

Brief to Counsel

For: Ms Cynthia Cochrane
Clerk: 5th Floor
Wentworth Chambers
Abstract: Brief to provide advice
Status: Confidential and privileged
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MEMORANDUM TO COUNSEL TO ADVISE

1. Background

1.1. The Institute of Patent and Trade Mark Attorneys of Australia (IPTA) is the peak professional body representing Australian patent and trade marks attorneys. IPTA's combined Memorandum and Articles of Association, By-Laws and Code of Ethics and Guidelines are enclosed for your perusal.

1.2. By-Law (1) provides that:

No member shall behave in a manner contrary to that defined in the Code of Ethics and any such contrary behaviour shall be deemed to be conduct unworthy of a member of the Institute.

1.3. Section 3.03 of the Code of Ethics provides that:

A member shall in the practice of the profession take care to avoid behaviour and practices that are misleading or deceptive or that are likely to mislead or deceive. [SEE GUIDELINES 15 to 18]

1.4. Section 3.04 of the Code of Ethics provides that:

It is the duty of a member to maintain professional and ethical standards in the practice of the profession, to promote the interests of his or her clients and of the profession, and, in the practice of the profession to render a service to the public. A member should refrain from doing any act or sanctioning any act which is undignified or is likely to bring discredit upon, or otherwise prejudice the public confidence in, the profession, the Institute, or any of its members.

1.5. The Code of Ethics Guidelines 16, 17 and 18 are set out as follows:

Guideline 16

A member shall not make any representation or indication at his or her office premises or on his or her stationery or likewise which is misleading or is likely to mislead the public.

Guideline 17

In the event that a member carries on practice in Australia as a patent attorney or a trade marks attorney under his or her own name and under one or more business names, or under more than one business name, then an letterheaded stationery used by the member in his practice as a patent attorney or as a trade marks attorney under any one of those names shall also refer to his or her practice under the other name or names.

Guideline 18

If:

a member is engaged in practice as a patent attorney or as a trade marks attorney in Australia (hereinafter called the "Member's Principal Practice");

and where the member is in partnership with another person who is a patent attorney, a trade marks attorney or other intellectual property practitioner in

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Australia or overseas but is not a partner in the Member's Principal Practice, or the member and the other person are each a director or shareholder of a company or are each a trustee or a beneficiary of a trust, and where

the partnership, company or trust engages in the practice of a patent attorney, or trade marks attorney or other intellectual property practitioner; engages in the management of the practice of a patent attorney, a trade marks attorney or other intellectual property practitioner in Australia or overseas or derives a financial benefit from the Member's Principal Practice or from the practice of the other person;

then the association between the member and the other person, partnership, company or trust shall be referred to on all letterheaded stationery used in the conduct of the Member's Principal Practice.

- 1.6. There are currently two publicly listed intellectual property companies in Australia. IPH Ltd being the holding company for patent and trade mark attorney firms Spruson & Ferguson, Fisher Adams Kelly Callinans, Pizzeys Patent and Trade Mark Attorneys, and Cullens. Xenith IP Group Ltd is the holding company for Shelston IP. Xenith has also recently announced it has entered into an agreement to acquire the Watermark Group. IPTA Council is aware that a prospectus has issued on a third IP company for listing on the Australian Stock Exchange. Qantm Intellectual Property Ltd will be the holding company for the two firms Davies Collinson Cave and Freehills Patent Attorneys.
- 1.7. Member concern has been expressed to IPTA Council that the firms owned by the listed companies ("listed firms"), in particular those listed firms in the stable of IPH Ltd, are in breach of the Code of Ethics and Guidelines by not making it clear on their correspondence or on their websites of the association with the other firms within the company.
- 1.8. IPTA Council notes that the firms owned by IPH Ltd display the following statements on their websites:
 - (a) Fisher Adams Kelly Callinans

"Please note that Fisher Adams Kelly Callinans is a member of the IPH Limited group which includes a range of professional services firms operating under a number of brands throughout the Asia-Pacific region"

"Fisher Adams Kelly Callinans is a member of IPH Limited group"
 - (b) Pizzeys Patent and Trade Mark Attorneys

"Pizzeys is a member of IPH Limited group"
 - (c) Spruson & Ferguson

"Spruson & Ferguson companies are members of IPH Limited group"
 - (d) Cullens

"Cullens is a member of IPH Limited group"

The following announcement appears on the Cullens website:

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We are delighted to announce that Cullens has joined the IPH Limited group. IPH is the leading intellectual property (“IP”) services group in the Asia-Pacific region offering a wide range of IP services and products. We are excited to be part of the group, which currently comprises approximately 410 people, including some of the most highly regarded IP professionals in our region.

