

# Part 3.3

## (Trust Account Investigations)

### Investigation Policy

#### Introduction

- A. The *Legal Profession Act 2007* (the Act) at Part 3.3 sets out the obligations of law practices, practitioners and principals regarding trust money and trust accounts. One of the main purposes of Part 3.3 is to ensure that trust money is held by law practices in a way that protects the interests of persons for whom money is held.
- B. Breach of the obligations in Part 3.3 of the Act may, in appropriate circumstances, cause the Society to consider whether the responsible practitioner is a fit and proper person to hold a practising certificate and/or whether external intervention in the law practice is warranted. Section 244 of the Act imposes the trust accounting obligations of a law practice upon its Principals
- C. The Act obliges the Society to monitor and enforce compliance with Part 3.3 of the Act. To meet this obligation the Society conducts what the Act calls Part 3.3 Investigations (see s263(5)), which are investigations into ‘the affairs of a law practice’. ‘The affairs of a law practice’ include: -
  - (a) all accounts and records required under a relevant law to be kept by the practice or an associate or former associate of the practice;
  - (b) other records of the practice or an associate or former associate of the practice;
  - (c) any transaction:-
    - (i) to which the practice or an associate or former associate of the practice was or is a party; or
    - (ii) in which the practice or an associate or former associate of the practice has acted for a party.

- D. The Society conducts Part 3.3 Investigations of law practices in Queensland in accordance with s263 and Chapter 6 of the Act and this policy.
- E. The principal purposes of a Part 3.3 Investigation are:-
  - (a) to ascertain whether the law practice complies with Part 3.3 of the Act; and
  - (b) to detect and prevent defaults in relation to the law practice.
- F. Defaults are defined at s356 of the Act. They are a dishonest misappropriation of trust money or trust property.
- G. After completing a Part 3.3 Investigation a trust account investigator must give a report of the investigation to the Society (s264 of the Act).
- H. The power to consider Part 3.3 Investigation Reports given to the Society is delegated by the Council of the Society to its Professional Conduct Committee (PCC), the Manager, Part 3.3 Investigations (Manager, TAI) and Team Leader, Part 3.3 Investigations (Team Leader, TAI).
- I. If the Part 3.3 Investigation Report states that a breach of the Act has been committed or a default has occurred and the Society is satisfied that the breach or default is wilful or of a substantial nature, the Society may decide that the whole or part of the costs of carrying out the investigation is payable to the Society and may decide the amount payable (s265 of the Act).
- J. The power to make determinations under s265 of the Act is delegated by Council to the Professional Conduct Committee (PCC).
- K. This is Council's Policy about Part 3.3 Investigations conducted by the Society. It outlines the process followed and what practitioners should expect from that Investigation.

