The rise of the information barrier: Managing potential legal conflicts within commercial law firms

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The size of commercial law firms operating in Australia, coupled with increased partner movement between those firms, means that robust and effective practice management has become critical for the identification, avoidance and management of conflicts. This article analyses the use of information barriers (traditionally referred to as "Chinese walls") as a way of managing this risk and, in particular, considers the circumstances in which information barriers are commonly used by commercial law firms, namely: acting for multiple clients in the same, or related, matter; and acting against former clients; and how the courts have viewed the use of information barriers in these scenarios in the context of a lawyer's professional responsibilities and duties.

COMMERCIAL LAW FIRMS IN AUSTRALIA

Commercial law firms in Australia are some of the largest firms, by head count, in the Asia-Pacific region. Indeed, *The Asian Lawyer* identified 12 Australian commercial law firms as falling within the 50 largest law firms in the region in 2012.[1] However, the survey did not take into account the 2012 mergers of three of Australia's large national commercial law firms, which saw those firms grow even larger and become part of international mega-firms. In addition to widespread merger and acquisition, lateral partner recruitment has become an entrenched method of business growth for commercial law firms in Australia and evidence from the United Kingdom – albeit a much larger jurisdiction – suggests that a large number of lateral partner recruits are likely to leave their new firm to go to another firm within a three to five year time period.[2] Anecdotal evidence suggests a similar merry-go-round movement of partners in the Australian market.[3]

Commercial law firm mergers and acquisitions bring with them an expanded client base and, invariably, a suite of clients operating in the same highly competitive industry and a heightened potential for conflict to arise between serving their interests within the one firm. Lateral partner recruitment can, similarly, bring with it an expanded client base (assuming, of course, the partner's regular clients follow her or him to the new firm) and a new legacy of former clients (being those clients who did not follow the lateral partner recruit to their new firm). In this ever changing environment of commercial law firm merger, acquisition and lateral partner recruitment, robust and effective practice management has become critical for the identification, avoidance and management of conflicts arising from a lawyer's duties to their client.

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[1] Lin A, "Sizing Them Up: Which firms have the most lawyers in the Asia-Pacific Region?", *The Asian Lawyer*, 1 January 2013, http://www.americanlawyer.com/asian_lawyer/firms.jsp?pg=2.

[2] Brandon M, "Sum People", *The Lawyer*, 18 March 2013, http://www.thelawyer.com/sum-people/3002186.article: Brandon's research is in its third year and examines 2,763 partner hires in the London market 2005-2012. In the case of transaction lawyers, he found that "[o]verall, firms can expect 41% of finance hires and 31% of corporate hires to fail [leave the firm] within three years."

[3] See, eg the reports on lateral partner recruitment in Australia, http://www.lawyersweekly.com.au/appointments; http://www.americanlawyer.com/asian_lawyer/australia.jsp.

A LAWYER'S DUTIES TO THEIR CLIENT

Fiduciary loyalty

The relationship between a lawyer and their client is one of the settled categories of fiduciary relationships recognised by equity.[4] The lawyer (the fiduciary) acts for their client (the principal) in circumstances which give rise to a special relationship of trust and confidence and, as such, the client is "entitled to the single-minded loyalty" of their lawyer: *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18 (Millet LJ). Professor Conaglen argues that the approach taken by Millet LJ in *Mothew* is the cornerstone of a modern basis for analysing fiduciary loyalty and, whilst it has been criticised as a break from traditional analysis of fiduciary doctrine, the approach has been adopted by the courts in England and Australia.[5] Millet LJ identified the following legal principles as the core of a lawyer's duty of *single-minded loyalty* to their client (*Mothew* at 18-19):

(a) The potential conflict principle: A lawyer cannot act for two or more clients with potentially conflicting interests in the same or related matter without the fully informed consent of each client. Millet LJ referred to this principle as the "double employment rule". Both Professor Finn and Professor Conaglen note that the rule operates to preclude a lawyer from putting themselves in a position where they may be required to choose between conflicting interests.[6]

(b) The good faith principle: A lawyer must act in good faith in the interests of their client and must not intentionally further the interests of one client to the prejudice of another client. Whilst good faith is a core facet of the concept of single-minded loyalty, a duty of good faith can arise outside fiduciary relationships and, therefore, good faith is not a peculiarly fiduciary principle.[7]

(c) The inhibition principle: A lawyer must not allow the performance of their obligation to one client to be influenced by their relationship with another client. Millett LJ noted that "the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interest of his principal as faithfully and effectively as if he were the only employer".

