

**PROFESSIONAL STANDARDS BOARD FOR PATENT AND TRADE  
MARKS ATTORNEYS and PULLEN**

**Reasons for Decision**

**INTRODUCTION**

1. Dr Kevin Michael Pullen is a registered patent and trade marks attorney, who has been carrying on practice in the Sunshine Coast area of south-east Queensland.
2. Dr Pullen has been charged by the Professional Standards Board (**the Board**) pursuant to Part 8 of Chapter 20 of the *Patents Regulations 1991* (**the Regulations**) with three counts of professional misconduct or, in the alternative, unsatisfactory professional conduct, based on information provided by four complainants.
3. Mr Eteuati, solicitor, who appeared for the Board, confirmed that these proceedings relate only to Dr Pullen's registration as a patent attorney, not his registration as a trade marks attorney.
4. Regulation 20.32 of the Regulations defines "professional misconduct" and "unsatisfactory professional conduct" relevantly as follows:

***professional misconduct*** means:

  - (a) unsatisfactory professional conduct that involves a substantial or consistent failure to reach reasonable standards of competence and diligence; or
  - (b) any other conduct, whether occurring in connection with practice as an attorney or otherwise, that shows that the attorney is not of good fame, integrity and character; ... .

***unsatisfactory professional conduct*** includes conduct, in connection with practice as a registered patent attorney, that falls short of the standard of competence, diligence and behaviour that a member of the public is entitled to expect of an attorney."
5. The charges are set out and particularised in a five-page Notice filed with IP Australia on 28 November 2012. The conduct complained of can be summarised in the following table:

<b>Charge No.</b>	<b>Conduct</b>	<b>Complainant</b>	<b>Relationship to Dr Pullen</b>
1.	Failure to act promptly on the instructions of 3 clients or to promptly report his inability to do so.	Shane Murphy and OH&S Engineering Services Pty Ltd  Ms Laura Barrow, U.S. Patent Attorney  Luke O'Neill	Client  Principal  Client
2.	Misleading or deceptive conduct or conduct likely to mislead or deceive.	Shane Murphy – see above  Ms Laura Barrow – see above	Client  Principal
3.	Failure to pay invoices of foreign patent attorney and encouraging further work on assurances that the fees rendered already would be paid.	Ms Erika Spencer of Tsubame Patent Attorney Firm in Japan	Agent

6. The conduct described in respect of Charge 1 would be a specific breach of the terms of clause 3.2.7 i of the Code of Conduct for Patent and Trade Marks Attorneys of 1 July 2008, and that described in respect of Charge 2 would be a specific breach of clause 3.2.9.
7. Regulation 20.33(6) of the Regulations provides that the Board must consider the Code when deciding whether an attorney has engaged in professional misconduct or unsatisfactory professional conduct and it is obviously also relevant to the Tribunal to have regard to the Code when considering the Charges, although the Code is not mentioned in the Notice of Charges.
8. In the course of the hearing, I was informed that the Board accepts that subparagraph (b) of the definition of professional misconduct, in particular, the phrase “not of good fame, integrity and character”, is not supported by the evidence.
9. I was also informed that the charge relating to Mr Luke O'Neill is withdrawn.

### **An Ex Parte Hearing**

10. The Board sent correspondence to Dr Pullen regarding each of the complaints against him, apart from Mr O'Neill's complaint, asking for an explanation, and he responded in each case. He also responded to correspondence from Ashdale Workplace Solutions (**Ashdale**), to whom the matter was referred by the Board for investigation and report. However, he has not responded in any way to the charges made against him in these proceedings, nor has he appeared or been represented at the hearing, which took place over two days in Brisbane on 16 May and 20 June 2013, or the two telephone directions hearings I conducted, or otherwise taken part in the proceedings.
11. Initially, when Dr Pullen did not respond to documents served on him by post to PO Box 241, Landsborough, Queensland 4550, his address shown on the Register of Patent Attorneys, I directed personal service, but enquiry agents engaged by the Board, the IDS Group of Brisbane, were unable to achieve this. A Report dated 5 April 2013 from Mr Nick Wright, Director, Location Enquiries Division of IDS, advised that Dr Pullen is not recorded on the Electoral Roll.
12. In a letter to the Board dated 22 November 2011, Dr Pullen advised that his practice was "fully mobile" and that he did not maintain a traditional office. He said he had a physical address at Shed 9, 38 Maple St, Maleny, Queensland 4552 for delivery of documents but his presence at that address was rarely required.
13. He expressed the view that this met the requirements of s 203 of the *Patents Act 1990* (**the Act**) to which the Board had drawn his attention. This section provides that a registered patent attorney commits an offence if he or she maintains an office which is not regularly attended by a registered patent attorney who is in charge of the work being done there.
14. The enquiry agents did not investigate the address in Maleny in the Sunshine Coast hinterland, but I decided not to put the Board to that trouble and expense. I note that a process server referred to in the report issued by Ashdale in March 2012 was unable to effect personal service at that address and was informed by a neighbour that Dr Pullen had not been seen at the address for a couple of months.
15. Further, all letters from Dr Pullen in this matter are on a letterhead which nominates the PO Box number as his only address. There is also an email address, but there are

