

**Professional Standards Board for Patent and Trade
Marks Attorneys and Patent and Trade Marks
Attorneys Disciplinary Tribunal [2002] AATA 728 (26
August 2002)**

Last Updated: 2 September 2002

DECISION AND REASONS FOR DECISION [2002] AATA 728

ADMINISTRATIVE APPEALS TRIBUNAL)

) No A2001/503

GENERAL ADMINISTRATIVE DIVISION) A2001/504

Re Professional Standards Board for Patent and Trade Marks Attorneys

Applicant

And Patent and Trade Marks Attorneys Disciplinary Tribunal

Respondent

DECISION

Tribunal The Hon C R Wright QC., (Deputy President)

Date 26 August 2002

Place Canberra

Decision The formal findings and directions of the Tribunal are as follows: **(1) Paul Robert □Taylor□ was guilty of unprofessional conduct in that he** (a) on or about 19 September 1999 invoiced Workman Industries Pty Limited and received payment in advance for actions clearly specified as being associated with entry into national phase of patent a application; and (b) failed to pay the overseas associate amounts invoiced for that action and did not advise the client to that effect so that the client was unaware that its rights were at risk; and (c) by doing so precipitated the situation where the client was forced to pay the amounts still owing direct to the overseas attorney to ensure that its right would be maintained. (2) Paul Robert □Taylor□ was guilty of unsatisfactory conduct by providing inaccurate information in his advice on status to Workman Industries Pty Limited dated 21 July 2000. (3) Paul Robert □Taylor□ was guilty of unprofessional conduct in that he (a) on or about 10 August 1998 received advanced payment from ColoCare in respect of PCT/AU97/00145 including money on account for

overseas fees, but has not paid overseas associates and did not advise the client to that effect so that client was unaware that the client's rights were at risk; and (b) as a result of this failure to pay accounts overseas associates have declined to take further actions on behalf of ColoCare until payment is received; (c) by his non payment of overseas associates he placed the intellectual property of ColoCare in jeopardy. (4) In respect of the conduct mentioned in paragraphs 1 and 3 hereof, the Administrative Appeals Tribunal upon reviewing the decisions of the Patent and Trade Marks Attorneys Disciplinary Tribunal dated 1 and 2 November 2001, cancels Paul Robert □Taylor□'s registration as a Patent Attorney pursuant to Regulation 20.23 of the *Patents Regulations 1991*. (5) In respect of matters mentioned in paragraph 2, the Administrative Appeals Tribunal in reviewing the aforesaid decisions of the 1 and 2 November 2001 suspends the said Paul Robert □Taylor□'s registration as a Patent Attorney for a period of twelve months pursuant to Regulation 20.23(2)(b) of the *Patents Regulations 1991*.

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Deputy President

CATCHWORDS

Patents - Patent Attorneys - complaints of unsatisfactory conduct and unprofessional practice - role of Professional Standards Board for Patent and Trade mark Attorneys in commencing proceedings before the Patent and Trade Marks Attorneys Disciplinary Tribunal - hearing of complaints against and suspension of Patent Attorney - application by Professional Standards Board to review by AAT - Admissibility of evidence of unprofessional conduct not contained in original charges. Patent Attorney using funds supplied by clients for purposes other than those for which they were provided - Patent Attorney providing erroneous information to client as to status of his patent - adequacy of penalty imposed by PTMA Disciplinary Tribunal - Code of Ethics of the Institute of Patent Attorneys of Australia and Code of Ethics Guidelines - cancellation of registration of Patent Attorney determined to be appropriate.

[Patents Act 1990 \(C'th\) - ss200, 201](#)

Patents Regulations 1991 - r20,22

[Administrative Appeals Tribunal Act 1975 - ss30 and 40\(1A\)](#)

Drake for Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577

Otter Goldmines Limited v Australian Securities Commission 1997 26 AAR 99

Kioa v West (1985) [159 CLR 585](#)

Dickens v The Law Society of Tasmania, (No. 42 of 1981)

Law Society of NSW v Foreman (1994) 34 NSWLR 408

QXOO/C v Companies Auditors and Liquidators Disciplinary Board (2000) AATA 1144

Australian Securities Commission v Alfred Maxwell Kippe & Anor (1996) 517 FCA 1

The Law Society of South Australia v John Francis Murphy (1999) SASC 83

REASONS FOR DECISION

26 August 2002 The Hon C R Wright QC., (Deputy President)

1. The conduct of Patent Attorneys is regulated by the [Patents Act 1990](#) (C'th) ("the Act") and the *Patents Regulations 1991* ("the Regulations"). Chapter 20 of the Regulations is concerned with the discipline of Patent Attorneys.

2. The applicant is a statutory body constituted under the Patents Regulations:

(1) to determine the scope of and conduct examinations in respect of the subjects which comprise the examinations for registration of a Patent Attorney;

(2) to accredit courses of study in topic groups as meeting the requirements as a Patent Attorney;

(3) to assess the tertiary qualifications of persons seeking registration as Patent Attorneys; and

(4) to consider, and where appropriate, authorise referral of complaints of unprofessional practice and unsatisfactory conduct made by clients of Patent Attorneys to the Patent Attorneys Disciplinary Tribunal.

3. The Regulations provide that where a person is concerned about the conduct of a Patent Attorney, a written complaint may be made to the Professional Standards Board for Patent and Trade Marks Attorneys, and the complainant must lodge a Statutory Declaration with the Board setting out the facts relating to the alleged conduct of the Patent Attorney.

4. The Board is then required to consider the complaint and the Statutory Declaration and decide whether the Attorney may be guilty of either "unsatisfactory conduct" or "unprofessional conduct". "Unsatisfactory conduct" is defined in Regulation 20.1 as:

"not having attained or sustained a professional standard that is consistent with the standard of practice of registered patent attorneys."

"Unprofessional conduct" is defined in Regulation 20.1 as:

"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 patent attorney to observe."

5. Mr Paul R □**Taylor** ("□**Taylor**□") is a registered Patent Attorney who until recently practised on his own account at 10 Inkerman Street, Mosman, NSW. At the time of relevant events he had been a Patent Attorney of some 22 years standing. □**Taylor**□'s name had been entered in the register of Patent Attorneys and a certificate was issued to him on 17 January 1978. He had commenced taking examinations to qualify as a Patent Attorney in 1973 whilst he was employed by the firm of Spruson and Ferguson Patent Attorneys of Sydney. □**Taylor**□ had achieved a grade of "pass" in the subject "Patent Attorneys Practice" in December 1976. The subject "Patent Attorneys Practice" included matters relating to "prudent and ethical professional conduct" and "general nature of a Patent Attorney's own office practice for ensuring preservation of his client's rights".

6. At all relevant times □**Taylor**□ was a member and fellow of the Institute of Patent Attorneys of Australia ("IPTA"). IPTA regularly mailed out to members copies of the Code of Conduct and Guidelines during the period over which those documents were being developed. In his membership proposal to the IPTA on 14 February 1978, □**Taylor**□ certified (inter alia) "having studied the Institute's memorandum, articles and by-laws, if elected (I) agree to abide by the articles of association and by-laws of the Institute...". □**Taylor**□ commenced private practice on his own account in 1993.

