

Interest on Lawyers' Trust Accounts

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1. Introduction

In 1963, around £79 million was held in solicitors' trust accounts in New South Wales, Queensland and Victoria.¹ None of that earned interest. At the time, banking regulations prohibited the crediting of interest to 'current accounts'² — bank accounts characterised by frequent deposits and withdrawals, the latter usually by cheque. In offering solicitors trust account facilities, the banks therefore got sizable sums by interest free loan: 'all the cream off the cake'.³ That was to change in the 1960s as the Law Institute of Victoria pioneered a scheme for getting banks indirectly to credit interest to trust account deposits and to direct that money to fidelity funds and, later, to legal aid. Interest on Lawyers' Trust Fund Accounts (IOLTA) schemes then spread to other parts of Australia, and were later exported to New Zealand (NZ), Zimbabwe, South Africa, Canada and the United States (US).⁴ Slowly refined and expanded, Australian IOLTA schemes are now entrenched in the funding base for legal aid and the legal profession infrastructure. They now add well over \$30 million every year to the budgets of the nation's legal aid commissions.⁵

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1 Helen Gregory, *The Queensland Law Society Inc 1928-1988: A History* (1991) at 174.

2 For instance, savings accounts (which earned interest) could not be operated by cheque: *Banking (Savings Bank) Regulations* 1960 (Cth) r7. The rule was repealed with the deregulation of banking in 1984: *Banking (Savings Bank) Regulations (Amendment)* 1984 (Cth) s5.

3 Allan Holding, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 1 December 1963 at 2332.

4 Terry Boone, 'A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar' (1979) 10 *St Mary's LJ* 539 at 542-550; Halimah DeLaine, 'The Importance of Nominal Interest: An Analysis of the Supreme Court's Decision Regarding IOLTA Accounts' (1999) 13 *Georgetown Journal of Legal Ethics* 183 at 184; Kristin Dulong, 'Exploring the Fifth Dimension: IOLTA, Professional Responsibility, and the Takings Clause' (1997) 31 *Suffolk University LR* 91 at 96 n26.

5 See below Table 5.

IOLTA schemes evidently help the public good, so far as that is promoted by the work of the legal profession. However, despite the genesis of IOLTA schemes in Australia, they have, apart from Adrian Evans' pioneering work on the Victorian IOLTA arrangements, received no scholarly attention.⁶ In this article, I therefore explore and evaluate the structure, role and ethics of the present IOLTA schemes in Australia and, agreeing with Evans, conclude that they are, so far as public standards are concerned, structured unethically. I add, however, that the moral character of IOLTA schemes can be salvaged, if they are reformed. In this article, the means by which IOLTA is acquired by public agencies are therefore outlined (Part 2). Then, the different programs that are funded by IOLTA are discussed, with particular focus on legal aid (Part 3). This enables an analysis of the public ethics of IOLTA schemes, which is helped to a significant extent by the literature and adjudication on IOLTA that has emerged in the US and the Scottish case of *Brown v Inland Revenue Commissioners*.⁷ I nevertheless take the judicial reasoning in these cases as exemplifying and guiding moral reflection on the structure of IOLTA schemes, rather than giving them legal direction (Part 4). The discussion of the public ethics of these schemes then informs conclusions on the best form that restructured IOLTA schemes would take (Part 5).

2. *Method of Collection*

A. *Solicitors' Trust Accounts*

The basic resources of any IOLTA scheme are, of course, solicitors' trust accounts. Any money received by solicitors on another person's behalf is held under trust,⁸ and must (with only the most limited exceptions) be deposited in a general trust account held separately from the solicitors' office account.⁹ The handling of any

6 Adrian Evans, *The Development and Control of the Solicitors Guarantee Fund (Victoria) and its Ethical Implications for the Legal Profession* (LLM Thesis, Monash University, 1997) (hereafter *Solicitors Guarantee Fund*); 'A Concise History of the Solicitors' Guarantee Fund (Vic): A Marriage of Principle and Pragmatism' (2000) 26 *Mon LR* 75 (hereafter *Principle and Pragmatism*); 'Whose Money? The Solicitors Guarantee Fund' (1993) 18 *Alt LJ* 220 (hereafter *Whose Money*); 'Trust in a Trust Account' (2002) 76(Dec) *Law Inst J* 78 (hereafter *Trust*).

7 [1965] AC 244 (hereafter *Brown*).

8 *Re Batho* (1868) 1 QSCR 196; *In re Hallet's Estate; Knatchbull v Hallet* (1879) 13 Ch D 696 at 702-703; *Stumore v Campbell & Co* [1892] 1 QB 314 at 316; *Plunkett v Barclays Bank Limited* [1936] 2 KB 107 at 117; *In re a Solicitor* [1952] Ch 328; *Re Jones* (1953) 16 ABC 169; *Adams v Bank of New South Wales* [1984] 1 NSWLR 285 at 290, 300-301; *Target Holdings Ltd v Redfern* [1996] 1 AC 421 at 435-436; *Jalmoon Pty Ltd (in liq) v Bow* [1997] 2 Qd 62 at 72; *Twinsectra Limited v Yardley* [2002] 2 AC 164 at 168.

9 *Legal Practitioners Act* 1970 (ACT) ss90-91; *Legal Profession Act* 1987 (NSW) s61; *Legal Practitioners Act* 1974 (NT) ss55-57; *Trust Accounts Act* 1973 (Qld) s7(1); *Legal Practitioners Act* 1981 (SA) s31; *Legal Profession Act* 1993 (Tas) s101; *Legal Practice Act* 1996 (Vic) ss173-174; *Legal Practitioners Act* 1893 (WA) s34 (The *Legal Profession, Legal Practitioners and Legal Practice Acts* are hereafter *LPA*).

money in the trust account is then tightly regulated by statute, which effectively provides that the money 'should only be paid out to the persons to whom [it] belonged, or as they directed'.¹⁰ Significantly, this is money that the solicitors hold only as trustees for others — 'clients'.¹¹ The solicitors themselves do not own the money beneficially, and it is not available for the firm's use.¹²

The credit balance of the trust account thus represents a corpus of mixed trust money held for different clients under different trusts, and the Acts directing its management therefore provide statutory exceptions to the normal equitable principle that money held under different trusts cannot be mingled in the one bank account.¹³ If instructions to do so are given, the solicitors can place the client's money in a savings account, separate from the trust and any other accounts, where it can earn that client interest.¹⁴ In the Australian Capital Territory (ACT) and NSW and under the proposed Model Laws on a National Legal Profession, this is called 'controlled money'.¹⁵

The fact that trust account deposits are not, while in trust, a resource for the firm does not mean that they have no potential value for the solicitors. A common reason why solicitors ask for clients to deposit money in trust is in anticipation of professional fees — 'costs' — that the client will be billed for later, and outlays that will be incurred when carrying out the client's legal business. There are often strict controls on the payment of costs and outlays from money in trust,¹⁶ but it is plainly convenient to have the client's money for outlays at hand when it is needed. Further, money deposited in trust in anticipation of costs gives the solicitors assurance that, when rendered, bills can be paid, and helps to reduce the firm's exposure to bad debtors. A nodding acquaintance with the disciplinary cases on unauthorised remissions of trust money for the payment of bills suggests that it is not uncommon for large amounts, held on account of costs and outlays, to be kept in the trust account for long periods.¹⁷

10 *In re A Practitioner of the Supreme Court* [1941] SASR 48 at 51.

11 The term 'clients' includes any beneficiaries for whom solicitors hold money, whether or not they have contractually retained the solicitors to conduct legal business for them.

12 *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1 at 20–21.

13 *Lupton v White* (1808) 15 Ves 432; 33 ER 817; *Lunham v Blundell* (1857) 27 LJ Ch 179; *Re Todd* (1910) 10 SR (NSW) 490. See *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1 at 24.

14 LPA 1970 (ACT) s92; LPA 1987 (NSW) s61(9); LPA 1974 (NT) s58; *Trust Accounts Act* 1973 (Qld) s8(2); LPA 1981 (SA) s31(2); LPA 1993 (Tas) s101(5); LPA 1996 (Vic) s174(2); LPA 1893 (WA) s34.

15 LPA 1970 (ACT) s99A; LPA 1987 (NSW) s61(9); Standing Committee of Attorneys-General, *Legal Profession Model Laws Project – Model Provisions* (2004) at 67 (s702).

16 *Legal Profession Regulation* 2002 (NSW) r78; *Trust Accounts Act* 1973 (Qld) s8(1)(c); *Trust Account Practice Rules* 1998 (Vic) r31(1)(b); LPA 1893 (WA) s34A. For procedures in other states, see Gino Dal Pont, *Law of Costs* (2003) at 91–94.

B. *IOLTA Schemes in Australia: Basic Organisation*

All states¹⁸ in Australia have two IOLTA schemes. As will be seen soon, the 'statutory deposits' schemes have interest raised on client money under a two-trust structure, and the 'residual balances' schemes have interest raised under a single-trust structure. The details even within each kind of scheme differ between states, and there is no current plan to harmonise them. The Model Laws for a National Legal Profession, prepared at the direction of the Standing Committee of Attorneys-General, contemplate uniformity in the detail of regulations about solicitors' trust account management,¹⁹ and also assume that each state will have separate statutory deposits and residual balances IOLTA schemes.²⁰ However, even under the Model Laws the states can make their own regulations about how much in trust accounts is to be placed under an IOLTA scheme, who is to regulate it, and how the money is to be used.²¹ Indeed, the peculiarity of the IOLTA arrangements in each state, and their relationship to the funding of public programs, were among the impediments to centralising the regulation of the legal profession in Australia in a single federal agency.²² While IOLTA was probably not a significant consideration in finally reaching agreement on the form that a National Legal Profession would take, the Attorneys have preferred to pursue national legal practice by agreeing to uniform standards that are to be adopted by each state.²³ Accordingly, IOLTA schemes remain a state concern, with their existing binary organisation unchallenged. When adopted in each state, the Model Laws will require a relocation of the legal substructure of IOLTA from the existing

17 For example, ACT: *Robb v Law Society of the Australian Capital Territory* (1996) 72 FCR 225. NSW: *Law Society of New South Wales v Poynten* [1999] NSWADT 21 at [20]; *Law Society of New South Wales v Shenker* [1999] NSWADT 37; *Law Society of New South Wales v Hughes* [1999] NSWADT 44 at [86], [111], [174], [188]; *Law Society of New South Wales v Bryson-Taylor* [1999] NSWADT 41 at [17]-[18], [21]-[22], [29]; *Law Society of New South Wales v Cullen* [1999] NSWADT 121 at [79]-[85]; *Law Society of New South Wales v Bykowski* [2002] NSWADT 165 at [90], [95], [133], [192], [223]-[224]; *Laurent v Law Society of New South Wales* [2002] NSWSC 655 at [67]-[70]. Qld: *Re Crowley* (1996) 1 Bi-Annual Report of Disciplinary Action (BRDA) 6; *Re Mallet* (1998) 4 BRDA 5; *Re Williams* (1998) 4 BRDA 14; *Re Carberry* (2000) 6 BRDA 17 at 19; *Queensland Law Society Inc v Carberry* [2000] QCA 450 at [10]; *Re Lancaster* (2001) 8 BRDA 6 at 7-8; *Re Quinn* (2001) 8 BRDA 21 at 21-25; *Re Lavery* (2001) 9 BRDA 1 at 3; *Re Nielsen-Brown* (2002) 10 BRDA 16; *Re Partos* (2002) 10 BRDA 34 at 34-35; *Re Lawrence* (2002) 10 BRDA 52. Vic: *Victorian Lawyers RPA Ltd v Incerti* [2001] VSC 15 at [9]-[10]. WA: *Re a Practitioner* [2001] WASCA 154 at [8]; *Lashansky v Legal Practitioners Complaints Committee* [2002] WASCA 326 at [34]; *Re a Practitioner* [2003] WASCA 172 at [23]-[24].

18 When used generically, the term 'states' includes the ACT and the Northern Territory (NT).

19 Standing Committee of Attorneys-General, above n15 at 66-89 (ss701-745).

20 *Id* at 86-87 (s741).

21 *Ibid*.

22 Law Council of Australia, *Submission to the Standing Committee of Attorneys-General - Towards National Practice* (2001) at 12.