many references in the papers to ineffectual attempts to make contact with him by that means or by telephone. The Tribunal has also attempted to make contact with Dr Pullen by post, email and telephone, but has been unable to do so. Accordingly, I have accepted postage to Dr Pullen's registered address as sufficient service of documents, including notice of the hearing dates.

16. When renewing his registration, required annually under the Regulations, it is the PO Box address he has most recently nominated. Although I would have preferred personal service, I do not think Dr Pullen should be able to hide behind the anonymity of a Post Office Box and take advantage of the fact that he does not run, even from home, an office open to the public in business hours, to frustrate the prosecution of these proceedings.

## **THE FACTS**

17. The factual evidence before me consists of an affidavit of Lisa Darelle O'Neill, Chair of the Board, expressed to be on information and belief upon consideration of business records of the Board and IP Australia.
18. Previous decisions of this Tribunal have emphasised that the standard of proof in these matters is the higher-than-usual civil standard (*Briginshaw v Briginshaw* (1938) 60 CLR 336). In such circumstances, the best evidence would be direct evidence from the complainants themselves, the course generally adopted in previous cases in this Tribunal. I have, however, accepted the hearsay evidence of Ms O'Neill, as this Tribunal is not bound by the rules of evidence and the real probative value of the affidavit lies in the large volume of documents annexed. I also note that two of the complainants are overseas.
19. In any event, the annexures include a form of Statutory Declaration dated 26 September 2011 by Ms Laura Barlow, the US Patent Attorney referred to in the Table above. There is also the Investigator's Report by Ashdale dated March 2012.
20. I will deal with the facts relating to each complainant (apart from Luke O'Neill) separately.

**Shane Murphy**

21. Mr Murphy devised an invention called a “training apparatus” and, in May 2010, approached Dr Pullen enquiring about his services for obtaining patent protection.
22. Mr Murphy said he told Dr Pullen he needed to have the patent application finalised by Christmas 2010, so Dr Pullen suggested using the expedited request-for-examination process.
23. Mr Murphy’s retainer of Dr Pullen is reflected in a letter of 9 June 2010 from Dr Pullen to Mr Murphy, which records that Dr Pullen is to lodge “a complete patent application (20-year term)” as soon as practicable.
24. What was contemplated was the filing of a complete Australian Patent Application with a request for an examination and a request that the examination be expedited.
25. As to time projections, the retainer letter does not mention any particular deadline but is in these terms:

“As to delivery date for my services, as I am a sole practitioner, this greatly depends on the volume of work on hand at any given time and the complexity of the new engagement. Nevertheless, for a new patent application, I endeavour to forward a draft specification to a client for review within 2 to 3 weeks of engagement. You have forwarded sufficient information in your email for me to commence preparation of the specification.”
26. The complete patent application was filed with IP Australia on 21 July 2010, with full payment of the requisite fee. Dr Pullen wrote to Mr Murphy on 20 August 2010 and reported the filing of the request for expedition.
27. However, it was not until 24 September 2010 that Dr Pullen sent the letter requesting an examination and that the examination be expedited. The letter in question has a date of 20 August 2010 typed at the top, but this date has a line ruled through it and the letter is date-stamped “24 SEP 2010”. Receipt by IP Australia is date-stamped 28 September 2010.
28. Further delay was encountered because the letter enclosed a cheque for only \$420, when the required examination fee had been increased to \$450 as from 1 August 2010, apparently unknown to Dr Pullen. A form of Invitation to Pay (**ITP**) the

balance of \$30 was issued by IP Australia on 8 October 2010; by letter of 23 November 2010, they advised they deemed the request for examination of the patent application not to have been filed “because of failure to pay fees as required”. The ITP actually related to two examination requests – this matter and another unrelated matter – and listed the details the wrong way around, but in my view it would have been clear enough to Dr Pullen that the under-payment on this matter was \$30.

