

# Dealing with trust money – legal costs

## A. Background

Queensland Law Society (QLS) has followed the view expressed in the Legal Services Commission (LSC) Regulatory Guide 1. Charging Outlays and Disbursements. The regulatory guide defines outlays and disbursements as “...amounts that have actually been paid out on a client’s behalf to some other person or entity...”

A law practice billing clients for “unpaid outlays”, i.e. receiving funds from the client into the law practice general account before the law practice has paid for the outlay or disbursement, has been an issue for law practices since the inception of the *Legal Profession Act 2007* (Qld) (LPA).

QLS has reviewed s 258 of the LPA and r 58 of the *Legal Profession Regulation 2017* (LPR).

## B. Statutory framework

Section 249 of the LPA imposes a duty on a law practice to deal with trust money as prescribed.

Where an obligation is imposed on a law practice, the same obligation is imposed on the principals of the law practice.<sup>1</sup>

Section 258(1)(b) of the LPA authorises a law practice to withdraw money for payment to the practice’s account for legal costs owing to the practice, if the relevant procedures or requirements under the LPA or prescribed under the LPR are complied with.

### **258 Dealing with trust money—legal costs and unclaimed money**

- (1) *A law practice may do any of the following in relation to trust money held in a general trust account or controlled money account of the practice for a person—*
  - (a) *exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practice;*
  - (b) ***withdraw money for payment to the practice’s account for legal costs owing to the practice if the relevant procedures or requirements under this Act or prescribed under a regulation are complied with;***
  - (c) *after deducting any legal costs properly owing to the practice, deal with the balance as unclaimed money under [section 713](#).*

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<sup>1</sup> Section 244 of the *Legal Profession Act 2007*

- (2) *Subsection (1) applies despite any other provision of this part but has effect subject to [part 3.4](#).*

Regulation 58 of the LPR prescribes the procedure for the purposes of s 258(1)(b) of the LPA.

**58 Procedures and requirements for withdrawing trust money for legal costs—Act, s 258**

- (1) For [section 258](#)(1)(b) of the [Act](#), trust money, held in a general trust account or controlled money account of a law practice for a person, may only be withdrawn, for payment of legal costs owing to the practice by the person, in accordance with the procedure set out in subsection (2), (3), (4) or (5).
- (2) The law practice may withdraw the trust money—
- (a) if the practice has given the person a bill relating to the money; and
  - (b) if—
    - (i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or
    - (ii) the person has objected within 7 days after being given the bill, but has not applied for a costs assessment within 60 days after being given the bill; or
    - (iii) the money otherwise becomes legally payable.
- (3) The law practice may withdraw the trust money, whether or not the law practice has given the person a bill relating to the money, if—
- (a) the money is withdrawn in accordance with—
    - (i) a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or
    - (ii) instructions that have been received by the practice and that authorise the withdrawal; and
  - (b) the practice, before withdrawing the money, gives or sends to the person—
    - (i) a request for payment, referring to the proposed withdrawal; or
    - (ii) a written notice of withdrawal.
- (4) The law practice may withdraw the trust money if—

- (a) the money is owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person; and
- (b) the practice, before withdrawing the money, gives or sends to the person—
  - (i) a request for payment, referring to the proposed withdrawal; or
  - (ii) a written notice of withdrawal.
- (5) If a cost agreement or instruction, mentioned in subsection (3)(a), authorises withdrawal of only part of the money, the remainder of the money may still be withdrawn in accordance with subsection (2) or (4).
- (6) An instruction mentioned in subsection (3)(a)(ii)—
  - (a) if the instruction is given in writing—must be kept as a permanent record; or
  - (b) otherwise—must be confirmed in writing either before, or within 5 working days after, the law practice withdraws the money and a copy must be kept as a permanent record.
- (7) For the purposes of subsection (4), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the law practice has been debited.

*If a practitioner disburses trust money and fails to comply with regulation 58 or some other enabling provision, an offence under s 249 results.<sup>2</sup>*

### **C. Legal costs**

The term legal costs is not defined for the purposes of s 258 of the LPA or the LPR.

