

Trust accounting for law practices under the Legal Profession Act 2007 (Tasmania)

Part 1: About this seminar paper

The purpose of this seminar paper is to summarise the key legislative changes to the handling of trust money and the operation of trust accounts (by Tasmanian law practices) upon the commencement of the Legal Profession Act 2007 (Tas).

In this seminar paper I will generally refer to the:

- ❑ Legal Profession Act 1993 (Tas) as the **1993 Act**;
- ❑ Rules of Practice (Tas) 1994 as the **1994 Rules**;
- ❑ Legal Profession Act 2007 (Tas) as the **2007 Act**; and
- ❑ Legal Profession Regulations 2008 (Tas) as the **2008 Regulations**.

The materials which accompany this paper are as follows:

- ❑ Legal Profession Act 2007 Extracts - Part 3.2 Trust Money and Trust Accounts
- ❑ Legal Profession Regulations 2008 - Latest version
- ❑ Trust Accounting for law practices under the Legal Profession Act 2007 (Tasmania) - Comparative Table
- ❑ Trust Account Forms

Part 2: Introductory comments

The provisions of the 2007 Act relating to the operation of trust accounts by law practices are contained in Part 3.2 of the 2007 Act. Part 3.2 contains 51 sections. The provisions of the 2008 Regulations relating to the operation of trust accounts are contained in Part 3, which comprises some 40 regulations.

At first glance, the trust accounting provisions of the 2007 Act and the 2008 Regulations seem much more complex than what we are used to under the 1993 Act and the 1994 Rules. In short, there is a lot of "black letter law".

However, with some exceptions, there are not many fundamental changes to the basic obligations of practitioners in relation to the handling of trust money or the operation of trust accounts. Most of the changes can be broadly described as administrative in character, and for some firms, the new legislation will reduce the administrative burden in some areas - for example, in relation to transit money, which I will discuss further.

Overall, in my view, there is no need to panic about the new legislative regime - most of the changes are subtle rather than fundamental. Furthermore, I would also draw your attention to clause 21 in schedule 9 of the 2007 Act. Clause 21 is a saving and transitional provision which relevantly provides that an offence is **not** committed under the provisions of Part 3.2 of the 2007 Act, or the regulations made under that part, for anything done or omitted to be done in good faith during the period of 12 months after the commencement of the clause if:

- ❑ it was done for the purpose of attempting to comply with any of those provisions; or
- ❑ it was done in substantial conformity with the requirements of the 1993 Act or the 1994 Rules as if they had continued in force.

This provision should give law practices considerable comfort.

Another relevant point to note is that most of the trust accounting provisions in the new legislation are core uniform with the legislation that applies in other States that have adopted the model legislation. This means that many of the proprietary software programmes for legal practices, for example Locus, may already be compliant with some or all the changed

requirements of the new legislation - assuming of course that you have kept your software up-to-date.

Those practices which are computerised should check with their software suppliers to confirm whether the versions of the software being used by the firm are compliant with the model legislation.

For smaller practices that operate manual accounting systems, the required changes should not be too hard to implement.

Part 3: New definitions and concepts

Before I outline the new requirements of the 2007 Act and 2008 Regulations, it is necessary to examine some of the new definitions that apply.

3.1 Trust money

2007 Act: sections 231, 232, 279 and 366

For the first time in Tasmania, we now have a comprehensive definition of what constitutes trust money. Trust money is defined in section 231 of the 2007 Act to mean money entrusted to a law practice in the course of or in connection with the provision of legal services and includes:

- ❑ money received on account of legal costs in advance of providing services;
- ❑ controlled money received by the law practice;
- ❑ transit money received by the law practice; and
- ❑ money received subject to a power to deal with the money for or on behalf of another person.

