

**COMMONWEALTH OF AUSTRALIA**

Patents Act 1990  
Patents Regulations 1991, Chapter 20

**DISCIPLINARY TRIBUNAL FOR PATENTS AND TRADE MARKS ATTORNEYS**

**IN THE MATTER OF:** **JAMIE RICARDO MASSANG** a Patent Attorney

**COMPLAINT BY:** **AB**

**Tribunal:** Mrs S. Higgins

**Date:** 10 June 2009

**Place:** Sydney

- Decision:**
1. The patent attorney is guilty of unsatisfactory conduct in that it was not necessary for the attorney to take the 5 comparative photographs of the complainant on 10 November 2003 for the purpose of processing her patent application and furthermore that he conducted himself in such a manner at this time when taking all 10 photographs that the complainant was intimidated by him and allowed herself to be photographed by him in circumstances where she felt she had no option but to comply with his request.
  2. The Patent Attorney is guilty of unsatisfactory conduct in that on 23 July 2007 during a telephone conversation with the complainant and with the complainant's husband, the attorney shouted and used expletives which had the effect of intimidating the and her husband.
  3. Subject to the parties advising the Tribunal to the contrary by 17 June 2009, the proposed orders as set out in paragraph 169 of these reasons for decision will take effect.

.....  
Sigrid Higgins  
Patent and Trade Marks Disciplinary Tribunal

NOTE: on 11 June 2009 order 1 was amended by (a) removing the word 'unprofessional' and inserting the correct word 'unsatisfactory' and (b) removing the number '9' in the date and inserting the correct number '10'.

## CATCHWORDS

*DISCIPLINARY PROCEEDINGS – whether alleged conduct by the registered patent attorney constituted unprofessional conduct and or unsatisfactory conduct – the attorney took photographs of the complainant modelling her invention – whether it was not necessary to take the photographs in the circumstances in order to process the patent application – whether the attorney conducted himself in such a manner that the complainant was intimidated by him and allowed herself to be photographed as she felt she had no option but to comply with his request – whether attorney advised the complainant to lodge her PCT application at the about the same time as she lodged he innovation patent application and whether this advice was not correct – whether the attorney advised the complainant that she needed to lodge her national phase applications in order to protect her interest and whether this advice was incorrect –the attorney shouted and used explitives in his telephone conversation with his client and her husband.*

Patents Regulations 1991 reg 20.1, 20.23

Patents and Trade Marks Legislation Amendment Regulation 2008 (No 1)

Allison v General Council of Medical Education and Registration [1894] 1 QB 750

Briginshaw v Briginshaw (1938) 60 CLR 360

John Peter Gahan and Professional Standards Board for Patent and Trade Marks Attorneys (1998) 27 AAR 517; [1998] AATA 479

Law Society of New South Wales v Foreman (1994) 34 NSWLR 408

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170, (1992) 110 ALR 449

Nuttall and Kelly Patent Attorneys Disciplinary Tribunal (Cth), 28 February 199

Professional Standards Board for Patent and Trade Marks Attorneys Disciplinary Tribunal (2002) 70 ALD 592; [2002] AATA 728

Qantas Airways Ltd v Gama (2008) 101 ALD 459

Re Vern Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW), 136

## REASON FOR DECISION

### Introduction

1. These proceedings arise from a complaint, made in October 2007, by [AB] (**‘the complainant’**), against Jamie Ricardo Massang (**‘the attorney’**), a patent attorney registered under Chapter 20 of the *Patents Regulations 1991* (**‘the Regulations’**). The complainant made her complaint to the Professional Standards Board for Patent and Trade Marks Attorneys (**‘the Board’**) pursuant to Reg. 20.20 of the Regulations as they applied at that time. The Regulations were amended by the provisions in Schedule 1 of *Patents and Trade Marks Legislation Amendment Regulations 2008* (No 1). These new provisions came into force on 1 July 2008. However they do not apply to these proceedings: see clause 5 of the 2008 Regulations. The Regulations as they applied before 1 July 2008 apply.
2. On 14 March 2008, after investigating the complaint, the Board, pursuant to Reg. 20.21(2) of the Regulations, gave written authority to the complainant to bring disciplinary proceedings before the Tribunal against the attorney charging him with unsatisfactory conduct and/or unprofessional conduct in several respects (**‘the charge’**). The complainant subsequently informed the Board that she wanted the Board to bring the proceedings on her behalf: see Reg. 20.21(4) of the Regulations as they applied at that time.
2. These are the Tribunal's reasons for decision in regard to the alleged inappropriate conduct of the attorney that is the subject of the charge.

### Background

3. The attorney has been registered as a trade mark attorney since 11 January 2000 and a patent attorney since 6 March 2000. He has been a partner of his firm since October 2000.
4. On 10 November 2003, the complainant engaged the attorney to secure patent protection of [a garment] she had designed [**‘the complainant’s invention, her invention or the invention’**)]. [...]. The complainant had previously engaged the attorney, in November 2001, at the suggestion of her local solicitor. She engaged

him so as to secure patent protection of a changeable shoe she had designed. A provisional Australian patent application was lodged by the attorney on behalf of the complainant in regard to this changeable shoe. However, the complainant subsequently abandoned the application.

5. It is the attorney's alleged conduct in regard to the patent protection of [her subsequent invention] that is the subject of these proceedings.
6. The complainant had thought of the concept [for her subsequent invention] some weeks prior to 10 November 2003 and after making a prototype of the [invention] and trying it on and showing it to some friends, decided to contact the attorney. Prior to this, she had also contacted her solicitor. There is a dispute as to whether the complainant initially spoke to the attorney or his assistant. What is not disputed is that during the afternoon of 10 November 2003, the attorney travelled some 2 hours from his office to the home of the complainant, he met with her and examined the [complainant's invention], he took 3 photographs of the complainant modelling [her invention] with his digital camera and he was given by the complainant a prototype of [her invention] so that he could prepare and lodge, on behalf of the complainant, a patent application for her invention.
7. There is a dispute about the time the attorney arrived and how long he was there. There is also a dispute as to what was said during the time he was there, the circumstances giving rise to the taking of the photographs and how many photographs were taken.
8. It was the complainant's contention that she was embarrassed to model her [invention] for the attorney. She contended that after she was unsuccessful in obtaining someone younger to model them for her, she was intimidated by the comments of the attorney and felt she had no option but to model her [invention] and other comparative [garments] for the attorney so that he could take the photographs. The complainant's contention was that 10 photographs were taken by the attorney. It was the attorney's contention that, other than the 3 photographs of the complainant modelling her invention, the photographs were not taken by him and were forgeries.

9. On 12 November 2003, the attorney lodged, on behalf of the complainant, pursuant to the *Patents Act* 1990, an Australian innovation patent application for [her invention].
10. Twenty six (26) days later, on 8 December 2003, the attorney lodged an international patent application in regard to the [complainant's invention]: see Chapter 8 of the *Patents Act* 1990. The priority date in this international patent application was 12 November 2003, being the date of the filing of the innovation patent application. The international patent application provided provisional protection for the complainant's invention in countries that were a signatory to the *Patent Co-operation Treaty* ('PCT'). The provisional protection was however, subject to the complainant lodging, within the specified time, a separate patent application for her invention in each country where she wanted to have her invention protected. These applications are referred to as 'national phase' patent applications and the costs of these can be considerable.
11. On 13 January 2004, the attorney registered, on behalf of the complainant, pursuant to the *Trade Marks Act* 1995, the stylized version of the word mark [...].
12. Between 14 May 2004 and 16 December 2004, the attorney lodged, on behalf of the complainant and/or the company owned and controlled by her and her husband ('**the company**'), international patent applications in the European regional phase, and national phase applications in the United States of America, Canada, Japan, Australia and New Zealand. Further national phase applications were made in South Korea, South Africa and Israel in 2005 and a final national phase application was made in China in 2006.
13. By October 2006, the complainant, and/or the company, had been invoiced by and paid to the attorney's firm about \$100,000 towards the various patent applications that had been made on behalf of the complainant for her [...] invention. This was partly financed by the complainant and her husband selling their home in 2005. They then moved into a smaller home. It should be noted that the amounts invoiced and paid by the complainant and her husband for the work that was done is not the subject of the charge made by the Board. It was the timing of the PTC international

patent application and the subsequent national phase applications that is the subject of the charge.

14. Between October 2006 and April 2007, the complainant and her husband were experiencing difficulties in paying the amounts invoiced by the attorney's firm. Some payments were made. However, in April 2007 the attorney said he would do no further work until all outstanding invoices had been paid. It was during this time that the relationship between the attorney and the complainant and her husband deteriorated completely. In August 2007, the attorney commenced proceedings against the complainants company seeking payment of \$3,347.77 in outstanding fees. It was at this time that the complainant and her husband sought assistance from another patent attorney. As a result of this assistance, the complainant and her husband identified several issues of concern about the manner in which the attorney had dealt with the complainant's patent applications. As a consequence the complainant lodged her complaint with the Board.

### **The Charge**

15. On 28 May 2008, the Board particularised the charge of unsatisfactory conduct and/or unprofessional conduct it had made against the attorney. It relevantly provided as follows:

- '1. ...
2. ...
3. On 10 November 2003, [the attorney] attended [the complainant] at her home to discuss the patent application. At the meeting [the attorney] took photographs of [the complainant] modelling garments, including her invention [description of the invention].
4. It is alleged that [the attorney] informed [the complainant] that he required the photographs in order to process the patent application.
5. It is alleged that it was not necessary for [the attorney] to take the photographs of [the complainant] for the processing of the patent applications. It is alleged that, in the circumstances, the taking of photographs of [the complainant] amounted to unsatisfactory and/or unprofessional conduct.
6. It is further alleged that [the attorney] conducted himself in such a manner at this time that [the complainant] was intimidated by him and allowed herself to be photographed by him in circumstances where she considered that she had no option but to comply with his request. For further particulars of the

conduct referred to see paragraph 3 of the statutory declaration of [the complainant] dated 22 October 2007.

