Conflicts of Interest & Chinese Walls by Charles Hollander QC and Simon Salzedo (London: Sweet & Maxwell, 2000) pages i–xxxi, 1–272. Price £125.00 (hardcover) ISBN 0 421 73140 0.

Around the world, professional service providers such as lawyers and accountants are increasingly exposed to allegations that they are acting in the face of a conflict of interest. This is due to the increase in the size of professional service firms, the corresponding rise in market concentration, and the growing mobility of both professionals and clients between firms. Australia has witnessed a fairly dramatic increase in the number of conflicts cases before its courts, with increases also occurring in other common law jurisdictions such as Canada and the United Kingdom. Unfortunately, unlike the highest courts in those countries, the High Court of Australia has not yet considered the appropriate rule for conflicts of interest cases and this important area remains more uncertain and confused than it should be. At least until the matter is considered by the High Court, foreign judgments and analysis will remain very useful and influential. Indeed, courts in a number of Australian jurisdictions have expressly held that, in relation to former client conflicts, the principles set out in the most recent decision of the House of Lords[1] in this area apply.[2]

For this reason, *Conflicts of Interest & Chinese Walls*[3] is of real relevance to the Australian jurisdiction. In this book, barristers Charles Hollander QC and Simon Salzedo set out to examine the modern English rules concerning conflicts of interest, following the increased awareness and activity generated in this area by *Bolkiah v KPMG*[4] in 1998 and by Lord Hoffmann's role in the hearings regarding Augusto Pinochet's proposed extradition[5] in 1999.[6] The book has a broad scope, covering conflicts of interest faced not only by lawyers, but also by company directors, financial services firms, accountants, estate agents, insurance brokers and the judiciary. It seeks to explain the legal and equitable underpinnings of the laws governing conflicts of interest while providing practical advice on matters such as managing conflicts by contract,[7] 'beauty parades'[8] and Chinese Walls.[9]

1 *Bolkiah v KPMG* [1999] 2 AC 222 ('*Bolkiah*').

2 See, eg, *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Prior and Bleby JJ, 18 June 1999); *Newman v Phillips Fox* (1999) 21 WAR 309; *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000).

3 Charles Hollander and Simon Salzedo, *Conflicts of Interest & Chinese Walls* (2000).

4 [1999] 2 AC 222.

5 *R v Bow Street Metropolitan Stipendiary Magistrates; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, rev'd *R v Bow Street Metropolitan Stipendiary Magistrates; Ex parte Pinochet Ugarte [No 2]* [2000] 1 AC 119 ('*Pinochet's case*').

6 Hollander and Salzedo, above n 3, 1.

7 Ibid ch 4.

8 Ibid 17–18.

9 Ibid ch 7.

In his foreword, Justice Aikens describes the book as a 'trail-blazer'.[10] Indeed, the authors themselves state that their book is, 'so far as we are aware, the first book published in this jurisdiction devoted to an analysis of the circumstances in which conflicts of interest arise, the remedies, the ways of avoiding the problems, the ways of constructing Chinese Walls.'[11] This comprehensive book is therefore a welcome addition to the field. Several other books on this and related topics may also be of interest to readers, particularly when read in conjunction with *Conflicts of Interest & Chinese Walls*. For example, Paul Perell, *Conflicts of Interest in the Legal Profession* (1995) examines the Canadian position, aiming (like Hollander and Salzedo) to provide practical guidance, but concentrating on the legal profession. Also of likely interest are Chizu Nakajima, *Conflicts of Interest and Duty: A Comparative Analysis in Anglo-Japanese Law* (1999) and the more recent publication, Michael Davis and Andrew Stark (eds), *Conflict of Interest in the Professions* (2001). Finally, readers may wish to consult the various works of Professor Finn on this issue.[12]

In a sense, the book divides into two parts. The first part (chapters 1 to 8) examines the general principles involved in conflicts of interest. Early on, in chapter 2, the authors explain the facts, decisions and importance of *Bolkiah*[13] and the more recent case *Young v Robson Rhodes*.[14] Chapter 3 considers the fundamental rules governing conflicts of interest arising from the fiduciary obligations of professionals, while chapter 4 examines how contract or consent (whether express or implied) may affect the manner in which these rules are applied. Chapter 5 covers the obligation of an individual professional or a firm to disclose relevant knowledge to clients, as well as the circumstances in which the knowledge of an individual professional will be attributed to that individual's firm. Remedies for acting in the face of a conflict (for example, in breach of a duty of loyalty or confidentiality) form the topic of chapter 6. Chinese Walls are, of course, mentioned throughout the book, but chapter 7 is devoted specifically to them. Finally, chapter 8 discusses how the general principles are applied in practice and to certain generic kinds of conflicts such as personal conflicts. The second part of the book (comprising chapters 9 to 15) concerns specific professionals or conflict situations: judicial conflicts, directors, financial services, takeovers, lawyers, accountants and, finally, estate agents and insurance brokers.