(d) The actual conflict principle: A lawyer must take care not to put themselves in a position where there is an actual conflict between their duties to both clients and, where there is an actual conflict, they "may have no alternative but to cease to act for at least one and preferably both".

These principles address what are often referred to as *duty-duty* conflicts and operate to ensure that a lawyer is not swayed by considerations of competing client interests because equity requires a fiduciary to conduct themselves "at a level higher than that trodden by the crowd".[8] Further, and importantly, a lawyer cannot prefer their own interests to those of their client. This is an "inflexible rule" arising from fiduciary loyalty and disentitles a lawyer to any profit gained from preferring their own interests over duty.[9] Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71 at 113 noted:

> In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interest. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach.

[4] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96 (Mason J).

[5] Conaglen M, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart, UK, 2010) pp 16-31.

[6] Finn PD, "Fiduciary Law and the Modern Commercial World" in McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (OUP, Oxford, 1992) pp 7, 24; Conaglen, n 5, p 148.

[7] Conaglen, n 5, pp 40-44.

[8] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558 (High Court quoting with approval *Meinhard v Salmon* (1928) 164 NE 545 at 546 per Cardozo CJ).

[9] *Breen v Williams* (1996) 186 CLR 71 at 108 (Gaudron and McHugh JJ quoting with approval *Bray v Ford* [1896] AC 44 at 51-52 per Lord Herschell). See also *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [200]-[201] (Spigelman CJ, Sheller and Stein JJA). The appeal court judges noting that "duty-duty" conflicts and "duty-interest" conflicts are both manifestations of fiduciary loyalty and as such, there is no substantive difference between these types of conflicts.

Professor Conaglen argues that the concept of single-minded loyalty, and the peculiarly fiduciary principles that flow from it, provide a "subsidiary and prophylactic" form of protection for non-fiduciary duties, that is, "[t]he purpose of that protection is to enhance the chance of proper performance of those non-fiduciary duties by seeking to avoid influences or temptations that are likely to distract the fiduciary from providing such proper performance".[10]

Non-fiduciary duties

In addition to the peculiar fiduciary principles that flow from a lawyer's duty of single-minded loyalty to their client, a lawyer also owes separate and independent duties to their client. In *Breen* (at 93), Dawson and Toohey JJ (referring to the work of Professor Finn) noted that "what the law exacts in a fiduciary relationship is loyalty, often an uncompromising kind, but no more than that. The concern of the law in a fiduciary relationship is not negligence or breach of contract."

The contract, or retainer, between a lawyer and their client is central to the lawyer-client relationship. The retainer identifies the client, the scope of instructions and the authority of the lawyer in carrying out those instructions. It gives rise to contractual obligations directed to the competence of, and performance of services by, the lawyer. The lawyer-client relationship also attracts a duty of care in tort (similarly directed at competence and performance) and a duty of confidence (directed at protecting the confidences between a lawyer and their client).[11] These key non-fiduciary duties can be summarised as follows:

(a) A lawyer has a duty to act with reasonable care, diligence and skill in the performance of legal services for their client. This duty arises concurrently in contract and tort. The terms of the retainer will influence the ambit of the duty in tort.[12] Professor Dal Pont argues that "[t]ort-wise, the duty of care requires a lawyer to reveal to the client all material information within her or his possession relating to the client's affairs", as a lawyer must put at their client's disposal not only their skill, but also their knowledge so far as it is relevant.[13] However, given the duty of confidentiality (see below), it is common place for the retainers used by commercial law firms to expressly exclude any obligation to provide a client with confidential information belonging to another client.

(b) A lawyer has a duty not to disclose confidential information given to them by a client in the course of the retainer. This duty is imposed by equity to maintain inviolate clients' confidences. This duty can also arise in contract as an express or implied term of the retainer.[14]

[10] Conaglen, n 5, p 4.

