before the Tribunal.
 - satisfied there is a reasonable likelihood of the attorney being found guilty of unsatisfactory professional conduct, it may commence proceedings before the Tribunal.
- Hearings before the Tribunal are to be conducted quickly and informally, while allowing for the matter to be properly considered. The Tribunal is not bound by the rules of evidence, but may take evidence on oath.

Where the Tribunal finds an attorney guilty of professional misconduct it may:

- cancel the attorney's registration
- suspend the attorney's registration between six and 12 months, and in addition may:
- require the attorney to undertake additional CPE and/or
- require the attorney to work for a period of time not exceeding two years under the supervision of a person who has been registered for not less than five years.

Where the Tribunal finds the attorney guilty of unsatisfactory professional conduct, it may:

- administer a public reprimand to the attorney
- suspend the attorney's registration for not more than 12 months
- require the attorney to undertake additional continuing professional education
- require the attorney to work for a period of time not exceeding two years under the supervision of a person who has been registered for not less than five years.

Decisions of the Tribunal are published on the website. Appeals against decisions made by the Tribunal can be lodged in the Administrative Appeals Tribunal (AAT).

The disciplinary regime – issues

The process and procedures

Considering the very small number of complaints, a significant number of concerns were raised about the Board's process for handling disciplinary matters.

In his health check of the Code, Professor Christie observed dissatisfaction within the profession about the Board's complaints handling and investigation processes. Specific concerns were expressed as:

- 'The Board can ask an attorney about something without providing details of the complaint'.
- It was 'too easy' to make a complaint against an attorney: 'Some disgruntled client simply writes to the Board, and then the Board contacts the attorney.' The Board 'should get details of substance' from the client before contacting the attorney. There needs to be a 'prima facie case' before the Board acts.
- Clients can and do make complaints 'simply to avoid paying a debt'. They know that if they raise a complaint with the Board, 'a lot of the attorney's time will be taken up dealing with the Board'. Any complaint investigation by the Board should be 'put on hold until the debt dispute has been resolved'.
- Another believed that the Board undertook 'pro-active investigations, i.e. not on the basis of an actual complaint'. This participant considered the Board's complaint's handling process was 'very unprofessional' and that it 'doesn't understand how to handle a complaint or run an investigation'.

Professor Christie noted that while the Board has published the disciplinary guidelines, there is no published statement about the procedure followed prior to commencing an investigation – such as, for example, seeking to mediate or conciliate a dispute between a client and their attorney.

Professor Christie recommended that:

The Board should conduct a review of the processes it adopts when responding to receipt of a complaint about an attorney. Such a review should consider identifying staged objectives for complaint handling – e.g., whether the initial objective should be a settled outcome obtained through the process of mediation or conciliation. Other matters the review should address are the "triaging" of complaints, the degree of detail required from a complainant before commencing substantive investigation, and the formal process of a substantive investigation.

Further concerns were also raised with this review:

- The Board processes are conducted in a piecemeal fashion. An attorney was not informed of all details of the complaint and repeatedly asked for further information without knowing the basis of the complaint.
- The investigations are slow – the Board should meet more frequently.
- There do not seem to be standard operating procedures in place to ensure a prompt, consistent high-quality structured process that is consistent with the principles of administrative law.
- Persons being investigated should be entitled to obtain legal counsel at any stage.
- The current system does not provide any resolution for clients: the only options are to refer the matter to the Tribunal or discontinue the investigation.
- The current Tribunal processes mimic courts and are overly legalistic for an administrative decision-making body.
- Matters are escalated very quickly rather than resolved.

This report supports Professor Christie's recommendation to review the Board's processes and gives some further suggestions below as to how some improvements might be achieved.

The threshold test for referral to the Tribunal

While the number of complaints made to the Board is not high, very few of those are referred to the Tribunal. The threshold set in the regulations for referring matters to the Tribunal is very high and many matters do not reach that threshold.

The discipline regime was reviewed in 2002 by the then Professional Standards Board for Patent and Trade Marks Attorneys. At that time, the test for referral to the Tribunal was '**...if it appears to the Board ... that the attorney may be guilty of conduct of that kind...**' [emphasis added]. The review recommended retaining this low threshold. The 2002 review also recommended the introduction of a dispute resolution mechanism. The then Government's response in 2005 was:

*The Government considers that **with the introduction of a dispute resolution mechanism**, the threshold test for the PSB to conduct matters before the Tribunal should be higher. For consistency with other professions, the test should be that the PSB has to be "**satisfied that there is a reasonable likelihood**" of an attorney being found guilty. [emphasis added]*

It seems that the threshold test was increased but no dispute resolution mechanism was introduced. This has left a 'gap' in the regime for matters that do not reach the threshold to be referred to the Tribunal.

As discussed further below, this review does not recommend lowering the Tribunal threshold; rather, it suggests introducing a dispute resolution mechanism as well as allowing the Board to make decisions and impose sanctions for less serious misconduct.

Professional mediation

The current regime is directed to the discipline of attorneys. It does not provide a mechanism for the resolution of disputes between attorneys and clients.

Stakeholders were asked about whether they would support some type of professional mediation or other dispute resolution for complainants. All supported it in some form although there were some reservations.

FICPI Australia suggested that the Board should consider using a mediation service in some instances, where complaints relate not to the standard of professional knowledge but primarily financial situations.

A number of attorneys considered that the use of professional mediation would be attractive to attorneys rather than going before the Tribunal. One person commented about their experience of clients who choose not to make complaints but instead make an allegation of negligence which are dealt with by an insurer. They reported that all of these have gone to private mediation and have been resolved.

All were clear that the Board itself could not conduct mediation – it would have to be conducted by a professional mediator. Very rough estimates of costs were around \$10 000 – not insignificant for a SME. There were varying views about who would pay for the service: the Board, or the attorney and client.

The Migration Act 1958 contains a specific provision to allow MARA to refer a complainant and an agent who is the subject of a complaint to a mediator to resolve the matter complained of. Until

amended in March 2022, the code of conduct for migration agents contained a requirement for agents to participate in such mediation. Officers from OMARA advised this review that, although OMARA uses a range of resolution approaches, the provision in the Act to refer matters to an external mediator had never been used –probably for reasons of cost.

