

SUBMISSION TO TRANS-TASMAN IP ATTORNEYS BOARD

Draft Code of Conduct 2018 and Draft Guidelines to the Code of Conduct 2018

28 September 2017

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1. INTRODUCTION AND SUMMARY

This submission is made in response to the invitation from the Trans-Tasman IP Attorneys Board ('Board') to provide feedback on the proposed draft *Code of Conduct 2018* ('proposed Code') and draft *Guidelines to the Code of Conduct 2018* ('Guidelines'). I am making this submission on my own behalf, as a registered trans-Tasman patent attorney who will be bound by the Code.

Overall, my impression of the proposed Code is that it updates and improves upon the existing *Code of Conduct for Patent and Trade Marks Attorneys 2013*. I believe that it largely codifies what most in the IP professions would regard as good ethical and business practice, and plain 'common sense'. For example, I welcome the confirmation, in proposed section 19(1), that 'a registered attorney is a fiduciary in respect of the registered attorney's dealings with a current client, and owes a duty of loyalty to a current client'. This is, in my experience, the basis upon which most attorneys have conventionally operated. It is also a strength of the proposed Code that it draws on comparable international regulations, and in particular the *UK Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and Other Regulated Persons*, to ensure that the standards applicable to patent and trade marks attorneys in Australia and New Zealand are on-par with the expectations of corresponding professionals in other jurisdictions.

It is unsurprising, given the background to the drafting of the proposed Code and recent developments in the Australian profession, that the main area in which the proposed Code includes provisions that are specific to local circumstances relates to firm ownership. My submission is focused on this aspect of the proposed Code and, in particular, on:

- the provisions in proposed section 16 specifically regulating the way in which registered attorneys communicate their legal and ownership structures to clients; and
- the provisions in proposed section 21 relating to the obligations of members of 'ownership groups' to obtain written consent of clients when separate firms within the group act on opposing sides in formal adversarial proceedings.

As I will explain, with the assistance of concrete data derived from IP Australia's electronic records, I believe that these provisions, as presently drafted, would impose an excessive burden on attorneys, intermediaries/agents, and ultimate clients in the most common forms of indirect relationships. I also believe that they embody an unnecessary 'belt and braces' approach to matters that are adequately covered by more general obligations and duties of attorneys that are

embodied in the Code. I consider there to be a risk that excessively prescriptive provisions may result in client confusion and concern, and/or other unforeseen consequences.

In view of the matters discussed below, I submit that, in finalising the new *Code of Conduct*, the Board should consider:

- amending the waiver in proposed subsection 16(2) to encompass **all** of the matters set out in paragraphs 16(1)(a)-(f);
- further amending subsection 16(2) such that the waiver applies not only in respect of foreign-registered attorneys and (trans-Tasman) registered attorneys, but also to lawyers and other regulated professionals who are themselves bound by ethical obligations, laws, and regulations requiring them to act in the interests of their clients; and
- deleting proposed subsection 21(2).

2. ATTORNEY/CLIENT RELATIONSHIPS

Broadly speaking, there are two types of attorney/client relationship that are relevant under the proposed Code:

- **'direct' relationships**, in which an attorney deals directly with, and is instructed by, the client whose interests are represented by the attorney; and
- **'indirect' relationships**, in which an attorney deals with, and is instructed by, an agent or third-party representative of the ultimate client whose interests are represented by the attorney.

The most common form of direct relationship is between an attorney and a 'local' or 'domestic' client, i.e. an Australian or New Zealand entity or individual that has chosen to engage the attorney to assist and/or represent them in intellectual property matters in their home jurisdiction. However, this is not the only case in which an attorney may have a direct relationship with a client. For example, some larger international and multinational corporations – particularly those with their own in-house IP functions – will instruct their IP attorneys directly in a variety of jurisdictions, including Australia and New Zealand.

