INFORMED CONSENT AND SOLICITORS' DUTIES TO THE ADMINISTRATION OF JUSTICE IN AUSTRALIA

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Recent revisions to the Australian Solicitors' Conduct Rules 2021 ('ASCR') *sought to provide clarity for solicitors and their clients seeking to compromise the duties of loyalty and confidentiality to allow a solicitor to act in what might otherwise be a position of conflict with duties owed to other clients, or with the solicitor's own interests. This article focuses on the requirement for informed consent, and the ways in which this must balance client autonomy and access to justice, whilst also meeting the solicitor's obligations as an officer of the court. After examining the revisions to the* ASCR *and the extent to which they reflect the general law, the article considers case law suggesting that there are circumstances in which it will be inappropriate for a solicitor to act in a position of conflict, despite informed consent. The article explores those circumstances and suggests that they can be explained by the role that solicitors' obligations of confidentiality and loyalty play in the administration of justice. Finally, the article identifies a number of elements of informed consent that, if they are met, make it more likely that the solicitor's obligations to the court can be met, and therefore that the solicitor may act.*

I INTRODUCTION AND OUTLINE

It has long been recognised that solicitors and their clients are in a fiduciary relationship,[1] which gives rise to a duty of 'undivided'[2] or 'single-minded'[3] loyalty by a solicitor to their client ('duty of loyalty'). The obligation of loyalty means that a solicitor must not — without the client's consent — put themselves in a position where there is a conflict between their duty to the client and the solicitor's own interests, or where there are conflicting duties owed to multiple

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1 *Tyrell v Bank of London* (1862) 10 HL Cas 26; 11 ER 934, 941–2 [44] (Lord Westbury LC), cited in GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 7th ed, 2021) 129 [4.45].

2 Dal Pont (n 1) 128 [4.40].

3 Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (Discussion Paper, 1 February 2018) 65 ('*ASCR Review Discussion Paper*').

clients.[4] The duty forms part of the solicitor's role in the 'administration of justice',[5] and is seen to assist the court by ensuring that each party has 'independent legal representation'.[6] As such, the duty of loyalty is owed to — and enforceable by — the court, as well as the client.[7] In most Australian jurisdictions,[8] the duty ends with the termination or conclusion of the retainer, whilst the duty to maintain the confidentiality of client information received in the course of the retainer continues.[9]

The duties of loyalty and confidentiality are also reflected in the *Australian Solicitors' Conduct Rules 2021* ('*ASCR*').[10] Although the *ASCR* do not override the principles of equity or the court's own jurisdiction,[11] they remain a key source of

4 Adapting the definition in Dal Pont (n 1) 128–9, Dal Pont notes that the 'no-conflict' duty also includes avoiding conflicts between the fiduciary duty owed to a client and a duty owed to a third party, and that the duty of loyalty extends to prohibiting 'a person profiting from a relationship giving rise to fiduciary duties, except with the informed consent of the principal': at 129. A conflict may also result from a duty of confidentiality that is owed to a current or former client, as the discussion in Part II will identify.

5 DA Ipp, 'Lawyers' Duties to the Court' (1998) 114 (January) *Law Quarterly Review* 63, 93, citing *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, 360 (Davies and Lee JJ) ('*Blackwell*').

6 Ipp (n 5) 93, citing *Nangus Pty Ltd v Charles Donovan Pty Ltd (in liq)* [1989] VR 184 ('*Nangus*').

7 Under the court's 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': *Kallinicos v Hunt* (2005) 64 NSWLR 561, 582 [76] (Brereton J) ('*Kallinicos*'). See also *Porter v Dyer* (2022) 402 ALR 659, 679–80 [113] (Lee J) ('*Porter*'), quoting *Mumbin v Northern Territory [No 1]* [2020] FCA 475, [39] (Griffiths J) ('*Mumbin*'); Ipp (n 5) 94.

8 With the exception of Victoria, and potentially, courts exercising family law jurisdiction: see Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (Report to Legal Services Council, 5 May 2021) 51–2 ('*ASCR Review Final Report*'); Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale' (2006) 30(1) *Melbourne University Law Review* 88, 115; Ian Dallen, 'The Rise of the Information Barrier: Managing Potential Legal Conflicts within Commercial Law Firms' (2014) 88(6) *Australian Law Journal* 428, 433–4; *Milton v Milton* [2016] FamCA 1065, [70]–[71] (Berman J) ('*Milton*'), quoting *Osferatu v Osferatu* (2015) 301 FLR 295, 298 [20] (Finn, Ainslie-Wallace and Aldridge JJ) ('*Osferatu*') and citing *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501, 521–5 [52]–[58] (Brooking JA) ('*Spincode*').

9 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 235 (Lord Millett) ('*Prince Jefri*'). See also *ASCR Review Final Report* (n 8) 51.

10 Law Council of Australia, *Australian Solicitors' Conduct Rules 2021* (at 1 April 2022) ('*ASCR*'). This instrument forms the model rules developed by the Law Council of Australia originally in 2011 as proposed national conduct rules, and which have since been adopted in all jurisdictions except the Northern Territory: see Law Society of the Australian Capital Territory, *ACT Legal Profession (Solicitors) Conduct Rules 2015* (at 15 January 2016); Legal Services Council, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (at 1 July 2015) ('*ASCR NSW*'); Law Society of Queensland, *Australian Solicitors' Conduct Rules 2023* (at 27 September 2024); Law Society of South Australia, *South Australian Legal Practitioners Conduct Rules* (at 25 July 2011); Law Society of Tasmania, *Legal Profession (Solicitors' Conduct) Rules 2020* (at 1 October 2020); Law Society of Western Australia, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (at 1 July 2022). For the sake of clarity, this paper will use the numbering set out in the *ASCR* (n 10), rather than that adopted by an individual jurisdiction.

11 *ASCR* (n 10) r 2.2. See also Ipp (n 5) 63, 93; Goubran (n 8) 101; *Atanaskovic Hartnell v Birketu Pty Ltd* (2021) 105 NSWLR 542, 564 [105] (Gleeson JA) ('*Atanaskovic Hartnell*'), referring to the interaction between *ASCR NSW* (n 10) r 12.1 and the general law.

guidance for Australian solicitors, and a breach of the rules may be a matter for professional discipline. More specifically, rr 10–12 of the *ASCR* require solicitors to avoid conflicts between the duties owed to current and former clients (r 10); the duties owed to two or more current clients (r 11); and with the solicitor's own interests (r 12) (together, 'the conflict rules') unless the other provisions of those rules are met.[12]

The conflict rules formed a key part of the Law Council of Australia's ('LCA') 2018–20 review of the *ASCR*.[13] There were three key aspects of the review which led to recommended changes to the existing rules. The first related to the need to give effect to solicitors' obligations of confidentiality and loyalty, whilst also respecting clients' autonomy to engage the solicitor of their choice.[14] The Ethics Committee of the LCA ('Ethics Committee') considered whether the rules should contain an absolute prohibition against solicitors acting in situations of actual or potential conflict,[15] but ultimately concluded that the rules should continue to make provision for solicitors and their clients to agree on arrangements that would allow solicitors to act in certain circumstances.[16] The principal way to do this is with the client's informed consent, which may be used to modify a duty that would otherwise be owed to a client in order to avoid a conflict of interest from arising,[17] to authorise solicitors to act despite a conflict,[18] or to agree about what is to happen should a conflict arise in the future.[19] Under the general law, informed consent may be raised as a defence to a claim for breach of duty.[20]

Informed consent is not defined in the *ASCR*, and the Ethics Committee determined that it would be inappropriate 'to specify a precise manner in which the client is to be informed or to signify consent' within the rules.[21] In the case law, informed consent has been explained as

12 The requirements of *ASCR* (n 10) rr 10–12 are discussed in detail in Part II.

13 For the comprehensive report, see *ASCR Review Final Report* (n 8). The review considered revisions to the original rules beyond the conflict rules, but these are outside the scope of this article.

14 *ASCR Review Discussion Paper* (n 3) 65–6.

15 Ibid 65.

16 Ibid 66.

17 Man Yip and Kelvin FK Low, 'Reconceptualising Fiduciary Regulation in Actual Conflicts' (2021) 45(1) *Melbourne University Law Review* 323, 357. This article contains an extensive analysis of how informed consent might be used to avoid conflicts of interest, although its focus is on company directors rather than lawyers.

18 See, eg, *ASCR* (n 10) rr 10.2, 11.3–11.4.

19 See generally ibid r 11.5. See also Yip and Low (n 17) 357.

20 *Maguire v Makaronis* (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ) ('*Maguire*'). See also Goubran (n 8) 137.

21 *ASCR Review Discussion Paper* (n 3) 67. The commentary on the rules will be expanded, however, to include, for example, a recommendation that consent be in writing and a reminder that the solicitor bears the onus of establishing informed consent: *ASCR Review Final Report* (n 8) 55.

> consent given [by the client] in the knowledge that there is a conflict between the parties and … as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interest of the other.[22]

One of the changes recommended by the review was to remove the requirement for consent to be in writing.[23] In doing so, the Ethics Committee emphasised that the most important consideration is whether the client's consent is informed, not the form in which it is given.[24] Part IV of this article outlines a number of elements of informed consent that, if they are met, make it more likely that the client's consent will be accepted, and therefore that the solicitor may act.

The second change to the conflict rules related to the duty of confidentiality, and was designed to facilitate greater certainty for solicitors and their clients in the provision of informed consent.[25] Prior to the review, rr 10 and 11 had required only that the client consent to 'the solicitor or law practice so acting' where the conflict involved a duty of confidentiality.[26] The recommended revisions clarified that the client to whom a duty of confidentiality is owed must consent to the disclosure and use of the client's confidential information before the solicitor may act. This change goes beyond the requirements of the general law, as discussed in Part II, which examines the extent to which informed consent may be used to compromise solicitors' obligations of confidentiality and loyalty under both the *ASCR* and the general law. The analysis in Part II will focus on the law of informed consent and will not address the requirements for information barriers, even though the *ASCR* potentially allow a solicitor to act where the conflict involves a duty of confidentiality and there is an information barrier in place to protect that information.[27]

The third aspect of the *ASCR* review focused on balancing the requirements of the conflict rules with access to justice considerations.[28] This aspect considered whether the requirements of r 11 (conflicts concerning current clients) should be relaxed for solicitors assisting 'vulnerable and disadvantaged' clients in urgent and discrete situations in which it might be difficult to check for conflicts, or obtain informed consent.[29] This might include, for example, solicitors providing duty lawyer services in which the assistance needed is limited, but failing to provide it not only restricts access to justice for the person needing assistance, but also '[t]he

22 *Clark Boyce v Mouat* [1994] 1 AC 428, 435 (Lord Jauncey for Lords Goff, Jauncey, Lowry, Mustill and Slynn) ('*Clark Boyce*'), quoted in *ASCR Review Discussion Paper* (n 3) 66.

