

# CHINESE WALLS

by Ross Perrett



Ross Perrett is a Partner at Clayton Utz. Ross has over 20 years' experience in corporate and commercial litigation and dispute resolution. He also has considerable expertise in revenue, tax and securities law litigation.

**I**n the context of legal practice, a Chinese Wall is a device used to prevent the flow of confidential information within a firm. The effect of a Chinese Wall is “to treat different parts of the same firm ... as though they were separate entities”<sup>1</sup>.

It is thought that the term refers to the Great Wall of China, although some have doubted the validity of the metaphor:

*It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous*<sup>2</sup>.

The Great Wall of China is the most famous boundary in the world and as an impenetrable line, was a dismal flop... I think the more apt description ... is a Dutch dyke; a good barrier to water but involving the ever present risk of seepage leading to a leak<sup>3</sup>.

Others have suggested, more cynically, that the name refers to Chinese Whispers, or the Chinese practice of making walls out of paper. The imprecision of the term led Staughton LJ to prefer the term “information barrier” in *Re a Firm of Solicitors*<sup>4</sup>. “Cone of silence” has also been coined as an alternative.

## When can a Chinese Wall arise?

The authorities distinguish between existing client conflicts, where a firm simultaneously acts for two clients with conflicting interests, and successive representation, where the firm subsequently acts against a former client.

### *Existing Client Conflicts*

Where a firm acts concurrently for two clients with conflicting interests, the fiduciary obligations of loyalty owed to each client will inevitably clash. While a Chinese Wall may protect confidences, it cannot repair or resolve such conflicts of interest:

*... 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 interests. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in this situation*<sup>5</sup>.

As shown by this statement of Lord Millett, a firm must obtain the informed consent of both clients if it intends to act for clients with conflicting interests.

This requirement is also evident in the practice rules of New South Wales<sup>6</sup>, Victoria<sup>7</sup>, the Northern Territory<sup>8</sup> and the Australian Capital Territory<sup>9</sup>. Each of these jurisdictions requires that before the practitioner (which includes a practitioner's partner or employee and a practitioner's firm) accepts the (conflicting) retainer:

- each of the parties is aware that the practitioner is intending to act for the other; and



- each of the parties consents to the practitioner so acting in the knowledge that the practitioner may thereby be prevented from:
  1. disclosing to each party all information relevant to the proceedings within the practitioner's knowledge; or
  2. giving advice to one party which is contrary to the interests of another; and
  3. each of the parties consents to the practitioner so acting in the knowledge that the practitioner will cease to act for all parties if the practitioner would, otherwise, be obliged to act contrary to the interests of one of them.

The rules in these jurisdictions further require that where a practitioner, acting for more than one party, determines that they cannot continue to act for all parties without acting in a manner contrary to the interests of one of them, the practitioner must cease to act for all parties.

In Victoria, there are additional restrictions which prohibit, in the absence of compliance with strict requirements, for example, a practitioner acting for both vendor and purchaser in connection with a contract for the sale of land. These requirements include fully informing the parties in writing concerning the potential disadvantages to that party of the practitioner so acting<sup>10</sup>.

In both Western Australia and Queensland, a distinction is made between client conflicts in litigious and non-litigious matters. In each jurisdiction, a practitioner must not represent two or more clients with conflicting interests in litigation<sup>11</sup>. In relation to non-litigious matters, a practitioner may only represent two or more clients with conflicting interests if:

- to do so is not likely to prejudice the interests of any one client; and
- each client is fully informed of the nature and implications of any conflict of interest; and
- each client voluntarily consents to the practitioner so acting<sup>12</sup>

It should be noted that the status of the Solicitor's Handbook (Qld) is currently under consideration. The Handbook comprises information taken from the Rules of the Queensland Law Society and rulings made by the Queensland Law Society Council, but does not purport to be a code of conduct or an exhaustive statement of the law.

In fact, the only “hard law” regulating existing client conflicts in Queensland is Rule 85 of the Legal Profession (Solicitors) Rule 2006 (Qld), which provides that where a firm acts for a mortgagee or creditor, the firm cannot simultaneously act for another client in respect of the same matter nor in respect of any other matter in which the credit has been applied<sup>13</sup>.\*

**Dealing with Existing Client Conflicts**

So how should solicitors and their firms deal with existing client conflicts?

The first point of reference is the relevant solicitor’s practice rules - if the rules prohibit acceptance of the retainer, the firm must decline to act.

If there is no prohibition, firms must ask whether it is possible to resolve the conflict by either:

- limiting the retainer of one client to specific work (thus avoiding any “overlap”); or
- obtaining informed consent from each client, thereby releasing the firm from its duty to reveal to each client everything in its knowledge about the matter.