7. On 19 December 2000, Gary D □**Mares** ("□**Mares**□") on behalf of Workman Industries made a complaint to the Board, and filed a Statutory Declaration as required by the provisions of Regulation 20.20. The Board considered the complaint and Statutory Declaration on 8 March 2001 and decided that □**Taylor**□ may be guilty either of unsatisfactory conduct or unprofessional conduct in relation to two charges ("the Workman charges"). These charges are set out in a letter of authorisation, dated 15 March 2001 from the Board to □**Mares**□. This letter authorises □**Mares** to bring proceedings **against Taylor**□ in the Patent and Trade Marks Attorney's Disciplinary Tribunal ("the Respondent"). On the first charge the letter of authorisation states that the Board has found that □**Taylor**□ "may be guilty of the first charge of unsatisfactory conduct or unprofessional conduct in that he:

* invoiced Workman Industries Pty Limited and received payment in advance for actions clearly specified as being associated with entry into national phase of a patent application; and

* failed to pay the overseas associates amounts invoiced for that action and did not advise the client to that effect so that the client was unaware that its rights were at risk; and

* by doing so precipitated a situation where the client was forced to pay the amounts still owing to the overseas attorney to ensure that all rights would be maintained."

8. In relation to a second charge the letter of authorisation from the Board stated that "it appears that Mr □**Taylor**□ may be guilty of unsatisfactory conduct by providing inaccurate information in his advice on status dated 21 July 2000".

9. By letter dated 19 March 2001, □**Mares**□ requested that the Board bring the proceedings against □**Taylor**□ in the Disciplinary Tribunal on his behalf as provided for in Regulation 20.21(3).

10. At all material times Mr Bruce Hill ("Hill") was a Director of ColoCare Holdings Pty Limited ("ColoCare"). Prior to December 1998, ColoCare had been known as Bresendi Holdings Pty Limited ("Bresendi"). From about 1998 onwards, Bresendi engaged □**Taylor**□ to act as Patent Attorney in connection with patents and patents applications with respect to a colostomy pump and aid. In June 1998, Hill was appointed a Director of ColoCare. At that time Mr Lapcevic was also a Director of ColoCare.

11. On 16 January 2001, Hill made a complaint to the Board and both he and Mr Lapcevic provided supporting statutory declarations. The Board considered this complaint on 8 March 2001, and formed the opinion that □**Taylor**□ may be guilty of either unsatisfactory conduct or unprofessional conduct in relation to three charges ("the ColoCare charges"). These charges were set out in a letter of authorisation dated 15 March 2001 from the Board to Hill. This letter authorises Hill to bring proceedings against □**Taylor**□ before the Patent and Trade Marks Disciplinary Tribunal. A letter of authorisation states that □**Taylor**□ "may be guilty on the first charge of unprofessional conduct or unsatisfactory conduct in that he:

* received advanced payment from ColoCare in respect of PCT/AU97/00145 including money on account for overseas fees, but has not paid overseas associates and did not advise the client to that effect so that the client was unaware that the client's rights were at risk;

* and as a result of □**Taylor**□'s failure to pay accounts overseas associates have declined to take further action on behalf of ColoCare until payment is received."

In relation to the second charge "□**Taylor**□ may be guilty of unprofessional or unsatisfactory conduct in that he:

* has been paid by the client for the work undertaken; and

* despite having given assurances that the amounts would be paid to the overseas associates, the debt remains outstanding; and

* the amounts remain unpaid. "

In relation to the third charge "□**Taylor**□ may be guilty of unprofessional conduct or unsatisfactory conduct in that:

* by his non-payment of overseas associates, he placed the intellectual property in jeopardy."

12. Hill by letter dated 4 April 2001 requested the Board to bring proceedings before the Disciplinary Tribunal on his behalf. The Disciplinary Tribunal heard evidence and submissions in respect of the two Workman charges and the three ColoCare charges on 3 and 4 October 2001. The Disciplinary Tribunal considered the complaints and supporting Statutory Declarations, the Board's letters of authorisation, the Statutory Declarations of □Taylor□, dated 25 September 2001 and Statutory Declarations of two expert Patent Attorneys, Desmond James Ryan, dated 27 July 2001 and Terrence John Collins, dated 27 July 2001 and 28 September 2001.

13. On 1 November 2001, in respect of the Workman charges, the Tribunal found □Taylor□ guilty of unprofessional conduct on the first charge and imposed a penalty of a period of 4 months suspension of □Taylor□'s registration as a Patent Attorney. The Tribunal directed that such suspension commence at the expiration of 60 days from the date of the decision i.e. 1 January 2002. The Tribunal found the second Workman charge not proven and dismissed that charge.

14. On 2 November 2001, in respect of the ColoCare charges, the Tribunal found □Taylor□ guilty of unprofessional conduct on the first charge and imposed a penalty of 5 months suspension of □Taylor□'s registration as a Patent Attorney, directing that such suspension commence at the expiration of one month after 1 January 2002. The Disciplinary Tribunal found that the second ColoCare charge was essentially the same as the first ColoCare charge, and at the suggestion of the Tribunal, the Board conceded the point during the hearing and that complaint was withdrawn. As to the remaining (third) ColoCare charge, the Tribunal found it to be proved, but in accordance with the Tribunal's finding that there was on the facts "no actual risk to the client's intellectual property," it did not impose any separate penalty in respect of that charge. The total effect of the findings and penalties imposed by the Disciplinary Tribunal resulted in an effective suspension of □Taylor□ for a period of 6 months commencing on 1 January 2002. The Board submitted that the Tribunal should give a direction under Regulation 20.24 that the Commissioner of Patents publish in the Official Journal a copy of the written notice of the finding that the Tribunal must give under Regulation 20.23(6). The Tribunal declined to give such a direction, taking the view that it would "have the effect of imposing an unjustified further penalty on Mr □Taylor□ by affecting his goodwill and his prospects of successful subsequent practice or employment".

15. On 23 November 2001, the Board's solicitors lodged applications to review in respect of the Disciplinary Tribunal's decisions. Originally review was sought on the grounds that the penalties imposed did not adequately reflect the gravity of the findings made in relation to □Taylor□'s unprofessional conduct. On 29 November 2001, amended applications to review were lodged contending that the decisions were not "the correct and preferable" decisions, thereby initiating an unlimited review by way of re-hearing de novo on which basis both applications have since proceeded.

16. The Regulations 22.26 provide (inter alia) that a decision of the Disciplinary Tribunal made under sub-regulation 20.23(2), (4) or (5) may be reviewed by the Administrative Appeals Tribunal ("the AAT"). The Disciplinary Tribunal has been named as the respondent to the applications for review. The Disciplinary Tribunal has taken the view, correctly in my opinion, that it is not appropriate that it should appear or take any part in the AAT proceedings (see letter from the Disciplinary Tribunal to the District Registrar, dated 6 December 2001).

17. On 17 December 2001, the District Registrar wrote to □**Taylor**□ advising him of the applications for review and inquiring whether he wished to be joined as a party to the proceedings. On 15 January 2002, □**Taylor**□ advised the AAT that he did not wish to be so joined. He did however provide a letter dated 15 January 2002 containing written submissions which he wished to be placed before the AAT. This document subsequently became Exhibit A18 at the review hearing. There was a telephone directions hearing held on 6 February 2002 in which □**Taylor**□ participated. He was given the opportunity to reconsider his decision not to apply to be joined as a party, but no application for joinder was made either then or at any time thereafter. The District Registrar spoke to □**Taylor**□ by telephone on 6 March 2002 and he again confirmed that he did not wish to be joined as a party, but he did intimate that he wished to lodge a further submission in substitution for his earlier letter of 15 January 2002. However no such letter was received at the registry and nothing more was heard from □**Taylor thereafter and no further submission by Taylor**□ was lodged with the AAT.