The definition seeks to capture all money entrusted to a law practice in the course of or in connection with the provision of legal services. However, section 232(1) and (2) go on to provide that the following are **not** trust money:

- ❑ moneys entrusted to or held by a law practice for or in connection with financial services in circumstances where an Australian financial services licence is required or where the practice or an associate of the practice provides a financial service as a representative of another person; and
- ❑ money entrusted to or held by the law practice for or in connection with a managed investment scheme, mortgage financing or a mortgage investment scheme undertaken by the practice.

Pursuant to section 232(3), money that is entrusted to or held by a law practice for investment purposes, **whether on its own account or as agent**, is not trust money unless the following criteria are satisfied:

- ❑ the money was entrusted to or held by the practice in the ordinary course of legal practice and primarily in connection with the provision of legal services to or at the direction of a client; and
- ❑ the investment is or is to be made in the ordinary course of legal practice and for the ancillary purpose of maintaining or enhancing the value of the money or property:
 - (1) pending completion of the matter
 - (2) pending a further stage of the matter; or
 - (3) pending delivery of the property or money to or at the direction of the client.

Law practices will need to be extremely careful about deciding whether money entrusted to them is trust money, or is excluded from definition of trust money, because of the operation of section 232. Money that is not trust money is not covered by the Guarantee Fund: section 366. Furthermore, under section 279(2) of the 2007 Act, there is an obligation to notify a person who entrusts non-trust money to a practice, and in relation to trust money that becomes non-trust money, that:

- ❑ the money is not treated as trust money for the purposes of the 2007 Act;
- ❑ the money is not subject to any supervision, investigation or audit requirements under the 2007 Act; and
- ❑ a claim against the Guarantee Fund cannot be made in respect of the money.

A fine not exceeding 50 penalty units applies in relation to a breach of section 279(2).

3.2 Controlled money

2007 Act: sections 4 and 245

The 2007 Act introduces a new category of trust money called controlled money. Controlled money is defined as trust money received or held by a law practice subject to a written direction to deposit the money in an account (other than a general trust account) over which the practice has or will have exclusive control: see section 4, 2007 Act. The account must be with an authorised deposit taking institution: see the definition of controlled money account in section 4. It should be noted that controlled money cannot be pooled: see section 245(6).

Controlled money is subject to an entirely separate regime from trust money that "is run through a general trust account". In fact, controlled money should never be receipted in the general trust account or paid from the general trust account.

In my opinion, the controlled money regime could be a significant compliance burden for many practitioners, especially in conveyancing matters where the law practice is to act as stakeholder.

I think there are some real practical issues in relation to controlled money:

- ❑ First, controlled money must be deposited with an ADI - this rules out using a trustee company.
- ❑ Second, a separate controlled money account is required in relation to each matter. Although this is not different from what practitioners do now when acting as a stakeholder and placing moneys on deposit, a practical issue is that the controlled money cannot be processed through the general trust account before being deposited into the controlled money account: see section 245(1).
- ❑ Third, controlled money can only be withdrawn from a controlled money account by cheque or EFT in accordance with a written direction given by or on behalf of the person on whose behalf the money was received: see section 246.
- ❑ Fourth, the new legislation imposes a separate regime for recording the receipt and movement of controlled money outside the general trust account. From a regulatory point of view, I would much prefer to see all receipts and payments of "trust money" going through the general trust account rather than any number of separate controlled money accounts.

In my opinion, from a purely risk management point of view, and to reduce the compliance burden, law practices should think about using "the moneys held for investment" regime contemplated by section 232(3) of the 2007 Act.

3.3 Moneys held for investment

*2007 Act: section 232(3)
2008 Regulations: 50*

Section 232(3) of the 2007 Act recognises that a firm may hold money for investment, and that such money is trust money provided that the conditions set out in that section are satisfied: refer to part 3.1 above. Such moneys can be processed through the general trust account.