7. On 12 November 2003 an Innovation Patent (2003100936) was filed on behalf of [the complainant] for the [description of the invention] innovation by [the attorney].
  8. It is alleged that [the complainant] was advised by [the attorney] on or about the time when the Innovation Patent was filed to file an international (“PTC”) application for the [...] invention “without delay”.
  9. On 8 December 2003 a PTC Application was filed (PTC/AU2003/001649) for [the invention].
  10. By invoice dated 9 December 2003, [the complainant] was invoiced by [the attorney’s firm] for the amount of \$9500.00 in relation to the PTC application PTC/AU2003/001649.
  11. It is alleged that [the attorney] did not advise [the complainant] that the PTC application could be made up to 12 months after the date that the Innovation Patent was filed claiming priority from 12 November 2003.
  12. It is alleged that the advice given to [the complainant] by [the attorney] as particularised in paragraph 8 was not correct as there was no necessity to file the PTC application at that time in order to protect his client’s interests. As a result of this advice, [the complainant] incurred the cost of filing the PTC application at a time when this was not necessary. It is alleged that this constitutes unsatisfactory and/or unprofessional conduct.
  13. About late February 2004, [the attorney] advised [the complainant] that national phase applications needed to be filed to protect her interests. As a result of this advice, [the complainant] incurred the cost of filing such applications, which were filed between 14 May and 16 December 2004. It is alleged that such applications did not need to be filed until 12 May 2006.
  14. It is alleged that in providing the advice as particularised in paragraph 13 was not correct and resulted in [the complainant] incurring expenses at a time when this was not necessary. It is alleged that this constitutes unsatisfactory and/or unprofessional conduct.
  15. It is alleged that during telephone conversations with [the complainant] and her husband, [the attorney] shouted and used expletives which had the effect of intimidating his client and her husband. It is alleged that this constitutes unsatisfactory and/or unprofessional conduct.
16. No issue was taken about the form of the charge and the particulars thereof. The particulars identify 4 incidents in which it is alleged that the conduct of the attorney amounted to unsatisfactory and/or unprofessional conduct. In summary they are as follows:
- (a) **‘allegation 1’** – the allegation has two aspects to it. These are:

- i. it was not necessary for the attorney to take the photographs of the complainant, on 10 November 2003, in order to process her patent applications: see paragraphs 4 & 5 of the abovementioned particulars; and
  - ii. the circumstances in which the attorney conducted himself, on 10 November 2003, was intimidating in that the complainant felt she had no option but to comply with his request to be photographed wearing [her invention and other comparable garments]: see paragraph 6 of the abovementioned particulars.
- (b) **‘allegation 2’** - the attorney’s alleged advice to the complainant, on or about 12 November 2003, that on or about the time her innovation patent was filed she should file an international patent application without delay so as to protect her interest: see paragraph 12 of the above particulars;
- (c) **‘allegation 3’**- the attorney’s alleged advice to the complainant, in late February 2004, that national phase applications needed to be filed to protect her interest in the patent for her undergarment: see paragraph 14 of the above particulars; and
- (d) **‘allegation 4’** - the attorney’s alleged shouting and use of expletives during a telephone conversation with the complainant and her husband: see paragraph 15 of the above particulars.
17. The attorney does not deny every aspects of the alleged conduct as particularised. However, he strenuously denied that his conduct, as admitted or alleged, amounted to unsatisfactory and/or unprofessional conduct. He contended that he was at all times acting on instructions from the complainant and that he conducted himself, in the circumstances, in accordance with the standard of conduct expected of a registered patent and trademarks attorney.

### **The Issues**

18. The primary issues for determination in these proceedings are as follows:

- (a) whether, in regard to those areas in dispute, the attorney's alleged conduct, as particularised, did or did not occur;
  - (b) whether the attorney's conduct (as admitted or otherwise established) amounts to unsatisfactory and/or unprofessional conduct (see paragraphs 32 to 39 below); and
  - (c) if the attorney's conduct (as admitted or otherwise established) is found to amount to unsatisfactory and/or unprofessional conduct, what disciplinary action (if any) should be imposed on the attorney.
19. Only (a) and (b) are dealt with in these reasons for decision. Both issues are primarily factual in nature.
20. For the reasons set out below I have found that the attorney's conduct as particularised in allegation 1, and 4 have been established and that each allegation constituted unsatisfactory conduct. On the other hand I have found that the attorney's conduct as particularised in allegation 2 and 3 have not been established.
21. Accordingly, for the purpose of (c) above, disciplinary action can only be considered in the context of the attorney's conduct that has been found to amount to unsatisfactory conduct. It is appropriate that the Board and the attorney be given an opportunity to file evidence (if any) and make submissions in regard to this issue before any determination is made.

### **The Onus of Proof**

22. There is no dispute that the onus of proof in these proceedings rests on the Board and that the standard of proof is the civil standard of proof, on the balance of probabilities.
23. It is well accepted that 'the *strength* of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to be proved' (emphasis added): see *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, (1992) 110 ALR 449 at 450 per Mason CJ,

Brennan, Dean and Gaudron JJ, and *Qantas Airways Ltd v Gama* (2008) 101 ALD 459 at [109] per French and Jacobsen JJ and [123] to [126] per Branson J.

24. This concept was explained by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 360 at 361-362 in the following terms:

‘... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.’

### **The Evidence**

25. The Board tendered into evidence written statements of the complainant, the complainant’s husband, the complainant’s daughter, the complainant’s former neighbour and a friend of the complainant. The complainant and her husband also attended the hearing and gave oral evidence and were cross-examined by counsel for the attorney. The complainant’s daughter, former neighbour and friend also gave oral evidence by telephone and were cross-examined at the hearing.
26. The Board also tendered into evidence 2 expert reports of Gregory James Bartlett (**‘Mr Bartlett’**), a registered patent attorney for 22 years. Mr Bartlett also attended the hearing and was cross-examined by counsel for the attorney.
27. The attorney tendered into evidence written statements he had made and also written statements from his former personal assistant, the financial controller of his firm, the principal of his firm, a marketing consultant with whom he had worked and who had worked with the complainant on her invention, Brendan Nugent a partner in the firm Griffith Hack and Mr A F J Ward, the Chairman of Partners at Griffith Hack. The attorney, his personal assistant, the financial controller, the marketing consultant and Mr Nugent each gave oral evidence at the hearing and they were each cross-examined by the solicitor of the Board. The attorney’s former personal assistant and

the financial controller of his firm gave evidence by telephone at the hearing. They were also cross-examined.

28. The attorney also tendered into evidence an expert report by Kenneth John McInnes ('**Mr McInnes**'), a registered patent attorney for 27 years. Mr McGuinness also gave oral evidence at the hearing and was cross-examined by the solicitor appearing on behalf of the Board.
29. In addition to the abovementioned evidence the Board tendered into evidence relevant material from its investigation into the complainant's complaint.
30. The evidence of the various witnesses mentioned above is dealt with below under the heading 'Events of 10 November 2003' and the relevant allegation heading. It should be noted that objections were taken in regard to various aspects of the written statements that had been tendered by the respective parties. These objections were dealt with during the course of the hearing. To the extent statements included submissions and not evidence these have been considered as such.

### **Unprofessional Conduct and/or Unsatisfactory Conduct**

31. It is convenient to first set out the applicable statutory definitions of the terms 'unsatisfactory conduct' and/or 'unprofessional conduct' and how these have been construed.
32. At the time the attorney engaged in the abovementioned alleged conduct, the terms were then defined in Reg. 20.1 of the Regulations as follows:

*'Unprofessional conduct'* means conduct on the part of a registered patent attorney whereby he or she can be regarded as committing a gross failure to comply with the standards that, in the circumstances, it is reasonable to require the registered patent attorney to observe.

*'Unsatisfactory conduct'* means not having attained or sustained a professional standard that is consistent with the standard of practice of registered patent attorneys.

33. As can be seen from these definitions 'unprofessional conduct' is the more serious of the two. It applies where the conduct of a registered attorney may be regarded as a 'gross' failure to comply with the standards which are reasonable to require the

attorney to observe in the circumstances. The term 'gross' is not defined and should be given its ordinary meaning. In the Australian Concise Oxford Dictionary (4<sup>th</sup> Edition) the word is defined as follows:

'1 overfed, bloated; repulsively fat. 2 (of a person, manners or morals) noticeably coarse, unrefined or indecent. 3 *colloq.* very unpleasant, repulsive, disgusting. 4 flagrant; conspicuously wrong (*gross negligence*) ...'

34. The use of the word 'gross' in the definition of 'unprofessional conduct' is consistent with the original meaning given to the term by Lopes LJ in *Allison v General Council of Medical Education and Registration* [1894] 1 QB 750; namely conduct 'which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. It would however include conduct 'which may reasonably be held to violate, or fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency' see *Re Vern Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW), 136 at 143.
35. On the other hand 'unsatisfactory conduct' is conduct of a registered attorney undertaken in the course of his/her profession which falls short of the 'accepted' standards of practice of a registered patent attorney.
36. Both provisions are premised on 'standards'. In the case of unprofessional conduct the 'standards' are those that are reasonable to require a registered a patent attorney to observe and in the case of unsatisfactory conduct it is the 'standard of practice'. As pointed out by the Tribunal in *Nuttall and Kelly Patent Attorneys Disciplinary Tribunal* (Cth), 28 February 1997 at [60] in either case the particular 'standard' must be objectively ascertained. The Tribunal went on to say that it was so ascertained through the calling of expert evidence from experienced and knowledgeable registered patent attorneys and by reference to written rules or codes of conduct which are shown to have been accepted as part of the 'standard practice' of registered patent attorneys.
37. In *John Peter Gahan and Professional Standards Board for Patent and Trade Marks Attorneys* (1998) 27 AAR 517; [1998] AATA 479 and *Professional Standards Board for Patent and Trade Marks Attorneys and Patent and Trade Marks Attorneys*

*Disciplinary Tribunal* (2002) 70 ALD 592; [2002] AATA 728 the Administrative Appeals Tribunal ('the AAT') adopted a similar approach. In both cases the AAT considered the evidence of independent experienced registered patent attorneys who gave evidence of the circumstances which in their opinion could constitute unsatisfactory conduct and unprofessional conduct. That evidence is not relevant to these proceedings as it related to conduct of a different nature.