Here again, practitioners should check that they are meeting the requirements of disclosure and informed consent under the relevant solicitor’s practice rules.

**The Relevance of Chinese Walls**

A Chinese Wall does not remove the conflict of interest inherent in the representation of two clients with conflicting interests, and the informed consent of each client is paramount.

However, where both retainers are accepted, a Chinese Wall may be necessary to preserve the confidentiality of each client’s information. Practitioners should be concerned to protect not only the substantive content of the matter, but also more general “getting to know you” factors about each client.

In the case of Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd<sup>14</sup> it is instructive. The

**\* Managing Editor’s Note: As at 1 July 2007 the Legal Profession (Solicitors) Rules 2007 will contain a specific rule dealing with conflicts of interest**

Brisbane office of a national law firm was retained to act for Tasman Liquor Traders (“TLT”) in its defence of an undue preference action. Whilst the Queensland proceedings were on foot, the firm’s Melbourne office accepted instructions from Australian Liquor Marketers (“ALM”) as plaintiff in proceedings arising from a breakdown of negotiations with regard to the finalisation of a sale of business agreement between ALM and TLT. The firm’s Melbourne office expressly limited its retainer with ALM so that it was not required to make use of information regarding TLT which may be disclosed to the firm’s Brisbane office. Nevertheless, TLT applied for an injunction to restrain the firm from continuing to act for ALM in the Victorian proceedings.

Habersberger J, in dismissing the application, found that the potential for a conflict of duty had been ameliorated by the limited scope of the firm’s retainer with ALM<sup>15</sup>.

His Honour went on to note the danger of certain “getting to know you factors” concerning TLT being communicated to ALM<sup>16</sup>. For instance, knowledge of TLT’s reluctance to give evidence could prove useful to ALM. It was here that the firm’s Chinese Wall (between its Melbourne and Brisbane offices) proved relevant. Habersberger J was satisfied that “appropriate safeguards” had been implemented such that there was no “real and sensible possibility” of any misuse of “getting to know you” factors<sup>17</sup>.



**Successive Representation - Acting Against Former Clients**

Solicitors are obliged to protect the confidences of their former clients. As the fiduciary relationship ceases with the termination of the retainer, there can be no question of a “conflict of interest” in the case of former clients:

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<sup>18</sup>.

Consequently, in determining whether to restrain a solicitor from acting in relation to a former client, the Court will consider:

- whether the solicitor is in possession of confidential information which is or may be relevant to the new matter; and

- whether there is a real risk that the confidential information may be disclosed<sup>19</sup>

In order to justify judicial intervention, the risk of disclosure must be “real”<sup>20</sup>, but need not be “substantial”<sup>21</sup> nor “inevitable”<sup>22</sup>.

There is some divergence in the authorities as to which party bears the onus of proving this risk. In *Bolkiah*<sup>23</sup>, Lord Millett held that once the former client establishes that the defendant firm is in possession of relevant confidential information, the burden shifts to the firm to show that there is no real risk of disclosure. The earlier decision of Hayne J in *Farrow Mortgage v Mendall Properties* provided that an injunction should be granted “if there is a real and sensible possibility of a misuse of confidential information.”<sup>24</sup> This formulation puts the onus on the plaintiff seeking the injunction<sup>25</sup>.

The test outlined in *Bolkiah* was preferred in *Photocure ASA v Queen’s University at Kingston*<sup>26</sup> and *Newman v Phillips Fox*<sup>27</sup>, with Steytler J regarding that the “additional stringency” effected by the shifting of the evidential burden to the firm was justified to safeguard the proper administration of justice.

Consequently, if a firm is challenged on its decision to take instructions which may conflict with its duty to a former client, the firm must be prepared to discharge its evidentiary burden by demonstrating that there is no real risk of disclosure of the former client’s confidential information. It is here that knowledge of effective Chinese Walls becomes relevant.

### *A Question of Loyalty?*

It has been suggested that the fiduciary duty of loyalty survives termination of the client retainer, and will prohibit a solicitor from acting against a former client<sup>28</sup>.

In *Spincode*, Brooking JA opined that “the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client” and held that acting against a former client may also constitute a breach of the solicitor’s equitable duty of loyalty<sup>29</sup>.

This stands in stark contrast with the position adopted by the House of Lords in *Bolkiah*, where it was held that a solicitor has “no obligation to defend or advance the interests of his former client.”<sup>30</sup>

This divergence of opinion persists in the Australian authorities. In New South Wales, Young CJ has rejected Brooking JA’s approach in *Spincode*, holding that:

*The overwhelming weight of authority is to the effect that where the applicant ... is a former client, the sole consideration is whether there is a real risk of disclosure of confidential information*<sup>31</sup>.