23 State, Territory and Commonwealth Attorneys-General, *Historic Agreement on National Legal Profession*, Communiqué (7 August 2003).

legislation to the Model Laws themselves. Queensland is the first to do this: the *Legal Profession Act 2004* promising simpler procedures and closer government controls of IOLTA.²⁴

C. *Interest on Statutory Deposits*

The original means by which interest on trust account deposits was acquired for public programs in Australia was the requirement that solicitors set aside defined portions of trust money, which they lodged in designated savings accounts separate to their own trust account. Terminology has differed from state to state,²⁵ but in this article the separate accounts are called 'statutory deposit accounts' (SDAs) in which the solicitors lodge amounts of trust money called 'statutory deposits'. The sidling of money from the trust account into a savings account to earn interest for *anyone* (including the client) is in normal conditions illegal, unless the solicitors have specific written authority from the client to do that. This abnormal payment of trust money to an SDA is therefore directed by the governing Act.²⁶

The SDAs are either held by the local law society,²⁷ a statutory trustee corporation on which the law society is represented,²⁸ a professional regulator²⁹ or, under the new Queensland rules, the government itself³⁰ — any of which (in this rôle) I will refer to as the 'IOLTA Trustee'. In NSW and Victoria, the IOLTA Trustee is expressly stated to hold the statutory deposit on trust for the lodging solicitors,³¹ and elsewhere the trust relationship is implicit in its designation and duties.³² The client money therefore seems to be held under at least two strata of trusts: the IOLTA Trustee holding the statutory deposit (as trust capital) for the solicitors but the interest on that deposit (as trust income) for other purposes, and the solicitors holding that amount, albeit in mixed funds, for clients. Lodging the statutory deposit with the IOLTA Trustee effectively turns the trust between the

24 *LPA 2004* (Qld) ss202–211.

25 ACT: 'statutory deposits account'; NSW: 'special account'; Qld: 'special account' or 'prescribed account'; SA: 'combined trust account'; Tas: 'designated trust deposit account'; Vic: 'statutory deposit account'.

26 *LPA 1970* (ACT) ss123(1)–(3); *LPA 1987* (NSW) s64(1); *LPA 1974* (NT) ss80(1)–(3); *Trust Accounts Act 1973* (Qld) s8(1)(b); *LPA 1995* (Qld) s51(2); *LPA 2004* (Qld) s205; *Legal Profession Regulation 2004* (Qld) s8(1); *LPA 1981* (SA) s53(1); *LPA 1993* (Tas) s102(1); *LPA 1996* (Vic) ss179(1), 180(1); *Legal Contribution Trust Act 1967* (WA) s11(2). See also Boone, above n4 at 543–544.

27 *LPA 1970* (ACT) ss123(1)–(3), 127(1); *LPA 1987* (NSW) s65(1)(a); *LPA 1995* (Qld) s51(7); *LPA 1981* (SA) ss5(1), 53(1).

28 *LPA 1974* (NT) ss79A(4), 80(1)–(3) (the Legal Practitioners' Trust Committee); *LPA 1993* (Tas) ss96(1)(a), 98(1) (the Solicitors' Trust); *Legal Contribution Trust Act 1967* (WA) ss4, 6(1)(a), 11(2) (the Legal Contribution Trust).

29 *LPA 1996* (Vic) s181(1)(a) (the Legal Practice Board).

30 *LPA 2004* (Qld) s208(2); *Legal Profession Regulation 2004* (Qld) s4.

31 *LPA 1987* (NSW) s65(1)(a); *LPA 1996* (Vic) s181(1)(a).

32 'Trust' is used in *LPA 1974* (NT) ss79A(4), 80(1)–(3); *LPA 1993* (Tas) ss96(1)(a), 98(1); *Legal Contribution Trust Act 1967* (WA) ss4, 6(1)(a), 11(2). See also *LPA 2004* (Qld) s208(5).

solicitors and client, so far as the money kept in the SDA is concerned, into a sub-trust.³³ Given that the statutory deposit is of mixed trust money held for a range of clients, it would be difficult to establish a trust relationship directly between the IOLTA Trustee and the client. Furthermore, it is likely that the head trust and the sub-trust are of different character. Even though the lodging solicitors retain effective control over the statutory deposit by being able to recall it on demand,³⁴ the IOLTA Trustee usually has some responsibility to invest the money pooled in an SDA.³⁵ It therefore has more active responsibilities in relation to the trust capital than do the solicitors,³⁶ who must only move money at the client's behest and would normally be only bare trustees.³⁷

The statutory deposits scheme was first proposed in 1963 by the Law Institute of Victoria to offset a potential depletion of the Solicitors' Guarantee Fund after a series of major defalcations, and legislation gave it effect in Victoria in 1964.³⁸ The other states followed over the next decade, but with broader funding purposes, and especially legal aid, in mind. After two years of volleying between the state government and the Queensland Law Society over control of solicitors' trust accounts, Queensland adopted the Victorian scheme in 1965 as a means of funding legal aid without having to commit consolidated revenue.³⁹ NSW and Western Australia (WA) adopted the scheme in 1967,⁴⁰ South Australia (SA) in 1969,⁴¹ and Tasmania in 1970.⁴² The scheme was brought into the ACT in 1970, and the NT in 1974.⁴³

33 Austin Scott, *The Law of Trusts* Vol I (3rd ed, 1967) at 706–707. Compare *Washington Legal Foundation v Massachusetts Bar Foundation* 993 F 2d 962 (1993), 974 (Bownes SCJ), although the refusal to recognise a trust in this decision is now open to question: James Anderson, 'The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs' [1999] *University of Illinois LR* 717 at 742.

34 *LPA* 1970 (ACT) s124(1); *LPA* 1987 (NSW) s65(1)(b); *LPA* 1974 (NT) s81(1); *LPA* 1996 (Vic) s181(1)(b); *Legal Contribution Trust Act* 1967 (WA) s12(1). Compare *LPA* 1981 (SA) s54(9); *LPA* 1993 (Tas) s103(1).

35 *LPA* 1970 (ACT) ss128(1), (4); *LPA* 1987 (NSW) ss65(3), 69B(2)(b); *LPA* 1974 (NT) ss79D, 84A(1), (4)–(5); *LPA* 1995 (Qld) ss51(8)–(9); *LPA* 1981 (SA) ss56(1)–(6); *LPA* 1993 (Tas) ss99(1), (2)(b); *Legal Contribution Trust Act* 1967 (WA) ss13, 14(2)–(6).

36 Gino Dal Pont & Donald Chalmers, *Equity and Trusts in Australia* (3rd ed, 2004) at 603.

37 *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421 at 436 (Browne-Wilkinson LJ).

38 *Principle and Pragmatism*, above n6 at 95–98; John A Dawson, 'The Solicitors' Guarantee Fund' (1975) 49 *Law Inst J* 16 at 17; *Legal Profession Practice (Amendment) Act* 1964 (Vic) s6.

39 Gregory, above n1 at 173–176; *Legal Assistance Act* 1965 (Qld) s10(2).

40 William Stevenson, 'The Legal Practitioners Act: Proposed Amendments and Legal Aid Proposals' (1967) 5(1) *Law Society Journal* 16 at 17–18; *Legal Practitioners (Amendment) Act* 1967 (NSW) s7; *Legal Contribution Trust Act* 1967 (WA) s11(2).

41 *Legal Practitioners Act Amendment Act* 1969 (SA) s8.

42 *LPA* 1970 (Tas) s4.

43 *Legal Practitioners Ordinance* 1970 (ACT) s93; *Legal Practitioners Ordinance* 1974 (NT) s80. The *Legal Practitioners Ordinance* 1969 (ACT) would have introduced the scheme in the ACT a year earlier. However, this Ordinance was disallowed by the Senate, which objected to its provision for a divided legal profession in the Territory: Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 22 May 1969 at 1493–1519.

The calculation of the amounts that solicitors must keep in an SDA is undoubtedly the most bewildering aspect of this scheme. Its basic assumption is that, despite the cash flows in and out of the trust account, the balance generally never drops below a given amount: the 'hard core' of the trust account.⁴⁴ The 'core' is deemed to be a base amount that solicitors are to lodge in the SDA, and which usually must be adjusted every financial period. In all cases, the calculation is made by reference to the total amount (barring amounts of controlled money) held by the solicitors in trust for clients. Accordingly, the calculation is based on the total amount that the solicitors hold in the trust account together with any amount they might already have in an SDA.⁴⁵ It is the lowest balance of this trust money in a given financial period that governs the amount to be paid into the SDA. And, solicitors usually need not lodge the statutory deposit where the lowest amount held in trust, along with the amount kept in the SDA, has not reached a prescribed threshold. These range from \$500 to \$15000.⁴⁶ The original Victorian scheme began with a requirement to lodge one-third of the lowest balance.⁴⁷ However, both the desire to maximise revenue, and the need to maintain dollar returns on IOLTA against the 1990s drop in interest rates, have driven moves to increase the holdings in SDAs. As a result, the proportions of trust balances to be lodged as statutory deposits have risen steadily,⁴⁸ bringing the statutory deposit away from the trust account's 'core'.

As mentioned, controlled money held exclusively for one client is not counted when calculating the statutory deposit.⁴⁹ The interest it earns is already, on the client's direction, dedicated to the client's private use. The SA Act also discounts money received by solicitors for mortgage financing, even when that money is held in the trust account.⁵⁰ A general overview of the different methods of calculating statutory deposits across Australia is given in Table 1.

44 Vernon Wilcox, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 1 December 1963 at 1995–1996; Rupert Hamer, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 8 December 1963 at 2290.

45 If, as is common, the solicitors have more than one general trust account, then the aggregate balance of all trust accounts held by the firm enters the calculation: *LPA 1970 (ACT) s122(5)*; *LPA 1974 (NT) s79(5)*; *LPA 1995 (Qld) s51(2)*; *Legal Profession Regulation 2004 (Qld) s7*; *LPA 1981 (SA) s53(3)*; *Legal Contribution Trust Act 1967 (WA) s11(2)*.

46 *LPA 1970 (ACT) ss123(1)–(2)*; *Legal Profession Regulation 2002 (NSW) r130(4)*; *LPA 1974 (NT) ss80(1)–(2)*; *LPA 1995 (Qld) s51(13)*; *Legal Profession Regulation 2004 (Qld) s8(5)*; *LPA 1981 (SA) s53(4)(b)*; *LPA 1993 (Tas) s102(5)*; *LPA 1996 (Vic) s179(2)*; *Legal Contribution Trust Act 1967 (WA) s11(3)*.

47 *Legal Profession Practice (Amendment) Act 1964 (Vic) s6*.

48 *Principle and Pragmatism*, above n6 at 132–134. Compare 'Solicitors Express Concern Over New Statutory Deposit Regulation' (1995) 33(5) *Law Society Journal* 82.

49 *LPA 1970 (ACT) s122(8)*; *LPA 1987 (NSW) s64(3)(a)*; *LPA 1974 (NT) s79(8)*; *LPA 1995 (Qld) s51(2)(a)*; *Legal Profession Regulation 2004 (Qld) s5(2)*; *LPA 1981 (SA) s53(3)*; *LPA 1996 (Vic) ss179(5), 180(3)*; *Legal Contribution Trust Act 1967 (WA) s4*. Compare *LPA 1993 (Tas) s101(5)*.

50 *LPA 1981 (SA) s5(1)*.

Low cash levels in the trust account usually allow adjustments to be made to the base statutory deposit. Under the WA and Queensland rules, even with nothing left in the trust account, these adjustments need not be made. Where, because some trust money is in the SDA, the trust account balance itself is not sufficient to make client payments, solicitors can overdraw the trust account up to an amount equal to the statutory deposit.⁵¹ Banks do mistakenly dishonour cheques, and a trust account cheque that bounces is a trigger for an investigation of the law firm.⁵² Even with the option of overdrawing the trust account, the safer approach is therefore first to liquefy the trust account with money from the SDA.⁵³ However, in WA, overdrawing the trust account is the only lawful means by which solicitors can make payments when the account's balance is running down.⁵⁴ In all other states, the governing Acts allow lesser amounts to be held in the SDA if, when approaching the adjustment date, the balance of the solicitors' trust account would not allow the statutory deposit to be paid in full, or when, through the financial period, client payments cannot be made without overdrawing the trust account.⁵⁵ The allowable adjustments to the statutory deposit are set out in Table 2.

51 *Legal Contribution Regulations* 1968 (WA) rr7-8; *Trust Accounts Act* 1973 (Qld) s27(2); "The Legal Assistance Act of 1965" - Practitioners' Trust Account Deposits' (1968) 42 *Law Inst J* 436. Victoria's *Law Institute Journal* also served as the professional magazine for the Queensland Law Society at this time. Compare *Legal Profession Regulation* 2004 (Qld) s9(4)(a).

52 *Legal Profession Regulation* 2002 (NSW) r132; *Queensland Law Society Rule* 1987 (Qld) r92; *LPA* 1996 (Vic) s189.

53 Stevenson, above n40 at 18-19; A S Furze, 'Calculating the Statutory Deposit with the Law Institute' (1981) 55 *Law Inst J* 124; Tom Walsh, 'Statutory Deposit Section 42A' (1984) 22(4) *Law Society Journal* 230 at 231. See also 'Calculating Statutory Deposits' (1992) 30(2) *Law Society Journal* 24 at 27.

54 Notice must also be given to the Legal Contribution Trust (the WA IOLTA Trustee) of an overdrawing: *Legal Contribution Regulations* 1968 (WA) rr7-8. It would be expected that solicitors' compliance with that protocol should, at an early stage, preclude an investigation that might otherwise follow from an erroneous dishonouring of the trust account cheque.

