TOPIC 7: TRUST ACCOUNTING AND COSTS

TRUSTS ACCOUNTING

Position at General Law:
• L is a fiduciary to C where s/he holds money for that client
  o Might hold on behalf of client or disbursements, professional fees, etc
• A legal practice has two types of accounts:
  o Office account: For the business of the practice – paying bills, receiving legal fees and profit costs
  o Trust account: Receiving money paid by or for clients for specific purposes – off limits!

5 PRINCIPLES OF TRUST ACCOUNT REGULATION
  o 1. SEPARATION
    • Of practitioners’ and clients’ money
  o 2. DESIGNATION
    • Of client money as ‘trust money’
  o 3. SEPARATE IDENTIFICATION OF EACH CLIENT’S MONEY
    • And each transaction in relation to that money
  o 4. PRECISE
    • Record keeping which facilitates supervision and identification of irregularities
  o 5. EXTERNAL AUDITING, PROFESSIONAL AND CRIMINAL SANCTIONS
    • For breach (including some time in jail)

MEANING OF TRUST MONEY

Trust money is...

- S129(1) Uniform Law
  o Money entrusted to the law practice in the course of or in connection with the provision of legal services by the practice and include
    • A. money received by practice on account of legal costs in advance of providing the services;
    • B. Controlled money received by the practice;
    • C. Transit money received by the practice; and
    • D. Money received by the practice, that is the subject of a power, exercisable by the law practice or an associate of the law practice, to deal with the money for or on behalf of another person

It is not trust money if received...

- S129(2) Uniform Law
  o As remuneration for services performed as a legal practitioners
  o As reimbursement of disbursements paid by legal practitioners
  o For investment purposes
  o As part of a service for which an Aus Financial Services License is required
  o For a managed investment scheme or mortgage financing undertaken by the practice
  o NB: If unsure – put it in trust account – if you incorrectly place into office account big issues

Key definitions
• Trust account = account maintained with an authorised deposit-taking institution (ADI) to hold trust money
• General trust account = means an account for holding trust money, other than controlled money or transit money – NO INTEREST EARNED BY CLIENT
• Controlled money = Money received by client and written direction to deposit money in an account (other than a general trust account) over which law practice has exclusive control – INTEREST EARNED BY CLIENT
• Transit money = money received by a law practice subject to instructions to pay a third party – just handing over to someone else
• Trust property = means property (other than trust money) entrusted to law practice in connection with provision of legal services
• Trust records = covers a wide range of records relating to trust money, including receipts, ledgers, journals, statements of account, registers and files relating to trust transactions or bills of costs

TRUST MONEY REGULATORY REGIME
• Designed to ensure TM is held by law practices in a manner that protects interests of persons for whom or on whose behalf it is held
• Trust account movements =
  o CLIENTS MONEY → Write trust receipt → Make entry in receipts journal → CR entry in client’s ledger card
  → TRUST BANK ACC → DR entry in Ledger → Entry in Payments Journal → Draw a Trust Cheque or make an EFT → PAYMENT MADE TO?
RULES REGARDING TRUST MONEY

• WHO CAN DEAL WITH TRUST MONEY
  - Law firm only permitted if principal has a certificate that authorises s/he can receive TM

• DEALING WITH TM
  - UL s144: TM must not be withdrawn from a general trust account other than by cheque or electronic funds transfer
  - UL s145: TM is not available for the payment of debts of the law practice
  - UL s146: A law practice must not mix money with other money unless authorised by the VLSB

• UPON RECEIVING TRUST MONEY
  - UL s137: TM must be paid into trust ASAP after receipt
    - i.e. no more than 24 hrs after receipt
    - Money to be held exclusively for the client on whose behalf you’ve received it

• IF UNSURE WHO TM BELONGS TO:
  - Open a suspense account trust ledger record – so when audited, records match up to money in bank

• DEALING WITH TRANSIT MONEY
  - UL s140(1): A law prac that has received transit money must pay the money in accordance with the instructions or as soon as practicable

• WHEN TM NEED NOT BE PAID INTO TRUST ACCOUNT
  - Exceptions as per UL s137:
    - Receipt of a written direction by a client at or before TM received, to do otherwise
    - Cheques payable to third parties: called ‘transit money’
      - But still need to keep a record of it
    - Transit money is still trust money and must be recorded in a transit registered (UL s140), even if not physically paid into the bank