The use of professional mediation might be appropriate for some complaints. Mediation allows complainants to be heard and also get a commercial remedy. However, the issues of cost, and the lack of control over the process, raises concerns about whether the Board should be able to refer parties to professional mediation. Perhaps a preferred approach would be for the Board to provide information about the use, benefits and costs of professional mediation on the website and suggest to complainants that, in certain circumstances, for example fee disputes, professional mediation might provide a better outcome than submitting a complaint.

The use of other dispute resolution mechanisms is discussed further below.

Other regulatory complaint handling and disciplinary regimes

This review looked at other regulatory complaint-handling and disciplinary regimes. The Office of the Migration Agents Registration Authority (MARA) and the Tax Practitioners Board (TPB) are both Australian Government entities and both are responsible for the education, registration and compliance of practitioners. Both OMARA and the TPB receive many times the number of complaints the Board receives and consequently many of the specific structures and processes will not be suitable for the workload of the Board, but could assist in the formulation of guiding principles.

The Canadian Government recently established the Canadian College of Patent Agents and Trademark Agents (CAPATA). CAPATA has full disciplinary authority, administers entrance to the profession, regulates trainees and the qualifications they need, requirements for insurance, and professional development. The Canadian profession is about the same size as the trans-Tasman profession with about 900 patent agents and 1500 trademark agents.

Office of the Migration Agents Authority

There are around 5000 registered migration agents (RMAs) and OMARA receives about 350 complaints a year. OMARA has developed an Early Resolution Framework for early engagement and timely resolution. Core principles are:

- Use informal processes for early engagement and timely resolution. Collecting key information from the RMA and the complainant is part of early resolution.
- Rectification or improvement of practices through educative messaging is the preferred outcome unless the particular complaint or the agent profile warrants a stronger approach.
- Re-evaluate the complexity of the case as new information is received and escalate appropriately.
- Caseloads must be prioritised according to the age of complaint and how likely early intervention will resolve the issues in the circumstances of the case. All cases should be managed with a view to finalisation in 3 months.
- Adopt a risk-based approach in line with the Complaint Classification Risk Matrix.
- Consider whether referral to another agency, registration section, or monitoring is appropriate.

The Framework contains detailed guidelines for case officers covering, for example, communication with both parties, obtaining information, recording decisions and escalation processes. There is special guidance covering fee disputes which can result in a recommendation for a refund, with the advice that

'If the dispute is purely a fee dispute (ie no code of Conduct issues), and would require an expert costs assessment, it will be appropriate for the matter to be closed and/or referred to a consumer tribunal'. OMARA itself refers some matters to consumer tribunals.

A formal investigation may be undertaken where there is evidence to support allegations of more serious breaches of the Code of Conduct concerning one or more complaints.

OMARA staff at the APS6 and EL1 levels conduct investigations and exercise formal powers to require information. Recommendations on findings and sanctions are referred to the Director of OMARA — an EL2 position—who makes all sanction decisions including cancellations or suspensions of registration. The RMA is given the proposed cancellation or suspension decision and reasons and invited to make written submissions before the decision is made. There are no hearings. Appeals can be lodged in the AAT.

OMARA reports four types of outcomes for complaints:

1. **Resulted in sanction decision:** Sanction decisions occur where serious breaches of the Code have been found. The types of sanction decision are: barring former RMAs from applying for registration; cancellation or suspension of registration; and cautioning an RMA.
2. **Breach found but resolved and finalised without sanction:** Where an RMA has been found to have breached the Code but those breaches are considered insufficient to warrant a sanction, the complaint may be resolved by negotiation or issuing of a corrective action recommendation or a warning letter.
3. **No breach found (may include corrective instruction provided for action):** Issues, where the evidence is considered insufficient to warrant a breach finding, may be resolved by a recommendation of corrective action. Complaints are "Closed with no breach found" if after investigation it is found there has been no breach of the Code.
4. **Dismissed:** Complaints are dismissed where the OMARA has no jurisdiction (e.g. complaints about unregistered individuals); there is insufficient evidence to pursue; the complaint is withdrawn; or if the complainant will not provide consent for the complaint to be published to the RMA who is the subject of the complaint. Matters may be referred to other agencies or the State and Territory legal professional body.

The distribution of complaint outcomes for MARA shows that for the 146 cases OMARA finalised in the last half of 2021: 14% resulted in a sanction decision; in 8% a breach was found but no sanction; in 18% no breach was found; and 59% were dismissed.

Tax Practitioners Board

The TPB regulates around 80 000 tax practitioners, and receive over 2000 cases a year. Last year alone they terminated registration of 75 agents, who collectively represented 40 000 clients.

The TPB also have a complaints team to resolve complaints. Many complaints are out of jurisdiction (for example, fee disputes) or do not involve misconduct. Those matters are resolved quickly through contact with the complainant and practitioner to get the facts and determine whether it warrants further investigation.

The staff who investigate and resolve complaints usually have an investigations background. They may have legal qualifications or complete a certificate in government investigation. The staff who exercise the delegation to use powers to obtain information are at the EL1 level, but usually information is obtained without recourse to a formal notice.

Staff provide a report and recommendations on more serious matters to the Board. The practitioner is also provided with the report and has a right to respond. At least three Board members must make the more serious sanctions decisions. Not all matters go to the Board: staff members have the delegation to issue a caution.

Sanctions include:

- a written caution
- an order requiring the tax practitioner to:
 - complete a course of education or training
 - only provide certain services
 - provide services only under supervision
 - take certain actions within a specified timeframe
- suspension of registration for a certain period
- termination of registration.

Canadian College of Patent Agents and Trademark Agents

The CPATA has an investigations committee and a disciplinary committee which are appointed by, but are separate to, the CPATA Board. For disciplinary work, a complaint that is assessed as serious is referred to the investigations committee who may appoint an investigator. They can use fairly extensive powers to gather information – they can enter businesses, interview the parties and subpoena information. If this committee assesses that there is evidence of professional misconduct or incompetence, they can refer the matter to the discipline committee for a hearing. The disciplinary committee acts as a tribunal, decides the merits of the case and sets the remedies. Remedies range from fines, suspension to revocation of a licence to operate. The discipline committee also has the power to require the agents to reimburse fees or disbursements and can make costs orders; however the focus is on the protection of the public.