The duty of loyalty was more recently discussed in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*<sup>32</sup>. Here, Bergin J distinguished *Spincode* on its facts, and noted that Brooking JA’s observations on the duty of loyalty were obiter<sup>33</sup>. Her Honour observed that the proposed duty derives from 19th century authorities, and distinguished the current legal market from these earlier times:

*There is a statutory regime including statutory rules relating to conduct of legal practitioners with which the practitioners must comply ... There is a statutory complaints authority in New South Wales, the Office of the Legal Services Commissioner and layer upon layer of conduct committees within the professional organisations... It is a very different environment from that in which the Court was the only “regulator” prior to the establishment of these bureaucracies*<sup>34</sup>.

Her Honour went on to hold:

*In Belan v Casey, the Chief Judge referred to the confusion that existed prior to the decision in Prince Jefri. I apprehend that some of that confusion stemmed from the blurring of the line between the Court’s supervision of its officers and the entitlement to have the Courts intervene to protect an equitable right - the right to protection of confidential information. It seems to me that in respect of solicitors acting against former clients, the line between disciplinary supervision and consideration of the entitlement to injunctive relief for the protection of confidential information and/or for breach of duty is best accommodated by the approach taken in Prince Jefri and adopted...by the Chief Judge in Equity in Belan v Casey*<sup>35</sup>.

The Queensland position is also said to be “more in step with the decision in *Prince Jefri* than with the position in Victoria.”<sup>36</sup>

On the other hand, Victorian authorities continue to support the existence of an “independent equitable obligation of loyalty” to former clients<sup>37</sup>.

The Supreme Court of the Australian Capital Territory has also recognised that a fiduciary duty of loyalty may be owed to former clients<sup>38</sup>. While “primarily and usually” the Court will be concerned to protect confidential information:

*There may be a case where the very rapport created between solicitor and client may render it inappropriate for that solicitor to act contrary to the interests of that former client... There may be exceptional cases where the relationship had qualities beyond the mere reposal of confidential information, but, analogously with a close friendship or relationship, would or would appear to be a breach of an obligation of loyalty<sup>39</sup>.*

The Federal Court would appear not to have expressed a conclusive view. In *Photocure ASA v Queen’s University at Kingston*, Goldberg J, recognising the divergent approaches, applied the test in *Bolkiah* and concluded that public confidence (in the administration of justice):

*... is maintained where a former solicitor is able to establish that there is no real risk that confidential information by a former client will come into the possession of, or be used by, persons in the firm acting for another party whose interests are adverse to the former client<sup>40</sup>.*

His Honour went on to hold that “even if” loyalty to the client was a relevant consideration for the Court, it was not applicable to the case at hand<sup>41</sup>.

While a solicitor’s duty of loyalty to former clients has been unequivocally recognised in Victoria, it remains to be seen whether this equitable obligation will be embraced in other jurisdictions.

**A Question for the Court?**

In *Spincode*, Brooking JA also held, by way of dicta, that a solicitor may be restrained from acting against a former client through exercise of the Court’s inherent jurisdiction over its officers<sup>42</sup>. This additional basis for intervention has proved less controversial than his Honour’s suggested “duty of loyalty,” and has found acceptance in several recent decisions<sup>43</sup>.

The New South Wales Supreme Court, in *Kallinicos v Hunt*, held that:

*... the Court always has an 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<sup>44</sup>.*

Brereton J observed that the House of Lords’ silence on this issue in *Balkiah* should not be read as excluding this additional basis for the Court’s intervention as that case concerned accountants, who are not officers of the Court, and are not subject to the supervisory jurisdiction of the Court to which its officers are subject<sup>45</sup>.

In order to invoke this inherent jurisdiction, the relevant test 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 the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice<sup>46</sup>.*

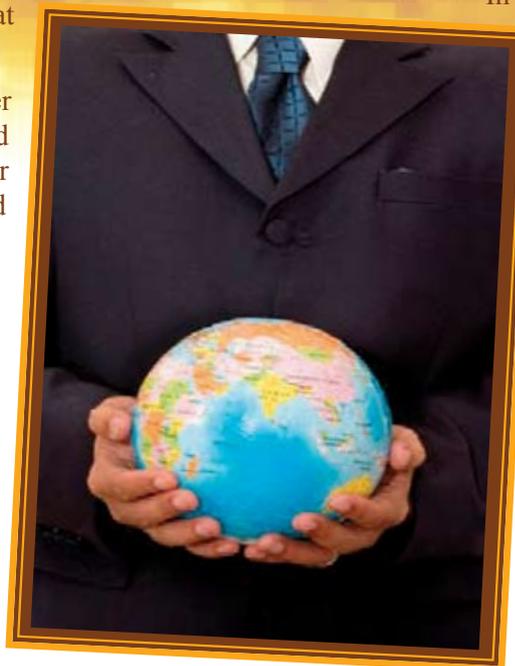
However, following a careful review of the authorities, Brereton J concluded that this was an exceptional jurisdiction to be exercised with caution having due regard to the competing public interest in “litigants not being deprived of a lawyer of his or her choice.”<sup>47</sup>

