

EXPLANATORY STATEMENT

Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018

Issued by the Trans-Tasman IP Attorneys Board

*Patents Act 1990 (Cth), Patents Act 2013 (NZ) and Trade Marks Act 1995
(Cth)*

The *Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018* ('the Code of Conduct') is established by the Trans-Tasman IP Attorneys Board ('the Board').

Subparagraph 228(2)(r)(ia) of the *Patents Act 1990 (Cth)* and subparagraph 231(2)(ha)(ia) of the *Trade Marks Act 1995 (Cth)* provide for assessing the professional conduct of registered patent attorneys and registered trade marks attorneys, respectively, by reference to standards of practice established by the Board from time to time. The Code of Conduct is a standard of practice established by the Board.

The *Arrangement between the Government of Australia and the Government of New Zealand Relating to Trans-Tasman Regulation of Patent Attorneys* signed in March 2013 ('the Trans-Tasman Arrangement') gives effect to a joint regulatory framework for patent attorneys to register and practice between Australia and New Zealand. The Trans-Tasman Arrangement, which is implemented in New Zealand by Part 6 of the *Patents Act 2013 (NZ)*, requires the Board to maintain a trans-Tasman code of conduct for all registered patent attorneys. The Code of Conduct is that code.

The Code of Conduct applies to:

- all registered patent attorneys under the *Patents Act 1990 (Cth)* and the *Patents Act 2013 (NZ)*, being individual patent attorneys, incorporated patent attorneys, and patent attorney directors; and
- all registered trade marks attorneys under the *Trade Marks Act 1995 (Cth)*, being individual trade marks attorneys, incorporated trade marks attorneys, and trade marks attorney directors.

In this Explanatory Statement, all of these are referred to as 'registered attorneys'.

The Code of Conduct:

- explains to registered attorneys the standards of professional conduct that they are expected to meet in their professional practice;
- aligns those standards with the behaviours expected of other comparable professionals;
- makes it clear to clients what they should expect from registered attorneys in terms of professional conduct; and
- provides a framework for the Board to determine when the conduct of registered attorneys should be the subject of disciplinary proceedings before the Trans-Tasman IP Attorneys Disciplinary Tribunal.

The Code of Conduct replaces the *Code of Conduct for Patent and Trade Marks Attorneys 2013* established by the predecessor of the Board ('the previous Code'). The previous Code was registered on 23 October 2013 and commenced on 23 November 2013. The previous Code will continue to be the standard for assessing the conduct of registered attorneys from 23 November 2013 up to the commencement of the Code of Conduct.

The Code of Conduct commences on 23 February 2018. From its commencement, the Code of Conduct will govern the conduct of registered attorneys.

To inform the drafting of the Code of Conduct, the Board conducted a number of public presentations and undertook a range of consultation activities, in both Australia and New Zealand, between February and November 2017. The consultation activities included issuing a Consultation Paper in April 2017, a Draft Code in August 2017, and a revised Draft Code in November 2017, on which submissions were sought and received.

The Office of Best Practice Regulation in the Department of the Prime Minister and Cabinet has advised that no Regulation Impact Statement is required to be prepared for this Code of Conduct.

An explanation of the sections of the Code of Conduct is set out in **Attachment A**.

A statement of compatibility under subsection [9\(1\)](#) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided as **Attachment B**.

Attachment A: Explanation of the Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018

Part 1—Preliminary

Part 1 sets out the name of the code, its commencement date, the authority under which it is made, the meaning of key terms used in it, and the code which it replaces.

Section 1—Name of code

The code is called the *Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018* ('the Code of Conduct').

Section 2—Commencement

The Code of Conduct commences on 23 February 2018.

