

PROFESSIONALISM for the PROFESSIONAL and the role of the PROFESSIONAL ASSOCIATION



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Opening Survey

- Who believes patent/trade mark attorneys is a profession?

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- **Who believes patent/trade mark attorneys is a profession?**
- **Who believes your profession exhibits “high” standards of professionalism?**
- **Who believes FICPI Australia materially contributes in maintaining and fostering professionalism amongst its members?**

Classic Professions

- Originally
 - law
 - church
 - military

[- the reputed oldest profession]
- Extended
 - medicine
 - architecture
 - accounting
- Contemporary
 - various “new” entrants

Key Questions

- Why do occupational groups aspire to be a “Profession”?
- Why do:
 - people in an occupation
 - customers of those peopleaspire to have their services provided with professionalism?

What is a Profession?

Etymology – from the Latin “professionem” meaning to make a public declaration (or vow)

Macquarie Dictionary – “a vocation requiring knowledge of some department of learning or science”

Derivation – guilds or Roman “collegia” or craft groups (hence the collegial nature of many “professions”)

What is a Profession (cont)?

Professions Australia Limited (peak industry body)

‘A profession is a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as, possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.

Inherent in this definition is the concept that the responsibility for the welfare, health and safety of the community shall take precedence over other considerations.

What are the common features of a profession?

- a body of complex knowledge requiring extensive, and continuing, education and learning
- entry qualifications based on competence
- work autonomy and independence
- vulnerability of users due to knowledge gap between suppliers and consumers
 - ? may attract fiduciary duties
- duty to protect the “public interest”
- enforceable codes of behaviour to maintain standards
- societal “licence” to operate (formal or informal)
- “self regulatory” element to maintain and enhance standards and reputation

Is it all Good? - Some Contrary Views

- Adam Smith (Wealth of Nations)
- George Bernard Shaw (The Doctor's Dilemma)
- Risks
 - anti-competitive/exclusionary
 - abuse of market power
 - protective self interest

Social Legitimacy of a Profession?

- promotion and protection of the “public interest”
- maintenance and enhancement of necessary standards for essential services required by society
- better societal outcomes through effective peer group action than through prescriptive government regulation and enforcement

How do Patent/Trade Mark Attorneys Measure Up?

Professional Criteria	Yes / No	
1. Body of complex knowledge and learning	✓	
2. Vulnerability of users - ? fiduciary duty	✓	
3. Risk of harm to public	•	(*)
4. Duty to protect public interest	•	(*)
5. Enforceable codes to maintain standards	✓	
6. “Licence” to operate	✓	
7. “Self-regulating” element to maintain/enhance standards	•	(*)

[(*) let's discuss further]

What are the contemporary hallmarks of a “best practice” professional association

- selective membership based on qualifying knowledge and/or experience
- corporate objectives to include:
 - enhance professional knowledge and skills
 - protect and further the “public interest”
 - promote the professional calling and its reputation
- codes to assure standards of conduct/behaviour
- complaints and disciplinary protocols (consumers and intra-professional)
- mandated continuing professional development
 - knowledge / skills
 - practice / risk management
 - ethics / professional integrity
- mandated professional indemnity insurance
- risk management practices to enhance professional standing
- transparency and accountability
- sincere “self regulatory” commitment beyond base legal standards

Observations concerning the P/TMA Profession's oversight

1. Diverse oversight organisations and bodies:

- FICPI Australia
- IPTA
- IP Australia
 - Advisory Council
 - IP and Competition Review Committee
 - Professional Standards Board (“PSB”)
 - Disciplinary Tribunal

[Issues arising:

- potential for confusion of responsibility and purpose for each
- overlapping roles
- potential for conflict]

Observations concerning the P/TMA Profession's oversight (cont)

2. Codes of Conduct / Guidelines

- PSB
- FICPI Australia
- IPTA

[Issues arising:

- potential for interpretative conflict
- what do FICPI Australia / IPTA substantively add to the regulated status
- extent to which members consulted to ensure “ownership” of the values promoted
- assurance and monitoring of compliance]

Observations concerning the P/TMA Profession's oversight (cont)

3. Complaints and disciplinary protocols

- PSB reference to Disciplinary Tribunal
- Ethics and Disputes Committee reference to IPTA
- FICPI Australia Secretary reference to Council

[Issues arising:

- accountability / transparency and perceived independence
- accessibility (?assistance to complainants)
- natural justice protection to complainant and practitioner
- alternative dispute resolution opportunities
- disciplinary outcomes
 - * reprimand * suspension
 - * disqualification * fine
 - * compensation
- costs of process (+ cost recovery)
- appeal rights
- data collection, analysis and use to improve profession's integrity
- professional commitment to honour and respect process]

Observations concerning the P/TMA Profession's oversight (cont)

4. Continuing Professional Development

- PSB requirements
 - 10/15 hours mandated (self compliance/maintain records/periodic audit)
- FICPI Australia - generic “maintain standards” (only)
- IPTA - generic “maintain standards” (only)

[Issues arising:

- what do FICPI Australia/IPTA add to regulated status
- lack of mandated functional diversity to assure holistic improvements
 - * knowledge
 - * skills
 - * practice risk management
 - * ethics and professional integrity
- no accrediting of CPD provider/courses/curriculum]

Observations concerning the P/TMA Profession's oversight (cont)

5. Mandatory Professional Indemnity Insurance

- PSB (Nil)
- IPTA (Nil)
- FICPI Australia
 - Code para 3.14
 - “adequate” PI insurance and/or assets

[Issues arising:

- self policing / compliance assurance
- subjective interpretation of “adequate”
- Association's role in data collection and actuarial analysis of adequacy
- Association's role in endorsing standards for PI policy terms and conditions]

Professional Standards “Schemes”

(a) Introduction

- Professional Standards legislation (State and Federal)
- unique social / ethical compact to:
 - reduce incidence of professional malfeasance
 - ensure availability of consumer recourse
 - contain PI insurance premiums
 - protect professionals against calamitous claims
 - minimise government regulatory oversight
- meta-regulation via PSC (statutory authority) and the relevant professional association
- “stick and carrot” approach:
 - professional liability to a fair “cap”
 - assured consumer recourse against PI insurance / business assets

Professional Standards “Schemes” (cont)

(b) Process

- Professional association proposes a “Cover of Excellence” ® Scheme
- Scheme mandates for its members:
 - CPD
 - rigorous practice risk management
 - code of ethics
 - enforced complaints and disciplinary protocols
 - “approved” PI insurance standards
 - liability cap (to approved PI insurance cover)
- Professional Standards Council (“PSC”) considers and endorses Scheme
- Minister approves and gazettes Scheme
- NB ongoing role of professional association in monitoring and enforcing Scheme and reporting and accounting to PSC

Intrinsic Qualities of a Professional

- assuring the social legitimacy of the profession's "calling"
- "service above self" attitude in the "public interest"
- genuine commitment to continuous improvement of professional standards
- symbiotic relationship between the individual's and peer group's collective professional responsibility

Conclusion

- patent and trade mark attorneys are worthy of “professional” standing
- current “confused” interplay between government regulation and industry association oversight
- available enhancements to current professional practices include
 - CPD
 - complaints and disciplinary protocols
 - PI insurance
- opportunity to investigate a professional standards “Scheme”
- intrinsic qualities of a professional (come from within)

Parting Quote

**“For the strength of the pack is the wolf, and
the strength of the wolf is the pack”**

Rudyard Kipling