A law practice must maintain a register of investments of trust money. Regulation 50 of the 2008 Regulations sets out what must be recorded in the register. These requirements are:

- ❑ the name in which the investment is held;
- ❑ the name of the person on whose behalf the investment is made;
- ❑ the person's address;
- ❑ particulars sufficient to identify the investment;
- ❑ the amount invested;
- ❑ the date the investment was made;
- ❑ particulars sufficient to identify the source of the investment, including, for example:
 - (1) a reference to the relevant trust ledger; and
 - (2) a reference to the written authority to make the investment;
 - (3) the number of the cheque for the amount to be invested;
- ❑ details of any documents evidencing the investment;
- ❑ details of any interest received from the investment or credited directly to the investment;
- ❑ details of the repayment of the investment and any interest, on maturity or otherwise.

Part 4: Key differences

4.1 General trust bank account

*2007 Act: section 241
2008 Regulations: 27*

Under the 1993 Act, all law practices were required to open a trust account, regardless of whether they received trust money or not.

Under the 2007 Act a law practice is only required to maintain a general trust account if it receives trust money: section 241(1). A general trust account is not required if the trust money is controlled money or transit money received in a form other than cash: section 241(3).

Accordingly, the previous requirement under section 101 of the 1993 Act to open a trust bank account, regardless of whether or not trust money is received, ceases.

If a general trust bank account is opened after the commencement of the 2007 Act then a new requirement is to add to the business name under which the law practice engages in practice the expression "law practice trust account" or "law practice trust a/c": see regulation 27(2) of the 2008 Regulations. This means that if, for example, you change banks and open a general trust account at a new bank, then you must comply with regulation 27(2).

There is no need to change the name of existing general trust accounts: see regulation 27(3).

4.2 Handling of cash

2007 Act: section 244, 246 and 249

A new requirement of the 2007 Act is that all trust money (except controlled money) received in the form of cash must be deposited into the general trust account regardless of any direction given to the contrary by the client: see section 249(1). Therefore, transit money received in the form of cash must be processed through the general trust account. Controlled money received in the form of cash must be deposited in a controlled money account regardless of any direction to the contrary: see section 249(3).

These requirements are not unreasonable but it does seem rather harsh that if a law practice breaches these requirements, it is liable to a fine not exceeding 50 penalty units.

Under the 1994 Rules of Practice, cash payments of trust money were permitted where the client authorised the payment: see rule 21 of the 1994 Rules. In comparison, the 2007 Act specifically prohibits cash withdrawals, and a client cannot authorise a cash payment in any circumstances. In general, trust money can only be withdrawn by cheque or EFT: see section 244(1). A law practice that breaches this requirement is liable to a fine not exceeding 50 penalty units.

Similar cash payment restrictions also apply in relation to controlled money: see section 246 of the 2007 Act.

4.3 Dealing with transit money

*2007 Act: sections 247 and 249
2008 Regulations: 47*

A law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money within the period specified in the instructions or as soon as practicable after it is received: see section 247(1). However, as noted above, if the transit money is cash it must be deposited into the general trust account: see section 249(4).

Under the 2007 Act and 2008 Regulations there is no obligation to record movements of transit money in a trust ledger account. Regulation 47 merely requires that the law practice record and keep brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received. These particulars can be kept on the matter file.

There is nothing in the 2007 Act which would prohibit you from continuing to record transit money in the trust account or transit money register. However, I see no real point in continuing the practice.

4.4 Controlled money

*2007 Act: sections 245, 246 and 249(3)
2008 Regulations: 42, 43, 45 and 46*

As noted above, there is a new category of trust money called "controlled money". Controlled money is to be receipted and paid outside the general trust account. There are extensive administrative requirements in relation to dealing with controlled money, which largely mirror the requirements for dealing with other categories of trust money processed through the general trust account. A further recording requirement is that a law practice that receives controlled money must keep a register consisting of the records in respect of the movements of controlled money for each controlled money account: see regulation 46(1) of the 2008 Regulations. Regulation 46(4) specifies the particulars to be recorded.

You should also note that within 15 working days of the end of each month a law practice must prepare and keep a statement listing all of the practice's controlled money accounts as at the end of the month. The statement has to show:

- the name, number and balance of each controlled money account;
- the name of the person on whose behalf the controlled money is held;
- a short description of the matter to which each account relates; and
- the date it is prepared.