55 In almost all cases, once the conditions for holding a lesser sum are met, the statutory deposit may be maintained at that lower amount for the rest of the financial period. Under the old Queensland rules, the solicitors must replenish the SDA once total trust moneys held have again stabilised at a point above the previous year's lowest level, for instance when for 30 consecutive days, two-thirds of the combined trust and SDA balance is at least equal to the base statutory deposit: *LPA* 1995 (Qld) s51(5); *Legal Profession Regulation* 2004 (Qld) s9(3).

Table 1: Base Statutory Deposit

	Formula — Statutory Deposit	Financial Period	Adjustment Date	Threshold ^a
ACT: <i>LPA</i> 1970	$\frac{2}{3}$ (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): ss122(2), 123(2)-(3)	1 April–31 March preceding adjustment date: s86	30 June: ss123(2)-(3)	\$3000: ss123(1)-(2)
NSW: <i>Legal Profession Regulation</i> 2002	Lowest aggregate trust account balance in previous financial period + amount held in SDA on that day: r130(1)	1 April–31 March preceding adjustment date: r129(2)	20 banking days after 1 April: r131(1)	\$10000: r130(4)
NT: <i>LPA</i> 1974	$\frac{1}{2}$ (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): ss79(2), 80(2)-(3)	1 July–30 June preceding adjustment date: s53	30 September: ss80(2)-(3)	\$3000: ss80(1)-(2)
Qld: <i>Legal Profession Regulation</i> 2004 ^a	$\frac{2}{3}$ (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): s8(2)	1 January–31 December preceding adjustment date: s8(2)	21 January: s10	\$3000: s8(5)
SA: <i>LPA</i> 1981	Lowest aggregate trust account balance in previous financial period + amount held in SDA on that day: s53(1a)	Two six month periods: 1 December–31 May and 1 June–30 November: s53(1)	14 June and 14 December: s53(1)	\$1000: s53(4)(b)
Tas: <i>LPA</i> 1993	$\frac{2}{3}$ (lowest aggregate trust account balance in previous financial period + amount held in SDA on last day of financial period): ss94, 102(1)	Four three month periods every year, ending on 31 March, 30 June, 30 September and 31 December: s102(1)	21 days after the end of the financial period	\$15000: s102(5)
Vic: <i>LPA</i> 1996	72% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): ss179(3), 180(1)	1 November–31 October: s3	7 November: s179(2) — but for first deposit only.	First deposit: \$4166.67: s179(2). Subsequent deposits: nil.
WA: <i>Legal Contribution Trust Act</i> 1967, <i>Legal Contribution Trust Regulations</i> 1968	65% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): s11(2), r3	Two six month periods: 1 July–31 December and 1 January–30 June: s4	No adjustment date specified.	\$500: s11(3)

a) The old Queensland rules found in the *LPA* 1995 (Qld) s51 held until 30 June 2004.

Table 2: Adjusted Statutory Deposit*

	Formula	When Adjustment Allowed
ACT: <i>LPA</i> 1970	Amount approved by Law Society: s126(1)	Application by solicitors, with proof of insufficient funds to maintain statutory deposit: s126(1)
NSW: <i>Legal Profession Regulation</i> 2002	EITHER: lowest aggregate trust account balance in 15 banking days from a withdrawal from the SDA + amount held in SDA on that day; OR amount approved by Law Society: rr130(3), (6)	Withdrawal from SDA: r130(3)
NT: <i>LPA</i> 1974	Amount approved by Trust Committee: s83(1)	Application by solicitors, with proof of insufficient funds to maintain statutory deposit: s83(1)
Qld: <i>Legal Profession Regulation</i> 2004	Lesser amount allowed, but no formula: s9	Withdrawal allowed to keep trust account in credit: s9(1)
SA: <i>LPA</i> 1981	Lesser amount allowed, but no formula. Auditor must give an opinion as to whether the amount withheld or withdrawn from the SDA was the minimum necessary to meet client commitments: ss53(4a), (9), (10)	Withholding money or withdrawal from SDA, notified to Law Society: ss53(4)(a), (9)
Tas: <i>LPA</i> 1993	2/3 (lowest aggregate trust account balance in financial period + amount held in SDA on last day of financial period): ss94, 102(1)	No special requirements for mid-period adjustments.
Vic: <i>LPA</i> 1996	72% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): s180(1)	No special requirements for mid-period adjustments.
WA	No variation permitted	Not applicable

* The old Queensland rules set out in the *LPA* 1995 (Qld) s51 held until 30 June 2004, and required the adjusted amount to be 2/3 (lowest aggregate trust account balance in previous 30 days + amount held in SDA on that day). Table 2 only states the usual position when an adjustment is made. It does not exhaust all variations possible in any given state, and does not include details of adjustments to be made when a firm cannot lodge the statutory amount on the adjustment date. For an inability to lodge a deposit on the adjustment date, see *LPA* 1970 (ACT) s125; *Legal Profession Regulation* 2002 (NSW) r130(2); *LPA* 1974 (NT) s82; *LPA* 1995 (Qld) s51(5); *LPA* 1981 (SA) s53(4)(a).

The statutory deposits schemes are largely self-regulated. IOLTA Trustees generally have few rights or obligations in relation to the pooled amounts held in the SDAs. Money held in the SDAs is repayable to lodging solicitors on demand, and whether the solicitors are withdrawing money from an SDA in accordance with the terms of the governing Act is, at least until they are audited, a question which is for the solicitors themselves to judge. Accordingly, the only practical obligation on the IOLTA Trustee, which is otherwise under a duty to invest the money held in its SDAs, is to ensure that each SDA has a sufficient cash balance to allow solicitors to make legitimate withdrawals from the account when an adjustment to the statutory deposit is required. For solicitors, nevertheless, the management of the responsibility to keep the statutory deposit at the prescribed amount can be difficult. The requirements of the governing Acts or regulators are complicated, and at times involve either impracticalities,⁵⁶ unnecessary nitpicking,⁵⁷ or vagaries.⁵⁸ While most law societies provide solicitors with information on how to deal with statutory deposits, only the NSW Law Society provides its members with an accessible electronic calculator that determines the statutory deposit for them.⁵⁹

To a small extent, the problems of interpretation associated with these schemes stem from the drafters' reluctance to use algebra in the legislation — leading to linguistic convolutions. However, the root cause of the complexity of the statutory deposits schemes remains the tension between government's and the profession's interest in maximising the capital held in interest-generating SDAs and the solicitors' convenience in being able to make payments for client business. As will be explained in greater depth in Part 4, the money in the SDAs remains client property, and so solicitors' access as agents and trustees for the client has effectively been given priority. But, except in WA, this comes at the administrative cost of ensuring that a correctly calculated adjustment is made and, again, as much as possible is left in the SDA.

56 For example, see Letter to the Editor, 'Statutory Deposit' (1980) 18 *Law Society Journal* 138; B A H Gunness, 'Statutory Deposits' (1980) 18 *Law Society Journal* 183; Mikelis Strikis, 'Statutory Deposit' (1980) 18 *Law Society Journal* 245 at 246; 'Section 42A Adjustment in April 1985' (1984) 22(10) *Law Society Journal* 715; 'Combined Trust Account – Amendment to Dates' (1988) 10 *Law Society Bulletin* 61 at 62; 'Solicitors Express Concern Over New Statutory Deposit Regulation' (1995) 33(5) *Law Society Journal* 82; 'Interest on Trust Accounts' (1972) 2 *Q Law Soc J* 137 at 138; Gregory, above n1 at 180–181.

57 See, for example, the accounting quibbles in 'Solicitor's Deposit with the Law Institute' (1977) 51 *Law Inst J* 7; Boone, above n4 at 544.

58 See, for example, 'The Legal Assistance Act of 1965 and the Regulations Thereunder' (1969) 43 *Law Inst J* 99; 'Calculation of Statutory Deposits – Section 42A' (1983) 21 *Law Society Journal* 468; Victorian Legal Practice Board, *Annual Report 2002* (2002) at 12.

59 Law Society of NSW, 'Statutory Deposit Calculator': <http://laws.lawsociety.com.au/profreg/stat_dep_calculator/> (11 April 2005). The SA Law Society sells a software package that calculates the statutory deposit, and that signals the need for any adjustments.

The solicitors' management of their statutory deposit obligations is independently reviewed in all states when the management of the trust account is audited or inspected.⁶⁰ In some states, a breach of the terms of the governing Acts technically exposes the solicitors to criminal sanctions.⁶¹ Furthermore, there is potential civil liability. In SA, failure to maintain the statutory deposit at the prescribed level for the correct periods makes the solicitors liable to reimburse the SDA, with interest, to compensate for any losses the IOLTA Trustee might have suffered as a consequence of the solicitors' failure to maintain the correct deposit.⁶² Although there is no statutory power to recover unpaid statutory deposits in the other states, the IOLTA Trustee may be able to invoke its general duty to take possession of its entrusted property, as a means of recovering either statutory deposits that remain unpaid or interest on late payments.⁶³ However, the only documented evidence of IOLTA Trustees taking an active role in trying to recover statutory deposits is in reported law society threats of discipline against non-complying solicitors, and discipline exercised for failing to obtain audit certification that statutory deposit obligations have been satisfied.⁶⁴ Some states, such as Victoria, appear to have no sanctions for failure to comply with statutory deposits obligations.

D. Interest on Residual Balances: Westpac Funds

A more direct means of acquiring IOLTA for public use is by payment of any interest earned on solicitors' trust accounts to the IOLTA Trustee. Although the ban on crediting interest to current accounts was lifted with the deregulation of banking in 1984,⁶⁵ the practice of not crediting interest to solicitors' trust accounts has generally remained unchanged. However, in all states but SA, the law society, a professional regulator or government can make an arrangement with banks and

60 LPA 1970 (ACT) ss101(1), 104(2)(b); *Legal Profession Regulation 2002* (NSW) r94; LPA 1974 (NT) s67; *Trust Accounts Act 1973* (Qld) s16; *Legal Profession Regulation 2004* (Qld) s12; LPA 1981 (SA) s33; LPA 1996 (Vic) s183; LPA 1893 (WA) s42A(1). There are no audit requirements in Tasmania, but inspections are conducted: LPA 1993 (Tas) s121. For reminders that a qualified audit certificate follows from non-compliance with the statutory deposit requirements, see 'Interest on Trust Accounts' [1972] *Law Society Bulletin* 2, republished: [1973] *Law Society Bulletin* 1; [1974] *Law Society Bulletin* 4. See also S P McNamara, 'Trust Accounting' (1985) 7 *Law Society Bulletin* 341; J A Whyte, 'The Combined Trust Account' (1986) 8 *Law Society Bulletin* 351: republished (1987) 9 *Law Society Bulletin* 326.

61 LPA 1974 (NT) s138A; LPA 1995 (Qld) ss54(1), 55; LPA 1981 (SA) s53(4)(b); *Legal Contribution Trust Act 1967* (WA) ss11(5), 54.

62 LPA 1981 (SA) ss53(8), (11).

63 *Grove v Price* (1858) 26 Beav 103 at 104; 53 ER 836 at 836; *Westmoreland v Holland* (1871) 23 LT 797; *Re Pilling; Ex parte Ogle* (1873) 8 Ch App 711 at 717; *Field v Field* [1894] 1 Ch 425 at 429.

64 Qld: *Re Zaghini* (1996) 26 Q Law Soc J 612; *Re a Practitioner, SCT/380* (1996) 26 Q Law Soc J 616; *Re Cremin* (1997) 2 BRDA 2; *Re X, SCT/15* (1999) 5 BRDA 2 at 4. SA: 'Interest on Trust Accounts' [1977] *Law Society Bulletin* 2. Vic: 'Statutory Deposits with the Institute' (1976) 50 *Law Inst J* 73 at 74; 'Statutory Deposit with Institute' (1978) 52 *Law Inst J* 76.

65 *Banking (Savings Banks) Regulation (Amendment)* 1984 (Cth) r5. See LPA 1970 (ACT) s74; LPA 1987 (NSW) s64(5); LPA 1974 (NT) s45(2)(a)(i); LPA 1996 (Vic) s137; LPA 1893 (WA) s28A(1).

other financial institutions by which amounts are calculated as if they were interest earned on the residual balances of solicitors' trust accounts. Those amounts are then paid to an IOLTA Trustee.⁶⁶ The remitted money goes into the Trustee's public funds,⁶⁷ and so adds to the capital from which it earns income for public programs.