In the Queensland decision of *Pott v Jones Mitchell*, PD McMurdo J recognised that the court has power to control its own officers, and to this end was “prepared to assume, without deciding, that this third basis of jurisdiction can provide a ground for restraining a lawyer from acting against a former client,” even where there is no risk of disclosure of confidential information<sup>48</sup>.

In exercising this jurisdiction, the test to be applied is an objective one, namely whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice

requires that the lawyer be prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause.

PD McMurdo J held that the hypothetical “fair minded member of the public” must be presumed to know the true facts of the matter. Having concluded that that there was no real risk of disclosure of confidential information,



McMurdo J held that the circumstances of the case could not cause a reasonable member of the public to lose confidence in the judicial system<sup>49</sup>. Bergin J adopted a similar approach in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*, finding that since there was no risk of disclosure of confidential information, there was no threat to the perception that justice must be done and appear to be done<sup>50</sup>.

Notwithstanding the weight of authority in support of the adoption of the Court's inherent jurisdiction as a separate basis for intervention, a note of caution to such an approach was sounded by Heenan J in *Westgold Resources NL v St Barbara Mines Ltd*<sup>51</sup>. His Honour held that it would "be preferable to recognise that ... the jurisdiction of the court to intervene by way of injunction should only be in aid of recognised rights, duties, obligations or interests" and not merely to vindicate a sense of disapproval of the proposed conduct<sup>52</sup>.

Thus whilst there is authority to support the existence of an inherent jurisdiction to restrain solicitors from acting against former clients, the risk of disclosure of confidential information would appear to remain the

primary consideration for the Courts when exercising this jurisdiction.

## A High Test

It is well recognised that practitioners who seek to establish the existence of an effective Chinese Wall face a high test<sup>53</sup>. As Steytler J acknowledged in *Newman v Phillips Fox*, "walls or information barriers ... have not often found favour with the courts."<sup>54</sup> In fact, Courts will begin any assessment of the efficacy of a wall from the starting point that information moves within a firm of solicitors<sup>55</sup>.

The difficulty is magnified by the fact that an effective wall must prevent not only deliberate disclosures but also inadvertent disseminations<sup>56</sup>.

## The Need for Structure

In *Bolkiah*, Lord Millett held that an effective Chinese Wall must be an established part of the organisational structure of the firm rather than an ad hoc creation<sup>57</sup>. This position has since softened, and it is now recognised that an ad hoc barrier may (on rare occasions) prove adequate<sup>58</sup>.

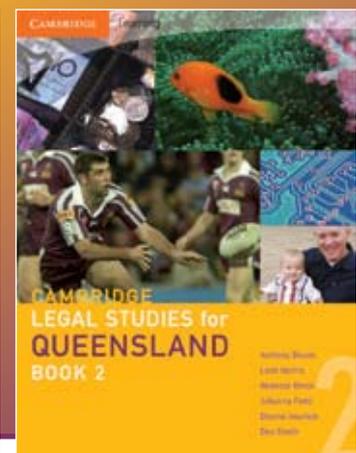
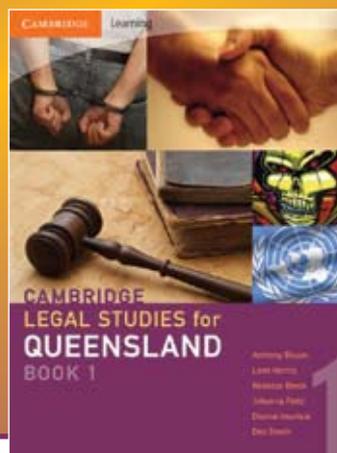
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Ultimately however, ad hoc barriers are unlikely to provide protection against inadvertent disclosures, and may come too late:

*As to proposed further arrangements that could be made, and that the defendant is now willing to make, the obligation was on the defendant to put in place adequate safeguards before acting for the bidders. I view it as far too late in the day for proposed further measures. The reality is that the spread of information within the firm may already have taken place and it is impossible to conclude that if the arrangements were inadequate until now, that fresh arrangements made at this stage will prevent the consequences of the earlier inadequate arrangements<sup>59</sup>.*

Best practice requires that firms be proactive in their approach, and develop effective walls in readiness for conflicts.