Similarly, the most common form of indirect relationship is between an attorney and a foreign-registered 'associate' attorney that has a direct relationship with, and acts as an agent of, the ultimate client (typically a foreign entity or individual

based in the associate's home jurisdiction). Again, however, this is not the only form of indirect relationship. For example, a domestic client's local legal representative may in some cases engage and instruct an attorney in IP matters as agent for the client. In either of these circumstances, the agent is a qualified and licensed/registered legal or IP professional in their home jurisdiction, and has been engaged by the ultimate client in this capacity. In such cases, the client has explicitly (e.g. through a written engagement agreement) or implicitly (through the provision of instructions to the agent) authorised the agent to represent their interests and to take the steps necessary (including the selection and instruction of associate attorneys) to prosecute those interests in Australia and/or New Zealand. Typically, the trans-Tasman attorney will not require formal evidence of the agency relationship, on the basis that the legal and regulatory regimes governing the provision of legal and/or IP services in the relevant jurisdiction are well-known and publicly available.

Variations on these two basic forms of relationships arise in a relatively small proportion of cases. Examples include:

- the attorney having direct communication with both the agent and the ultimate client, for example in order to discuss technical matters with inventors, or business/commercial issues specific to the Australian or New Zealand jurisdictions with corporate managers; and
- arrangements under which the attorney reports to, and receives instructions from, the agent in individual IP matters, and has a direct relationship with the ultimate client in relation to overall business dealings, such as operating procedures, overarching standing instructions relating to management of cases and the business relationship, invoicing and/or payments.

Relationships Addressed by this Submission

In this submission, I am concerned firstly with all relationships in which the attorney has some form of direct contact with the ultimate client, such that the client has specific knowledge of, and interest in, the attorney's identity and/or business operations. A common characteristic of such relationships is that the attorney has contact details of, and channels of direct communication with, the client (e.g. an individual client, or a director or authorised employee of a client entity). I will refer to these as **relevant direct relationships**.

I am also concerned with the overwhelming majority of indirect relationships, in which the attorney normally has no direct contact with the ultimate client, and is aware that the agent is suitably-qualified and authorised to provide instructions on behalf of the ultimate client. By the same token, the client typically has no

specific knowledge of, or interest in, the attorney's identity and/or business operations, having entrusted the selection and instruction of the attorney to the agent. A common characteristic of such relationships is that the attorney is not provided with contact details, nor any channel of direct communication with, the client. I will refer to these as **relevant indirect relationships**.

Relationships Not Addressed by this Submission

I am not concerned in this submission with less common forms of indirect relationships, in which there is no formal regulatory scheme to establish the authority of the agent to act on behalf of the ultimate client. This includes circumstances in which the client is 'represented' by a third party such as an invention promotion company, or a business associate. In such cases it has always been my practice, and that of the attorneys with whom I have worked, to advise the ultimate client of the potential consequences of the arrangement, and to obtain authorisation in writing to accept instructions from the third party. Even then, the relationships must be managed carefully, and the attorney must remain cognisant of the primacy of the interests of the ultimate client, guided by general principles of professional ethics and express obligations under the Code of Conduct.

I also acknowledge, but again am not concerned in this submission with, circumstances in which an attorney may find it necessary to 'pierce' the agency relationship and communicate directly with the ultimate client. Very rarely it may occur that an attorney believes that this is necessary in order to preserve the client's rights or interests. It may be, for example, that the relationship between the client and the agent has broken down, and the agent has informed the attorney that it is no longer representing the client, or that it has simply proven to be impossible to obtain necessary instructions from the agent. Again, these are circumstances in which the attorney must be guided by general principles of professional ethics and express obligations under the Code of Conduct.

Indeed, I would argue that these types of circumstances highlight the fact that it is impossible, and therefore inappropriate, to try to cover specific situations in the Code of Conduct. By setting out general principles and obligations, the Code provides a framework within which attorneys are able to determine their duties to clients (whether direct or indirect) and a broad range of foreseen, unforeseen, and unforeseeable circumstances.