23 Formerly contained in r 10.2.1: *ASCR Review Final Report* (n 8) 55–6.

24 *ASCR Review Discussion Paper* (n 3) 67. See also ibid 55.

25 *ASCR Review Discussion Paper* (n 3) 50.

26 Ibid 50, 64.

27 *ASCR* (n 10) r 10.2.2. For a more extensive discussion of information barriers: see Dallen (n 8).

28 *ASCR Review Discussion Paper* (n 3) 56, quoting Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 646–7.

29 Law Council of Australia, *Australian Solicitors' Conduct Rules: Short-Term Legal Assistance Services* (Consultation Paper, 6 November 2020) 6 ('*Rule 11A Review*'). See also at 8.

efficient functioning of [the] courts'.[30] The new r 11A now provides greater flexibility for solicitors providing legal assistance where it is difficult to screen for conflicts, requiring them to ensure only 'to the extent reasonably practicable' that no conflict exists, and the client has given informed consent.[31] As discussed in Part II of this article, the revisions do not only apply to duty lawyering, however, making it important that solicitors relying on r 11A continue to consider the requirements for informed consent, as outlined in Part IV.

Despite the provisions of the *ASCR*, it is important for solicitors to bear in mind that informed consent is not only a mechanism that allows clients to have greater flexibility to engage the law practice of their choice, to allow clients to decide up-front what they wish to happen in the event of later conflict, or to provide vulnerable clients with access to some form of legal representation. This is because the duties of confidentiality and loyalty are not only duties owed to the client that may be modified by them, but also duties that are owed to the court, as part of the administration of justice.[32] It is unlikely that the duty to the court can be waived,[33] such that, even where there is informed consent or some limitation of the retainer, the court retains an inherent jurisdiction to restrain a solicitor from acting,[34] where that is necessary to protect the due administration of justice.[35]

In the 2021 decision of *Atanaskovic Hartnell v Birketu Pty Ltd* ('*Atanaskovic Hartnell*'),[36] the New South Wales Court of Appeal confirmed that there are situations in which a conflict of interests may be 'so profound' that a solicitor ought not act — despite the client's informed consent.[37] There, the Court of Appeal was required to determine whether the firm of Atanaskovic Hartnell ('AH') was able to recover their fees for acting in a situation in which there was an actual conflict between the firm's interests and those of their client, and whether the client had — or indeed *could* — provide informed consent to the position of conflict.

The circumstances were reasonably complex: AH had two longstanding clients, including Birketu Pty Ltd. In 2016 and 2017, one of the firm's employed solicitors, Brody Clarke, had defrauded the clients by directing them to pay around $1 million into his own account instead of the firm's trust account ('Westpac frauds') and also

30 In the sense that the court's proceedings may be delayed whilst a conflicts check is being conducted: ibid 5.

31 *ASCR* (n 10) r 11A.

32 Ipp (n 5) 93.

33 See *Karapataki v Karapataki* [2011] FMCAfam 6, [33]–[34] (Walters FM), quoting *Holborow v Macdonald Rudder* [2002] WASC 265, [28] (EM Heenan J) ('*Holborow*') and quoted in *Gill v Wynne* [2016] FCWA 40, [33]–[34] (Walters J) ('*Gill*'). See also *Afkos Industries Pty Ltd v Pullinger Stewart (a firm)* [2001] WASCA 372, [34] (Murray J) ('*Afkos*').

34 Ipp (n 5) 93–4. See also *Afkos* (n 33) [34] (Murray J).

35 Dallen (n 8) 437, quoting *Kallinicos* (n 7) 582 [76] (Brereton J). See also Goubran (n 8) 136, quoting *Kallinicos* (n 7) 582 [76] (Brereton J); 138, quoting *Holborow* (n 33) [30] (EM Heenan J).

36 *Atanaskovic Hartnell* (n 11).

37 Ibid 561 [87] (Gleeson JA, Basten JA agreeing at 545 [1], McCallum JA agreeing at 570 [149]).

tricked their banker, Deutsche Bank, into paying him client funds of around $7 million directly ('Deutsche frauds'). The conflict arose when the firm agreed to act for its client in investigating the circumstances of the Deutsche frauds. This was because the bank's defence was that Clarke had had ostensible authority to direct the bank on behalf of the firm's clients, which meant that, if the bank was responsible for the client's losses, it could then recover against AH. For both the Westpac frauds and the Deutsche frauds, there was also a question of whether the firm was vicariously liable for Clarke's actions as their employee. The principal issue for both matters was whether Clarke had acted within the course and scope of his employment with the firm. This meant that there was an actual conflict between the firm's interests and those of their clients, in undertaking the investigation.[38]

Ultimately, the court determined that informed consent had not been provided, and so was not required to determine whether — had this been provided — it would have been sufficient to cure the conflict. It did not, however, overturn the trial judge's finding that 'fully informed consent would not be effective to make AH's position any less untenable given its professional ethical obligations'. [39] *Atanaskovic Hartnell* follows a number of other decisions in which courts have recognised that there are some cases in which it will be inappropriate for a solicitor to act in a situation of conflict, despite the client's wishes and their provision of informed consent.[40] Precisely what it is about the circumstances that makes it inappropriate to act remains unclear, however.[41]

Part III of this article contends that the crux of the issue is the importance of solicitors' independence for the due administration of justice. That is, the duty of loyalty is not only about the client's interests, but forms part of the solicitor's role in the administration of justice by ensuring that courts are assisted by independent counsel.[42] 'Independent', in this context, means independent from duties owed to other clients and from their own interests, and includes the appearance of independence. In Parts III and IV I will argue that the requirements for informed consent are bounded by, and must be considered in the context of, the importance of independence for the solicitor's role in the administration of justice. Part IV also identifies 11 elements of informed consent that, if they are met, make it more likely that the appearance of independence can be maintained, and therefore that the solicitor may act.

38 Ibid 556 [53] (Gleeson JA).

39 Ibid 560 [82], discussing *Atanaskovic Hartnell (a firm) v Birketu Pty Ltd* [2020] NSWSC 573, [97] (Hammerschlag J) ('*Atanaskovic Hartnell Supreme Court*').

40 See, eg, *Law Society (NSW) v Harvey* [1976] 2 NSWLR 154 ('*Harvey*'); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J) ('*Farrington*'), quoted in *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, 576 [31] (Lord Walker) ('*Hilton*'). See also Goubran (n 8) 137–8, quoting *Holborow* (n 33) [30] (EM Heenan J).

41 As Part III of this article will explain.

42 See, eg, Ipp (n 5) 93, citing *Nangus* (n 6) and *Blackwell* (n 5) 360 (Davies and Lee JJ); Goubran (n 8) 138, quoting *Holborow* (n 33) [30] (EM Heenan J).

II BACKGROUND TO SOLICITORS' CONFLICTS OF INTEREST AND THE USE OF INFORMED CONSENT IN AUSTRALIA

There are two principal grounds on which a conflict of interests may arise for solicitors in Australia.[43] These are:

1 Where a solicitor's own interests, or their duty to use their knowledge for the benefit of a client, conflicts with their duty of confidentiality to that, or another client ('conflicts involving the duty of confidentiality').

2 Where a solicitor's duty of loyalty to a client conflicts with their duty of loyalty to a different client, or with the solicitor's own interests ('conflicts involving the duty of loyalty').

A *Conflicts Involving the Duty of Confidentiality*

It is well-recognised that Australian solicitors owe a duty of confidentiality to their clients. This may arise under the contract of retainer or in equity,[44] and is reflected in the *ASCR*.[45] The duty of confidentiality survives the conclusion or termination of the retainer,[46] with the result that the duty to maintain a client's confidentiality is likely to be the most common ground on which a conflict arises where the matter involves a former client. The existence of a duty of confidentiality to one or more current clients may also result in (or exacerbate) a potential or actual conflict involving current clients, however.

Where the duty of confidentiality is invoked, whether the firm or solicitor may continue to act depends on:

1 Whether the firm or solicitor is in possession of confidential information belonging to a former or current client which is relevant to the interests of another current client;[47]

43 See also Dal Pont (n 1).

44 See, eg, *Re Timbercorp Finance Pty Ltd (in liq)* (2019) 137 ASCR 189, 202 [73] (Anderson J) ('*Re Timbercorp*').

45 See *ASCR* (n 10) r 9.1.

46 *Prince Jefri* (n 9) 235 (Lord Millett).

47 See, eg, *ASCR* (n 10) rr 10.2, 11.4; Dallen (n 8) 434; *Osferatu* (n 8) 299–300 [26]–[29] (Finn, Ainslie-Wallace and Aldridge JJ).

2 Whether the former or current client on whose behalf the confidential information is held has given informed consent to the firm or solicitor acting despite their possession of the information;[48] or

3 If the client has not given informed consent, whether there is a risk that the confidential information will be used:

(a) to the detriment of the former or current client;[49] or

(b) for the unauthorised benefit of another person — including the solicitor themselves.[50]

To show a solicitor is in possession of confidential information pertaining to a current or former client, there must be evidence of the circumstances sufficient to establish that[51] (but without disclosing the confidential information itself).[52] The court may take into account: the nature of the matter; the extent of the solicitor's involvement in the former matter; and the length of time that has passed, in determining whether the firm or solicitor is in possession of relevant confidential information.[53] However, in some circumstances, the court may be prepared to restrain even the risk of a subconscious or inadvertent risk of disclosure of confidential information.[54]

48 At general law, informed consent acts as a defence to a claim for breach of duty: *Maguire* (n 20) 465–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also Goubran (n 8) 137, citing *Wan v McDonald* (1992) 33 FCR 491, 510–12 (Burchett J) ('*Wan*'), *Archer v Howell [No 2]* (1992) 10 WAR 33, 49 (Rowland J) ('*Archer*') and *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 636 (Upjohn LJ) ('*Boulting*'). The requirement for consent under the *ASCR* (n 10) will be discussed below.

49 The terms of any information barriers that have been put in place to protect the confidential information from disclosure will also be relevant here: see, generally, Dallen (n 8); Goubran (n 8) 139–42.

50 See, eg, *Boardman v Phipps* [1967] 2 AC 46, 85–6 (Viscount Dilhorne), 101 (Lord Cohen), 115–16 (Lord Guest), 128–9 (Lord Upjohn); *Fordham v Legal Practitioners' Complaints Committee* (1997) 18 WAR 467, 486 (Malcolm CJ) ('*Fordham*').

51 See, eg, *Gill* (n 33) [45] (Walters J).

52 See, eg, *Osferatu* (n 8) 299 [25]–[26] (Finn, Ainslie-Wallace and Aldridge JJ), quoting *McMillan v McMillan* (1999) 159 FLR 1, 31 [87] ('*McMillan*'). See also *Osferatu* (n 8) 300 [31] (Finn, Ainslie-Wallace and Aldridge JJ).