The case of *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*<sup>60</sup> demonstrates the benefit of organised systems which respond quickly to potential conflicts. In this case, a former client sought to restrain the law firm from acting for Optus. As soon as the conflict was alleged, the former client's file was placed in a locked cupboard in the probity manager's office. The probity manager held the only key to the cupboard, which was located on a separate floor to all practising solicitors. Each lawyer and staff member who had worked for the former client provided undertakings that they would preserve the client's confidences and would not perform work for Optus. Conversely, the team acting for Optus undertook not to seek or obtain access to the former client's file nor to discuss any matter relating to it with any lawyer or legal secretary who worked on the file. These prompt but simple measures satisfied Bergin J that there was a "sensible and safe system in place" to prevent disclosure.

### Elements of an Effective Wall

In *Bolkiah*, Lord Millett referred to the English Law Commission's 1992 Consultation Paper of *Fiduciary Duties and Regulatory Rules* which described organisational arrangements for an "effective wall" as normally involving some combination of<sup>61</sup>:

- physical segregation of the various departments in order to insulate them from each other;
- an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information;

- strict and carefully defined procedures for dealing with a situation where it is felt that the walls should be crossed and the maintaining of proper records where this occurs;
- monitoring by compliance officers of the effectiveness of the wall; and
- disciplinary sanctions where there has been a breach of the wall.

These requirements were endorsed by Steytler J in *Newman v Phillips Fox*<sup>62</sup>, and also find expression in the Information Barrier Guidelines adopted by the Council of the Law Institute of Victoria.

Additionally, the Information Barrier Guidelines<sup>63</sup> suggest the following measures:

- obtaining informed consent from each client in terms that acknowledge the firm's duty of disclosure does not extend to confidential information held by the firm as a result of an earlier matter<sup>64</sup>;
- undertakings given by all personnel involved in the matter<sup>65</sup>; and
- correspondence and communications stored securely with restricted access to technological communications<sup>66</sup>.

By way of example, an effective Chinese Wall was created by the law firm concerned in *Fruehauf Finance Corporation Pty Limited v Feez Ruthning*<sup>67</sup>. Here, the plaintiff (a client of the firm in an earlier unrelated proceeding) sought to restrain the firm from acting for Westpac in a later proceeding against the client, on the grounds that relevant confidential information had been disclosed by the plaintiff to the firm in the earlier proceeding. In dismissing the application and allowing the firm to continue to act for Westpac, Lee J considered the following matters:

- the two proceedings were unrelated, and had been handled by different "sections" of a large firm, each section having no knowledge of the other's actions;
- each matter was handled by different partners, solicitors and support staff;
- the firm did not hold an unlimited retainer from Westpac and had been released from any duty to disclose information that would conflict with the duty of confidentiality to the plaintiff; and

- the firm had offered to provide the plaintiff with an undertaking.

The above standards provide some guidance for firms when designing procedures for dealing with client conflicts. Beyond these guidelines, the following considerations are also relevant.

### *Size and structure of the firm*

Large firms with discrete sections or geographic separation are more able to create effective information barriers than their smaller counterparts.

In *Pradhan v Eastside Day Surgery Pty Ltd*<sup>68</sup>, Bleby J regarded that it would be “almost impossible” for a small firm to construct an effective Chinese Wall.

By way of contrast, in *Fruehauf Finance Corporation Pty Limited v Feez Ruthning*<sup>69</sup>, Lee J noted that the defendant firm was “very large” (28 partners), with “discrete areas of operation backed up by separate support staff”. The size and structure of the firm was held to reduce the potential for disclosure<sup>70</sup>.

However, it should not be thought that large firms have free license and Lee J was careful to note that in certain cases it may be inappropriate for a large firm to act against a former client<sup>71</sup>. *Newman v Phillips Fox*<sup>72</sup> is a case on point - despite the size of the firm (20 partners and 80 professional staff) and the physical segregation of the relevant sections, the measures taken by the firm came too late to avoid the risk of disclosure.

### *Contact with colleagues*

The Law Institute of Victoria’s Information Barrier Guidelines recommend that practitioners involved in Chinese Wall matters limit their contact with other

colleagues involved in the matter to avoid inadvertent disclosures<sup>73</sup>. This is consistent with the comments of Bryson J in *D&J Constructions Pty Ltd v Head*, where it was noted that inadvertent communication may occur “by attitudes, facial expressions or even avoiding people one is accustomed to see.”<sup>74</sup> Physical segregation of practitioners can limit such interactions.

