

02 June 2017

*by email*

Trans Tasman IP Attorneys Board

**Re: Review of the Code of Conduct**

We refer to the consultation paper, and to the request to provide comments on the paper and the proposals.

### **Overall objectives**

In considering the appropriate response in adapting the code to new situation, we submit that the correct starting point is the core obligations in the code, section 11:

- (1) A registered attorney must act as a patent attorney or a trade marks attorney:
  - (a) in accordance with the law; and
  - (b) in the best interests of the registered attorney's client; and
  - (c) in the public interest; and
  - (d) in the interests of the registered attorney's profession as a whole.

It is important to appreciate that the attorney is required to place the interests of the client above the public interest, and above the interests of the profession. Thus, we submit that similarly the paramount consideration of any changes to the code should be the advantages and benefits to the client.

If we are to operate as a profession with an enduring public mandate, then maintaining the highest standards is imperative. We must generate a perception by the public at large, and our clients in particular, that we are committed to observing those standards and disciplining those who do not comply. We otherwise have the potential to undermine our claims to professional recognition.

### **Conflicts of interest**

We note and in general concur with the discussion on the nature of conflicts of interest, be they duty-interest or duty-duty conflicts. However, there is a distinction to be drawn between the existence of a conflict, and acting upon the conflict. One has a conflict of interests where one interest leads to a first course of action, and another interest leads to a second course of action. If the attorney acts (say) in his own interests, and that course of action is not the best course of action for his client, the attorney does not merely have a conflict of interest - he has committed a malfeasance.

The point is that the conflict arises when different interests or obligation lead the attorney, individual or corporate, in different directions. It is a preceding step to actually acting on those conflicts. To put it another way, once you start having to worry about which course to take, you have a conflict.

### New business structures

The new business structures we will reference as a parent company, with two or more sister companies which carry on practice as attorneys. We do not think that it is reasonable to describe them as a 'holding company', as this implies a hands off, passive investment.

On the contrary, if you review the annual reports and ASX releases, and similar documents, from the three ASX listed companies, this is not the impression given therein of the management or marketing intentions of those companies. We hasten to say that we raise this not in any sense as criticism, but to illuminate the intentions and operations which are currently undertaken and proposed.

For example, in a release to the ASX regarding an acquisition, <http://www.xenithip.com/Home/?page=ASX-Announcements>, 'Presentation Griffith Hack Acquisition and Entitlement Offer' dated 15 November 2016, the presentation notes:

'Combined Xenith group will have leading market share in Australia' p17  
Listing of combined market shares across various categories p17  
Listing of combined staff numbers and revenue, p19  
'one of the largest IP groups in Australia' p20  
A combined growth strategy into Asia p24  
Shared services and IP advisory services p25  
Synergies p 27

In the IPH half year report to 31 December 2016, <http://www.asx.com.au/asxpdf/20170216/pdf/43g1bh3y05dfyj.pdf>, it notes:

'A a group, IPH holds No 1 patent (22% market share) and trademark (13% "qualified" market share) market position in Australia' p6  
Details of group market share p8  
Details of largest clients across group p26  
IPH operates as an IP service hub p29

In the QANTM half yearly report to 31 December 2016 <http://www.asx.com.au//asxpdf/20170223/pdf/43g7qlnyyh4fhp.pdf> it notes:

Group revenue reported p8  
Mention of firm and group market shares (i.e. relative to other 'groups') p8  
Revenues for group across client sizes, group client tenure p9

Revenue and costs reported across group p 12

Defined group strategy (for Asia) p 19

'Opportunity for FPA to leverage DCC's knowledge of Singaporean regulatory and commercial environment and back office and ICT infrastructure in Singapore' p 19

From the perspective of these public reports which are provided to investors and regulators, it is clear that the intention is to grow the groups, and to achieve synergies within the groups (i.e. between the sister companies). This is the underlying business proposition.

### **Control in new business structures and duties of Directors**

I note that one issue is whether the sister companies are 'truly' independent, and indeed how that could be defined.

We note that each sister company has, as we understand it, a separate board. Given that the shares in the sister company are owned by the parent, this means that in effect the board members of the sister companies serve at the pleasure of the parent company board. There may be agreements between each sister company and the parent company, but these can be no more than a statement of good intentions. The sister company obviously cannot enforce any such agreement against its owner.

Thus, in a financial and control sense, as all of the sister companies are completely under the legal and financial control of the parent, none of them can be said to be 'truly' independent from the parent. It is accordingly a dubious proposition to suggest that they can ever be truly independent from each other. We are not suggesting that on a day to day basis the sister companies do not largely operate on their own, as in any operating corporate subsidiary. However, the ability exists for the board of the parent to direct each sister company.

Directors have duties defined by the Corporations Act, as well as by ASX listing requirements. These duties are not necessarily congruent with the code of conduct. Thus, where the patent and trade mark attorneys are in control of a business, it may be appropriate to consider that they will or ought to impose an overriding consideration of client interests on a particular situation. This is not the case for entities which are controlled by non-attorneys. Indeed, in the case of the patent company, the Directors' are obliged to act in the best interests of the shareholders, not clients, to the extent there is a conflict.

### **Conflict Risks**

In our view, there is no case to treat the sister companies any differently in term of conflict of interest than as a single related corporate group. Noting the issues above which flow from a corporate structure, we do not see how independence can be established in a legal sense, how it could be enforced, and as we will discuss below, how this could be transparent to clients.

