

## NOTICE OF DETERMINATION

A notice made under section 318 of the *Legal Profession Uniform Law* (Victoria).

<b>Complainant:</b>	<b>Victorian Legal Services Commissioner</b>
<b>Respondent Lawyer/Law Practice:</b>	██████████ of ██████████
<b>Ref:</b>	██████████

### ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law* (Victoria) (“the Uniform Law”), I have decided that the respondent has engaged in unsatisfactory professional conduct and I make the following orders –

1. The respondent is cautioned pursuant to section 299(1)(a) of the Uniform Law.

### STATEMENT OF REASONS

#### BACKGROUND

2. On 12 February 2016, ██████████ of the Law Institute of Victoria conducted an Investigation Risk Assessment Review (“the Review”) of the law practice trust account.
3. The Review identified that a conveyancing firm, ██████████ (“the conveyancing firm”), deposited monies into the law practice’s trust account with respect to three conveyancing matters in connection with non-legal services.
4. On 1 March 2016, the respondent sought an exemption from the Victorian Legal Services Board (“VLSB”) under section 85 of the *Legal Profession Uniform Law Application Act 2014* (Victoria) from the requirement to not mix trust money with other money pursuant to section 146 of the Uniform Law.
5. On 9 June 2016, the VLSB refused the exemption request.
6. On 7 September 2016, the Victorian Legal Services Commissioner (“VLSC”) decided to investigate the conduct outlined in paragraph 2 above as a disciplinary matter under sections 266(2) and 282 of the Uniform Law.

#### ISSUES UNDER INVESTIGATION

7. The issue under investigation was whether the respondent acted in breach of section 146 of the Uniform Law by mixing trust money with other money, without authorisation from the VLSB.

## INVESTIGATION

8. On 7 September 2016, the VLSC gave notice to the respondent of its decision to investigate the issue outlined above, requested a response from the respondent pursuant to section 371(1) of the Uniform Law and invited him to make any written submissions.
9. On 21 September 2016, the VLSC received a response from the respondent. The respondent stated that:
  - a. prior to the Review, he was of the view that the funds received from the conveyancing firm were trust monies;
  - b. no further funds had been received from the conveyancing firm and deposited into the law practice's trust account since the Review, save for two further payments of \$1,000 and \$5,000 being made on 5 February 2016 and 16 February 2016 respectively;
  - c. that these payments were made without reference to him and before he had the opportunity to notify the conveyancing firm of the outcome of the Review; and
  - d. the law practice would no longer accept such funds from the conveyancing firm.
10. On 26 September 2016, the VLSC wrote to the respondent:
  - a. giving notice that the conduct relating to the use of the law practice's trust account would constitute a breach of section 146 of the Uniform Law;
  - b. notifying him of the proposed determination of unsatisfactory professional conduct and the likely orders to be made, being a reprimand pursuant to section 299(1)(b) of the Uniform Law and an order requiring him to undertake education with respect to trust accounting requirements pursuant to section 299(1)(e)(i) of the Uniform Law; and
  - c. inviting written submissions about the proposed orders.
11. On 4 October 2016, the respondent attended the office of the VLSC and met with [REDACTED], [REDACTED], Manager, Disciplinary Investigations, and [REDACTED], Investigations Officer. During the course of the interview, the definition of trust money and the law practice's trust account practices were discussed. The respondent noted that he had no prior substantiated complaints and that he was not seeking to make a financial gain from the transaction, rather, that it was an act of goodwill to the conveyancing firm.
12. Following this meeting and further investigation of the complaint, it was identified that the law practice had charged fees for legal costs and/or professional services to the conveyancing firm with such amounts being deducted from the monies received.
13. Further, it was noted that on 10 June 2014, an Investigation Report was prepared by [REDACTED] and [REDACTED] pursuant to part 3.3 of the *Legal Profession Act 2004* (Victoria) ("the LPA") and signed by the respondent (the "Investigation Report"). The Investigation Report identified various breaches of the *Legal Profession Regulations 2005* (Victoria) and noted that monies received from the

conveyancing firm and deposited into the law practice's trust account were not trust monies pursuant to section 3.3.2 of the LPA. The Investigation Report contained an acknowledgment which provided as follows:

'By signing this Investigation report the law practice acknowledges and confirms that remedial action (where necessary) will be undertaken to ensure it complies with Part 3.3 of the LPA and Part 3.3 of the Regulations.'