Firms should exercise caution in deciding whether to involve trainee solicitors in Chinese Wall matters. The proclivity for trainees to rotate throughout sections may “breach” the Chinese Wall:

*Articled clerks will, as part of their training, no doubt be exposed to a range of different types of work and, consequently, personnel at Phillips Fox. They can be expected to mix with other articled clerks and young practitioners at that firm. They can also be expected, as is the case with other young practitioners, to share experiences and to exchange advice*<sup>75</sup>.

As was noted in *Newman v Phillips Fox*, safeguards should extend to administrative staff who may receive confidential information<sup>76</sup>.

Those solicitors who enjoy engaging in professional banter with their colleagues may be encouraged by the pragmatic approach of Bergin J in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*<sup>77</sup>. The case concerned a former client conflict. The team who worked on the previous matter occupied the same department and floor as the team who worked for the new client. Evidence was heard that the solicitors “bounce[d] matters off each other in a professional sense and attend[ed] litigation seminars together.”<sup>78</sup> Nevertheless, Bergin J was satisfied that measures taken by the firm (the appointment of a probity manager, securing the former client’s file immediately upon becoming aware of the suggested conflict and



providing extensive undertakings), meant that there was no real risk of disclosure.

**The importance of education**

Firms should not underestimate the importance of instituting programs to educate staff on the importance of preserving confidentiality. The lack of any educational program was a relevant consideration for Steytler J’s finding that the ad hoc wall was inadequate in Newman v Phillips Fox<sup>79</sup>.

Whilst general guidance can be provided as to the various factors taken into account in constructing an effective barrier, it is clear from the authorities that whether a particular Chinese Wall is effective will be dependent upon the facts of each particular case.

**Chinese Walls and Client Legal Privilege**

Notwithstanding the erection of a Chinese Wall, the simultaneous representation of opposing clients may prejudice claims of client legal privilege.

The principle of joint privilege provides that where “two or more persons ... join in communicating with a legal adviser for the purpose of retaining his or her services or obtaining his or her advice[,] the privilege which protects these communications from disclosure belongs to all the persons who joined in seeking the service or obtaining the advice”<sup>80</sup>.



Authority from the Victorian Supreme Court indicates that Courts will treat cases of simultaneous representation as giving rise to joint privilege.

In Yunghanns v Elfic Pty Ltd<sup>81</sup>, a Chinese Wall was constructed to allow both plaintiff and defendant to be advised by different members of the same firm<sup>82</sup>. The defendants claimed privilege over communications with their solicitor. The plaintiffs successfully argued that this was a joint privilege:

*In the context that the same firm provided advice to two clients on the same matter...then prima facie joint*

*privilege attaches to communications between both or one or other of the clients and the firm*<sup>83</sup>.

While recognising that the plaintiff and defendant each sought separate advice from different solicitors within the firm as to their respective positions, Warren J dismissed the defendant’s argument that the Chinese Wall preserved the defendant’s privilege. Her Honour held that such an analysis involved an “artificial dissection of the relationship between the two sets of clients and the firm”<sup>84</sup>.

Thus it would appear that in the absence of carefully drafted terms of retainer, the law of privilege may not recognise Chinese Walls where firms simultaneously represent opposing clients in relation to the same matter.

**Chinese Walls and the “Mega Firm”**

The case for Chinese Walls has been argued by reference to the emergence of “mega-firms” in the Australian legal market<sup>85</sup>. According to this argument, the concentration of legal work and expertise in the hands of the largest firms

necessitates Chinese Walls if clients are to obtain adequate representation. Steytler J has acknowledged that:

*... the ability to use Chinese Walls may become more important as legal talent in particular areas of expertise becomes increasingly concentrated in the ‘mega-firms’*<sup>86</sup>.

However this argument has not inspired judicial leniency when considering the efficacy of Chinese Walls. In Village Roadshow Ltd v Blake Dawson Waldron, Byrne J made it clear that he was unsympathetic to such arguments:

*It is a notorious fact that a good deal of commercial litigation in this state is conducted by a handful of very large firms. How is a client to obtain the services of one of them if the conflict rule is applied too strictly? To my mind, this is the price which the clients of such firms and the firms themselves must pay. The firms have found it commercially convenient to become large. This is but one disadvantage of this trend. It is certainly no reason for the courts to weaken the traditionally high standard of a practitioner’s loyalty to the client which have characterised the practice of law in this state*<sup>87</sup>.

Similarly, in D&J Constructions Pty Ltd v Head, it was held that:

... there is a thriving, diverse and talented legal profession and the Court need not fear that a litigant who is deprived of the services of one firm will not be able to retain adequate representation<sup>88</sup>.