Butterworths Concise Australian Legal Dictionary defines “legal costs” as:

*The remuneration and disbursements due to a party or solicitor under a retainer or agreement between a party and a solicitor or under an order of a court or tribunal.*

At common law, “costs” has been held to be the remuneration and disbursements incurred in relation to legal work.<sup>3</sup>

<sup>2</sup> *Legal Services Commissioner v King* [2013] QCAT 260, [58].

<sup>3</sup> *Ex parte Farmer Fertilizers Corp Ltd* (1916) 16 SR (NSW) 645

## **D. Regulation 58 of the LPR**

### **i. Compliance with r 58(1) of the LPR**

A law practice seeking to withdraw trust money for legal costs owing to the law practice under 258(1)(b) of the LPA, must comply with either r 58 (2), (3), (4), or (5).

If a law practice relies on r 58(3)(a)(ii) to withdraw trust money for legal costs, the law practice must also comply with r 58(6)

If a law practice relies on s 58(4) to withdraw trust money for legal costs, the law practice must also comply with s 58(7).

Once a law practice has complied with any one of r 58 (2), (3), (4) or (5), the law practice is taken to have complied with r 58. When a law practice has complied with r 58 and the money is deposited to its account, they are no longer trust money.

A breach of r 58 is also a breach of s 249 of the LPA. A breach of s 249 is a substantial breach under Part 3.3 (Trust Account Investigations) Investigation Policy.

### **ii. Regulation 58(2) – the giving of a bill**

Regulation 58(2) provides for the withdrawal of trust money for legal costs by a law practice where a bill relating to the money has been given to a person.

A bill, and the giving of the bill must meet the requirements set out in s 330 of the LPA.

A bill must be either a lump sum bill that describes the legal services to which it relates and specifies the total amount of the legal costs or an itemised bill, meaning a bill that describes in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under the LPA (see s 300 of the LPA definition of lump sum bill and itemised bill).

If 58(2)(a) and either 58(2)(b)(i), (ii) or (iii) are met, the law practice is entitled to withdraw the trust money.

*r 58(2) The law practice may withdraw the trust money—*

- (a) if the practice has given the person a bill relating to the money; and*
- (b) if—*
  - (i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or*
  - (ii) the person has objected within 7 days after being given the bill, but has not applied for a costs assessment within 60 days after being given the bill; or*
  - (iii) the money otherwise becomes legally payable.*

## Practice Notes

To rely on r 58(2) a law practice must ensure that the bill only relates to the matter for which the trust money is held.

If the law practice acts for a client on multiple matters, the law practice must ensure the bill relates to trust money held for that client and the matter on which costs are sought.

If a law practice gives a person a bill via electronic communication, the law practice must ensure the client has consented to receiving the bill via electronic communication.

Money becomes otherwise legally payable (r 58(2)(b)(iii)) if the law practice issued a bill that included a written notice of withdrawal or a request for payment referring to the proposed withdrawal. The money would be legally payable under r 58(3) of the LPR. It may be unwise to use this to avoid or get around the 7 days objection period set up at 58(2)(b).

*i.*     **Regulation 58(3) – withdrawal of trust money in accordance with a costs agreement or instructions received by the law practice**

R 58(3) provides how a law practice may withdraw trust money whether or not a bill relating to the money has been given.

*58(3) The law practice may withdraw the trust money, whether or not the law practice has given the person a bill relating to the money, if—*

- (a) the money is withdrawn in accordance with—*
  - (i) a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or*
  - (ii) instructions that have been received by the practice and that authorise the withdrawal; and*
- (b) the practice, before withdrawing the money, gives or sends to the person—*
  - (i) a request for payment, referring to the proposed withdrawal; or*
  - (ii) a written notice of withdrawal.*

The following must be satisfied to comply with r 58(3):

**a. Costs agreement r 58(3)(a)(i) and 53(3)(b)(i) or (ii)**

A law practice may withdraw trust money for legal costs if a costs agreement that complies with the legislation under which it is made authorises the withdrawal of trust money for legal costs. In most cases the legislation will be the LPA.