18. The review hearing was scheduled to commence in Canberra on 15 April 2002. □**Taylor**□ did not attend. The applicant Board was represented by Ms Rhondda Nicholas who indicated that in addition to the material relevant to the various charges which had been placed before the Disciplinary Tribunal, she wished to lead additional evidence as to □**Taylor's dealings with both Mares**□ and Hill and also to present material indicating that □**Taylor**□ had behaved in a similar unprofessional manner in his dealings with two other clients, Klaus Zimmer-Vorhaus and Norman John Easterbrook. Whilst not determining whether the scope of the two review applications could be broadened in this way, I took the view that □**Taylor**□ should be made aware of the fresh allegations and should be given an opportunity to respond. Accordingly, the hearing was adjourned and directions were given that copies of the new evidentiary material consisting of Statutory Declarations lodged with the AAT since the institution of the applications to review be given to □**Taylor**□. I also directed that he be advised in writing of his right to apply to be joined as a party under the AAT Act, [s30](#), and that any such application must be made in writing within 7 days. As the applicant's counsel indicated that □**Taylor**□ would be required for cross-examination, even if he did not apply to be joined as a party, I also directed that the District Registrar issue a summons to □**Taylor**□ to give evidence at the resumed hearing, scheduled for 1, 2 and 3 July 2002, pursuant to the AAT Act, [s40\(1A\)](#). On 1 July 2002 the hearing resumed. □**Taylor**□ was not in attendance at 10 am, but presented himself after the luncheon adjournment at 2.00 pm. He confirmed that he was only there to "answer questions". He made no application to otherwise participate or be made a party. He gave evidence on the morning of 2 July 2002. Although advised that he could remain throughout the proceedings, he departed during the mid-morning

adjournment and was not seen thereafter. During the course of the hearing, oral evidence was received from John Swift, Secretary of the applicant Board, Gary David □Mares□, Bruce Hill, the two principal complainants, Terrence John Collins and Desmond James Ryan, the two qualified and experienced Patent Attorneys already mentioned above who gave expert evidence bearing upon the practice and ethical standards of Patent Attorneys, and Paul Robert □Taylor□ himself. In the case of Messrs Swift, □Mares□, Hill, Collins and Ryan, their oral evidence was brief and supplementary only to several Statutory Declarations which each of them had made for the purposes of the hearing before the Disciplinary Tribunal and later for the purposes of the hearing before the AAT. These Statutory Declarations became Exhibits in the hearing before me. In addition such reference was made to the transcript of the proceedings before the Disciplinary Tribunal as appeared necessary.

19. Counsel for the applicant also tendered a Statutory Declaration and led oral evidence from Klaus Zimmer-Vorhaus, an inventor, who had engaged the services of □Taylor□ between 1993 and 1999 and who blamed him for failing to account for large sums of money paid to his firm to ensure the granting of patents and also for the loss of his (Zimmer-Vorhaus) intellectual property in those inventions by reason of □Taylor□'s allowing the patents to expire. Similarly, a Statutory Declaration by Norman Easterbrook was tendered and oral evidence was led from Mr Easterbrook who made complaints about □Taylor□'s failure to pay overseas associates to secure the completion of the overseas phases of patents applications, notwithstanding the prepayment to □Taylor□ of adequate funds to do so.

20. After some initial argument by counsel, I admitted the evidence of Zimmer-Vorhaus and Easterbrook "de bene esse", although it seemed clear to me that as these matters had not been included as matters of complaint to the Board and had not formed any part of the complaints heard by the Disciplinary Tribunal they could not be dealt with as fresh material at this stage of proceedings.

21. Although the AAT is a merits review tribunal with a capacity and obligation to rehear the issues for determination and to reach the correct or preferable decision on the material presented to it, it does not have jurisdiction to expand its terms of reference at will even though, as in this case, it may be contended that the new matters could have an important bearing upon the fitness of a relevant individual to pursue his professional calling (see *Drake for Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 per Bowen CJ and Deane J @ 589; *Otter Goldmines Limited v Australian Securities Commission* 1997 26 AAR 99 per Merkel J @ 106).

22. It seems to me that there is also an issue of natural justice quite apart from the jurisdictional problem already mentioned. □Taylor□ whilst not formally a party to the present proceedings, was clearly a party to the initial proceedings brought before the Disciplinary Tribunal and has a legitimate expectation that proceedings will be conducted fairly and that the review process will not involve a substantial redefinition of the adverse allegations made against him.

23. To adopt the question posed by Mason J in *Kioa v West* (1985) 159 CLR @ 585:

"What does the duty to act fairly require in the circumstances of the ... case?"

24. It seems clear to me that to introduce completely new and distinct issues as to alleged professional misbehaviour at this stage of proceedings would be wrong - perhaps I may be excused for saying "patently" wrong. Apparently this conclusion was also reached by counsel for the applicant because as the hearing progressed she all but conceded that the Zimmer-Vorhaus and Easterbrook matters should not be considered by me for any purpose in the course of these proceedings. Accordingly, their evidence whether oral or in the form of statutory declaration will be excluded entirely from my considerations of this case.

25. In its written decision the Disciplinary Tribunal made findings as to the Workman complaints which were not disputed by □Taylor□ and which were not challenged by the applicant in the present proceedings. In so far as those findings deal with the historical course of dealings between □Taylor□ and his clients and overseas associates, there is no reason or basis for departing from the findings made by the Disciplinary Tribunal. However, the Disciplinary Tribunal also made findings as to □Taylor□'s state of mind and motivations which have been challenged by the Board and which appear to me to bear directly upon the outcome of the charges dismissed by the Disciplinary Tribunal and also upon the penalties which it inflicted. It has therefore been necessary to re-examine these issues.

26. My essential findings of fact in relation to the Workman matters may be stated as follows.

27. □Taylor□ was engaged to act for Workman Industries in relation to a number of patent matters including International Application No. PCT/AU98/00400 in respect of "Vehicle Cargo Lift". On or about 7 September 1999, □Taylor□ sent to Workman Industries an invoice for entry into the national phase for PCT/AU98/00400 in relation to Australia, USA, Europe, Japan and South Korea in the amount of \$37,180. This invoice refers to "services and disbursements preparing and entering the national phases in Australia, USA, Europe, Japan and South Korea inclusive of associates charges; these being the basic charges (less discount)."

28. On or about 15 September 1999, □Mares□ forwarded a cheque for the amount of this invoice which was banked by □Taylor□ on 16 September 1999. On 29 November 1999 □Taylor□ instructed the United Kingdom Patent Attorneys, Baily, Walsh and Co, to prepare and file the International Application in order to enter the national phase with the European Patent Office. □Taylor□ failed to pay on Baily, Walsh & Co's invoice in January 2000 and thereafter. By November 2000 □Taylor□ had had the use of the funds supplied by Workman for a period of 14 months during which time those funds had apparently been used by □Taylor□ for the general purposes of his business. On 29 November 2000, Baily, Walsh and Co advised □Mares□ that the above invoice regarding the work that Baily, Walsh and Co had performed in connection with the entry into the

national phase PCT/AU98/00400, and a further European Patent Application No. 98946147.0 were outstanding, and unless the sum due viz \$20,217.63 was paid, the applications would be terminated. Accordingly, □Mares□ paid Baily, Walsh and Co the outstanding amounts by direct remittance.

29. □Taylor□ also instructed E M Hwang and Partners to prepare and file the International Application with the South Korea Patent Office. On 7 December 1999, Hwang advised □Taylor□ that the International Application had been prepared and filed and enclosed its invoice in the amount of \$US1,858 and sent a further invoice for \$US224 on 25 January 2000. As at 15 September 2000 Hwang's account had not been paid by □Taylor. In early September Mares□ wrote to foreign associates seeking details of the status of Workman Industries intellectual property and as to whether or not □Taylor□ had paid the foreign associates fees. Associates from South Korea, United Kingdom, Japan and USA all responded that their invoices remained unpaid by □Taylor□

30. In an undated statement to the applicant Board, □Taylor□ admitted that he had received the amount of \$37,180 from Workman Industries for the purpose of preparing and filing entry into the national phase of PCT/AU98/00400 including payment of invoices issued by foreign patent attorneys engaged by □Taylor□ to perform this work. □Taylor□ also made a similar admission whilst under cross-examination at the hearing before the Disciplinary Tribunal in October 2001. □Taylor□ also admitted in paragraph 20(iv) of his Statutory Declaration of 25 September 2001 that he instructed foreign associates to prepare and file entry into the national phase of PCT/AU98/00400 and that he had received invoices from them seeking payment for work done. He also admitted, in paragraph 20(vi), that he had not paid the Baily, Walsh & Co invoices.

