Whose Money? THE SOLICITORS GUARANTEE FUND

Adrian Evans

Conflicts of interest in a self-regulatory system.

In Victoria and indeed many western legal jurisdictions, lawyers have attempted for some decades to compensate clients unfortunate enough to lose funds to a few unscrupulous practitioners who have stolen from trust and other accounts. This case study demonstrates how a compensation fund within a western legal system can lose its innocence when its controllers are exclusively drawn from the organised professional body. The Victorian compensation fund (known as the Solicitors Guarantee Fund (SGF)) commenced in 1946 and has been a prime example of 'upright professionalism', operating in the best interests of the Victorian community.

The SGF provided the entire contribution of the State to the Legal Aid Commission, and fully supported 'Professional Standards' (the regulatory mechanism of the Law Institute of Victoria), the Leo Cussen Institute (for post graduate, 'professional' legal education), the Victoria Law Foundation (for legal research) and the late lamented Victorian Law Reform Commission. The last organisation was subsequently decapitated by the new Liberal Government at a time, no doubt coincidental, when it was beginning to examine the structure of the SGF.

During the 1970s and 1980s, the fortunes of the Fund grew with interest rates to the point that when the bubble burst and rates decreased, the beneficiaries (who by then included those diverse institutions mentioned above, in addition to defrauded clients) were left exposed on the beach. The only beneficiary left untouched was the Law Institute of Victoria (LIV). The plight of cash-strapped groups such as the Legal Aid Commission and the Leo Cussen Institute, which had come to depend on SGF grants, has provoked a discreet but anxious examination of the SGF structure.[1] Reflection on the relationship between the SGF, its dependencies and the LIV which controls the Fund has raised questions about current SGF priorities and the purposes they serve. In particular, there is discomfort about the downturn in SGF income and its parallels to the decline in public attitudes to the legal profession. There are also legal and ethical concerns about the conflicting obligations of the LIV to its members and the public at large. The crisis of funding has made it clear that the organised profession prefers to fund its self-regulatory mechanisms (quite apart from compensating defrauded clients) over and above the public support of access to the courts through the legal aid system. The Victorian profession recognises that its control of regulation (and the limiting of complaints) made possible by its control of the SGF is central to the maintenance of legal professional power. Not surprisingly, the LIV will not acknowledge, or even comprehensively debate, the assertion that this conflict damages its ability to support the rule of law and the stability of our system of justice.

Public attitudes to the legal process

International corporate excess in the boom conditions of the 1980s led to unprecedented growth amongst law firms in Australia and elsewhere. In 1987-88 the legal services industry in Australia had a total turnover of $3069 million (*Australian Bureau of Statistics: 1987/88 Legal Services Industry, Australia*). When that growth turned sour, lawyers' incomes began to decline and government scrutiny began to increase. The *Economist* of 18 July 1992 notes at p.5:

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> According to the American Lawyer . . . revenues at America's top 100 law firms rose last year [1991] by just 3%, to $13.9 billion, after a 9% increase in 1990 — two successively more painful years for an industry in which anything less than double digit growth had become a dim memory.

The international recession made clients very cost-conscious and the larger corporate clients in particular began to sit up. The *Economist* again: 'Once docile clients are taking charge and shifting the balance of power between them and their law firms' (at p.6).

Lawyers who sniffed the wind understood that the public mood was changing and began to adapt, developing their practices to meet a questioning clientele. Partners of cost-conscious firms began tendering for retainers in the multi-national market, while smaller practices retained in-house counsel, developed well-researched client newsletters and hastened to identify specialisations where they could be cost effective.

Much of this energy, however, was focused inwardly, that is, on how to compete. Professional awareness that lawyers face more fundamental challenges to their role has been limited. However, the increased scrutiny has led to some insightful and purposive responses designed to tackle the issues of government and client confidence in the profession. Nicholas Cowdery, QC, is one of these respondents. Speaking at the LawAsia conference in Perth, Western Australia, he said that: '. . . the best form of defence [for lawyers is] to carry out their duties according to proper principles and provide their services in a professional way'.[2]

Mr Cowdery quoted with approval the comments of Professor Austin Sarat of Amherst College, USA, speaking in Brussels in 1988:

> Public attitudes towards lawyers often seem quite contradictory and at war with themselves. Contradictions in public attitudes reflect the fact that what the public thinks about lawyers is closely tied to what the public thinks about legal institutions and processes.