Despite the book being firmly centred on English law, it provides a valuable resource for Australian lawyers, academics and students among others (although some may find the price prohibitive). Hollander and Salzedo consider the rules of some other countries, such as Australia, Canada and the United States, at certain points in the book.[15] More importantly, as mentioned above, decisions of

[10] Ibid v.

[11] Ibid 3.

[12] See, eg, Paul Finn, *Fiduciary Obligations* (1977); Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) 7.

[13] [1999] 2 AC 222. See generally Andrew Mitchell, 'Chinese Walls in Brunei: *Prince Jefri Bolkiah v KPMG*' (1999) 22 *University of New South Wales Law Review* 243.

[14] [1999] 3 All ER 524 ('*Robson Rhodes*').

[15] These are listed by country in the index.

the House of Lords on conflicts of interest and Chinese Walls are highly influential in Australian courts and are likely to remain so, at least until the High Court of Australia rules in this area. In addition, the book examines underlying policy considerations relating to conflicts of interest, as well as the practical implications of choosing particular rules for governing such conflicts. Particularly given the highly concentrated nature of the Australian market for the supply of legal services by solicitors, these issues are of equal, if not greater, concern in this country. However, Australian readers may find the second part of the book of less direct relevance because it relates more closely to the legislation and professional guidelines of the United Kingdom than do the other chapters.

The introduction in chapter 1 contains a helpful description of several meanings of 'conflict of interest', defining the following terms used throughout the book: existing client conflict, former client conflict, personal conflict, commercial conflict, judicial conflict, and Chinese Wall.[16] In describing an existing client conflict, and later in the book,[17] the authors emphasise that a professional (or firm) cannot act for two clients with opposing interests at the same time without their consent, not because of the risk of disclosure of confidential information, but because of the 'conflict of interest inherent in the situation.'[18] This phrase of itself is of limited assistance but it is explained further in chapter 3. Confidential information forms the basis of a former client conflict, where the risk is that a professional may use confidential information disclosed by a former client to assist a current client. A similar problem of confidentiality arises in an existing client conflict. However, such a case also entails the greater risk that the professional will be unable or unwilling to uphold the interests of a client when acting against that same client in another matter.[19] Thus, a fiduciary's obligation consists of four facets, each of which may be at issue to a greater or lesser degree in a particular case: no conflict, no profit, undivided loyalty, and confidentiality.[20] Of these facets, the content of the duty of loyalty is the most uncertain. As noted by Glover, judges sometimes use this phrase as 'a rationale of judicial intervention [rather] than an independent rule governing when it will occur.'[21] The authors have had only slightly more success in clarifying this duty than the judges — it should be done away with.

At the beginning of chapter 3 the authors introduce a view that recurs throughout the book — namely, that 'equitable rules [regarding existing client conflicts], when coupled with the rules that focus on firms and partnerships rather than individuals owing fiduciary duties, have lagged behind modern commerce and need reconsideration.'[22] Many commentators in various jurisdictions take a similar view with respect to existing and former client conflicts given the increasing size of professional firms and their frequently national or international

16 Hollander and Salzedo, above n 3, 3–5.
17 Ibid 12, 97.
18 Ibid 3, citing *Bolkiah* [1999] 2 AC 222, 235 (Lord Millett).
19 Hollander and Salzedo, above n 3, 27.
20 Ibid 14.
21 John Glover, 'Conflicts of Interest and Chinese Walls' (2001) 15 *Trust Law International* 61, 62.
22 Hollander and Salzedo, above n 3, 33. See also at 36, 66.