3. COMMUNICATION OBLIGATIONS

Section 16 of the draft Code of Conduct provides that:

(1) Prior to undertaking work for a new or prospective client, a registered attorney must ensure that the client is clearly informed in writing of the following matters:

(a) that the registered attorney is registered as a patent attorney, a trade marks attorney or both, and is bound by this code; and

(b) the type of work for which the registered attorney has competency; and

(c) the procedures, timing and estimated cost of doing particular work; and

(d) the legal personality of the registered attorney and the legal structure under which the registered attorney practices; and

(e) where the registered attorney is an incorporated company – whether the company is public or private; and

(f) where the registered attorney is the member of an ownership group – that fact and the identity of the other members of that group.

(2) A registered attorney is not required to comply with any of paragraphs (1)(a), (1)(b) and (1)(c) if:

(a) the client is also represented by a foreign-registered attorney and the registered attorney is dealing with the client by dealing with the foreign registered attorney; or

(b) the registered attorney has been requested to do work for the client by another registered attorney and the other registered attorney continues to act for the client in the work.

(3) Where any of the matters specified in subsection (1) become materially different from those previously notified to the client, the registered attorney must clearly inform the client in writing of the changes.

Broadly speaking, proposed paragraphs 16(1)(a), (b) and (c), and subsection 16(2), correspond with section 13 of the existing *Code of Conduct for Patent and Trade Marks Attorneys 2013*. There is, however, no equivalent in the existing Code to the obligations under proposed paragraphs 16(d), (e) and (f) to inform

the client in writing of matters relating to the legal and ownership structures under which the registered attorney practices.

Notably, where the registered attorney has a relevant indirect relationship with the ultimate client via either a foreign-registered attorney or another registered attorney, the obligations under proposed paragraphs 16(1)(a), (b) and (c) would be waived by proposed subsection 16(2), as in the existing Code. However, the proposed code would require the matters specified in paragraphs 16(1)(d), (e) and (f) to be communicated in writing to all clients, even where a relevant indirect relationship exists.

In my view, this additional communication requirement in relation to indirect clients is unnecessary and imposes an unduly onerous regulatory burden upon all registered attorneys, the agents of indirect clients (e.g. foreign-registered attorneys), and the indirect clients themselves.

In order to illustrate the extent of the burden that would be imposed by the proposed obligations, Appendix A contains data resulting from an analysis of foreign patent-holders and applicants represented by the top 50 trans-Tasman attorney firms, which collectively account for over 97.5% of all foreign-originating patent applications filed in Australia during the 2016 calendar year. The data is derived from the 2017 Intellectual Property Government Open Data (IPGOD) set.¹ In particular:

- Table A.1 lists the top 50 firms based on number of foreign-originating filings in 2016, along with the corresponding numbers of such filings and equivalent overall 'share';
- Table A.2 lists the number of distinct foreign clients having 'live' patents or applications within the data set (i.e. as at the end of 2016) for which each of the top 50 firms is listed as the address for service; and
- Table A.3 summarises the extent to which foreign applicants engage the services of multiple firms for filing, prosecution and maintenance of their Australia patents and applications.

I also note that there are now over 50 incorporated patent attorneys, and that at least 21 of the top 50 firms identified in Appendix A are incorporated.² Of these, nine are members of the three currently-existing ownership groups. Of the top 20 firms, only six (Phillips Ormonde Fitzpatrick, Madderns, Baldwins IP, Allens, James & Wells IP, and Halfords IP) are not incorporated, and only five of the

¹ <http://data.gov.au/dataset/intellectual-property-government-open-data-2017>

² Trans-Tasman IP Attorneys Board, *Directory of Firms*, <https://www.ttipattorney.gov.au/resources/directory-of-firms>, accessed 28 September 2017.

incorporated firms in the top 20 (FB Rice, Wrays, AJ Park, Cotters, and Houlihan²) are not members of ownership groups.