• PAYMENT FROM TRUST ACCOUNT
  - UL s138: Handling/dispersing and accounting or trust money
  - Payment from trust account is permitted to be paid:
    - To the person on whose behalf the money was received, or at their direction
    - Towards your legal costs or hold as lien against those costs
    - Payment of a ‘Statutory Deposit’ to the Legal Services Board
    - Out of trust money received. This is held on trust by LSB and payable on demand. Failure to do so may constitute professional misconduct. The interest goes to the LSB!
    - Used for paying out claims

• RECEIVING AND DEALING WITH CASH TM
  - UL s143: TM received in cash form must be deposited in the law practice’s general trust account as soon as practicable after receiving it, even if it has a written direction to deal with it in some OTHER WAY
    - i.e. even if its transit money
    - Only once deposited, then $ can be dealt with in accordance with written direction

DEFICIENCIES IN TRUST ACCOUNT

• GENERAL RULE
  - Deficiency = lack of funds in trust account generally, or a lack of funds credited to any client in trust bank account
  - UL s149: A law practice must not, without reasonable excuse, cause a deficiency in any trust account or trust ledger account, or fail to pay any trust money
  - Penalty = 500 penalty units (just over $80K) or imprisonment of 5 years, or both

• IF YOU BECOME AWARE OF IRREGULARITIES/DEFICIENCIES
  - UL s154: Practitioner is obliged to report anyone when a deficiency is suspected – fraudulent misappropriation of client funds is a crime and PM at CL
  - Even technical breaches of trust account requirements involving CARELESSNESS, but NO DISHONESTY may still amount to UPC
    - Carelessness – not filling out receipt correctly for client when they pay you money for a barrister to appear in court
LSC v Nguyen [2011] – not DISHONEST but CARELESS management

FACTS:
- Young lawyer not authorised to receive TM - his practice involved conveyancing transactions (set up so he could avoid having trust acc)
- In a case where no agents - had to receive money in cash – he deposited into his general account
- Gave receipt but no trust acc receipt – he didn’t steal, gave it to vendor but didn’t abide by rules

HELD:
- Found G of PM - his practice restrained for 12 months and had to attend PD training re: trust account and pay costs
- Even though not dishonest, can still be in breach

LSC v Nguyen [2013] – FOLLOW UP

FACTS:
- Nguyen had not held a practicing cert since sept 2009 - continued to practice

HELD:
- G of 16 charges of PM

Legal Services Board v Bourozikas [2009]

FACTS:
- B authorised to receive TM and operated a trust acc at ANZ - accounts audited and LIV investigators found 2 unsigned letters to 2 different clients purporting to enclose $50K cheques
- Clients did not receive money
- He admitted to depositing them into own personal bank accounts – used it to pay school fees etc

HELD:
- Convicted of 3 counts of theft and One count of deficiency in a trust account
- Defalcation in trust account is a serious breach of professional obligation - it brings the profession into disrepute
- He received 18 months imprisonment AND he was struck off – they were deliberate and repeated mistakes

CONSEQUENCES OF BREACH
- Trust account irregularities amounting to misconduct will usually result in disbarment
- Can also result in criminal penalties/ sue for compensation in breach of trust

COSTS

GENERALLY
- Majority of complaints are about costs and excessive hourly billing rates
- Can safeguard themselves with disclosure requirements, regulation of costs agreements, independent review mechanisms, disciplinary sanctions etc.