Mr Cowdery continued:

> He argued that the fate of the legal profession is closely tied to the quality of legal institutions. The image of lawyers will improve if lawyers are able to contribute to the improvement of legal institutions. Professor Sarat also referred to public cynicism about lawyers engendered by their office practices; and to a dangerous and destructive embrace of commercialism by lawyers which lowers their public prestige.
>
> What can and should we do about this slide from grace? I am not talking about how to improve our rating in the popularity polls by improved public relations or cosmetic adjustments. I am talking about approaches to matters of basic principle which, if we address them properly and consistently, will go some way towards securing our status as independent professionals performing a respected service to our societies.

Traditional formulations of professional ethics have concentrated on the practitioner-client or practitioner-practitioner relationships and, in the case of lawyers, on ethical duties to the courts. The idea that there may be some yet wider duties for which lawyers are accountable — the 'matters of basic principle' — is relatively new. Ethical duties are usually concerned with an individual lawyer's behaviour to another individual, and do not provide much guidance. 'Basic principles' in this context means the primacy of the public interest: i.e. that there must be *no* hint of lawyers as a group benefiting at the expense of the public as a group, when a public duty is being discharged by the *organised* profession. The aspect of 'wider duties' of relevance to client compensation funds such as the SGF is that of conflicts of interest emerging at the institutional or corporate level. These conflicts are not immediately obvious to the layperson, but become notorious over time as their ramifications become clearer.

In England and Wales the annual 'turnover' of the Law Society Compensation Fund is already many millions of pounds, with solicitors expected to come up with a levy of just over £1000 for the year 1 November 1993 to 31 October 1994 to cover defalcations. The expected 'payout' for the same period will be £33m. Canadian provinces and nearly all US State jurisdictions maintain compensation funds, exacting levies varying from purely nominal levels (for example, Ontario, Nova Scotia) to several hundred dollars (for example, Manitoba, Saskatchewan). The England and Wales, the Scots Fund and most Canadian funds do not receive income from the interest earned on deposits by clients in their lawyers' trust accounts (a major factor in the conflicts of interest evident in Victoria) but US funds are *usually* funded by such interest (so-called IOLTA funds) and significant defaults do reduce the amounts available for legal aid.[3]

When the compensation funds *and* the regulatory mechanisms are run by the organised profession, as in 13 States of the US, the UK, Australia, New Zealand and Canada, the potential exists for the profession to limit public criticism and reduce the pressure for greater lawyer accountability. Complaints procedures cannot, in general, be used to criticise the compensation process and an award of compensation payments does not imply any thorough investigation of accompanying non-fiduciary complaints. There are added complications in Australia: legal aid dependency on the interest earned on trust accounts, the partial *financing* of regulation by the compensation funds (as in Ontario) and the pressure to keep levies on lawyers low — in lawyers' interests — make it hard to identify the public interest, much less uphold it.

A painful example of these conflicts has recently occurred in New Zealand, and points the way to the sort of action which will inevitably occur elsewhere. Renshaw and Edwards, an otherwise unremarkable Wellington two-man partnership, engaged in bad property investments and poor predictions on the race track. The NZ Law Society President Judith Potter said:

> New Zealand can claim a rueful first in that both partners were conducting their dishonest activities contemporaneously, each claiming that he did not know what the other was doing. [*Australian Lawyer*, June 1993, at p.22]

More than 500 claims against the New Zealand Fidelity (compensation) Fund in respect of Renshaw and Edwards and other firms now total $NZ60 million, with $NZ25m already admitted for payment and the balance climbing quickly. The Fund is bankrupt. Practitioners, to their credit and with admirable pragmatism, have elected to pay $NZ10,000 each to bring the Fund back into the black. However, many property investment deposits in solicitors' trust accounts will no longer be protected. There is a universal awareness that if the profession did not itself impose the levy, the reborn Fund would have been removed from Law Society control and a much closer scrutiny of legal practices would be the result. The new levy represents the price of legal professional power in New Zealand, and is an eloquent testament to its benefits for lawyers (minimal public scrutiny) and disadvantages for the public (reductions in protected transactions).