It is therefore clear that a significant majority of foreign applicants are implicated by all three of the proposed paragraphs 16(1)(d), (e) and (f). All registered attorneys and clients would, of course, be impacted at least by proposed paragraph 16(1)(d).

Based on Tables A.2 and A.3, had the proposed Code of Conduct come into effect on 31 December 2016 (i.e. the date on which the IPGOD 2017 data is current):

- the top 50 firms would collectively have been obliged to communicate the matters specified in paragraphs 16(1)(d), (e) and/or (f) to a total of 41,235 ultimate foreign clients;
- since some of these clients are represented by multiple firms in relation to different applications/patents, the total number of written communications would have been 55,970;
- a total of 7,588 clients would have received multiple communications from at least two, and as many as 24 of the top 50 firms; and
- given that most of these clients are represented via relevant indirect relationships through foreign-registered attorneys, the bulk of the responsibility for receiving and forwarding the communications (with whatever explanation they deemed necessary) would fall to the foreign-registered attorneys.

This obligation would then continue to apply to all new and prospective clients, as well as in the event of any pertinent changes in status, in accordance with proposed subsection 16(3).

It is also necessary to bear in mind that the numbers above are for Australian patent filings only, and therefore represent only a 'lower bound' on the potential impact of the proposed Code. They do not include applicants or owners of Australian trade marks or registered designs, or clients that may be advised by attorneys in other IP matters, and they do not include New Zealand rights of any kind.

For an Australian instrument to impose this level of 'red tape' upon not only the regulated profession itself, but also upon foreign-registered attorneys and their direct clients, is, in my opinion, totally unacceptable.

In my submission, given that it is seen to be necessary for the Code to impose the express obligations as set out in proposed paragraphs 16(1)(d), (e) and (f), these should be waived in the case of relevant indirect clients, along with the obligations under paragraphs 16(1)(a), (b) and (c).

Furthermore, I would argue that the waivers in subsection 16(2) should apply not only to foreign-registered attorneys and (trans-Tasman) registered attorneys, but also to lawyers and other regulated professionals who are themselves bound by ethical obligations, laws, and regulations requiring them to act in the interests of their clients. All such professionals have a duty to their clients such that when they are required to select and engage agents to act on behalf of those clients, they are obliged to inform themselves appropriately about the selected agents, to ensure that the agents are suitably-qualified, and to be aware of any issues that may affect the ability of the agents to represent the interests of the ultimate client.

4. INDEPENDENCE AND ADVERSARIAL PROCEEDINGS

Section 21 of the proposed Code provides that:

(1) For the purposes of sections 19 and 20 [dealing with loyalty and conflicts], a registered attorney that is a member of an ownership group will not be regarded as independent of the other members of the group unless the registered attorney operates independently of the other members in the provision to clients of attorney professional services.

(2) Notwithstanding subsection (1), a registered attorney that is a member of an ownership group must not act for a client in a matter relating to proceedings before a court, a tribunal or a like adjudicative body where the registered attorney knows that a client of another member of the group is involved in the matter and that the clients' interests are adverse unless the registered attorney's client in writing has given reasonably informed consent to the registered attorney acting in the matter.

Proposed subsection 21(1) appears to be a reasonable provision addressing the issue of independence of firms (and individual attorneys) within ownership groups. The effect of this subsection must clearly be considered in light of proposed section 12 and, as such, responsibility for ensuring that a member of an ownership group is genuinely operating independently, and in accordance with proposed sections 19 and 20, lies collectively with:

- any and all individual attorneys involved in acting for a client in a particular matter;

- the attorney director(s) of the firm acting for the client in the matter; and
- the incorporated attorney (i.e. the firm itself) acting for the client in the matter.