38. In neither case did the AAT hold that the evidence of the independent registered patent attorney was conclusive. It was ultimately a matter for the AAT to determine having regard to the particular circumstances of the disciplinary matters before it, including the relevant professional standards that applied at the time the alleged misconduct conduct was engaged in.
39. A person who is registered as a patent attorney under the Regulations is no different to a legal practitioner or other regulated professional in that high standards of competence and diligence are expected of such persons when dealing with clients, other registered practitioners and the relevant patent authorities: see *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 412 per Kirby P. The reasons for this is so that members of the public, clients, other registered practitioners and the relevant authorities can have confidence in 'the integrity of those who enjoy special privileges' as a registered practitioner.

### **Events of 10 November 2003**

40. Before I set out my findings in regard to the five allegations, it is necessary to deal with the evidence, to the extent there are material differences, in regard to the events of 10 November 2003. As I have mentioned in the background the material differences in the evidence concern the following:
- (a) the circumstances leading to the meeting between the complainant and the attorney – e.g. was the meeting arranged directly with the attorney? Or was it arranged through the attorney's assistant?
  - (b) at what time was the attorney at the premises of the complainant?

(c) what were the circumstances giving rise to the taking of the photographs?  
Did the complainant volunteer to be photographed?

(d) how many photographs did the attorney take?

41. *Circumstances in which the meeting was arranged* –It was the complainant’s evidence that on the morning of 10 November 2003 she telephoned the attorney’s firm and spoke to the attorney. She said they had a conversation along the following lines (see Exhibit A3 at [4]):

He said: ‘Your idea certainly sounds like it is unique and innovative and have you made any prototypes.’

She said: ‘Yes I have made some and tested them on my girl friends the previous Saturday with terrific responses. My girlfriends were astounded [...].’

He said: ‘You should proceed without delay to ensure your idea is secured by lodging a patent application which I can write up immediately. My costs are very reasonable.’

She said: ‘How can I do this?’

He said: ‘I am free to come to your home this afternoon, to discuss and see the prototype, which will allow me to draft up a patent application.’

She said: ‘That will be OK, see you this afternoon.’

42. The attorney denied he had spoken to the complainant that morning. His evidence was that his assistant had informed him that the complainant had called that morning and she had arranged for him to meet with the complainant at her home that afternoon at 2.00pm. In support of this evidence the attorney relied on his office diary for that day: see Exhibit R2 at JMR1. Hand written in the diary for this day, at ‘2.00’ was the complainant’s name, her telephone number (land line and mobile). The details of the complainant’s address were written immediately underneath this. The writing is not that of the attorney.

43. In her statement, the attorney’s assistant, who left the firm in 2004, said she had taken the call from the complainant that morning and made the appointment for the attorney to ‘attend her premises ... on an urgent basis’ (see Exhibit R5). In her oral evidence the attorney’s assistant explained that she had made her statement on the

basis of a series of questions that were asked of her by the assistant to the solicitor of the attorney. These questions it appears were not asked in the context of relevant contemporaneous documents held by the attorney as the assistant said she was not provided with these. Notwithstanding, this the assistant's evidence was that she had a clear recollection of events on that day, which occurred 5 years previously. When pressed as to her recollection, the assistant acknowledged that she did not necessarily remember every specific detail of what happened that day. Her concession in my opinion was correct, given the time lapse and the fact that she was not able to refresh her memory from contemporaneous documents. For example, she was not even able to give evidence that the handwriting on the diary was hers. In light of this and the concession made by the assistant, in my opinion, little weight, if any, can be given to her evidence as to whether she received the call from the complainant that day.

44. I also find it difficult to accept the evidence of the attorney. The diary entry made no reference to the meeting being urgent or that it was for 'patent advice' or a 'patent'. The latter descriptions I note were included in other appointment references in the diary on this and the following day. If the attorney's assistant had taken the call and made the appointment one would have expected a reference of this kind and 'urgent' to have been included against the complainant's name and details. The complainant lived a 2 hour drive from the attorney's office and it defies commonsense that he would drive this distance, without some knowledge about the invention and assessing the relevant urgency for him to go that particular afternoon.
45. On the other hand, there is no reason not to accept the evidence of the complainant. Although the events were a long time ago the complainant is more likely to have remembered speaking to the attorney that morning. The purpose of her call after all was to speak to the attorney as she wanted to ensure that she obtained the necessary protection for her invention. While her invention was relatively new, things were moving quickly and she was keen to ensure that her idea was protected. She had already made a prototype of her [invention], she had shown it to her friends, she had spoken to her solicitor who had recommended the attorney to her previously, her solicitor had provided her with confidentiality agreements which she had given to her friends to sign (see Exhibit A12) and she was arranging to meet with the marketing consultant. Furthermore, there was no suggestion that at the time the complainant

called that the attorney's firm that he was not in his office and if he was why, in the circumstances, would the complainant speak to anyone else.

46. *At what time was the attorney at the premises of the complainant?* – The attorney's evidence was that he had a clear recollection of having arrived at the home of the complainant at about 2.00pm that day as he remembered looking at his watch and seeing that it said 2.00pm (T147 at 41-42). He was emphatic that his recollection did not arise from having looked at his office diary for that day. In my opinion, the attorney's evidence was entirely disingenuous and self-serving. Especially when he had acknowledged in his statement that there were other aspects of what had occurred that day and which he no longer recollected the details of (e.g. whether the complainant gave him a cheque that afternoon for his professional services in preparing and lodging the innovation patent application).
47. Nor do I accept the complainant's evidence about the time the attorney arrived at her home. In her statutory declaration she said it was 7.00pm (see Exhibit A2 at [3]), and subsequently she said it was around 6.00pm (see Exhibit A3 at [5]). As the complainant was living in a state, which was on daylight saving time and the attorney's office was not, the evidence of the complainant as to time was 1 hour in advance of the time in the attorney's state.
48. In her oral evidence the complainant readily acknowledged that she may be mistaken as to the exact time the attorney arrived (T42-45).
49. In my opinion, the exact time of the attorney's arrival and departure are not critical to the issues in these proceedings. What is important are the circumstances in which the attorney took the photographs of the complainant, including the time when this occurred.
50. The essence of the attorney's evidence was that his visit to the complainant's home was all in the course of a normal working day. That is, his evidence was that he went to the complainant's home, examined the [invention], took the photographs which he said the complainant volunteered to model and he was back at his offices, before the close of business, at about 4.00 to 4.30pm (or 5.00 to 5.30pm day light saving time). According to his evidence he was at the complainant's home for a relatively short

period; no more than  $\frac{3}{4}$  to 1 hour. In support of his evidence the attorney relied on the evidence of his assistant, the former financial controller of his firm and that of the marketing consultant.

51. It was the complainant's evidence that the attorney did not leave her home until it was dark. That is, some 3 hours after he had arrived. In support of her evidence the complainant relied on the evidence of her former neighbour, her daughter and her friend.
52. In my opinion, the evidence relied on by the attorney in support of his evidence can be given little, if any, weight, or it must be rejected on the basis of inconsistency and contrary to contemporaneous documentation.
53. It was the evidence of the attorney's assistant that the attorney had returned to the office that day as usual at about 4.30pm. For the reason I have already stated in my opinion this evidence is not reliable given the lapse of time. In her statement, the financial controller, who left the firm in 2006, made a similar statement (see Exhibit R6 at [10]). Again, in her oral evidence, this witness insisted that she had an independent recollection of this without any reference to contemporaneous records. However, she acknowledged that her statement had been prepared on the basis of being informed 'about what allegations had been made' against the attorney and being provided with the statements of the complainant and her husband. In my opinion, little, if any, weight can be given to this evidence for the same reasons stated in regard to the evidence of the assistant.
54. The marketing consultant's evidence was that she had arrived at the complainant's home that day at around 4.00 to 4.30pm (see Exhibit R10 at [6]). She said that when she arrived she was given a confidentiality agreement by the complainant to sign and that the complainant had said to her words to the effect 'oh you have just missed [name of attorney].'
55. During cross-examination, the marketing consultant was shown a copy of a confidential agreement, which she acknowledged was the one she had been given by the complainant and which she had signed (see Exhibit A13). The agreement specifically referred to the innovation application the attorney had prepared for the

complainant after he had left her home and which he lodged on 12 November 2003. A copy of that application was also attached to the agreement.