53 See *Mancini v Mancini* [1999] NSWSC 800, [7] (Bryson J) ('*Mancini*'), quoted in *Osferatu* (n 8) 299–300 [27] (Finn, Ainslie-Wallace and Aldridge JJ). See also at 301 [35], 302 [41].

54 See, eg, *Australian Commercial Research and Development Ltd v Hampson* [1991] 1 Qd R 508. Prior to the decision in *Osferatu* (n 8), it had been thought that the level of risk of the disclosure of confidential information that a court exercising family law jurisdiction might be prepared to accept was lower than in other jurisdictions: David Bowles, '*Osferatu v Osferatu [2015] FamCAFC 177: Conflicts in Family Law Proceedings*' (Case Note, 9 February 2018) <https://www.qls.com.au/Content-Collections/Ethics/Casenote-Osferatu-v-Osferatu-2015-FamCAFC-177-conf>, summarising the test in *McMillan* (n 52). However, the Full Court of the Family Court of Australia confirmed that, consistent with civil jurisdictions, '[t]he risk of disclosure "must be a real one, and not merely fanciful or theoretical. But it need not be substantial"': *Osferatu* (n 8) 300–1 [32] (Finn, Ainslie-Wallace and Aldridge JJ), quoting *Prince Jefri* (n 9) 237 (Lord Millett).

There are two key aspects of the duty of confidentiality that highlight how it is shaped by the solicitor's role in the administration of justice, and the importance of the duties of confidentiality and loyalty to the appearance of justice.

The first relates to information that was once confidential, but which is now in the public domain. Although the High Court in *Glencore International AG v Federal Commissioner of Taxation*[55] recognised that legal professional privilege is 'an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications',[56] it held that this did not extend to a right to seek an injunction to prevent the use of privileged documents now in the public domain.[57] And in confirming the need for the party seeking an injunction to prove the existence of confidential information in *Osferatu v Osferatu*,[58] the Full Court of the Family Court reflected that '[c]onfidential information which once existed may no longer be confidential; it may no longer be available although it was communicated in the past; it may not be material to any use which might now be proposed to be made of information'.[59]

Nevertheless, solicitors who seek to use information they had gained from a client whilst acting in their professional capacity must tread cautiously, even if the information is now public, or already known by the new client. Although a client might authorise their solicitor to use confidential information for certain purposes in the course of acting for that client, once they are no longer a client '[i]t does not follow that the practitioner is then free to communicate the same information to other persons for other purposes'.[60] Solicitors may be subject to discipline if they use information that was once confidential 'professionally to advance the interests of another client'.[61] This is because the duty of confidentiality is more than a duty that is owed to a client. Together with legal professional privilege, it plays a role in the administration of justice by facilitating the provision of information by a

55 (2019) 265 CLR 646.

56 Ibid 656 [12] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

57 Ibid 656–7 [13].

58 *Osferatu* (n 8).

59 Ibid 300 [27] (Finn, Ainslie-Wallace and Aldridge JJ) (emphasis omitted), quoting *Mancini* (n 53) [7] (Bryson J).

60 *Fordham* (n 50) 486 (Malcolm CJ).

61 Ibid. In *Fordham* (n 50), the lawyer, Ms Fordham, was disciplined for using information she had initially gained when acting for a former client to cross-examine the former client in a later matter — even though much of the information was by then in the public domain or the client had authorised Ms Fordham (his then lawyer) to disclose it in the course of the first matter. Similarly, in *Rosen v Legal Services Commissioner* [2016] QCA 190 ('*Rosen*'), the Queensland Court of Appeal upheld the disciplinary Tribunal's decision that the solicitor was guilty of unsatisfactory professional conduct for breaching then r 4 of the Law Society of Queensland, *Legal Profession (Solicitors) Rule 2007* (at 1 July 2007) (which prohibited solicitors from acting for a new client where they held relevant confidential information pertaining to a former client). The solicitor had argued that he was not prevented from acting, because any information that was confidential to the former client, was already known to the new client, who had been in a relationship with, and present at 'every meeting' between, the solicitor and his former client in the previous matter: *Rosen* (n 61) [30]–[31] (McMurdo P). This argument was rejected: see at [32]–[34].

client to their solicitor,[62] which in turn allows that solicitor to exercise the independent forensic judgment that is necessary to limit the issues and evidence that are put before the court.[63] It is important for the administration of justice that solicitors do not appear to only give effect to their obligations of confidentiality during the course of the retainer. It is also important that they do not — without the client's consent and even if the confidential information is now public — use the same information against the client at a later point, because this would undermine the duty of confidentiality and in turn, the administration of justice more broadly.

The second issue that highlights how the duty of confidentiality is shaped by the administration of justice, is the recognition by Australian courts of 'Getting to Know You' ('GTKY') factors — either as an aspect of confidentiality, or under the court's inherent jurisdiction.[64] These (relatively intangible) factors were first described by Gillard J in *Yunghanns v Elfic Ltd* ('*Yunghanns*')[65] as encompassing aspects of 'a client's personality, weaknesses or strengths, honesty (or perhaps dishonesty), fears and reactions (including reactions to pressure or tension)' as well as 'a client's attitude and approach to litigation'.[66] Although both courts[67] and commentators[68] have expressed reservations about the factors being broadly applied to all solicitor-client relationships, they continue to be raised in both general civil and family law jurisdictions.

Within the case law, there is some inconsistency about whether the GTKY factors give rise to a duty of confidentiality that may be directly enforced by a client, or whether they consist of circumstances that may ground an injunction to 'protect[] … the integrity of the judicial process' under the court's inherent jurisdiction.[69] The distinction is especially relevant where the only information held by the

62 That is, clients are unlikely to impart full information to their lawyers unless they know that the information will be kept confidential. Without full information, lawyers are less able to advise their clients, including advice to settle a matter or limit the evidence or issues that are put before the court. This in turn affects the administration of justice by potentially taking up more of the court's time unnecessarily.

63 See, eg, *Baker v Campbell* (1983) 153 CLR 52, 73 (Mason J), 127 (Dawson J); *Goldberg v Ng* (1995) 185 CLR 83, 93–4 (Deane, Dawson and Gaudron JJ). Legal professional privilege has a much stronger connection with the administration of justice than confidentiality, which restricts the circumstances in which privileged information may be disclosed. Nevertheless, the duty of confidentiality remains important. For the duty to exercise independent judgment: see *ASCR* (n 10) r 17.1.

64 Similar factors were also recognised by the New Zealand Court of Appeal in *Black v Taylor* [1993] 3 NZLR 403 ('*Black*'). See at 408 (Richardson J).

65 (Supreme Court of Victoria, Gillard J, 3 July 1998) 10–11 ('*Yunghanns*').

66 *Gill* (n 33) [36] (Walters J), citing ibid.

67 See, eg, *Re Timbercorp* (n 44) 208 [109] (Anderson J).

68 See, eg, Goubran (n 8) 104; Dallen (n 8) 435, quoting *Ismail-Zai v Western Australia* (2007) 34 WAR 379, 389 [29] (Steytler P) ('*Ismail-Zai*').

69 *Kallinicos* (n 7) 582 [76] (Brereton J).

solicitor consists of vague 'impressions of the former client's personality',[70] as opposed to concrete details of the client's property holdings, for example. As I outline in Part III, the court's inherent jurisdiction is directed at circumstances in which there is something about the situation which means that an ordinary person would think it inappropriate for the solicitor to act, even if the duties of confidentiality and loyalty are not directly invoked. That is, would an ordinary person consider that a solicitor's knowledge of their former client's personality is enough to undermine the appearance of justice, even if they hold no other relevant confidential information about the client or their interests.

The leading approach to considering restraint on the basis of GTKY factors alone is that applied by Steytler P in *Ismail-Zai v Western Australia* ('*Ismail-Zai*').[71] There, Mr Ismail-Zai had been prosecuted for an unrelated criminal offence by his former defence lawyer.[72] Although Mr Ismail-Zai had been 'nervous [during] cross-examin[ation]' by his former solicitor, the issue was not raised with the trial judge until after 'the jury had retired to consider their verdict', and the trial judge 'declined to discharge the jury'.[73] In determining whether a miscarriage of justice had occurred, Steytler P found the solicitor's knowledge of the former client was not confidential information, nor was there any evidence that confidential information had been misused.[74] With respect to the GTKY factors, Steytler P said that *Yunghanns* was 'unusual',[75] and that it was 'questionable' whether the 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'.[76] Rather, the factors might be considered in view of what is required for the due administration of justice, under the court's inherent jurisdiction.[77]

Conversely, in *Re Timbercorp Finance Pty Ltd (in liq)* ('*Re Timbercorp*'),[78] the court considered the presence of GTKY factors as an aspect of confidentiality, comparing the extent of time Mr Nash had spent with his solicitors, Mills Oakley, with the extent of time the client in *Sent v John Fairfax Publication Pty Ltd*

70 *Rosen* (n 61) [18] (McMurdo P).

71 *Ismail-Zai* (n 68).

72 Who had previously represented the defendant in 'unrelated matters', including a plea in mitigation, and to whom Mr Ismail-Zai still owed around $1,400 in unpaid fees: ibid 384 [1], 385 [10], 386 [14] (Steytler P).

73 Ibid 384 [6], 385 [8], 386 [14].

74 Ibid 393 [42]–[43].

75 In the sense of the length of the lawyer-client relationship: ibid 389 [29].

76 Ibid, citing *Black* (n 64) 412 (Richardson J).

77 *Ismail-Zai* (n 68) 389 [29] (Steytler P), quoted in Dallen (n 8) 435. This appears to be the approach taken in the family law jurisdiction: see, eg, *Milton* (n 8) [85] (Berman J).

78 *Re Timbercorp* (n 44).

('*Sent*')[79] had spent with his counsel.[80] Because the court in *Sent* had found that GTKY factors existed as a result of 'a conference that ran for about two hours (and one held over a decade prior to the application to restrain counsel)',[81] it was likely that the factors also applied to Mills Oakley, whose relationship with Mr Nash was 'more extensive'[82] — or at least to those solicitors who had had direct contact with Mr Nash during that time.[83]

The outcome of *Re Timbercorp* is appropriate, given that there had been an 'extended professional relationship' between the firm and its client, Mr Nash, over many years.[84] Nevertheless, the test for whether GTKY factors apply cannot depend on length of relationship alone. Given that GTKY factors are likely to be most relevant only where the possession of other forms of confidential information cannot be established,[85] I suggest the approach taken by the court in *Ismail-Zai* is more suitable, because it focuses on whether there is something about the circumstances which means that the appearance of justice would be compromised, were the solicitor to act.[86] This is a broader test which allows the court to take into account all of the circumstances in determining whether to restrain a solicitor from acting, rather than a single factor such as the length of the solicitor-client relationship alone.