PROFESSIONAL FEES vs DISBURSEMENTS

UL stc
- Legal Costs: Amounts that a person is liable to pay
  - (a) to a law practice for provision of legal services; or
  - (b) as a third party in respect of legal services provided by a law practice to another person
  - It includes disbursements but not including interest
- Disbursements:
  - ‘out of pocket’ expenses incurred with client’s approval, such as barristers’ fees, photocopying costs, expert reports, court filing and transcript fees
  - Allowance for practice overhead expenses (rent, salaries, electricity, stationary, etc) are built into professional fee structures – these are not separately chargeable to clients

TYPES OF BILLING PRACTICES
- Item Remuneration Billing
  - Task completed basis – pre-determined scale.
  - Courts use this in terms of scale fees
  - E.g. drafting letter - $30 per folio, set per 100 words
- Time based billing
  - Hourly rate / 6 min interval
  - This cannot operate without a valid cost agreement in place
  - Benefits – generally higher level of fees
  - Issues – takes longer for mediocre lawyer to do work than a good lawyer
- Fixed fee
  - In retainer agreement
- Value billing
  - Lawyer and client negotiate at the start
- Event based fees
Fees for each stage of work – spread across rather than paid at the end – but must be governed by a cost agreement

- **Contingency fees (damages-based billing) – PROHIBITED**
  - LPUL s183 bans contingency fees
  - Lawyer takes percentage of actual judgement when client wins
  - This inherently creates a conflict of interest – maximise settlement proceeds and minimise the work they need to do!

- **Uplift fees – PERMITTED**
  - Defined under s6 LPUL: A lawyer can charge up to 25% of their normal fee if they win – the matter must be litigious (an extra add on fee)
  - The fee is not based on the amount of settlement, but the final fees
  - It cannot exceed 25%[LPUL s182(2)(b)] FOR LITIGIOUS MATTERS ONLY!!

- **Conditional costs agreement – ‘no win no fee’**
  - The lawyer is only paid if the client is successful
  - LPUL s181(7): Cannot be used in a criminal or family case
  - LPUL s182(2): If combined with uplift fee, successful outcome must be reasonably likely
  - Ethical disputes arise from this
    - What is ‘success’? Matter settling for $10K – legal costs $18K clearly not a success
    - Clients unaware of disbursements that need to be paid and that they have to pay other sides costs

**BILLING PRESSURES**

- Often a catalyst for conflict.
- Affordable Justice Report 2013 – per RMIT Centre for Justice Innovation discussed the *tyranny of the billable hour* – lawyers charge according to time and fees are open-ended.
- Lawyers are often expected to make a **disproportionate profit margin**
- To combat this?
  - More widespread use of **fixed fees** and access to legal assistance for discrete tasks, rather than unlimited engagements
  - Establishment of a **legal consumer advocate** for an increased focus on legal consumers

---

**Law Society of NSW v Carol Foreman (1994)**

**FACTS:**

- Former partner at Clutz – struck off for forging a time sheet to prove a bill of half a million dollars for a property dispute arising from a divorce
- Foreman swore she gave a costs agreement - nothing to show for it. She submitted an altered time sheet to the court

**HELD:**

- She was **struck off** → she knowingly misled the court. In her hearing, she argued she acted inappropriately because she was **under pressure to meet billing targets**
- Kirby J was concerned about the social ethics of law firm and billing processes – she should be ordered to be pro bono and entire law firm disciplined
- But Mahony J noted only confessed once she was struck off – she could handle the pressure so shouldn’t be a lawyer

RE: originally charged for gross overcharging – charges dropped because there was a cost agreement. This c.f. D’Allesandro

---

**COST DISPUTES – STEPS TO RECOVERING COSTS/DEALING WITH COST DISPUTES**

**RECOVERING COSTS? LPUL 4.3**

- A lawyer must have (1) written disclosure (2) written costs agreement (3) billing

1. **WHO** might be aggrieved in this scenario, **HOW** and **WHY**? What ethical issues arise?

  - Look for signs of wrongdoing, conflicts, etc

2. How **VULNERABLE** are the clients? Does LPUL Part 4.3 apply or not to each of the clients in the scenario? S170

  - The Act is more likely to apply to vulnerable clients (i.e. individuals are generally considered vulnerable.
    Corporations are generally not)
  - LPUL s170 – Applies to everyone **BUT** (a) a commercial or government client – see s170(7) for meaning of commercial/govt client or (b) a third party payer who would be a commercial or government client if third party payer were a client of the law practice concerned.
3. Has there been valid **DISCLOSURE** under LPUL Part 4.3 Div 3?