Given that this appears to cover the obligations of all registered attorneys with regard to loyalty, fiduciary duties, and the avoidance and management of conflicts, it is difficult to understand why an additional express obligation of obtaining reasonably informed consent in writing should be imposed in the circumstances set out in proposed subsection 21(2).

The proposed Code appears to contemplate that while an attorney's general obligations are sufficient to protect the interests of clients in the case of non-adversarial matters, such as the filing and prosecution of applications, or even providing infringement advice, additional protections are necessary in the event that a matter progresses to '*proceedings before a court, a tribunal or a like adjudicative body*'.

No explanation is offered, in either the *Background and Explanatory Notes* document, or in the draft *Guidelines*, for this difference in obligations for adversarial proceedings conducted before an adjudicative body, compared with any other matters in which an attorney may act for a client. There appears to be no logic to the distinction.

Firstly, I note that in many cases the adverse interests of the clients exist independently of the circumstances contemplated by proposed subsection 21(2). For example, an attorney employed by one independent member of an ownership group may act for a client in relation to the filing and prosecution of a patent application. If the grant of a patent on the application is subsequently opposed by a client of a different independent member of the ownership group, this is a result of the fact that the respective clients' interests in the acceptance and grant of the patent were already adverse. This fundamental truth is not altered by the existence of the opposition proceedings before the Patent Office.

Similarly, an attorney employed by one independent member of an ownership group may act for a client in relation to the provision of advice as to whether or not the actions of the client infringe a granted patent, and/or whether the patent is valid. If the owner of the patent subsequently commences court proceedings for infringement against the client, this is a consequence of the fact that the parties' interests were already adverse prior to the client seeking infringement advice. The potential involvement of an attorney employed by a different independent member of the ownership group in the proceedings is irrelevant to

the adversity of the respective clients' interests before and after the commencement of proceedings.

In either example, proposed subsection 21(2) triggers a situation in which a direct client who may have been working with an attorney for an extended time, and who should already be aware of the membership of the ownership group (having been informed as required by proposed paragraph 16(1)(f)), would be required to provide reasonably informed consent, in writing, to enable the attorney to continue to act. It would be perfectly understandable if the client were to be confused by this sudden requirement, and/or were caused to doubt the past independence and loyalty of the attorney, despite the fact that there is no basis for such doubts. It would be natural for the client to conclude that if the Code requires express written consent in the specific event of the commencement of proceedings, then there must be some sound reason for this, and a legitimate cause for concern.

This does not, however, appear to be the case. If the clients' interests are adverse following the commencement of proceedings, then they were clearly adverse prior to the commencement of proceedings. The duties and obligations of the individual attorneys, attorney directors, and incorporated attorneys under sections 19 and 20 of the proposed Code are unchanged by the commencement of proceedings. There is no apparent reason why the general obligations under the Code, relating to loyalty and conflicts, are inadequate to protect the interests of clients involved in adversarial proceedings, without the additional express requirement for written consent that would be imposed by proposed subsection 21(2).

Furthermore, concerns in relation to regulatory imposts upon agents (e.g. foreign-registered attorneys) and relevant indirect clients already raised in relation to proposed section 16 also apply to subsection 21(2). Appendix B summarises the residency of applicants and opponents in all filed substantive oppositions to the grant of standard patents under section 59 of the *Patents Act 1990* and to innovation patents under section 101M since the commencement of records included in the IPGOD 2017 data set (i.e. since 2001).

The data in Table B.1 shows that a majority of such oppositions (1,101 out of 1,408) have involved at least one foreign-resident (i.e. non-Australian) party, and that over one third (506 out of 1,408) involve no Australian-resident party. As with application filing and prosecution, the overwhelming majority of foreign applicants and opponents are represented by qualified agents (e.g. foreign-registered attorneys) subject to their own professional obligations to ensure that the interests of their direct clients are appropriately protected. No useful purpose can be served by compelling independent attorney members of ownership groups to obtain the written consent of relevant indirect clients in order to continue to

act in the event that opposition, or other proceedings, are commenced through another independent member of the same ownership group.