## Implications for Professional Mobility

What of the case where a practitioner moves firms and finds themselves acting against a former client?

The first step is to determine whether the migratory solicitor has confidential information about the former client in their possession. In *Bureau Interprofessionnel De Vins De Bourgogne v Red Earth Nominees Pty Ltd*<sup>89</sup>, a solicitor who had transferred between two firms swore that she had limited contact with Red Earth and did not recall any confidential information of Red Earth. This evidence was accepted by Ryan J.

If the migratory solicitor does possess relevant confidential information, safeguards (in the form of Chinese Walls) should be taken to ensure that the solicitor has no contact with the matter. In *Wagdy Hanna & Associates Pty Ltd v National Library of Australia*<sup>90</sup>, Higgins CJ refused to disqualify the firm from acting after finding that the migratory lawyer was not involved in the current litigation and had undertaken not to discuss the case with those involved in the litigation.

It is now well accepted that the knowledge of a solicitor joining a new firm is not automatically imputed to other lawyers at that firm<sup>91</sup>. Consequently, the risks inherent in professional mobility ought to be capable of management through isolating the migratory solicitor from particular matters as required, and, where necessary, supplementing such arrangements with appropriate undertakings.

## Ethical standards

The test imposed on a law firm seeking to take advantage of a Chinese Wall is a high one. In *Bolkiah*, Lord Millett held that “the Court should restrain the firm from acting for the second client unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure [of confidential information] will occur.”<sup>92</sup>

As noted in the commentary on the Law Institute of Victoria’s Information Barrier Guidelines, “Australian Courts are unimpressed with solicitors who act in conflict of duties or interests or otherwise attempt to lower the ethical standards expected of the legal profession and stress the importance of maintaining the good reputation

of the profession and confidence that justice is done and seen to be done.”<sup>93</sup>

Hence, a high standard is applied. It is self-evident from the authorities that the Courts, in all jurisdictions, will be vigilant to ensure that this high standard is met.

However, with the benefit of clear authority as to the Court’s expectations, and resources such as the Law Institute’s Guidelines, it is apparent that law firms are becoming increasingly aware of the issues pertaining to the possible misuse of clients’ confidential information, and more sophisticated in ensuring that they have in place as part of the practice’s risk management protocols, processes and procedures which operate as an effective safeguard, in appropriate circumstances, against the risk of such misuse.

## Notes

- 1 *Conflicts of Interest and Chinese Walls*, C Hollander QC & S Salzedo (Sweet & Maxwell) (2004), 116.
- 2 *Mallesons Stephen Jaques v KPMG Peat Marwick* [1990] 4 WAR 357 at 371 (Ipp J).
- 3 *Yunghanns v Effic Pty Ltd (In liq)* (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) at 28.
- 4 [1992] 1 All ER 353 at 367.
- 5 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215, at 224-225.
- 6 *Professional Conduct and Practice Rules 1995 (NSW)*, 9.2 - 9.3.
- 7 *Professional Conduct and Practice Rules 2005 (Vic)*, 8.3 - 8.4.
- 8 *Law Society Northern Territory, Rules of Professional Conduct and Practice 2002*, 7.2 - 7.3.
- 9 *Law Society of the Australian Capital Territory Professional Conduct Rules 2003*, 8.2 - 8.3.
- 10 *Professional Conduct and Practice Rules 2005 (Vic)*, 8.5 - 8.8.
- 11 *he Law Society of Western Australia, Professional Conduct Rules 2005*, 7.4; *Solicitor’s Handbook (Qld)*, Reg 9.0.
- 12 *The Law Society of Western Australia, Professional Conduct Rules 2005*, 7.5; *Solicitor’s Handbook (Qld)*, Reg 9.0.
- 13 *Note the listed exceptions including where the creditor/mortgagee is a bank, credit society, or building society.*
- 14 [2002] VSC 324.
- 15 [2002] VSC 324 at [23].
- 16 [2002] VSC 324 at [24].
- 17 [2002] VSC 324 at [26-27].
- 18 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 225. *Approved in Bureau Interprofessionnel De Vins De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [18].
- 19 *Photocure ASA v Queen’s University at Kingston* [2002] FCA 905 at [50]; *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215; *Bureau Interprofessionnel De Vins De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [18]; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 at [34].

## Notes continued...

20 *Farrow Mortgage v Mendall Properties* (1995) 1 VR 1 at [5]; *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 226; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 at [34].

21 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 226.

22 *Farrow Mortgage v Mendall Properties* (1995) 1 VR 1 at [5].

23 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215.

24 (1995) 1 VR 1 at [5].