29. On 25 November 2010, Dr Pullen re-cycled the letter referred to in paragraph 27 above with a cheque for the correct amount of \$450.
30. An acceptance fee also became due and was left unpaid. A Notice of Acceptance of the application was issued on 17 February 2011 and the acceptance fee of \$200 was required to be paid by an ITP of 28 February 2011. By letters dated 22 June and 8 July 2011, IP Australia advised Dr Pullen that the patent had now lapsed because of failure to pay the acceptance fee but that reinstatement and an extension of time for payment of the examination fee may be available under s 223 of the Act.
31. Finally, on 26 August 2011, Dr Pullen forwarded a form of Application for Extension of Time supported by a Statutory Declaration explaining the non-payment of the acceptance fee and a Direct Deposit Receipt for \$600 (acceptance fee of \$200 plus extension fee of \$400). Reinstatement of the application and grant of the patent followed.

### **Laura Barrow**

32. As already mentioned, Ms Barrow is a US patent attorney based in Florida. In April 2002, she engaged Dr Pullen’s services to prepare and file the Australian national phase PCT application for her client in respect of a “Method for Treating Gastrointestinal Disorders”.
33. The patent was obtained here and was due for renewal on 31 October each year. Renewal was attended to by Dr Pullen in a timely manner from 2002 to 2009, but not in 2010.
34. Ms Barrow sent Dr Pullen a fax on 27 September 2010 with instructions to renew the patent and received a letter on Dr Pullen’s letterhead dated 28 September 2010, signed on his behalf by J A Large, which said this had been attended to. The letter

enclosed an account for \$A725 including an official renewal fee of \$400.

35. In fact the action to renew was not taken until the eve of the 31 October deadline, well after the letter from Large had been sent; the cheque for the renewal fee was for \$400, although the required amount was \$450 and was dishonoured on presentation. Accordingly the patent was not effectively renewed.
36. An email of 3 October 2010, again from J A Large, purportedly confirmed that renewal had been attended to. In fact, the renewal documents were not received until 29 October 2010.
37. By letter of 9 November 2010, IP Australia advised that the renewal fee received was \$400, whereas the required fee was \$450 (another fee increase from 1 August 2010)
38. The patent could still have been renewed up to 6 months after 31 October 2010, but Dr Pullen took no further action. Ms Barrow did not find out until September 2011, through another patent attorney in Australia, that the patent had lapsed. Fortunately, the firm Ms Barrow retained to replace Dr Pullen was apparently able to have the patent reinstated.

### **Erika Spencer**

39. Ms Spencer is a representative of Tsubame Patent Attorney Firm of Tokyo, Japan (**Tsubame**) and complained to the Board about unpaid invoices rendered to Dr Pullen for work undertaken at his request to obtain PCT national phase entry in Japan, China and South Korea for Christopher Jorgensen in respect of a “Method and Device for High Temperature Combustion Applications”.
40. The Invoices, totalling the equivalent of \$A16,565, according to the particulars in Notice of Charges, can be summarised as follows:

05.10.09	Japanese national stage filing	JPY 458,480
17.12.09	Korean national stage filing	JPY 278,293
17.12.09	Chinese national stage filing	JPY 264,330
05.02.10	Request for examination (China)	JPY 64,600
06.06.11	Request for examination (Japan)	JPY 233,700

41. Dr Pullen sought Tsubame's services by email on 2 August 2009. Quotes by Tsubame for fees were immediately issued and accepted by email of 5 August 2009 from "J A Large on behalf of K Pullen" attaching a "signed [apparently by Dr Pullen] quotation approval".
42. In an email of 18 August 2010 to Dr Pullen from Ms Spencer, she complained that "We have been calling and e-mailing you constantly for the past couple of months and have received no reply".
43. In late 2010 and early 2011, Tsubame emailed Dr Pullen seeking instructions regarding the Chinese application and advised that they could not go ahead with it whilst their accounts rendered remained unpaid. By email of 20 January 2011, they advised that the Chinese application had lapsed.
44. By email of 11 February 2011, Dr Pullen told Ms Spencer cleared funds from the client were not yet available but he had despatched a cheque that "covers outstanding debt plus cost of requesting examination", on the strength of which Tsubame went ahead and filed a request for substantive examination in Japan. However, no cheque was received.
45. By letters of 22 November 2011 and 6 December 2011 to the Board, Dr Pullen acknowledged his indebtedness to Tsubame. So far as I am aware, the accounts are still outstanding in full, Dr Pullen not having appeared to contradict this.