5. CONCLUSION

Attorneys have professional obligations to clients, including placing the interests of clients ahead of all other considerations (other than observance of the law), a duty of loyalty, and an obligation to avoid conflicts of interest. These obligations are appropriately codified within the proposed Code of Conduct.

However, where the Code extends beyond general principles to impose specific requirements upon attorneys in satisfaction of their general obligations in particular circumstances, care must be taken to ensure that these requirements serve some valid purpose, and do not have unintended adverse consequences.

In this regard, in my view there are two aspects of the proposed Code, as currently drafted, that embody an overreaction to the recent developments relating to public ownership of IP attorney firms, and the associated formation of ownership groups. These are:

- an obligation, under proposed section 16, to inform all clients in writing of matters relating to the legal and ownership structures under which a registered attorney practices, even where the client is represented by an agent (e.g. a foreign-registered attorney) also subject to formal qualification requirements and regulation; and
- a seemingly arbitrary requirement, under proposed section 21, to obtain reasonably informed consent, in writing, in the event that formal adversarial proceedings are commenced involving clients of attorneys within a single ownership group, even where the adversarial nature of the clients' interests is pre-existing, and the independence of the respective attorneys is not otherwise in question.

I have shown that, in addition to any other intended consequences these proposed provisions may have, they would impose a significant regulatory burden not only upon registered trans-Tasman IP attorneys subject to the Code, but also upon agents and the ultimate clients involved in relevant indirect relationships.

It is therefore my submission that, in finalising the new *Code of Conduct*, the Board should consider:

- amending the waiver in proposed subsection 16(2) to encompass **all** of the matters set out in paragraphs 16(1)(a)-(f);

- further amending subsection 16(2) such that the waiver applies not only in respect of foreign-registered attorneys and (trans-Tasman) registered attorneys, but also to lawyers and other regulated professionals who are themselves bound by ethical obligations, laws, and regulations requiring them to act in the interests of their clients; and
- deleting proposed subsection 21(2).

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APPENDIX A: FOREIGN CLIENTS OF AUSTRALIAN ATTORNEY FIRMS

The 'top 50' firms listed in Table A.1 below were determined on the basis of the number of standard Australian patent applications (direct filings and PCT national phase entries) filed on behalf of foreign-resident applicants during calendar year 2016 (i.e. the most recent complete year of data within the IPGOD 2017 data set). Applications with multiple applicants are considered to be filed on behalf of a foreign resident only if all applicants are foreign.

Table A.1 lists, for each firm, the total number of such applications filed, the corresponding firm share as a percentage of all foreign-resident applications, and the cumulative share of the firm along with all higher-ranked firms. These 50 firms together handled 97.61% of all applications filed in Australia by foreign-resident applicants in 2016.

Table A.1: Top 50 firms based on 2016 filings of foreign-originating standard patent applications

Rank	Firm Name	Applications filed (2016)	Firm Share	Cumulative Share
1	SPRUSON FERGUSON	3420	13.28%	13.28%
2	DAVIES COLLISON CAVE	2869	11.14%	24.41%
3	GRIFFITH HACK	2456	9.53%	33.95%
4	PHILLIPS ORMONDE FITZPATRICK	2072	8.04%	41.99%
5	FB RICE	1941	7.53%	49.52%
6	PIZZEYS	1872	7.27%	56.79%
7	SHELSTON INTELLECTUAL PROPERTY	1576	6.12%	62.91%
8	FPA	1470	5.71%	68.61%
9	FISHER ADAMS KELLY CALLINANS	1193	4.63%	73.24%
10	WATERMARK INTELLECTUAL PROPERTY	1121	4.35%	77.59%
11	CULLENS	584	2.27%	79.86%
12	WRAYS	548	2.13%	81.99%
13	AJ PARK	514	2.00%	83.98%
14	MADDERNS	431	1.67%	85.66%
15	BALDWINS INTELLECTUAL PROPERTY	263	1.02%	86.68%
16	ALLENS	228	0.89%	87.56%
17	COTTERS	203	0.79%	88.35%
18	JAMES WELLS INTELLECTUAL PROPERTY	181	0.70%	89.05%
19	HALFORDS INTELLECTUAL PROPERTY	177	0.69%	89.74%
20	HOULIHAN	172	0.67%	90.41%
21	COLLISON	154	0.60%	91.01%
22	INTELLECTUAL PROPERTY GATEWAY	145	0.56%	91.57%
23	MURRAY TRENTO ASSOCIATES	122	0.47%	92.04%
24	ADAMS PLUCK	110	0.43%	92.47%
25	MINTER ELLISON	108	0.42%	92.89%