It is implicit that the general provisions relating to the operation of controlled money accounts apply to controlled money accounts as at the commencement of the 2007 Act. Regulation 42(2) provides that the provisions relating to the description of controlled money accounts do not apply to an account opened before the commencement of regulation 42. Regulation 42(2) would have been unnecessary if none of the controlled money provisions applied to existing accounts.

Therefore law practices should check whether they are in fact holding money which is properly characterised as controlled money.

4.5 Trust money subject to a specific power

*2007 Act: sections 231(3) and 248
2008 Regulations: 51*

Another new category of trust money is "trust money subject to a specific power" or, in shorthand, "power money".

Power money is money received by the practice that is the subject of a power exercisable by the practice or an associate of the practice to deal with the money on behalf of another person. Examples of power money might be estate moneys where the associate is:

- ❑ the trustee/executor of an estate; and
- ❑ an attorney authorised to act on behalf of a client.

Section 231(3)(b) excludes from "power money" money that is given in a private or personal capacity to the associate.

The record keeping requirements in relation to power money are contained in regulation 51 of the 2008 Regulations.

4.6 Intermixing of trust money

*2007 Act: section 232, 251 and 279
2008 Regulations: 39*

A law practice is not allowed to mix trust money with other money: see section 251 of the 2007 Act. Consistently with this prohibition, regulation 39 of the 2008 Regulations provides that, subject to certain exceptions a law practice must not maintain a trust ledger account in the name of the practice or a legal practitioner associate of the law practice. The exceptions are that a trust ledger may be maintained for the purpose of transferring costs and where a legal practitioner associate has a personal and beneficial interest as a vendor, purchaser, lessor, lessee or in another similar capacity: regulation 39(2).

Costs must be withdrawn from the costs ledger account not later than one month after the day on which the money was transferred: see regulation 39(3). Moneys held for a legal practitioner associate must be withdrawn at the conclusion of the matter: see regulation 39(4).

As noted above, section 232 of the 2007 Act declares money held by a law practice for or in connection with a managed investment scheme, mortgage financing or a mortgage investment scheme is not trust money for the purposes of the 2007 Act. Therefore, such moneys in my view should not be processed through the general trust account because it would breach the prohibition against intermixing.

Note also the obligations under section 279 discussed under heading 3.1 above.

4.7 Signing of trust cheques and related matters

*2008 Regulations: 31(3),
32(2), 40 and 45(1)*

Under the previous legislation trust cheques can only be signed by "a principal of the firm" or a person approved by Council. The requirement for approval of non-principal signatories is abolished.

In general terms cheques and EFTs in relation to trust money (including controlled money) can be signed or authorised by:

- an authorised principal of the law practice;
- if a principal is not available:
 - (1) an authorised legal practitioner associate;
 - (2) an authorised Australian legal practitioner who holds an unrestricted practising certificate authorising the receipt of trust money;
 - (3) 2 or more authorised associates of the law practice.

Authorised means authorised by the law practice. Accordingly, any employed legal practitioner, or any 2 employees of a law practice, are able to sign cheques or authorise a withdrawal of trust money if authorised by the law practice, and no approval from Council is required. For sole practitioners, withdrawals can be authorised by another legal practitioner (who is authorised to receive trust money). However, non principals can only authorise a withdrawal if a principal is **not** available.

However, in the case of the general trust account, a law practice is required to notify the Society of the giving or termination of authority to sign cheques . Time limits apply: see regulation 40.

4.8 Trust cheque requirements

2008 Regulations: 31

A cheque must be payable to the order of a specified person or persons and not to bearer or cash: regulation 31(2)(a). Under rule 22(b) of the 1994 Rules bearer cheques were permitted. Therefore, after the commencement of the 2007 Act, when using supplies of trust cheques that include the words "or bearer", make sure that those words are crossed out. Obviously, when re-ordering cheques make sure the template for the cheque is corrected as necessary.