Another advantage of considering the GTKY factors under the court's inherent jurisdiction is that the appearance of justice may require that only those solicitors who have had direct contact with the client be restrained, rather than the entire firm.[87] This is because, unlike other forms of confidential information that may be held on a file, the GTKY factors may be more nebulous and therefore less *transmissible* to other members of the firm,[88] meaning that it may not be reasonable

79 [2002] VSC 429 ('*Sent*').

80 *Re Timbercorp* (n 44) 203 [79] (Anderson J).

81 Ibid, citing *Sent* (n 79) [68]–[70] (Nettle J).

82 *Re Timbercorp* (n 44) 203 [79] (Anderson J).

83 Ibid 204 [87].

84 Ibid 203 [81]. See also at 203 [80].

85 Given that the possession of confidential information alone would likely be sufficient to ground an injunction, as opposed to the reliance on personality impressions ascertained in the course of dealings with the client — which is arguably less tenable.

86 *Ismail-Zai* (n 68) 389 [29] (Steytler P).

87 In *Re Timbercorp* (n 44), although the court considered the GTKY factors as an aspect of confidentiality, it was nevertheless satisfied that other members of the firm could examine their former client in a public examination under the *Bankruptcy Act 1966* (Cth), provided that an information barrier was erected between the lawyers who had had prior contact with Mr Nash, and the examining lawyers: *Re Timbercorp* (n 44) 209 [115], 211 [126] (Anderson J).

88 In *Re Timbercorp* (n 44), Anderson J described the GTKY factors as '[a] form of information [that] is not capable of communal possession' but rather 'knowledge and experience contained within the mind of an individual solicitor': at 204 [87], citing *Newman v Phillips Fox* (1999) 21 WAR 309, 317–18 [32]–[36] (Steytler J) and *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 453, [60] (Riordan J).

to require that an entire firm be restrained where the former client has had contact with only some of its solicitors.

B *Conflicts Involving a Duty of Confidentiality and the Requirements of the ASCR*

Where there is a conflict involving a duty of confidentiality owed to one or more clients (either current or former), the *ASCR* require that the conflict be avoided, unless:

1 Where the duty of confidentiality is owed to a former client, that client 'has given informed consent to the disclosure and use of [the confidential] information', or there is an information barrier in place to maintain confidentiality.[89]

2 Where the duty of confidentiality is owed to a current client, all clients (including any clients to whom there would otherwise be a duty to use the confidential information for their benefit) have given informed consent to either the disclosure and use of the confidential information, or to the use of an information barrier to maintain confidentiality.[90]

The use of informed consent to allow firms to act in situations of conflict involving the duty of confidentiality is consistent with the general law, which allows the use of informed consent to effectively 'contract out' of a duty owed to one or more clients.[91] This might include, for example, modifying the duty to one client in order to remove any duty to use confidential information pertaining to another client for the benefit of the first client.[92]

Whereas the *ASCR* as originally drafted had only required consent to 'the solicitor or law practice so acting',[93] the revised rr 10 (conflicts involving former clients) and 11 (conflicts involving current clients) require that the client to whom a duty of confidentiality is owed must consent to the disclosure and use of confidential information unless the duty of confidentiality is to be maintained using an

89 *ASCR* (n 10) r 10.2.

90 Ibid r 11.4.

91 PG Turner, 'Conflict of Duty and Duty' (2005) 79(8) *Australian Law Journal* 488, 490, citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 ('*Hospital Products*'). See also Goubran (n 8) 137, citing *Wan* (n 48) 510–12 (Burchett J), *Archer* (n 48) 49 (Rowland J) and *Boulting* (n 48) 636 (Upjohn LJ).

92 It is likely that any modification of duty must be explicit rather than implied: see, eg, *Hilton* (n 40) 577–8 [37]–[38] (Lord Walker), citing *Hilton v Barker Booth & Eastwood* [2002] EWCA Civ 723, [32]–[33] (Morritt V-C) ('*Hilton CoA*') and discussing *Moody v Cox* [1917] 2 Ch 71.

93 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011* (at June 2011) rr 10.2.1, 11.3.2.

information barrier.[94] This is more restrictive than the general law[95] which, as an alternative to the waiver of confidentiality by the client to whom that duty is owed, would instead allow a new client to waive any requirement to use confidential information pertaining to another client for the new client's benefit, thus maintaining confidentiality. Nevertheless, the requirement for explicit consent to the disclosure and use of confidential information under the revised *ASCR* arguably makes it clear to clients exactly what it is they are agreeing to, and in that sense, more likely that the consent would be regarded as 'informed' under the general law, as Part IV will identify.[96]

C *Conflicts Involving the Duty of Loyalty*

A conflict between the duty of loyalty to one client, and the same duty to another, is the conflict that most often arises where a solicitor wishes to act (at the same time) for multiple clients whose interests are adverse.[97]

In Victoria, the duty of loyalty to a former client may survive the termination of the retainer and can therefore be used to ground an injunction to prevent a solicitor from acting against a former client.[98] In most other jurisdictions however,[99] it is only the duty to maintain confidentiality that survives the conclusion of the retainer.[100] In *Ismail-Zai*, Steytler P suggested that it may not ultimately matter whether the duty of loyalty continues past the retainer because

> there may be little distinction, for any practical purpose, between the question whether there is a breach of a continuing duty of loyalty, on the one hand, and the questions whether there is a real risk of a breach of confidence and whether there is or will be other impropriety of a kind that is likely to undermine the integrity of the judicial process and the due administration of justice (which comprehends the appearance of justice), on the other hand.[101]

94 See *ASCR* (n 10) rr 10.2, 11.3.

95 And the opposite of arrangements that Dallen (n 8) suggests are commonly made between large commercial law firms and their clients, which he describes as 'expressly exclud[ing] any obligation to provide a client with confidential information belonging to another client': at 430.

96 This may also avoid situations, as in *Rosen* (n 61), where the former client was initially happy for Mr Rosen to act in a situation of conflict (having been 'told by Mr Rosen that confidentiality was not a problem') but whose later withdrawal of that consent was accepted by the Tribunal and eventually led to the finding of unsatisfactory professional conduct against Mr Rosen being upheld on appeal: at [33] (McMurdo P).

97 Although a breach of the duty of confidentiality and the inherent jurisdiction grounds are also available: Goubran (n 8) 113.

98 *Spincode* (n 8) 525 [59] (Brooking JA). See also *ASCR Review Final Report* (n 8) 51, citing Brooking JA's comments in *Spincode* (n 8).

99 Including New South Wales: Goubran (n 8) 120, quoting *Sent* (n 79) [101] (Nettle J) (citations omitted).

100 For a comprehensive analysis of the extent to which the duty of loyalty survives the retainer: see Goubran (n 8) 115, 126–32. See also Dallen (n 8) 434.

101 *Ismail-Zai* (n 68) 388 [24].

The potential for conflict involving the duty of loyalty is most pronounced where solicitors wish to act concurrently for multiple clients whose interests are adverse.[102] In an influential article,[103] senior barrister Mr Sandro Goubran KC, has suggested that 'the court will generally have the widest possible jurisdiction and the strictest approach to the discharge of its power',[104] and 'the applicant or plaintiff need do no more than set out the fact that the lawyer is presently acting for two or more clients in relation to matters which are the same or closely related and that the clients' interests are adverse'[105] in order for the court to issue an injunction.[106]

The duty of loyalty may also be invoked where the solicitor owes a duty to a client which conflicts with their own interests, such as where the solicitor intends to enter into a transaction with the client,[107] or is to be a beneficiary or executor under the client's will.[108] As I argue in Part IV, the intersection between duty and interest is also relevant to the provision of informed consent — even where the primary conflict is between clients.[109]

D *Conflicts Involving Loyalty and the Requirements of the ASCR*

The *ASCR* deal with conflicts involving loyalty under rr 11 (conflicts involving current clients) and 12 (conflicts involving the solicitor's own interests).[110] Rule 11 allows firms to act for multiple clients in situations of potential conflict, provided each client is aware of the situation and has given informed consent to it.[111]

102 Dallen (n 8) 431, citing *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 47–8 [204] (Spigelman CJ, Sheller and Stein JJA) (citations omitted).

103 Which has been cited in judgments of the Federal Court of Australia, Supreme Courts of New South Wales and Tasmania, Family Court of Australia and High Court of Kwasulu-Natal: see, eg, *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252, 268 [60] (Beach J) ('*Dealer Support*'); *McGuirk v Kirby* [2011] NSWSC 677, [8] (Harrison AsJ); *Styles v O'Brien* (2007) 16 Tas R 268, 274 [18] (Crawford J); *Buick v Boesten* [2013] FamCA 208, [45] (Dawe J); *Wishart v Blieden* [2013] 6 SA 59, 27–8 [46], 29–30 [48] (Gorven J) (High Court).

104 Goubran (n 8) 107.

105 Ibid 114.

106 Goubran also questioned whether the recognition of GTKY factors may have widened the possibility for matters to be connected, but ultimately concluded that the decision in *Yunghanns* (n 65) 'reinforces, rather than diminishes, the requirements that: there must be a connection between the two underlying matters (they must be the same or closely related); and that the parties' interests must be adverse to each other, before a court should exercise its jurisdiction to restrain a lawyer from acting': Goubran (n 8) 108–9.

107 See, eg, *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204.

108 *ASCR* (n 10) r 12.4 deals with this scenario explicitly.

109 See below n 181 and accompanying text.

110 *ASCR* (n 10) rr 11–12.

111 Ibid r 11.3.

The general law does not proscribe solicitors from acting where there is a conflict or potential conflict, nor require that informed consent be obtained per se.[112] Rather, the approach adopted under the general law focuses on whether there has been a breach of duty (either as a fiduciary or under the contract of retainer), in which case informed consent may act as a defence.[113]

Where there is no consent, then, under the general law, the solicitor must either perform the duty to both clients 'as best he can',[114] or, if he cannot, then he may need to perform the duty owed to one client only, and pay compensation for a breach of duty to the other.[115]

The alternative to the use of informed consent as a defence for what would otherwise constitute a breach of duty, is to limit the scope of the retainer from the beginning, in order to reduce or remove the scope for conflict.[116] Goubran suggests that this option is of limited utility, given that — at some point — the retainer may be so restricted that the client cannot be said to be receiving the service for which they sought to retain the solicitor in the first place.[117] There is also a risk that, despite the purported limitation, the solicitor might incur additional duties by providing advice beyond the initial scope of the retainer.[118]

Where, despite these measures, an actual conflict arises between the duties owed to two or more current clients, the *ASCR* allow the solicitor to continue to act for one client ('or … two or more … clients between whom there is no conflict')[119] only where the other client has given informed consent to that arrangement, and the duty of confidentiality to all clients is maintained.[120]

As the discussion in Part IV will identify, it is likely to be important (both in terms of the *ASCR* and under the general law) that the clients have provided consent before the actual conflict arises, because once it has (and particularly if the conflict also involves a duty of confidentiality) it may be difficult to provide the level of information required for consent to be 'informed', without breaching another duty.