Rank	Firm Name	Applications filed (2016)	Firm Share	Cumulative Share
26	APT	106	0.41%	93.30%
27	DARK INTELLECTUAL PROPERTY	103	0.40%	93.70%
28	GOLJA HAINES FRIEND	84	0.33%	94.03%
29	INTELLECTUAL PROPERTY SOLVED ANZ	80	0.31%	94.34%
30	KL GATES	76	0.30%	94.63%
31	PETER MAXWELL ASSOCIATES	74	0.29%	94.92%
32	PIPERS	67	0.26%	95.18%
33	PATENT ATTORNEY SERVICES	59	0.23%	95.41%
34	WALLINGTON DUMMER	48	0.19%	95.78%
35	ELLIS TERRY	49	0.19%	95.60%
36	BAXTER	39	0.15%	96.09%
37	INLEGAL	38	0.15%	96.23%
38	LORD	39	0.15%	96.09%
39	EAGAR MARTIN	37	0.14%	96.38%
40	ARMOUR INTELLECTUAL PROPERTY	35	0.14%	96.65%
41	FRANKE HYLAND	36	0.14%	96.52%
42	MICHAEL BUCK INTELLECTUAL PROPERTY	30	0.12%	96.89%
43	SMOORENBURG	31	0.12%	96.77%
44	HENRY HUGHES INTELLECTUAL PROPERTY	28	0.11%	97.11%
45	TATLOCKS CHRYSILIOU INTELLECTUAL PROPERTY	29	0.11%	97.00%
46	CREATEIP	26	0.10%	97.42%
47	ACACIA LAW	27	0.10%	97.32%
48	WADESON	27	0.10%	97.32%
49	AHEARN FOX	24	0.09%	97.61%
50	AJ PIETRAS	24	0.09%	97.61%

For each one of the 50 firms identified in Table A.1, Table A.2 lists the number of 'active foreign clients' of the firm, as at 31 December 2016. An active client is defined as one having at least one live application or patent for which a trans-Tasman registered attorney is recorded as the address for service.

The final two rows of Table A.2 identify: the total number of distinct active foreign clients, i.e. the number of active foreign clients having at least one live application or patent for which any one of the top 50 firms is recorded as the address for service; and the cumulative total over all agents, i.e. the sum of the number of active clients of each individual firm. These two numbers differ because in some cases different agents have been engaged to file, prosecute, and/or maintain different applications/patent owned by a single foreign-resident applicant.

The engagement of multiple firms on behalf of a single applicant is itself most commonly a result of the fact that foreign-originating filings are typically arranged by agents of the applicants, i.e. the foreign-registered attorneys with

which the applicants have a direct relationship. Over time, and for a variety of business and/or technical reasons, a foreign-registered attorney may elect to instruct different attorneys/firms in relation to the filing and prosecution of individual applications on behalf of the ultimate client. Since the foreign-registered attorney is entrusted by the client with overall management of its portfolio across multiple jurisdictions, the distribution of work in this manner is typically of no concern to the client.