Cullens will continue to operate as before as a separate business, under our current name, and with our existing team of Principals and attorneys.

Our services will continue to be delivered promptly and professionally, in a cost effective manner, with the same personnel providing the same services from the same premises.

- 1.9. A “Group Relationships Statement” is included on the website of Fisher Adams Kelly Callinans, Pizeys Patent and Trade Mark Attorneys, Spruson & Ferguson and Cullens. With the exception of the name of the firm, the statements appear to be the same.

As an example, the statement on Spruson & Ferguson’s website reads as follows:

"GROUP RELATIONSHIPS STATEMENT"

Spruson & Ferguson is a member of the IPH Limited group. IPH Limited is the holding company for a number of intellectual property professional services firms (group businesses) and adjacent businesses, offering services and products across a range of countries and brands.

The success of Spruson & Ferguson’s business and the success of our clients require us to deliver the highest quality services, independently, and always in our clients’ best interests.

To ensure this, Spruson & Ferguson and each IPH group business adhere to the following key principles to ensure independence, appropriate disclosure of group relationships and the management of actual or potential conflicts of interest.

Always act in the best interests of our clients

Spruson & Ferguson and each of its attorneys have as their first and primary obligation, always to act in the best interests of their clients and in accordance with the law.

Independent conduct of all client matters

Spruson & Ferguson conducts all client cases independently from any other IPH group business. Spruson & Ferguson and each other group business maintain separate case management systems and no case related information is shared with another group business.

(Note: Spruson & Ferguson may in some cases engage or be engaged by other IPH group businesses as a foreign agent.)

Active compliance with all legal and ethical requirements

Spruson & Ferguson and each of its attorneys actively comply with all applicable laws, regulations and codes of conduct, including professional regulations and codes, and privacy, competition and consumer protection legislation.

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Active management of conflicts of interest

Spruson & Ferguson and each responsible attorney actively consider and manage actual and potential conflicts of interest. The IPH group structures and arrangements, including as to the separation and independent conduct of client cases by each group business, ensures compliance with legal and ethical requirements, and minimises the potential occurrence of conflicts.

Disclosure of group relationships and independence in tenders and proposals

Spruson & Ferguson is open and transparent about its relationship with IPH and other group businesses, including by expressly notifying its membership of the group in competitive proposals and tenders. Spruson & Ferguson and other group businesses prepare all tender responses and proposals independently from each other. No group business shares the content of any such tenders or proposals with any other group business.

Gathering and sharing of personal information

Spruson & Ferguson and each group business collect and manage personal information in accordance with applicable privacy and personal data protection legislation, including the Australian Privacy Act 1988 (Cth.), the Singapore Personal Data Protection Act 2012 and other applicable privacy legislation in jurisdictions in which the group business has an establishment. For more information on how we manage and share such information see our Privacy Policy.

The proper management of these matters is of critical importance to Spruson & Ferguson and the IPH group so as to ensure the interests of Spruson & Ferguson clients are not affected.

If you would like further information with respect to Spruson & Ferguson's approach to these matters please contact us.

- 1.10. On its website IPH Limited lists the following companies as part of the IPH Group:

Spruson & Ferguson; Fisher Adams Kelly Callinan; Practice Insight (including Wisetime); Pizeys Patent and Trade Mark Attorneys

2. Instructions for Counsel

- 2.1. Counsel is requested to review the IPTA Code of Ethics and Guidelines, the websites of the listed firms and advise if the disclosure on these websites is in compliance with the Code of Ethics and Guidelines. If not, to advise of the level of disclosure required of a listed firm, including a listed firm within a stable of firms owned by the same holding company in order to comply.
- 2.2. Counsel is also requested to advise if letterheads and other marketing/promotional documentation used and circulated by the listed firms must also carry the same level of disclosure for compliance purposes.
- 2.3. If Counsel requires any further information or would like to discuss this matter, please contact Jennifer McEwan.