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NZIPA Submissions on the Review of the Code of Conduct Consultation Paper

Introduction

The following submissions have been made on behalf of the New Zealand Institute of Patent Attorneys ("NZIPA").

NZIPA was incorporated in 1912 and represents most, although not quite all, New Zealand patent attorneys that are resident and practising in New Zealand.

The current membership of NZIPA comprises 152 Fellows, 2 Honorary, 60 Students, 18 Nonresident, 14 Associates and 7 Retired. The membership comprises virtually the whole of the senior professional staff of all of the firms of registered patent attorneys practising in New Zealand comprising more than one partner, plus most of the registered patent attorneys who practice as sole practitioners. In addition a number of our Fellows are partners or senior staff solicitors in the intellectual property law sections of some major law firms in New Zealand.

Comments on the Review of the Code of Conduct Consultation Paper

NZIPA generally welcomes the changes as outlined in the consultation paper.

The NZIPA provides the following answers and comments on the questions as outlined in Part A, item 3 – *Matters For Consultation* and further elaborated in Part B of the Consultation Paper:

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

- Are there any amendments, other than those already identified by the Board, that need to be made to the Code as a result of the introduction of the trans-Tasman regime?

  Yes.

a) *NZIPA considers that there is a need to provide more definitions of certain terms used within the Code because without being defined the meaning of these terms could be uncertain and misinterpreted. The following terms are examples of terms that require definition:*

- *"amalgamated firm"*
- *"client"*
- *"other professional service providers"*
- *"former client"*
- *"lien"*
- *"dependent"*
- *"family"*

b) *The definition of the term "regulatory authority" amended to cover New Zealand entities such as the Ministry of Business, Innovation and Employment (MBIE), NZ Custom Service, Commerce Commission New Zealand, etc.*

c) *Section 24 is not clear what is an "improper purpose". Perhaps this term needs to be defined and also examples as to what consitutes improper purpose be provided.*

d) *NZIPA considers that it would be beneficial to also include some rules around the following:*

- *"Relationsuip with other Professionals"*
- *"Fees"*
- *"Complaints handling"*
- *"Liens"*
- *"Continuing professional development"*
- *"professional indemnity"*
- *"publicity"*

The provision of rules for those listed above (in the same/similar fashion as that in the UK IPReg Rules) would provide clarity and understanding of those matters to which issues regularly arise.

e) *NZIPA considers that the Code should include an avoidance regulatory conflict rule in order to cater for those registered attorneys who are also regulated by another professional regulator, e.g NZ Law Society. NZIPA suggest adopting similar wording to that of Rule 21 of IPReg Rules.*

f) *In in para (ii) of each of sections 21, 22, and 23. "outside Australia" should be changed to "outside Australia and New Zealand".*

Issue 2: Equal application of provisions generally

- Should the Code apply the provisions of sections 11(4), 12, 13(1), 13(2), 14(2), 14(3), 14(4) and 24(3) to all registered attorneys – including, in particular, incorporated attorneys and attorney directors – not just registered attorneys, who are individuals?

  Yes, the provisions of these sections should apply equally to all Attorney types.

- If not, which (if any) of these sections should be applied to incorporated attorneys and/or to attorney directors?

- Should the provisions of sections 22 and 23 be consolidated with the provisions of section 21?

  Agreed.

Issue 3: Elaboration of the Professional Conduct Standards

- Should the professional conduct standards of the Code be elaborated by the introduction of Guidelines providing guidance in relation to the discharge of the standards, in a manner similar to which the UK Rules provide such guidance?

  Agreed, however there needs to be clarity of the legal status of the word guidance and how they are to be used. Perhaps the first two paragraphs of Rule of the UK IPReg Rules could be incorporated into the Code, e.g.

  > *These Rules set out the standards of professional conduct and practice expected of regulated persons undertaking professional work. Registered persons are responsible under these Rules not only for their own acts and omissions, but also for those sanctioned, expressly or otherwise, by them.*
  >
  > *Not every shortcoming on the part of a regulated person, nor failure to comply with these Rules, will necessarily give rise to disciplinary proceedings. The guidance shown in italics accompanying these Rules is not mandatory and does not form part of the Rules. Nevertheless, any alleged breach of the Rules will be considered with reference to the guidance.*

  Also with respect to the new Code what is status of "notes' in the current code – will they remain? If they remain, will they be treated in the same way as the guidelines?

- If so, which standards should be so elaborated, and what is the guidance that should be provided in relation to them?

  The core obligations such as fees, competency, integrity, client care and service, and conflicts of interest. These need to be elaborated in enough detail that is precise and clear and preferably with examples to explain what is the minimum required (in the same way as the guidance provided in the UK IPReg Rules).

Issue 4: Groups of firms

- Should the Code expressly recognise the possibility of a legal person (whether a publicly listed or privately owned company, an individual or some other legal person), owning and operating a plurality of incorporated attorney practices?

  Yes

- Should the Code provide that incorporated attorney practices that are commonly owned are not to be treated (a) as other than separate practices, and (b) as business associates of each other for the purposes of the conflict of interest provisions, so long as they are operated independently?