This scheme originated in 1979 in a proposal of the Law Institute of Victoria (hereafter 'the Institute') to its state government that interest be paid on the balances of money held in solicitors' trust accounts that had not been lodged with an SDA. The Institute's position was that, if interest were to accrue on these balances and be remitted to the Solicitors' Guarantee Fund (the then IOLTA Trustee), another \$12 million would be available for legal aid in Victoria and the statutory deposits scheme would become redundant.⁶⁸ That was soon diluted. To a joint Institute and government committee chaired by Solicitor-General Daryl Dawson, the Australian Banking Association was said to have objected to the Institute's original plan on the ground that the accrual of interest on trust accounts would 'be unhistorical, immoral and ... impossible to calculate'.⁶⁹ The profession itself recognised that, once interest was credited to trust accounts, it would have to be paid to the clients. Accordingly, the banks' position in refusing to pay interest on trust accounts was accepted. However, a fiction was adopted by which banks would make ex gratia payments, calculated by reference to trust account balances, to the Guarantee Fund.⁷⁰ The first bank to make these payments was Westpac, and the money is still called 'Westpac funds' (regardless of its source) in some legal circles.⁷¹ As the banks' payments were made voluntarily, this calculation was made on the basis of rates well below those applicable to the SDAs. Therefore, if revenue was to be maximised, the statutory deposits scheme had to be retained. The Institute, nevertheless, progressively negotiated higher relative rates⁷² until, in 1993, its bargaining power was strengthened by a prohibition on banks offering trust account facilities to solicitors unless the banks had agreed to make these payments to the Guarantee Fund.⁷³ In 1996, the Institute's role in this scheme was given to the Legal Practice Board. Westpac funds were soon paid throughout the

66 *LPA 1970 (ACT) s129(1); LPA 1987 (NSW) s69E(1); Law Society Public Purposes Trust Act 1988 (NT) s3(1); Queensland Law Society Act 1952 (Qld) s36C(b); LPA 2004 (Qld) s202(b); LPA 1993 (Tas) s104(1); LPA 1996 (Vic) ss176(1)-(2); Law Society Public Purposes Trust Act 1985 (WA) s3(1).*

67 *LPA 1970 (ACT) s129(2); LPA 1987 (NSW) ss69B(2)(b), 69E(2); Law Society Public Purposes Trust Act 1988 (NT) s3(2); Queensland Law Society Act 1952 (Qld) s36C(b); LPA 1993 (Tas) s105; LPA 1996 (Vic) s176(3); Law Society Public Purposes Trust Act 1985 (WA) s3(2).*

68 'Interest Sought for Trust Accounts' (1979) 53 *Law Inst J* 403.

69 Robert Cornall, 'Considerable Sums of Money: A Short History of the Solicitors' Guarantee Fund' (1995) 69 *Law Inst J* 12 at 13; *Solicitors Guarantee Fund*, above n6 at 61.

70 Cornall, *id* at 13; 'Bank Interest on Trust Accounts is Benefit for All' (1983) 57 *Law Inst J* 248.

71 Evan Walker, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 14 June 1983 at 2737.

72 Evans, *Principle and Pragmatism*, above n6 at 132, 136; 'Interest on Trust Accounts' (1986) 60 *Law Inst J* 519.

73 Evans, *Principle and Pragmatism*, above n6 at 136; Cornall, above n69 at 13; *Legal Profession Practice (Guarantee Fund) Act 1993 (Vic) s7*.

country,⁷⁴ and legislation validating this came in the ACT in 1983,⁷⁵ in Queensland and WA in 1985,⁷⁶ in the NT in 1988,⁷⁷ and in Tasmania in 1990.⁷⁸ Although banks began to remit payments based on residual balances of trust accounts to the NSW Law Society in 1983, validating legislation was not passed until 1998.⁷⁹

The SA scheme is slightly different. In 1978, the State Attorney-General, Peter Duncan, proposed that solicitors be limited to holding their trust accounts at government-approved banks that would credit interest to them, but also remit the interest to a regulator to help fund legal aid. There were objections within the profession that this would limit practitioners' freedom to choose their banks. It was also claimed that the personal sweeteners that banks offered to attract solicitors' business (which would not be available without solicitors' ability to choose a bank) reduced the overheads of legal practice and, so, the cost of professional representation.⁸⁰ The proposal was only abandoned temporarily, and was implemented in full in 1985.⁸¹ In SA, the remission of interest earned on residual balances does not therefore depend on the law society striking an agreement with the banks. The *Legal Practitioners Act* puts a direct obligation on the banks to pay the SA Law Society interest accruing on the balances left in solicitors' trust accounts, and those accounts must be held at government-approved banks or financial institutions.⁸²

E. Efficiency and Effectiveness: A Sketch

IOLTA schemes do not create value, or make client money more productive. This claim has been made in American litigation on IOLTA schemes,⁸³ but is inaccurate economics. IOLTA schemes redistribute the income earned on client money. If client money is banked, but in a trust account that is credited no interest, it is as

74 See, for example, comments in Neil Bell, Northern Territory Legislative Assembly, *Parliamentary Debates (Hansard)*, 25 May 1988 at 3356; Gregory Crafter, South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 14 February 1985 at 2548.

75 *Legal Practitioners (Amendment) Ordinance (No 2)* 1983 (ACT) s5.

76 *Queensland Law Society Act Amendment Act* 1985 (Qld) s28; *Law Society Public Purposes Trust Act* 1985 (WA) s2 (sch).

77 *Law Society Public Purposes Trust Act* 1988 (NT) s2 (sch).

78 *Legal Practitioners Amendment Act* 1990 (Tas) s5.

79 New South Wales Law Reform Commission, *Fourth Report on the Legal Profession – Solicitors' Trust Accounts* Report No 44 (1984) at 26; 'Interest on Statutory Deposits and Trust Funds' (1988) 16(10) *Law Society Journal* 11 at 12; Jeffrey Shaw, Attorney-General, New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 21 October 1998 at 8695–8696; *Legal Profession Amendment Act* 1998 (NSW) s3 (sch 1 [10]).

80 'Trust Fund Changes Opposed' [1978] *Law Society Bulletin* 1; Gregory Crafter, above n74 at 2548; id at 20 February 1985 at 2707.

81 *Legal Practitioners Act Amendment Act* 1985 (SA) s11.

82 *LPA* 1981 (SA) s57A(1).

83 'The program creates income where there was none before': *Paulsen v State Bar of Texas* 55 SW 3d 39 (2001), 44 (Kidd J) (hereafter *Paulsen*). See also the argument of the US Government in *Phillips v Washington Legal Foundation* 524 US 156 (1998), 170 (hereafter *Phillips*); Michael Heller & James Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harv LR* 997 at 1019.

generally productive as if in an interest-bearing savings account. That productivity is wholly represented by the bank's profit-margin on re-lending, which is higher than it is for deposits in savings accounts to the extent that the bank does not incur interest costs to the depositors.⁸⁴ The IOLTA scheme therefore does not create value from 'sterile' money in the trust account.⁸⁵ Rather, it shifts value from the banks' shareholders to the public programs designated by the scheme.⁸⁶ Thus, the banking policy and the nature of the scheme raise the question of where the value earned on trust account deposits is to fall; a question of distributive justice that bears further consideration when the moral claims that *should* — but do not — coordinate the structure of IOLTA schemes are considered later.

The earlier outline of IOLTA in Australia plainly suggests that administrative costs would be reduced if statutory deposits schemes were discontinued, and bank payments to IOLTA Trustees made by reference to total trust account deposits. The NZ and various US IOLTA schemes adopt this pattern — the latter only differ in the extent to which law firms are compelled to participate in them. An alternative is the Canadian scheme of having the banks credit interest to an amount equivalent to the statutory deposit, but that is retained in the trust account without a separate deposit being made in the SDA.⁸⁷ In Australia, either approach would save solicitors having to calculate statutory deposits, constantly monitor overall trust account balances and pay money into and withdraw it from the SDA, alongside the additional audit costs incurred to review compliance. However, the simplification of IOLTA in Australia is unlikely while the ability of each scheme to redistribute the wealth generated by trust account deposits differs so markedly. Even a cursory glance at Table 3 suggests that residual balances schemes actually raise more than twice the amounts that statutory deposits schemes can, and have enhanced IOLTA significantly. However, with a deregulated banking sector, government probably has the ability to disgorge a greater share of the value earned on trust account deposits under the statutory deposits scheme than it can through a residual balances scheme. Information available on SDA balances and rates of return is poor, and on the residual balances schemes it is worse. But enough is available to indicate that in recent years SDAs have earned up to 5 per cent in interest and the invested funds from SDAs even more.⁸⁸ Although calculated on larger amounts of

84 See *Brown*, above n7 at 257 (Lord Reid).

85 Compare *Anderson*, above n33 at 744–745; *Phillips*, above n83 at 181 (Breyer J).

86 *Dulong*, above n4 at 123; *Heller & Krier*, above n83 at 1020. 'In practice, IOLTA took from the banks and gave to the poor': *Paulsen*, above n83 at 48 (Kidd J).

87 *Law Practitioners Act 1982* (NZ) ss91A–91N; *Boone*, above n4 at 546–547; Brent Salmons, 'IOLTAs: Good Work or Good Riddance' (1998) 11 *Georgetown Journal of Legal Ethics* 259 at 262–263.

88 Law Society of the ACT, *Annual Report 2002* (2002) at 25; Statutory Interest Account Financial Report – 30 June 2002 at 7; *Annual Report 2003* (2003) at 25; Statutory Interest Account Financial Report – 30 June 2003 at 7; NT Legal Practitioners' Trust Committee, *Special Purpose Financial Report for the Year Ended 30 June 2001* (2001) at 5, 6; *Audited Special Purpose Financial Report – Year Ended 30 June 2002* (2002) at 7, provided by NT Legal Practitioners' Trust Committee, Letter to Author, 14 October 2003; WA Legal Contribution Trust, *Annual Report 30 June 2002* (2002) at 8, 9; *Financial Report for the Six Months Ended 30 June 2003* (2003) at 9.

trust capital, the rates of return to public programs under the residual balances schemes are probably much lower. First, the payments are usually still made ex gratia, even if some states have strengthened the incentives for banks to participate in the residual deposits schemes by banning solicitors from holding trust accounts with non-participating banks. Secondly, at best, the banks are only likely to calculate the payments to be made to IOLTA Trustees at rates applicable to current accounts. Since deregulation, banks have responded to competition and demand by crediting interest to some brands of current account, but at rates well below those applied to savings accounts. The notional rates applied to trust accounts are unlikely to be above those applied to current accounts. Thirdly, the SDAs represent pools of money that dwarf the separate balances of trust accounts on which residual balances calculations are made. The higher balances made possible by pooling also mean that higher interest rates are applied to SDAs, with more effective redistribution of value from the banks to public programs.⁸⁹ The rational economic decision, for governments and professions trying to maximise IOLTA returns, is therefore to maintain the more effective statutory deposits schemes.

However, the self-regulation of the statutory deposits scheme means that its costs, in time and effort, are largely borne by private practitioners. Its complexity, requiring adjustments, adds to that cost, and creates some incentive for avoiding the obligation to lodge a statutory deposit altogether. The thresholds listed in Table 1 give an opportunity to do that. So long as the total amount held in the trust account and the SDA is below the threshold on at least one day in the financial period, there is no need to lodge a statutory deposit. That can be (and in practice is) arranged, where the solicitors make a concerted effort to secure investment authorities for all money held in trust so that, for at least one day, almost all trust money becomes controlled money and is disregarded when calculating whether to lodge a statutory deposit. While, superficially, that practice might seem devious, it will be seen that it is actually more compatible with the solicitors' basic duty to act in *clients'* interests.⁹⁰ In any case, there is a strong argument for enhancing solicitors' willingness to lodge client money in separate savings accounts where it can earn more for the client, and it would be preferable that they practised this routinely.

89 *Principle and Pragmatism*, above n6 at 132; Heller & Krier, above n83 at 1019-1020.