56. After being presented with this confidentiality agreement, the marketing consultant said she had been at the complainant's home on the '12<sup>th</sup>, 10<sup>th</sup>, 9<sup>th</sup>, 8<sup>th</sup>, 7<sup>th</sup>' and that she had signed several confidentiality agreements because the complainant was not happy with the one that had been signed previously.
57. I agree with the submissions made on behalf of the Board that this oral evidence of the marketing consultant cannot be accepted.
58. In her statement the marketing consultant described her alleged meeting with the complainant on '10 December 2003' as being the 'first meeting'. At the hearing, in her evidence in chief she said the month was incorrect and it should have been 'November', but she did not alter her statement in regard to the 10<sup>th</sup> being the 'first meeting'. Additionally, if she had been at the complainant's home on 10 November, the complainant would undoubtedly have given her a confidentiality agreement in the same form she had given her friends on 8 November 2003 (see Exhibit A12). The complainant explained that these agreements had been given to her friends to sign at the suggestion of her solicitor. Yet there is no evidence of any such earlier confidentiality agreement having been signed by the marketing consultant. The only evidence is the confidentiality agreement dated 12 November, which the complainant said was specifically prepared by her solicitor to give to the marketing consultant that particular day. It is noted that the innovation application that is attached to the confidentiality agreement, is stamped as having been sent by facsimile, that morning, from the attorney's firm to the complainant's solicitor. In addition to this there is evidence of the complainant having telephoned the attorney's office requesting that this application be forwarded to her solicitor that day.
59. There was also evidence indicating that the marketing consultant was given the date of her meeting by the assistant to attorney's solicitor and not through her independent record in her diary for this day or any other relevant day. This diary the marketing consultant said was in storage following her move and she had made no effort to retrieve it for the purpose of preparing her evidence.

60. On the other hand, the contemporaneous confidentiality agreement supports the evidence of the complainant. On this basis, I accept her evidence as to when she met with the marketing consultant and her evidence that she had made the arrangements for this meeting on the morning of 10 November 2003, prior to the attorney arriving at her home. The consequence of my findings is that the evidence of the marketing consultant cannot support the evidence of the attorney as to the time he was at the complainant's home.
61. In my opinion, the most reliable evidence of the time the attorney was at the complainant's home is the evidence of the complainant's former neighbour, her daughter and her friend who was at her home that day. It was the complainant's evidence that she had gone to speak to her then neighbour and telephoned her daughter that afternoon. The attorney also acknowledged that the complainant had telephoned her daughter.
62. The neighbour's evidence was that the complainant had come to her home that afternoon and asked if her daughter-in-law, who was living with her, would model the [invention] for her. She said the complainant explained that photos needed to be taken and she had no one to model them and wondered whether her daughter-in-law would model the [invention] at such short notice. In her oral evidence at the hearing, the complainant's neighbour said that she remembered the time when the complainant came to her home as it was during the time her daughter-in-law always watched her favourite TV show. When asked what the show was she said it was 'the Bold and the Beautiful' which started at 4:30pm daylight savings time: (T99 at 2). The neighbour also said that she told the complainant that she was sure her daughter-in-law would nonetheless refuse to model the [invention] because [...].
63. The complainant's daughter's evidence was that her mother had telephoned her at about 4:30pm to 5:00pm eastern standard time (T100 at 43 and 101 at 4-5). She said she was sure about the time because she was getting organised to make dinner. She said her mother told her about the attorney being at her home and that he wanted to take photos of her modelling her [invention]. She said her mother told her she felt embarrassed about modelling the [invention] and she had been unable to find someone who could model for her. The complainant's daughter said her mother

sounded 'quite stressed' and asked if she could come down. At the time the complainant's daughter was living more than an hour away from her mother's home and she was unable to come because she had no petrol and she needed to get dinner ready. She said her mother even offered to pay for a taxi and they had a short argument when she again refused to come.

64. The evidence of the complainant's friend was that she was at the complainant's home when the attorney arrived that afternoon. The friend said she saw the complainant showing the attorney a prototype of her [invention]. She also recalled the complainant telephoning her daughter to see if she would model [the invention] and that her daughter had declined to do so. She said that she left the complainant's home at about 6:30pm to 7:00pm to cook dinner and that by this time the attorney had been there for about 2 hours. In her oral evidence at the hearing, the complainant's friend acknowledged she 'did not remember everything' that happened that day and she could 'only answer questions to the best of my recollection': (T79 at 5-7).
65. The evidence of these three witnesses all placed the attorney at the complainant's home some time between 4.30 and 6.00pm daylight saving time. That is, there were three witnesses, whose evidence was to the effect that the attorney was at the complainant's home at a time he said he was either back at his office or in his car returning to his office. Furthermore, according to the evidence of these 3 witnesses, it was a time prior to the attorney having taken any photographs of the complainant modelling her [invention]. In my opinion each of these witnesses gave independent accounts of their respective recollections as to the approximate time the complainant approached them that day or, in the case of the friend, when she left the complainant's home.
66. It is noted that the attorney had stated that a business associate of the complainant was present during the time he was at the complainant's home, including when he took the photographs (see Exhibit R2 at [16] and R4 at [5]). In his oral evidence the attorney said that the complainant's friend who gave evidence was not, to his recollection, the person who was there that day (T152-3). He went so far to say that the friend and the complainant's former neighbour had given false evidence. In my

opinion this was one of several examples during the course of the hearing where the attorney pressed serious allegations he had made in his statements that were not based on any proper foundation.

67. It is noted that the complainant, in her statutory declaration said she had 'asked an older woman friend who was my house guest to stay with [the attorney] while I reluctantly went into the bedroom and changed into the [invention]': see Exhibit A2 at [3]. She retracted this in a subsequent statement after having spoken to her friend: see Exhibit A4 at [13].
68. It was the evidence of the friend that she was not present at the time the photographs were taken: see Exhibit A9 at [11]. In my opinion the friend gave full and frank evidence to the best of her recollection. Had she been present while the photographs were taken, in my opinion, this is something she would have remembered.
69. On the basis of the above findings, I reject the attorney's evidence that he was back in his office by 4.30pm eastern standard time.
70. This does not mean I accept the evidence of the complainant as to the time the attorney departed her home. This in my opinion cannot be determined precisely from the evidence before the Tribunal. The most that can be determined is, as I have already mentioned, the approximate time the attorney was at the complainant's home just prior to the photographs having been taken.
71. *Circumstances that gave rise to the taking of the photographs* - It was the attorney's evidence that when he met with the complainant that day she had informed him that she 'wanted to file a patent for her invention as soon as possible' as she was meeting with a commercial manufacturer the following week. He said he advised her that 'because of her prior disclosure' to her friends she should file 'an innovation or standard application to take advantage of the grace period that had been introduced the previous year.'
72. The attorney went on to say that his usual practice when attending a client's premises was to carry a digital camera and that on this particular day he explained to the complainant:

‘...[the] patent specification required an illustration of a working embodiment, photographs would need to be taken of the invention being worn.

...due to the urgency ... we may have to lodge the photographs informally with the patent application as there was no time to engage and instruct a patent draftsman before [your] meeting.’

73. It was the attorney’s evidence that the complainant, having been unsuccessful in contacting her daughter and another person, volunteered to model her invention. In his statement he said the complainant ‘was in fact proud and enthusiastic to show off her creation’: see Exhibit R3 at [13].
74. He said he did not recall the complainant being embarrassed ‘because she was able to model the [invention] in front of me by [...].’ He also said:
- ‘...[the complainant] had volunteered to model for [the photographs], for the purposes of converting into line drawings. In fact, it was actually my suggestion that a younger and more professional model be used to reflect the market. [The complainant] agreed but was unable to contact her daughter or her daughter’s friends.’
75. The attorney again relied on the evidence of the marketing consultant to support his evidence as to whether the complainant was intimidated by him and also embarrassed when modelling the [invention]. He also contended that the complainant’s 4 year delay in making her complainant was inconsistent with her evidence of intimidation and embarrassment and they had only been made for the purpose of avoiding paying of his 2007 outstanding account. That is, the alleged embarrassment, intimidation and additional photographs were all fabrications by the complainant and her husband.
76. The marketing consultant’s evidence was that when she met with the complainant, the complainant told her that ‘she could not get anyone to model the [invention] and she joked with me by saying she had to model it herself’ (see Exhibit R10 at [9]). She said that the complainant did not appear to be embarrassed and had actually ‘laughed and joked’ with her about them. She also said that the complainant did not say that she felt ‘undignified’ in front of the attorney or that he had ‘belittled’ her in any way. Instead the complainant appeared to be ‘more excited about her product than usual’: see Exhibit R10 at [15] and [17].
77. In my opinion, this evidence is not necessarily inconsistent with the complainant being embarrassed and feeling intimidated by the attorney. It was 2 days after the

photographs had been taken and the complainant had by then been provided with a copy of the innovation patent application that had been prepared and lodged by the attorney (see Exhibit A13), which did not have any photographs attached. It only had drawings of the 3 photographs that had been taken of the complainant wearing her [invention]. The complainant may have felt she needed to say something about how these drawings came about. For her to do this in a joking fashion, without revealing her true feelings as to what happened on the day the photographs were taken is understandable in the circumstances. The marketing consultant was not a friend of hers. She was a stranger from whom the complainant was seeking assistance to market her product and also an acquaintance of the attorney. At the same time, in my opinion, the evidence of the marketing consult must be treated with some caution as it would appear that she too was informed about the terms of the allegations made by the complainant prior to making her statement (see the last paragraph of her statement).

78. The complainant's evidence was that after she and the attorney had their discussions about her invention the attorney produced a camera and said words to the effect (see Exhibit A3 at [8]):

'I will need you to model your prototypes so I can photograph the difference [...] with other types, [...]. This will allow me to draft the wording and draw up the sketches for your application quicker. By doing this I can have this lodged by tomorrow.'

79. The complainant said she informed the attorney that she did not want to model the [invention] as she felt embarrassed but she was willing to try and find someone who might be prepared to do so. When she was unable to get someone she said the attorney said to her words to the effect:

'I need you to model the [invention] as I have not driven from [name of the city] and not get all I need to write and draw up the patent tomorrow.' and

'I will need to photograph you with three types [...] to help me write a patent application that I can easily see the differences between what is already in the market and how your [invention] are different. I will then need you to model the three types [...].'

