



THE AUSTRALIAN FEDERATION OF INTELLECTUAL PROPERTY ATTORNEYS
FICPI AUSTRALIA

7 June 2017

WEBSITE: www.ficpi.org.au

By email: MDB-TTIPABCodeOfConduct@ipaaustralia.gov.au

To: Janine Brown

Trans-Tasman IP Attorneys Board
IP Australia

Dear Ms Brown

Review of the Code of Conduct – Consultation Paper

FICPI Australia welcomes the opportunity to respond to the Consultation Paper produced as a result of the Trans-Tasman IP Attorneys Board review of the Code of Conduct and thanks the Board for providing an extension of time to today to file our response.

About FICPI Australia

As you may be aware, FICPI Australia is an organisation whose members are all registered Patent Attorneys or Trade Marks Attorneys, or registered Patent and Trade Marks Attorneys who have senior roles in IP firms conducting business in Australia.

We now provide our response to the Proposals for Revision and Matters for Consultation referred to in the Consultation Paper.

1. Proposals for Revision

Consequential Amendments

1 – 4: Agreed

Equality in Application of Code

5 – 6: Agreed

Elaboration of Professional Conduct Standards

7: Agreed

Listed Group Scenario

8 – 11: We are in general agreement with the Board's consideration of these issues, although there are different perspectives on certain of the specifics, reflecting generally the breakdown of views expressed in the Consultation Paper corresponding to different IP stakeholder standing. Our comments on the specific proposals referred to are as follows:

PRESIDENT:
STEPHEN KROUZECKY
C/- Krouzer IP
Suite 11, Level 2
Versatile Building
29-31 Lexington Drive
Bella Vista NSW 2153
Australia

Telephone
(02) 9680 8622
International
+612 9680 8622
Facsimile
(02) 8850 7789
International Facsimile
+612 8850 7789
E-Mail
stephen.krouzecky@ficpi.org

SECRETARY:
BILL MCFARLANE
C/- Madderns
Level 4 19 Gouger Street
Adelaide, South Australia, 5000
Australia

Telephone
(08) 8311 8311
International
+618 8311 8311
Facsimile
(08) 8311 8300
International Facsimile
+618 8311 8300
E-Mail
bill@madderns.com.au

TREASURER:
MARK ROBERTS
C/- Davies Collison Cave
1 Nicholson Street
Melbourne VIC 3002
Australia

Telephone
(03) 9254 2777
International
+613 9254 2777
Facsimile
(03) 9254 2700
International Facsimile
+613 9254 2700
E-Mail
MRoberts@davies.com.au

8: Yes

9: Generally, in agreement, although different stakeholders have different perspectives regarding the sufficiency and clarity of the proposal to addressing conflict of interest concerns regarding duty-interest and fiduciary duty obligations in contentious matters or matters which could become contentious. Therefore, we are unable to express further comment on the issue.

10: Yes, this would appear to be very important and require close consultation with the profession to ensure that it addresses the concerns of all stakeholders. From the 'listed holding company/listed group attorney firm' perspective, the concept of operational independence requires some clarification given that many areas of business operation have no implications for conflicts of interest and the Board should not be purporting to dictate how business entities organise themselves beyond that necessary to address perceived conflict of interest issues. A further view on operation independence, not necessarily restricted to the listed group scenario, was that there was considered a need to ensure that the operational and reporting structures chosen by the owner entity of the attorney firms, as well as the operational and reporting structures within the individual firms, are devised to ensure 'real operational independence' such as to enable the individual corporate attorney and individual employed attorneys to comply and discharge their professional and ethical obligations under the Code of Conduct. As noted in the Consultation paper (and previous iterations of the Code), the obligations under the Code should apply equally to incorporated and individual attorneys.

11: Yes, with a minimum requirement that the disclosure requirements should require companies within the same corporate group to identify that they are members of that corporate group and thus disclose the identity of its corporate owner on its website, letterhead and emails. There were different views according to whether anything further should be provided, such as listing the other members in that corporate group.

Conflict of Interest Obligations of Attorneys

12 – 15: FICPI agrees with these proposals, except certain of the detail concerning Proposal 14. With respect to Proposal 14, we elaborate as follows:

14:

First bullet point: We agree with the notion of "reasonably informed consent" to make the requisite type of consent practically workable.