90 See 4B.

Table 3: Australian IOLTA Income (in \$'000s), 2000–2003

	2000–1			2001–2			2002–3		
	Statutory Deposits*	Residual Balances	Total	Statutory Deposits*	Residual Balances	Total	Statutory Deposits*	Residual Balances	Total
ACT ^a (%)	325 (31.9)	693 (68.1)	1 018 (100)	276 (26.8)	752 (73.2)	1 028 (100)	329 (24.6)	1 006 (75.4)	1 335 (100)
NSW ^b (%)	11 683 (32.7)	24 023 (67.3)	35 706 (100)	10 867 (30.9)	24 346 (69.1)	35 213 (100)	13 901 (31.4)	30 353 (68.6)	44 254 (100)
NT ^c (%)	65 (26.6)	179 (73.4)	244 (100)	52 (26.9)	141 (73.1)	193 (100)	55 (25.7)	168 (75.3)	223 (100)
Qld ^d (%)	4 809 (26.6)	13 243 (73.4)	18 052 (100)	3 894 (24.4)	12 067 (75.6)	15 961 (100)	5 107 (23.4)	16 713 (76.6)	21 820 (100)
SA ^e (%)	1 334 (43.9)	1 706 (56.1)	3 040 (100)	1 104 (37.8)	1 814 (62.2)	2 918 (100)	1 299 (39.8)	1 961 (60.2)	3 260 (100)
Tas ^f (%)	659 (41.7)	921 (58.3)	1 580 (100)	666 (42.8)	889 (57.2)	1 555 (100)	771 (41.5)	1 088 (58.5)	1 859 (100)
Vic ^g (%)	10 475 (33.6)	20 727 (66.4)	31 202 (100)	9 699 (33.3)	19 466 (66.7)	29 165 (100)	13 055 (37.0)	22 201 (63.0)	35 256 (100)
WA ^h (%)	1 004 (45)	1 225 (55)	2 229 (100)	853 (36.8)	1 465 (63.2)	2 318 (100)	959 (39.1)	1 496 (60.9)	2 455 (100)
Total Australia (%)	30 354 (32.6)	62 717 (67.4)	93 071 (100)	27 411 (31.0)	60 940 (69.0)	88 351 (100)	35 476 (32.1)	74 986 (67.9)	110 462 (100)

*) Amount listed may be the aggregate of interest earned on SDAs, and income on amounts from SDAs that have been invested. a) Law Society of the ACT, *Annual Report 2001* (2001) at 29; Statutory Interest Account Financial Report (SIAFR) 30/6/01 at 5; *Annual Report 2002* (2002) at 25; SIAFR 30/6/02 at 5; *Annual Report 2003* (2003) at 25; SIAFR 30/6/03 at 5. b) Law Society of NSW, *Annual Report 2001* (2001) at 89; *Annual Report 2002* (2002) at 97; *Annual Report 2003* (2003) at 105. c) NT Legal Practitioners' Trust Committee (NLTPTC), *Special Purpose Financial Report for the Year Ended 30 June 2001* (2001) at 4; *Audited Special Purpose Financial Report - Year Ended 30 June 2002* (2002) at 3, provided by NLTPTC, Letter to Author, 14/10/03. NLTPTC, *Special Purpose Financial Report for the Year Ended 30 June 2003* (2003) at 3; NT Law Society Public Purposes Trust, *Annual Financial Report 30 June 200* (2001) at 4; *Financial Statements and Reports for the Year Ended 30 June 2002* (2002) at 3; *Financial Statements and Reports for the Year Ended 30 June 2003* (2003) at 2, provided by NT Law Society, Letter to Author, 11/12/03. d) Queensland Law Society, *Annual Report 2000-2001* (2001) at 61; *Annual Report 2001-2002* (2002) at 39, 66, 75; *75th Annual Report 2002-2003* (2003) at 50, 79, 89; Legal Aid Queensland, *Annual Report 2000-2001* (2001) at 61; *Annual Report 2001-2002* (2002) at 65; *Annual Report 2002-2003* (2003) at 85; The Queensland Law Society did not report the total amount earned on statutory deposits, so the figures given have been obtained by reconstruction of items reported for Legal Aid Queensland, the General Trust Accounts Contribution Fund and the Fidelity Guarantee Fund and assume that the governing Acts have been followed. e) Law Society of SA, *Annual Report 2001-2002* (2002) at 5, 11; *Annual Report 2002-2003* (2003) at 54, 60. f) Solicitors' Trust, Letter to Author, 15/3/04. The Tasmanian Solicitors' Trust reports on a calendar year basis. The figures given for a financial year are estimated at half of the aggregate of the income for the two calendar years it spans. g) Victorian Legal Practice Board, *Annual Report 2001* (2001) at 31; *Annual Report 2002* (2002) at 35; *Annual Report 2003* (2004) at 42. h) Law Society of WA, *Public Purposes Trust Financial Statements 30 June 2001* (2001) at 5; *Public Purposes Trust Financial Statements 30 June 2002* (2002) at 5; *Public Purposes Trust Financial Statements 30 June 2003* (2003) at 5; WA Legal Contribution Trust, *Annual Report 30 June 2002* (2002) at 5, *Annual Report 30 June 2002* (2002) at 5; *Financial Report for the Six Months Ended 30 June 2003* (2003) at 2.

3. *Public Programs*

A. *Allocations*

IOLTA funds a range of programs, although all are related in one way or another to the practice or administration of law. In all states, priority is given to the IOLTA Trustee's costs of administering the scheme.⁹¹ After that, legal aid and the fidelity funds — administrative arrangements for reimbursing those who lose money as a result of a solicitor's defalcation⁹² — remain the major recipients of IOLTA. As has been seen, the Law Institute of Victoria originally developed the statutory deposits scheme to secure finance for the Solicitors' Guarantee Fund, which was at risk of depletion, and a potential inability to meet claims, as a result of defalcations by a number of Victorian firms in the early 1960s.⁹³ In the next state to introduce the scheme, Queensland, IOLTA was largely seen as a means of supporting legal aid, and at no cost to the government. Indeed, the Queensland Law Society paid legislated portions of interest on SDAs directly to the Legal Assistance Fund, without government's mediation of the payments.⁹⁴

There is also a range of public programs that can receive distributions, including: community legal centres; university and community legal education; practical legal training programs; continuing legal education for practitioners; law reform; legal research; promotion of access to justice; legal profession regulation; law society objections in admission proceedings; investigations into practitioners' conduct and disciplinary proceedings; maintenance of law libraries; and publication of legal works. The older legislation set defined portions of income from IOLTA funds that were to be directed to one end or another.⁹⁵ More recently, the IOLTA Trustee is nominally given some discretion as to how much money is to be directed to any given program, but this is usually subject to government dictation and control.⁹⁶ In the NT, the IOLTA Trustees decide how to allocate distributions without any necessary reference to government.

Table 4 summarises the legally directed distribution of IOLTA after administrative costs are met, with the proportions specified where the governing Act does so.

91 *LPA 1970 (ACT) s128(4)(j); LPA 1987 (NSW) s69F(1)(d); LPA 1974 (NT) s84A(5); LPA 1995 (Qld) s51(9)(a); Queensland Law Society Act 1952 (Qld) s36E(a); LPA 2004 (Qld) s209; LPA 1981 (SA) s56(4); LPA 1993 (Tas) s99(1); LPA 1996 (Vic) ss374(2)(a)(i), 376(2); Legal Contribution Trust Act 1967 (WA) s14(2)(a).*

92 For details of fidelity funds, see Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, 2001) at 259–260.

93 Dawson, above n38 at 17.

94 Gregory, above n1 at 173–176; *Legal Assistance Act 1965 (Qld) s10(5)*. This position changes under the *LPA 2004 (Qld) s209*.

95 *LPA 1974 (NT) s84A; LPA 1995 (Qld) s51(9); Queensland Law Society Act 1952 (Qld) s36E; LPA 1981 (SA) s56(5); LPA 1993 (Tas) s99(2); Legal Contribution Trust Act 1967 (WA) s14(3).*

96 *LPA 1970 (ACT) s123(4); LPA 1987 (NSW) s691(1); LPA 2004 (Qld) ss209–210; LPA 1996 (Vic) ss372–387. Compare Queensland Law Society Act 1952 (Qld) s36E(b)(iii); LPA 1981 (SA) s56(6); Legal Contribution Trust Act 1967 (WA) s14(3).*

Table 4: Allocations of IOLTA Revenue *

	Legal Aid	Fidelity Fund	Regulation & Discipline	Legal Education	CLE	PLT	Law Reform	Legal Research	Legal Publishing	Access to Justice	Supreme Court Library
ACT: <i>LPA</i> 1970 s128(4)	√	√	√	√	√	√	X	X	√	X	X
NSW: <i>LPA</i> 1987 ss69G, 69I	√	√	√	√	√	√	√	√	√	√	X
NT - Statutory Deposits: <i>LPA</i> 1974 s84A	√	100%, but discretion to apply to other programs if fund > \$250 000	X	√	X	X	X	√	X	X	X
NT - Residual Balances: <i>Law Society Public Purposes Act</i> 1988	X	X	X	√	√	√	X	√	√	√	X
Qld - Statutory Deposits (to 2004): <i>LPA</i> 1995 s51(9)	50% + surplus above fidelity fund allocation	Up to an amount that will maintain fund at \$5 million	X	X	X	X	X	X	X	X	X
Qld - Residual Balances (to 2004): <i>Queensland Law Society Act</i> 1952 s36E	75%	X	10%	5%							10%
Qld (from 2004): <i>LPA</i> 2004 s209	√	√	√	X	X	X	√	√	√	√	√
SA - Statutory Deposits: <i>LPA</i> 1981 ss56(5)-(6)	62.5% + surplus above fidelity fund allocation	The lower of 37.5% or an amount that will maintain the fund at \$7500 per practitioner	X	X	X	X	X	X	X	X	X
SA - Residual Balances: <i>LPA</i> 1981 s57A(2)	50%	40%	10%								
Tas: <i>LPA</i> 1993 s99(2)	X	100%	X	X	X	X	X	X	X	X	X
Vic: <i>LPA</i> 1996 ss372-387	Up to 30%	√	√	√	√	Up to 15%				√	X
WA - Statutory Deposits: <i>Legal Contribution Trust Act</i> 1967 ss14(2)-(3)	At least 50% of surplus above fidelity fund contribution	Up to an amount that will maintain fund at \$100 000	X	√	X	X	√	√	X	X	X
WA - Residual Balances: <i>Law Society Public Purposes Trust Act</i> 1985 s5	X	X	X	X	√	X	X	√	√	√	X

* For instance, after the costs of administering the schemes are met. The repealed Queensland rules are provided as the information in Tables 3 and 5 relates to money raised under the schemes they governed. √ = A potential funding program, but in discretionary amounts. X = Unable to receive IOLTA money in that state.

All of these programs, especially legal aid, benefit lawyers, even if others also benefit, and it will inevitably be debatable as to whether that translates into a program that serves the public good, or a private interest. However, I make no attempt to nominate any program as more deserving of IOLTA than another. Evans' work has revealed serious ethical problems with some law societies' management of IOLTA money, including 'round robin' allocations to programs that, in turn, allocate money to the law society, and piggy-backing law society administration on a fidelity fund or regulatory administration that is IOLTA-resourced.⁹⁷ It also appears that IOLTA money could have helped buy downtown real estate as an investment for the profession.⁹⁸ These need further investigation, but my focus is on shortcomings that are prior to the ethics of allocation. Further analysis of IOLTA allocations is therefore limited to legal aid, to show how dependent governments and professions have become on IOLTA for a program of benefit to both the public and lawyers.

B. *Legal Aid*

Although the importance of IOLTA to the funding of legal aid in Australia has occasionally been downplayed,⁹⁹ Table 5 shows that around 10 per cent of all legal aid funding nationally comes from IOLTA. Once account is taken of the limited application of federal legal aid funding to federal matters, it can be seen that IOLTA provides between 15 and 20 per cent of funds for legal aid in state matters, which include most criminal defence work and a range of civil claims in areas like child protection, domestic violence, workers compensation, anti-discrimination and consumer protection. IOLTA is therefore a significant support for legal aid services, although its importance does differ from state to state. In Tasmania, legal aid cannot receive anything from the IOLTA schemes. In the NT it can receive money from the statutory deposits scheme but has received nothing in the last three financial years, and in WA the most that the law society directed to legal aid in that time is around \$150000. At the other extreme, Queensland, true to its original plan for the statutory deposits scheme, is the most reliant on IOLTA for legal aid funding. Since 1996, IOLTA schemes have sometimes provided more than 20 per cent of the total Queensland legal aid budget and close to 40 per cent of the budget that can be used for state matters.¹⁰⁰

97 *Principle and Pragmatism*, above n6 at 128–132; *Solicitors Guarantee Fund*, above n6 at 146, 148, 198, 230–232, 392–393. Compare Rod Welford, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 May 2004 at 1069–1070.

98 Compare Peter Patmore, Tasmania, House of Assembly, *Parliamentary Debates (Hansard)*, 27 November 1990 at 5504; Doug Lowe, Tasmania, Legislative Council, *Parliamentary Debates (Hansard)*, 6 December 1990 at 4409.

99 Maria Imperial, 'A Global Forum on Access to Justice April 6–8, 2000: Transcript Roundtable: Funding Strategies April 7, 2000' (2000) 24 *Fordham International LJ* 254 at 262.

100 Legal Aid Queensland, *Annual Report 2000–2001* (2001) at 61. See the reports given for 1996–1997 and 1999–2000: Australian National Legal Aid, 'Finance': <<http://www.nla.aust.net.au/>> (11 April 2005).

Those states that distribute IOLTA to legal aid use it both to extend the budgets of the legal aid commissions and reduce the appropriation from the states' consolidated revenue for legal aid programs. In the NT and Tasmania (in 2001 and 2002), two jurisdictions in which IOLTA either cannot be, or is not, allocated to legal aid, per capita funding of legal aid is above the national average (as shown by comparing the amounts given to legal aid as a share of the national allocation to the proportion of the national population in the jurisdiction). However, this is largely because of disproportionate federal funding. The budgets for non-federal matters are well below the national average. Unlike the other states, Tasmania does not provide legal aid for any non-federal, civil law matters (apart from child protection and de facto couple claims).¹⁰¹ In WA, where the IOLTA Trustee does not allocate significant amounts to legal aid, per capita legal aid funding is less than the national average. More than in any other state, legal aid in WA depends on state government appropriations. Three states that deploy IOLTA for legal aid are around or above the national average in the proportion of legal aid budgets that can be used in non-federal matters. NSW (in 2002 and 2003), SA (in 2001 and 2002) and Queensland have per capita legal aid funding above the national average.¹⁰² Victoria has a lower than average share of the national allocation to legal aid, and this may be attributable to its smaller proportionate distribution of IOLTA to legal aid programs. Queensland again shows best how IOLTA can be used both to extend the provision of legal aid but to reduce the burden this places on taxpayers. Its per capita funding of legal aid is slightly above the national average. However, this is due entirely to a more marked commitment of IOLTA, as the state government appropriation to legal aid is amongst the lowest proportionate commitments made in Australia.