112 *Clark Boyce* (n 22) 435 (Lord Jauncey for Lords Goff, Jauncey, Lowry, Mustill and Slynn); *Maguire* (n 20) 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also Goubran (n 8) 137.

113 *Maguire* (n 20) 466–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also Goubran (n 8) 137. The onus of proving the defence falls on the solicitor: *Atanaskovic Hartnell* (n 11) 558 [66] (Gleeson JA).

114 *Hilton* (n 40) 579–80 [44] (Lord Walker).

115 Ibid.

116 Goubran (n 8) 138. See also ibid 575 [30], citing *Hospital Products* (n 91) 97 (Mason J).

117 Goubran (n 8) 138–9.

118 Ibid 138 n 328, quoting Charles Hollander and Simon Salzedo, *Conflicts of Interest & Chinese Walls* (Sweet & Maxwell, 2nd ed, 2004) 61.

119 *ASCR* (n 10) r 11.5.

120 Ibid.

E *Conflicts of Loyalty — 'Short-Term Legal Assistance Services'*

The recent revisions to the *ASCR* relax the requirements of r 11 for solicitors providing 'short-term legal assistance services'.[121] The changes were intended to increase access to justice for clients needing urgent and short-term assistance, in circumstances where meeting the standard requirements for conflicts checks and informed consent might 'result in a real risk of the client being denied access to legal assistance'.[122]

The changes apply to legal services that are:

1 *Discrete*, in the sense that they might involve specific tasks such as the provision of advice before a first court appearance or assistance with settling a court document that a client has drafted, rather than an ongoing retainer.[123]

2 *Short-term*, in the sense that there must be '[an] expectation by the solicitor and the client that the solicitor will not provide continuing legal advice or representation in the matter'.[124]

3 Provided by a *legal assistance service provider* or on a *pro bono* basis. 'Legal assistance service provider' is not defined in the *ASCR*, but is 'an umbrella term used in the *National Legal Assistance Partnership Agreement* … to refer to individual Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services'.[125]

4 Provided in 'circumstances where it is *not reasonably practicable*' to systematically 'screen for conflicts of interest'.[126]

Of these requirements, it should be noted that:

1 The expectation that the services will only be provided in the short-term does not prevent the engagement from continuing in the longer term.

2 The relaxations are not restricted to assistance provided by legal aid commissions or community legal centres, but potentially apply to any

121 Defined in ibid r 11A.4 as 'services offered by a solicitor to a client, whether through a legal assistance service provider or on a pro bono basis, with the expectation by the solicitor and the client that the solicitor will not provide continuing legal advice or representation in the matter'.

122 Ibid r 11A.1.

123 See, eg, *Rule 11A Review* (n 29) 6.

124 *ASCR* (n 10) r 11A.4.

125 *Rule 11A Review* (n 29) 8 (citations omitted), citing *National Legal Assistance Partnership* (Agreement, 1 July 2020) cl 6 <https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2023-04/National%20Legal%20Assistance%20Partnership%20-%20Multilateral%20Signed.pdf >.

126 *ASCR* (n 10) r 11A (emphasis added).

> legal services provided without cost. This is because the Ethics Committee recognised that restricting the relaxations to legal services provided by specific organisations 'would exclude … legal assistance provided by many other individuals and organisations to disadvantaged and vulnerable members of the community in urgent need'.[127]

The new r 11A.1 requires that, if the solicitor providing the services forms a reasonable belief that the solicitor cannot screen for conflicts of interest due to circumstances where it is not reasonably practicable as the time required to do so may result in a real risk of the client being denied access to legal assistance, the solicitor must ensure, to the extent reasonably practicable, that

> 11A.1.1 the solicitor has disclosed the nature of the services to the client, and
>
> 11A.1.2 there is no actual or potential conflict between the duties owed to the client and one or more other clients, and
>
> 11A.1.3 the client has given informed consent to the provision of the services.[128]

Given that r 11A.1 only applies to scenarios in which it is not practically possible to screen for conflicts, it may be difficult to obtain fully informed consent under the general law, given that two of the requirements for informed consent are:

1 That it be based on full disclosure; and

2 That what the client is agreeing to is explicit.[129]

Thus, it may be important that the terms of the consent focus on the risk that, if a conflict is later discovered, the solicitor may be required to withdraw with little notice.[130]

The requirement to withdraw if a conflict is later discovered is contained in r 11A.2.[131] Withdrawal is also inconsistent with the general law which — were informed consent able to be provided — would allow this to act as a defence to any claim for a breach of duty,[132] including the duty to disclose confidential information pertaining to another current or former client. Nevertheless, the requirement to withdraw if a conflict involving confidentiality or loyalty is later discovered may be appropriate. Rule 11A is directed at scenarios in which the extent of any conflict may not be known, and where the full disclosure required for informed consent may not have been met.

127 *Rule 11A Review* (n 29) 8.

128 *ASCR* (n 10) rr 11A.1.1–11A.1.3.

129 See below Part IV.

130 *ASCR* (n 10) rr 11A.2–11A.3 do not allow a solicitor to continue to provide short-term legal assistance services if a conflict involving loyalty or confidentiality is later discovered.

131 Ibid r 11A.2.

132 See generally *Maguire* (n 20) 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

Where it is known from the beginning that two members of the same firm wish to provide short-term legal assistance services to clients whose interests are adverse, r 11A.3 allows this to happen providing there is informed consent and 'measures are in place to ensure confidential information will not be disclosed'.[133]

This relaxes r 11[134] in the following ways:

1 The standard rule (r 11.3.1) requires that each client 'is aware that the solicitor or law practice is also acting for another client' before providing informed consent,[135] whereas r 11A.3.1 only requires informed consent to the *potential* for conflict.[136] Clients receiving short-term legal assistance may be unaware that the firm is also acting for other clients whose interests are adverse, and therefore their consent may not meet the requirements for full disclosure under the general law.[137]

2 Where confidential information is involved, the standard rule (r 11.4) requires that each client consent to the disclosure and use of that information for the benefit of the other, or to maintaining confidentiality through an information barrier. Conversely, r 11A.3.2 assumes that confidentiality is to be maintained in situations of short-term legal assistance but refers to this being done through the use of 'measures' (which are not further defined) rather than the formal requirements of an information barrier.[138]

Despite these purported relaxations, the professional conduct rules do not override the general law — even in situations where free, short-term legal assistance is being provided. Although there may be elements of justice that indicate there should be some flexibility in order to facilitate the pro bono representation of clients requiring short-term legal assistance,[139] the fulfilment of the duties of loyalty and confidentiality are also important for the appearance of the due administration of justice — including for short-term and pro bono clients.[140] The focus for solicitors must remain on whether informed consent is able to be provided — in particular, ensuring that the client understands precisely what it is that they

133 *ASCR* (n 10) r 11A.3.

134 Ibid r 11, which applies to conflicts involving current clients other than in the provision of short-term legal assistance services.

135 Ibid r 11.3.1.

136 Ibid r 11A.3.1.

137 See below Part IV.

138 *ASCR* (n 10) r 11A.3.2. This has specific elements including undertakings not to disclose confidential information, and physical and electronic separation of files: see, eg, Law Society of Queensland, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners* (Commentary, 29 November 2021) app B.

139 *ASCR* (n 10) r 11A purports to apply simply because the representation is pro bono, regardless of duration.

140 Ipp (n 5) 93, citing *Blackwell* (n 5) 360 (Davies and Lee JJ).

are consenting to.[141] This is especially important if the initially short-term engagement continues for a longer period.[142]

If a conflict is discovered or where a firm chooses to act for two clients whose interests are potentially adverse from the start, it is also important to heed the warnings given in *Hilton v Barker Booth & Eastwood* ('*Hilton*')[143] and more recently, *Atanaskovic Hartnell*.[144] Namely, where a solicitor chooses to act despite an actual or potential conflict, a mere recommendation to the client to seek independent legal advice or alternative legal representation may be insufficient to meet the ethical obligations of the general law. This will be discussed in more detail in Part IV.

F *Conflicts Between the Duty of Loyalty and the Solicitor's Own Interests*

Rule 12.1 of the *ASCR* contains a general prohibition against acting where there is a conflict between the solicitor's own interests, and their duty to the client. Unlike r 11, r 12 does not specify that a solicitor may act with the client's informed consent.[145] It is, however, likely that the capacity to obtain informed consent to a conflict of duty and interest is recognised by the general law.[146]

In *Atanaskovic Hartnell*, Gleeson JA expressed the view that the prohibition contained in r 12.1 does not override the general law[147] and that, 'if there is fully informed consent, there is no breach of r 12.1'.[148] Nevertheless, there may be situations in which it will be inappropriate for a firm to act, even with informed consent.[149]

Parts III and IV of this paper will address the elements of informed consent, and the circumstances in which — despite consent — it may be inappropriate for a firm to act. This analysis is also relevant where the conflict is between duties owed to multiple clients.

141 See below Part IV.

142 See below n 170.

143 *Hilton* (n 40) 576 [32] (Lord Walker).

144 *Atanaskovic Hartnell* (n 11) 556 [52], 560 [77] (Gleeson JA).

145 *ASCR* (n 10) rr 11–12, except where the solicitor is receiving a financial benefit from third parties in relation to dealings where they are representing a client, or from service providers to which they have referred the client: at r 12.4.3.

146 See, eg, *Maguire* (n 20); *Atanaskovic Hartnell* (n 11); *Harvey* (n 40). Goubran (n 8) points out that there may be a difference between the professional conduct rules and the court's approach and that ultimately, '[a] lawyer's fiduciary obligation is determined by a court of equity and not by the standards of the professional body, although the same conduct may amount to both a breach of fiduciary obligation and professional misconduct': at 101 (citations omitted).

147 *Atanaskovic Hartnell* (n 11) 564 [105] (Gleeson JA).