A cheque must be crossed not negotiable: regulation 31(2)(b).

A cheque must include the name of the law practice or business name of the law practice and include the expression "law practice trust account" or "law practice trust a/c": regulation 31(2)(c). This regulation does not apply to pre-existing trust accounts: see regulation 31(9).

4.9 Electronic funds transfer

*2007 Act: sections 244 and 246
2008 Regulations: 32 and 45*

Electronic funds transfer of trust moneys are permitted: see section 244(1) (general trust money) and section 246(1) (controlled money). There are record keeping requirements in relation to EFTs: see regulation 32 (general trust account) and regulation 45(4)(c) (controlled money). Generally, electronic transfers must be authorised as I have outlined above.

Cash withdrawals, ATM withdrawals and telephone banking withdrawals or transfer are strictly prohibited: see section 244(2) (general trust money) and section 246(2) (controlled money).

There is no requirement to get the Society's approval of the EFT system used by the law practice.

4.10 Journal transfers

2008 Regulations: 37

Trust money may be transferred by journal from one trust ledger account to another trust ledger account but only if:

- ❑ the law practice is entitled to do so; and
- ❑ the transfer is authorised in writing:
 - (1) by an authorised principal of the law practice; or
 - (2) if a principal is not available: by an authorised legal practitioner associate; by an authorised Australian legal practitioner who holds an unrestricted practising certificate authorising the receipt of trust money; or by 2 or more associates jointly.

Authorised means authorised by the law practice. The practical operation of these provisions is that a journal transfer must be properly authorised: see regulation 37(1) and (2). These are new requirements.

A law practice must keep a trust account transfer journal if it transfers trust money by journal transfer. The journal entry must show:

- ❑ the date of the transfer;
- ❑ the "to" and "from" trust ledger account details;
- ❑ the amount transferred;
- ❑ the purpose of the transfer, matter reference and a short description of the matter.

Journal pages or entries must be consecutively numbered.

See generally regulations 37(4), (5), (6) and (7).

4.11 Withdrawing trust money for legal costs

2008 Regulations: 53

Regulation 53 of the 2008 Regulations provides 2 alternatives for withdrawing trust money for legal costs and payment of disbursements - note that legal costs include disbursements: see section 4 of the 2008 Act. These provisions are more restrictive than existing Rules 39 and 40 in the 1994 Rules.

The first alternative is contained in regulation 53(2). It provides that a law practice may withdraw money for legal costs from a general trust account or a controlled money account:

- ❑ in accordance with a costs agreement that complies with the law under which it was made (regulation 53(3)(a));
- ❑ in accordance with instructions received by the law practice. (Note the requirements in regulation 53(5) regarding the form of instructions. The instructions if given in writing must be kept, and if the instructions have not been given in writing, they must be confirmed in writing within 5 working days after the withdrawal) (regulation 53(3)(b));
- ❑ the money has been requested by and paid to the law practice for that purpose: see regulation 53(3)(c); or
- ❑ the money is owed for reimbursement of money already paid by the law practice and the law practice gives or sends to the client a request for payment referring to the proposed withdrawal or a written notice of the withdrawal: see regulation 53(3)(d). There is no requirement for the notice of withdrawal to be received by the client before the withdrawal is made.

Under existing Rule 40, all that was required was to send an account, bill of costs, letter, statement or memorandum within a reasonable time to the client's last known address.

Under regulation 53(3) the notice of withdrawal must be sent to the client before the withdrawal is made. I would suggest that practices be very careful about this requirement and ensure that where an account is to be paid by retention that the account has been sent to the client before the

withdrawal, and that the account includes a statement to the effect that the account is a notice of withdrawal of trust money.

The second alternative for withdrawing trust money is contained in regulation 53(4). It provides that a law practice may also withdraw trust money if the practice has given the client a bill relating to that money **and**:

- ❑ the person has not objected to the withdrawal within 7 days after the bill has been given;
- ❑ if the person objects but has not requested a review of costs within 60 days after being given the bill; or
- ❑ the money otherwise becomes legally payable.