If a law practice relies on r 58(3)(a)(i) in relation to a costs agreement, the law practice must ensure that before withdrawing the trust money, the law practice gives or sends the person, a request for payment, referring to the proposed withdrawal or a written notice of withdrawal (r 53(3)(b)(i) or (ii)).

If the costs agreement only allows withdrawal of part of the money, the remainder of the money might be withdrawn in accordance with r 58(2) or (4). If that is so all withdrawals are lawful (r58(5))

### *Practice Notes*

The law practice must ensure that the making of the costs agreement complies with s 322 of the LPA.

A law practice relying on r 58(3)(a)(i) must ensure the costs agreement covers the circumstances under which the law practice is seeking to withdraw the trust money.

For example if a law practice wishes to withdraw trust money for outlays incurred by the law practice, but not yet paid, the law practice must ensure that the costs agreement covers such a situation.

The law practice and client may agree to a costs agreement that allows the law practice to withdraw trust money for outlays incurred, but not yet paid by the law practice. Such an agreement is lawful. Refer to the QLS Trust Accounting Guide for a specimen term.

A law practice must give or send the person either a request for payment, referring to the proposed withdrawal, or a written notice of withdrawal, before the money is withdrawn. It is advisable to set a time frame in the making and delivery of a request or notice that allows the client to know the monies are being withdrawn before that withdrawal occurs. To not send or give those notices means 58(3) is not complied with and the monies must not be withdrawn from trust or if withdrawn, returned to trust immediately the lack of compliance is found. Such a withdrawal may be a breach of s 249 of the LPA.

There would be nothing to prevent the process being conducted again, properly in these cases.

A written request for payment referring to the proposed withdrawal does not have to be in the form of a bill. However a bill may include a written request for payment referring to the proposed withdrawal or a notice of withdrawal (see r 58(2) above).

A law practice should consider the costs assessment provisions in Part 3.4 of the LPA, including s 335(4) and (5) of the LPA when determining whether to issue a bill with a written request for payment or notice of withdrawal or to issue a written request for payment or notice of withdrawal separate to the issue of a bill.

A request for payment, referring to the withdrawal or a written notice of withdrawal are trust records as defined in s 237 of the LPA. Trust records must be kept in accordance with s 261 of the LPA and r 59 of the LPR.

If a law practice wishes to give or send a person the request for payment or a written notice of withdrawal via electronic communication, the law practice must ensure the client has consented to receiving communications via electronic communication.

If a law practice relies on r 58(3) to withdraw trust money for legal costs owing to the law practice in the form of disbursements incurred but not paid by the law practice, the law practice must ensure it deals with the money in the way authorised by the client i.e. the payment of legal costs.

If the law practice does not deal with the money in the way authorised by the client, then the requirements of r 58(3) will not be met. The law practice must return the money to the trust

account and report the irregularity as required under s 260 of the LPA. Failing to return the money to trust may contravene s 257, mixing trust money with other money

***b. Instructions received by the law practice authorising the withdrawal of trust money r 58(3)(a)(ii) and 53(3)(b)(i) or (ii)***

A law practice may withdraw trust money for legal costs if an instruction has been received by the law practice authorising the withdrawal of money for legal costs.

If an instruction is given in writing, it must be kept as a permanent record (r 58(6)(a)).

If the instruction authorising the withdrawal of trust money for legal costs has not been provided in writing, the instruction must be confirmed in writing either before the withdrawal of the trust money, or within 5 working days after the withdrawal of trust money and a copy must be kept as a permanent record (r 58(6)(b)).

Permanent records must be kept in accordance with s 261 of the LPA.

If a law practice is seeking to rely on r 58(3)(a)(ii) in relation to an instruction authorising the withdrawal of trust money, the law practice must also ensure that before withdrawing the trust money, the law practice gives or sends the person, a request for payment, referring to the proposed withdrawal or a written notice of withdrawal (r 53(3)(b)(i) or (ii)).

## Practice Notes

The request for payment referring to the proposed withdrawal or a written notice of withdrawal does not have to be in the form of a bill.