80. The complainant's evidence, from the time she lodged her complaint, was that she felt intimidated by the attorney's comments and felt she had no option but to agree to model the [invention] as requested by the attorney: see Exhibit A2 at [3]. In her

statement the complainant said she felt that the attorney was very agitated about her delaying modelling the [invention]. She said she told the attorney about her embarrassment and that she 'need[ed] to have a few red wines to give me the courage to be photographed ....'see Exhibit A3 at [18]

81. As mentioned above, the complainant's daughter and her friend, in their evidence, referred to the complainant appearing 'stressed' and 'anxious' about finding someone to model the [invention], is consistent with the complainant's evidence as to how she felt about modelling her [invention]. It is not consistent with the attorney's evidence that it was he who had suggested a younger model. If this was his view he could have obtained a younger person to model the [invention] the following day as he took a prototype with him.

82. The complainant's husband gave evidence of his wife saying to him words to the effect (see Exhibit A5 at [9]):

'I still feel very embarrassed and ashamed from when [the attorney] took those horrible photos as he always make me feel inferior when I ask questions.'

83. The complainant's husband was interstate on business at the time the attorney attended the home of the complainant. He was however aware of the attorney being present that day. His evidence and that of the complainant was that he spoke to the attorney over the phone. The attorney denied any such conversation, but on the evidence as a whole I accept the evidence of complainant and her husband.

84. It was their evidence that they agreed, following the events of 10 November 2003, all future direct dealings with the attorney would be done by the complainant's husband and not the complainant. On the evidence this appears to have been largely the case.

85. In her first statement filed in these proceedings, the complainant attached 10 photographs (including the 3 she had attached to her complaint) she said the attorney had taken that day (see Exhibit A3 at [26]). In that statement the complainant again spoke about her embarrassment. She said the following:

'The episode involving [the attorney] taking those photographs had the effect that I did not want to meet with [the attorney] again, particularly after the photos were sent back to me. Seeing those photographs still has the effect of making me feel embarrassed.'

86. It is noted that the evidence of the complainant's friend was that, while she was at the complainant's home that day, the attorney did not appear 'pushy or in a rush'.
87. In regard to the attorney's contention concerning the delay in making a complaint, this in my opinion, does not necessarily lead to a conclusion that the complainant felt no embarrassment or intimidation by the attorney's conduct at the time the photographs were taken. As I have already indicated, things were moving very fast for the complainant's [invention] at that particular time and they continued to do so for some considerable time thereafter. Accordingly, it is equally plausible that the complainant put the embarrassment and intimidation she had felt on 10 November to the back of her mind. It was after all an isolated event, which was not seen by anyone else and until recently no other person was aware of all the photographs that had been taken. Nor was there any other event, which required her to re-live that particular time as the complainant had no further direct contact with the attorney. This appears to have changed on 23 July 2007 when she spoke to the attorney about an outstanding account for some \$3,000.00 (see allegation 5 below). This undoubtedly caused her to relive her experience of 10 November 2003, but I do not believe that these experiences were the primary foundation of her complaint to the Board. The foundation of the complaint was clearly a sense of frustration with the manner in which the attorney had dealt with her various patent applications and the amounts that had been spent without having particular patents granted. That frustration, I believe was primarily driven by her husband who had been the person dealing with the attorney. This did not mean that the complainant felt any less embarrassed or intimidated about the circumstances in which the photographs were taken.
88. From my observations of the complainant when she gave evidence, the embarrassment she spoke of was one that was genuinely held by her at the time the photographs were taken and it has continued to do so. The evidence of her friend, her daughter and her husband support this. I also accept her evidence that she felt intimidated by the attorney's comments to her on this particular day. Her invention was relatively new, it was the first time she had shown it to someone other than her immediate friends and the attorney was there in his professional capacity, which placed him a position of authority as the complainant was obviously keen to ensure that her invention was given the proper protection.

89. *How many photographs did the attorney take?* In her evidence the complainant tendered into evidence 10 colour photographs on A4 sheets of paper: see Exhibit A3. Three (3) of these were those of the complainant wearing her [invention] (i.e. the front, side and rear view photographs referred to above) and which the attorney acknowledged he had taken.
90. However, the attorney strenuously denied he had taken the remaining 7 photographs. These were also photographs of a person's torso, but they were only pictures of the person's back view. [...].
91. There did not appear to be any dispute that the person in each photograph was the same person. In each photograph the person was wearing the same top and the visible torso of the person in each photograph was the same. In light of there being no dispute that 3 of the photographs are of the complainant the inference to be drawn from this is that the remaining photographs are also of the complainant.
92. On their appearance alone the photographs suggest that they were all taken at about the same time. On the bottom left hand side of each photograph, there are also a series of numbers. These are also indicative of them having come into existence at about the same time.
93. Each series of numbers begins with the number '11' followed by a time. The time ranges from '7:10am' to '7:17am'.
94. In his statutory declaration (see Exhibit R1 at [14]), after having acknowledged that the 3 photographs attached to the complainant's statutory declaration were taken by him, the attorney said:
- '...[the] digital images had to be "developed" onto a printer for [his assistant] to trace them, and they were pictures of [the complainant].'
95. The 3 photographs attached to the complainant's statutory declaration (see Exhibit A2) were all black and white and were contained on a single A4 page, side by side. The middle picture [...] had the serial number '11 7:16am' on the bottom left hand side. The same photograph (except in colour and a larger version) was one of the 10 photographs attached to the statement that the complainant made subsequently for the

purpose of these proceedings. The other 2 photographs were also included in these 10 photographs. As I have mentioned each of the 10 colour photographs had the same series of numbers – the only difference being the number after ‘7’ and before the letters ‘am’.

96. In a statement filed in these proceedings, the attorney said, in regard to the 3 photographs he acknowledged he had taken of the complainant, that he believed the ‘marking’ (i.e. the series of numbers) on these photographs was ‘a marking made by an old EPSON printer [his firm] had inherited from a [related firm]’: see Exhibit R4 at [18]. He went on to contend that the ‘marking’ in the remaining 7 colour photographs had been ‘fraudulently included’. When asked in cross-examination whether he maintained this position, he said ‘yes’ and when asked why this would have been done he said ‘I think it’s just to avoid the payment of what’s owing to us’.
97. In my opinion this evidence was once again self-serving and was yet another serious allegation made without any proper basis.
98. The attorney first contended that as the complainant had only attached 3 of the photographs to her original statutory declaration (i.e. her complaint), the only inference to be drawn was that the other photographs were taken subsequently. In my opinion this does not necessarily follow. The complainant’s explanation was that she had only attached 3 photographs to her complaint as these were the only ones she had shown her husband when he returned home after 10 November 2003. She said she was too embarrassed to show him all the photographs at that time and did not show them to him until recently. In my opinion this evidence is consistent with the complainant’s evidence of feeling embarrassed and intimidated by the conduct of the attorney when he photographed her. It was not until after these proceedings had commenced that the complainant decided to disclose all the photographs and in doing so she again expressed the embarrassment she had felt.
99. The attorney also contended that a letter addressed to the complainant, dated 12 November 2003, and an invoice of the same date (see Exhibit R2 at JRM 2) were contrary to him having taken the additional photographs. The letter from the attorney, dated 12 November 2003, said the following:

‘Please find **enclosed** the following:

- [the proto type of the invention]
- Digital camera chip, and
- Photos

...’

100. The letter also referred to an invoice being enclosed. However, the letter did not contain any details of that invoice, such as its number or the amount invoiced.
101. The complainant on being shown the letter said she had not seen it before. She also said she did not at any time receive a camera chip. She said she only received the photographs and the [proto type of her invention]. It is noted that in his oral evidence the attorney said the photographs were on a disk and not a chip and that the description in the letter was an error (T173-28).
102. The evidence of the attorney’s assistant was that the attorney had given her 3 photographs of the complainant wearing her [invention]. It was from these that she made sketches as requested by the attorney and once she had done these she said she returned the 3 photographs to the complainant. In my opinion, this evidence does not necessarily mean that the attorney only took 3 photographs. What it does show is that the attorney gave 3 photographs to his assistant. It is assumed that these are those from which the assistant made her drawings, however there is no direct evidence of this from the assistant. As explained above, the assistant’s statement was prepared without her having access to any relevant documents, including the letter of 12 November 2003.
103. The attorney asserted that invoice number 1576 (also dated 12 November 2003) had been enclosed with the letter of the same date. The complainant’s evidence was that she did receive this invoice, but not the letter. The amount of the invoice was \$37.40 and it was stated to be for ‘the developing of digital camera film and the postage of [the proto type of the invention] and photo’s by registered mail.’ Once again, the fact that this invoice was for a relatively small amount does not mean that only 3 photographs were taken.
104. When this invoice was sent to the complainant is not clear. A schedule prepared by the financial controller of the attorney’s firm, shows that this particular invoice was not paid until 25 February 2004 (see Exhibit R2 at JRM 24). It was paid together

with two other invoices numbered 1753 and 2028. Yet two earlier invoices, number 1569 and 1570 for \$500.00 and \$3,000.00 respectively, are recorded as having been paid on 11 November 2003. It was this amount that the complainant paid, at the request of the attorney, after he had taken the photographs for the patent application documents for the complainant's invention. After these two invoices were issued, a further four invoices were issued and paid by the complainant and her husband, prior to February 2004. If, as asserted by the attorney, the invoice for the \$37.40 had been sent together with the letter of 12 November 2003 it is difficult to understand why it had not been paid prior to 25 February 2004. In my opinion, the only explanation open on the evidence is that the invoice was sent some time after 12 November 2003 and it was sent without the alleged covering letter.

105. In my opinion, having regard to all the material before the Tribunal, there is no basis not to accept the evidence of the complainant that the attorney took all 10 photographs when he was at her home on 10 November 2003. At the same time the attorney's evidence on this issue was once again evasive and entirely self-serving.

**Allegation 1:           it was not necessary for the attorney to take photographs of the complainant for the processing of her patent application, and the attorney's conduct was intimidating**

106. As I have already mentioned, the attorney's evidence was that due to urgency it was necessary for him to take the photographs that particular day. The urgency he said arose because of the complainant's prior disclosures, her pending meeting with potential manufacturers, her intention to market her product on the internet and the complainant's instructions to act quickly. The photographs he said were necessary so that the functionality of the [invention] could be demonstrated in the drawings that were necessary to include in any patent application.