Therefore, the use of the method in regulation 53(4) imposes a minimum 7 day waiting period on transferring costs.

I would also note that there is no exception to these requirements even if the trust money was held on account of legal costs.

The reason that regulation 53 contains 2 alternative methods for withdrawing trust money for legal costs is largely historical. The drafters of the Model Regulations (upon which the 2008 Regulations are based) provided for 2 alternative withdrawal methods to reflect pre-Model Regulation requirements in different jurisdictions.

It should be also noted that regulation 53(3) is less restrictive than the corresponding provisions contained in the Model Regulations because of the inclusion of regulation 53(3)(c). Regulation 53(3)(c) allows a law practice to withdraw money for legal costs where the money has been requested by and paid to the law practice for that purpose.

4.12 Trust account statements

2008 Regulations: 48

A law practice has an obligation to provide a trust account statement to each person for whom or on whose behalf trust money (other than transit money) is held or controlled by the law practice or an associate of the law practice: see regulation 48(1).

The statement must be provided in respect of each trust ledger account: see regulation 48(2). In relation to controlled money, a separate statement must be provided in relation the record of movements of the controlled money: see regulation 48(3).

A statement must also be provided in relation to the record of dealings with trust money which is subject to a power: see regulation 48(4).

The statement is to be provided:

- ❑ as soon as practicable after the completion of the matter;
- ❑ as soon as practicable after a reasonable request by the person for whom or on whose behalf the money is held or controlled;
- ❑ as soon as practicable after the end of 30 June in each year (but exceptions apply).

See regulation 48(6).

A trust account statement is not required to be provided at the end of each financial year in the following circumstances:

- ❑ the ledger account record has been open for less than 6 months;
- ❑ the ledger account has a zero balance and there has been no activity affecting the account during the previous 12 months; or
- ❑ a statement has been provided within the previous 12 months and there has been no subsequent transaction affecting the account or record.

See regulation 48(7).

A law practice has to keep a copy of each trust account statement furnished under the regulation: see regulation 48(8).

Sophisticated clients can direct a law practice not to provide trust account statements under regulation 48. Sophisticated client is defined in section 283 of the 2007 Act.

4.13 Notification obligations

*2007 Act: sections 254(1), 254(2)
2008 Regulations: 40*

There are new obligations to notify the Society of various matters:

- ❑ First, pursuant to section 254(1) of the 2007 Act, there is a positive obligation on all legal practitioner associates of a law practice (ie principals and employed practitioners) to report all irregularities in relation to the trust account.
- ❑ Second, pursuant to section 254(2), a practitioner has an obligation to report a suspected irregularity in relation to the receipt, recording or disbursement of trust money involving another law practice.
- ❑ Third, pursuant to regulation 40, there are obligations to notify the Society of various matters in relation to the general trust account. These matters include:
 - (1) notification (within 14 days) of the establishment or closure of a general trust account;
 - (2) notification (either before or within 14 days after) of giving of authority to, or the termination of the authority of, a non principal to sign trust cheques or to authorise the withdrawal of trust money from the general trust account;
 - (3) before 31 July each year, details of non principals who can sign trust cheques or authorise the withdrawal of trust money.
- ❑ Fourth, pursuant to regulation 60, a law practice that holds trust money must provide to the Society at least 14 days' written notice of its intention to cease to exist as a law practice, cease to engage in legal practice in this jurisdiction or cease to practice in such a way as to receive or hold trust money.
- ❑ Pursuant to section 280, a law practice must notify the Society of each account maintained at an ADI in which funds entrusted to the practice are held. This section applies whether or not the money is trust money and whether or not section 232 or section 233 applies to the money.

4.14 False names

2007 Act: section 256

Pursuant to section 256(1) a law practice is prohibited from knowingly receiving or recording the receipt of money in the practice's trust records under a false name. If a person is commonly known by more than one name, the trust records must record all of the names by which that person is known: see section 256(2).