31. In cross-examination before the Disciplinary Tribunal he admitted that he was unable to account for how the amount of \$37,180 had been spent, except to say that the amount would have been used to meet the most pressing expenses of running his business. It appears that the amounts due to his overseas associates are still unpaid by □Taylor□ and he has not repaid to Workman the money it paid to meet Baily, Walsh & Co's fees on the international application.

32. Both Mr Collins and Mr Ryan expressed the clear opinion that the relevant conduct of Mr □Taylor□ in respect of these matters constituted a gross failure by him to comply with the standards that in the circumstances it was reasonable to require him as a Patent Attorney to observe.

33. The Disciplinary Tribunal agreed with those opinions, and I too agree with those opinions. There is no legal requirement that Patent Attorneys must deposit monies provided by clients in a separate trust account, but as Mr Ryan said in paragraph 10 of his Declaration "I do not accept □Taylor□'s suggestion (page 202 of the documents) that because of a Patent Attorney is not required to keep a separate trust account he does not have an obligation to properly apply funds to the purpose to which they are paid."

34. Mr Collins expressed similar opinions. It seems to me to be arguable that □Taylor□ having sought funds from Workman for specific purposes and having received funds from Workman for those purposes, by then applying those funds without consent, for his own purposes in running the business was guilty of the crime of stealing by misappropriation. To sustain an indictment based on such an allegation it would be necessary to establish that □Taylor□ was acting in violation of good faith and dishonestly, and it may also be necessary to rebutt the implicit claim that he made in his Statutory Declaration that the payment by Workman could properly be treated as simply an item in a debtor and creditor account between them. On the view taken by the Disciplinary Tribunal that □Taylor□ was seriously wrong and misguided, but not dishonest, such a criminal charge would not succeed. The Disciplinary Tribunal made a finding that □Taylor□'s practices were misguided and wrong and that there was no "conscious" wrongdoing by □Taylor□ and further that he had not intentionally misled Workman as to the status of its intellectual property in a letter of 21 July 2000 as alleged in the second Workman charge. Indeed the Disciplinary Tribunal at the hearing before it took the view that as □Taylor□ had not been charged with misrepresentation or misleading his client in respect of the letter of 21 July 2000, and that evidence going to this issue could not be received and that the issue was beyond the Tribunal's purview. Notwithstanding this ruling, the Disciplinary Tribunal subsequently made positive findings in its written decision that □Taylor□ was a "truthful and frank" witness, and that he had not intentionally misled his client.

35. The Disciplinary Tribunal also accepted that when □Taylor□ prepared the letter of 21 July 2000 he thought he had in fact prepared the examination requests referred to. The Tribunal also found that □Taylor□'s failure to lodge the examination requests resulted from "negligence and inadequate negligent and improper procedures" adopted by □Taylor□ in his office, but the Tribunal was not prepared to find that this was sufficient to constitute "unsatisfactory conduct" within the meaning of Regulation 20.1 and consequently dismissed the second Workman charge. I take the view that it was open to the Disciplinary Tribunal and is also open to me to conclude that □Taylor□ had deliberately misrepresented the status of the patents in the letter referred to above. It seems to me that the processes available for checking the accuracy of the information in that letter were so readily available to □Taylor□, and were so likely to be accessed by him to enable him to write the letter, that he must have been aware at the time he did so that the relevant renewals had not been effected. If his misinformation to his client was not the result of studied deceit, at the very least it must have been the product of wilful blindness or utter recklessness. Whatever the mental state accompanying his default, his professional conduct in my opinion can only be characterised as utterly reprehensible.

36. The Disciplinary Tribunal found that the two wrong statements in the status report which formed the basis of the second Workman charge whilst resulting from negligent and inadequate procedures did not provide a sufficient basis for finding according to *Briginshaw v Briginshaw* test, that □Taylor□'s conduct amounted to unsatisfactory conduct within the meaning of Regulation 20.1.

37. I have reached a contrary conclusion and have no hesitation in concluding that by any objective yardstick the impugned conduct was "unsatisfactory". In my opinion the second Workman charge should be sustained.

38. Turning now to the ColoCare matters, I note that in its written decision the Disciplinary Tribunal made findings as to the ColoCare complaints which were not disputed by □Taylor□ at the hearing before that Tribunal and which were not challenged by the applicant in the present proceedings.

39. Accordingly, my findings in respect of the ColoCare complaints can be stated compendiously in much the same language as that employed by the Disciplinary Tribunal. My findings are as follows: that □Taylor□ was engaged by ColoCare to act for it in relation to a number of patent matters, including International Application No. PCT/AU97/00145. On 7 July 1998 the complainant requested Mr □Taylor□ to provide an estimate of the cost of proceeding to entry into the national phase in respect of that International Application in various countries. In a letter dated 13 July 1998 □Taylor□ provided an estimate in which he said that the costs were only approximate and "could rise due to changes in exchange rates and agents' fees". The estimate included disbursements to foreign associates.

40. On or about 30 July 1998, ColoCare advised □Taylor□ that it wished to proceed with the International Application in countries listed in his letter with the exception of Hungary and Vietnam, and, accordingly, ColoCare sent to □Taylor□ a cheque for \$62,250 being the amount of the estimate contained in the letter of 13 July 1998, less the costs for Hungary and Vietnam.

41. □Taylor□ instructed his foreign associates, including his European associate Page, White and Farrar ("Page") to file applications for entry of the International Application into the national phase in their countries and regions. Page complied with these instructions and on 19 October 1998 issued a debit note to □Taylor□ in the amount of £4,730.60.

42. On 12 November 1998, □Taylor□ issued to ColoCare a debit note No 1324 for \$21,370.97 in respect of entry into the national phase of the International Application in Europe. That debit note included an amount of \$16,320.57 stated to be in respect of "disbursements, associates charges and official fees \$16,320.57". On 4 February 1999 Wobbegong Technology Information Pty Limited, (a company operated by □Taylor□ as an adjunct to his Patent Attorney business) advised ColoCare that an annuity was due on its European application on 31 March 1999 and enclosed a debit note in respect of the payment of that annuity. The debit note included an amount for "disbursement, our associate's charges and official fees \$1,202.27". ColoCare instructed Mr □Taylor□ to pay the annuity and forwarded a cheque for the amount of the debit note, including the amount for the associate's fees and official fees.

43. On 12 March 1999 as a result of a request from incoming shareholders of ColoCare who were dissatisfied with □Taylor's services, ColoCare advised Taylor□ that it had

appointed another firm of Patent Attorneys, F B Rice and Co ("Rice") to act for it in future and requested □Taylor□ to transfer ColoCare's files to that firm. On 10 January 2000, Rice advised ColoCare that Rice had received information from □Taylor□'s associates in Singapore and Japan that their accounts for entry of the national phase in those countries had not been paid. ColoCare provided to □Taylor a copy of Rice's letter with a request to Taylor□ that payment be attended to. Having been advised that several of □Taylor□'s overseas associates claimed that they had not been paid for services rendered in respect of the national phase entry, ColoCare telephoned □Taylor□ on 2 May 2000 and complained. □Taylor□ said he would pay all outstanding amounts owed to foreign associates in respect of International Application Patent No. PCT/AU/9700145 by 30 June 2000. ColoCare accepted this commitment.

44. On 10 July 2000, □Taylor□ was still in default in making payments to associates in USA, Europe, China, Japan, South Korea, Singapore and Mexico, i.e. seven of the foreign associates in respect of whom ColoCare had already paid □Taylor□ for national phase entry.