nature, as well as growing multidisciplinarity.[23] On the other hand, some writers maintain that strict rules are required to protect clients' interests and that courts should carefully scrutinise Chinese Walls before allowing them to justify what would otherwise be a conflict of interest.[24] In the end, the appropriate result will typically depend on the particular facts of the case, including the size of the firm, the extent of conflicting interests between the clients, and the precise nature of any Chinese Wall. In chapter 5, Hollander and Salzedo explain the difficulties of imposing on a professional or firm an obligation to disclose to an existing client all relevant information, however confidential, obtained from previous clients. In the case of a firm, such a wide-ranging obligation would preclude any use of Chinese Walls at all.[25] One line of cases dealing with this issue has arisen where a solicitor acts for a lender in circumstances where the solicitor already acts for the borrower. In such cases, the solicitor is only obliged to disclose to the lender information received in the course of carrying out the given instructions, and not information obtained independently of those instructions (such as that previously learned from the borrower).[26] While acknowledging that these cases might be distinguished on the basis of inferred consent,[27] the authors suggest that they might alternatively establish a principle of general application, not restricted to borrower–lender cases or cases of inferred consent.[28]

Practitioners, in particular, may be tempted to turn directly to chapter 7, which focuses on Chinese Walls. These devices, whether referring to the paper walls that spawned the game of 'Chinese whispers'[29] or (as this book maintains) the Great Wall of China,[30] may provide one of the few practical solutions to the steady growth in the number of conflict situations that has resulted from the development of the 'mega-firm'. Hollander and Salzedo describe a Chinese Wall as 'an information barrier within the firm which is intended to ensure that information available to or known by certain members of the firm is not available to other members of the firm.'[31] As the law currently stands, a professional cannot rely on such a barrier to escape liability for an existing client conflict.[32] This flows from the view, mentioned above, that the primary difficulty with such a situation is not confidentiality, but inherent conflict of fiduciary duties.

[23] See, eg, Audrey Benison, 'The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants' (2000) 13 *Georgetown Journal of Legal Ethics* 699, 700–1; Janine Griffiths-Baker, 'Further Cracks in Chinese Walls' (1999) 149 *New Law Journal* 162, 175; Mitchell, 'Chinese Walls in Brunei', above n 13; Andrew Mitchell, 'Whose Side Are You on Anyway? Former Client Conflict of Interest' (1998) 26 *Australian Business Law Review* 418.

[24] Harry McVea, '"Heard It through the Grapevine": Chinese Walls and Former Client Confidentiality in Law Firms' (2000) 59 *Cambridge Law Journal* 370, 372, 389. See also Mark Waller, 'Review: Conflicts of Interest and Chinese Walls' (2001) 117 *Law Quarterly Review* 335, 337–8.

[25] Hollander and Salzedo, above n 3, 65–7.

[26] Ibid 67–71.

[27] See Waller, above n 24, 336–7.

[28] Hollander and Salzedo, above n 3, 73–4.

[29] John Quarrell, 'Modern Trusts in Legal Education' (1991) 5 *Trust Law International* 99, 103–4.

[30] Hollander and Salzedo, above n 3, 96, fn 1.

[31] Ibid 96.

[32] Ibid 97.

Therefore, in general,[33] a practitioner wishing to act for clients with opposing interests at the same time will need each client's explicit consent to a Chinese Wall and agreement as to its effects. Moreover, even this consent may be insufficient to save the professional from breaching fiduciary obligations to act for one client without being inhibited by the existence of the other client, and to avoid any actual conflict (whereby it is impossible to fulfil obligations to one client without breaching obligations to the other).[34]

Different considerations apply to the use of Chinese Walls in former client conflicts, primarily because the major risk in these cases is disclosure of confidential information of the former client to the current client (or use of such information other than for the benefit of the former client).[35] The authors explain that, under *Bolkiah*, a court should restrain a firm from acting in these circumstances, unless the court is satisfied that there is no risk (meaning a real but not necessarily substantial risk) of disclosure. A court can so satisfy itself only 'on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur'.[36] This is a stringent test to apply to Chinese Walls, and the authors query whether it is justified, given the existence of case law indicating that the extent of a firm's obligation of disclosure to the current client is only to pass on information learned in the course of acting for that client.[37]

It is interesting to compare the current English test governing former client conflicts to that applied in Australia, as the authors themselves do briefly.[38] Before *Bolkiah*, the leading test in Australia was contained in the judgment of Hayne J in *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd*,[39] where his Honour stated that an injunction preventing a firm from acting would be given where there was a 'real and sensible possibility of the misuse of confidential information.'[40] This was very similar to Lord Millett's test in *Bolkiah*,[41] although it differed in one key respect: the *Farrow* test placed the onus on the plaintiff to show the possibility of misuse of the plaintiff's confidential information rather than requiring the defendant to show that there was no possibility of such misuse.[42] Today, Australian courts are likely to apply the principles outlined in *Bolkiah* when resolving these cases.[43]

[33] The rules may differ where the *Financial Services Act 1986* (UK) applies: ibid ch 11.