The Victorian case

Compensation funds such as the Victorian SGF consist of quasi-*public* moneys administered by the organised legal profession to finance a self-regulatory discipline system, as well as to compensate defrauded clients and support legal aid. Its structure is one of the most complex in western legal systems and is replicated to a similar pattern in most Australian States. The SGF sits at the centre of the structure much like a piece of financial DNA, institutionalising a network of conflicting interests that is beginning to fray.

The performance of the Funds has attracted attention in Victoria (see ref. 1) and Queensland (Report of Queensland Public Accounts Committee, No. 17, December 1991). The SGF has evolved to the point where its operations and influence profoundly affect the administration of justice in Victoria. Its current administration does raise matters of basic principle, including its effect on the funding of legal aid and the position of the legal profession in Victoria. This article traces that evolution and seeks to point the way towards SGF reform that will enhance its public respect and, with it, public support for legal professionals.

An institutional ethic?

The legal obligations on professional organisations administering funds based on the interest from lawyers' trust accounts have not been, as far as I am aware, judicially defined. However, it is possible to characterise the relationship as a trust, particularly in Victoria where, in 1964, the banks were prevailed upon by the profession to pay the interest to the (LIV controlled) SGF. The more challenging question, however, is whether there is also an ethical obligation on Fund bureaucrats (beyond that imposed by the law of trusts) to consider the wider public interest as paramount regardless of the source of Fund income?

William F. May, in his article entitled 'Professional Virtue and Self-Regulation',[4] is in no doubt that there is a case for a corporate ethic:

> In order to guarantee to the public that certain standards shall be maintained, the state limits the licence to practice to those who have completed a course of professional education. Professionals as a group profit from this state-created monopoly. They fall short of their responsibility for the maintenance of standards if they merely practise competently and ethically as individuals. The individual's licence to practice depends upon the prior licence to licence which the state has, to all intents and purposes, imposed upon the guild. If the licence to practice carries with it the obligation to practice well, then the licence to licence carries with it the obligation to judge and monitor well. Not only the individual, but also the collectivity itself, is accountable for standards . . .

Richard Abel concedes that legal practitioners have obligations to society (described as 'generalised third parties') in administrative legislative proceedings, but is not attracted to codification of those duties because of the hypocrisy and unreality of generalised rules.[5] John Kultgen argues for *inclusion* of a 'bureaucratic ethic' in professional codes, although he knows its growth will be problematic:

> To come to terms with the realities of modern society, a sharper distinction needs to be drawn between the entrepreneurial ethic appropriate to self-employed professionals and the bureaucratic ethic appropriate to professionals in corporate settings. The latter ethic is embryonic, would be hard to develop, and will be less flattering to the professions' image than present codes.[6]

In the wider business community, theories of 'social responsibility' are well advanced. William A. Wines, in charting the apocalyptic growth of US law schools and describing the phenomenon as based essentially on greed, compares that situation with the growth of 'responsible' business ethics, now defined to demonstrate that profit maximisation and social responsibility 'may be different sides of the same coin'.[7] If business generally can see that private interests are also public interests, is it too much for the legal profession to see that the social accountability of compensation funds assists in the recovery of public confidence in the profession?

To the extent that SGF inputs and outputs were increasing virtually without question during the 1980s, the reduction in the SGF balance has allowed previously 'submerged' issues of policy to emerge above the water line. We have seen satisfaction within the Law Foundation, the Legal Aid Commission and the Leo Cussen Institute turn to uncertainty and alarm as SGF support became tenuous. The resulting scrutiny has become more acute as the extent of the SGF decline becomes more obvious. In particular, the following issues are now circulating.