[11] Lawyers are also subject to various statutory obligations in Australia, including legal profession legislation in each jurisdiction which governs the practice of law: see, eg *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2008* (WA). The rules of professional legal bodies (such as law societies and Bar associations) set out the standard of conduct their members are expected to follow. However, these rules do not supplant the general law and/or statute.

[12] *Astley v Austrust Ltd* (1999) 197 CLR 1 at [44], [47] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Hawkins v Clayton* (1998) 164 CLR 539 at 544 (Mason CJ and Wilson J).

[13] Dal Pont GE, *Lawyers' Professional Responsibilities* (5th ed, Lawbook Co, Sydney, 2013), p 156 (citing *McKaskell v Benseman* [1989] 3 NZLR 75 at 87 (Jefferies J) and *Mortgage Express Ltd v Bowerman* [1996] 2 All ER 836 at 842 (Bingham MR) (although Bingham MR limited this proposition to "information which is not confidential and clearly of potential significance")).

[14] As to the duty on equitable grounds, see *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438 (Deane J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [30] (Gleeson CJ); see also *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [2949]-[2952]; *Marshall v Prescott [No 3]* [2013] NSWSC 1949 at [150]-[156]. As to the duty as an express or implied term of contract, see *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7 (Lord Denning MR), 9 (Diplock LJ).

Further, in addition to the fiduciary and non-fiduciary duties a lawyer owes to their client, a lawyer (as an officer of the court) has an overriding duty to the court to ensure the lawful, proper and efficient administration of justice. This *overriding* duty arises from the court's inherent supervisory jurisdiction over its officers.[15]

INFORMATION BARRIERS

Information barriers, historically referred to as "Chinese walls", have become a favoured technique for commercial law firms to deal with the risks of potential duty-duty conflicts. Information barriers are a means of restricting the flow of information between lawyers within the same firm and have their origins in the operations of large international and national financial institutions.

Initially in Australia, the courts were wary as to the effectiveness of information barriers operating in law firms. In *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 123, Bryson J, referring to information barriers, stressed that "it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently … even by people who sincerely intend to conform to control". In *Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357 at 371, Ipp J, when considering the emerging practice in Australia of law firms using information barriers to manage potential conflicts, noted, referring to the descriptor "Chinese walls": "The derivation of the nomenclature is obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous."

However, following the House of Lords decision in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, the Australian courts have adopted a more accepting, albeit cautious and scrutinising, approach to information barriers.[16] Commercial law firms, despite this cautious judicial approach, commonly use information barriers where: (a) a firm acts for multiple clients in the same or related matter; and (b) a firm acts against a former client.[17] Indeed, the use of information barriers in these scenarios has been enshrined in the *Australian Solicitors Conduct Rules* (ASCR) (rr 10, 11) which have now been adopted by the Law Societies of South Australia, Queensland and New South Wales.[18]

ACTING FOR MULTIPLE CLIENTS IN THE SAME OR RELATED MATTER

The double employment, or simultaneous representation, scenario is the "heartland of fiduciary law" and very likely to give rise to a duty-duty conflict.[19] Indeed, the creation of an information barrier between separate client teams (whilst, if effective, will operate to protect each clients' confidential information and help ensure compliance with a lawyer's duty of confidence) does not of itself eliminate or avoid the potential conflict principle. This is because "the vice is not the possibility of the

[15] *Rondel v Worsley* [1969] 1 AC 191 at 227 (Lord Reid); *Giannarelli v Wraith* (1988) 165 CLR 543 at 555 (Mason CJ); *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [62]-[76].

[16] Compare *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 (Bergin J found an information barrier to be effective) with *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 (Bergin J, almost two years later, found the same information barrier to be ineffective when evidence was brought before the court to show that the barrier had been breached, albeit inadvertently and in circumstances where no confidential information was in fact leaked from the barrier). See also *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [32]-[76]; *Ismail-Zai v Western Australia* (2007) 34 WAR 379 at [19]-[35].

[17] See Law Society of NSW, *Information Barrier Guidelines*, 16 March 2006 (prepared in consultation with Law Institute of Victoria and adopted by the Qld Law Society in 2012): The aim of the Guidelines is "to assist law practices guard against the risk of a breach of duty of confidentiality owed to former clients".