The system also has a separate process that encourages early resolution of inquiries. This process is focused on restoring relationships and trust, ensuring the provision of competent and ethical services by licensees (attorneys). On its website CPATA encourages inquirers (potential complainants) to commence with an informal inquiry process, rather than by filing a complaint. The inquirer provides information to allow the Registrar to check whether the matter is within jurisdiction and identifies options for responding to or resolving concerns quickly. The Registrar also assesses whether the inquiry may have been made for an improper purpose. If the inquirer agrees that their concerns do not seem to support a complaint – for example, the inquiry or concern is outside jurisdiction, or filing a complaint is unlikely to achieve the inquirer’s desired outcome – the Registrar may still assist in resolving a concern by providing resources or other information to the inquirer and/or trying to assist the inquirer in resolving their issues through contact with the agent, in appropriate circumstances. This informal resolution process requires consent of both the inquirer and agent before engaging in resolution efforts. If successful, this process can resolve the matter without the need for a formal complaint.

If the early resolution process does not resolve the concerns, the inquirer may opt to file a complaint, or an individual may file a complaint without engaging in early resolution efforts.

Principles for reform

The discussion paper notes that modern regulatory regimes generally involve an approach where most matters are addressed through education, persuasion, and support. Education campaigns and support activities would generally focus on areas of greatest risk identified through an assessment of complaints

and other information regarding non-compliance. The current disciplinary regime is not consistent with this approach.

The Tribunal process requires a high threshold to commence, and is lengthy and expensive. It does not seek to resolve complaints or provide a remedy for complainants. OMARA, the TPB and CPATA have similar functions but all provide a resolution process for less serious matters that can provide a remedy for a complainant without compromising the public interest.

This report does not attempt to provide a template for reform of the Board's complaints and disciplinary system but proposes some broad principles that might guide reform and suggests how these principles might be implemented.

Complaints should be triaged initially according to the alleged conduct with a focus on early dispute resolution

Categories could be defined as, for example:

- Category 1: Serious matters that are likely to reach the threshold for referral to the Tribunal, for example, matters with a strong public interest, integrity issues, fraud or other criminal matters, systemic failure to manage conflicts of interest, patterns of misconduct.
- Category 2: Less serious matters that raise concerns about competence or conduct but are unlikely to reach the threshold of referral to the Tribunal, for example, file disputes, or isolated matters of professional judgement. The threshold could be related to compliance with the Code, for example, 'suspected breaches of the Code'. (This is not to say that minor, one off, or inadvertent suspected breaches would necessarily all be managed as category 2 cases.)
- Category 3: Matters that are best managed administratively by dispute resolution resulting in suggestions for improvement but will likely not lead to a decision of a breach of the Code.
- Category 4: Matters that are better handled by other authorities, for example simple fee disputes (without aspects of professional misconduct) where complainants should be referred to the relevant state or territory office of fair trading.

The categorisation of a particular complaint could change as further information is obtained.

Investigations should be actively case managed and investigated to ensure prompt resolution

Complaints should be actively case managed. Investigations should be delegated to suitably qualified and experienced investigators for whom the task is a high priority and who are guided by standard procedures.

It is unlikely that the workload would require a large staff. IP Australia has a number of experienced hearing officers who have many of the skills that would be relevant to this work and might be seconded. Investigators can also be provided by panel legal firms.

Decisions should be made at the most appropriate level

This review suggests that, in line with other authorities, investigators should have responsibility for the finalisation of category 3 and 4 cases including making suggestions for resolution. Where appropriate, cases could be referred directly to other authorities (including fair trading offices or legal services commissioners). Category 3 and 4 cases could be managed administratively without the use of statutory powers.

It is suggested that for category 2 cases investigators should make recommendations about findings of fact and a recommendation of a sanction to the decision maker. Category 2 cases may involve a sanction. The current regime requires any decision that involves a sanction to be decided by a Panel that includes at least one member that is a resident of the same country as the attorney who is the subject of the disciplinary proceedings. For this reason this review considered that it would not be appropriate for any sanction decision to be delegated to an Australian public servant. It is suggested that the decision maker for category 2 conduct should be the Board or a subcommittee of the Board (containing at least one member that is a resident of the same country as the attorney who is the subject of the disciplinary proceedings). This would require legislative change.

Category 1 cases could require a more senior investigator, perhaps with legal qualifications, with close oversight to ensure that the preparation of a brief for the decision maker, if appropriate, is prepared promptly and correctly.

There are two clear options for the decision maker for the more serious, category 1, conduct matters that would currently be referred to the Tribunal:

- The Board or a sub-committee of the Board: this would have the advantage of not having a standing Tribunal which is not often required to be convened. It could also reduce double handling and decrease delays. There are, however, some concerns about the Board both directing investigations and making decisions for more serious conduct matters but this could be mitigated by clear and proper processes. There would still be review by the AAT.
- The Tribunal as currently convened: submissions to this review expressed confidence in the skills, expertise and independence of the Tribunal although there were concerns about how long the process took.

While this review is at the five-year point, there have been very few cases before the Tribunal and no cases from New Zealand. This means that many aspects of the regime relating to referral of jurisdiction, including the availability and accessibility of appeals and review from New Zealand have not been tested. It is suggested that it would be premature to change the current jurisdiction for the Tribunal for more serious cases.

A range of appropriate remedies and sanctions should be available

It is suggested that the sanctions that apply to findings of professional or unsatisfactory professional conduct should be retained.

There was widespread support for providing the Board with the power to apply lesser sanctions. These could include:

- Written cautions
- Compulsory education
- Working under supervision
- Perform an action for a client
- Limitations on practice
- Censure

Legislative amendments would be required to enable the Board to make decisions about breaches of the Code and to apply sanctions.

Recommendation 15

IP Australia and MBIE should review the disciplinary and complaint-handling regime increasing the focus on the resolution of complaints. This review should be based on the following principles:

- 1. Complaints should be triaged initially according to the alleged conduct with a focus on early resolution**
- 2. Investigations should be actively case managed and investigated to ensure prompt resolution**
- 3. Decisions should be made at the most appropriate level**
- 4. A range of appropriate remedies and sanctions should be available.**

Powers of the Board to obtain information and professional and privilege

Patent Regulation 20.34 allows the Board to require an attorney to cooperate with investigations and provide information. While the regulation also states that failure to provide the information is unsatisfactory professional conduct, this is difficult to prove in practice as the information might be required by the Board to proceed to a Tribunal hearing.