148 Ibid 564 [106] (Gleeson JA, Basten JA agreeing at 545 [1], McCallum JA agreeing at 570 [149]).

149 See below Part IV.

III INFORMED CONSENT AND THE ADMINISTRATION OF JUSTICE

The *ASCR* categorise conflicts according to the actors involved,[150] allowing solicitors in practice to identify the type of client with whom they are dealing and apply the relevant rules from there. Focusing on the type of client, however, risks de-emphasising the fundamental nature of the duties of confidentiality and loyalty and their connection to the administration of justice.[151] As David Andrew Ipp has pointed out,[152] although the duties that give rise to a conflict between the interests of different clients or those of the solicitor themselves are 'usually expressed as a fiduciary obligation arising out of the relationship between solicitor and client',[153] as officers of the court, solicitors also owe a duty *to the court* to avoid conflicts of interest.[154] The ability of solicitors and their clients to compromise the duties of confidentiality and loyalty using informed consent is necessarily limited by the solicitor's duty to the court. This means that, even where there is informed consent or some limitation of the retainer, the court may still intervene to grant an injunction under the court's inherent jurisdiction, where that is necessary to protect both the due administration of justice and the appearance of justice being done.[155]

The test for the exercise of this 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 the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.[156]

More recently, some courts[157] have preferred a formulation of the test which replaces 'would' with 'might',[158] although the 'weight of authority favours the

150 That is, conflicts involving former clients: *ASCR* (n 10) r 10; conflicts involving current clients: at r 11; conflicts involving the solicitor's own interests: at r 12.

151 Remedied (to some extent) by revisions to the *ASCR* which added headings for 'Duty of confidentiality' and 'Duty of loyalty' to r 11: ibid rr 11.2–11.4.

152 Ipp (n 5) 63.

153 Ibid 93.

154 Ibid.

155 Dallen (n 8) 437; Goubran (n 8) 136, 138.

156 *Kallinicos* (n 7) 582 [76] (Brereton J) (citations omitted).

157 See, eg, *Charisteas v Charisteas* (2022) 65 Fam LR 492, 499 [37] (Alstergren CJ, McClelland DCJ and Aldridge J) ('*Charisteas*'), citing *Porter* (n 7) 679–80 [113] (Lee J) and quoting *Mumbin* (n 7) [39] (Griffiths J).

158 Which 'conforms or coheres more closely with the test for apprehended bias': *Porter* (n 7) 679–80 [113]–[114] (Lee J), citing *Dyer v Chrysanthou [No 2]* [2021] FCA 641, [138] (Thawley J).

former *would* formulation'.[159] As the analysis in this section identifies, this lower standard may make it even more likely that a solicitor should not act where their independence is compromised, despite the client's consent.

The inherent jurisdiction may be exercised in addition to, or separately from, applications in respect of confidentiality and loyalty, because the idea that solicitors act 'with perfect good faith, untainted by divided loyalties of any kind' is 'central to the preservation of public confidence in the administration of justice'.[160] In some cases, and *regardless of the client's wishes*, the courts have explicitly recognised that it will be inappropriate or even impossible for a law practice to act in a situation of conflict, despite the provision of informed consent. In *Law Society (NSW) v Harvey* ('*Harvey*'),[161] Street CJ (referring to a conflict between duty and interest) reflected that there are situations in which '[t]he conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for and advise his client'.[162] According to the Court of Appeal in *Atanaskovic Hartnell*, this means that:

1 In some cases the circumstances of the solicitor's conflict of interest and duty may be so profound that the objective of the conflict rule (to preclude the solicitor being swayed by considerations of self-interest) can only be achieved if the solicitor does not act for the client;[163] and

2 In some cases it may not be 'even possible' for the solicitor to obtain the client's fully informed consent, in the sense of not being 'practically possible', given the high standard of disclosure required of the solicitor.[164]

For conflicts of duty and duty, a similar comment was made by Richardson J in *Farrington v Rowe McBride & Partners*.[165] Namely that, despite full disclosure and the informed consent of both clients, '*there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both*'.[166]

159 *Porter* (n 7) 680 [114] (Lee J) (emphasis in original), citing *Kallinicos* (n 7) 582 [76] (Brereton J), *Sent* (n 79) [113] (Nettle J), *El-Cheikh v Miraki* [2017] NSWSC 1765, [20] (McDougall J) and *Dealer Support* (n 103) 276 [94] (Beach J).

160 Ipp (n 5) 93 (citations omitted), citing *Blackwell* (n 5) 360 (Davies and Lee JJ). See also *Ismail-Zai* (n 68) 388 [24] (Steytler P). The ground may apply even if it is 'demonstrated that there is no risk of the misuse of confidential information': *Mumbin* (n 7) [39] (Griffiths J), citing *Dealer Support* (n 103) 276 [96] (Beach J) and quoted in *Porter* (n 7) 679 [113] (Lee J).

161 *Harvey* (n 40).

162 Ibid 170–1, quoted in *Atanaskovic Hartnell* (n 11) 561 [85] (Gleeson JA).

163 *Atanaskovic Hartnell* (n 11) 561 [87] (Gleeson JA, Basten JA agreeing at 545 [1], McCallum JA agreeing at 570 [149]).

164 Ibid 561 [88].

165 *Farrington* (n 40).

166 Ibid 90 (emphasis added), quoted in *Hilton* (n 40) 576 [31] (Lord Walker).

Aside from these warnings, none of the decisions examined the limits of informed consent in detail, or elucidated further the circumstances that indicate a firm should not act. Given that — in each of the decisions referred to above — the courts were referring to circumstances in which disclosure had been made and informed consent provided, the concern cannot be about client choice alone. Rather, and *despite the client's informed and willing choice to continue with the transaction*, there may still be something about the situation that makes it improper for a firm to act.

I contend that the crux of the issue is the importance of the appearance of solicitors' independence for the due administration of justice. The duties of loyalty and confidentiality are not only about the client's interests. They also form part of the administration of justice, by ensuring that the court is assisted by officers who are independent of obligations to multiple clients and unswayed by their own interests.[167] I suggest that this goes beyond actual independence and includes the appearance of independence. In *Atanaskovic Hartnell*, for example, the facts were so 'overlapping and complicated'[168] that AH could not complete the investigation for their client without in some way also gaining a benefit for themselves. This was enough to undermine the appearance of independence and of the due administration of justice, notwithstanding whatever arrangements the client was prepared to consent to, and however much AH might have argued that their own interest in the matter — rather than being a conflict — simply provided additional motivation to win the dispute in favour of their client.[169] This is because, although the client may be able to waive or modify a duty that is owed to them, client consent cannot be used to modify the duties of confidentiality and loyalty to the court, to such an extent that those duties become meaningless, or give the impression that justice is not being administered at all.[170]

I propose that the circumstances in which a firm ought not act are directed at situations in which the terms of the client's consent — or of the transaction itself — compromise the duty of loyalty and the appearance of the solicitor's independence to such an extent that the due administration of justice is also undermined. The recent re-formulation of the test for the exercise of the court's inherent jurisdiction from 'would' to 'might'[171] makes this even more important.

This is consistent with the High Court's approach in *Maguire v Makaronis* ('*Maguire*').[172] There, it did not matter that the transaction in question did not disadvantage the client. Rather, the solicitors' fiduciary duties meant that the court's approach was 'not so much to recoup a loss suffered by the plaintiff as to

167 Ipp (n 5) 93, citing *Nangus* (n 6) and *Blackwell* (n 5) 360 (Davies and Lee JJ). See also *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587, 590 (Thomas J), quoted in *Charisteas* (n 157) 499–500 [38] (Alstergren CJ, McClelland DCJ and Aldridge J).

168 *Atanaskovic Hartnell* (n 11) 561 [91] (Gleeson JA).

169 Ibid 562 [92].

170 See also Goubran (n 8) 138, quoting *Holborow* (n 33) [30] (Heenan J).

171 See above nn 157–9 and accompanying text.

172 *Maguire* (n 20).

hold the fiduciary to, and vindicate, the high duty owed [to] the plaintiff'.[173] In other words, the focus when dealing with conflicts of interest is not only on the terms of the transaction to the client, but is also about maintaining the appearance of loyalty, independence, and the due administration of justice.

Whilst the need for independence may be more pronounced in conflicts involving the solicitor's own interests, it nevertheless remains relevant for conflicts of duty and duty. Even there, the duty of loyalty to individual clients — and therefore the appearance of independence from the interests of other clients — plays an important role in the administration of justice. There is a limit beyond which the duties owed to multiple clients cannot be compromised without also compromising the appearance of independence. Moreover, being able to act for multiple clients concurrently also provides some benefits to a firm — because, for example, they do not lose the clients' business, in addition to benefitting from the fees involved in the transaction. This means that the solicitor's own interests remain relevant, even in conflicts of duty and duty.

Of course, if informed consent alone is sometimes insufficient to meet the firm's broader ethical obligations, then it may be difficult (in a practical sense) for a firm to know when they should or should not act. As Singaporean Law Academics Professors Man Yip[174] and Kelvin FK Low[175] point out,[176] decisions in this area need to strike an appropriate balance between upholding the fiduciary duty of loyalty and respecting the client's right to choose the arrangements that best suit them. Forcing a firm to resign from acting for one or more clients due to a conflict may ultimately result in the duty to neither client being met,[177] and there may be legitimate reasons why a client may wish to instruct a particular solicitor despite the potential for conflict — including, for example, because they have special knowledge or expertise that is important to the client.[178] There may also be access to justice considerations to take into account, such as those intended to be remedied by the revisions to r 11A.[179]

Rather than focusing only on the terms of the client's consent, therefore, I suggest that the circumstances in which a law practice should not act despite the provision of informed consent might be expressly considered as part of the administration of justice, applying the tests for the exercise of the court's inherent jurisdiction. That

173 Ibid 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ) (citations omitted). The court also quoted the 'formulation by Lord St Leonards LC in *Lewis v Hillman* that, if a transaction between solicitor and client is to stand, it must be "open and fair, and free from all objection", not merely "fair"': at 465, quoting (1852) 10 ER 239, 249.

174 Professor Man Yip is a Professor of Law in the Yong Pung How School of Law, Singapore Management University.

175 Professor Kelvin FK Low was a Professor in Law at the National University of Singapore at the time of the article's publication, but is now at the University of Hong Kong.

176 See, eg, Yip and Low (n 17) 345.

177 Ibid 344–5.

178 Ibid 349.

179 *ASCR* (n 10). Although it is queried whether these reflect the general law, as outlined in Part II.

is, in the circumstances (including the circumstances of the consent), would a fair-minded, reasonably informed member of the public consider that the solicitor ought not act, in the interests of the protection of the integrity of the judicial process and due administration of justice, including the appearance of justice?

This might be broad enough to take into account, on the one hand, that, where the client has been provided with full disclosure, obtained independent advice, and is not reliant on the solicitor-client relationship in providing consent, a reasonably informed member of the public would consider that the appearance of independence is not compromised, and the client's choice ought be respected. On the other hand, informed consent (or the circumstances in which it is obtained) cannot be used to compromise the appearance of independence to such an extent that the administration of justice is also undermined.