Table A.2: Active foreign clients of the top 50 firms

Firm Name	Number of Active Foreign Clients
CREATEIP	45
MURRAY TRENTO ASSOCIATES	45
HENRY HUGHES INTELLECTUAL PROPERTY	58
ARMOUR INTELLECTUAL PROPERTY	64
AJ PIETRAS	65
TATLOCKS CHRYSILIOU INTELLECTUAL PROPERTY	77
WADESON	81
INLEGAL	83
FRANKE HYLAND	89
ELLIS TERRY	98
SMOORENBURG	109
MICHAEL BUCK INTELLECTUAL PROPERTY	110
WALLINGTON DUMMER	112
EAGAR MARTIN	115
AHEARN FOX	119
ACACIA LAW	123
BAXTER	143
COTTERS	204
KL GATES	211
DARK INTELLECTUAL PROPERTY	238
JAMES WELLS INTELLECTUAL PROPERTY	242
LORD	259
PIPERS	261
MINTER ELLISON	270
HOULIHAN	276
HALFORDS INTELLECTUAL PROPERTY	282
GOLJA HAINES FRIEND	301
ADAMS PLUCK	308
PATENT ATTORNEY SERVICES	321
PETER MAXWELL ASSOCIATES	333
INTELLECTUAL PROPERTY GATEWAY	403
INTELLECTUAL PROPERTY SOLVED ANZ	419
BALDWINS INTELLECTUAL PROPERTY	504
APT	530

Firm Name	Number of Active Foreign Clients
COLLISON	735
ALLENS	758
AJ PARK	947
MADDERNS	1042
WRAYS	1561
CULLENS	1709
WATERMARK INTELLECTUAL PROPERTY	2426
FISHER ADAMS KELLY CALLINANS	2466
FPA	2646
SHELSTON INTELLECTUAL PROPERTY	3595
PHILLIPS ORMONDE FITZPATRICK	3972
PIZZEYS	4045
FB RICE	4245
GRIFFITH HACK	5959
SPRUSON FERGUSON	6475
DAVIES COLLISON CAVE	6491
Distinct active foreign clients	41235
Cumulative total over top agents	55970

In order to assess the extent to which Australian applications made by individual foreign-resident applicants are distributed across multiple attorney firms, Table A.3 lists the corresponding distribution, i.e. the frequency with which an individual applicant's applications/patents are handled by different numbers of firms within the top 50. Although a majority of foreign-resident applicants have only one local agent (in large part because many have only one Australian application or patent), there is a significant number on behalf of which multiple agents have been engaged.

Table A.3: Distribution of the number of foreign-resident applicants in behalf of which different numbers of top 50 firms are engaged

Number of Agents Engaged	Frequency
1	33647
2	4672
3	1431
4	594
5	299
6	208
7	120
8	88
9	44
10	42
11	22
12	18
13	16
14	13
15	4
16	7
17	4
18	3
20	1
21	1
24	1

APPENDIX B: PATENT OPPOSITIONS

The IPGOD 2017 data set includes information about oppositions filed since 2001, including the type of opposition and the identity of the opponent in each case. Table B.1 below lists the number of substantive oppositions to standard and innovation patents filed under sections 59 and 101M, broken down according to the residency (Australian or foreign) of the applicant and opponent. This includes all cases in which a notice of opposition was filed, regardless of the eventual outcome or whether the opposition ultimately proceeded to a hearing.

Where multiple notices of opposition have been filed against a single patent/application, these are counted as separate oppositions. Where an application has multiple applicants, it is counted only once, and is considered to be an application by an Australian resident so long as at least one of the applicants is an Australian resident.

Table B.1: Distribution of substantive oppositions to standard patents (section 59) and innovation patents (section 101M) by residency (Australian/foreign) of applicant and opponent

Applicant	Opponent	Number of Substantive Oppositions
Australian	Australian	307
Australian	Foreign	78
Foreign	Australian	517
Foreign	Foreign	506