The Board has no power to compel anyone to assist its investigation. In the case of disputed facts, for example whether an attorney has given a client certain information, the Board cannot compel either party to be questioned.

A related problem is that there is currently no provision to retain professional privilege if material is disclosed to the Board.

While these issues are raised in the context of the current Board functions, these issues will be particularly pertinent if the Board is given powers to make decisions about conduct or sanctions.

Recommendation 16

IP Australia and MBIE should review whether existing powers available to the Board to obtain information are sufficient. At the same time, the question of retaining professional privilege over material disclosed to the Board should also be considered

Scope of disciplinary proceedings against an incorporated attorney

In a written submission NZIPA questioned why Patent Regulation 20A.10 requires that the Board can only apply to the Tribunal to cancel or suspend an incorporated patent attorney's registration after an employee patent attorney has been found guilty of professional misconduct. By comparison, the Tribunal may suspend an individual patent attorney's registration after being found guilty of professional misconduct or the lesser offence of unsatisfactory professional conduct.

They argue that, on that basis, an incorporated patent attorney is subject to a reduced scope of disciplinary proceedings than an individual patent attorney. NZIPA stated that they believe that difference needs a more thorough explanation, and/or a reform of the Regulations to align the two scopes.

The explanatory statement for the Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 explains:

Under the new regulation 20A.10, the PSB may apply to the Disciplinary Tribunal for cancellation or suspension of an incorporated patent attorney's registration on the grounds that an officer or employee of the incorporated patent attorney has been found guilty by the Disciplinary Tribunal of professional

misconduct under 20.43(1) and the Tribunal has cancelled or suspended the registration of the officer or employee.

The Regulation is intended to provide flexibility for the Disciplinary Tribunal to take action where it considers there is a systemic problem with the firm that might not be sufficiently dealt with by suspension of an individual attorney employed by the firm. The potential for de-registration of an incorporated attorney will provide a greater incentive for the board of the company, as a whole, to take active steps to ensure that individual officers and employees do not engage in activities that would amount to professional misconduct.

This regulation does not contemplate circumstances where action might be taken independently against an incorporated entity without a prior successful action against an individual attorney. This is incongruous with provisions in the Code that apply explicitly to incorporated attorneys (for example, paragraphs 12(3)(a) and 16(1)(d)).

Paragraph 16(1)(d) of the Code requires that prior to undertaking any work for a client, a registered attorney must ensure that the client is, or previously has been, clearly informed in writing whether the registered attorney is an incorporated company and, if it is, whether the company is public or private. In the case of an allegation that an incorporated entity has failed to comply with this provision, it would seem most efficient for the disciplinary proceedings to be commenced against the incorporated entity, rather than an individual attorney. This is particularly relevant if a number of individual attorneys were jointly responsible. There could also be a problem if the individual at fault was a contractor or a member of the administrative staff or there were concerns about the governance arrangements of the entity, and no individual attorney was directly responsible (except in their capacity as a director of the company).

Although these circumstances might be rare, this anomaly should be explored and addressed if appropriate.

Recommendation 17

IP Australia and MBIE should review the ability of the Board to take initiate disciplinary proceedings against an incorporated attorney and propose legislative amendment if appropriate.

Voluntary removal from the register and the disciplinary regime

The consultation paper notes that:

During the implementation of the regime, some specific issues have arisen in relation to implementation. In particular, the application of the regime only to registered patent attorneys has raised difficulties where a person undertakes actions while registered as an attorney and then, following the Board commencing action in relation to a complaint, suspends or removes themselves from the register.

This means that questions arise regarding the jurisdiction of the Board and the Tribunal to continue to deal with any complaints or disciplinary issues regarding the actions of that person. Although, if the person suspends or removes themselves from the register they cannot continue to operate as a patent attorney, the specific issues related to the actions complained about are not addressed. There is also the potential for that person to seek reinstatement of their registration in the future without the previous complaint being addressed. Notably, similar professional conduct regimes, such as those applicable to lawyers, provide for the complaints and disciplinary regime to apply to former lawyers in relation to conduct while they were a legal practitioner. This issue has the potential to undermine the public's confidence in the regime as an effective regulatory approach.

The Arrangement could be amended to ensure that the Board and the Tribunal retain jurisdiction on matters where an attorney undertook particular action while registered, regardless of whether the

attorney subsequently voluntarily suspends or removes their name from the register. A further option would be to place a bar on reregistration of attorneys where they had previously removed themselves while disciplinary proceedings were underway.

In the health check of the Code Professor Christie found that:

Almost all Attorneys and Clients were of the view that it should be possible for disciplinary proceedings to be brought or maintained against someone who was an attorney at the time of the alleged misconduct, even if they had subsequently removed themselves from the Register. It should not be possible for a wrong-doer to avoid the consequences of their wrong-doing by voluntary removal. Also, a message needs to be sent, to other attorneys and the public, that wrong-doing has consequences. A few participants felt that disciplinary proceedings would not need to be brought in this situation, as the objective of preventing the accused person from practising had been achieved through the action of voluntary removal from the Register. However, in this situation “the Board should have a long memory”, and should re-institute proceedings if the accused later sought to be reinstated on the Register.

There was general agreement from stakeholders in this review that the current system did not protect the public and that the cessation and re-commencement of proceedings could be costly and time-consuming – particularly if different Tribunal members were involved.

By way of comparison, under the *Migration Act 1958* MARA may start, or complete, an investigation of a complaint about a person at a time when they are no longer a registered migration agent. However, the Authority can investigate a complaint about a former registered migration agent only if the complaint is received within 12 months after he or she ceased to be a registered migration agent.

In 2020 the Australian Government agreed with a recommendation that a similar provision should apply to the TPB, that is, that investigations are able to commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration.