4.15 ADI reporting obligations

2007 Act: section 275

An ADI at which a trust account is maintained is under a mandatory obligation to report to the prescribed authority any deficiency in a trust account or any suspected offence in relation to a trust account: see sections 275(1) and (2) of the 2007 Act.

4.16 Deficiency in trust account

*2007 Act: section 253
2008 Regulations: 53A*

A practitioner is guilty of an offence if he or she without reasonable excuse causes a deficiency in any trust account or a trust account ledger or a failure to pay or deliver any trust money. Note that deficiency is broadly defined to include the non-inclusion or exclusion of any amount that is required to be included in any trust account.

Regulation 53A of the 2008 Regulations provides that a deficiency does not occur for the purposes of section 253 in the circumstances set out in that regulation. In essence, regulation 53A replicates the operation of Rule 37 of the 1994 Rules.

Regulation 53A is necessary because, in the absence of regulation 53A, a law practice would breach section 253 of the 2007 Act by overdrawing its trust account for the purposes of purchasing a bank cheque where trust money to purchase the bank cheque were not held at the time of purchase. Pursuant to regulation 53A, for the purposes of section 253, a deficiency in a trust bank account or trust ledger account does not arise if:

- money amounting to at least the amount withdrawn is held in relation to that account at the time of withdrawal either:
 - (1) in the trust bank account to the credit of the client;
 - (2) in the possession of the law practice for payment into the trust bank account for the credit of the client; or
 - (3) in the trust bank account identifiable by details recorded in the trust ledger account as being money to which the client is entitled; or
- the withdrawal arises from the debiting of a cheque which has been properly used to obtain a bank cheque on behalf of the client while that cheque remains in the possession of the law practice pending its proper disposition.

A law practice cannot retain the bank cheque for a period exceeding 2 banking days.

4.17 External Examinations of trust records

*2007 Act s265- 272)
2008 Regulation 59*

A law practice must at least once in each financial year have its trust records examined by an external examiner appointed in accordance with the regulations. The Law Society may designate persons who may be appointed as external examiners, similar to the appointment of trust account inspectors under the 1994 Rules.

Section 266(3) and regulation 59 allows the Society to grant exemptions from examinations. Section 269 provides for a final examination of trust records. The examiner may disclose information in his report to an investigator, supervisor, manager or receiver appointed under the Act or to the Board.

Regulation 59 provides that for the purposes of section 270(3) of the 2007 Act, the standards to be adopted and the procedures to be followed by external examiners and the form and content of the external examiner's report on an examination are to be approved by the Law Society. In comparison, Rule 50 of the 1994 was prescriptive as to the matters to be examined.

4.18 Authority to receive trust money

2008 Regulations 60A

This clause has been added as a temporary measure to ensure that a Principal of a law practice who holds a current practising certificate under the 1993 Act, unless certificate contains a condition to the contrary, is taken as authorised to receive trust money.

Part 5: Administrative changes

In this part I want to outline less significant changes.

5.1 Bank reconciliation of trust records

2008 Regulations: 38

The time for preparing a reconciliation has been extended from 10 calendar days from the end of the month to 15 working days from the end of the month: See regulation 38(3). Regulation 38(2) sets out how the reconciliation to be carried out. As part of the reconciliation, a practice must prepare a statement containing a list of the practice's trust ledger accounts showing the name, identifying reference and balance of each account, and a short description of the matter to which each relates.

The reconciliation statements must show the date they were prepared.

5.2 Register of powers or attorney and estates

2008 Regulations: 52

Regulation 52 imposes an obligation to maintain a register of powers and estates in relation to trust money.

5.3 Trust receipts

2008 Regulations: 28(5)(h) and 28(8)

There are 2 differences:

- ❑ the names of the writer of the receipt has to be shown on the receipt (rather than a signature as per the 1994 Rules): see regulation 28(5)(h); and
- ❑ if a receipt is cancelled or not delivered, it must be kept: see regulation 28(8).