45. On 23 October 2000, Page informed Rice that it would have to reconsider whether it would continue to act for ColoCare if it were not paid for at least its disbursement in respect of the national phase entry, and also payment of the third annuity. ColoCare communicated this advice to □Taylor□ on 27 October 2000.

46. On 16 November 2000, Page wrote to Rice informing it that it would not continue to act for ColoCare until its outstanding charges for entry into the national phase and payment for the third annuity were met. In order to save the relevant European application from lapsing, ColoCare was obliged to pay the third annuity fee direct to Page. It is clear that □Taylor□ used the greater part of ColoCare's \$62,250 for other purposes of his business, and he has not yet paid the seven foreign associates referred to above. It is plain to me that this conduct by □Taylor□ constitutes a gross failure by him to comply with the standards that in the circumstances that it was reasonable to require of him as Patent Attorney. This view is entirely supported by the opinions expressed by Messrs Collins and Ryan. Accordingly, □Taylor□'s conduct was plainly unprofessional conduct. This is a view which was shared by the Disciplinary Tribunal. I also agree with the following comments made by the Disciplinary Tribunal at paragraph 22 of its reasons for decision.

"An aggravating factor is that Mr □Taylor□'s conduct in not using ColoCare's funds for the specific purpose of paying his foreign associates for their filings clearly placed Colocare's relevant patent rights at risk in clear breach of standards in the Guidelines referred to in Mr Collins' evidence. The UK Associates, Page, White and Farrar have been kept so long out of their money owed to them by Mr □Taylor□ that they were finally driven to say that they would allow Colocare's International Application to lapse unless they were paid. In the end, Page did not carry out their threat and paid the relevant fees out of their own pocket, but Mr □Taylor□'s conduct had clearly placed ColoCare patent rights in jeopardy."

47. Notwithstanding these comments, the Disciplinary Tribunal went on to observe that *"I do not think the third charge adds anything to the first charge, it merely refers to a consequence of the conduct the subject of the first charge which will be taken into account in fixing a penalty on the first charge"*. According the Disciplinary Tribunal dismissed the third charge on the ground that *"it "merely duplicates the first charge"*.

48. Earlier in its published reasons, the Disciplinary Tribunal had said this:

Paragraph 9(8).

"The third charge adds to the first charge only the allegation that conduct, the subject of the first charge, placed the client's intellectual property in jeopardy. This was an inherent quality of the conduct in the first charge. So I find the third charge to be proved, but since there was on the facts no actual risk to the client's intellectual property, I do not think any separate penalty should be imposed in respect of this third charge".

49. Whilst I cannot agree with the observation that *"since there was on the facts no actual risk to the client's intellectual property ..."*. I think the Disciplinary Tribunal was correct in viewing the third charge as merely descriptive of an inherent consequence of the conduct mentioned in the first charge, and thus an aggravating factor to be taken into account in the imposition of penalty. However I cannot agree there was no "actual risk" to the client's intellectual property. As it turned out there was no actual damage to or loss of the client's intellectual property, but it was placed in serious jeopardy. This is a seriously aggravating feature of □Taylor□'s conduct in my opinion.

50. I turn therefore to the question of penalty in respect of the charges of unprofessional conduct and the single charge of unsatisfactory conduct that have been established against □Taylor. Taylor□ claimed that a considerable part of his financial difficulty which led to the non-payment of the ColoCare associates fees resulted from Workman's failure to pay fees which were due to him over a considerable period of time before mid-September 1999. This claim was accepted as mitigatory fact by the Disciplinary Tribunal, but was contested in the hearing before me by the witness, □Mares□, who pointed out (Exhibit A16, □Taylor□'s Statutory Declaration) that Exhibit A1 thereto showed that, of a balance claimed by □Taylor□ from Workman Industries Pty Limited in September 1999 amounting to nearly \$150,000, \$90,000 of that sum was actually paid to □Taylor **within 7 days of receipt of the account. Mares□ also pointed out that □Taylor□ had never taken proceedings to recover the alleged indebtedness by Workman, and that, upon performing a reconciliation of the accounts between the two companies, he found that, taking into account payments made by Workman to □Taylor□'s overseas associates in respect of those of their accounts upon which □Taylor had defaulted, Workman actually owed Taylor□ nothing whatsoever.** I accept this evidence. I am therefore not prepared to find that any conduct of Workman resulted in, or contributed towards, □Taylor□'s financial difficulties at any relevant time. In this respect I differ from the Disciplinary Tribunal.

51. In dealing with the question of penalty, the Disciplinary Tribunal also took into account its findings (a) that there had been no conscious wrongdoing by □Taylor□ and (b) that he genuinely believed that he was not doing anything wrong in the course of his dealings with the client's funds. The Disciplinary Tribunal also took into account in □Taylor□'s favour a finding that it was *"satisfied that Mr □Taylor□ has now seen the error of his ways and has now taken appropriate steps to see the offending conduct does not occur again, and I do not think he will offend again in the future"*.

52. Dealing with the question of penalty in respect of the ColoCare charge, the Disciplinary Tribunal also took into account □Taylor□'s considerable financial trouble at the relevant time and his consequent considerable personal stress. The Disciplinary Tribunal also referred to Regulation 20.23(3)(a) which provides that the Disciplinary Tribunal *"may take into account the findings about conduct of the Attorney in any other proceedings brought before the Tribunal"*. The Disciplinary Tribunal observed that the Workman and ColoCare offences *"were part of the same course of conduct in the same circumstances"*. In dealing with the penalty in respect of both matters the Disciplinary Tribunal correctly acknowledged a well settled principle that the primary purpose of disciplinary proceedings of this kind is not to punish the practitioner but to protect the public.

53. Counsel who appeared for the Board before the Disciplinary Tribunal asked that □Taylor□'s registration be cancelled, but this submission was rejected by the Disciplinary Tribunal and the penalties which I have described previously were imposed.

54. In the present proceedings Miss Nicholas, counsel for the applicant Board again submitted that □Taylor□'s registration should be cancelled. She submitted that □Taylor□'s conduct went beyond mere ignorance or naivety as to his professional obligations and that his dealings with both Workman and ColoCare after defaulting in payment of the overseas associates accounts due in respect of each of them indicated that he was deceitful and quite prepared to breach undertakings given to meet those expenses. I accept this submission.

55. In the course of his evidence before the AAT, □Taylor□ at first claimed that he had done no *"official"* work since the suspension imposed by the Disciplinary Tribunal had come into effect. He said that renewals which were falling due were handled by Wobbegong, a separate company, but then conceded that in fact he was handling this renewal work personally. He said *"my position is that one doesn't need to be a patent attorney to attend to renewals"*. □Taylor□ agreed that he lodged applications for two clients during the suspension period. He also said that an overseas client had requested him to lodge an application for provisional registration of a patent on his behalf. He said *"I realise this was against the order"*.

56. Mr John Swift the Secretary of the applicant Board in his second Statutory Declaration, (Exhibit A2) in paragraphs 4 to 6 gave details of material provided by the patent office to him in April 2002, confirming that □Taylor□ had been acting as a Patent Attorney during the course of his suspension. This conscious flouting of the Disciplinary

Tribunal's order by □Taylor□ tends to refute the proposition that he has now seen the error of his ways and that he will probably not offend again. Such a conclusion is reinforced by a consideration of the contents of □Taylor□'s letter to the Administrative Appeals Tribunal, dated 15 January 2002, (Exhibit A18), in which he accuses the members of the applicant Board of mala fides and defiantly criticises the opinions of Messrs Collins and Ryan. The contemptuous manner in which he expresses his views goes far beyond making an appropriate submission for the consideration of this Tribunal. In the letter he reluctantly acknowledges that he was at fault in the way in which he conducted his business, but he continues strenuously to maintain that his difficult financial circumstances were largely caused by his dealings with Workman Industries Pty Limited. The content and tenor of □Taylor□'s letter are such as to lead me to the conclusion that he has not really seen the error of his ways at all, and that he sees himself as a victim of oppressive conduct on the part of the applicant Board, the two experts Messrs Collins and Ryan and his former client, Workman Industries.