## The policy

1. A Part 3.3 Investigation will be undertaken of every law practice in Queensland. The aim is to conduct a Part 3.3 Investigation of every law practice at least once every 3 years.
2. The Part 3.3 Investigation will investigate the law practice and report on any substantial or minor breaches of Part 3.3 and Part 3.4 of the Act and any best practice issues.
3. Substantial and minor breaches are breaches of Part 3.3 and Part 3.4 of the Act. A substantial breach is one of greater weight in determining if satisfied the interests of those persons for whom trust money is held are protected
4. Best practice issues are not breaches of the Act but are rather elements of good practice that in the course of the Part 3.3 Investigation have been found wanting. Best practices, while not required by the Act, minimise the risk that trust money will be dealt with inappropriately, intentionally or otherwise.
5. The provisions, the breach of which are substantial breaches, are set out at Appendix 1.
6. The provisions, the breach of which are minor breaches, are set out at Appendix 2.
7. A list of what are best practices issues is set out at Appendix 3.
8. A Part 3.3 Investigation takes two forms, a Trust Account Review (TAR) and an Investigation of Affairs (IOA).
9. A TAR is a limited, routine investigation of the affairs of the law practice. The scope of the investigation is limited to the review of trust records and will not usually involve review of client files. The time period relevant to the investigation will be limited to recent trust account records of the law practice, generally from the preceding three months. The purpose of the TAR is to check compliance with Part 3.3 of the Act, to detect any breaches or defaults, or best practice issues and to determine whether the trust account processes implemented by the law practice will prevent or minimise the risk of breaches or defaults by the law practice in future.
10. A TAR is conducted in the following circumstances:
  - (a) the First Part 3.3 Investigation for law practices that operate a law practice trust account; and
  - (b) repeat investigations of a law practice that holds a trust account where the previous Part 3.3 Investigation found the law practice was compliant, providing there are no circumstances which would require an IOA to be conducted.
11. An IOA is a broad investigation of the affairs of the practice. An IOA is conducted in the following circumstances:
  - (a) where a law practice does not hold a trust account;
  - (b) where the previous Part 3.3 Investigation resulted in the law practice being deemed non-compliant;
  - (c) where information has been received or identified that indicates that there may be a breach of Part 3.3 of the Act or a default; and
  - (d) where no external examination report has been provided by a law practice
12. An IOA will include:
  - (a) a review of trust account records (where applicable);
  - (b) a comprehensive review of the affairs of the law practice, including a review of the law practice general account and a selection of client files; and
  - (c) if breaches or defaults were identified in the previous Part 3.3 Investigation, a review of the trust records since that investigation to determine whether any of those breaches or defaults have been repeated.
13. For a law practice that does not operate a law practice trust account, the only Part 3.3 Investigation is an IOA. The procedure for a First Part 3.3 Investigation of such a law practice commences at paragraph 23. Such law practices are subject to a Part 3.3 Investigation to ensure they are not receiving and improperly handling trust money, for example, by depositing trust monies into the general law practice account.

### **The First Part 3.3 Investigation – TAR**

14. An Investigator will attend upon the law practice and conduct a TAR.
15. The Investigator will complete a report for the Society of the TAR. That report will:-
  - (a) identify any breaches and how they ought to be remedied;
  - (b) classify the breaches as substantial or minor;
  - (c) identify any best practice issues;
  - (d) identify what action must be taken to remedy the breaches;
  - (e) provide a date for compliance;
  - (f) make a reasoned recommendation having undertaken the weighting exercise (set out at 18 below) of the breaches as to whether the law practice is compliant or non-compliant.
16. A copy of the report will be provided to the law practice.
17. The Manager, TAI or Team Leader, TAI will consider the report and decide whether the law practice's trust accounting is compliant or non-compliant.
18. This determination is made by assessing the breaches identified in the report, giving more weight to substantial breaches than minor breaches and also taking into account any best practice issues in order to decide whether the report provides information upon which the Society can be satisfied the trust accounting of the law practice protects the interests of those for whom Trust money or Trust property is held. In order to make this determination the Society may need to make further inquiries of the law practice.
19. If the Manager, TAI or Team Leader, TAI is satisfied the trust accounting of the law practice protects the interests of those for whom trust money or trust property is held; the law practice is compliant. The law practice will be so advised and provided with the report of the investigation. The law practice will be advised of any breaches identified and how they can be remedied. The law practice will then, in the absence of any intervening circumstances, not be subject to a further Part 3.3 Investigation for a period of approximately 3 years. The law practice when investigated again is for the purpose of this Policy a law practice subject to a First Part 3.3 Investigation
20. If the Manager, TAI or Team Leader, TAI is not satisfied the trust accounting of the law practice protects the interests of those for whom trust money or trust property is held; the law practice is non-compliant. The law practice will be subject to an IOA.
21. Before that IOA takes place the law practice will be given a copy of the report upon the First Part 3.3 Investigation and the reasons the law practice is deemed non-compliant. The law practice will also be advised:
  - (a) that if wilful or substantial breaches of the Act are detected upon the IOA that the law practice might be liable to a costs order pursuant to s265 of the Act;
  - (b) *prima facie*, if the IOA identifies that any breaches of the Act (substantial or minor) listed in the report upon the First Part 3.3 Investigation have been repeated since the report was given to the law practice, this is a basis for the making of an order for costs on the grounds of wilful breach.
22. Principals of the law practice will be invited to undertake a Trust Account Consultancy prior to the IOA to assist in developing appropriate procedures and process to comply with the law relating to trust accounts.