## **COMPLAINTS AND RESPONSES**

46. The first of the complainants was Ms Spencer of Tsubame, by email to the Board on 18 May 2011, in which she said Dr Pullen had "informed us countless times that [he] will pay", but no payment of Tsubame's costs had been forthcoming.
47. The Board called for Dr Pullen's comments and had to follow up on this request. On 1 August 2011, a male voice answered a telephone call from Acting Secretary Xavier Gisz and said Dr Pullen was convalescing after an ongoing health problem but may be back to work within a few days.
48. Eventually, Dr Pullen responded by email dated 5 September 2011. He did not dispute the debt owed to Tsubame and indicated he would pay it off by periodic payments – although there is no evidence of any such payments having been made.

49. In his response, Dr Pullen canvasses the health and other problems he is experiencing in these terms:

“Health deteriorated in late 2007/early 2008. Little improvement to date. Mental impairment manifests itself as an intense lack of motivation and significant fatigue ... . Despite reducing all possible expenses, practice is not financially viable. Additional employment has been gained to meet living expenses. Friends and family have attempted to assist in the administration of this practice.”

50. Two further complaints followed in late 2011 – by a long letter from Mr Murphy of 23 October and an email of 25 October from Ms Barrow attaching her Statutory Declaration of 26 September 2011.
51. Ms Barrow said she had had a good working relationship with Dr Pullen from 2002 but, since approximately June 2011, she had received no replies to her communications.
52. Mr Murphy also complained about problems communicating with Dr Pullen, who frequently did not answer or return telephone calls. Generally, Mr Murphy complained about expense and delay.
53. Dr Pullen responded promptly to the Board on these matters. The response regarding Mr Murphy on 2 November 2011 was confusing in that it repeated the assertion that the request for expedition had been lodged in August 2010. It claimed the delay arising from the underpayment referred to in paragraph 28 above was, in some way which is not clear, attributable to the inefficiencies of IP Australia following the closure of their Brisbane office. It said that the failure to pay the acceptance fee (see paragraph 30 above) simply arose from a failure to diarise the due date.
54. Dr Pullen’s responses also referred to telecommunication problems he had only just discovered were being experienced arising from his “office” being a mobile one. As I understand it, all incoming emails, faxes and telephone messages were said to be linked to a single email address which had been “hacked into” and corrupted.
55. He referred again to his health problems, which he said prevented him from practising full-time. He said he could only devote an average of 10 – 12 hours per week to the practice.
56. In the letter of 22 November 2011 (referred to at paragraph 12 above), Dr Pullen says

he has been involved in long-running litigation with the Australian Taxation Office in which he seeks several hundred thousand dollars but, in the meantime, his practice is “currently unable to meet all of its outstanding past debts”.

57. On 30 November 2011, a four-page letter was sent to Dr Pullen by the Board regarding all complainants, apart from Mr O’Neill. It advised that the Board had met and was considering proceedings before this Tribunal.
58. Dr Pullen was asked to attend a meeting in Brisbane to discuss the problems with his practice and bring his active files. The Board undertook to preserve confidentiality but pointed out that, if legal proceedings became necessary, confidentiality would no longer be possible.
59. By letter of 6 December 2011, Dr Pullen declined to attend the meeting referring, inter alia, to the impracticality he suggested would be involved in transporting a large volume of files 100 km to Brisbane. He later maintained that production of the files to the Board would be a breach of client/attorney privilege.
60. With a letter of 24 April 2012 to the Board, Dr Pullen enclosed an unsigned copy of a statutory declaration by him dated 1 September 2009 describing problems said to have been experienced in the Sunshine Coast area with the receipt and despatch of mail through Australia Post “for the past approximately 30 months”.
61. In the meantime, on 25 January 2012, the Board referred the matter to Ashdale for investigation and report. Dr Pullen was unco-operative with them and they issued the report of March 2012, which was adverse to him.
62. The present proceedings were commenced by Notice filed with IP Australia on 28 November 2012 and provided to me, constituting the Tribunal, on 18 January 2013.