57. □Taylor□ also gave evidence before the Tribunal that he is now working "in house" as an industrial property officer for a former client, Atlantis Corporation. This involves doing work in relation to patents which would normally be done by a Patent Attorney. However, he said he is not paid in accordance with the Patent Attorneys scale and is simply paid a piece work or daily rate on a part-time casual basis. He intends to continue with Atlantis as an employee. He also does part-time work in a bottle shop. He is in the process of negotiating with another Patent Attorney with a view to selling his practice.

58. At first sight this evidence by □Taylor□ may suggest that he is not only carrying on business as a Patent Attorney contrary to the provisions of the order made by the Disciplinary Tribunal, but he is also committing an offence under the *Patents Act 1990* ('the Act').

59. However consideration of the provisions of [ss.200](#) and [201](#) of [the Act](#) indicate that such conclusions would not be justified. [Section 200\(1\)](#) provides as follows:

"A registered Patent Attorney:

(a) is entitled to prepare all documents, transact all business and conduct all proceedings for the purposes of [this Act](#); and

(b) has such other rights and privileges as are prescribed."

[Section 200\(1\)](#) provides.

"A person must not carry on business, practice or act as a Patent Attorney unless the person is a registered Patent Attorney or a legal practitioner. Penalty \$3,000."

[Section 201\(7\)](#) provides:

"For the purposes of this section, a person or company is taken to carry on business, practice or act as a Patent Attorney if, and only if, the person or company does, or undertakes to do on behalf of someone else, any of the following in Australia for gain:

(a) applying for or obtaining patents in Australia or anywhere else;

(b) preparing specifications or other documents for the purposes of this Act, or patent law of another county;

(c) giving advice, other than advice of a scientific or technical nature (about the validity, or infringement of patents."

[Section 201\(8\)](#) provides:

"A person does not commit an offence against sub-section (1) in respect of anything done, or undertaken to be done, by the person in the capacity of employee for:

(a) in any case - the person's employer; or

(b) if the person's employer is a member of a related company group - another member of the group."

60. It seems therefore that it is not unlawful for a person do Patent Attorney work when employed on behalf of another, even if he is not a registered Patent Attorney or his registration as a Patent Attorney has been suspended or cancelled. Nor I think can it be said that □Taylor□'s employment with Atlantis Corporation and his performance of patent work for that employer amounts to a breach of the suspension order imposed by the Disciplinary Tribunal. This may or may not be an intended result of the legislation, and it may be thought by some, to be contrary to general principle that a person, suspended for unprofessional conduct, should be permitted to continue dealing with patent matters on behalf of an employer. That however is not an issue I need to decide. Although □Taylor□ has clearly breached the terms of the suspension orders by dealing with clients in the manner outlined both in his evidence and Mr Swift's second affidavit; it cannot be said that his employment by Atlantis Corporation constitutes an infringement of the orders.

61. The principles which should inform the approach to the imposition of a penalty upon a wayward professional practitioner in any skilled or learned discipline appear to me not to be in dispute. Although cancellation of registration is not "punishment" in any criminal sense, it has very serious consequences for a practitioner who derives his income from the discipline in question. Most comprehensive statements of principle have been made in respect of the defaulting legal practitioners, but in the my opinion the same general principles apply in this case.

62. In *Dickens v The Law Society of Tasmania*, (No. 42 of 1981) Cosgrove J in the Supreme Court of Tasmania observed as follows:

"There is high authority for the proposition that the powers given to the Disciplinary Committee to discipline a practitioner are entirely protective in character and no element of punishment is involved. (See Ziems v Prothonotary of the Supreme Court of New South Wales (1957) [97 CLR 279](#) at 286 per Dixon CJ; Clyne v The New South Wales Bar Association (1960-61) [104 CLR 186](#) at 201-2; The New South Wales Bar Association v Evatt (1968) [117 CLR 177](#) at 183-4; and Ex Parte Attorney-General for the Commonwealth; Re a Barrister and Solicitor (1972) 20 FLR 234 at 244). But to say that is merely to say that the powers are to be exercised for the purpose of, and in a manner seen to be likely to achieve, the maintenance of that high standard of conduct within the profession which will continue its good reputation, and so protect, not only the future of the profession, but also protect its clients from harm. With this object in mind, the Committee is required to look to the future. Even if the practitioner's misconduct be relatively slight, he may yet be struck off, if his capacities and attitude have been revealed to be such that his continuance in practice constitutes a threat to the profession. On the other hand, conduct which is itself more grave in nature, may not warrant striking off, if it is seen as a temporary and explicable departure from the practitioner's own high standards. The committee's task is to uphold the dignity and standards of the profession. To enable them to do so, they have been given powers to fine, to order payment of costs, to suspend, and to strike off. The exercise of any of these powers inevitably involves a deprivation of one kind or another to the practitioner. But the deprivation is merely part of the exercise of the discipline of the profession. There is in it no retributive element, no intention to express outrage, as there sometimes is in sentences for crime. The order which the committee is called upon to make is that order which, in its opinion, is necessary, and no more than is necessary, to maintain professional discipline and high standards of conduct. It is not entirely incorrect to describe such an order as punishment, and that term is often used (see in Re Daley (1908) [5 CLR 193](#); Southern Law Society v Westbrook (1910) [10 CLR 609](#); Mellefont v Queensland Law Society Inc (1981) QSR 17 at 28 per Andrews J., and in Re Moseley (1925) 25 SR (NSW) 174 at 178). But it is punishment of a special kind, for a special purpose."

63. In *Law Society of NSW v Foreman* (1994) 34 NSWLR 408, Mahoney JA made the following observations in respect of the approach that the Court should make to the hearing of a complaint of misconduct and the principles which the Court should apply in determining the appropriate penalty:

*"The appeal to this Court from the Tribunal is a hearing de novo. Therefore the Court must make its own assessment of the issues presented to it on appeal. As I have said, it will still in an appropriate case give weight to any assessment of professional standards and of dishonourable conduct which is made by senior members of the profession, in the Tribunal or otherwise. But the Court is not bound by the Tribunal's view of, for example, what is required for "the protection of the public" or by what the Tribunal determines to be the prevailing or the appropriate standards of conduct of solicitors. In England, it has been said: see *McCoan v General Medical Council* [1964] 1 WLR 1107 at 1113; [1964] 3 All ER 143 at 147; and recently reiterated: *Bolton v Law Society* [1994] 1 WLR 512 at 516, that the court should not, or not ordinarily, differ from the view formed by practitioners as to, for example, the seriousness of the conduct in question before it. That*

view has been referred to in, for example, *Re Hodgekiss* (at 343; 165); *Law Society of New South Wales v Foreman* (at 252F). However, in my experience this Court has not regarded itself as bound by the views of disciplinary tribunals upon these or similar matters. It has, on occasions, differed from the views of these tribunals: see, eg, *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736; *O'Reilly v Law Society of New South Wales*; see generally *Bridges v Law Society of New South Wales* [1983] 2 NSWLR 361. It is, in my opinion, the duty of the Court, as on a re-hearing de novo, to form its own assessment of the evidence and its own view of the principles to be applied.

