



GREENWAY CHAMBERS

# Conflicts of Interest

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## Ed Cox SC and Adele Carr

# Conflicts of Interest

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## Topics to be covered

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- General law/Solicitors' Conduct Rules
- Informed consent
- Recognising conflict
- Exercising inherent jurisdiction
- Duty of loyalty

# Conflicts of Interest

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## General law of fiduciary

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- Well established category
- Solicitor is required to act at all times in the client's best interests and always prefer the client's interest over their own
- Duty ceases with retainer



# Conflicts of Interest

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## Legislative Scheme

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- Legal Profession Uniform Law 2014 (NSW)
  - s 419
- Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW)
  - 10 - former clients
  - 11 - current clients
  - 12 - solicitor's own interests

# Conflicts of Interest

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## Informed consent

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- Fully informed of the material facts and circumstances of the case
- Independent advice
  - Must be meaningful

# Conflicts of Interest

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## Recognising there is a conflict

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- Established categories that may give rise to conflicts
- Litigation funding and class actions
  - Recommendations made on 21 December 2020 by Commonwealth Parliamentary Joint Committee on Corporations and Financial Services



# Conflicts of Interest

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## Inherent jurisdiction

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- Designed to impose higher standards than the law applies generally
- Jurisdiction is exceptional and should be exercised with caution
- *Kallinicos v Hunt* (2005) 64 NSWLR 501; [2005] NSWSC 1181 at [76] per Brereton J

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## Kallinicos v Hunt

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... the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice. *Prince Jefri Bolkiah* does not address this jurisdiction at all. *Belan v Casey* and *British American Tobacco Australia Services Ltd* are not to be read as supposing that *Prince Jefri Bolkiah* excludes it. *Asia Pacific Telecommunications Ltd* appears to acknowledge its continued existence.





# Conflicts of Interest

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## Kallinicos v Hunt

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The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.



# Conflicts of Interest

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## Kallinicos v Hunt

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The jurisdiction is to be regarded as exceptional and is to be exercised with caution.

Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.

The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.



# Conflicts of Interest

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## Inherent jurisdiction

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- Breach of confidence
  - *Jing Li v Jin Lian Group Pty Ltd* [2018] NSWSC 479
- Practitioner ceasing to act
  - *Zamattia v Zamattia* [2019] NSWSC 1769



# Conflicts of Interest

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## Duty of loyalty

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- Victoria
  - Spincode Pty Ltd v Look Software Pty Ltd (2001) 4 VR 501; [2001] VSCA 248 per Brooking JA
  - AB & EF v CD [2017] VSC 350
  - Visser v Director of Public Prosecutions (Cth) [2020] VSCA 327

# Conflicts of Interest

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## Duty of loyalty

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- NSW
  - *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181 at [76] per Brereton J

# Conflicts of Interest

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## Kallinicos v Hunt

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During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests (*Prince Jefri Bolkiah*).



# Conflicts of Interest

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## Kallinicos v Hunt

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Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure) (*Prince Jefri Bolkiah*).

After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer.



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## Duty of loyalty

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- Experts
  - A Company v X, Y, Z [2020] EWHC 809
  - Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd [2002] FCA 653



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## Contact details

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