But, whatever effect IOLTA schemes might have on legal aid budgets and state appropriations, they are now enshrined in the funding structure of legal aid. In 1998, federal legal aid funds (which mainly support family law work) were cut by just over \$20 million nationally,¹⁰² causing great consternation in the legal aid sector, the legal profession and the Family Court. The consequential rise in the number of unrepresented litigants in the Family Court led its Chief Justice, Alistair Nicholson, to claim that the reduction in government funding had caused a crisis in family law, and the Law Council of Australia shared this view.¹⁰³ Accordingly, a loss of IOLTA revenue, now more than \$30 million annually, would have a major detrimental effect on legal aid services in the states that are more dependent on it, with cuts in assistance for state matters of lesser funding priority the most likely consequence. Given the *Dietrich*¹⁰⁴ obligations to provide a fair trial in criminal cases the funding from non-federal sources must give priority to criminal defence work, this raises the possibility of an increase in unrepresented litigants in most civil matters that can currently receive legal aid.

101 Matter Type Guidelines, issued under the *Legal Aid Commission Act 1990* (Tas) s27: <<http://www.legalaid.tas.gov.au/Business/Guidelines/default.htm>> (11 April 2005).

102 Australian National Legal Aid, 'Finance': <<http://www.nla.aust.net.au/>> (11 April 2005).

103 Family Court of Australia, *Response of the Family Court of Australia to ALRC Discussion Paper 62 Entitled Review of the Federal Civil Justice System* (1999) at 17, 27-32; Law Council of Australia, *Law Council Supports Judge's Legal Aid Comments, Asks Attorney for Further Details on Federal Magistracy*, Press Release (21 October 1998); Alistair Nicholson, 'Legal Aid and a Fair Family Law Justice System', paper presented at the Legal Aid Forum Towards 2010, Canberra, 21 April 1999.

104 *Dietrich v R* (1992) 177 CLR 292.

Table 5: Legal Aid Funding Sources (in \$'00s), 2000–2003^a

		ACT ^b	NSW ^c	NT ^d	Qld ^e	SA ^f	Tas ^g	Vic ^h	WA ⁱ	Australia
% National Population ^j		1.7	33.9	1.0	18.7	7.8	2.4	24.8	9.8	100
2000–2001	IOLTA (%)	599 (9.8)	13 674 (13.9)	0 (0)	12 098 (20.8)	1785 (7.3)	0 (0)	5800 (8.2)	151 (0.6)	34 107 (11.5)
	Other Non-Federal (%)	5520 (90.2)*	51 720 (52.4)	2428 (49.1)	22 508 (38.8)	13 175 (53.6)	3459 (42.3)	37 134 (52.4)	14 847 (60.9)	145 716 (49.3)
	Federal (%)		33 301 (33.7)	2512 (50.9)	23 458 (40.4)	9588 (39.1)	4727 (57.7)	27 870 (39.4)	9371 (38.5)	115 902 (39.2)
	Total (%)	6119 (100)	98 695 (100)	4940 (100)	58 064 (100)	24 548 (100)	8186 (100)	70 804 (100)	24 369 (100)	295 725 (100)
	% National Allocation	2.1	33.4	1.7	19.6	8.3	2.8	23.9	8.2	100
2001–2002	IOLTA (%)	637 (9.6)	13 839 (12.2)	0 (0)	11 042 (17.9)	1449 (5.7)	0 (0)	6555 (8.7)	0 (0)	33 522 (10.3)
	Other Non-Federal (%)	5977 (90.4)*	62 894 (55.6)	2834 (48.6)	24 906 (40.5)	13 779 (53.9)	3161 (33.4)	41 148 (54.3)	15 708 (59.7)	165 317 (51.0)
	Federal (%)		36 337 (32.1)	3002 (51.4)	25 606 (41.6)	10 318 (40.4)	6298 (66.6)	28 074 (37.0)	10 616 (40.3)	125 341 (38.7)
	Total (%)	6614 (100)	113 070 (100)	5836 (100)	61 554 (100)	25 546 (100)	9459 (100)	75 777 (100)	26 324 (100)	324 180 (100)
	% National Allocation	2.0	34.9	1.8	19.0	7.9	2.9	23.4	8.1	100

Table 5: Legal Aid Funding Sources (in \$'000s), 2000–2003* cont.

		ACT ^b	NSW ^c	NT ^d	Qld ^e	SA ^f	Tas ^g	Vic ^h	WA ⁱ	Australia
% National Population ^j		1.7	33.9	1.0	18.7	7.8	2.4	24.8	9.8	100
2002–2003	IOLTA (%)	586 (8.1)	15 965 (12.6)	0 (0)	15 255 (20.7)	2279 (8.6)	0 (0)	7630 (9.6)	0 (0)	41 715 (11.7)
	Other Non-Federal (%)	6659 (91.9)*	72 043 (56.7)	2941 (54.7)	30 750 (41.8)	13 194 (50.1)	3476 (45.8)	44 249 (55.5)	17 564 (61.2)	190 876 (53.7)
	Federal (%)		38 956 (30.7)	2436 (45.3)	27 547 (37.5)	10 884 (41.3)	4109 (54.2)	27 893 (34.9)	11 146 (38.8)	122 971 (34.6)
	Total (%)	7245 (100)	126 964 (100)	5377 (100)	73 552 (100)	26 357 (100)	7585 (100)	79 772 (100)	28 710 (100)	355 562 (100)
	% National Allocation	2.0	35.7	1.5	20.7	7.4	2.1	22.4	8.1	100

* The accounts for the Legal Aid Commission (ACT) do not distinguish between government payments from the Territory and Commonwealth Governments. a) Where there is a discrepancy between the amounts recorded by the relevant legal aid commission and the state IOLTA Trustee, the legal aid commission's statements have been preferred. There are also discrepancies between the actual income reported by legal aid commissions in their annual reports and the finance reports of National Legal Aid, a national forum for the commission directors: compare Australian National Legal Aid, 'Finance': <<http://www.nla.aust.net.au/>> (11 April 2005). b) Legal Aid Commission (ACT), *Annual Report 2000-2001* (2001) at 39-67; *25th Annual Report 2001-2002* (2002) at 40, 47; *Annual Report 2002-2003* (2003) at 40. c) Law Society of NSW, *Annual Report 2001* (2001) at 89; *Annual Report 2002* (2002) at 97; *Legal Aid NSW, Annual Report 2001-2002* (2002) at 38, 48; *Annual Report 2002-2003* (2004) at 38, 48. d) NT Legal Aid Commission, *Annual Report 2000-2001* (2002) at 34; *Annual Report 2001-2002* (2002) at 35, 41; *Annual Report 2002-2003* (2003) at 37, 43. e) Legal Aid Queensland, *Annual Report 2000-2001* (2001) at 61; *Annual Report 2001-2002* (2002) at 65; *Annual Report 2002-2003* (2003) at 85. f) Law Society of SA, *Annual Report 2001-2002* (2002) at 5, 11; Legal Services Commission of SA, *23rd Annual Report 2000-2001* (2001) at 42, 49; *24th Annual Report 2001-2002* (2002) at 53, 59; *25th Annual Report 2002-2003* (2003) at 57, 64. g) Legal Aid Commission of Tasmania, *Annual Report 2001* (2001): <<http://www.legalaid.tas.gov.au/annualreport/Financial/>> (11 April 2005); *Annual Report 2002* (2002): <<http://www.legalaid.tas.gov.au/Annual%20Report%202002/>> (11 April 2005); *Annual Report 2003* (2003): <<http://www.legalaid.tas.gov.au/Publications/AnnualReport0203/>> (11 April 2005). h) Victorian Legal Practice Board, *2001 Annual Report* (2001) at 31; *Annual Report 2002* (2002) at 35; Victoria Legal Aid, *Sixth Statutory Annual Report 2000-2001* (2001) at 61, 64; *Seventh Statutory Annual Report 2001-2002* (2002) at 41, 44; *Eighth Statutory Annual Report 2002-2003* (2003) at 51, 53. i) Legal Aid WA, *Annual Report 2000-2001* (2001) at 84, 99; Legal Aid Commission of WA, *Annual Report 2001-2002* (2002) at 86, 97; Legal Aid WA, *Annual Report 2002-2003* (2003): <<http://www.legalaid.wa.gov.au/Annual/2002/ARFinance1.htm>> (11 April 2005). j) Australian Bureau of Statistics, *2003 Year Book Australia*, no 85 (Canberra: AGPS, 2003) at 113.

4. *The Ethics of IOLTA*

The legal validity of Australian IOLTA schemes is not debatable. Since 1998, when the NSW Parliament finally passed a validating Act for the state's residual balances scheme, IOLTA in Australia has rested on a comprehensive platform of state legislation. It will remain that way if the Model Laws on a National Legal Profession are implemented. As such, it does not have to meet any constitutional requirements that compensation be provided to those who might have property 'taken' by government — unlike federal legislation that must give 'just terms'¹⁰⁵ or any US legislation that must (under the 'takings clause') provide 'just compensation' when 'private property' is 'taken for public use'.¹⁰⁶ A constitutionally directed compensation requirement might well be useful. It forces government to satisfy itself that the economic benefits of the scheme outweigh its costs, and makes it easier to justify the scheme as being for the public benefit.¹⁰⁷ However, the Australian people have voted not to extend the 'just terms' requirements of the federal *Constitution* to the states.¹⁰⁸ As a consequence, IOLTA schemes are not in Australia subject to the overarching 'takings' requirements that they are in the US, where there have been repeated takings clause challenges to the validity of IOLTA schemes since they were introduced in 1981.¹⁰⁹

This is not to say that the IOLTA schemes, though legal, are ethical. To a significant extent, an account of the public ethics of IOLTA schemes is helped by the judicial reasoning that identifies where, if the schemes had not been introduced, the revenue earned on trust account deposits would fall. In this sense, then, the courts also model the public ethics that should shape the schemes,¹¹⁰ but which in Australia have been ignored completely.

A. *Interest as Client Property*

A traditional analysis of the trusts implicated in IOLTA schemes suggests that, were it not for the Acts that redistribute value earned on trust account deposits, any interest that a bank was prepared to credit to a trust account would belong to the clients. No parliamentarian who has contributed to the debates about IOLTA has expressed any doubt that a trust account *deposit* being used to earn revenue for public programs was client money, and the structure of the legislative schemes that have resulted both assumes, and reinforces, the character of the capital as trust

105 *Commonwealth of Australia Constitution Act 1900* (Imp) s51(xxxi).

106 *The Constitution of the United States*, Fifth Amendment.

107 Heller & Krier, above n83 at 1001.

108 *Constitution Alteration (Rights and Freedoms) 1988* (Cth) s3; compare Joseph Starke, 'The Failure of the Bicentennial Referendum to Amend the Constitution, 3 September 1988' (1988) 62 *ALJ* 976 at 977.

109 Boone, above n4 at 544; DeLaine, above n4 at 183. See *Cone v State Bar of Florida* 819 F 2d 1002 (1987); *Paulsen v Texas Equal Access to Justice Foundation* 23 SW 3d 42 (1999); *Paulsen*, above n83; *Washington Legal Foundation v Texas Equal Access to Justice Foundation* 270 F 3d 180 (2001) (hereafter *Washington Legal Foundation* [No 2]).

110 This borrows the idea of a supreme court as an exemplar of public reason: see John Rawls, *Political Liberalism* (1993) at 236-237; compare Evans, *Principle and Pragmatism*, above n6 at 152-153.

money held for clients. The clients have complete control over the money held for them in the trust account.¹¹¹ It is only to be moved as the clients direct in instructions given before or after the money is lodged in trust. And, while the statutory deposits schemes take the money out of solicitors' immediate possession, solicitors, and so their clients, keep ultimate control, as the money lodged in an SDA must be repaid to them on demand without prior questioning.¹¹²

It is much rarer in the IOLTA debates to find parliamentarians prepared to recognise that *interest* earned on clients' deposits, no matter how much, is client property.¹¹³ This is nevertheless the interest's inevitable moral and legal character. Struggling to explain the nature of intangible property like bank interest, the courts have often appealed to physical analogues — 'interest shall follow the principal, as the shadow the body'.¹¹⁴ Although the physical analogue has been criticised,¹¹⁵ it does accurately portray the dependence of interest on the bank deposits. 'Money' in the bank is itself a metaphor, representing the agreed extent of the bank's indebtedness to the depositor. The amount of interest represents an agreed increase in that indebtedness arising from the time the bank takes to repay the amounts that the depositor has lent. While, for many purposes, the law usefully segregates this indebtedness into 'capital' and 'income', these remain mere subsets of the one relationship of debt between bank and customer. To this extent, US judges have been the most technically accurate when they speak of interest as an 'increment' to the bank's existing indebtedness.¹¹⁶ It is nonsensical to present the interest — as has happened in parliamentary debates about IOLTA — as money earned on deposits, but independent of any prior indebtedness and without a creditor, awaiting appropriation from the State of Nature by government or profession.¹¹⁷

The House of Lords' decision in *Brown*¹¹⁸ strongly confirms this analysis. The structure of the banking arrangements in *Brown* was similar to that of the statutory deposits scheme but with the redistribution made directly to the lawyer. A Scottish

111 With only the potential qualification that the money may possibly be withheld if subject to a solicitor's lien for unpaid work: see Dal Pont, above n16 at 870–874.