[34] Hollander and Salzedo, above n 3, 98, 117–18.

[35] Ibid 98.

[36] *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249, 269 (Sopinka J); approved by Lord Millett in *Bolkiah* [1999] 2 AC 222, 237, '[w]ith the substitution of the word "effective" for the words "all reasonable"': at 238.

[37] Hollander and Salzedo, above n 3, 100, referring to ch 5 of the book, which deals with borrower–lender cases, as discussed above.

[38] Ibid 101.

[39] [1995] 1 VR 1 ('*Farrow*').

[40] Ibid 5.

[41] See *Colonial Portfolio Services Ltd v Nissen* [2000] NSWSC 1047 (Unreported, Rolfe J, 7 November 2000) [143]; *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSC 287 (Unreported, Warren J, 17 August 2001) [32].

[42] *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000) [116].

[43] See above n 2.

In a recent decision, the Victorian Court of Appeal dismissed an appeal, ruling that there was no reason to doubt the Supreme Court's finding that 'the appellant had failed to show that there was no real risk of the misuse of the confidential information and that the respondents had shown a real and sensible possibility of that misuse.'[44] Strictly, this decision did not determine whether *Bolkiah* or *Farrow* should be followed. Brooking JA, in obiter dicta, made lengthy comments about two other independent bases on which the decision could have been made apart from the danger of misuse of confidential information: breach of the fiduciary's duty of loyalty,[45] and the desirability of restraining the solicitors as officers of the court.[46] These comments are instructive of how the High Court of Australia might decide a similar decision in the future.

Chapter 9 concerns judicial conflicts, such as where a judge or other arbitrator in a particular case has some relevant prior or ongoing personal, professional or financial relationship with one of the parties. As foreshadowed above, the House of Lords' decision in *Pinochet's case* has renewed interest in this area. In an unusual move, the House of Lords granted a petition by Pinochet to set aside its order of 25 November 1998 on the basis that Lord Hoffmann, who had heard the case, was a director and chairperson of Amnesty International Charity Ltd.[47] The Appellate Committee of the House of Lords considered that Lord Hoffmann had a longstanding involvement in the cause of Amnesty International and was therefore effectively a party in the relevant appeal, since Amnesty International had been granted leave to intervene in the appeal. Hollander and Salzedo go behind and beyond the circumstances of this case to explain the possibility of actual bias — as distinct from a perceived possibility of bias arising from a tribunal's direct pecuniary or proprietary interest,[48] or (following *Pinochet's case*) non-pecuniary interest, in a given cause.[49] Importantly, the authors raise the issue of whether art 6 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*[50] might alter the common law test of 'real danger or possibility of bias'[51] in cases of alleged danger of bias so that it becomes something closer to a 'reasonable suspicion or reasonable apprehension' test.[52] As the High Court of Australia noted in *Ebner v Official Trustee in Bankruptcy*,[53] the common law in this area has developed slightly differently in Australia than in England. The general principle applied to cases of apprehended

44 *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 (Unreported, Brooking JA, Ormiston and Chernow JJ, 21 December 2001) [24] (Brooking JA).

45 Ibid [42]–[53].

46 Ibid [32]–[40].

47 *Pinochet's case* [2000] 1 AC 119. See also Kerry Abadee, 'Lessons from the Pinochet Case for the Bias Rules of Procedural Fairness in Its Application to Australian Judges' (2000) 8 *Australian Journal of Administrative Law* 19; Andrew Mitchell, 'Leave Your Hat On? Head of State Immunity and Pinochet' (1999) 25 *Monash University Law Review* 225, 244; Michael Zander, 'Who Judges Matters' (1999) 149 *New Law Journal* 5; John Caldwell, 'The Pinochet Saga' [1999] *New Zealand Law Journal* 103.

48 *Dimes v Proprietors of the Grand Junction Canal* [1852] 3 HL Cas 759; 10 ER 301.

49 Hollander and Salzedo, above n 3, 123–5.

50 Opened for signature 4 November 1950, ETS 005 (entered into force 3 September 1953).

51 *R v Gough* [1993] AC 646.