  Yes as long as independent operation is clearly established and maintained and subject to requirements around disclosure of business structures as discussed below.

- Should the Code provide guidance on what governance and management structures and procedures are required within group scenarios for group practices to be considered as operating independently for the purposes of the Code?

  Yes, there needs to be at least minimum standard of what is expected in order to be considered as "operating independently" and to provide examples of what is and what is not considered "operating independently".

- If so, what are the governance and management structures and procedures that should be specified in the guidance? How prescriptive should be the guidance?

  See comments mentioned previously in respect of Issue 3 above. Some examples of governance and management structures and procedures that could be specified are 'no common directors', 'no shared operational finances', and 'separate financial reporing'.

- Should the Code impose on a commonly owned attorney practice an obligation to disclose the practice's ownership status to prospective and existing clients?

Yes as it is important that clients understand fully and make informed decisions in relation to any effects that the practices ownership structure may or may not have in relation to the clients' IP and businesses. However there needs to be guidance as to how a firm would comply (see comments below).

- If so, what is the minimum information about the practice's ownership status that should be disclosed?

  Information sufficient for clients to make an informed decision as to the nature of the attorney's interest should be provided. For example, the names of the actual practices that make up the commonly owned practices should at least be disclosed and the nature and extent of the common ownership should be stated.

  The Code should require information on ownership status to be provided in a manner that reasonably ensures that the client will receive and be able to understand the information. We do not think, for example, that a notice on a website would be sufficient to ensure that the client has received the information unless they are specifically directed to that notice in correspondence addressed to the client.

Issue 5: Equal application of conflict of interest provisions

- Should the Code's conflict of interest provisions apply to all attorneys equally, whether they are individual attorneys, incorporated attorneys that are not part of a group, or incorporated attorneys that are part of a group (either a publicly listed group or a privately owned group)?

  Yes. One area that could be clarified in the Code is the extent to which conflicts of interest apply to individuals or firms within which the individuals are practising. For example, is it sufficient to avoid a conflict by having work handled by another attorney in the same firm? If so, what measures need to be put in place in such a situation (e.g. information barriers)?

- If not, which conflict of interest provisions should be limited in their application, to which types of attorney should they be limited, and why?

Issue 6: Double employment

- Should the Code expressly permit double employment in non-contentious matters so long as the clients provide sufficient consent?

  Yes

- If so, what type of consent should the Code specify as being sufficient for this purpose?

  Written reasonably informed consent.

- Should the Code provide guidance on what information must be provided to a client for its consent to be sufficient to permit an attorney to act in a double employment situation?

  Yes

- If so, what is the information that should be specified in the guidance?

  The guidance should inform what constitutes "double employment" and should provide examples of what is and what is not "double employment".

- Should the Code expressly prohibit double employment in contentious matters?

  Yes

- If so, should the Code provide guidance on what are to be regarded as contentious matters for this purpose?

  Yes

- What matters are to be considered contentious matters for this purpose?

  These matters may include Inter-party agreements, such as licensing agreements and distribution agreements, oppositions, litigation and duty–duty conflicts.

- If not, what other safeguards might be implemented to protect clients in contentious matters giving rise to, or likely to give rise to, double employment?

Issue 7: Resolution of conflicts of interest

- Should the Code apply the obligation to take steps to resolve a conflict of interest to all types of such conflict?

  Yes

- Should the Code provide guidance on what steps an attorney must take to resolve a conflict of interest?

  Yes

- If so, what are the steps that should be specified in the guidance?

  Where a clear conflict exists, such as where the attorney is acting for both parties and a contentious matter arises between the parties, the attorney should explain to both parties that the attorney is unable to represent either

party in respect of the conflict and that each party will need to seek alternative representation.

Sugguest following and using similar content and steps as that set in the UK IPReg Rules.

Also, the NZIPA provides the following comments that the NZIPA considers of importance or at the very least be brought to the attention of the TTIPAB for due consideration.

- *Has the TTIPAB considered the respective Law Society Rules for each of Australia and New Zealand to ascertain if the proposed code of conduct are within and not contrary to Law Society rules?*

- *In respect of New Zealand, there is a significant number of patent attorneys who are also lawyers and as such, it is not uncommon for these patent attorneys to undertake IP work which could be considered to be legal work and as such the dual lawyer/patent attorney is liable to NZ Law Society Rules and to the TTIPAB's code of conduct. In New Zeland the demarcation line in what a patent attorney can and cannot do relative to that of a lawyer in respect of IP matters is not that clear cut as there are some aspects that cross over. The issue of concern is that a dual lawyer/patent attorney is likely to face or comply with differing standards/rules, for example, in respect of conflict of interest the NZ Law Society rules have a higher threshold than what is proposed in the code of conduct. It would seem the dual lawyer/attorney needs to conform to the higher standard.*

We trust these submissions are of assistance and are more than happy to answer any questions in relation to them or be contacted by officials should the need arise.

Thank you for considering our submissions. For any questions or any further information on the above submissions, please contact:

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Yours Sincerely

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