

Draft for Public Consultation

Code of Conduct for Patent & Trade Marks Attorneys 2018 and the accompanying draft Guidelines to the Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018

Background:

In March 2013, the governments of Australia and of New Zealand signed the Arrangement between the Government of Australia and the Government of New Zealand Relating to Trans-Tasman Regulation of Patent Attorneys (“Arrangement”). Clause 9.9 of the Arrangement requires the Board to conclude a review of the *Code of Conduct for Patent and Trade Marks Attorneys 2013* and make any appropriate amendments within one year of the date of entry into effect of the Arrangement – that is, by 23 February 2018.

On 21 April 2017 the Trans -Tasman IP Attorneys Board (the Board) released a consultation paper proposing revisions to the Code to accommodate the introduction of the trans-Tasman regime and to address concerns relating to conflicts of interest. The Board received 18 submissions in response to the paper. The Board reviewed these submissions at its meeting in July 2017 and based on this provided guidance to Professor Andrew Christie to draft a new Code and accompanying Guidelines to be released for further public consultation.

Explanatory Notes accompany the draft Code, to assist the reader in understanding where changes and additions in comparison to the current Code have been made.

Responding to this Consultation process:

The draft Code and draft Guidelines are now available for consultation and the Board invites all interested parties to make written submissions by 28 September 2017.

Written submissions should be sent to MDB-TTIPABCodeOfConduct@ipaaustralia.gov.au

For accessibility reasons, please submit responses by email in Word, RTF or PDF format.

The contact officer is Janine Brown who may be contacted on (02) 6283 2536. Please note that, unless requested otherwise, written comments and any associated information submitted to the Board may be made publicly available on the TTIPAB website and may be disclosed to other Commonwealth agencies with an interest in this consultation

When you make a submission, unless stated otherwise, you provide your consent to your personal information being published online. Information published online may be accessed world-wide, including by overseas entities. The Board will not be able to control any subsequent use under the Privacy Act 1988, nor are you able to seek redress under that Act, for the actions of any overseas entities.

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- how you may seek access to and correction of the personal information we hold;
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A request made under the Freedom of Information Act 1982 for access to a submission marked confidential will be determined in accordance with that Act.

Explanatory Notes to the DRAFT Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018

Part 1—Preliminary

1 Name of code

The new code is named to reflect the trans-Tasman nature of the professions.

2 Commencement

The new code will commence one month after the code is registered as a legislative instrument.

3 Authority

The new code is made under the Australian patent and trade marks legislation, in accordance with the Arrangement between the Australian and New Zealand Governments establishing the trans-Tasman patent attorney profession.

4 Definitions

ancillary business – This term is new. It brings within an “ownership group” businesses providing services that are ancillary to those provided by an attorney, such as services of accounting, commercialisation, management or valuation of intellectual property.

associated person – This is a simplified, consolidated version of the current definition.

guidelines – This term is new. The guidelines are in a separate document that accompany the new code. The guidelines incorporate many of the Notes and Examples of the current code, together with explanations of provisions of the new code.

incorporation group – This term is new. It uses the *Corporations Act 2001* (Cth) definition of “associated entities” to capture groups of companies that have a significant degree of common ownership or control.

ownership group – This term is new. It is a group of companies or partnerships that have a degree of common ownership or control.

partnership group – This term is new. It is an equivalent for a group of partnerships of an incorporation group for a group of companies.

5 Former Code of Conduct

This provides that the new code replaces the current code.

Part 2—Overview

6 Application of code

This is the current section 6. The Notes have been moved to the guidelines.

7 Objective of code

This is the primary objective of the new code.

8 Guidelines

The Examples have been deleted and moved to the new guidelines to the new code, along with many of the current Notes. The guidelines are not binding, but assist in understanding and interpreting the new code.

9 Rights of clients not affected

This is the same as the current section 9.

10 Administration

This is a slightly simplified version of the current section 25.