A provision such as this could give the Board and Tribunal the discretion whether to commence or continue with disciplinary proceedings in the event that an attorney voluntarily withdrew their registration. This review suggests that, where an attorney was prepared to give a binding undertaking that they would not seek re-registration within a certain period (for example, five years), the proceedings would be discontinued.

This type of proceeding would require different sanctions. Possible sanctions could include:

- a bar to seeking re-registration for a certain period
- require the attorney to undertake additional continuing professional education before re-registration
- require the attorney to work under supervision for a period of time following re-registration
- administer a public reprimand to the attorney.

Recommendation 18

IP Australia and MBIE should propose legislative amendments to allow the Board and Tribunal discretion whether to commence or continue with disciplinary proceedings in the event that an attorney voluntarily withdraws their registration.

Step-in powers for the Board

The current framework allows the Tribunal to appoint a registered patent attorney to carry on the practice of an attorney whose registration has been cancelled, until all outstanding matters are disposed of.

If a practitioner is temporarily incapacitated and unfit to practice, for example because of mental health reasons, in the absence of disciplinary proceeding and the cancellation of registration there are no provisions for another attorney to continue with their practice on a temporary basis. This leaves the IP rights of clients vulnerable and could decrease confidence in the system.

This review was advised that for lawyers, step-in rights allow someone to take over the practice for a period of time.

It was suggested that a professional association could arrange this. This would be sensible, and may already happen, if the hand over is voluntarily but the problem arises when a registered attorney, who is not competent at the time, declines assistance.

Recommendation 19

IP Australia and MBIE should consider whether the Board should have any role or powers to set up arrangements to ensure that the practice of a registered attorney who is temporarily incapacitated should be taken over for a period of time to ensure that the IP rights of clients continue to be safeguarded.

Should the Board be able to enforce offence provisions against unregistered patent practitioners?

According to section 201 of the *Patents Act 1990* an individual commits an offence if the individual carries on business, practises or acts, or describes themselves, as a patent attorney and they are not a registered patent attorney or a legal practitioner. The offence provisions in the legislation are enforced by the Australian Federal Police.

In the health check on the Code, Professor Christie found that attorneys expressed mixed views on whether the Board should be able to discipline non-registered people who undertake attorney work. A number wanted it to be able to do so. A few said they could not see how the Board would be able to do so, because the Code only applies to those who are registered. He noted that clients were of the view that the Board should be able to discipline non-registered people undertaking attorney work. It is important that someone takes responsibility for doing so, to ensure that the public is protected.

Professor Christie recommended this matter should be considered in the review of the trans-Tasman arrangements.

The Board has no powers to enforce against unregistered people. It is not clear how the Board, as currently structured, would investigate criminal matters of this type. Even with legislative amendment, this type of enforcement action would be very far removed from the disciplinary proceedings conducted against registered attorneys.

A key part of protecting the public from unregistered and unqualified practitioners is education. Recommendation 11 above proposes that the Board should increase awareness about what a registered patent attorney is, what services they can offer, and how they are regulated to enhance confidence that there is a high level of professional standards.

COMPETITION IN THE MARKET FOR PATENT ATTORNEY SERVICES

The consultation paper sets out the aims of the Arrangement for promoting competition:

By reducing barriers to providing patent attorney services across the two countries, the regime promotes competition in the market for patent attorney services. The joint regime promotes Australian and New

Zealand patent attorneys distinguishing themselves on standards, quality, and price of their services, rather than on their mere location. Competition can also provide a greater choice to innovative businesses when seeking an attorney to assist with patent attorney services in one or both two countries.

The paper provides data from both Australia and New Zealand on patent applications filed by Australian and New Zealand-based attorneys in the period 2010 to 2020. The data shows that the market share for domestic work has not changed significantly, but the market share for international applications has. More NZ attorneys are filing for international clients in Australia since 2016, but also more Australian attorneys are filing for international clients in New Zealand building on a trend apparent since 2010.

This evidence indicates that attorneys from both countries are making inroads into the other's markets thereby increasing competition in those markets. This was confirmed by anecdotal comments that the Arrangement had allowed both countries' firms to penetrate the markets of the other countries.

One comment was that the trans-Tasman arrangements had been good for competition by giving an opportunity for New Zealand to find a bigger market, reaching into the Australian market much more easily. New Zealand firms were competing favourably on cost with Australian firms and appearing more in matters including oppositions. Another comment was that Australian firms were marketing their services better in New Zealand and could be winning work that way thereby supporting increased competition.

A registered patent attorney from New Zealand expressed concern about what he described as 'decreased trans-Tasman cooperation between attorneys of the two countries. Friends are now competitors and sharing of information on issues of law and practice has been curtailed.' He commented

The joint regulatory regime enabled an Attorney sitting in Sydney to represent an American client in filing a Patent application or in, for example, a Patent Opposition at IPONZ in Wellington without leaving the comfort of his Australian office. Whilst it can be argued that the same is true in reverse, the imbalance in the volume of work coming from overseas into the respective countries has seen a significant decrease in the filings handled by NZ attorneys in New Zealand..

This attorney expressed concern that the joint regulatory regime has facilitated the creation of 'mega-groups' and led to a proliferation of attorney firms, as staff splinter from the consumed firms, giving the appearance that choice to the public has been enhanced. For companies looking for the size and resources of a large NZ based patent firm, this attorney believed that the acquisition of major firms had significantly reduced the choice available to NZ's bigger companies. One attorney was concerned about the increased competition and the downwards pressure on prices and said that the services had become 'commodified' although this was not because of the Trans-Tasman Arrangement.

Many stakeholders commented that the introduction of incorporated patent attorneys and the rise of listed holding companies had changed the landscape in a very significant way quite independently of the Trans-Tasman Arrangement. Many also commented on the increase in small independent firms that had resulted but saw these firms as providing increased competition. One partner of a small firm noted that their overheads were lower and they did not have to worry about returns to shareholders and so their services were more affordable.

IPTA noted that:

Through firm mergers and acquisitions it would appear that there are anecdotes of a reduction in the numbers of more experienced attorneys in the profession, perhaps earlier than would have usually been expected (i.e., earlier than a conventional retirement age of about 65). However, there has also been an apparent increase in the number of smaller attorney firms (e.g., through experienced attorneys leaving

large firms and establishing new practices), which may also be seen to have provided a new range of options to consumers seeking patent attorney services in Australia.