[18] The Law Council of Australia, in consultation with the law societies in each of the Australian jurisdictions, has been endeavouring to introduce uniform professional conduct rules and prepared the ASCR, which have been adopted in SA (25 July 2011), Qld (1 June 2012), NSW (1 January 2014). Victoria is also expected to adopt the ASCR in 2014. An earlier form of the ASCR (which also enshrines the use of information barriers) was adopted in WA in 2010 (*Legal Profession Conduct Rules 2010* (WA)).

[19] *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [204].

misuse of confidential information but, rather the compromising of a fiduciary's duty of loyalty".[20] The law firm, being in a fiduciary relationship with each client, must obtain fully informed consent from each client in order to act for them in the same, or related, matter. As noted by Millett LJ in *Prince Jefri* (at 234): "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest." This is reflected in r 11 of the ASCR and, in particular, rr 11.2-11.4 which provide:

> 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
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> 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
>
> > 11.3.1 is aware that the solicitor or law practice is also acting for another client; and
> >
> > 11.3.2 has given informed consent to the solicitor or law practice so acting.
>
> 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of 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;
> >
> > 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.[21]

Therefore, in double employment/simultaneous representation matters, a lawyer must obtain fully informed consent from each client before they can act and, subject to the scope of the consent, will need to ensure an effective information barrier is put in place to protect each client's confidential information.

The High Court has stated that the existence of *fully informed consent* is a question of fact in all the circumstances of the matter.[22] Further, there is no precise formula for determining whether fully informed consent has been given and the sophistication of the clients involved will have an impact upon the level of disclosure required.[23] However, there will usually need to be full and frank disclosure of all material facts regarding the proposed simultaneous representation. This should include the manner in which the law firm intends to manage the inherent conflict and the potential disadvantages of simultaneous representation.

Commercial law firms deal with these issues via the use of separate teams of lawyers for each client, the erection of information barriers between them and the careful drafting of the retainer with each client, including ensuring that the retainer expressly includes an acknowledgment from each client to the effect that:

[20] *ASIC v Citigroup [No 4]* (2007) 160 FCR 35 at [312] (Jacobson J referring to the observations of Professor Finn as to the nature of the "vice").

[21] In those States where the ASCR have not been adopted, there is also an express requirement for a law practice to obtain informed consent of each client in double employment/simultaneous representation matters (see, eg *Professional Conduct and Practice Rules 2005* (Vic), r 8.3; *Legal Profession Conduct Rules 2010* (WA), r 14(3)).

[22] *Maguire v Makaronis* (1997) 188 CLR 449 at 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[23] *Farah Constructions Pty Ltd v See-Dee Pty Ltd* (2007) 230 CLR 89 at [107].

- the confidential information of each client will be preserved via the use of separate client teams and the operation of a stringent information barrier (which ring-fences each team via the use of electronic and physical separation protocols);[24]
- as a consequence, the law firm cannot disclose to the client all relevant information within the firm's knowledge; and
- the client consents to the law firm acting in these circumstances.

In this way, the ambit of the law firm's responsibilities and duties to each client is clear and unambiguous.

In those Australian jurisdictions where the ASCR have been adopted, it is prudent to also include in the retainer an acknowledgment and consent to the effect that, if an actual conflict arises, the law firm can continue to act for one of the clients (or a group of clients between whom there is no conflict).[25] However, in those Australian jurisdictions where the ASCR have not been adopted (save for Western Australia), the applicable professional conduct rules require the law firm to cease to act for both clients where an actual conflict arises.[26]

ACTING AGAINST A FORMER CLIENT

In *Prince Jefri*, Millett LJ observed (at 235):

> The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

The above proposition has been approved by the Federal Court[27] and by various State Supreme Courts[28] in Australia. However, there are a number of State Supreme Court decisions, largely out of the Victorian Supreme Court, which have followed the obiter of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 at [52]-[57] to the effect that a lawyer continues to be subject

[24] As to the attitude of the Australian courts regarding the effectiveness of information barriers, see below under the heading "Acting against a former a client".

[25] This reflects ASCR, r 11.5: "If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent."