The person ought to know and the instruction should record the sum to be paid when the instruction is sought and given.

The regulation requires the instruction and a request for payment or written notice of withdrawal before the withdrawal can be made. It does not contemplate only an instruction. To take the money over in reliance only on an instruction without the request or notice may be a breach of s 249 of the LPA.

It is advisable to set a time frame in the making and delivery of a request or notice that allows the client to know the monies are being withdrawn before that withdrawal occurs.

If the request or written notice must specify the amount to be taken, if an amount is recorded in the instruction and that amount is exceeded by the request or written notice a fresh instruction must first be obtained.

If a law practice wishes to give or send a person the request for payment or a written notice of withdrawal via electronic communication, the law practice must ensure the client has consented to receiving communications via electronic communication.

If a law practice withdraws trust money relying on r 58(3)(a)(ii) but does not comply with r 58(6) the law practice will be in breach of s 249 of the LPA.

If there is a deficiency in the costs agreement or instructions authorising withdrawal, the law practice may be able to withdraw the legal costs if the requirements set out in r 58(4) are met (see r58(5)).

ii. **Regulation 58(4) withdrawal of trust money by way of reimbursement of money already paid by the law practice.**

For the purposes of r 58(4), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the law practice has been debited (r 58(7) of the LPR).

The law practice may withdraw trust money pursuant to r 58(4) if the money is already owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person.

*58(4) The law practice may withdraw the trust money if—*

- (a) the money is owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person; and*
- (b) the practice, before withdrawing the money, gives or sends to the person—*
  - (i) a request for payment, referring to the proposed withdrawal; or*
  - (ii) a written notice of withdrawal.*

Before the law practice withdraws the trust money, the law practice must give or send a request for payment, referring to the proposed withdrawal or a written notice of withdrawal (r 58(4)(b)(i) or (ii)). To take the money from trust without the request or notice may be a breach of s 249 of the LPA.

It is advisable to set a time frame in the making and delivery of a request or notice that allows the client to know the monies are being withdrawn before that withdrawal occurs.

A written request for payment referring to the proposed withdrawal does not have to be in the form of a bill. However a bill may include a written request for payment referring to the proposed withdrawal or a notice of withdrawal.

A law practice should consider the costs assessment provisions in Part 3.4 of the LPA, including s 335(4) and (5) of the LPA when determining whether to issue a bill with a written request for payment or notice of withdrawal or, issue a written request for payment or notice of withdrawal separate to the issue of a bill.

If a law practice withdraws trust money relying on r 58(4) but does not comply with r 58(4) or 58(7), the law practice has not satisfied r 58 and will be in breach of s 249 of the LPR.

### **Practice Notes**

A request for payment, referring to the withdrawal or a written notice of withdrawal are trust records as defined in s 237 of the LPA. Trust records must be kept in accordance with s 261 of the LPA and r 59 of the LPR.

If a law practice wishes to give or send a person the request for payment or a written notice of withdrawal via electronic communication, the law practice must ensure the client has consented to receiving communications via electronic communication.



## **E. Best Practice**

The relationship between a solicitor and client is fiduciary. Section 249 of the LPA requires a law practice to hold trust money exclusively for the person on whose behalf it is received, and disburse the trust money only under direction given by the person. If a law practice disburses money, but not in accordance with the direction given, the money must be returned to the trust account and the matter reported to the Society in accordance with s 260 of the LPA.

While it is the case that:-

- when a law practice has complied with r58 and
- the money is deposited to its account in payment of legal costs

that money is no longer trust money; it may be unsatisfactory professional conduct if a law practice having complied with Regulation 58(3) in withdrawing money for disbursements incurred then fails to pay the full amount owing to the service provider with whom the disbursement was incurred.

If a law practice wishes to give or send a person a request for payment or a written notice of withdrawal via electronic communication the law practice must ensure it has complied with the LPR and the Electronic Transactions (Queensland) Act 2001 and should refer to Chapter 3 of the Queensland Law Society Costs Guide regarding disclosure via electronic means.