Data provided by IP Australia supports anecdotal information that the number of large firms has increased (largely through mergers) while the number of small and very small firms has increased. (The data is approximate because the field for the name of the firm is not mandatory.)

	Very small (1-2)	Small (3-5)	Medium (6-10)	Large (11+)
2017	120	26	6	15
2022	144	31	9	11

FICPI Australia advised its submission that it was not aware of any shortage of patent attorney services by firms although it is aware that the patent attorney labour market is currently tight in some technical areas in some geographic locations.

The cost of attorney services continues to be reported to be a key barrier to access to services. The report *Patents Accessibility Review* (R Mortley, Australian Government Department of Industry, Science, Energy and Resources, February 2021) found that for small businesses the costs of professional services fees – those of patent attorneys or lawyers – do become a problem, and many professed to be surprised by the way in which these mounted up. These associated professional services fees pose a barrier for a small business budget and are a cause of patent avoidance. The report also noted that very few businesses complained about Australian patent attorney fees, and some observed that the attorneys were very highly skilled and added a great deal of value to their proposal.

AusIndustry advisers' reports indicate that few issues with availability of patent or trade marks attorney services were noted, even though some companies are regionally based. All were being serviced from capital cities. There were some isolated issues in respect of specialised technologies. The companies reported they have had positive experiences with patent and trade marks attorneys, and believed they received value for money even though the costs were expensive. For some small businesses IP costs were prohibitive and they might adopt a different strategy (for example, first to market). One adviser's comment was that 'company's would also understand that a technically proficient and experienced attorney is worthwhile engaging and investing in. These initial costs could be the difference between significant business growth and market expansion. It is also worth noting that if the IP is ever contested, having a sound patent or alternate IP protection will be "where the rubber really hits the road" in protecting assets.'

In summary, the limited amount of data available in the short period since implementation indicates that the introduction of the Trans-Tasman system may have increased competition in the marketplace although this is probably not the primary cause for the increase in the number of firms; the re-structuring of the profession with the rise of listed entities, mergers and acquisitions is also relevant.

REGULATORY REGIME FOR TRADE MARKS ATTORNEYS IN AUSTRALIA

The framework

In Australia trade marks attorneys have been recognised and regulated as a profession since 1998. As with registered patent attorneys, registered trade marks are afforded privileges in relation to confidentiality of communications and advice to clients, and rights of lien in relation to documents and property of a client.

Trade marks work is defined in *Trade Marks Act 1995* only in respect of the requirements for an incorporated trade marks attorney (s 157A(8)). It includes:

- applying for or obtaining trade marks in Australia or anywhere else;
- preparing trade marks applications or other documents for the purposes of this Act or the trade marks law of another country;
- giving advice (other than advice of a scientific or technical nature) about the validity, or infringement, of trade marks.

There is no provision in the *Trade Marks Act 1995* corresponding to s 201(1) of the *Patent Act 1990* setting out the rights of registered trade marks attorneys to practice.

Is trade marks practice completely deregulated under the current legislation?

The explanatory memorandum for the 1998 amendments explained that:

Professional practice in trade marks and designs will be deregulated. The new registered trade marks attorney will have the same right of privilege over communication and the same exemptions from provisions of the copyright legislation as patent attorneys. They will be subject to the same disciplinary provisions as patent attorneys.

...

The [Johns Committee] recommends deregulation in the case of trade marks and designs, so that any person be allowed to lodge trade marks and designs applications. The basis of the recommendation is that such applications are more simple and less technical than in the case of patents. It also recommends that only qualified persons can carry the title of 'trade marks attorney'. It is proposed to adopt this recommendation.

...

The repeal of the section will have the effect of allowing any person to practice on behalf of a trade marks applicant before the Trade Marks Office in respect of trade marks matters

The explanatory memorandum for the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (that permitted incorporated attorneys to be registered) states:

A key difference between patents and trade marks attorneys is that there is no restriction on who may do trade marks work.

The Trans-Tasman Review discussion paper states that 'However, unlike patents, there is no requirement to be registered as an attorney under the regime in order to give advice or file trade mark applications so long as the terms 'trade marks attorney' or 'trade marks agent' are not used.' Information on the Trans-Tasman IP Board website also states that 'Registration is not compulsory for practice in trade mark matters'.

Submissions to the review raise issues that cast doubt about the accuracy of these statements and suggest that the current legislation may not allow any person to do the full range of 'trade marks work' in light of state and territory legislation restricting who may engage in legal practice.

The situation is complex but is explored in some detail in the paper *Understanding the 'Safe Harbour': The Prohibition on Engaging in Legal Practice and Its Application to Patent and Trade Marks Attorneys in Australia* (F Bartlett, R Burrell, (2013) 24 AIPJ 74). Bartlett and Burrell suggest that:

... a degree of confusion that appears to have arisen in relation to who may perform trade marks and designs work. Specifically, an understanding seems to have developed in some quarters that anyone may perform such work. For example, the Explanatory Memorandum to the Raising the Bar Act states that there is no restriction on who may do trade marks work. Claims of this type are potentially misleading and seem to be grounded in the fact that PTAs [patent and trade marks attorneys] do not have an exclusive right to act in trade mark matters in Australia. There is no per se prohibition on someone filing a trade mark application on behalf of another person or assisting a person in preparing a case for a hearing

before the Office or representing someone at such a hearing. This is consistent with the generally informal nature of trade mark proceedings before the Office. However, the mere fact that the Trade Marks Act 1995 (Cth) does not seek to limit expressly who may provide assistance to applicants and opponents in no way displaces the legal practitioners' reserve. In this respect, it is worth bearing in mind the form that any exception to the prohibition on engaging in legal practice has to take. As is discussed in more detail below, PTAs only avoid trespassing on the legal practitioners' reserve to the extent that they are engaged in practice under the authority of a law of the Commonwealth. It is this language that determines the scope of any exception and the Trade Marks Act could therefore only be understood to create a general safe harbour if it were interpreted as permitting anyone and everyone to engage in legal practice in these fields. There is simply no provision in the Trade Marks Act that can be read as having this effect.