107. Mr Bartlett, the Board's expert, questioned the speed at which the original meeting was arranged, the time of day the meeting took place and the modelling of the prototype by the complainant: see exhibit A10 at [18]. He went on to say at [19] that if the complainant's circumstances were urgent then the attorney's subsequent preparation and filing of the patent application on 12 November were 'necessary and commendable.'

108. Mr Bartlett's initial evidence was that in his practice as a patent attorney he tries to avoid the use of photographs in design applications as they 'often will not produce well' and because of the drawing requirements of Schedule 3 of the Regulations. He also said that the more rigid drawing requirements in a foreign patent application also made photographs unsuitable. However, in his subsequent statement, he accepted that there may be circumstances where photographs may be necessary: see Exhibit A11 at [11].
109. In regard to the need for photographs for the complainant's patent application, Mr Bartlett said the following :
- '32. ...[given] that the Attorney should have been able to take away from the meeting on 10 November 2003 a prototype [of the invention], and it appears that the manner of use of the [invention] should have been evident from a simple description or hand sketch (prepared by either Complainant or the Attorney), I regard it as unnecessary to have taken a photograph on 10 November 2003 (or at any other time) *as worn*. I am of this view regardless of whether the complainant's circumstances on 10 November 2003 did or did not dictate urgency.
33. If there was no urgency, *and* if it was regarded by the Attorney as important for the prototype to be modelled and viewed (or photographed) in use, there should have been time to arrange for modelling on a mannequin or a store dummy. If no mannequin or store dummy was available, and if a person was willing to personally model the prototype, it should have been possible for the complainant to have arranged for photographs to be taken of a person (herself or otherwise) modelling the prototype, with a view to providing the Attorney with the photographs (possibly suitably altered to mask the identity and unnecessary parts of the model). ...
34. Even if there was urgency on 10 November 2003, I regard it as unnecessary that it was the Attorney who took the photographs. The Attorney's camera could have been given to another person to take the photographs. I also regard it as unnecessary for the Complainant to have been wearing the prototype with no other clothes under the prototype. ...
110. In his subsequent report, Mr Bartlett said that had the complainant volunteered to model her [invention] then the easiest and fastest solution for the attorney was to take the photographs: see Exhibit A11 at [15]. However, in the event the complainant had not volunteered to model her [invention] he stood by what he had said in his earlier report (i.e. that which is extracted above).
111. In regard to the photographs of the complainant wearing the [...] (i.e. the comparisons) Mr Bartlett said that these in his view were not necessary: see Exhibit 10 at [35]. In his statement the attorney said he was in 'complete agreement' with this comment of Mr Bartlett: see Exhibit R3 at [15].

112. The attorney's expert, Mr McInnes, generally concurred with the initial comments of Mr Bartlett in his first report: see Exhibit R11 at [15] and [16]. However, he 'vigorously' disagreed with comments of Mr Bartlett in regard to the necessity of taking the photographs. He said he had a 'not dissimilar situation' arise in his own practice in the recent months. At [18] he described the circumstances as follows:

'...[On] very short notice, Mr A asked me to attend an early evening meeting with directors of a mutual client .... Mr A asked me to attend this urgent meeting as it was apparent that there was a need of expert advice from a patent attorney.

The meeting was held in an inner city terrace house office and attended by both a male and a female director of the company, along with Mr A and myself. The discussions centred around a new innovative design for [a garment] and it was very apparent during the course of the meeting that the two directors were of the view that urgent applications needed to be filed without delay. At one point the male director removed most of his outer garments to reveal the [garment] that he was wearing to illustrate better functional aspects of the designs. I was not unduly surprised and having reflected on this matter in the light of the present report, I do not consider that I would have considered it exceptional if the female director had undertaken the identical actions. I note I was invited to take photographs so that I could better understand and research the intellectual property issues surrounding the new design. However, by the end of the meeting it was clear that the degree of urgency was not so strong as initially perceived by the client. ...'

113. Mr McInnes went on to say that he would not hesitate to take photographs which were necessary to fulfil his professional responsibilities, but he added the following:

'...[it] is the normal policy of HMCIIP to ensure that all meetings involving male attorneys meeting with female clients, are conducted in situations where a witness is present in order to avoid any allegations of impropriety on behalf of the attorney.'

114. Both experts seem to agree that in circumstances of urgency it may have been necessary to take photographs of the complainant's invention being worn.

115. However, they do not say that this necessity over-rides the need for the person who is to be photographed, be they the client or otherwise, to voluntarily model the [invention]. Mr Bartlett expressly said that in his opinion no photographs should be taken unless the person being photographed does so voluntarily. I do not understand Mr McInnes to have a different view.

116. In regard to the first part of allegation 1 the issue for determination is whether it was not necessary for the attorney to take the photographs of the complainant for the processing of her patent application. Leaving aside the issue of whether the

complainant volunteered to be photographed, which in my opinion is relevant to the second part of allegation 1, I find on the material before the Tribunal that during the meeting between the complainant and the attorney that there was a sense of urgency for the attorney prepare and lodge a patent application for the complainant's invention as soon as possible and before 12 November 2003. This sense of urgency being driven both by the complainant and the attorney. There had been prior disclosures and while the complainant was not planning to meet a manufacturer she had already arranged to meet a marketing consultant in 2 days later. As I have said things were moving fast and the complainant was no doubt anxious about protecting her interest as soon as possible.

117. On the basis of these findings and the evidence of the experts, I find that it cannot be said that it was not necessary for the attorney to take the 3 photographs of the complainant wearing her [invention], which were taken and were used for the purpose of preparing and lodging her innovation patent application 2 days later.
118. The same cannot be said in regard to the comparison photographs. There were 5 of these [...]. It was the evidence of the experts and the attorney that these were not necessary.
119. Accordingly, I find that the first part of allegation 1 has been established in so far as it relates to the 5 comparison photographs.
120. In regard to the second aspect of allegation 1, for the reasons I have already stated, I find that on 10 November 2003, while the attorney was at the complainant's home, he conducted himself in a manner in which the complainant felt intimidated by him and allowed herself to be photographed in circumstances in which she felt she had no option but to comply with his request. As I have indicated, the attorney was at the complainant's home in his professional capacity. The complainant was on her own at the time the photographs were taken, she had been unsuccessful in getting someone else to model her [invention], and at the same time wanted to make sure she did not jeopardise obtaining the necessary patent protection for her [invention]. This was a matter falling within the expertise of the attorney and not the complainant. I have accepted her evidence of being embarrassed and I also accept her evidence about the short and aggressive manner in which the attorney spoke to her that day. He

demonstrated a similar manner during the course of his oral evidence in that he did not listen to questions asked of him and often gave responses which served his own purposes. His evasive and self-serving evidence during the course of the hearing, in my opinion, evidenced a lack of awareness as to how his behaviour may be construed by clients, especially those who have limited knowledge of his field of professional expertise. It was also indicative of his inability to identify with any embarrassment that may be felt by his client.

121. Accordingly, I find that the second aspect of allegation 1 has been established. The essence of this finding is that the complainant did not voluntarily model the [invention] for the attorney.
122. On the basis of these findings (i.e. both aspects of the allegation having been satisfied), the next issue for determination is whether the conduct amounted to unprofessional conduct or unsatisfactory conduct.
123. In my opinion, it does not amount to unprofessional conduct. There is no evidence that the attorney took the comparative photographs for a self gratifying inappropriate purpose or that he intentionally/deliberately acted so as to intimidate the complainant. Had he done so, in my opinion, from the evidence of the experts, in these circumstances this would be conduct which may reasonably be held to violate, or fall short, to a substantial degree, the accepted standard of professional conduct.
124. I do however find that the attorney's conduct amounted to unsatisfactory conduct in the circumstances in 2 respects. The first respect being his intimidatory behaviour. The other respect is a failure to adhere to a policy, similar to that referred to by Mr McInnes and which applies in his firm. The circumstances in which the photographs were taken by the attorney in these proceedings, differed considerably to those described by Mr McInnes. In the example given by Mr McInnes there were other people present and the person who demonstrated the [garment] clearly did so spontaneously and voluntarily. On the basis of my findings, neither circumstance was present when the attorney took the photographs of the complainant.

**Allegation 2 – the alleged incorrect advice by the attorney, to the complainant, on or about the time that the innovation patent was filed, that she should file an international PCT application**

125. I have already mentioned the attorney filed an international patent application (i.e. a PCT application), on behalf of the complainant on 8 December 2003. This application had a priority date of 12 November 2003, the same date on which the innovation patent application had been filed.
126. There was no dispute that this PCT application could have been filed any time within 12 months of filing the innovation patent application (i.e. any up to 12 November 2004) and still retain the same priority date. This 12-month period is commonly referred to as the 'convention period'. It is also referred to as the '12 month grace period' before a PCT application needs to be lodged after an initial patent application has been made.
127. It was the attorney's evidence that he had lodged the PCT application on instructions from the complainant. He said he advised her to conduct a preliminary novelty search before 'she invested in either an overseas or PTC patent application': see Exhibit R2 at [22]. On 14 November 2003, he received instructions from the complainant to undertake that search. While the complainant complained about the fact that unbeknown to her this search was undertaken by an entity related to the attorney's firm, this is not a matter relevant to the charge, as particularised, that is before the Tribunal.
128. It was the complainant's evidence that the attorney had asked her and her husband if they intended to seek overseas protection and when they said they did 'he strongly advised that we file an International PCT Application without delay ...': see Exhibit A2 at [6]. The complainant said the attorney did not advise her of the 12-month grace period before a PCT application had been lodged. In response, the attorney tendered 2 letters he had written to the complainant about her changeable shoe. These letters specifically referred to the 12-month grace period. The most recent letter was, however, dated September 2002: see Exhibit R2 at JRM5.
129. The evidence of the complaint's husband was that he recollected speaking to the attorney in late November 2003 about filing an international application: see Exhibit A6 at [5]. He said that the attorney 'strongly advised me that my wife should file an international application without delay.' He went on to say the attorney had advised him that it would be cheaper and that they would obtain the patents more quickly.