What then, are the purposes of the orders to be made and the considerations to be taken into account? It has frequently been said that disciplinary procedures and the orders made in the course of them are directed not to the punishment of the solicitor but to the protection of the public. This, of course, is true. The protection of the public has been described as, for example, the primary purpose or a primary object of such proceedings: *Walter v Council of Queensland Law Society Inc* (1988) 62 ALJR 153 at 157E; 77 ALR 228 at 235; *Smith v New South Wales Bar Association* (1992) [176 CLR 256](#) at 270 per Deane J; or one of the primary objects of the proceedings and the orders made; see *Wentworth v New South Wales Bar Association* (1992) [176 CLR 239](#) at 251. In the relevant sense, the protection of the public is in my opinion not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors and has, in this sense, the purpose of publicly marking the seriousness of what the instant solicitor has done.

But, in my opinion, it would be wrong to confine the objects of disciplinary proceedings and the purposes to be achieved by the orders made in them strictly to matters of this kind. Those purposes and objectives have traditionally been seen as having a wider operation. In the end, the question to be determined is whether the solicitor is a fit and proper person to be a solicitor of the Court and the orders to be made are to be directed to ensuring that, to the extent she is not, her practice is restricted."

64. In *QXOO/C v Companies Auditors and Liquidators Disciplinary Board* (2000) AATA 1144 @ page 20. A 3-member Administrative Appeals Tribunal dealing with the proposed suspension of an errant liquidator said this:

"Suspension, or cancellation, is only a course that should be adopted if it is necessary for the public protection. Circumstances in which it would be necessary were identified by Kirby P in *Pillai v Messiter* (No. 2) (1989) 16 NSWLR 197:

"The public needs to be protected from delinquents and wrong-doers within the professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the register or from the relevant roll of practitioners, at least until they can demonstrate that their disqualifying imperfections have been removed." "

65. In the case of *Australian Securities Commission v Alfred Maxwell Kippe & Anor* (1996) 517 FCA 1, the Full Federal Court conducted a review of several authorities and at page 13 said:

"The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventive in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing that person from participation therein!"

66. In *The Law Society of South Australia v John Francis Murphy* (1999) SASC 83 the Full Court of the Supreme Court of South Australia observed:

"In dealing with a charge of unprofessional conduct, the Court acts in the public interest, and not with a view to punishment: New South Wales Bar Association v Evatt (1968) [117 CLR 177](#) at 183-184; Wentworth v NSW Bar Association (1992) [176 CLR 239](#) at 250-251. The Court is concerned to protect the public, not to punish a practitioner who has done wrong, although of course the removal of the practitioner's name from the Roll will operate as a punishment. The Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner, and by demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of a profession that plays an important part in the administration of justice and in which the public is entitled to place great trust."

67. Assessing the culpability of **□Taylor□** in respect of the charges which have been found proved against him, regard must be had to the Code of Ethics of the Institute of Patent Attorneys of Australia, a copy of which was appended to the affidavit of John Swift, (Exhibit A2), as it stood at 19 April 1996. There is no evidence that it has been modified since that time. The code contained (inter alia) the following provisions

"Part 3 Professional Conduct 3.02

Members must give priority in the professional conduct to act :

(a) ...

(b) in the best interests of their clients;

(c) in the public interest; and

(d) in the interests of profession as whole in that order.

3.03

A member shall in the practice of his profession take care to avoid behaviour and practices that are misleading or deceptive or that are likely to mislead or deceive."

68. The code, which is necessarily fairly broad and general in its scope, has been augmented by Code of Ethics Guidelines. In considering the present matter the following excerpts seem relevant. Paragraph 2:

"A member shall at all times apply his utmost skill and diligence in the handling of matters on behalf of his clients and associates and shall, on becoming aware of any error, omission or defect in the handling of any matter in his care, take all possible steps which are reasonable in the circumstances of the case to rectify the error, omission or defect. A member shall keep clients informed of the status of any matter in his care."

Paragraph 3:

"In the event that a member ceases permanently or temporarily to practice by reason of retirement, incapacity, bankruptcy or any other reason, he shall take all reasonable steps to avoid or minimise inconvenience to his clients as a result thereof, and he shall be especially vigilant to ensure that no statutory period is permitted to expire without necessary action being taken to safeguard the interests of his client."

Paragraph 5:

"A member who is unwilling to accept a call upon his professional services or who withdraws his services shall forthwith inform the potential or existing client and shall, where he withdraws, take reasonable action to inform the client of the immediate steps to reserve his rights."

Paragraph 15:

"In his professional practice a member shall not knowingly make a false or misleading statement, or prepare or be a party to the preparation or lodgement of documents in relation to the grant of intellectual property rights which contain any such statement, nor shall a member wilfully misrepresent facts or otherwise mislead another member, a client or any other person or organisation in any matter with which he is concerned."

Paragraph 22

"(a) Unless an agreement to the contrary is in force with a person with whom costs are to be incurred, a member is responsible for all costs incurred on behalf client, even if the member is unable to obtain payment from the client."

(b) All such costs shall be paid in a timely manner and the non-payment by the client shall not be an acceptable excuse for a late payment."

(c) ..."

69. Both Mr Desmond James Ryan and Mr Terrence John Collins, the two experts previously referred to, took account of the Code of the Ethics and Code of Ethic Guidelines in making the assessments that they did of □Taylor□'s conduct.

70. In dealing with his assessment of □Taylor□'s performance in respect of the Workman charges, Mr Ryan expressed the following opinions in relation to charge 1, he said:

"In failing to pay his foreign associates in a timely manner, □Taylor□ failed to honour obligations imposed on him to pay those associates, breached the fiduciary owed by him to the complainant and placed in jeopardy the complainant's patent rights in Europe and Korea. In my opinion, □Taylor□'s actions in this regard departed so far from the accepted standards and practices in the Patent Attorney profession in Australia as to constitute a gross failure by him to comply with the standards that, in the circumstances, it was reasonable to require to observe."

71. Also in dealing with the Workman charge 1, Mr Terrence John Collins voiced this opinion:

"□Taylor□ was obliged to apply the funds received to meeting costs incurred in carrying out the instructions. □Taylor□ was not entitled to apply the funds received as an offset against accounts previously issued against Workman in respect of other matters ... such behaviour is contrary to ... the standard practice within the Australian Patent Attorney profession."

72. In dealing with the second Workman charge, Mr Ryan made the following observations:

"(a) □Taylor□ appears to have failed to monitor and control the due dates for action to request examination in respect of the cases;

(b) Failed to take such action as was necessary to maintain the applications on foot;

(c) Failed to inform the complainant of the lapsing of the application;

(d) Either negligently or intentionally misrepresented to the complainant that action had been taken to request examination."

73. Mr Ryan expressed the conclusion that □Taylor□'s conduct was in breach of paragraph 2 of the Code of Ethics Guidelines. He continued:

"□Taylor□'s failure to adhere to the complainant's instructions to maintain its applications in force unless otherwise instructed, and subsequent false statement to the complainant as to the status of the Australian application constitutes a gross failure to comply with the standards that, in the circumstances, it was reasonable to require him to observe."

74. Dealing with the same charge, Mr Collins said:

"□Taylor□ did not apply an appropriate level of care when compiling the status reports of 21 July 2000. □Taylor□ had a duty to compile the report on the basis of the results of inquiries conduct, and not simply on the basis of assumption... . The report of 21 July 2000 was misleading ... I am therefore of the opinion that the behaviour of □Taylor□ in respect of this matter constituted gross failure to comply with the standards that, in the circumstances it was reasonable to require him to observe."

75. Dealing with the first charge in respect of ColoCare, Mr Ryan said:

"As a practicing Patent Attorney, □Taylor□ had a duty at all times to act in the best interests of his client, to deal honestly with the client and to carry out the client's instructions in a timely manner ... It is my opinion that in failing to pay his foreign associates, □Taylor□ clearly failed to meet the standard of conduct expected of a Patent Attorney in private practice in Australia. It is also my opinion that in seeking payment from his client in respect of matters which he designated as disbursements for associates charges, □Taylor□ assumed a distinct liability to the complainant to use the funds provided, also much of them as is relevant, for that purpose for which they were obtained. I do not accept □Taylor□'s suggestion that because a Patent Attorney is not required to keep a separate trust account he does not have an obligation to properly apply funds to the purpose for which they are paid."