The Bartlett and Burrell paper also argues that more needs to be done to clarify the safe harbour that registered trade marks attorneys enjoy from the prohibition on engaging in legal practice. They suggest that, in the absence of clear Commonwealth authority, it is possible that many of the activities of registered trade marks attorneys could trespass the reserves of legal practitioners. This could include representing clients in trade marks hearings.

A submission from a registered trade marks attorney, Mr Matthew Hammon, also suggests that the activities of a trade marks attorney could easily be construed as clearly mirroring those of a legal practitioner. He suggests that 'This ambiguity may place [trade marks attorneys] in a position of at unreasonable risk from an ethical standpoint and can only be rectified in a more permanent sense through regulatory reform.'

Hammon also notes that the uncertainty about the scope of trade marks practice extends to the issue of privilege and provides a recommendation as to how to 'to clarify and contemporise the scope of Trade Marks Attorney Practice and Privilege'.

In summary, although the *Trade Marks Act 1995* does not contain any express provision that a person commits an offence if they carry on business, practise or act as a trade marks attorney when they are not a registered trade marks attorney, patent attorney or legal practitioner, it is possible that such conduct might come within the scope of state and territory legislation that applies to the legal profession to prohibit such a person carrying out acts that comprise legal practice.

This uncertainty also extends to trade marks work conducted by registered trade marks and patent attorneys.

It is not within the scope of this report to reach a considered conclusion on this uncertainty, but these questions must be resolved.

Recommendation 20

IP Australia should clarify the extent to which individuals who are not legal practitioners can do trade marks work in light of the reserve of legal practitioners at a state or territory level, and inform applicants and registered attorneys of the outcome of this review.

Depending on the outcome of this exercise, IP Australia should also clarify the current provisions relating to the scope of work that can be done by trade marks attorneys. Qualifications to register as a trade marks attorney

Like patent attorneys, trade marks attorneys must have an academic qualification, must have appropriate knowledge of intellectual property law and practice, and must meet certain character requirements. However, the qualifications and knowledge requirements are less stringent than those of patent attorneys, and there is no requirement to complete a period of supervised employment before becoming a registered attorney or to provide a statement of skills.

Currently a person can qualify as a registered trade marks attorney without any practical experience and work as a sole practitioner without supervision. FICPI Australia recommend a minimum period of experience be obtained in relation to certain areas of skill before registration can be obtained, to improve the level of skill in trade marks attorneys and aid in protecting the public from inexperienced or unskilled but registered trade marks attorneys.

In IPTA's view, candidates for registration as a Trade Marks Attorneys should engage in a period of supervised legal practice and their application for registration accompanied by a statement from the supervisor confirming the completion of the period of supervised practice accompanied by a statement of skill prepared by the candidate. IPTA suggests that the period of supervised practice should be no less than 2 years with the candidate practising at least 50% of their time exclusively in relation to trade marks matters. The period may be completed during the period of study.

The current Trade Marks Regulations require attorneys to hold a qualification at Australian Qualifications Framework Level 5 or higher, which is equivalent to a Diploma level. Bannon suggest that 'to the extent that work carried out by TMAs is both complex and requires expert judgement, the qualification level outlined appears to be incongruent with the standard of work that attorneys will inevitably undertake'. He suggests that at Level 7 – Bachelor's Degree, graduates will possess a higher-level knowledge and demonstrate wider skills, which appears considerably more in line with the requirements of the profession.

This view was not supported by others. One attorney questioned why any academic qualification was a pre-requisite for registration. It should also be noted that the educational requirement for a patent attorney is also Level 5 (although the requirement for depth of study means that often candidates will hold a bachelor's degree).

This review noted that there are very few complaints relating to the level of professional expertise of registered trade marks attorneys. While introducing a requirement for work experience and increasing the level of academic qualifications could improve the standards of expertise, this review was not persuaded that there is evidence that this level of additional regulation is warranted.

Should there be an exclusive right to practice for trade mark attorneys?

This report concludes above that there is some uncertainty as to the degree to which the provision of trade marks services is, in fact, currently deregulated. Notwithstanding this uncertainty, this section looks at whether there should be greater regulation in this area.

A significant number of submissions and comments in meetings raised concerns about the provision of advice by unqualified and unregistered trade marks practitioners, including accountants and other business advisers. In 1998 deregulation was based on the assumptions that trade marks applications are more simple and less technical than in the case of patents, and that the commercial risk is lower. Many attorneys disputed these assumptions.

Hammon also argues that consumers and businesses should be protected from unqualified providers. He suggests:

Further, the scope of trade marks work is increasingly complex, not least of which due to contemporary issues concerning the internet and jurisdictional matters, but also with respect to the emergence of trade mark "adaptations" such as Non-Fungible Tokens (NFTs), Cryptocurrency Addresses, Domain Name Extension deregulation and the emergence of digital and virtual experiences and marketplaces. All these applications involve at least some degree of application of trade mark law principles and are only likely to become increasingly front and centre to trade mark law in the future. It appears problematic, at best, that

under the current statutory regime, almost anyone may conduct trade marks work with respect to these services, even they hold no legal qualifications.

IPTA stated that it is in favour of a strong framework for regulation of Trade Marks Attorneys with a view to strengthening the integrity of the profession. They assert:

One key issue which is of significant ongoing concern in relation to the regulation of Trade Marks Attorneys, and IPTA Members, is the lack of any exclusive right to practice. This lack of exclusive right to practice creates inequity as there are now a set of professionals (Trade Marks Attorneys and Australian Legal Practitioners) who are heavily regulated, and an ever-growing set of unqualified agents who are not regulated. IPTA is not aware of any other situation in which parties are able to routinely act on behalf of others for payment (that is a Non-Qualified Agent) before an authority in Australia or New Zealand, and advertise and solicit work on this basis, without some form of qualification, registration or system of regulation.

... IPTA has consider the issue at length and importantly the Trade Marks Attorney profession seems to have its closest comparison with the Conveyancer. A Conveyancer need only have relevant understanding of state-based laws in relation to property and yet Conveyancers enjoy an exclusive right of practice in the various States. Another comparison may be drawn to Migration Agents who enjoy an exclusive right of practice at the Federal Level. There are many other examples.