130. The contemporaneous record of events concerning the complainant's PCT application were as follows:

- (a) a handwritten note, dated '14/11/03', from the complainant to the attorney requesting that he 'please prepare USA pattern claiming Australia filing date': see Exhibit R2 at JMR9. The file note is stamped as having been received on 17 November 2003;
- (b) a letter, dated 18 November 2003, from the attorney to the complainant, thanking her for her instructions of '14 November 2003 to request a Full International database search' and enclosing a copy of the results of such a search (see Exhibit R2 at JRM6). This letter, signed by the attorney's assistant, said 'we draw your attention to the asterisk which states the excellent results of the search';
- (c) an undated handwritten note, stamped 'Received 24 November 2003' from the complainant's husband to the attorney requesting that he 'please proceed to register international rights on patent pending No 2003100936' and enclosing a cheque for the balance that was due (see Exhibit R2 at JRM3); and
- (d) a file note, dated '02-12-2003', written by the attorney's assistant and stating that 'This application will not be lodged, instead a PTC will be lodged' (see Exhibit R2 at JRM4).

131. In my opinion, on the basis of the contents of the above contemporaneous documents, it is not possible to resolve the differing evidence as to whether the attorney, as alleged in paragraph 8 of the particulars, advised the complainant on or about the time her innovation patent was lodged that she should file a PCT application without delay. As I have already indicated the evidence shows that at this time the complainant was very enthusiastic about her invention and wanted to ensure that her [invention] was protected locally and in other countries. This enthusiasm is reflected in the timing of her note of 14 November 2003 to the attorney instructing him to take steps to protect her [invention] in the United States of America. This note was written only 2 days after she had met with the marketing consultant, who had provided her with even more encouraging words. Accordingly, on the evidence, it is

equally probable that the complainant pressed for international protection without delay.

132. On the other hand, the contemporaneous record contains no evidence of advice from the attorney about the 12-month grace period. The fact that the attorney had mentioned this in previous correspondence, in my opinion may not be sufficient in the circumstances. As I have already indicated, the complainant and her husband were relative novices in the area of patent protection and relied on the advice of the attorney. The earlier advice related to another product, which did not proceed past the initial application.
133. However, it is the advice as alleged in paragraph 8 of the particulars (i.e. to lodge a PCT application without delay) and not the failure to give the advice as particularised in paragraph 11 (i.e. the 12 month grace period) which the Board has identified as giving rise to the third incident of alleged unsatisfactory and/or unprofessional conduct by the attorney (see paragraph 12 of the particulars). In light of my findings above, the Board has not established, to the requisite standard, that it was the attorney who gave the advice as alleged in paragraph 8 of the particulars. Accordingly, I find that the Board has failed to establish allegation 3.
134. Even if I were to have found that the attorney gave the alleged advice, the evidence of both experts, Mr Bartlett and Mr McInnes, was, in essence, to the effect that, depending on the circumstances, the advice may not necessarily be incorrect.
135. Mr Bartlett said that an international application was a 'sensible (and common) path to follow ... where an applicant will (or may) want to ultimately secure patent protection in countries other than Australia': see Exhibit A10 at [41]. He went on to say that while there were costs involved in making an international patent application, the advantages in making such an application was to defer 'the significant costs of filing foreign patent applications.' That is, if a PCT application is lodged towards the end of the 'convention period' the time within which national patent applications needed to be lodged would be extended by an equivalent period of time. As a consequence the costs associated with lodging a PCT and a national phase application would also be deferred and for this reason it was Mr Bartlett's

evidence that it was unusual to lodge a PCT application so soon after the initial patent application had been lodged.

136. At the same time, Mr Bartlett acknowledged that there were circumstances, which would warrant the early lodging of a PCT application. A prior 'damaging' disclosure he said may give rise to such a circumstance. However, Mr Bartlett said that in his 17 years of practise as a patent attorney he did not recall having filed an international patent application so soon after a priority date had been filed in this case (see Exhibit A11 at [18]).
137. Mr McInnes, the attorney's expert, agreed with the evidence of Mr Bartlett other than in respect of his contention that it was unusual to lodge an international PTC application so soon after the priority date of the filing of the local innovation patent application: see Exhibit R11 at [25]. It was his evidence that the time for lodging such an application depended on many factors and in this case there was ample justification for lodging the international PCT application at the time it was in fact lodged.
138. What is apparent from the evidence of the experts is that, in general, a PCT application is made towards the end of the 12-month convention period and the reason for this is to defer the costs associated with the application and subsequent national phase applications. There are however, circumstances that may warrant a PCT application to be lodged earlier. Mr Bartlett's evidence suggested that if such circumstances arise then it is incumbent on the attorney to advise the client on the various alternatives and the cost consequences related thereto. In these proceedings there is no evidence of the attorney providing advice in this regard prior to the lodging of the PCT application. However, again this is not a matter that is the subject of the charge as particularised by the Board.

**Allegation 3: February 2004 advice by the attorney to the complainant that national phase applications needed to be filed to protect her interests**

139. I have already mentioned that the attorney commenced lodging national phase applications about 6 months after he had lodged the complainant's PCT application. It is not disputed that the deadline for lodging national phase applications was 12 May 2006, almost 2 years after they had in fact been lodged.

140. In her statutory declaration the complainant said the following (see Exhibit A2 at [8] and [9]):

8. In February 2004 we had become concerned about [the attorney's firm] escalating invoices and our capacity to keep paying as we were negotiating with other parties to market our product and had no income from it. Accordingly my husband faxed [the attorney] a hand written note on 20 February 2004 requesting costs of patenting for budget purposes and asking about advantages of seeking design registration as well as patent, as [the attorney] was strongly advocating both. ...
9. After [the attorney's firm] received our budgeting request of 20 February 2004 listing countries of interest [the attorney] started agitating for us to file applications in these countries. He said he would use an intermediary company ...to obtain low cost national phase applications ... He actually provided a quote of \$23,379 to retain [name of intermediary] to enter National Phase in United States, Canada and Europe and for [the attorney's firm] to enter Australia and New Zealand. We were reluctant to do this as we were already having to borrow money on our home to cover expenses but [the attorney] kept at us and we finally decided to draw a bigger loan. ... We have since found out that none of these applications needed to have been filed until 12 May 2006, 30 months after the original basic Australian application ...'

141. In his statement, the complainant's husband said that he had met with the attorney at his offices in early 2004 and in response to his question about why it was necessary for he and the complainant to 'outlay money for the international protection at this time' the attorney responded by saying (see Exhibit A5 at [14]):

'By lodging the National Phase Application immediately, it has two advantages. One being it is cheaper and allows broader coverage, plus [the complainant] will get her patents granted a lot quicker.'

142. The attorney denied that he said this or that he strongly advocated for the filing of national phase applications in February 2004 or at any other time. He relied on the correspondence that was sent to the complainant and dated 29 January 2004 (see Exhibit R2 at JRM 11) and 15 March 2004 (see Exhibit R2 at JRM 15). The complainant's husband acknowledged that he and the complainant received these letters. He also conceded that the letter dated 15 March 2004 was in response to his handwritten note of 20 February 2003 (see exhibit A2 at JAD5).

143. The letter dated 29 January 2004 sets out the 'present status' of the complainant's innovation patent application and her PCT application. Under the heading 'the next step' is the following:

‘The PTC application affords a period of 30 months (31 months in certain countries, for example Australia and New Zealand) from the priority date in which to lodge your National Phase applications. National Phase applications in most countries (30 months) must be lodged before **12 May 2006**.

...

It is an advantage to lodge National Phase applications in countries of interest at an early stage if possible because patents usually take between 2 and 4 years to issue in most countries and the sooner the National Phase applications are lodged the sooner the patent is granted. ...’

144. The person who signed the letter appears to have been the attorney’s assistant.
145. In my opinion, the letter does not amount to advice, by the attorney, in the form alleged in paragraph 13 of the particulars of the charge. On its face the letter appears to be a standard form letter that the attorney sends to all clients after a PCT application has been lodged. Nor did the complainant or her husband identify the letter as containing the advice on which they relied to instruct the attorney to commence making national phase applications in May 2004.
146. The letter does however, contradict the complainant’s evidence that she was unaware of there being an extended deadline to make such applications and that this deadline ended on 12 May 2006. I do not infer from this that the complainant was lying. The statement in her statutory declaration was made not only on her behalf but also on behalf of her husband. Her husband as I have already found was the person who, after 10 November 2003, primarily dealt with the attorney. It is evident from the material before the Tribunal that he was also instrumental in making the decisions in regard to the progress and payments of the various patent applications. It was for this reason that he sent his handwritten note of 20 February 2004 (see Exhibit A2 at JAD5) in which he asked the attorney to:
- ‘(a) Please detail protocol that needs to be addressed to ensure [complainant’s] patent application proceeds to full patent being granted, starting at national phase application onwards, setting out budget costs including examination, prosecution etc. qualify length of patent, renewal costs and outgoings, barriers that need t be addressed in budget dollars over life of the patents by country.

The countries of interest are:

...

This is needed mostly to enable us to arrive at a commercial decision verses upfront payment to overtime royalty stream.

(b) ...'