### **EXPERT EVIDENCE**

63. The Board relies on an Expert Report of Gregory James Bartlett, a highly experienced patent attorney. Mr Bartlett is a graduate in chemical engineering from Monash University and has been in full time practice as a patent attorney in Australia, continuously since 1989. He is currently a partner in Phillips, Ormonde, Fitzpatrick, patent attorneys, based in their Adelaide office.

64. Mr Bartlett supplemented his report with oral evidence before me, which I found of great assistance.
65. I consider that expert evidence as to the practices and standards of the patent attorney profession would usually be essential in these matters and, in this regard, respectfully adopt the approach taken by Mr John Lyons QC in the earliest of these cases of which I am aware, *Re Kelly*, unreported, Patent Attorneys Disciplinary Tribunal, 28 February 1997.
66. Further, I consider that an expert patent attorney can give evidence both as to “reasonable standards of competence and diligence” of an attorney when considered objectively, and “the standard of competence, diligence and behaviour that a member of the public is entitled to expect of an attorney”, within the meaning of Regulation 20.32 set out at paragraph 4 above.

## **THE CHARGES**

67. The basis for each of the three charges is encapsulated in the table above.
68. In each case, it is alleged that the conduct complained of represents professional misconduct or, in the alternative, unsatisfactory professional conduct, the latter being the less serious.
69. The relationship between the two types of conduct described in sub-paragraph (a) of the definition of “professional misconduct” and the definition of “unsatisfactory professional conduct” is that the latter is wholly incorporated within the former, which has the additional elements of:
  - (a) a substantial; or
  - (b) a consistent;  
failure to reach –
  - (c) reasonable standards of competence and diligence.

Therefore, sub-paragraph (a) requires a substantial or consistent failure to reach reasonable standards of professional work (but not other conduct, which is dealt with in sub-paragraph (b)), which is more than that required for the purposes of

unsatisfactory professional conduct.

70. The concession noted at paragraph 8 above means that Charges 2 and 3 are no longer in the alternative. Professional misconduct, as alleged in those charges, is based on the very allegation now noted as being withdrawn. Accordingly, the allegation of professional misconduct must now be taken to have been withdrawn, leaving those charges limited to allegations of unsatisfactory professional conduct.
71. Further, as noted in paragraph 9 above, the matter of Mr O'Neill is no longer the subject of Charge 1.
72. A finding of professional misconduct is still available on Charge 1, but if one examines the wording of the charges, it becomes clear that the only feature which takes Charge 1 into the realm of professional misconduct is the allegation that there has been a "consistent failure" across both of the Murphy and Barrow matters "to reach reasonable standards of competence and diligence".

#### **FINDINGS ON THE CHARGES**

73. Except on Charge 1 insofar as it relates to professional misconduct, a matter to which I will return, it will be convenient to deal with each complainant separately.

#### **Shane Murphy**

74. Dr Pullen pointed out that it would have been impossible to obtain a grant of a patent in Australia by Christmas 2010 on instructions received only a few months earlier and, when Mr Murphy said he wanted the application finalised by Christmas, Dr Pullen probably interpreted that to mean that the complete application was to be lodged by then, which seems to me to have been reasonable.
75. Mr Bartlett explained in his Report that the plan seemed to have been to obtain a priority date by filing the application as soon as possible and then to progress the application to obtain a grant within 12 months, by which time action (which would be expensive) would need to be taken to initiate foreign patent protection. The initial filing of the complete application on 21 July 2010 was in accordance with such a plan.
76. Mr Bartlett noted that the application for expedited examination seems to have been

prepared for lodgement by 20 August 2010, when Dr Pullen wrote the letter reporting having done so.