Second bullet point: We agree with the notion of providing guidance on what is required to meet consent. We consider this to be very important and require close consultation with the profession to ensure that it addresses the concerns of all stakeholders.

Third bullet point: There are different views on the notion of a blanket prohibition on double employment in contentious matters, not necessarily based upon stakeholder standing, and therefore we are unable to express further comment on the issue and so cannot comment further on the requirement.

2. Matters for consultation

Issue 1: Amendments consequential upon introduction of the trans-Tasman regime

Bullet point 1: No

Issue 2: Equal application of provisions generally

Bullet point 1: Yes

Bullet point 2: N/A

Bullet point 3: Yes

Issue 3: Elaboration of the Professional Conduct Standards

Bullet point 1: FICPI supports the introduction of guidelines in a similar manner to the UK Rules, but considers that the guidelines should not be overly prescriptive. It should be made clear to the extent to which particular guidelines are mandatory, and other guidelines are not, and what are the consequences of not following them. Given the fluidity with which professional practice changes in the current working environment, we consider it appropriate that the guidelines be reviewed on an annual basis and updated to ensure that they address concerns arising from practice, especially where existing guidelines are inadequate or redundant.

Bullet point 2: This requires further consideration, but some areas other than the Conflict of Interest provisions that may require further elaboration and guidance are as follows:

- conduct of attorneys, both incorporated and individual associated with an attorney, or group of attorneys, leaving a practice
- backup and support services for attorneys conducting sole practices in the event of unavailability or illness
- the requirement for providing a written estimate of costs
- extension of the principle of 'independence' to individual employed attorneys to enable them to comply and discharge their professional and ethical obligations under the Code of Conduct in the spite of employment considerations.

Issue 4: Groups of firms

Bullet point 1: Yes

Bullet point 2: Yes, but see the comments made under Proposal 9.

Bullet point 3: Yes, but see the comments made under Proposals 9 and 10.

Bullet point 4: The guidelines should specifically acknowledge that back office functions can be combined provided client information is quarantined within each firm, but see the comments made under Proposal 9.

Bullet point 5: Yes

Bullet point 6: See comments in relation to Proposal 11.

Issue 5: Equal application of conflict of interest provisions

Bullet point 1: Yes, in line with how this has been addressed in the Consultation paper

Bullet point 2: In the same way that the Consultation paper has the address the issue

Issue 6: Double employment

Bullet point 1: Yes

Bullet point 2: We agree with the notion expressed in the Consultation paper that the 'informed consent' be along the lines of "reasonably informed consent" that is practically workable, as opposed to the notion of "fully informed consent" as has been interpreted in the courts.

Bullet point 3: Yes, but not in an overly prescriptive sense.

Bullet point 4: At least the identity of the parties and the nature of the matter (where disclosure of the identity of the other party will not breach confidence).

Bullet point 5: As indicated in response to Proposal 9, we are not able to comment.

Bullet point 6: As indicated in response to Proposal 9, we are not able to comment.

Bullet point 7: As indicated in response to Proposal 9, we are not able to comment.

Issue 7: Resolution of conflicts of interest

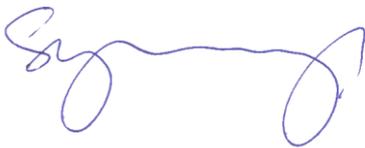
Bullet point 1: Yes

Bullet point 2: Yes

Bullet point 3: Examples of different scenarios that could happen, and the appropriate steps that can be taken and what can be said in each instance, as steps may differ from example to example. Obviously, this requires more time to work through than in the time allowed for responding, and we would welcome the opportunity to consider examples provided by the Board in relation to this matter.

Finally, we advise that we have had an opportunity to consider the IPTA submission, and note in particular the comments made under the heading Fiduciary Duty. FICPI endorses the comments and agrees with the suggestion that particular reference be made in the Code of Conduct to all attorneys having a fiduciary duty obligation to their clients at law.

Yours sincerely



President – FICPI Australia

cc: FICPI Australia Councillors