[26] *Professional Conduct and Practice Rules 2005* (Vic), rr 8.3, 8.4; *Rules of Practice 1994* (Tas), r 12; *Legal Profession (Solicitors) Rules 2007* (ACT), rr 7.2, 7.3; *Rules of Professional Conduct and Practice 2005* (NT), rr 7.2, 7.3. *Legal Profession Conduct Rules 2010* (WA) (based on an earlier version of the ASCR) are silent on whether or not a law firm who acts in a double employment/simultaneous representation matter must cease to act for both clients where actual conflict arises.

[27] *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [17]-[18]; *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 905 at [48]-[61].

[28] NSW: *Belan v Casey* [2002] NSWSC 58 (Young CJ in Eq set the foundation for most of the Australian decisions following and applying *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 on the proposition that lawyers *do not* continue to owe a fiduciary duty of loyalty to their former clients following the conclusion of the retainer, rather than the wider obiter of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501); *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350; *Kallinicos v Hunt* (2005) 64 NSWLR 561; *Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567; *Campbell v Illawarra Golf Club Pty Ltd (in liq)* [2012] NSWSC 1252; *Cooper v Winter* [2013] NSWCA 261 at [96] (Ward JA quoting with approval observations of Brereton J in *Kallinicos v Hunt* (2005) 64 NSWLR 561); *Marshall v Prescott [No 3]* [2013] NSWSC 1949 at [109]. Qld: *Fruehauf Finance Corp v Feez Ruthning* [1991] 1 Qd R 558 at 570; *Flanagan v Pioneer Permanent Building Society Ltd* [2002] QSC 346 at [10]-[11]; *GAC v CNT* [2013] QSC 127. WA: *Ismail-Zai v Western Australia* (2007) 34 WAR 379 at [23] (Steytler P) (quoted above); *DPP (Cth) v A Legal Practitioner* [2012] WASC 459 at [69]-[70]. SA: *Nasr v Vihervaara* (2005) 91 SASR 222 at [33]. Tas: *A v Law Society* (2001) 10 Tas R 152 at 164-165; *Styles v O'Brien* [2007] TASSC 67 at [17]-[18]; *Spaulding v Adams* [2012] TASSC 61 at [93]. NT: *Dundee Beach Pty Ltd v Maher* [2006] NTSC 96 at [14].

to fiduciary loyalty in respect of their former clients.[29] In *Ismail-Zai v Western Australia* (2007) 34 WAR 379 at [23], Steytler P, after considering the weight of authorities across the various Australian superior court jurisdictions, noted:

> In my opinion, the weight of authority currently supports the proposition that the duty of loyalty does not survive the termination of the retainer. Moreover, some of cases which support the existence of a continuing duty of loyalty seem, in my respectful opinion, to draw no clear distinction between a fiduciary obligation of that kind, on the one hand, and the court's inherent supervisory jurisdiction to protect the integrity of the judicial process, on the other.

Six years on from *Ismail-Zai* the weight of authority in Australia continues to be against the *Spincode* obiter and, as such, the better view is that fiduciary loyalty does not survive the termination of a retainer.[30] Reflecting the weight of authority, the *Spincode* obiter has been subject to academic criticism for stretching fiduciary loyalty "too far out of shape in pursuit of an objective that is not one of its core purposes".[31]

In light of above, where a law firm proposes to act against a former client (which has become a regular occurrence for commercial law firms given the explosion of merger, acquisition and lateral partner recruitment in recent years), the issue is no-longer informed consent (as the law firm is no-longer in a fiduciary relationship with the former client), but rather the ongoing duty of confidentiality. Therefore, it is critical to ascertain:

- Whether there are any lawyer(s) in the law firm in possession of confidential information of the former client (the disclosure of which has not been consented to by the former client) and whether that information is, or might be, relevant to the new matter.
- If so, whether there is a *real risk* that the confidential information may be disclosed to the new client.

