

Draft for Public Consultation on the 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

Submissions by

Baldwins Intellectual Property

Baldwins Law Limited

“Baldwins” comprises the patent attorney firm Baldwins Intellectual Property and the law firm Baldwins Law Limited which provides litigation and other legal services. Further information is available on our website at <http://www.baldwins.com/firm-profile/>.

Baldwins has reviewed the draft submissions of the New Zealand Institute of Patent Attorneys (NZIPA) and supports the NZIPA’s position on the matters which it has submitted on.

Baldwins has the following submissions additional to those provided by the NZIPA.

Section 19(4) – Loyalty

“Subject to subsection (5), a registered attorney must not act for a client in a matter knowing that the client’s interests are adverse to the interests of another current client of the registered attorney unless:

- (a) both clients in writing have given reasonably informed consent to the registered attorney acting in the matter; and
- (b) where the registered attorney holds confidential information relevant to the matter obtained from or on behalf of either client – the registered attorney has established an effective information barrier in relation to the relevant confidential information”

This subsection simply requires “reasonably informed consent” to be given.

The Guidelines say:

“A client’s consent will be reasonably informed when it is given with knowledge of all the information that is reasonably necessary and legally possible to be provided to the client so that the client can make an informed decision”.

This is a lesser requirement than provided by S11.4 of the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 and S6 of the New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, both of which require “informed consent”:

S11.4 of the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015

“In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to another client’s current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor’s law practice must not act for the other client, except as follows:

- 11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client; and
- 11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential

information where an effective information barrier has been established”

S6 of the New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

“Conflicting duties

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.”

There seems little reason for the duties of a registered attorney to be any different to those of an Australian or New Zealand solicitor. In fact, there are many registered attorneys who are also solicitors and for whom the lower requirement will simply be irrelevant. Most firms will need to adhere to the requirements of the Solicitors’ Conduct Rules as they include Australian and/or New Zealand solicitors. This will give rise to a two layered system which should be avoided for consistency and to avoid public confusion.

We observe that the requirement for an “effective information barrier” is consistent between the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 and the draft Code. The requirement for “informed consent” is well known and understood and the same consistency should exist regarding informed consent.

Section 21(2) – Independence

We repeat our submissions from 1 above with regard to the requirement for “reasonably informed consent” in S21(2).

Further, an “effective information barrier” should also be a requirement as it is possible that ownership groups may seek to share support services to maximise business efficiency.

Section 17 – Disclosure

This would appear to require some further qualification. Disclosure of all information that is relevant could be quite an onerous burden to meet. Perhaps this could be tempered to read “materially relevant” or similar.

Section 23(2)

"identify" should be "identity".

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