Section 3—Authority

The Code of Conduct is established by the Trans-Tasman IP Attorneys Board ('the Board') under subparagraph 228(2)(r)(ia) of the *Patents Act 1990* (Cth) and subparagraph 231(2)(ha)(ia) of the *Trade Marks Act 1995* (Cth), and in accordance with the *Arrangement between the Government of Australia and the Government of New Zealand Relating to Trans-Tasman Regulation of Patent Attorneys* signed in March 2013 ('the Trans-Tasman Arrangement'). The Trans-Tasman Arrangement gives effect to a joint regulatory framework for patent attorneys to register and practice between Australia and New Zealand. That framework is implemented in New Zealand by Part 6 of the *Patents Act 2013* (NZ).

Section 4—Definitions

The Code of Conduct defines key terms used in it.

Section 5—Former Code of Conduct

Until the Code of Conduct commences, the operative standard of practice for registered attorneys will continue to be the *Code of Conduct for Patent and Trade Marks Attorneys 2013*. Schedule 1 repeals that instrument upon commencement of the Code of Conduct.

Part 2—Overview

Part 2 explains to whom the Code of Conduct applies, the objectives of the Code of Conduct, the guidelines for interpreting the Code of Conduct, the effect of the Code of Conduct on the rights of registered attorneys' clients, and the administration of the Code of Conduct.

Section 6—Application of code

The Code of Conduct applies to a registered patent attorney and a registered trade marks attorney. These terms are explained in the *Patents Act 1990* (Cth) and the *Patents Act 2013* (NZ), and in the *Trade Marks Act 1995* (Cth), respectively.

Section 7—Objective of code

The Code of Conduct explains the professional conduct required of registered attorneys by setting out the standards of practice to which registered attorneys are required to adhere in their dealings with clients, with other professional service providers, and with regulatory authorities (such as IP Australia and the Intellectual Property Office of New Zealand).

Section 8—Guidelines to code

The Code of Conduct provides that the Board may publish non-binding guidelines to assist registered attorneys and their clients understand it and the conduct that it covers.

Section 9—Rights of clients not affected

The Code of Conduct does not affect or reduce the rights of clients in relation to the conduct of registered attorneys.

Section 10—Administration of code

The Board is responsible for raising awareness of, and for conducting periodic reviews of the effectiveness of, the Code of Conduct.

Part 3—Professional conduct

Part 3 of the Code of Conduct sets out the substantive standards of practice that apply to all registered attorneys.

Section 11—Core obligations

Registered attorneys must act, in order of priority, in accordance with the law, in the best interests of their clients, in the public interest, and in the interests of their profession as a whole.

Section 12—Responsibility

Registered attorneys are responsible for their own work, acts and defaults, and for the work, acts and defaults of persons who do work for them under contract (including their employees).

Section 13—Integrity

Registered attorneys must not act in a way that is fraudulent, deceitful or knowingly misleading, and must maintain standards of practice that are courteous, ethical and well-informed.

Section 14—Competency

Registered attorneys must have appropriate competency for the work that they undertake, and must carry out their work with due skill and care.

Section 15—Diligence

Registered attorneys must carry out their work in a timely manner, and must act on the instructions of a client in a timely manner or inform the client in a timely manner of their inability to do so.

Section 16—Communication

Before undertaking any work for a client, registered attorneys must inform the client (or, in certain situations, the client's representative) of their registration

and competency to perform the work, the procedures, costs and timing of the work, and their corporate and ownership status, unless they have already done so. Registered attorneys are required to inform the client (or the client's representative) where any substantial change occurs in relation to information previously notified.

Section 17—Disclosure

Registered attorneys are required to disclose to their client all information of which they are aware and that is relevant to work being undertaken for the client, except where they are prohibited by a legal obligation from doing so (such as by an obligation to maintain the confidentiality of information).

Section 18—Confidentiality

Registered attorneys must not use or disclose a client's confidential information unless permitted or required by law or with the client's informed consent.

Section 19—Loyalty

Registered attorneys owe a duty of loyalty to their clients. They must not prefer their own interests over the interests of a client, and must not prefer the interests of one client over the interests of another client. Registered attorneys must not act for one client against the interests of another client unless both clients have given informed consent and the confidentiality of the clients' information is maintained. Even where the clients would consent and the confidentiality of the clients' information could be maintained, registered attorneys must not act in contentious matters for one client against another client.