As to the first inquiry, in *Prince Jefri* (at 235), Millett LJ did not regard the burden of proof as being a heavy one given the unique relationship of confidentiality between a solicitor and their client. Indeed, in *Baker v Campbell* (1983) 153 CLR 52 at 65 Gibbs J observed that "the relationship between solicitor and client imposes on the solicitor a duty (subject to certain exceptions) to keep inviolate his client's confidences". That said, the information must be confidential (as information generally is not protected) and so must have "the necessary quality of confidence about it".[32] Further, the information in question must be identified with precision and not merely in global terms.[33]

It was noted by Gillard J in *Yunghanns v Elfic Ltd* (unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) that "getting to know you factors" (that is, what the lawyer learns from their client during the retainer about the client's strengths, weaknesses, honesty (or lack thereof), attitude to litigation and the like) can amount to confidential information. This suggestion seems at odds with the general requirement that the information in question be identified with precision (see above). However, *Yunghanns* was an exceptional case in that the former client/lawyer relationship spanned

[29] See Supreme Court (Vic): *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429 at [98]-[104]; *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152 at [40]; *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202 at [13]-[14]; *Connell v Pistorino* [2009] VSC 289 at [27]. See also *Wagdy Hanna & Assocs Pty Ltd v National Library of Australia* (2004) 155 ACTR 39; 185 FLR 367 at [55] (albeit the ongoing duty was stated to arise in "exceptional circumstances" (Higgins CJ)).

[30] Compare nn 28 and 29.

[31] Conaglen, n 5, p 195.

[32] *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438 per Deane J; *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services & Health* (1990) 22 FCR 73 at 87; *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [2950]-[2952]; *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2 at [157]-[161] (Barrett JA); *Marshall v Prescott [No 3]* [2013] NSWSC 1949 at [150]-[152].

[33] *O'Brien v Komesaroff* (1982) 150 CLR 310 at 328 (Mason J); *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443; *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services & Health* (1990) 22 FCR 73 at 87; *Carringdale County Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314; *Artek Productions Pty Ltd v World of Adams Platform Pty Ltd* [2011] VSC 240 at [37]; *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2 at [159] (Barrett JA).

almost 30 years and many matters (indeed, the former client was a lawyer employed by the firm for five years before becoming a client) and the proposition that "getting to know you factors" can amount to confidential information has been subsequently questioned. According to Steytler P in *Ismail-Zai* (at [29]):

> If these so-called "getting to know you" factors, to the extent that they involve knowledge of the client rather than of anything imparted in confidence by the client concerning his or her affairs, can constitute confidential information (a proposition that seems to me, with respect, to be questionable …), they will only rarely do so … However, the misuse of information of that kind might be such as to undermine the due administration of justice.

Turning to the second inquiry, and importantly for commercial law firms operating in Australia (where partner numbers can run into the hundreds and lateral partner recruitment is common place), the knowledge of each individual partner, and the lawyers working with them, will not necessarily be imputed to the whole of the firm. Indeed, this would be impracticable and even absurd.[34] Rather, as noted (referring to and following Millet LJ's observations in *Prince Jefri*) by Steytler J in *Newman v Phillips Fox* (1999) 21 WAR 309 at [32]-[33]:

> given the basis upon which the jurisdiction was to be exercised … (the preservation of confidential information), there was no cause to impute or attribute the knowledge of one partner to his fellow partners … whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.
>
> It seems to me, with respect, that this is the preferable approach.

As to partners, and other lawyers, *laterally* recruited by one law firm from another, Ryan J observed in *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [34]:

> It is now well established that the knowledge of a solicitor joining a new firm should not automatically be imputed or attributed to other lawyers or employees at that firm. As Lord Millett said in *Bolkiah*, whether a particular individual is in possession of confidential information is a question of fact to be proved or inferred from the circumstances of the case.

However, once it is established that an individual lawyer is in possession of confidential information, there appears to be a *rebuttable presumption* that the information has moved, and/or will move, freely within the law firm. In *Prince Jefri*, Millett LJ noted: "There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm."[35] In the circumstances, the establishment of an *effective* information barrier around the individual lawyer(s) in possession of confidential information is a critical tool to assist a law firm to rebut this presumption and allow the firm to act in a matter against a former client (or even against a former client of a lateral partner, or other lawyer, recruited by the firm).