In IPTA's view there is nothing which is easy or straightforward in filing, prosecuting and giving advice in relation to trade mark matters. IPTA considers that this unfortunate assumption appears to have arisen as a result of focusing primarily on the process of obtaining a registered trade mark without a full appreciation of the substance involved in the complex web of legislative requirements, practice and case law issues surrounding the area of trade marks.

There was substantial anecdotal information that, although filing a trade marks application was inexpensive and reasonably straightforward, many applications filed by unqualified practitioners contained fatal flaws that could prove very costly. These latent flaws might only become apparent in oppositions or when attempting enforcement at which time rectification was not possible. The general view expressed was that, although anyone could conduct the administrative act of filing an application, particular skills were required to determine classes of goods and services, conduct a search and provide advice on validity – which services were often associated with filing. It was asserted that, if a trade mark is opposed, those filed by a registered attorney are less likely to have fatal problems.

It must be acknowledged that input into this review was heavily biased towards registered attorneys who might be expected to argue for an exclusive right to practice; however, the large number of concerns raised, and the potential cost to business, indicates that this is an issue that requires further exploration. It is difficult to quantify the problem based on anecdotal information and premature to propose further regulation. It might be possible for IP Australia to obtain relevant data about the extent of any problem by looking at the experiences of trade mark applicants when their applications are opposed.

Recommendation 21

IP Australia should investigate the experiences of trade mark applicants who have used unqualified and unregistered practitioners to determine if further regulation of the profession is required. This could be achieved, for example, by way of a quantitative and qualitative survey of trade marks clients after opposition proceedings to ascertain the extent to which the advice of unqualified and unregistered practitioners was considered by clients to have adversely affected their interests.

A key part of protecting the public from unregistered and unqualified practitioners is also education. Recommendation 11 above proposes that the Board should increase awareness about what a registered attorney is, what services they can offer, and how they are regulated to enhance confidence that there is a high level of professional standards.

OTHER ISSUES

Patents work performed overseas

A number of practitioners said that they had heard anecdotally of registered patent attorneys sub-contracting drafting work offshore to reduce costs. Concerns were raised about the treatment of confidential information, the ethics of using a non-Australian attorney to do the work, and the likelihood that the work could be properly supervised if it was outsourced as a cost-saving measure. Other attorneys had not heard of this practice and some said that, in any event, it would not cause concern if the work was properly under the control and supervision of the registered attorney.

In the health check of the Code of Conduct Professor Christie considered this concern and recommended that:

The Guidelines should be enhanced by:

- (i) *stating that the Code section 17 obligation of disclosure requires an attorney to inform the client of the person by whom the work was undertaken, where that person is not the attorney or a member of the attorney's firm;*

This is a matter that is properly dealt with under the Code and Guidelines and this review supports Professor Christie's recommendation.

Proceedings against a complainant

A confidential submission proposed that the Code should be amended to ensure that if a person makes a complaint against an attorney or an incorporated attorney, then the attorney complained of must not commence proceedings against a complainant 'except for manifest malice'.

This issue is not within the scope of this review. It could be considered further in the next review of the Code.

Limitations on liability and professional indemnity insurance

FICPI Australia urged the introduction of a limitation on liability scheme similar to those provided to lawyers in state-based schemes.

FICPI Australia also questioned the current arrangements for incorporated patent attorneys requiring professional indemnity (PI) insurance. They noted that there is currently no guidance or requirement on the quantum of insurance regarded as adequate. There is also no requirement for PI insurance for firms having a different structure. FICPI Australia suggests that firms should have for their own protection and for the public's protection no matter the structure.

The explanatory statement for the 2013 amendment that introduced the relevant regulation states:

Currently, there is no requirement for patent attorneys to be covered by a professional indemnity insurance policy. At present, only individuals can be registered as patent attorneys. The potential for an individual or partner to be personally liable in negligence is sufficient incentive to ensure that they acquire appropriate professional indemnity insurance. With the introduction of incorporated patent attorneys, however, there may be issues of liability for negligence claims. The patent attorney director, or an

employee of the company, may bear no personal responsibility if a claim of negligence or breach of professional duty is made against the company. Furthermore, the company may have insufficient assets to cover a successful negligence action.

New subregulation 20A.3(b)(iii) requires that incorporated patent attorneys hold a professional indemnity insurance policy. It is intended that the Designated Manager would be able to ask an incorporated attorney to provide evidence that it had an adequate professional indemnity insurance policy at any time, to ensure that an appropriate policy was maintained.

While these concerns have been raised, there is no strong evidence as to why further regulation is required introducing a limitation on liability, or addressing the quantum of insurance or cover for unincorporated entities.

APPENDIX A: LIST OF SUBMISSIONS

1. Confidential
2. The Australian National Association of the International Federation of Intellectual Property Attorneys (FICPI)
3. Henry Hughes IP
4. The Institute of Patent & Trade Mark Attorneys of Australia (IPTA)
5. The New Zealand Intellectual Property Attorneys Inc (NZIPA)
6. Matthew J. Hammon
7. Kristy Tan

APPENDIX B: LIST OF MEETINGS

Patrick McManamny	Disciplinary Tribunal
Andre Meyer	Disciplinary Tribunal
Anthony Alder	TTIPAB (current)
Siobhan Ryan	Disciplinary Tribunal
Tania Obranovich	TTIPAB (former)
Andrew Christie & Ben Hopper	University of Melbourne
Matthew Rimmer	Queensland University of Technology
Ian Finch	TTIPAB (current)
Kate Duckworth	TTIPAB (current)
Natalie Stoianoff	University of Technology Sydney
Elizabeth Hopkins	TTIPAB (current)
Simon Saunders	Airflow Innovation
Mary Padbury	TTIPAB (former chair)
Jennifer Enmon & Belinda Hartmann	Pearce IP
Liz Eadie & Hishani Prabakaran	CSIRO
Ian Horak & Robynne Sanders	IPSANZ
Mark Pullen	LESANZ
Janelle Borham	IPTA
Carl Harrap	TTIPAB (current)
TPB staff	Tax Practitioners Board
Philip Heuzenroeder	IPH
Andrew Christie	Reviewer of the Code
OMARA staff	Office of the Migration Agents Registration Authority
Michael Schwager	IP Australia