- **Requirements**
  - LPUL s174 (1)(e) Information disclosing the basis of legal cost calculation;
  - LPUL s174 (1)(d) Information disclosing any significant change to anything previously disclosed, including significant change to legal costs payable;
  - LPUL s174 (3) Law practice must take all reasonable steps to satisfy itself the client understands and consents to the proposed course of action;
  - LPUL s174 (6) All disclosure to be made in writing;
  - Note: disclosure is an ongoing requirement.

- **Exceptions and special circumstances**
  - LPUL s174 (4)(5) Disclosure not required if legal costs will likely not exceed amount specified in Uniform Rules
    - (a) if total estimate is under $750: Disclosure is not required
    - (b) if total estimate is between $750-$3000: Basic standard disclosure required
    - (c) if total estimate is above $3000: Main disclosures required (see above) and advice to be made asap
  - LPUL s175 Where the law practice has previously disclosed total costs will not exceed a lower threshold, the law practice must inform the client in writing ASAP after becoming aware costs are likely to exceed the lower threshold.
  - LPUL s176 If alternative law practice is retained by client, the first law practice must disclose all details and info to second practice.
  - LPUL s176 If disclosure is required under s174 175, the law practice must also make disclosure to any associated third party payer, but only matters relevant to them and costs payable.
  - LPUL s176 (2) Discloses to third party payer to me made in writing ASAP after becoming aware of legal obligation to disclose.
  - LPUL s177 (1) If a law practice negotiates a settlement on a client’s behalf, they must disclose the estimate of the legal costs payable by the client before settlement is executed.

4. Is there a valid **COSTS AGREEMENT** under LPUL Part 4.3 Div 4?

- **General requirements**
  - LPUL s180 (1) Costs agreement may be made between a client and law practice, on behalf of a client by another law practice, between one law practice and another, or between a law practice and a third party payer.
  - LPUL s180 (2) Costs agreements must be made or evidenced in writing.
  - LPUL s180 (3) Costs agreement must be accepted in writing or by other conduct.
  - LPUL s180 (4) Costs agreement cannot provide that legal costs to which it relates are not subject of a costs agreement.

- **Conditional costs agreements**
  - LPUL s181 (1) May provide that payment of some or all of the legal costs is condition on a successful outcome (‘no win, no fee’).
  - LPUL s181 (2)(3)(4) Conditional costs agreement must (a) be in writing and plain language (b) set out in circumstances constituting a successful outcome; (c) be signed by the client; (d) include a statement that client has been informed of the right to seek independent legal advice; before entering into the agreement; and (e) contain a cooling-off period of no less than 5 clear business days during which the client may terminate (inapplicable to agreements between law practices).
  - LPUL s181 (5) If a client terminates within cooling-off period, the practice may recover only those legal costs in respect of services performed prior to termination, and done at the client’s instructions and knowledge (i.e., uplift fees are not recoverable).
  - LPUL s181 (6) Disbursements may be payable regardless of outcome.
  - LPUL s181 (7) Conditional costs agreement cannot be made for criminal law or family matters.

- **Uplift fees**
  - LPUL s182 (1) Conditional costs agreements may provide for payment of an uplift fee.
  - LPUL s182 (2) If litigious matter – costs agreement must not provide for uplift fee unless successful outcome is reasonably likely. Uplift fee cannot exceed 25% of legal costs, excluding disbursements.
  - LPUL s182 (3) Conditional costs agreements including an uplift fee must (i) identify basis on which uplift fee is calculated; (ii) include estimate of uplift fee, or range/estimates thereof.

- **Contingency fees**
  - LPUL s183 (1) A law practice must not enter into a contingency costs agreement (i.e., where costs are calculated by reference to the amount of any award or settlement, or the value of property which may be recovered in proceedings. Penalty = 100 penalty units.
  - LPUL s183 (2) Contravention can lead to disciplinary proceedings - unsatisfactory professional conduct or professional misconduct.
5. Is there a valid BILL (or what would need to be done to validly bill the clients) LPUL Part 4.3 Div 5?