## **IOA**

23. An Investigator will attend upon the law practice and conduct an IOA.
24. The Investigator will complete a report of the IOA. That report will:-
  - (a) identify any breaches and how they ought to be remedied;
  - (b) classify the breaches as substantial or minor;
  - (c) identify any best practice issues;
  - (d) identify what action must be taken to remedy the breaches;
  - (e) provide a date for compliance;
  - (f) make a reasoned recommendation having undertaken the weighting exercise of the breaches as to whether the law practice is compliant or non-compliant;
  - (g) if the IOA was conducted because the law practice was deemed non-compliant, state whether or not there have been any breaches of the type detected upon the previous investigation and whether those repeated breaches were committed before or after delivery to the law practice of the investigator's report;
  - (h) state any steps by the law practice to achieve compliance, including whether or not the invitation to take up the Trust Account Consultancy was availed of and when.
  - (i) paragraphs 24(g) and (h) do not apply to a law practice without a trust account.
25. That report will then be considered by the Manager TAI or Team Leader, TAI.
26. If the Manager TAI or Team Leader TAI is satisfied on considering the report that the trust accounting of the law practice protects the interests of those for whom Trust money or Trust property is held, then the law practice is to be so advised and provided with a copy of the report of the investigation. If there were breaches the law practice will be advised of them and how they can be remedied. That law practice will then, in the absence of any intervening circumstances, not be subject to a further Part 3.3 Investigation for a period of approximately 3 years. The law practice when investigated again is for the purposes of this Policy a law practice subject to a First Part 3.3 Investigation.
27. If the Manager TAI or Team Leader, TAI is satisfied on considering the report that the law practice is non-compliant:-
  - (a) the Investigator's report will sent to the law practice;
  - (b) the law practice will be advised:
    - (i) the report will be put to the PCC for consideration of whether the law practice is compliant or non-compliant;
    - (ii) the PCC will consider whether to impose a costs order under s265 of the Act; and
    - (iii) the likely costs payable to the Society if, calculated in accordance with Rule 24 of the *Queensland Law Society (Administration) Rule 2005*.
  - (c) the law practice will be requested to give a response to:
    - (i) the breaches as set out in the report for attention, including evidence of any remedial action taken;
    - (ii) whether the law practice is non-compliant; and
    - (iii) whether a costs order should be imposed under s265 of the Act.
28. If the law practice does not respond to the report within the given timeframe, then the Manager, TAI or Team Leader TAI will present the report to the PCC.
29. If the law practice responds, the Manager, TAI or Team Leader TAI will prepare a report for the PCC (PCC Report) consisting of the investigator's report, the response to the report by the law practice, an analysis of that response and a recommendation regarding whether a costs order under s265 of the Act ought to be made and whether the practice ought to be found compliant or non-compliant.
30. The law practice will be provided with a copy of the PCC Report and invited to make submissions in response.

