# MANAGING CLIENT MONEY

## Lawyers' Trust Accounts in Queensland

REID MORTENSEN



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# MANAGING CLIENT MONEY – LAWYERS' TRUST ACCOUNTS IN QUEENSLAND

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| SWITZERLAND | Staempfli Verlag AG, Berne |
| TAIWAN | LexisNexis, Taiwan |
| UNITED KINGDOM | LexisNexis UK, London, Edinburgh |
| USA | LexisNexis Group, New York, New York |
| | LexisNexis, Miamisburg, Ohio |

National Library of Australia Cataloguing-in-Publication entry

| | |
|---|---|
| Author: | Mortensen, Reid. |
| Title: | Managing Client Money: Lawyers' Trust Accounts in Queensland. |
| Edition: | 1st edition. |
| ISBN: | 9780409327410 (pbk). |
| Notes: | Includes index. |
| Subjects: | Lawyers — Queensland — Accounting. |
| Dewey Number: | 657.834. |




Typeset in Bembo and Frutiger.

Printed in Australia by Ligare Pty Ltd (NSW).

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# PREFACE

The aim of this book is to offer an integrated approach for lawyers to use in relation to how they should handle their clients' money — a central issue for solicitors' practices. Handling clients' money is arguably the most closely regulated aspect of legal practice in Australia, and is certainly of enduring concern to regulators and law societies. And, as would be expected when an issue attracts so much judicial, regulatory and professional attention, there is a large body of law, regulatory control and guidance, professional ethics and accounting practice that together direct how lawyers should look after other people's money. As a result, I have tried to integrate all of the relevant information in all of those sources for a comprehensive account of how client money should be handled.

Trust account management is so serious a professional concern that, in Australia, anyone on the path to practice as a principal solicitor must show knowledge of the field at three points — in an academic course at university, in a practical legal training course, and in a post-admission practice management course — in addition to compulsory professional development every year. However, some formal coursework focuses too much on one aspect of the trust account to the detriment of others. At times, it concentrates on bare statutory duties, and ignores the accounting aspects (which can flummox lawyer and legal academic alike). At other times, it considers the accounting practice without much reference to the law and the reasons for the law. However, the accounting is an inherently ethical exercise — a means of maintaining the lawyer's fidelity to client interests. The accounting aspects also provide a means of proving fidelity to client interests. The prophylactic rules relating to receipts, deposits and payments facilitate the maintenance of the ethic of fidelity. I therefore hope, in presenting the material in an integrated way, that it helps to improve understanding of how the detail of client money management fits into a broader understanding of how lawyers should work for their clients.

The book deals with the law and regulatory practice in Queensland. The trust accounts provisions in the *Model Laws on National Legal Practice* are, of course, a preoccupation of the book, and the *Model Laws* are given force by legislation not only in Queensland, but everywhere else in Australia (other than South Australia).

To that extent, I hope that the book is of use and value outside the Sunshine State, and that it provides more detail on trust account management throughout Australia than is currently available in published form. There are nevertheless aspects of client money management where differences between states and territories are prominent: the regulatory structure, the Fidelity Fund, the more serious criminal offences for misappropriation and the structure of discipline. But, while the aim is to deal with these issues exhaustively for Queensland, the material, in many cases, draws on law from other jurisdictions in areas where the general law still governs and where the material helps to explain the *Model Laws* more effectively. As the *Model Laws* are themselves modelled on arrangements introduced in New South Wales in 1987, the decisions of the NSW Supreme Court are especially important in this respect.

It is not clear how much more life the *Model Laws* have in them. At the time of writing, consultation on national legal profession reform was ongoing. So far as the trust account is concerned, if the *Legal Profession National Law* is implemented there will be little change from the substance of the *Model Laws*, and almost no change for most solicitors and solicitors' practices in Queensland. I have therefore included references to the draft *National Law* (as it stood in May 2010) wherever it has parallels with the *Model Laws*. Some discussion has also been included of the option the *National Law* may give for multi-jurisdiction practices to hold only one trust account. Nevertheless, if implemented, even the *National Law* may not give us a single body of Australian adjudication on trust account management. The Law Council of Australia has noted that most mismanagement has been dealt with by professional discipline rather than criminal prosecution. The Law Council has submitted that there should be even greater reliance on the disciplinary system for addressing client money mismanagement, and consequently that the scheme of regulatory fines in the *Model Laws* should be pared back. To some extent, the *National Law* responds to that submission. However, the *National Law* also leaves discipline within a national legal profession to the different disciplinary systems of the states and territories. It seems likely that, as now presented, national legal profession reform will continue to help maintain the sharp focus that solicitors must have on how the tribunals and courts in their home-state or territory interpret lawyers' duties in relation to other people's money.

Little is written on client money in Australia, but the work of Adrian Evans and Mark Lunney should be acknowledged. Linda Haller's comprehensive research on discipline in the Queensland legal profession has been an invaluable resource for this book. I thank David Franklin of the Queensland Law Society for giving background on the *Model Laws* trust account provisions, and for being able to explain

the seemingly inexplicable. Marietta Gunn, Elise Carney, Joanne Beckett, Jocelyn Holmes, Kerry Paul and Steven Schwarz of LexisNexis are thanked for getting this book to completion — and for their patience.

References to BRDA are to the Bi-Annual Report of Disciplinary Action published by the Queensland Law Society between 1997 and 2003. The law is stated as at 30 September 2010.

Reid Mortensen

Toowoomba, Queensland

*5 October 2010*

# MANAGING CLIENT MONEY

Lawyers' Trust Accounts in Queensland

## REID MORTENSEN

Every law firm has a trust account, and the proper handling of client money remains the most sensitive practical and ethical aspect of legal work. Its mismanagement – whether because of ignorance, negligence or design – is one of the greatest concerns of law societies and is the subject of many disciplinary actions against solicitors.

*Managing Client Money: Lawyers' Trust Accounts in Queensland* provides a comprehensive, detailed yet practical account of the law and ethics necessary for an effective understanding of lawyers' responsibilities in handling others' money. It addresses the principles of trust account management clearly and comprehensively by integrating the legislation, principles of trusts and fiduciary law, the professional ethical rules, and tribunal and court decisions.

Although this work focuses on Queensland, *Managing Client Money* easily extends to other Australian jurisdictions as it rests on the uniform *Model Laws* regulating the management of trust money.

This unique title covers: the purpose of a trust account; the lawyer as fiduciary and trustee; supervision of trust accounts; statutory deposits; controlled money and investments, audit and supervision; civil liability for mismanagement; fidelity funds; criminal responsibility and discipline for trust account mismanagement.

This book is an invaluable resource for students, academics and practitioners to explain and guide lawyers in this important aspect of legal practice.

**About the author**

Reid Mortensen is Professor of Law at the University of Southern Queensland. He teaches, researches and publishes in the fields of lawyers' ethics and private international law.

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ISBN 978-0-409-32741-0

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