25 *World Medical Manufacturing Corp v Phillips Ormonde & Fitzpatrick Lawyers* (Unreported, Supreme Court of Victoria, Gillard J, 18 May 2000) at [115].

26 [2002] FCA 905 at [51].

27 [1999] 21 WAR 309.

28 *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307; *Wan v McDonald* (1992) 33 FCR 491; and *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248.

29 [2001] VSCA 248, at 521-522.

30 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 225.

31 *Belan v Casey* [2002] NSWSC 58 at [21], an approach affirmed by His Honour in *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 at [104].

32 [2005] NSWSC 550.

33 [2005] NSWSC 550 at [37-41].

34 [2005] NSWSC 550 at [51].

35 [2005] NSWSC 550 at [54].

36 *Flanagan v Pioneer Permanent Building Society Ltd* [2002] QSC 346 at [11].

37 *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202. See also *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152; *Edmonds v Donovan* [2005] VSCA 27; and *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505.

38 *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2004] ACTSC 75.

39 *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2004] ACTSC 75 at [55].

40 [2002] FCA 905 at [56].

41 [2002] FCA 905 at [57].

42 *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248.

43 See eg. *Asia Pacific Telecommunications v Optus Networks Pty Ltd* [2005] NSWSC 550 at [56-58]; *Kallinicos v Hunt* [2005] NSWSC 1181; *Pott v Jones Mitchell* [2004] QSC 48; and *Westgold Resources NL v St Barbara Mines Ltd* [2003] WASC 29.

44 [2005] NSWSC 1181 at [76].

45 [2005] NSWSC 1181 at [49].

46 [2005] NSWSC 1181 at [76]. Approved in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 at [57].

47 [2005] NSWSC 1181 at [76].

48 *Pott v Jones Mitchell* [2004] QSC 48 at [21].

49 [2004] QSC 48 at [22].

50 [2005] NSWSC 550 at [58].

51 [2003] WASC 29.

52 [2003] WASC 29 at [24].

53 *Newman v Phillips Fox* [1999] WASC 171 at [73]; *Conflicts of Interest and Chinese Walls, C Hollander QC & S Salzedo* (Sweet & Maxwell) (2004), 127.

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54 [1999] WASC 171 at [65].

55 [1999] WASC 171 at [72]. *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 227.

56 *Bureau Interprofessionnel Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [48].

57 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 229.

58 *Young v Robson Rhodes* [1999] 3 All ER 524 at 529.

59 *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2004] 3 All ER 774 at [35].

60 [2005] NSWSC 550 at [23-27] and [36].

61 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 228.

62 [1999] WASC 171 at [76].

63 Note that these Guidelines apply only to cases of former client conflicts.

64 Guideline 3.

65 Guidelines 5 & 6.

66 Guidelines 8 & 9.

67 [1991] 1 Qd R 558.

68 [1999] SASC 256.

69 [1991] 1 Qd R 558.

70 [1991] 1 Qd R 558 at 565.

71 [1991] 1 Qd R 558 at 572.

72 [1999] WASC 171.

73 Guideline 7.

74 (1987) 9 NSWLR 118 at 123.

75 *Newman v Phillips Fox* [1999] WASC 171 at [78].

76 [1999] WASC 171 at [79].

77 [2005] NSWSC 550.

78 [2005] NSWSC 550 at [35].

79 [1999] WASC 171.

80 *Farrow Mortgage Services Pty Ltd v Webb* (1996) 39 NSWLR 601 at 608.

81 [2000] VSC 113.

82 In another action, Gillard J determined that this Chinese Wall was ineffective, and restrained the defendants from retaining Corrs as their solicitors. However, in assessing the question of privilege, Warren J stated that she was neither bound nor influenced by Gillard J's finding as it was necessary that she consider the facts on an entirely separate basis. As is clear from Warren J's judgment at [29], her decision with respect to privilege did not turn on the effectiveness of the Chinese Wall.

83 [2000] VSC 113 at [29].

84 [2000] VSC 113 at [29].

85 *Rachael Mulheron, Arguments For and Against the Construction of Chinese Walls*, (2000) *Bulletin* 18; Lee Aitken, *Chinese Walls and Conflicts of Interest*, (1992) 18 *Monash University Law Review* 91.

86 *Newman v Phillips Fox* [1999] WASC 171 at [74].

87 [2003] VSC 505 at [49].

88 (1987) 9 NSWLR 118 at 123.

89 [2002] FCA 588.

90 [2004] ACTSC 75.

91 *Newman v Phillips Fox* (1999) 21 WAR 309; *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98; *Bureau Interprofessionnel De Vins De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588; and *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215.

92 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215 at 227.

93 Guidelines page 10.