112 LPA 1970 (ACT) s124(1); LPA 1987 (NSW) s65(1)(b); LPA 1974 (NT) s81(1); LPA 1996 (Vic) s181(1)(b); *Legal Contribution Trust Act* 1967 (WA) s12(1). Compare LPA 1981 (SA) s54(9); LPA 1993 (Tas) s103(1).

113 For explicit recognition, see, for example, Eric Lloyd, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 2 December 1964 at 2029, 2030; Lawrence Springborg, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 26 November 2004 at 5243–5244; Patmore, above n98 at 5434, 5436, 5504; Anthony Fletcher, Tasmania, Legislative Council, *Parliamentary Debates (Hansard)*, 6 December 1990 at 4414.

114 *Beckfield v Tobin* (1749) 1 Ves Sen 308 at 310; 27 ER 1049 at 1051 (Hardwicke LJ); *Phillips*, above n83 at 165. Kitto J used a similar 'tree' and 'fruit' analogue in *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 at 396.

115 *Phillips*, above n83 at 181–182 (Breyer J).

116 *Bordy v Smith* 34 NW 2d 331 (1948), 334 (Wenke J); *University of South Carolina v Elliott* 149 SE 2d 433 (1966), 434 (Bussey J); *State Highway Commission v Spainhower* 504 SW 2d 121 (1973), 126 (Higgins J); *State, ex rel Board of County Commissioners of Bernallilo County v Montoya* 575 P 2d 605 (1978), 607 (McManus CJ).

117 See, for example, Percy Smith, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 2 December 1964 at 2029.

118 *Brown*, above n7.

solicitor — whose firm was also involved in a range of commercial activities — received large amounts from business clients into his client current account. Individually large receipts would be invested separately in savings accounts, but others were thought too small to be likely to earn net interest for the client, once transaction costs (like bank charges and administrative expenses) were deducted. However, when the client account approached a balance of £10000, the solicitor would withdraw £5000 and lodge it in a savings account. The interest earned there was paid to the solicitor's own office account, and he treated it as his own. This was the origin of his dispute with the Inland Revenue Commissioners, for if the interest was the solicitor's, he was entitled to some tax relief. The practice was common amongst Scottish solicitors, and endorsed by the Scottish Law Society.

The Lords unanimously regarded the interest earned as the property of the clients from whom money in the client account had been received.¹¹⁹ Little analysis was undertaken to reach that conclusion — Lord Donovan was the most loquacious in saying that 'none of the interest is his income at all, but that of his clients to whom the capital, upon which the interest was paid, belongs'.¹²⁰ Lord Reid recognised that the solicitor's pooling arrangements alone made it possible for these client deposits to earn any interest, '[b]ut that does not appear to me to make any difference in law'.¹²¹ The Lords also agreed that this was not affected by 'the difficulties that the solicitor might have had in apportioning interest between clients',¹²² the fact that other Scottish solicitors commonly did the same thing,¹²³ or that the law society had endorsed the practice.¹²⁴

A similar conclusion was reached in *Phillips*,¹²⁵ the first takings clause challenge to IOLTA that was considered by the US Supreme Court. It held by a 5:4 majority¹²⁶ that the interest earned on accounts maintained under the Texas IOLTA scheme was the 'private property' of attorneys' clients for the purposes of the takings clause. The court left the questions whether there was a 'taking', and whether Texas gave 'just compensation', to be considered on remand, although a federal appeals court did eventually strike the scheme down.¹²⁷ This characterisation of the interest was certainly settled by the time, in *Brown v Legal*

119 *Id* at 257 (Reid LJ), 260, 261–262 (Evershed LJ), 263, 264 (Guest LJ), 266–267 (Upjohn LJ), 268 (Donovan LJ). A unanimous Court of Session had already reached the same conclusion: *Brown v Inland Revenue Commissioners* 1963 SC 331 at 337 (President Clyde LJ), 338 (Guthrie LJ). Compare *Paulsen*, above n83 at 44–45 (Kidd J).

120 *Brown*, above n7 at 268.

121 *Id* at 257.

122 *Id* at 257 (Reid LJ), 261 (Evershed LJ), 266 (Upjohn LJ).

123 *Id* at 257–258 (Reid LJ), 260 (Evershed LJ), 263 (Guest LJ), 266 (Upjohn LJ).

124 *Id* at 258 (Reid LJ), 261–262 (Evershed LJ), 264 (Guest LJ), 267 (Upjohn LJ), 268 (Donovan LJ).

125 Above n83.

126 Rehnquist CJ, O'Connor, Scalia, Kennedy & Thomas JJ; Souter, Stevens, Ginsburg & Breyer JJ dissenting.

127 524 US 156 (1998), 172. On remand, the Texas scheme was initially upheld: *Washington Legal Foundation*, above n130. However, this was overruled by the Fifth Circuit Court of Appeals, which held the scheme invalid on the ground that just compensation had not been given: *Washington Legal Foundation [No 2]*, above n109.

Foundation of Washington,¹²⁸ the Supreme Court held that the Washington IOLTA scheme survived a takings clause analysis. Following *Phillips*, the whole court accepted that the interest was clients' private property and that, through the IOLTA scheme, the state did 'take' it.¹²⁹ However, a 5:4 majority ruled that the clients had incurred no loss and, so, should receive no compensation under the takings clause.¹³⁰

The refusal of Australian parliaments to concede anything to the clients' moral claims over the management of IOLTA schemes therefore brings the schemes' ethical structure into serious question. When the statutory deposits scheme was being debated in the NSW Parliament, the government appealed to *Brown* as providing the 'objective' moral basis to the scheme.¹³¹ The Attorney-General presented Lord Upjohn as stating, as he did, that the solicitor's use of the interest on pooled client money in the savings account was 'an entirely innocent and commonsense practice'.¹³² The Attorney-General omitted, however, Lord Upjohn's next sentence in *Brown*: '[b]ut this interest belongs collectively to the clients and not to the solicitor'.¹³³ Already selectively quoted, *Brown* was then said to support the idea that the scheme was not using other people's money for public programs,¹³⁴ despite its ratio that the interest belonged to the clients. 'The only organization or individual to lose anything by reason of this legislation will be the bankers'.¹³⁵ The clients' moral claims to the interest have therefore not only been ignored, the general law claims that they would have to the interest were misrepresented.¹³⁶ This is in the sharpest contrast to *Brown*'s effect in the United Kingdom (UK), where strict procedures for solicitors to return interest on client money were introduced, and are still maintained. The UK professions set scales indicating when given amounts to be held for different periods have to be invested for the client's benefit.¹³⁷

128 123 SCt 1406 (2003).

129 Id at 1422-1423.

130 Souter, O'Connor, Stevens, Ginsburg & Breyer JJ; Rehnquist CJ, Scalia, Kennedy & Thomas JJ dissenting.

131 Kenneth McCaw, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 March 1967 at 4290.

132 Id at 4291; Arthur Bridges, New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 15 March 1967 at 4218, quoting *Brown*, above n7 at 267.

133 *Brown*, above n7 at 267.

134 McCaw, above n131 at 4291.

135 Ibid.

136 Though, in all probability, innocently. The speeches in both the Legislative Assembly and the Legislative Council were similar, with the same parts of *Brown* quoted. This suggests that the Ministers were relying on common briefing papers in their presentation of the effect of *Brown*.

137 England and Wales: *Solicitors Accounts Rules* 1998 (Eng) r24. Northern Ireland: *Solicitors Accounts Regulations* 1998 (UK) r15. Scotland: *Solicitors (Scotland) Accounts etc Rules* 2001 (UK) r11. See Lesley King, 'Solicitors Accounts Rules 1998' (1998) 142 *Sol J* 968 at 969. For the initial reaction to *Brown*, see 'Res Nullius?' (1964) 108 *Sol J* 625; 'The Horns of a Deposit' (1964) 108 *Sol J* 945.

Even if the amount that is earned on any single client's trust account deposit is barely discernible, the clients have a moral claim on the management of the interest increment to the deposits they have made.¹³⁸ It is only the convenience of the arrangement that leads to the suggestion, effectively made when IOLTA schemes have been introduced, that clients have a moral claim over the management of their capital, but not over its income¹³⁹ — as if the interest exists independently of the deposit on which it was calculated. However, despite the clients' moral claims, Australian IOLTA schemes direct that interest to public programs, often, in the place of returning to clients the interest that could be earned by them and, almost always, without clients' knowledge. Furthermore, as will be seen, in some states the spending of that money remains secret, with IOLTA Trustees unwilling to account for it publicly.

B. *Investing Duties*

The redistribution of IOLTA from clients is often justified by the claim that, individually, the deposits held in trust accounts could not earn net interest for the client, once transaction costs are taken into account.¹⁴⁰ Even if taken as a part of pooled money (whether in an SDA or the trust account's residual balance) that earns interest, the interest apportioned to an individual client would be infinitesimal or, if measurable, would still be less than the costs of apportionment. The suggestion that apportionment between clients is that costly is, with modern information technology, indefensible,¹⁴¹ but even on the brave assumption that it is, the argument also depends on trust account deposits being of small amounts held for short periods. That further assumption is commonly made,¹⁴² but bears little relationship to actual practice in Australia where, first of all, there is still no clear professional duty on solicitors to invest money that is capable of earning net interest for clients and, secondly, there is evidence that investable amounts could be commonly held in the trust account.

138 Compare DeLaine, above n4 at 193.

139 Dan Chern, 'Why Mandatory IOLTAs Should Be Eliminated' (1997) 4 *Texas Wesleyan LR* 123 at 140–141.

140 Dulong, above n4 at 119–120; Bryan Goldstein, 'Phillips v Washington Legal Foundation: The Future of IOLTA' (1999) 79 *Boston University LR* 1277 at 1287, 1295–1296; David Luban, 'Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers' (2003) 91 *Cal LR* 209 at 230; Katharine Smith, 'IOLTA in the Balance: The Battle of Legality and Morality Between Robin Hood and the Miser' (2003) 34 *St Mary's LJ* 969 at 975–976; Phillips, above n83 at 181–182 (Breyer J).

141 On this point, see *Solicitors Guarantee Fund*, above n6 at 252; J David Breemer, 'IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause' (2000) 23 *Hawaii LR* 221 at 245–246; Imperial, above n99 at 264; Salmons, above n87 at 265; Norman Mannix, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 March 1967 at 4299; Fletcher, above n113 at 4414; Haddon Storey, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 14 June 1983 at 2737; Brown, above n7 at 257 (Reid LJ), 261 (Evershed LJ), 266 (Upjohn LJ).

142 See, for example, McCaw, above n131 at 4291; Peter Delamothe, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 2 December 1964 at 2016; Wilcox, above n44 at 1993.

In practice, Australian solicitors often arrange for any sizable amount entrusted by a client to be deposited as controlled money in a separate savings account and, for the most part, recommend to the client that that be done. However, professional rule-makers, including courts and tribunals, are yet to articulate a solicitor's *duty* to recommend this.¹⁴³ The Queensland Law Society tried to secure the discipline of a solicitor who failed to invest amounts between \$4800 and \$17000 held in the trust account, but the charges were dismissed once they met the tribunal's inability to determine the time by which a deposit in a controlled money account should have been made.¹⁴⁴ Under the current rules of conduct, it would be difficult to sustain a charge of failing to advise investment. This is a marked contrast to other jurisdictions, which demand a deeper level of ethical engagement of lawyers to secure private financial returns to clients.

In NZ, the introduction in 1991 of a single IOLTA scheme, by which banks would credit interest to trust accounts but pay it to the IOLTA Trustee,¹⁴⁵ was coupled with a legislated duty to ensure that, wherever possible, client money is placed in a controlled money account. The *Law Practitioners Act* provides:¹⁴⁶

It shall be the duty of a solicitor to ensure that, wherever practicable, all money held on behalf of a person by that solicitor earns interest for the benefit of that person, unless –

- (a) That person instructs otherwise; or
- (b) It is not reasonable or practicable (whether because of the smallness of the amount, the shortness of the period for which the solicitor is to hold the money, or for any other reason) for the solicitor to invest the money, at the direction of that person, so that interest is payable on it for the benefit of that person.

British and American lawyers also have responsibilities to lodge client money in controlled money accounts whenever possible.¹⁴⁷ For the UK that means that there is *no* diversion of IOLTA to public programs whatsoever, but in the United States this duty is built into the structure of most IOLTA schemes. For example, under the Washington scheme considered in *Brown v Legal Foundation of Washington*,¹⁴⁸ an attorney was not to deposit investable amounts in an IOLTA account. So long as the rule was followed, money in an IOLTA account, by definition, could not have earned net interest if invested. Accordingly, the reason why the Supreme Court found that, despite a 'taking' of private property, the takings clause did not require compensation to be paid to the client, was that there was no loss to the client by

143 *Trust*, above n6 at 78.