Section 20—Conflicts

Registered attorneys must avoid the creation of a situation that gives rise to a conflict of interests, and must take all reasonable steps to resolve a conflict of interests upon becoming aware of one.

Section 21—Independence

For the purpose of the duty of loyalty and the obligations to avoid and to resolve a conflict of interests, the clients of one registered attorney are treated as the clients of another registered attorney where those registered attorneys are members of a group of associated entities, unless the attorneys operate independently of each other in the provision of their professional services. Registered attorneys will be members of a group of associated entities where they have a significant degree of common ownership or control. Even where registered attorneys who are members of a group of associated entities are operating independently of each other, they must not act in contentious matters for a client against a client of another member of the group unless the clients give informed consent.

Section 22—Termination of services

When registered attorneys cease to act for a client, they must take all reasonable steps to inform the client of the actions required to maintain the client's intellectual property rights, and must cooperate with the client and its new representative to ensure that the intellectual property rights are maintained during the transfer of responsibility.

Part 4—Practice management

Part 4 explains the information about ownership that registered attorneys must provide to the public, the manner in which registered attorneys must deal with a client's funds and property, and the obligation on registered attorneys to inform the Board of their current address.

Section 23—Ownership

Registered attorneys that are members of a group of associated entities (in the sense of having a significant degree of common ownership or control) must clearly disclose to the public that fact and the identity of the members of the group.

Section 24—Funds

Registered attorneys must account for a client's funds, and must apply those funds only for the purpose for which they were provided or as directed by the client.

Section 25—Client property

Registered attorneys must, upon request, provide to a client material that is the client's property or to which the client has a right of access, subject to any lien over that material.

Section 26—Address

Registered attorneys must have, and must notify the Board of, a current address at which notices can be served.

Part 5—Complaints and disciplinary proceedings

Part 5 explains how complaints against registered attorneys may be made, and how and by whom disciplinary proceedings against registered attorneys are initiated.

Section 27—Complaints

Complaints about registered attorneys may be made to the Board by any person.

Section 28—Disciplinary proceedings

The Board has the sole responsibility for commencing and conducting disciplinary proceedings against registered attorneys, and can do so as a result of information received or on its own initiative. Disciplinary proceedings are conducted before the Trans-Tasman IP Attorneys Disciplinary Tribunal ('the Tribunal'). If satisfied that there is a reasonable likelihood of an individual registered attorney being found guilty of unsatisfactory conduct, the Board may commence proceedings before the Tribunal. If satisfied that there is a reasonable likelihood of an individual registered attorney being found guilty of professional misconduct, the Board must commence proceedings before the Tribunal. Where an individual registered attorney's registration has been cancelled or suspended because of being found guilty of professional misconduct, the Board may apply to the Tribunal to cancel or suspend the registration of an incorporated attorney of which the individual was an employee or officer when the professional misconduct occurred.

Schedule 1—Repeals

Clause 1—Code of Conduct for Patents and Trade Marks Attorneys 2013

The previous Code is repealed by the Code of Conduct.

Attachment B: Statement of Compatibility with Human Rights

Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018* ('the Code of Conduct') is a Legislative Instrument detailing the standards of practice expected of registered patent attorneys under the *Patents Act 1990* (Cth) and the *Patents Act 2013* (NZ) and of registered trade marks attorneys under the *Trade Marks Act 1995* (Cth) (hereafter jointly referred to as 'registered attorneys').

The objective of the Code of Conduct is to explain the professional conduct required of registered attorneys. It does so by setting out the standards of practice to which registered attorneys are required to adhere in their dealings with clients, with other professional service providers, and with regulatory authorities. The Code of Conduct also sets out how information can be provided to the Trans-Tasman IP Attorneys Board to enable it to investigate the conduct of a registered attorney.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Trans-Tasman IP Attorneys Board