77. The delay between that date and 24 September 2010, when the documents were lodged, is unexplained, but the evidence from Mr Bartlett was that the speed of the application process up to 25 November 2010 was actually quite fast compared to normal, so I do not think I can regard this as proof of Charge 1.
78. The terms of the letter of 20 August 2010 are another matter. The letter was clearly untrue in that it reports an event, the lodgement of the request for expedited examination, as having happened when it did not happen until a month later.
79. The evidence of Mr Bartlett was that this misrepresentation was below the standards the public could expect from an attorney, whether or not it was deliberate. Accordingly, to this extent, I find Charge 2 proven.
80. A letter to the Board of 2 November 2011 containing the same misrepresentation in the course of the Board's investigations (see paragraph 53 above) is also particularised in respect of Charge 2, but it has not been specifically dealt with by Mr Bartlett and I do not find the charge proven in this respect.
81. I note that clause 3.2.9 of the Code of Conduct says that misleading or deceptive conduct can include dealings with IP Australia, but it does not mention dealings with the Board.
82. The next point is the under-payment of the examination fee by \$30.
83. Mr Bartlett did not consider the initial under-payment could be classified as a failure to act promptly within Charge 1 and I agree. He thought it was better described as "failure to act correctly".
84. Moreover, I do not believe I can regard the delay between 28 September 2010 and the payment of the full fee on 25 November 2010 as a failure to act promptly within Charge 1 either, for the same reason as that mentioned in paragraph 77 above.
85. The final matter relating solely to Mr Murphy is the failure to pay the acceptance fee.
86. The failure to pay the fee by 3 June 2011 or at all must, I think, come within Charge 1. I am satisfied that it was a failure to comply with implicit instructions with the

promptness a member of the public is entitled to expect from a patent attorney. In my view, complete inaction can be regarded as failure to comply promptly with instructions.

87. This failure was compounded by the delay in responding to the letter of 8 July 2011 at least. This letter was addressed to Dr Pullen's usual PO Box. Although Dr Pullen suggests otherwise, I think it was probably received, whereas the letter of 22 June 2011 was addressed to 23/28 Tytherleigh Ave, Landsborough, an address I cannot recall seeing anywhere else in the papers; I therefore cannot conclude that it was received.

### **Laura Barrow**

88. This matter involved two representations to Ms Barrow that a step had been taken when it had not: the letter of 28 September 2010 and the email of 3 October 2010.
89. The letter and the email were both signed by J A Large, who appears to be an unqualified assistant of Dr Pullen. It seems clear from the correspondence from Dr Pullen that Mr (or Ms) Large was acting with his authority. I note that the Code of Conduct (clause 3.2.2) confirms the general law by providing that the attorney is responsible for the work of unqualified staff. Dr Pullen accepted this.
90. These misstatements seem to me to be in the same category as the letter of 28 August 2010 to Mr Murphy (see paragraph 78 above). Mr Bartlett had no hesitation classifying this conduct (i.e., re Ms Barrow) as being below the standards which clients would expect and, accordingly, I regard this as another example of Charge 2 being made out.
91. I do not regard Dr Pullen's inadequate efforts to renew this patent on or about 29 October 2010 as a failure to act promptly on instructions for similar reasons to the under-payment of the examination fee for Mr Murphy (see paragraph 83 above).
92. In oral evidence, Mr Bartlett appeared to agree with Mr Eteuati that the failure to process the renewal until 29 October 2010 after receiving instructions on 27 September 2010 was an instance of not acting promptly on instructions within the terms of Charge 1, but I respectfully take a different view. Promptness is a relative concept and, in my view, it is sufficient to take action to renew a patent before the

due date. The fact that the application was inadequate is beside the point – it does not mean that there was a failure to act promptly. In this respect, I therefore do not regard Charge 1 as proven to the standard required.

93. Mr Bartlett is critical of the complete inaction by Dr Pullen to remedy the situation in the ensuing 12 months, sentiments which I share. However, this inaction is not relied on in the particulars of the Notice of Charges and accordingly requires no further consideration.
94. On the question of professional misconduct on Charge 1, it is necessary to view the history of the Murphy and Barrow matters together.
95. There was discussion at the hearing as to whether a “substantial or consistent failure” to reach reasonable professional standards had been demonstrated but, as mentioned above, Charge 1 does not mention the word “substantial”. It is limited to an allegation of “consistent” failure.
96. Mr Bartlett is (in my view, justifiably) critical of the constant errors in the administration of Dr Pullen’s practice in the 12 months from mid-2010 to mid-2011 and probably beyond, but I think he may have included in his consideration conduct which is not particularised in the charges.
97. If I limit myself in that way, I am unable to find a sufficiently consistent pattern of conduct to uphold the charge of professional misconduct.