Increased theft

There is an increase in the size of defalcations from trust accounts and an increase in the number of so-called 'secret accounts', into which some practitioners are depositing clients' funds and avoiding the trust audit process. It is unclear whether the larger scale of this theft substantially reflects the increasing number of practitioners *per se*, a possible decline in overall ethical standards, or both, or is purely coincidental with the reduction in SGF fortunes. Growth in the size of the profession is certainly the attractive cause, yet it is also true that the overall number of complaints to Professional Standards (the regulatory Section of the LIV) in all areas have been rising rapidly in recent years.[8] Whatever the explanation, SGF funds are being significantly depleted by the need to compensate clients. *Figure 1* shows the rate of change in SGF total income compared with defalcation claims paid out by the Law Institute, over the period 1980 to 1991.[9]

Ownership and control of the Fund

While the SGF gradually increased in size and significance through the 1950s and 1960s — when, indeed, society could be considered less concerned with what belonged to whom and what it was used for the question of what the SGF actually was and who 'owned' it was clearly a non-event. Except for a brief flurry of concern in 1964,[10] control of the Fund was never on the agenda. It was, and still is, accepted that it is a benevolent scheme designed to pay out the victims of theft, and this was the task it achieved. There were occasional figures who raised concerns in the 1980s also. For example, the former President of the Law Institute and Chairman of the Legal Aid Commission, Rowland Ball, is one who has firm views on aspects of the Fund but it is still undisputed that the Fund is a public benefit which must continue. It is the stress of recent times that has spurred closer enquiry — not of the central purpose, but of the means used to achieve the end.

The fact that the interest income of the Fund was originally too difficult to credit to the accounts of particular clients — and was thus 'available' in a pragmatic sense for some worthy purpose — does not, however, diminish the truth that the Fund is in fact built on moneys that are, at least, the 'moral' earnings of the mass of solicitors' clients. Again, this also did not matter because in the days before digital computing, the task of crediting interest was considered impractical even if the particular transactions could be identified in the solicitors' trust

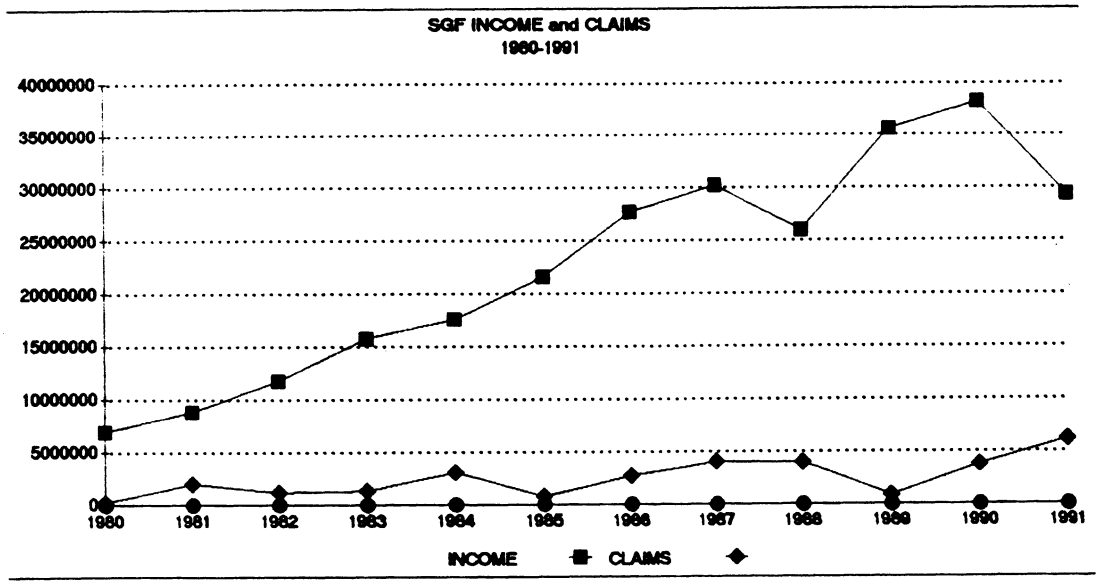

Figure 1: Guarantee Fund income versus claims

accounts.[11] Now, however, the interest is easily calculated and recorded and it is quite easy to credit interest to a client's 'account' — within the overall trust account structure when that individual account is closed.[12] In principle, it is now difficult to see how that portion of SGF balances which is derived from client funds can be considered 'public' or Institute property the money is indisputably a private resource. What is true in principle, however, is not as clear in practice.