- Requirements
  - LPUL s186: Bill may be in the form of a lump sum bill or itemised bill
  - LPUL s188(1): A bill given must (a) be signed by principal of the law practice or (b) nominate a principal as responsible for the bill
  - LPUL s188(2): If a principal does not sign or is not nominated as responsible for the bill, each principal is taken to be responsible for the bill
  - LPUL s189: A bill must be delivered, in person or by mail
  - LPUL s191: Law practice must not charge for preparation or giving a bill
  - LPUL s192: A bill must include or be accompanied by a written statement setting out avenues open to the client in event of a dispute as to legal costs, and time limits for taking action
  - LPUL s193: A law practice may give an interim bill covering only part of legal services retained to provide

- Requests for itemised bills and progress reports
  - LPUL s187(1)(2)(3) - Itemised Bill: if a bill is given in lump sum form, any person entitled to an assessment of legal costs to which the bill relates can request an itemised bill. Requests must be made within 30 days after costs become payable. Practice must comply within 21 days of the request.
  - LPUL s190(1)(2)(3) - Progress Report: a law practice must on reasonable request, without charge and within a reasonable period, provide a written report of legal costs incurred to date, or since last bill was rendered. Law practice retained by another law practice on behalf of a client is not required to give a report, but must disclose to the other practice any information necessary for the other practice to comply with (1). (2) does not apply if the other law practice ceases to act in the matter for which they were retained.

6. Are the costs charged to these clients (or likely to be charged) FAIR AND REASONABLE? LPUL ss172, 173, Civ Proc Act s25

- Meaning
  - LPUL s172(1): law practice must not charge costs that are no more than fair and reasonable in all the circumstances, i.e. which are proportionately and reasonably incurred, and proportionate and reasonable in amount

- Considerations
  - LPUL s172(2): in considering whether costs are fair and reasonable, regard must be had to whether costs reasonably reflect
    - (a) the lawyer's level of skill, experience, specialisation and seniority,
    - (b) the novelty, complexity or difficulty of the case,
    - (c) the quality of work done,
    - (d) the amount of time spent on the matter
    - (e) the labour and responsibility involved
    - (f) the extent to which the matter involved a matter of public interest
    - (g) the amount or value of the subject matter
    - (h) the urgency of the matter
    - (i) the number and importance of documents involved
    - (j) the amount costs were likely to be assessed at
    - (k) retainer and instructions
    - (l) presence of costs agreement
  - LPUL s172(3): Costs agreement prima facie evidence legal costs are fair and reasonable provided
    - (a) ss174-178 are complied with and
    - (b) agreement does not contravene ss180-185 (D'Allesandro v LPCC)
  - LPUL s172(3): Regard must be had to the Uniform Rules

- ASCR 12.2; s207 - Contravention
  - Charging more than fair and reasonable costs can constitute UPC/PM on the part of the principals and legal practitioners responsible
  - LPUL s178 - Avoidance of increased legal costs
    - A practice must not act in a way that unnecessarily results in increased legal costs, and must act to avoid unnecessary delay resulting increased legal costs.
      - Gross Overcharging = Determined by 172(2) factors
        - Generally speaking, 'normal overcharging' is allowed i.e. no more than 15% of the original assessment.
        - Such overcharging may result in bill reduction, but not disciplinary proceedings
        - Costs agreement do not act as a bar to disciplinary proceedings, i.e. a lawyer cannot charge certain fees simply because a client agreed to them.
        - Gross overcharging is determined objectively (D'Allesandro v LPCC)
• The court can determine whether a solicitor grossly overcharged clients, even where there is no prior formal assessment of the bill charged

**Costs agreements:**
• It is fraudulent to bill a client on a different basis disclosed in costs agreement.
• A lawyer breached fiduciary duty when they (per *QLS v Rocha*)
  o (a) fail to draw their client’s attention to the provision of a previous retainer, particularly where first retainer has limited increases in charges;
  o (b) fail to provide an assessment of the likely impact of proposed increases to fees payable;
  o (c) fail to advise clients seek independent legal advice in respect of a new agreement or
  o (d) fail to give clients an opportunity to make an informed decision

**Misconduct in billing practice:**
• A solicitor cannot charge for a unit of time more than once
• Where acting for multiple clients in proceedings head together, must apportion costs to clients (*Bechara v LSC*)
• Forging timesheets warrants striking off (*Law Soc of NSW v Foreman*)
• The principal solicitor is ultimately responsible for their employee’s failure of their employees to charge client’s inappropriately or erroneously (*LSC (NSW) v Keddie*)

