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*by email*

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Trans Tasman IP Attorneys Board

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

We refer to the phase 2 materials which have been made available by the Board, and, and to the request to provide comments on the draft code and guidelines.

#### **Overall objectives**

As we noted in our previous submissions, the paramount consideration of any changes to the code should be the advantages and benefits to the client. Attorneys in our view should be free to choose a business structure; however, those choosing a novel structure must make the accommodations needed to secure a proper ethical framework for the profession. The code should not be compromised in order to accommodate novel structures.

#### **Conflicts of interest**

We note with approval the proposed prohibition on attorneys acting on both sides of disputes, and in particular the proposed section 19. However, we are concerned that the field is too narrowly defined. For example, in our view it is unacceptable for an attorney to advise one client on the possible infringement or validity of a patent (or other rights) held by another client. We submit that this is true across different companies or firms within incorporation or firm groups, as it is within a single firm. Such advice amounts to providing an opinion as to the prospects of a party in potential litigation. This is as much a conflict as representing both parties in actual litigation. The Board will be aware that this is a much more common event than actual litigation. It is extremely unlikely that informed consent would ever be sought, or indeed that it could be given, to such advice.

Amending 19(5) to read 'in the same matter relating to possible or actual proceedings' may go some way to resolving this issue. However, the difficulty is that one party (say, the patentee) will often not be aware that an opinion has been sought about their patent. We submit that it is important that this circumstance is dealt with more clearly in the code or guidelines, and not left to be resolved in a future misconduct allegation.

## Independence

We note firstly that the guidelines do not make it clear where important services provided by many attorney or by their related businesses lie, for example searching services and renewal services. Are these 'back office' or 'client facing'? We would submit they are the latter.

We continue to question the legal and practical reality of independence between the sister attorney companies in an incorporation group, particularly when they are listed, noting the obligations of the listed entity board under the Corporations Law and the ASXC listing rules. As we demonstrated, all of these entities discuss market share and clients in a group way when they report to the ASX, which is not consistent with a view that they are a hands-off holding company with independent subsidiaries.

The proposition is put that the day to day operations of each sister firm are independent, at the level of client facing activities. One must distinguish between what generally occurs and what is actually possible as a matter of control. The individual firm boards serve at the pleasure of the listed company board; to our knowledge it is not possible for it to be any other way, or for the listed parent to have any enforceable contractual obligation to its subsidiary. While interference may be uncommon, this is not enough to establish independence. Moreover, any such influence may be subtle and not direct or in writing. We do not see how any such independence can be guaranteed. Who is able to enforce it?

A further barrier to independence is that principals (and possibly other attorneys) within each incorporation group will own (directly or indirectly) substantial shareholdings in the listed entity, and so stand to benefit from profits made by the sister companies. There is an old adage that in order to understand a structure, you must follow the money. In this case, the money binds all the sister companies into a single structure. The concept that they are none the less independent is very difficult to maintain.

In the event that the Board determines to retain this exemption for 'independence', then it must be much more rigorously defined, and further should provide that any measures which undermine independence are themselves in breach of the code. With respect, clause 21(1) is effectively circular. Examples of what is independence and what is not must be provided in the guidelines. Clause 21(2) needs to be modified, consistent with our comments on 19(5).

In relation to section 20, we submit that there is a need for a positive obligation on attorneys to maintain a reasonable system to check for conflicts and to do so wherever possible before accepting a new client. In the case of a firm group or incorporation group, this should be required to extend to the whole of the group, not just the firm or company in question. Otherwise, the provisions of 19(5) and 21(2) may not be properly implemented.



We thank the Board for the opportunity to provide comments.

We note the intention for the board to provide a presentation in Melbourne, with a video for those unable to attend. Might we suggest that this be available as a live webinar and provide a chance for those located elsewhere to interact? Or alternatively that additional presentations in major locations in Australia and New Zealand be delivered? There are significant changes proposed and it is critical that we all understand our new obligations.

Yours sincerely

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*Principals*