52 Hollander and Salzedo, above n 3, 125–7.

53 (2000) 176 ALR 644.

bias in this country is to ask 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide.'[54]

Chapter 13, which relates specifically to lawyers, includes discussion of merger, termination of retainer, and solicitors changing firms, as well as a brief but interesting section on barristers. Although a barrister has, in effect, both a professional client (the solicitor) and a lay client (who is also the client of the solicitor), Hollander and Salzedo conclude on general principles that the barrister owes a fiduciary duty to the lay client and not to the solicitor. Thus, in the event that the solicitor appears to have acted negligently, the barrister has a duty to advise the client of this.[55] Because of the way in which barristers work (in general, being instructed on specific pieces of work rather than pursuant to a retainer), a question arises as to whether the rules governing existing or former client conflicts apply in specific cases. The authors give the example of a barrister, having settled a defence, being asked to act for the other side in circumstances involving a potential conflict of interest. In their view, the fiduciary obligation continues only until a given set of instructions is completed.[56]

In relation to the sharing of chambers and facilities, the courts draw a distinction between barristers and solicitors. As barristers are independent, self-employed practitioners, the stringent rules of *Bolkiah* do not apply.[57] The authors refer to the unsuccessful attempt to remove counsel (ironically, Hugh Laddie QC, who subsequently became a judge of the English High Court of Justice and decided *Robson Rhodes*)[58] in *Pavel v Sony Corporation*[59] on the grounds that Mr Laddie QC had received confidential information about the case from the opposing party's counsel,[60] who happened to be a close colleague in chambers.[61] In *Pavel*, the Court of Appeal determined that there was no reason to believe that confidential information of a professional nature had been shared, and that ordinarily the court should leave it to the relevant barrister to decide whether it is appropriate to act. The authors suggest that in today's climate of heightened sensitivity to conflicts a court is unlikely to express itself in quite this way.[62] Moreover, they warn that '[t]he fear that professional confidences will be made light of over chambers tea or in the circuit mess is one that often should not be ignored.'[63]

Like the rest of the book, the appendices focus on England, but readers from other jurisdictions may be curious to examine, in particular, some of the profes-

54 Ibid 652.
55 Hollander and Salzedo, above n 3, 179–80.
56 Ibid 180–1.
57 *Laker Airways Inc v FLS Aerospace Ltd and Burnton* [1999] 2 Lloyd's Law Rep 45; ibid 181.
58 [1999] 3 All ER 524. See the discussion of this case in Hollander and Salzedo, above n 3, 9–10.
59 (Unreported, English Court of Appeal, Bingham, Hirst and Aldous LJJ, 12 April 1995) ('*Pavel*').
60 Robin Jacob QC, who also subsequently became a judge of the English High Court of Justice.
61 Hollander and Salzedo, above n 3, 181–2.
62 Ibid 182.
63 Ibid 181.

sional ethics guides that have been included.[64] The Law Society (the professional body for solicitors in England and Wales) is currently revising *The Guide to the Professional Conduct of Solicitors* (8th ed, 1999),[65] which appears in Appendix C.[66] The authors consider this guide in detail in chapter 13, and in fact recommend that it be urgently reviewed to address areas where it differs from the law as it currently stands (in particular, where the rules incorrectly describe the law or are less onerous than the general law).[67]

Conflicts of Interest & Chinese Walls is a useful resource written in a clear and easily accessible style (although we would have preferred gender-neutral language). It is well cross-referenced and important points are repeated where necessary, meaning that the reader need not necessarily read all the chapters, nor read them in order. In several places, Hollander and Salzedo include helpful lists summarising the principles arising from particular cases or areas of the law.[68] They also examine the existing conflict rules with a critical eye, protesting where the rules improperly balance the relevant interests or clash with good modern practice. We hope that a similar book appears for Australia after the High Court has had an opportunity to consider the issue.

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64 See, eg, ibid 223 (Appendix D — Code of Conduct of the Bar of England and Wales), 225 (Appendix E — Institute of Chartered Accountants in England and Wales Guide to Professional Ethics).

65 The Law Society, *Annual Report: 1 May 2000 to 30 April 2001* (2001) 10.

66 Hollander and Salzedo, above n 3, 211.

67 Ibid 178–9.

68 See, eg, ibid 8–9, 19–20, 105.

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