

8 June 2017

Ms Janine Brown
Trans-Tasman IP Attorneys Board
Email: MDB-TTIPABCodeOfConduct@ipaaustralia.gov.au

Dear Ms Brown,

**Trans-Tasman Attorney Regime
Review of Code of Conduct
Conflict of Interest Provisions
Response to Consultation Paper**

Thank you for the opportunity to comment on the draft proposals paper.

As a general comment, we believe the draft proposals are well considered and (if given effect) should update the Code to better meet the changed landscape of attorneys practice. Set out below are some comments that may assist with the final formulation of the Code's review.

1. There are a number of references to businesses operating 'independently' of each other. This may mislead or confuse readers of the Code. We suggest that the two key requirements are:
 - a. subject to paragraph b., separation of client facing activities (as distinct from administrative or back office operations); and
 - b. separation of client confidential information,

between business that share common ownership. Provided the management of the subsidiary businesses is conducted in compliance with these principles, the interest of clients and the profession should be protected and advanced.

As a very simple example, the sharing within a group of financial information that is high level and contains no details about individual clients should not be restricted – but processes should be in place to ensure that the detail of individual financial arrangements that go to the substance of the client relationship with a client of one subsidiary are not accessible by employees carrying on the business of another subsidiary working in the same profession. This should not impact on back office services and should not restrict access to aggregated financial information that is not identifiable to any specific client, but information such as client billing arrangements would not be shared across subsidiaries.

2. Following on from adopting the above requirements, we suggest that it is potentially dangerous to seek to prescribe what is required by way of governance and management structures. The risk with entrenching any guidelines is that they are:
 - a. not sufficiently comprehensive to cover all relevant situations; and/or

- b. become 'safe harbours' that may lead to people complying with the form rather than the substance of the above two requirements.

We therefore suggest that the above requirements be codified and that registered attorneys be obliged to give effect to them having regard to the relevant circumstances ie on a case by case basis. A solution for one client in its circumstances may not be appropriate to another.

In this regard, we note that the legal profession is not subject to a prescriptive regime concerning matters involving conflicts ie. there are not prescribed matters that have to be attended to. Instead the rules are set out and the regulator may be asked to assesses the conduct of lawyers by reference to the then relevant circumstances.

To the extent that the Board adopts this 'non-prescriptive' approach, over time its decisions will be able to be referenced by registered attorneys to see how the Board (in a particular case) interpreted whether or not the requirements had been met. It may also be appropriate or desirable for the Board (as it sees fit) to issue guidelines from time to time where circumstances indicate that such are necessary eg. where there appears to be a course of conduct which the Board objects to but which recurs amongst registered attorneys.

3. We suggest that it should be an obligation on any incorporated attorney that it disclose that it is commonly owned with another incorporated attorney by a holding company. It would be sensible to record the fact of this in any costs or like agreement with the clients involved, and where there is no formal agreement covering the provision of services, in another written communication (including by email). Currently, the structures are all predicated on a holding company owning 100% of each subsidiary – but the level of ownership should be appropriately recorded if there was less than 100% common ownership and with common 100% ownership this may be described with such words rather than using % holding terms. Where the holding company is listed, no further ownership information should be required as relevant information would be held on the ASX or other recognised stock exchange.
4. To the extent that commonly owned incorporated attorneys cannot meet the above requirements, it may be appropriate to 'aggregate' them so that they are regarded as one attorney and obliged to act accordingly.
5. Clients should be permitted to agree to arrangements that would be precluded by the Code but for that consent. Consent would generally be required where:
 - a. a registered attorney seeks to play more than one role on a matter or represent two clients; or
 - b. two (or more) commonly owned registered attorneys do not satisfy the above requirements and seek to play more than one role on a matter or represent two clients.

Such consent needs to be informed with the concept of 'informed' based on what is reasonably known to the registered attorney and client at the relevant time. For the reasons set out at paragraph 2, we do not believe it appropriate to prescribe what is needed to secure informed consent (and we note that the legal profession is not subject to a prescriptive regime in this respect).

6. Subject to appropriate drafting to reflect the differences that arise naturally between incorporated attorneys (and the distinction between listed ones, with greater disclosure obligations, and others) and individuals (whether in partnership or acting as sole practitioners), it would be useful for all attorneys to be held to the same obligations under the Code. We suggest this would advance the standing of the profession as a whole and mean that the public does not need to deal with different requirements depending on the structure adopted by the attorney.

Having regard to the general comments above, we now address each of the issues identified by the Board for stakeholder feedback at pages 7 and 8 of the Consultation Paper, using the same 'numbering'.

Issue 1

- No.

Issue 2

- To the maximum extent practicable (and subject to the drafting outcome), yes.
- Not applicable.
- It may be simpler to leave them separate, but we have no strong view.

Issue 3

- As noted at paragraph 2 above, the Board may see merit in doing this but it could be done on an 'as needs' basis.
- See above.

Issue 4

- Yes.
- Yes but consistent with our comments at paragraph 2 above.
- We suggest that the guiding requirements be entrenched and registered attorneys obliged to comply with them without prescription as to what is required, as outlined above.
- Not applicable.
- Yes, consistent with paragraph 3 above.
- In the context of wholly owned groups, the fact of that common ownership and that separation of client facing activities and maintenance of confidentiality is adopted to achieve the requirements is in place should suffice. If there is overall control but minority interests are held, it may be useful to clients for that fact to also be disclosed.

Issue 5

- Yes, consistent with our comments above.
- Not applicable.

Issue 6

- Yes, with client consent only required as contemplated by paragraph 5 above.
- 'Informed' consent without prescription as to what is required, as contemplated by paragraph 5 above.
- Not applicable.
- The Board should consider whether this is required if the relevant clients have provided 'informed' consent.
- This would likely be of use to registered attorneys.
- It is submitted that the requirements outlined above and an 'informed' consent regime should adequately protect clients' interests and the profession's reputation.

Issue 7

- Yes, in the context of our comments above as to when such 'conflicts' arise and in light of an 'informed' consent regime.
- No, consistent with our comments at paragraph 2 above.
- Not applicable.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Leon Allen', written in a cursive style.

Leon Allen
Managing Director/CEO
Qantm Intellectual Property Limited