76. Dealing with this charge Mr Collins said:

"Having accepted the instructions and the advanced payment of \$62,250, in my opinion □Taylor□ was obliged to apply the funds paid by the complainant to meeting costs incurred in carrying out the instructions... □Taylor□ had a duty to use the funds for the purpose intended by the complainant. To do otherwise would be contrary to the intentions of the complainant and would not be in the best interests of the complainant."

77. As already mentioned, at the hearing before the Disciplinary Tribunal, □Taylor□ either accepted or did not dispute the allegations of fact made against him in respect of the Workman and ColoCare matters.

78. I have already mentioned that in dealing with the question of penalty in respect of both matters, the Disciplinary Tribunal took account of □Taylor□'s claim that his financial difficulties were caused in part by Workman withholding funds to which he was entitled and I have said that I do not accept this to be the case. Again as I have already mentioned, the Disciplinary Tribunal took account of its finding that there was no conscious wrongdoing by □Taylor□ and that he genuinely believed that he was not doing anything wrong in the course of conduct that he wrongly followed in relation to his client's funds.

79. Bearing in mind in particular the comments made by Kirby P as he then was in *Pillai v Messiter (No 2)* (see supra quoted in the excerpt from *QXOO/C v Companies Auditors*

and Liquidators Disciplinary Board (2000)) and those of Cosgrove J in *Dickens v The Law Society of Tasmania* (supra), I have difficulty in seeing how these views, even if correct, could operate to mitigate the seriousness of □Taylor□'s conduct.

80. I have also mentioned that the Disciplinary Tribunal took the view that □Taylor□ has now seen the errors of his ways. But I am unable to share that conclusion. I do however agree that the Disciplinary Tribunal's observation that □Taylor□'s conduct in respect of both the Workman and ColoCare matters was based on "the same wrong concept of his duties in relation to funds received for a specific purpose and in this respect might be regarded as part of the same course of conduct."

81. The Disciplinary Tribunal is of course is a specialist Tribunal, constituted by an eminent Queen's Counsel and the views expressed by the Tribunal are entitled to the greatest possible respect. It is nonetheless clear that the Administrative Appeals Tribunal in conducting a review of the Disciplinary Tribunal's decision must reach its own conclusions as to matters of fact and if necessary, reassess the orders which should be made. I agree with the views expressed in the decision of the Tribunal in *QXOO/C v Companies Auditors and Liquidators Disciplinary Board* (2000) supra at paragraph 72 where it said:

"..., in reviewing the Board's decision, we must make the decision afresh and are not limited to a consideration of whether the Board's decision was open on the evidence. We are not limited to the evidence led before the Board. As part of that review process, we must make findings of fact based on the evidence and we must reach our decision in light of those findings and the relevant law. If we were to give weight to the decision of the Board simply because of our regard for the Board and because it is the highest level of peer review of an auditor's conduct, we would be taking into account something other than the evidence and we would be in danger of adopting the Board's decision rather than making our own. The Board's decision can only be evidence of the fact that it made a decision based on certain findings of fact. It founds the Tribunal's jurisdiction but it cannot itself be evidence of the matters upon which it has reached a decision and it cannot influence the decision on review that the Parliament has entrusted to this Tribunal."

82. A similar approach was regarded as correct by Mahoney JA in *The Law Society of NSW v Foreman* (supra).

83. I see little purpose in debating whether or not concurrent or cumulative penalties should be imposed in respect of the Workman and ColoCare charges. In each case I think □Taylor□ committed very serious breaches of his professional obligations to his clients. In the Workman case those breaches were compounded by the misinformation which was contained in the letter of 21 July 2000. In my opinion, in respect of each of the two charges of "unprofessional conduct" which have been found proved, the only appropriate order is that □Taylor□'s registration should be cancelled. As to the second Workman charge of "unsatisfactory conduct", the maximum permissible penalty under the Regulations is suspension of registration for not more than 12 months.

84. In a case where registration is to be cancelled in respect of other conduct such an order as suspension would appear to be superfluous. Nonetheless I think it appropriate in respect of the second Workman charge to order that □Taylor□'s registration as an Attorney be suspended for a period of 12 months. The other alternative, i.e. a reprimand of the Attorney is inappropriate in my opinion.

85. At the hearing before the Disciplinary Tribunal, counsel for the applicant Board submitted that a direction should be given by the Disciplinary Tribunal under Regulation 20.24 that the Commissioner of Patents publish in the official journal a copy of the written notice of findings that the Tribunal was obliged to give under Regulation 20.23(6). The Disciplinary Tribunal declined to give such a direction, taking the view that it would at least potentially have the effect of imposing an unjustified further penalty on □Taylor□, and unless the whole decision were to be published, publication of the finding would not give a full and fair picture and would not therefore serve as a warning to other attorneys. I cannot agree with these conclusions. I think it is of importance that the decision should be publicised in the official journal and accordingly I give a direction under Regulation 20.24 to that effect. It is unnecessary, of course, that the Commissioner should publish my reasons in full. The applications to review are allowed and the decisions of the Patent and Trade Marks Attorneys Disciplinary Tribunal are set aside.

86. The formal findings and directions of this Tribunal are as follows:

(1) Paul Robert □Taylor□ was guilty of unprofessional conduct in that he (a) on or about 19 September 1999 invoiced Workman Industries Pty Limited and received payment in advance for actions clearly specified as being associated with entry into national phase of patent application; and (b) failed to pay the overseas associate amounts invoiced for that action and did not advise the client to that effect so that the client was unaware that its rights were at risk; and (c) by doing so precipitated the situation where the client was forced to pay the amounts still owing direct to the overseas attorney to ensure that its right would be maintained. (2) Paul Robert □Taylor□ was guilty of unsatisfactory conduct by providing inaccurate information in his advice on status to Workman Industries Pty Limited dated 21 July 2000. (3) Paul Robert □Taylor□ was guilty of unprofessional conduct in that he (a) on or about 10 August 1998 received advanced payment from ColoCare in respect of PCT/AU97/00145 including money on account for overseas fees, but has not paid overseas associates and did not advise the client to that effect so that client was unaware that the client's rights were at risk; and (b) as a result of this failure to pay accounts overseas associates have declined to take further actions on behalf of ColoCare until payment is received; (c) by his non payment of overseas associates he placed the intellectual property of ColoCare in jeopardy. (4) In respect of the conduct mentioned in paragraphs 1 and 3 hereof, the Administrative Appeals Tribunal upon reviewing the decisions of the Patent and Trade Marks Attorneys Disciplinary Tribunal dated 1 and 2 November 2001, cancels Paul Robert □Taylor□'s registration as a Patent Attorney pursuant to Regulation 20.23 of the *Patents Regulations 1991*. (5) In respect of matters mentioned in paragraph 2, the Administrative Appeals Tribunal in reviewing the aforesaid decisions of the 1 and 2 November 2001 suspends the said Paul

Robert □**Taylor**□'s registration as a Patent Attorney for a period of twelve months pursuant to Regulation 20.23(2)(b) of the *Patents Regulations 1991*.

I certify that the 85 preceding paragraphs are a true copy of the reasons for the decision herein of The Hon C R Wright QC., (Deputy President)

Signed:

Administrative Assistant

Date/s of Hearing 15 April 2002 and 1 and 2 July 2002

Date of Decision 26 August 2002

Counsel for the Applicant Rhondda Nicholas

Solicitor for the Applicant Nicholas Dibb

Counsel for the Respondent -

Solicitor for the Respondent -

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