The Australian courts assess the *effectiveness*, rather than reasonableness, of the steps taken to screen the *tainted* individual lawyer(s). Indeed, doubt has been cast on whether an information barrier can effectively operate within a small firm given the closeness in which the lawyers in small firms are accustomed to working with each other.[36] The use of information barriers by a law firm to protect the confidential information of former clients when acting against them and the strict common law requirement that, in this situation, they must be *effective* (and not simply reasonable) has been reflected in r 10 of the ASCR and, in particular, rr 10.2 and 10.2.2 which provide:

> 10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

[34] *Re a Firm of Solicitors* [1992] QB 959 at 973.

[35] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 237.

[36] *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 at [52] (Bleby J).

> 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or
>
> 10.2.2 an *effective* information barrier has been established [emphasis added].[37]

Certainly, strict protocols for the lawyers to follow, both those lawyers in the new matter team and the tainted individual lawyer(s), *combined with* formal written solicitor undertakings and technology restricting access to matter information held on a law firm's document system, will help to ensure the creation and operation of an effective information barrier.[38] In essence, the information barrier must operate so that there is no real risk, or sensible possibility, of disclosure of the relevant confidential information. Where there is a real risk of disclosure, even inadvertent disclosure, the former client will be able to obtain an injunction preventing the law firm from acting against them. In *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 at 5, Hayne J noted:

> it is not necessary to conclude that harm is inevitable (or well nigh inevitable) before acting to restrain a possible breach of duty that a solicitor owes to clients and former clients to keep confidential information given to the solicitor in confidence … I consider that an injunction should go if there is a real and sensible possibility of a misuse of confidential information.

Millett LJ, similarly, noted in *Prince Jefri*: "the court should intervene unless it is satisfied that there is no real risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful and theoretical. But it need not be substantial."[39] There is "little practical difference" in the way the above proposition is formulated in *Prince Jefri* compared to that in *Farrow Mortgage* (above).[40] Further, once the former client establishes that an individual lawyer(s) within a law firm is in possession of their confidential information, the burden of establishing that there is no real risk of disclosure of the confidential information to the new client moves to the law firm itself. Millet LJ in *Prince Jefri* noted:

> Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party.[41]

What constitutes a real risk of disclosure has been interpreted very strictly in Australia. For example, in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550, Bergin J (initially) held that an information barrier established by a commercial law firm was effective to ensure that there would be no real risk of disclosure. However, almost two years after this finding, Bergin J held that the same information barrier was ineffective because the law firm had inadvertently allowed one of the *tainted* lawyers, who was meant to have no contact with the new matter, to become involved in the matter when he signed (at the request of a junior lawyer) uncontroversial consent orders on behalf of his partner when the partner responsible for the new matter was unavailable. In *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 at [40]-[41] Bergin J stressed:

> The unfortunate inadvertent conduct … is a salutary lesson to the proponents of the advantages of information barriers as a mechanism … to retain "business" … It must be remembered that although

[37] The requirements of rr 10.2.1 and 10.2.2 are expressed to be alternatives. However, accepting that fiduciary loyalty does not survive the termination of a retainer, informed consent of the former client is not necessary as a matter of law because the lawyer/law firm is no-longer in a fiduciary relationship with the former client.

[38] See *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [12] for the steps taken by Corrs Chambers Westgarth to create an information barrier re lateral recruitment of a lawyer into that firm: "In these circumstances, and in light of the measures taken by Corrs, I am satisfied that there is no real risk that any relevant confidential information … will come into the hands of those solicitors and support staff at Corrs entrusted with the conduct of the present proceedings" per Ryan J at [60]. See also the 10 guidelines set out in Law Society NSW, n 17.

[39] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 237.

[40] See *Newman v Phillips Fox* (1999) 21 WAR 309 at 322-323 (Steytler J); see also *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [47] (Ryan J).

[41] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 237. In *UTi (Aust) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219 at [44] Barrett J lists various cases that have confirmed and followed this principle.

> there are "business" pressures on the operations of a law firm the duties of lawyers are professional duties both to the Court and to the client … In this case it [the information barrier] has proved to be paper-thin at least in respect of one of its essential elements, the quarantining of the lawyers who acted on the Retainer from having any involvement in the present proceedings.
>
> I am satisfied that the risk of disclosure or misuse is probably real and not fanciful.