The LIV Director of Professional Standards relates the Bank view that, despite advances in technology, the cost of calculating interest due to particular client accounts is still likely to exceed the actual interest earned. Compare this with the view of the Law Society of Scotland, which not only requires interest on trust account balances to be credited to clients, as a legal and ethical obligation, but encourages legal practices to make use of the payment as a marketing advantage. At least one Edinburgh practice has persuaded its clients that their fees can be partially or totally 'offset' by the interest earned on trust balances (reported by K.W. Pritchard, Secretary to the Law Society of Scotland, in an interview on 6 July 1993 with the author). The research necessary to establish the cost/benefit clearly has not been done, but it is undoubtedly a key issue in the future debate.

Thus effective ownership of the SGF funds is still a murky subject. Suffice it to say that the Fund shortages have made it more apparent that quasi-private funds (SGF interest) are used to support a public need (defalcation compensation) with the process controlled, at law, by the Law Institute (*Legal Profession Practice Act* 1958 as amended, Part V, Division 2, s.52(2)). In this respect the question does not arise as to the propriety of the Institute's administration of the claims handling function. It is common knowledge that this process occurs in a fair and professional manner and, in any event, a client dissatisfied with an offer of settlement from the Fund has a clear right of appeal to the court (*Legal Profession Practice Act* 1958, ss.66, 67). Rather the difficulty arises with ancillary issues.

In each Australian State, solicitors are involved in professional self-regulation in various statutory schemes. The Victorian version is comparatively advanced and 'user friendly' with some degree of separation between the prosecution and adjudication functions, performed by Professional Standards and the Solicitors Board respectively. The tradition of self-regulation is, however, substantially supported and, indeed, financed from the income of the SGF.[13] In 1991-92, $6.7 million was allocated to Professional Standards from the fund.[14] To the extent that the regulation function is, of course, a public function, there can be no criticism of this fact. However, the issue that arises for consideration, now more so because of the diminishing resources available for allocation to legal aid, is this: to what extent is it still appropriate for Victorian solicitors to benefit from control of a public function (SGF claims compensation) by allocation of some millions of quasi-private funds for the purposes of a self-regulatory function? In the United Kingdom, there is no doubt that the interest on clients' accounts belongs to them, and there is no suggestion that any of those funds should be applied to professional regulation. The question is unfortunately made more acute because solicitors do not themselves contribute any significant sum towards their regulation.[15] It is not too strong a description to characterise the process simply as one of conflicting interests. And if this is perceived to be the case in the community, are we not putting at risk the confidence which society has placed in the profession? To quote again from Cowdery, QC: 'We all have a duty to each other, acting responsibly, to assist our societies, and their lawful institutions, to function efficiently'. He returned to the theme that legal professional support for basic principles of justice within those institutions will '. . . reflect in turn upon our standing in the community'.

The LIV is, however, aware that public scrutiny is increasing. The notion of trustee responsibility, with its high moral tone, and the contrary influence of the self serving advantages derived from LIV control, seem to alternate in their effect on Fund administration. Thus the cap on expenditure by Professional Standards at $7 million for 1992-93 is partly due to the realisation that it would be inappropriate to spend more on LIV-controlled areas than is allocated from the Fund to legal aid, and also to a recognition that steadily increasing LIV expenditure will invite more scrutiny of its details.

At this point the debate spills over into the detail of self-regulation, because the conflicts of interest inherent in (self-regulatory) financing carry on into its structure. Thus the key power of the Executive Director of the LIV to refuse to proceed against a solicitor in the Solicitors Board is unreviewable by the Lay Observer (a lay-overseer with a watching brief only) despite the latter's recommendation that this be altered. The financial power given to the LIV by control of the SGF increases the resources with which it is able to argue for a continuation of the *status quo* surrounding the complaints process. As a result, the profession is further enmeshed in the cycle of waning public confidence.