31. The PCC will consider the PCC Report together with any responses of the law practice.
32. If the PCC is satisfied the law practice is compliant then the law practice is to be so advised. That law practice will then, in the absence of any intervening circumstances, not be subject to a further Part 3.3 Investigation for a period of approximately 3 years. The law practice when investigated again is for the purposes of this Policy a law practice subject to a First Part 3.3 Investigation.
33. If the PCC is satisfied the law practice is non-compliant then it may, depending on the circumstances:
  - (a) recommend a follow-up investigation (IOA) at a time in the future ranging from immediately to within 12 months time
  - (b) recommend Principal/s of the law practice to undertake the Trust Account Accounting Course;
  - (c) advise Queensland Law Society Practice Support of the non-compliance so it might offer assistance to the law practice as deemed appropriate;
  - (d) recommend to the law practice that its principal/s seek assistance of Queensland Law Society Practice Support
  - (e) recommend that an application for External Intervention into the law practice ought to be made having regard to the nature and/or history of the breaches;
  - (f) refer the matter for consideration of the fitness of the Principals to practice to the Executive Committee of Council;
  - (g) make a costs order under s265 of the Act.
  - (h) recommend that conduct disclosed in the PCC report be referred to the Legal Services Commission or a relevant Police Service.
34. It is the Council's expectation that if the PCC is satisfied the law practice is non-compliant then recommendations would be made that:-
  - (a) A recommendation be given that principals undertake the Trust Accounting Remedial Course;
  - (b) the practice be referred to the practice support function of the Society;
  - (c) a follow up IOA be undertaken within a certain period of time;
  - (d) a costs order under s265 be made.
- It is recognised however that the PCC may find circumstances exist to depart from the expected course.
35. The law practice must be advised:-
  - (a) of the PCC's decision and the reasons for it;
  - (b) that any follow-up investigation will take place in the designated time;
  - (c) that until the law practice is deemed compliant following a Part 3.3 Investigation, the decisions made by the PCC as a result of a further non-compliant investigation will take into account not only that instant investigation but all previous non-compliant investigations including and since the First Part 3.3 Investigation, as well as any efforts to improve compliance made by the law practice; and
  - (d) by an Information Notice in accordance with s265(3) of the Act if a costs order was made.

## **The Follow Up IOA**

36. In the designated time an investigator will attend upon the law practice and conduct the follow-up IOA.
  37. The same process set out at paragraphs 23 to 32 will follow in respect of this Follow Up IOA.
  38. If the PCC decides a law practice is non-compliant after a Follow Up IOA, then when deciding what action to take, it will consider the risk to trust money held by the law practice, the interests of the clients of the law practice and the nature and history of the law practice's non-compliance, this includes a consideration of:
    - (a) previous non-compliant reports;
    - (b) previous substantial and minor breaches;
    - (c) whether previous substantial and minor breaches have been remedied and if so how;
    - (d) whether there have been repeated or wilful breaches;
    - (e) any steps taken by the law practice to address non-compliance, including whether a Trust Account Consultancy or Trust Account Accounting Course has been undertaken.
  39. The PCC may then take any of the actions set out at paragraph 33.
  40. It is the Council's expectation that absent any countervailing circumstances upon a non-compliant Follow up IOA the PCC would:-
    - (a) recommend another Follow Up IOA;
    - (b) advise the practice support function as deemed appropriate;
    - (c) seriously consider making a costs order under s265 of the Act;
    - (d) seriously consider recommending an application for External Intervention; and
    - (e) refer to the Executive Committee consideration of the fitness of the principals of the law practice to hold a practising certificate, having regard to suitability matters set out in the Act, including s9(1)(k) of the Act.
- It is recognised however that the PCC may find circumstances exist to depart from the expected course.
41. Reporting the determination of the PCC will be the same as the reporting set out at paragraph 35 above.
  42. Any subsequent Follow Up IOAs follow the steps outlined in paragraphs 36 to 41, above.
  43. Upon a law practice achieving compliance they recommence upon the next Part 3.3 Investigation as a law practice subject to First Part 3.3 Investigation.

## **Compliance achieved**

44. It is the expectation of the Society that where a law practice is deemed compliant:
  - (a) it will not be subject to a further Part 3.3 Investigation for a period of approximately 3 years;
  - (b) the next Part 3.3 Investigation will be a First Part 3.3 Investigation.
45. However, there may be intervening circumstances that will require an investigation prior to that time, for example, a request by the Legal Services Commissioner to conduct the Part 3.3 Investigation (see s263 of the Act) or the receipt of information by the Society which gives reason for an earlier investigation then would otherwise occur.
46. As stated above, where a law practice has previously been found non-compliant but subsequently achieves compliance, it will generally go back to a First Part 3.3 Investigation. However, if further non-compliance is detected in any subsequent Part 3.3 Investigation the entire history of the law practice's non-compliance may be considered in determining what action should be taken. Relevant details regarding the history of non-compliance and the previous Part 3.3 Investigation Reports will be provided to the decision maker for consideration before a decision is made.