It is obviously essential that any individual actually in possession of relevant confidential information must have absolutely no involvement with the new matter. If this is allowed to occur, even inadvertently, the information barrier will be ineffective giving rise to a real risk of disclosure of the confidential information to the new client. The salient lesson for law firms is to ensure that they have an appropriate ongoing and ingrained practice management regime "to keep the level of consciousness up" as to the requirements of any information barriers operating within the firm.[42] This echoes Millet LJ's concerns in *Prince Jefri*,[43] who expressed the view that an *effective* information barrier needed to be an established part of the organisational structure of a firm (as opposed to something created on an ad hoc basis and dependent upon the acceptance of sworn evidence from the members of the team who are subject to the barrier).

THE COURT'S INHERENT JURISDICTION TO CONTROL ITS OFFICERS

A lawyer has an overriding duty to the court to ensure the lawful, proper and efficient administration of justice. In *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76], Brereton J noted:

> the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice …. The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of protecting the integrity of the judicial process and the due administration of justice, including the appearance of justice … The jurisdiction is to be regarded as exceptional and is to be exercised with caution.[44]

Further, and importantly, the operation of this inherent supervisory jurisdiction must be balanced against "the public interest in a litigant not being deprived of the solicitor of its choice without due cause".[45] Therefore, even where there is an effective information barrier, an injunction can still be obtained against a law firm in *exceptional circumstances* to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice.

The facts of *Kallinicos* provide some guidance as to what will be regarded as exceptional circumstances. In that case, the lawyer had acted on behalf of a partnership company in respect of transactions which were highly contentious in a later litigation between the directors and shareholders of the company. In the litigation, the lawyer acted for one of the parties. Brereton J, exercising the court's inherent supervisory jurisdiction over its officers, granted an injunction preventing the lawyer from continuing to act given the following circumstances:

- the lawyer might well be exposed to a suit (there were serious allegations of wrong doing and the possibility of the solicitor being implicated in improper conduct);
- the lawyer would (almost certainly) be a material witness; and
- the lawyer appeared to have a vested interest in how the evidence turned out.[46]

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[42] *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 at [39] per Bergin J.

[43] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 239.

[44] See also *Grimwade v Meagher* [1995] 1 VR 446 at 452.

[45] *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404 at [35] (which followed and applied *Kallinicos v Hunt* (2005) 64 NSWLR 561).

[46] See also *Ausmedic Australia Pty Ltd v Whiteley Medical Supplies Pty Ltd* [2012] NSWSC 1270; *R & P Gangemi Pty Ltd v D & G Luppino Pty Ltd* [2012] VSC 168 for recent examples of where the court, exercising inherent supervisory jurisdiction, found that there were exceptional circumstances to warrant the granting of an injunction to prevent a lawyer from acting for a client. As to situations where the courts have found there are *no exceptional circumstances* to warrant granting such an injunction, see *Artek Productions Pty Ltd v World of Adams Platform Pty Ltd* [2011] VSC 240; *Re The Consortium Centre Pty Ltd* [2012] NSWSC 898.

CONCLUSION

The majority of Australian cases regarding the effectiveness of information barriers involve commercial law firms which have, given the size of their client base, sought to use information barriers as a means of protecting the confidential information of former clients. The cases indicate that the Australian courts, whilst willing to accept *effective* information barriers, will scrutinise the barriers and take a cautious approach in determining whether they are, in fact, effective (rather than porous). Indeed, the ad hoc creation of an information barrier is unlikely to survive judicial scrutiny. Rather, law firms need to incorporate the use of information barriers into their practice management structure so as to ensure that ongoing education, and appropriate monitoring, is in place to keep up the level of consciousness within the firm of the requirements of information barriers (including the specific requirements of any and all such barriers operating within the firm). In essence, adherence to information barriers must be engrained into a law firm's practice management psyche.

Further, an information barrier alone is not sufficient in double employment/ simultaneous representation matters, but rather *fully informed consent* from each client must be obtained before a solicitor can act in such matters.

Finally, and importantly, information barriers cannot and do not release a lawyer from their overriding duty to the court to ensure the lawful, proper and efficient administration of justice and the court can and, in exceptional circumstances, will exercise its inherent supervisory jurisdiction over its officers to ensure that "justice should not only be done but manifestly and undoubtedly be seen to be done".[47]

[47] *Grimwade v Meagher* [1995] 1 VR 446 at 452.