The final section of this paper outlines the elements of informed consent, and explains how meeting each of these makes it more likely that the client's consent will be regarded as sufficient. Conversely, where any of the elements cannot be met, this may suggest that a firm ought not act, despite a client's willingness to proceed with a transaction.

IV THE ELEMENTS OF INFORMED CONSENT

In *Maguire*, the High Court said: 'What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given.'[180]

Nevertheless, it is suggested that the following elements are relevant to determining whether a fair-minded, reasonably informed member of the public would consider that the appearance of independence can be maintained, and that the situation is therefore not one in which the firm should not act.

Throughout, it must be noted that informed consent (even to a situation where the primary conflict is between clients) also involves the solicitor's own interests to some degree, given that it acts as a defence against a claim of breach of duty, and allows the solicitor to avoid what would otherwise be the consequences of that breach.[181] In that sense, there is an inherent conflict between the solicitor's interests in obtaining consent, and those of the client, which may also have implications for the administration of justice.

180 *Maguire* (n 20) 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ) (citations omitted), cited in Dallen (n 8) 432.

181 See *Atanaskovic Hartnell* (n 11) 555 [46], quoting *Maguire* (n 20) 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ); 556 [52], 560 [77] (Gleeson JA).

1 *There must be full disclosure.*

The first element of informed consent is that, for consent to be 'informed', the client must have been provided with full disclosure, including 'a conscientious disclosure of all material circumstances, and everything known to [the solicitor] relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice'.[182]

In *Atanaskovic Hartnell*, informed consent could not be established because the client had never been told there was an actual conflict between their interests and those of AH. Rather, the conflict had been described in a reasonably vague way as '"potential" … or one that "may … possibly arise" in the future'.[183] Even the use of indefinite language to describe the conflict was found to be inaccurate and insufficient, given the trial judge had been satisfied that the interests of AH and those of their client were 'plainly at odds'.[184]

2 *Disclosure must consist not only of the facts, but how those facts affect the client's interests.*

Full disclosure must go beyond a mere statement of facts, and include explanation of how the facts affect the client's interests. In *Atanaskovic Hartnell*, AH had told the client that, in conducting the investigation into the conduct of its former employee, AH might become privy to information that would be relevant to a claim of vicarious liability against AH.[185] It had not adequately explained why this would be of benefit to AH, however — specifically, that AH might be able to use that information to defend itself against any future suit from the client.[186]

In relation to conflicts of duty and duty, it may be necessary to:

1 Warn clients who are being asked to consent to the disclosure and use of their confidential information as to how this might affect their interests.[187]

2 Ensure that current clients appreciate the risks involved in allowing a firm or solicitor to act for other clients in situations of potential conflict.[188] At the very least, current clients should be warned of the risk that, should an actual conflict arise, the firm may be prevented from acting for one or

182 *Harvey* (n 40) 170 (Street CJ).

183 *Atanaskovic Hartnell* (n 11) 557 [55] (Gleeson JA).

184 Ibid 559 [73], quoting *Atanaskovic Hartnell Supreme Court* (n 39) [88] (Hammerschlag J).

185 *Atanaskovic Hartnell* (n 11) 558 [68] (Gleeson JA).

186 Ibid 558 [64].

187 As required under *ASCR* (n 10) r 10.

188 As required under ibid r 11.

more clients[189] and that, as a result, the client may be forced to provide instructions to another firm or solicitor, potentially with little notice.

3 *The client must not be left to infer information.*

Disclosure must be extensive, and it is generally no answer (and may even make the situation worse) to disclose only some information and leave the client to infer or investigate the remainder themselves. In *Harvey*, the clients were told that the solicitor had an interest in the company in which their funds were to be invested, but 'were not given any real understanding' of the investments.[190] This was insufficient to meet the burden of disclosure, because it relied on the clients to investigate other relevant information for themselves.

4 *In determining what to disclose, the firm should consider what advice an independent solicitor would likely provide to the client.*

One way to determine whether adequate disclosure has been provided, is to stand in the position of an independent solicitor and consider what advice that person would give to the client. In *Atanaskovic Hartnell*, an independent solicitor would likely have advised the client to accept any settlement offered by Deutsche Bank and sue AH for the balance.[191] In *Hilton*, an independent solicitor would have looked more closely at Mr Bromage's circumstances, and advised Mr Hilton accordingly.[192] The fact that neither firm was able to provide this advice because it conflicted with the firm's own interests,[193] a duty owed to another client — or both,[194] ought have signposted that it was inappropriate for the firm to act, despite the client's purported consent.[195]

This is an important element. Where a firm is able to provide the level of disclosure that an independent solicitor would provide, it is more likely that a reasonably informed member of the public would consider that the appearance of justice is maintained, were the firm to act. Conversely, the inability to provide such disclosure — either because of a pre-existing duty of confidentiality, or because the firm's own interests are involved — suggests that the firm's independence may be compromised.

189 As noted above, where there is an actual conflict, ibid r 11.5 allows the firm to continue to act for one of the clients only. Even then, there must be informed consent, and the duty of confidentiality must be maintained.

190 *Harvey* (n 40) 162–3 (Street CJ).

191 *Atanaskovic Hartnell* (n 11) 557 [59] (Gleeson JA).

192 *Hilton* (n 40) 574–5 [26] (Lord Walker), quoting *Hilton v Barker Booth & Eastwood* (England and Wales High Court, Judge Maddocks, 28 September 2001).

193 See generally *Atanaskovic Hartnell* (n 11); *Hilton* (n 40).

194 In *Hilton* (n 40), the firm made the conflict worse by putting up the deposit for the transaction: at 573 [20] (Lord Walker).

195 In addition to the general law which prohibited acting for both vendor and purchaser in the same transaction: see generally ibid at 576 [31]–[32].

5 *The client's 'sophistication' does not excuse poor disclosure.*

Although the level of disclosure required may depend on the 'sophistication and intelligence' of the client,[196] a firm will not be excused from meeting 'the heavy burden of full disclosure'[197] simply because of the client's 'sophistication, experience [or] resources'.[198] This is particularly relevant where the firm's own disclosure has not been fulsome.[199]

Whilst this consideration may be most acute in conflicts of duty and interest, there may be circumstances in which the client's sophistication in a conflict of duty and duty is also insufficient to overcome a lack of full disclosure (particularly where the other elements of informed consent cannot be met). Firms must exercise caution when relying on 'sophisticated client' type arguments, and should not allow a client's eagerness to enter into a conflict transaction to dissuade the firm from providing full and appropriate disclosure.

6 *If the firm is not in a position to provide full disclosure, it may be inappropriate to act.*

The sixth element ties in with element four, but is worth emphasising. Where a firm is not in the position to provide the level of disclosure required by the preceding elements — particularly because this would conflict with the firm's own interests or a duty owed to another client — this may be a situation in which the appearance of independence is compromised to such an extent that the firm ought not act.

To an extent, it may be easier to provide the level of disclosure that is required where the conflict is between duty and interest, given that, in those circumstances, it is technically within the firm's power to disclose all relevant information. It may be harder to meet the burden of disclosure where there is a conflict of duty and duty, given that, where confidential information pertaining to another client is relevant, the firm may not be in a position to disclose this without the other client's consent.[200]

7 *The client cannot be reliant on their solicitor in giving consent.*

In addition to the preceding requirements, the client's consent must be given freely. This means that the client cannot appear to still be relying on the solicitor to take

196 *Atanaskovic Hartnell* (n 11) 556 [50] (Gleeson JA), quoting *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 139 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*'). See also Dallen (n 8) 431–2. See generally Goubran (n 8) 137, quoting *Clark Boyce* (n 22) 435 (Lord Jauncey for Lords Goff, Jauncey, Lowry, Mustill and Slynn).

197 *Atanaskovic Hartnell* (n 11) 560 [78] (Gleeson JA).

198 Ibid.

199 See, eg, ibid 557 [58].

200 See also Goubran (n 8) 137.

care of their best interests, despite agreeing to compromise the duties of confidentiality or loyalty. This also applies to the provision of consent in the sense that, where there is a pre-existing solicitor-client relationship, it is difficult to ensure that the client is not more comfortable agreeing to arrangements that compromise the solicitor's duties, because they trust that 'their' solicitor would not ask them to agree to anything inappropriate.[201]

Where the conflict is of duty and interest or there is a pre-existing solicitor-client relationship, then careful consideration should be given to determining whether the firm is in a position to act, and it will be important to ensure that the client's consent is not unduly influenced by their trust and reliance in the firm as a result of that relationship.[202] Whilst this may be most relevant to conflicts of duty and interest, it may also arise where another party is an existing client of the firm, and this lends a sense of credibility to the transaction. This was the situation in *Hilton*, where Mr Hilton was potentially less likely to look into Mr Bromage's background because he was also an existing client of the firm.[203]

Where these considerations apply, meeting the requirements for full disclosure will be even more important. Partial disclosure or downplaying the extent of any conflict 'may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest'.[204] In *Harvey*, for example, the solicitor's disclosure of his interests in the companies only made his clients more likely to invest in them. Rather, they ought have been given all information materially relevant to the transaction, *including* information that might have prevented them from investing.[205]

To an extent, the risk of reliance on the solicitor to take care of the client's interests may be reduced by independent legal advice.[206] Where there is a pre-existing relationship, a mere referral for advice may be insufficient, however, particularly where disclosure has been insufficient, or the extent of any conflict downplayed.

201 See, eg, *Harvey* (n 40) 163 (Street CJ).

202 In relation to conflicts of duty and interest, Street CJ observed in ibid 171 that

> [i]n varying degrees the trust of and reliance upon the solicitor to act fairly and independently arising from the initial preparedness of the solicitor and client to trade may remain as the reason why the client ultimately deals with the solicitor and not somebody else. It is difficult to be sure it does not.

203 See *Hilton* (n 40) 572–3 [15]–[20] (Lord Walker).

204 *Harvey* (n 40) 170 (Street CJ).