14. On 27 October 2016, the respondent notified the VLSC that he had identified 42 cases since May 2009 where fees were charged to the conveyancing firm for "administrative services", acknowledging that the trust account records occasionally used the term "legal costs".
15. On 16 November 2016, the VLSC wrote to the respondent proposing that if the respondent undertook to do the following, the VLSC would agree to make a finding that he had engaged in unsatisfactory professional conduct and make an order cautioning him pursuant to section 299(1)(a) of the Uniform Law:
  - a. Complete the following continuing professional development ("CPD") courses, in addition to his usual CPD requirements prior to the renewal of his practicing certificate in 2017:
    - i. Bookkeepers' Trust Recording Workshop; and
    - ii. Authorisation to receive trust money course.
  - b. Refund the fees charged to the conveyancing firm for legal costs and/or professional services to the conveyancing firm's clients.
16. On 8 December 2016, the respondent made the abovementioned undertaking to the VLSC.

## **FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION**

17. On the basis of the Review, the law practice's trust bank reconciliation and trust trial balance as at 31 December 2015, the Investigation Report, the trust ledgers of client 1, client 2 and client 3 and the lawyer's admissions, I find that the law practice deposited and/or received non-trust monies, being money not in connection with client legal services provided by the law practice, into the law practice's trust account without authorisation from the VLSC.

## **RELEVANT LAW**

18. The Uniform Law applies to the conduct the subject of the finding of fact.
19. The conduct occurred on 23 and 24 November 2015 with respect to the conveyancing firm's client 3; 27 November 2015 with respect to the conveyancing firm's client 1; 17 December 2015 with respect to the conveyancing firm's client 2; 5 February 2016 with respect to the conveyancing firm's client 4; and, 16 February 2016 with respect to the conveyancing firm's client 5, being the dates monies were deposited into the law practice's trust account.

## **CHARACTERISATION OF THE CONDUCT**

20. Section 146 of the Uniform Law provides that a 'law practice must not mix trust money with other money unless authorised to do so by the designated local regulatory authority, and only in accordance with any conditions the designated local regulatory authority imposes in relation to that authorisation.'
21. Trust money is defined in section 129(1) of the Uniform Law as 'money entrusted to a law practice in the course of or in connection with the provision of legal services by the law practice, and includes—
  - (a) money received by the law practice on account of legal costs in advance of providing the services; and
  - (b) controlled money received by the law practice; and
  - (c) transit money received by the law practice; and
  - (d) money received by the law practice, that is the subject of a power exercisable by the law practice or an associate of the law practice, to deal with the money for or on behalf of another person.
22. Section 135(1) of the Uniform Law prescribes that a law practice must deal with trust money in accordance with the Uniform Law.
23. The money received by the law practice was not in the course of or in connection with the provision of legal services by the law practice. The monies received were in connection with conveyancing services performed by the conveyancing firm. It is noted in the Investigation Report that the conveyancing firm did not hold a trust account.
24. In light of the above and by reason of the above finding of fact, I find that the respondent has breached section 146 of the Uniform Law and, accordingly, section 135(1) of the Uniform Law.
25. Section 298(a) of the Uniform Law prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Uniform Law.
26. Accordingly, the abovementioned breaches of the Uniform Law constitute unsatisfactory professional conduct pursuant to section 298(a) of the Uniform Law.

## **DETERMINATION & REASONS**

27. I make an order cautioning the practitioner pursuant to section 299(1)(a) of the Uniform Law
28. In making this determination, I have taken into account that the the respondent has co-operated with this office during the course of the investigation, providing his answers in a timely manner. In addition, the respondent has not had a prior substantiated complaint against him.

29. Further, the respondent has provided an undertaking to the VLSC that he will complete further CPD courses and refund the fees charged to the conveyancing firm to the conveyancing firm's clients.
30. Having considered all of the evidence and relevant law, and having made the above finding on the issue under investigation, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

#### **APPEAL**

31. Pursuant to section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal ("VCAT"), or seek a review by VCAT, of this determination made under section 299 of the Uniform Law.



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**Michael McGarvie,**  
**Victorian Legal Services Commissioner**  
Date: 27 January 2017