### **Erika Spencer**

98. In his Report, Mr Bartlett indicates that lengthy delays in settling accounts are not uncommon between foreign and Australian patent attorneys, and can be tolerated for a variety of reasons. However, he does not excuse this practice and said that a delay of more than 18 months is uncommon and undesirable.
99. Mr Bartlett also suspects that Tsubame would have gone ahead with the Japanese substantive examination even without Dr Pullen’s assurance of a cheque in the mail. However, he again does not condone Dr Pullen’s misstatement in that regard, particularly if known to be untrue, a view which I again share.
100. I am unable to make a finding as to whether or not it was intentional, but in any

event, Mr Bartlett says that, once the true position about the cheque in the mail became apparent, Dr Pullen should have apprised Tsubame of that, and I agree.

## **DECISION**

101. The result of these proceedings can be summarised as follows:

- (a) The charges of professional misconduct in relation to Mr O'Neill and Ms Spencer and in relation to Mr Murphy and Ms Barrow in respect of misleading or deceptive conduct were not proceeded with.
- (b) The charge of professional misconduct in relation to Ms Murphy and Ms Barrow concerning the failure to act promptly on a client's instructions is not proven.
- (c) Dr Pullen is guilty of unsatisfactory professional conduct as follows:
  - (i) By writing a letter of 20 August 2010 to his client, Mr Murphy, reporting that a request for expedited examination in respect of his patent application had been lodged, when it had not.
  - (ii) By failing to pay the acceptance fee of \$200 on Mr Murphy's application promptly or at all.
  - (iii) By representing to Ms Barrow, through a member of his staff, on 28 September 2010 and on 3 October 2010 that action to renew Australian national phase PCT application of her client, Mr J S Wilkins Jnr, by 31 October 2010 had been undertaken, when it had not.
  - (iv) By failing to pay fees of 1,299,403 Yen due by him to Tsubame, Patent Attorney firm of Japan, for a period of at least 18 months.
  - (v) By sending an email to Ms Spencer of Tsubame, Patent Attorney firm of Japan, on 11 February 2011 advising that he had sent them a cheque covering their outstanding fees when he had not, as an inducement for them to perform further work in Japan for one of his clients.

**Penalty**

102. On a finding of unsatisfactory professional conduct by a patent attorney, regulation 20.45 provides for administration of a public reprimand or suspension of the attorney's registration for a maximum period of twelve months. The Tribunal may also impose conditions on return to the Register.
103. My powers on penalty are not intended to be punitive but rather, protective of the public: *Professional Standards Board for Patent Attorneys v Trade Marks Attorneys Disciplinary Tribunal* [2002] AATA 728.
104. The Board has submitted that various conditions should be imposed on Dr Pullen's re-registration after a period of suspension has elapsed, in particular, that for a period of one or two years he should work under the supervision and as an employee of another registered patent attorney approved by the Board.
105. Assuming such a person could be found, it seems to me that this condition would be difficult to put into practice and is in any event not warranted.
106. Dr Pullen is a very experienced patent attorney, and his unsatisfactory conduct seems to me to have arisen, not from lack of skill and knowledge, but from personal problems which prevented him from giving sufficient attention to the day-to-day business aspects of his practice. This was acknowledged in evidence from Mr Bartlett.
107. I have given careful consideration to the Board's submissions, but do not intend to impose any of the conditions on re-registration which have been requested.
108. Those submissions did not include anything in relation to Tsubame's outstanding fees, so I have not considered that.
109. Nonetheless, I have found Dr Pullen guilty of unsatisfactory professional conduct on a number of counts and I think the maximum period of suspension is appropriate.
110. Accordingly, I suspend Dr Pullen's registration as a patent attorney for twelve months from today's date.
111. The Regulations provide for a number of administrative steps following decisions of the kind which I have made today. Accordingly, in conformity with regulation

20.50, I direct that a copy of these reasons for decision be sent to Dr Pullen at his registered address and to the Board and that a statement setting out my decision today including the decision as to penalty be published in the Official Journal.

112. In addition, I direct that a copy of these reasons be published in accordance with regulation 20.50(d).

113. I make no order under 20.51(2) about Dr Pullen's practice being carried on during the period of suspension by another patent attorney, in the absence of any submissions from Dr Pullen in that regard.

**Katrina Howard SC**

**Acting as the Patent Attorney and Trade Marks Attorney Disciplinary Tribunal**

**25 July 2013**