205 Ibid.

206 Ibid 170–1.

8 *The importance of independent legal advice.*[207]

If the conflict is between duty and interest, 'it will be a rare case where [the solicitor] should not, at least, advise his client to take independent legal advice'.[208] Independent advice reduces the risk that the client remains reliant on the solicitor-client relationship when providing their consent, and makes it more likely that the consent will be regarded as 'informed'. Conversely, where the client has provided their consent without having had the opportunity to obtain independent legal advice, any later withdrawal of that consent is more likely to be accepted by the courts.[209]

Depending on the circumstances and the extent of the conflict, however, a mere referral or recommendation to obtain independent advice may be insufficient. This is particularly so if the conflict is between the solicitor's own interests and those of the client, but also where the client has an existing relationship with the firm, or the firm is in possession of relevant information which they are unable to disclose to the client. Again, if the test for the exercise of the court's inherent jurisdiction is applied, a reasonably informed member of the public might consider that the consent of a client who has been provided with full disclosure and appropriate warnings (including to take independent advice) ought be upheld. Such warnings might be insufficient, however, where full disclosure has not been provided, or the client remains reliant on the solicitor to take care of their best interests. Where a client refuses to obtain independent advice or obtains the advice but still wishes the firm to act, deciding whether to act may involve considering the level of disclosure that has been provided to the client, and whether the client ultimately remains reliant on the solicitor-client relationship despite appropriate warnings.[210]

Where independent advice is obtained, it will be important that the advice is not general, but focuses on the specific conflict and the provision of consent. In *Atanaskovic Hartnell*, the client had been referred for — and taken — independent advice, and nevertheless instructed AH that they 'retained confidence' in it and had 'compelling practical reasons' for wanting them to continue to act in the investigation, despite the potential for conflict.[211] This was still insufficient to overcome the extent of the conflict, including because the independent advice had focused on 'the "whole position"'[212] (rather than the specific conflict), and the

207 See, eg, *Maguire* (n 20) 466–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ), citing *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 393 (Davies, Sheppard and Gummow JJ). See also Dallen (n 8) 432.

208 *Harvey* (n 40) 171 (Street CJ), quoted in *Atanaskovic Hartnell* (n 11) 561 [85] (Gleeson JA).

209 See, eg, *Rosen* (n 61) [33] (McMurdo P).

210 Where full disclosure has been provided and the client referred for independent legal advice, for example, then the firm may be found to have done 'all that was reasonably required of [them]': *Clark Boyce* (n 22) 437 (Lord Jauncey for Lords Goff, Jauncey, Lowry, Mustill and Slynn).

211 Email from AH to client dated 28 October 2017: *Atanaskovic Hartnell* (n 11) 548 [21].

212 Ibid 556 [52].

client had previously been told by AH that any claim against that firm would have 'poor claim prospects'.[213]

9 *Consent should be obtained before there is an actual conflict.*

The need for full disclosure means that informed consent should be sought and provided before a potential conflict turns into an actual one,[214] or before the firm is in possession of confidential information pertaining to one of the parties. Yip and Low suggest that, once an actual conflict occurs, 'it would be almost impossible for the [solicitor] to obtain the [client's] informed consent to authorise them to continue acting for both parties' because the duty of confidentiality would prevent the solicitor from making 'full and frank disclosure'.[215] There may, however, be 'unusual cases where the [solicitor] succeeds in obtaining the [client's] "informed consent"', in which case 'the "consent" may be characterised as a waiver of the right to pursue the breach that has occurred and authorisation of the [solicitor's] position of actual conflict, resulting in a narrowing of their duty going forward'.[216]

As outlined in Part II, r 11.5 allows a firm to continue to act for only one of the clients between whom there is an actual conflict ('the first client'), but only where the other client ('the second client') has provided their informed consent, and the duty of confidentiality to both clients is maintained.[217] Although the rule refers to informed consent only in relation to the second client, where the duty of confidentiality is to be maintained, it is likely to be necessary (under the general law) that the first client has waived the duty to use confidential information pertaining to the second client for the first client's benefit. Rule 11A is similar, effectively stating that the firm or solicitor cannot continue to act if a conflict is discovered, but may act where both clients have given informed consent.[218]

It may be difficult to meet the requirement for full disclosure in seeking such consent, however, where the firm is already in possession of relevant confidential information pertaining to one of the clients. This is particularly the case for short-term legal assistance services, where the relaxations to r 11[219] are directed at

213 Email to Mr Gordon and Mr Lancaster from Mr Atanaskovic dated 16 October 2017: ibid 547 [19]. On appeal, the court was satisfied that 'there was no evidence that Birketu obtained advice on the actual conflict of interest which existed': at 560 [77] (Gleeson JA).

214 *ASCR* (n 10) r 11.5 states that a solicitor or law practice can only continue to act for one of the clients in the event of an actual conflict if there is informed consent and the duty of confidentiality is not put at risk.

215 Yip and Low (n 17) 353. In the quotation, Yip and Low refer to 'fiduciary' (the party that owes the duty of loyalty) and 'principal' (the party to whom the duty is owed) because their analysis applies to fiduciaries generally (not only solicitors). I have replaced the authors' descriptions with 'solicitor' and 'client' where indicated, as this makes more sense within the context of this article.

216 Ibid 353–4.

217 *ASCR* (n 10) r 11.5.

218 Ibid r 11A.

219 Ibid r 11. See above nn 121–44 and accompanying text.

scenarios in which it may be impractical to screen for conflicts until the representation is already underway.

The firm's own interests may also be more pronounced in a situation of actual conflict, given that the consent would allow them to continue to act for one of the clients (or all clients, in the case of short-term legal assistance services) whilst avoiding the consequences of a breach of fiduciary duty.

The key issue is, I think, whether the firm can maintain the appearance of independence in obtaining informed consent. Where they have never acted for either client and therefore have no perceived loyalties nor relevant confidential information, then they can more easily explain the risks and gain the clients' consent to what might occur in future. In that case, informed consent might be used to prevent a potential conflict from becoming an actual one.[220] Conversely, where the firm has already acted for one or more of the clients, or is already in possession of relevant confidential information, then the terrain of obtaining consent that is appropriately informed and freely given becomes more difficult to navigate without compromising the appearance of independence that is necessary for the due administration of justice.

10 *The client's consent must be given explicitly[221] and must reflect exactly what it is that the client is agreeing to.*

In *Atanaskovic Hartnell*, AH had described the document which purported to contain their disclosure and the client's informed consent as 'administrative or "paperwork"'.[222] Describing the document in this way to the firm's client was 'inapt, given the importance of the purported disclosure by AH in the retainer letter'.[223] Although '[c]onsent can be established "at different times and in different ways"',[224] the client must be aware that they are providing consent, and the mere fact that a conflict exists (whether the client is aware of it or not) cannot be used to imply some modification of duty, without the client's explicit agreement.[225]

220 See Yip and Low (n 17) 357.

221 *Hilton* (n 40), discussed in ibid 354–5, 357.

222 *Atanaskovic Hartnell* (n 11) 557 [60].

223 Ibid (Gleeson JA).

224 Ibid 556 [50], quoting *Farah Constructions* (n 196) 139 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). Cf Kirby J in *Maguire* (n 20), who described the solicitors' duty as to make 'full and frank disclosure of all material facts' and 'on the basis of full disclosure, to secure the express concurrence of the clients for the involvement of their personal interest': at 483 (citations omitted).

225 In *Hilton CoA* (n 92), the Court of Appeal had been prepared to find that there was an 'implied exclusion [as part of the firm's retainer with Mr Hilton] from any general duty of disclosure of that which they are legally obliged to treat as confidential': at [32] (Morritt V-C), quoted in *Hilton* (n 40) 577 [37] (Lord Walker). The House of Lords disagreed, finding that the failure to disclose relevant facts about Mr Bromage to Mr Hilton was a second breach of the firm's duty: at 578 [38] (Lord Walker, Lord Hope agreeing at 569 [2], Lord Scott agreeing at 569 [3], Lord Brown agreeing at 581 [48]).

The terms of the consent must outline the extent of the conflict, and exactly what it is that the client is agreeing to. In *Maguire*, for example, the applicable professional conduct rules prevented a solicitor from acting for both lender and borrower in the same transaction without obtaining a written acknowledgement from the clients in an approved form.[226] Although the solicitors in that case had obtained this approval, the High Court found that it did not satisfy the solicitors' *fiduciary* obligation, because its terms did not expressly deal with the conflict of duty and interest that arose because it was the solicitors themselves who were to hold a mortgage over the client's property, which had not been disclosed to the client.[227]

In a practical sense, it is likely to be easier for a firm or solicitor to prove that consent has been given, where the nature of the conflict and exactly what the client is agreeing to, is clear and explicit. Given that the consent acts as a defence against a claim of breach of duty, it is in the firm's interest to treat consent as requiring clear evidence, not just signing a standard form client agreement.

11 *Where the firm cannot act due to a conflict, a mere refusal and referral to another solicitor may not be sufficient to meet the firm's fiduciary obligations.*

Where there is an existing relationship with a client, or the firm is already in a position of conflict, it may be necessary, in addition to refusing to act and encouraging the client to seek alternate representation, to warn the client that their new solicitors should not concentrate only on what information the firm has already provided, but should 'start[] afresh'.[228]

In *Hilton*, Barker Booth & Eastwood was not in a position to provide Mr Hilton with the advice that an independent solicitor would have provided, given their obligation of confidentiality to Mr Bromage. Not only that, but the firm had lent money to Mr Bromage, a fact which was also unknown to Mr Hilton. Simply refusing to act, whilst consistent with the firm's ethical obligations, would not have been enough to meet those obligations. Rather,

> [t]heir duty was to inform Mr Hilton (first) that they could not act for him and (second) that he should seek legal advice from other solicitors, starting afresh (and not relying on any advice that he might already have received from BBE). A bare refusal to act, without clear advice about going to new solicitors [that is, without a recommendation to seek independent advice], would not have been sufficient to discharge their duty.[229]

226 *Maguire* (n 20) 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

227 Ibid 460 (Brennan CJ, Gaudron, McHugh and Gummow JJ), 481 (Kirby J).

228 *Hilton* (n 40) 576 [32] (Lord Walker).

229 Ibid.

The imperative that independent legal advice 'start[] afresh'[230] and not rely on any information that has previously been given to the client (or on the strength of an existing solicitor-client relationship) is also likely to be relevant to independent advice given in relation to the provision of informed consent, as outlined in element eight.

V CONCLUSION

As Goubran suggests, determining whether a solicitor should be permitted to act in a situation of conflict involves balancing multiple considerations, including client choice, the appearance of justice and (he argues) ensuring the viability of the legal profession by ensuring that solicitors and their clients are not unduly restricted.[231] Where full disclosure is able to be provided and the client is therefore in a position to provide fully informed consent, that consent may potentially be used to allow the solicitor to act for multiple clients without breaching the professional conduct rules, as well as acting as a defence to a claim of breach of duty under the general law.

Nevertheless, there is something special about the relationship between solicitors and their clients that means that, even if full disclosure is provided and informed consent obtained, there may still be something about the situation that means that the firm should not act. In this article, it has been argued that those circumstances are directed at the solicitor's role in the administration of justice and the importance of the appearance of independence from other interests, including the solicitor's own interests and those of other clients. That is, and despite the provision of informed consent, the dilution of the solicitor's duty cannot be so great that it compromises their independence and loyalty — not only to their clients, but as officers of the court. To that end, I suggest that the appropriate test for whether the client's consent ought be upheld, is whether a fair-minded, reasonably informed member of the public would consider that the solicitor is in a position to act. In doing so, it would be best that they have regard to the elements set out above.

230 Ibid.

231 Goubran (n 8) 143.