144 *Re X*, SCT/40 (2001) 8 BRDA 10 at 20.

145 *Law Practitioners Amendment Act 1991* (NZ) s4; *Law Practitioners Amendment Act 1982* (NZ) ss91A–91N.

146 *Law Practitioners Amendment Act 1991* (NZ) s3; *Law Practitioners Amendment Act 1982* (NZ) s89A.

147 *Solicitors Accounts Rules 1998* (Eng) r24; *Solicitors Accounts Regulations 1998* (UK) r15; *Solicitors (Scotland) Accounts etc Rules 2001* (UK) r11; Boone, above n4 at 541; Dulong, above n4 at 95; Salmons, above n87 at 261–262.

148 Above n128.

lodging the client's money in an IOLTA account.¹⁴⁹ If investable amounts were deposited in an IOLTA account, the client's remedy was against the attorney for breaking the rules of the scheme.¹⁵⁰ That did not invalidate the scheme itself.

Not only is this not required of Australian solicitors, the evidence of disciplinary cases suggests that, especially if money is entrusted on account of potential costs and outlays, investable amounts are routinely kept in the trust account. Further, in their reasons for decision, judges and tribunal members pass over this practice without remark,¹⁵¹ confirming *sub silentio* both that the general practice of lodging investable amounts in a controlled money account is not yet an enforceable duty, and how common it is not to invest when that is convenient for the solicitors. Without this duty as a threshold for money passing into IOLTA schemes, it is doubtful that any Australian IOLTA scheme would survive anything akin to a takings clause analysis. But then, it would not have to. What is certain is that, although it could never be quantified, interest that could be returned to clients is being redistributed to public programs without their knowledge.

C. Client Choice

Even if solicitors were to sift investable amounts from the trust account, IOLTA schemes would still not rest on an acceptable ethical foundation, as a duty to advise lodgment in a controlled money account does not address the basic problem that clients have — at the very least — moral claims over interest that is only capable of being earned on pooled aggregations of trust account deposits. This, of course, was the central point of *Brown*, which confirms that, without the IOLTA statutes, clients would have a prior *legal* claim to this interest. That basic claim must be given effect before IOLTA schemes in Australia can be ethically justified, and the surest means of recognising the strength of that claim is allowing client *choice*.

American commentators, fearing possible invalidation of IOLTA schemes under the takings clause, have consistently suggested that reinforcing client choice is the best option for salvaging IOLTA in the US.¹⁵² Any moral objection to the redistribution of value to public programs immediately dissolves once the client, informed of the use that can be made of his money through IOLTA schemes, consents to that use. However, any accommodation of client choice is lacking completely in all Australian IOLTA schemes. It would be exceptional to find solicitors who, when asking for money to be kept in trust, advise clients that it will not earn them interest, or that, when pooled with other money in the trust account, it will earn interest that helps to fund programs like legal aid and the maintenance of a fidelity fund. There is, despite increasing mandatory disclosure requirements on solicitors,¹⁵³ no duty to give this advice. And, in times when even small personal cheque accounts are credited interest, it could not be inferred from

149 Id at 1419–1420.

150 Id at 1414–1415.

151 See above n17.

152 Anderson, above n33 at 746–749; Breemer, above n141 at 244; Goldstein, above n140 at 1287, 1296; Salmons, above n87 at 271–273; Smith, above n117 at 1004–1005.

153 For example, see Dal Pont, above n16 at 26–33.

'custom' that clients would be conscious that trust account deposits would not attract interest *for them*, let alone be aware that the interest that was being credited (actually and notionally) to trust account deposits was being used for public programs. A similar issue was considered in *Brown*, where the solicitor claimed that his clients had agreed that he keep the interest on the savings account as they had impliedly agreed to the custom of Scottish solicitors to take it as a fee for the time and trouble involved in handling client money. The House of Lords disagreed that it was 'customary', although admitting that it was common.¹⁵⁴ Implicit in *Brown* is the suggestion that, even if there were in Scotland a custom that this money could be treated as business receipts, it would not be sufficient to meet the standards of consent required before a solicitor could profit from the use of clients' money.¹⁵⁵

Advice to clients that interest is not earned for them in the trust account, but that government arrangements lead to its earning revenue for public programs, would allow the inference that, if money is entrusted to solicitors in these conditions, the clients have consented to the redistribution of value to those programs.¹⁵⁶ Of course, if that consent is to be real then clients must retain the right to direct that their money be placed in controlled money accounts even if, given transaction costs and the small interest credited, that means they invest at a personal loss. David Luban objects that this is just 'a spite right',¹⁵⁷ a miserly refusal to allow public use of the money at the client's own cost. And so it is. However, given the irrationality of that choice, few would make it. This is also a legal right that clients already have. If, having been advised that depositing money in a controlled money account will, after transaction costs are incurred, be unprofitable, the client still directs that money be invested, the solicitor must follow the client's instructions. And, recognising that the client is, in this context, exercising a proprietary right in money being requested by the solicitor, the solicitor's *moral*¹⁵⁸ and legal duty is to give effect to the preference of the owner of the property — no matter how irrational or niggardly it is, or how needy or meritorious others might be. The difference is that, at present, the client would generally make that choice without being advised how, if the money were deposited in the trust account, the income earned on it is going to be used.

154 *Brown*, above n7 at 257–258 (Reid LJ), 260 (Evershed LJ), 263 (Guest LJ), 266 (Upjohn LJ).

155 As Lord Upjohn said: '... he cannot without his clients' agreement, make indirect charges by way of retaining interest on the investment of his clients' money. It avails him not to say that he retains such interest either in lieu of or in reduction of such charges or in addition thereto because of the extra time and trouble in which he may be involved in handling his clients' affairs. But the client may agree to allow his adviser to retain such interest provided that the true legal position is explained to him and he fully understands it. Such an agreement may be expressed or may be implied from the course of dealing between the client and his adviser but can, in my view, only be implied where, at all events, it can be shown that the client knew of his rights and by his course of conduct agreed or assented to their waiver and substitution of this practice': *id* at 265–266.

156 It is doubtful that informed consent requires detailed statement of the programs for which the interest is used: compare Breemer, above n141 at 245–246.

157 Luban, above n140 at 231.

158 See Immanuel Kant, *Kant's Political Writings* (1970) at 70–71.

D. *Representation and Accountability*

Two questions of accountability arise under some Australian IOLTA schemes: the identity of the IOLTA Trustee, and its willingness to disclose how it manages its trust. Having established that IOLTA schemes raise questions of distributive justice between clients, bank shareholders and the various beneficiaries of the schemes' programs, it remains to be asked why, in seven Australian jurisdictions, government continues to place the responsibility for effecting the redistribution onto private institutions — a law society,¹⁵⁹ or a statutory trustee on which it is represented.¹⁶⁰ This is regrettable, as (especially given the size of the allocation to legal aid) lawyers are direct beneficiaries of most IOLTA programs and the law society, whatever regulatory roles it may have, is principally the representative of lawyers. There is an appearance of *interest*. In some cases, the law society's ostensible interest has no underlying reality as its role is mechanical, with allocations being directed by the governing Act or government. Still, as has been seen, there is evidence that some law societies' real self-interest has directed how they have allocated IOLTA.¹⁶¹ But it is not merely to contradict claims that IOLTA is a solicitors' 'fringe benefit scheme'¹⁶² that it is suggested that the government should be the IOLTA Trustee. It is the only institution that represents all citizens who could conceivably have a claim on IOLTA, including clients,¹⁶³ and the only institution that can properly act as an agent of distributive justice. The Victorian Legal Practice Board was the first IOLTA Trustee to be independent of a law society,¹⁶⁴ and it is only under the new Queensland rules that a state government has, for the first time, become an IOLTA Trustee.¹⁶⁵

The conflation of private and public roles in law societies or statutory trustees may also explain why, in some states, the IOLTA Trustee's accounting for its management of IOLTA schemes remains unacceptably poor. There are no reports of residual trust account balances, and few of interest rates and SDA balances.¹⁶⁶ The terms of residual balances schemes, which are after all arrangements made over a notional bank indebtedness to clients, are not available to clients or the general public. The ACT, NSW, SA and Victorian IOLTA Trustees do fully report the revenue raised, and the amount of allocations. In other cases, though, IOLTA scheme accounts are retained privately but made available on request.¹⁶⁷ Under the old Queensland rules, the statutory deposits scheme earnings can only be estimated by reconstructing a range of accounts under the assumption that the governing Acts had been followed.¹⁶⁸ It is evident that some law societies, while

159. Above n27.

160. Above n28.

161. Above nn96–97.

162. For example, Lloyd, above n113 at 2030–2031.

163. Patmore, above n98 at 5434, 5436.

164. *LPA* 1996 (Vic) s181(1)(a).

165. *LPA* 2004 (Qld) s208(2).

166. See above Part 2E.

167. See Table 3 note g; NT Legal Practitioners' Trust Committee, Letter to Author, 14 October 2003; Law Society of Tasmania, *Annual Report 2001–2002* (2002) at 29, 41; *Annual Report 2002–2003* (2003) at 22.

prepared to publish IOLTA accounts to solicitor-members, are occasionally uncertain whether the accounts can be disclosed to the public. The confusion is understandable, given that a public role is being carried by a private organisation, but again supports the view that it is best not to place the management of IOLTA schemes with law societies if the actual nature of the trust they hold is not readily appreciated.

5. *Restoring Trust to IOLTA*

From the early twentieth century, government and law societies have taken admirable steps to buttress the trust created when solicitors hold client money, regulating closely how client interests, client control of the money and solicitors' accountability are to be respected and managed. Nevertheless, government and law societies have themselves refused to respect those demands when they (in statutory deposits schemes) hold client money or (in residual deposits schemes) take advantage of it. Worse, they have often done so *knowing* that a moral trust is being violated.¹⁶⁹ All Australian IOLTA schemes are bereft of safeguards to promote clients' knowledge and control of government and law society use of their money, and consent to this use. Some, perhaps reflecting an embarrassment about IOLTA schemes, fail to provide any accounting for it. Against this moral trust, the interests of the states, the professions, other beneficiaries of IOLTA programs and the banks are consistently given priority over those of the banks' creditors — whose deposits make it all possible.

The reasons are obvious. IOLTA revenue, now over \$110 million annually, is vital for significant public programs. As the account of legal aid funding shows, its immediate loss would be catastrophic for the administration of justice in some states. Effectively, it is an important expropriation for public use. Still, it is an expropriation without a taxing or appropriation statute, or even notice to those who have the greatest moral claim to the money, and so fails to meet the most basic public standards for raising public revenue.

Government and professions are now IOLTA-dependent, and so are being asked to accommodate clients' moral claims from a position of actually conflicting interests and duties.¹⁷⁰ Undoubtedly, the straightforward response to the unethical structure of IOLTA would be to return any interest earned on trust account deposits to clients¹⁷¹ — apportionments between clients can now be easily made. But the extent of government interest in IOLTA makes this unlikely.

However, an ethical structure for IOLTA can be developed if this moral trust is reinforced by an explicit, enforceable duty on solicitors to recommend to clients that investable amounts be lodged in controlled money accounts; and to advise clients that money held in the trust account will not earn them interest, but will help

168 See Table 3 note c.

169 See *Solicitors Guarantee Fund*, above n6 at 251–252, 319–320, 394–395; *Principle and Pragmatism*, above n6 at 153, 157; *Trust*, above n6 at 78.

170 *Principle and Pragmatism*, above n6 at 153; *Whose Money*, above n6 at 224–225.

171 Springborg, above n113 at 5244.

earn funds for public programs. The practice of entrusting the management of IOLTA to law societies and statutory trustee corporations also requires serious reconsideration. The recent assumption by the Queensland Government of the role of the state's IOLTA Trustee is therefore a more promising development: having a better appearance; improving public accountability; setting distributive justice on its proper institutional foundation; and showing more honestly that IOLTA is a public expropriation.

Evans believes that, given changes in banking practice, trust account deposits are a declining source of capital for the earning of revenue and that, for pragmatic and ethical reasons, government and professions should be weaning themselves from their reliance on IOLTA.¹⁷² This is more imperative in the larger states, where legal aid commissions rely so significantly on allocations from IOLTA schemes. Any change to the ethical structure of IOLTA that improves both client knowledge of the schemes and choice over the destination of client money will also reduce returns made to public programs. This may also mean that IOLTA returns are reduced to a point at which the cumbersome but more effective statutory deposits schemes lose their comparative advantage over residual balances schemes, and can either be abandoned completely or substituted with the Canadian scheme.¹⁷³ However, a government and professional interest in (what is morally) client income can, with ethical integrity, be preserved, although the present *extent* of that interest should be reduced. It is merely expecting of government and the guardians of the law the same standards that they expect of others.

172 *Solicitors Guarantee Fund*, above n6 at 200.

173 See above n87.