7. What **REMEDIES** are available to the client in this scenario?

• **LPUL s178**– Non-Compliance with Disclosure obligations
  o Costs agreement is void;
  o Client does not have to pay legal costs until they are assessed by the LSB;
  o Practice cannot commence proceedings against the client until costs assessed;
  o If proceedings are commenced prior to assessment, the practice may be subject to disciplinary proceedings for UPC
• **LPUL s185(1)(2)(3)** – Non-compliance
  o Costs agreements contravening section are void
  o Law practice cannot recover amounts in excess of that which they would have been entitled to if costs agreement had not been void;
  o Required to pay the excess amount received
  o If repayment not made, person entitled to be repaid may recover from the law practice as a debt
  o Costs agreement in contravention does not entitle to recovery of an uplift fee
• **LPUL s199**:
  o Applications can be made to VCAT
• **Part 5.2**:
  o Complaint can be made to LSC

8. Could any of the legal actors in this scenario face **DISCIPLINARY CONSEQUENCES** – A finding of unsatisfactory professional conduct (UPC) or professional misconduct (PM) or **OTHER PENALTIES** for their conduct?

• **LPUL s178(1)(d); 207** – Gross Overcharging
  o UPC or PC, for which principal of firm is liable
• **LPUL s173, 182(4), 183, 191, 194**
  o Civil penalties for practice
  o Aus consumer law - MLDC

9. What can the legal actors in this scenario do to **FIX THESE PROBLEMS**? What should the legal actors do differently in the future?

• Legal Consumer advocate
• Greater transparency and predictability in charges
• Websites to rate and review legal affordability
• Widespread use of fixed fees
### D’Allesandro v LPCC (1995) – EXISTENCE OF COSTS AGREEMENT NO BAR

**FACTS:**
- D found G of 7 counts UPC – gross overcharging. He employed junior clerks – one ground of appeal was that there was a cost agreement in place so since client agreed, he was permitted to charge amount in costs agreement.

**HELD:**
- Court did not agree – existence of a costs agreement between solicitor and client is no bar to disciplinary proceedings against solicitor.

### Council of the QLD Law Society Inc v Roche [2003] – OVERCHARGING FOR MUNDANE WORK

**FACTS:**
- R’s law firm – retained by Arthur on no win no fee basis.
- He was asked to sign a new costs agreement but wasn’t made aware that it was a new costs agreement – agreement entitled firm to charge additional amounts for care and consideration – not over 30% - prior one said it could not increase more than 10%.
- He was also under erroneous impression most of work was done in his case.
- In new retainer – paralegals being charged same amount as partner s- $300/hr for all work (c.f. $100/hr paralegal work and $250/hr partners)

**HELD:**
- Just because he signed costs agreement, doesn’t mean it was not GROSS OVERCHARGING.
- A solicitor proposing same rate as secretary or clerk at same rate as solicitor must have careful justification.
- Further, insufficient disclosure – client not fully informed.

### Legal Services Commissioner v Keddie [2012] – GROSS OVERCHARGING AND FAILURE TO SUPERVISE

**FACTS:**
- Ms Meng – awarded $3M to cover medical expenses when win her case – but received bill of over $800K.
- Numerous allegations of overserving, overcharging, doing unnecessary work, charges for worked unperformed, failure for Keddie to supervise the way bills were charged by principal solicitor.

**HELD:**
- KEDDIE WAS STRUCK OFF – Had regard to the frequency of excessive costs over 3 years and amount of overcharging. He also downplayed the seriousness of the breach.
- This case shows that a single instance of gross overcharging any result in a striking off/suspension order.

### Bechara v LSC [2010] – DOUBLE BILLING

**FACTS:**
- A case of double billing the same clients for an appearance at the same tie in court, despite the fact that the proceedings were heard all together. No attempt to apportion the cost between the three.

**HELD:**
- PM: deliberate charging of grossly excessive fees. It was irrelevant that the client’s signed cost agreement. NB: may be able to use an uplift fee in some circumstances.
- But overall- A LAWYER CANNOT CHARGE THE SAME UNIT OF TIME MORE THAN ONCE.