It is important to also consider the cultural changes and career advancement opportunities with a listed company, particularly looking ahead. As in any other corporate group, it will be implicitly understood that advancement ultimately depends upon the parent board, not the operating entity that one works for. No one need state this or issue a memo; it is just understood by anyone working within such a structure. This is only going to be more and more the case as the companies settle into their new status over coming years, as the former partners, now shareholders, of the sister firms retire or move on to new opportunities, to be replaced by (most likely) non-patent attorney shareholders and non-partner attorneys as employees.

Consider for example a junior attorney in sister firm A, acting for an Australian start up, which is opposing a patent owned by a fortune 500 company, represented by sister firm B. The junior attorney identifies an issue with the priority claim by the fortune 500 company, which will lead to invalidity. Firm B is likely at fault. There is clear potential for a large negligence claim and loss of a major client of the group. No one other than the junior attorney need ever know. Clearly, the junior attorney would at least be concerned that this could be career limiting if he acts in the best interests of his client. Without acting one way or another, this attorney has a conflict.

There is also, for shareholders in the group, the very direct threat to the value of their shareholding if the fortune 500 company is lost as a client, together with potential reputational losses from such an incident.

Thus, apart from the conflict between the interests of two clients, there are concomitant conflicts between the career and financial interests of the attorneys and their client.

It is important to consider that some of the work, particularly of patent attorneys, is highly technical in nature and is not well understood by many clients, particularly smaller, less sophisticated or start up entities. These are the clients who are most vulnerable, and for whom the profession provides the most critical advice and support.

We must be conscious of trying to create a situation in which the risk of an attorney being placed in a conflict and then potentially acting inappropriately is minimised. However, we also must not create a scenario in which the profession is subject to an appearance of impropriety, it is not just the actuality which has the potential to cause damage.

Consider a trade mark opposition, between a large multinational represented by sister company A, and a local manufacturer represented by sister company B. The local manufacturer loses. They then take to the press and social media to assert 'well, of course we lost, the lawyers were acting for both sides and we are the little guy'. Even if there was a proper disclosure to the local manufacturer, there is no explaining this to the public in a way that leaves a good impression, even if nothing improper occurred and the local manufacturer simply had a poor case.

To avoid creating a situation of conflict within the various IP groups, we submit that for the purposes of conflict they need to be treated in the same manner as a firm with several branches. There must be a complete prohibition (even with informed consent) on sister companies acting for both sides of a contentious matter.

### **Feedback**

We have discussed this with approximately 10 local clients and more than 50 international IP practitioners. Not one has considered that the scenario of sister companies acting in conflict was acceptable. Indeed, the overriding view was amazement that such an arrangement could ever be contemplated.

We strongly recommend that the Board undertake formal confidential research with a range of Australian and NZ applicants, of a range of sizes and including the public and private sector, to establish their views. This procedure would allow for independent assessment of stakeholder views, rather than views filtered by the present attorney participants in this discussion. This may be appropriate once a draft code is established.

This must not simply be a matter of attorneys settling things amongst themselves.

### **Contentious matters**

This obviously extend to any matters, such as litigation, oppositions, re-examinations, directions to co-owners, or other matters in which clients are in direct legal conflict. We submit that it also extends to advising on the infringement or validity of IP rights. This includes matters such as freedom to operate advice. One sister company should not attempt to provide FTO advice about IP owned by clients of sister companies.

### **Informed Consent**

In our view this is possible and acceptable for clients with a risk of conflict, providing it is truly informed. In the event that the client instructor is a legal practitioner or attorney, both sides consent in writing, and it is not a contentious matter (in which case both clients must be handed away), this is not objectionable.

However, in the case of a less sophisticated client, they should be encouraged or possibly required to seek independent legal advice before they can give informed consent, as the serious risks and consequences may not be apparent to them.

### **Transparency**

To be clear, we do not consider that information regarding the composition of a group merely being 'available' somewhere on a website meets the necessary level of transparency. As with the ASX, we

think that disclosure must be continuous, so that if (say) a new firm is acquired, an exercise of identifying conflicts to all existing clients and either terminating representation or seeking informed consent from existing clients must be undertaken. That is, clients are told that 'sister company A acts for XYZ'. Acquisition of new clients should entail a conflict check across the group.

### Specific issues

Apart from the comments above, our comments on the specific issues noted are as follows:

Issue 1 No other amendments are apparent to us at this stage.

Issue 2 We would like to see a consistent set of obligations for attorneys, directors and incorporated attorneys. Consideration to appropriate exemptions for in-house attorneys should be considered.

Issue 3 We would like to see guidelines, particularly around conflicts of interest, and (e.g.) how to resolve conflicts. The UK model is a good one.

Issue 4 Given our views above, we see no need to treat a group differently than a single incorporated attorney. Our views are otherwise made clear above. We see it as impossible to define an enforceable form of direct and indirect independence when clearly the commercial intent is to operate as a group.

Issue 5 Addressed above.

Issue 6 Double employment in non-contentious matters with informed consent is acceptable. Detailed rules and guidelines about informed consent are required. It must be explicitly prohibited in contentious matters.

Issue 7 The code should provide guidelines for how to resolve a conflict. In general, this should involve handing away both clients at least for the particular matter, subject to meeting procedural deadlines.

We thank the Board for the opportunity to provide comments

Yours sincerely



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