Part 3—Professional conduct

11 Core obligations

This is the same as the current subsections 11(1) and 11(2).

12 Responsibility

This is a simplified and consolidated version of the relevant parts of the current sections 21, 22 and 23.

13 Integrity

(1) – This is the same as the current section 11(3)(a), with the addition of “knowingly misleading” (consistent with the current subsection 17(1)).

(2) – This is the same as the current section 11(3)(b).

14 Competency

(1) – This is the same as the current section 12, but extended to all registered attorneys.

(2) – This is new. It expressly imposes an obligation to act with skill and care, similar to rule 4 of the UK Rules.

15 Diligence

(1) – This is new. It expressly imposes an obligation to act in a timely manner, similar to rule 6 of the UK Rules.

(2) – This is the same as the current section 16.

16 Communication

(1) – This is new. It includes the obligations of the current subsections 13(1), 13(2), 14(1), 14(2) and 14(3), together with new obligations to disclose the legal nature of the registered attorney and details of any ownership group of which the registered attorney is a member.

- (2) – This is a consolidation of current subsections 13(3), 13(4), 14(5) and 14(6).
- (3) – This is new. It introduces an obligation to disclose material changes in the matters required to be disclosed by subsection (1).

17 Disclosure

This is new. It imposes an obligation to disclose relevant information, subject to the duty of confidentiality.

18 Confidentiality

This is a consolidation and simplification of the current section 19.

19 Loyalty

- (1) – This is new. It expressly imposes a fiduciary duty of loyalty.
- (2) – This is a revision of the current subsection 15(4) obligation. Whereas the current provision imposes a duty to avoid the creation of a conflict between the attorney's interests and the interests of a current or former client, the new provision imposes a duty not to prefer the attorney's interests over the interests of a current (but not a former) client.
- (3) – This is new. It expressly imposes a duty not to prefer the interests of one current client over those of another current client.
- (4) – This is a substantial revision of current subsection 15(1), to achieve a position similar to that which applies to Australian and New Zealand lawyers under their respective codes of conduct.
- (5) – This is new. It imposes a prohibition on double employment in contentious/litigation-like matters, similar to rule 7 of the UK Rules.
- (6) – This is new. It achieves a position similar to that which applies to Australian and New Zealand lawyers under their respective codes of conduct, but without the requirement in the Australian lawyers' code of obtaining client consent.

20 Conflicts

- (1) – This is a revised version of the current subsection 15(4), but limited to current clients.
- (2) – This is a simplified version of the current subsection 15(8).

21 Independence

- (1) – This is new. It requires members of an ownership group to operate independently in the delivery of attorney professional services if those members wish to be treated as independent for the purposes of the provisions concerning loyalty and conflicts.
- (2) – This is new. It requires members of an ownership group to obtain the consent of the client to act in a contentious/litigation-like matter against a client of another member of the group, even where the members of the group are operating independently.

22 Termination of services

- (a) – This is the same as the current section 20, but limited to taking reasonable steps.
- (b) – This is new. It introduces an obligation to co-operate in a hand-over, similar to rule 9 of the UK Rules.

Part 4—Practice management

23 Ownership

(1) – This is new. It expressly recognizes the possibility of a registered attorney being a member of an ownership group.

(2) – This is new. It requires disclosure of details of membership of an ownership group.

24 Funds

This is the same as the current section 18.

25 Client property

(1) – This is the same as the current subsection 14(7).

(2) – This is the same as the current subsection 14(8), expanded to include a lien imposed at common law.

26 Address

This is the same as the current subsections 11(5) and 11(6).

Part 5—Complaints and disciplinary proceedings

27 Complaints

This is the same as the current subsections 24(5) and 24(6).

28 Disciplinary proceedings

This is the same as the current subsections 24(1), 24(2), 24(3), 24(4) and 24(8) (with current subsection 24(7) moved the Guidelines).