5.4 Trust account receipt cash book

2008 Regulations: 34(1)(b) and 34(4)

There are some minor differences:

- ❑ The receipts cash book must now record the receipt number: see regulation 34 (1)(b).
- ❑ Particulars of receipt must be entered into the trust account receipt cash book within 5 working days counting from and including the date of issue of the receipt. Under the 1994 Rules particulars had to be entered within 7 days of the issue of the receipt. This should only be an issue for those law practices operating manual accounting systems.

5.5 Trust account payments cash book

2008 Regulations: 35

There are some additional or changed requirements:

- ❑ In the case of a cheque made payable to ADI, the particulars to be recorded include the name or BSB number of the ADI and the name of the person receiving the benefit: see regulation 35(1)(c).
- ❑ The cheque number must be recorded: see regulation 35(1)(a).
- ❑ There are a separate series of recording obligations in relation to EFT payments: see regulation 35(2).
- ❑ If using a manual system, details of payments are to be entered in the trust account cash payments book within 5 working days counting from and including the day the payment was made: see regulation 35(4).

5.6 Trust deposit records

2008 Regulations: 29

Regulation 29 is quite prescriptive as to what has to be shown on a trust deposit record. However, I would expect that as a matter of practice most ADIs will already require a law practice to complete deposit slips with the details required by regulation 29.

5.7 Trust ledger accounts

2008 Regulations: 36

New or additional details to be recorded on trust ledger accounts are:

- ❑ For receipts the receipt number: see regulation 36(4).
- ❑ For cheque payments, the cheque number and, if payment is to an ADI, the name of the ADI or BSB number and the person receiving the payment benefit: see regulation 36(5)(c).
- ❑ For payments by EFT, the date and number of the transaction, the amount, name and number and BSB to which the amount was transferred. If the payment was to an ADI then the ADI name or BSB and the person receiving the payment and particulars to identify the purpose of the payment: see regulation 36(6).
- ❑ For journal transfers, the journal reference number, the name of the other trust ledger account from which or to which the money was transferred and particulars sufficient to identify the purpose for which the payment was made: see regulation 36(7).
- ❑ After each transaction the balance is written in the balance column: see regulation 36(10).
- ❑ Details of any changes in the title of the trust ledger must be recorded: see regulation 36(3).

Particulars in respect of the receipt, payment and transfer of trust money must be recorded in the ledger within 5 working days counting from and including the date of the receipt, payment or transfer: see regulation 36(9). Under the 1994 Rules, 7 days was allowed.

5.8 Trust records

*2007 Act: section 231
2008 Regulations: 54*

Trust records are to be retained for 7 years: see regulation 54. The previous requirement under rule 58(b) of the 1994 Rules was to keep accounting records for 10 years.

Note that there is an expansive definition of trust records in section 231 of the 2007 Act. Records include, among other things, files relating to trust transactions or bills of costs or both.

5.9 Computer systems

2008 Regulations 23, 24, 25 and 26

In relation to computerised accounting systems there are 4 specific regulations:

- ❑ Copies of trust records are to be printed monthly within 15 working days of the end of the month being the trust account receipts cash book and payments cash book, reconciliation statement, trust ledger accounts, and list of controlled money accounts and their balances. An exception is that the cash books are not required to be printed out each month if kept in electronic form that is readable or reportable on demand.
- ❑ When creating, amending or deleting information about the client name, address, matter reference and description, or the ledger account number, then a record must be maintained in chronological sequence.
- ❑ A debit balance is not to be created unless a contemporaneous record is made in a permanent form. (There are several other general requirements such as that the system

does not delete any ledgers unless there is a zero balance and all outstanding cheques have been presented, and a hard copy printed).

- Back ups are required to be made at least monthly and a complete set of back ups kept off site. It is recommended that twelve back ups (one per month) be retained.

See regulations 23 to 26 of the 2008 Regulations.