147. The attorney's response (see Exhibit R2 at JRM15) to this note set out the costs of lodging national phase applications in the countries of interest listed in the abovementioned note. It also set out the costs of renewal and the period of protection once a patent had been granted. Whether the response adequately answered the questions asked of him by the complainant's husband was not the subject of the charge.
148. Once again, on the evidence before the Tribunal, I am unable to make a finding that the attorney advised the complainant in late February 2004 that she needed to file national phase application to protect her interest as alleged in paragraph 13 of the particulars of the charge. Accordingly, I find that the Board has failed to establish allegation 4.
149. Even if the advice had been given as alleged, the evidence of the experts was similar to the evidence they had given in regard to allegation 2; namely it depended on the circumstances.
150. Mr Bartlett's evidence was that (see Exhibit A10 at paragraph 50):

'It is normal for national phase entries (from an international patent application) to occur as late as possible. A patent applicant is able to enter the national phase (or the regional phase in the case of some global regions, notably the European Patent Office) as late as either 30 months or 31 months from the filing of the first patent application (in the Complainant's case, the deadline thus being either 12 May 2006 or 12 June 2006) depending on the country/region.'

151. That is, so long as a national phase application is initiated before the relevant deadline, a person's rights are not put at risk. However, he did note that the later a national phase application is lodged the examination and grant process will similarly be delayed. Where 'a client wanted to obtain a grant of patents quickly, simply to obtain a grant sooner rather than later (and for no other reason)' he said he would 'counsel' his client against doing so because of the 'subsequent expediting of the costs and the danger of handling the task poorly due to allowing insufficient time ...'. The costs of national phase applications he explained could be considerable and as it

was 'common for a project' to discontinue before the relevant deadline for filing a national phase application, it was money unnecessarily spent. Lodging national phase applications early did not, to Mr Bartlett's knowledge save costs. Mr Bartlett concluded by saying that notwithstanding his advice, if a client instructed him to obtain a grant of patents quickly, he would follow those instructions.

152. Mr Bartlett also acknowledged that there were circumstances that warranted or required an early lodgement of a national phase application. These were, the commercial significance of a particular country (e.g. the United States and European, national/regional), the requirements of an actual or potential commercial partner and where a potential infringement is identified in a particular country.
153. Mr McInnes agreed with what Mr Bartlett had said (see Exhibit R11 at paragraphs 28 and 29). Mr McInnes went on to say that on the basis of the statements filed by the complainant and her husband there was no suggestion that the national phase would not have been entered into at all and that in his opinion the only issue was timing. This of course ignores what would have happened had the attorney advised the complainant to delay their applications, as Mr Bartlett indicated a competent and prudent registered patent attorney would do.

**Allegation 4: the alleged shouting and use of expletives by the attorney during a telephone conversation with the complainant and her husband**

154. In her statutory declaration the complainant said she had received an abusive telephone call from the attorney on 23 July 2007 (Exhibit A2 at [15]). In support of this she attached, at JAD11, a copy of email exchanges between herself and the attorney. It was the complainant who alleged, in her email, that the attorney had threatened her. The threat was the attorney's demand for the payment of outstanding fees, which the complainant had requested further time to pay as her company, which she had incorporated in February 2004, did not have the necessary funds at that time. The attorney responded to the complainant's email by saying that his 'threat' to recover the outstanding amounts had not been made 'in jest or as an idle threat'. He also made reference to 'the false defamatory imputation' made by the complainant that he had deposited their funds into his own personal account. His response was

that he was seeking advice in regard to the ‘imputation’ and was immediately ceasing all work on her files and would advise his overseas agents accordingly.

155. In his statement the complainant’s husband set out his direct dealings with the attorney since early 2004: see Exhibit A5 at [23] to [49]. These dealings arose out of his concerns about the money he and the complainant had advanced to the attorney without receiving a full and proper account as to how and when the money was spent and delays in the progress of the United States national phase patent application. At [57] to [59] he set out the substance of his telephone conversation with the attorney on 23 July 2007. His evidence was that the attorney swore at him and also hung up on him twice. He described the attorney’s behaviour as aggressive and “‘piggish” overbearing.’ Later that evening the complainant’s husband sent an email to the principal of the attorney’s firm setting out what had happened that day and also his concerns about the conduct of the attorney generally in regard to his wife’s patent applications.
156. The attorney said that he did have a ‘terse’ conversation with the complainant that day: see Exhibit R2 at [97]. He also said that as a result of accusations the complainant had made about him, he believed it was only proper for him to inform her husband of these and that it was no longer tenable for him or his firm to continue to act as their attorney. He did not otherwise dispute what the complainant or her husband had said.
157. In his report (see Exhibit A10) Mr Bartlett said at [66] and [67] the following:

‘66 There is never a situation where it is acceptable for a patent attorney to speak in a derogatory manner to a client, such as directing a swear word at the client. It is never acceptable for a patent attorney to speak in a manner that causes intimidation, particularly insofar as a client might feel forced to accept a recommendation from a patent attorney. If the Complainant has been exposed to either of these situations from the Attorney, particularly if deliberate and regular, the Attorney would not have been behaving in a manner that the majority of the Australian patent attorney profession would regard as normal or acceptable.

67 It is always preferable for the patent attorney to avoid language tones that may be regarded by the client as being offensive or rude. It can be difficult to assess what language or tones may be received by a client in such a way, but a patent attorney must be diligent to this possibility and work to avoid problems before they arise. Unfortunately, this diligence must be extend to situations where the patent attorney is perhaps being unfairly criticised and is himself/herself being poorly treated by a

client ...Again, if the Complainant has been exposed to offensive or rude conduct from the Attorney, particularly if deliberate and regular, the Attorney would not have been behaving in a manner that the majority of the Australian patent attorney profession would regard as normal or acceptable.'

158. Mr McInnes endorsed these remarks of Mr Bartlett: see Exhibit R11 at [32].
159. I understand Mr Bartlett's evidence to be that intimidating conduct or the use of offensive and rude language by a patent attorney must both be deliberate and regular for it to become unacceptable. In this case, the conduct of the attorney the subject of the allegation, while deliberate occurred at about the same time.
160. While I do not disagree with Mr Bartlett's remarks, in my opinion the proposition as to the expected standards of behaviour of patent attorneys in their relationships with their clients can be more succinctly stated as an expectation to demonstrate the highest standard of behaviour. Swearing at a client or behaving in an aggressive or intimidating way towards a client is in my view an unacceptable departure from that standard.
161. I accept that the attorney was frustrated with the complainant and her husband. He even said he was angry with her (T192). However, this did not justify the manner in which he responded to the complainant and her husband on 23 July 2007. They were clearly seeking an explanation from him as to the costs and progress of the complainant's patent applications. Rather than providing an explanation he insisted on the payment of an amount, which Mr Bartlett correctly noted was a 'relatively small amount that had been outstanding for a relatively short period of time.' The complainant, Mr Bartlett noted, had been a 'reasonably good payer over a reasonable period of time' (see Exhibit A10 at [68]) and as noted above she had by then paid a substantial amount.
162. Even at the hearing the attorney seemed to be of the view that he was justified in saying what he had said and how he said it.
163. On the evidence before the Tribunal I find that on 23 July 2007, during a telephone conversation with the complainant, the attorney spoke to her in a threatening manner with the intention of intimidating her. I make a similar finding in regard to the

attorney's conduct during his telephone conversation with the attorney's husband. However, in this case his unacceptable conduct was the use of a swear word.

164. I also find that this conduct of the attorney amounted to unsatisfactory conduct as it was behaviour that did not meet the accepted professional standard of practice of registered attorneys.
165. For the reasons set out above I find that the Board has, in substance, established allegation 4 to the requisite standard.

### **Conclusions in regard to the Charge**

166. On the basis of my findings set out above, I find proven, to the requisite standard, the charge that the attorney is guilty of unsatisfactory conduct in the following respects:
- (a) It was not necessary for the attorney to take the 5 comparative photographs of the complainant on 10 November 2003 for the purpose of processing her patent application and furthermore that he conducted himself in such a manner at this time when taking all 10 photographs that the complainant was intimidated by him and allowed herself to be photographed by him in circumstances where she felt she had no option but to comply with his request.
  - (b) During telephone conversations, on 23 July 2007, with the complainant and her husband, the attorney shouted and used expletives which were intended to and did have the effect of intimidating his client and her husband.
167. The above findings are 2 separate incidents of conduct by the attorney which amount to unsatisfactory professional conduct.
168. For the reasons set out above, I have found that the Board has failed to establish the other 2 allegations of unsatisfactory conduct by the attorney. The circumstances surrounding these allegations did raise concerns as to whether the attorney's advice or lack thereof in regard to the early timing and cost consequences of lodging PCT application and the subsequent national phase applications was not consistent with the standard of practice of a patent attorney as evidenced by Mr Bartlett and not

disputed by Mr McInnes. However, as I mentioned advice of this nature was not the subject of the charge.

169. Having made findings that the attorney is guilty of unsatisfactory conduct it is appropriate that the attorney and the Board be given an opportunity to consider, in light of my findings generally, the appropriate disciplinary action that should be taken against the attorney. Subject to any objections filed by the parties I propose to make following orders in regard to finalising this matter:

- (a) on or before 1 July 2009 the parties to file and serve evidence (if any) and submissions in regard to disciplinary action that should be taken;
- (b) on or before 22 July 2009 the parties to file and serve evidence (if any) and submissions in reply;
- (c) the Tribunal to determine the issue of disciplinary action on the papers.

.....  
Disciplinary Tribunal for Patents and Trade Marks Attorneys

<b>Date of Hearing:</b>	2 and 3 December 2008, Brisbane
<b>Date of Decision:</b>	10 June 2009
<b>Appearance for the Board</b>	Mr A Markus, solicitor
<b>Appearance for the Patent Attorney</b>	Dr D Eliades, counsel
<b>Solicitor for the Board</b>	The Australian Government Solicitor
<b>Solicitor for the Patent Attorney</b>	McKays Solicitors