Competing public purposes

Before 1992, the Legal Aid Commission received all of its State funding from the SGF, recycling the still considerable SGF 'surplus' to the benefit of those still eligible to receive support. Often aid was granted via private practitioners and the whole approach was considered, more or less, to be just and reasonably fair.[16] Declining LACV income/expenditure ratios from 1990 onwards meant tighter guidelines on eligibility, but the process still worked. Suddenly, 1992 saw the realisation that the SGF surplus would simply be unavailable despite pleas by the Commission to the LIV to increase the share to be paid to legal aid. It was evident that, despite the decade-long reliance of legal aid on the SGF, the formula controlling disbursements would favour the expenses of self-regulation over and above the community needs for access to legal aid.[17] In consequence, the State Labor budget of August 1992 was forced to allocate an unprecedented $28.2 million to the Commission. Although this may be desirable as a recognition that access to justice is a direct social responsibility of government, rather than indirectly through a Fund such as the SGF, the magnitude of the change reminded the Victorian Government and the LIV of the need to examine SGF procedures.

Independent audits

A key 'input' to the SGF is the interest income from banks under s.53(3)(e) of the *Legal Profession Practice Act*, negotiated between the Law Institute and each bank since 1983 and known collectively as the 'Westpac moneys'. Although the percentage rates negotiated with the banks by the Institute in any year have been kept confidential (to ensure, it is said, the opportunity to get the best rate from each bank), the weakness of the system has been the inability to check on the bank's actual calculation and accumulation of the agreed interest.[18] The Institute has been especially wary of this deficiency and has recently negotiated access to the banks' records to conduct its own 'audit' of those calculations. Although little if anything has been officially published about that enquiry, it is understood that significant compliance with the agreement by the banks has been confirmed.[19] Lingering uncertainty about the interest on Westpac moneys remains, however. Interest rate secrecy is worrying because there has still not been an independent audit of the actual rates negotiated (or indeed of the whole SGF conglomerate).[20] The Attorney-General is 'aware' of the rates, but it is unclear whether the (now) Department of Justice will in fact undertake a commercially rigorous examination of the rates and preceding negotiations.

'Ultra vires' expenditure

The refusal of a practitioner, John Little, to either insure his professional activities through the Solicitors Liability Committee or take out a practising certificate occurred at the time when the SGF income was peaking and then in decline.[21] Although many convoluted issues emerged during his odyssey through the courts as a result of those objections, Mr Little touched here and there on SGF intricacies which are still unresolved. A key if uncomfortable fact (for the SGF) was the then lack of statutory clarity as to the appropriate purposes of SGF funding under the general classification of 'funds expenses'.[22] Mr Little contended that Fund income and LIV income were often intermingled[23] and that expenditure on activities such as essentially social functions, some educational and administrative purposes amounted in effect to a public subsidy of a private professional organisation. In 1991 the whole of the continuing legal education and library costs of the LIV ($197,283) — functions which arguably relate more to the competency of solicitors than to their honesty — were met from the SGF. In addition, $91,592 was allocated from the Fund to LIV sections and committees, $255,385 to the costs of the Executive and Council and $87,630 to the meeting and travel costs of Council members. The importance of these charges, recognised in part as worthy of careful scrutiny by Robert Clark MP,[24] became lost in the haze of allegation and counter allegation that surrounded Little's imprisonment and considerable public pressure for release. It is to be noted again that this drama occurred on a stage where, despite the fact that LIV staff struggled to find a reasonable and honourable 'way out' for Mr Little, the background scenery of decreasing Fund income and increasing dollar allocations to Professional Standards faded quickly from memory once the curtain came down on his saga. Amending legislation in 1993 means that the expenditure is no longer *ultra vires* in the strict sense, but the crucial nature of the issues in moral and ethical terms is undiminished.

The pie chart in *Figure 2* shows the proportions of expenditure on the above items (as a part of total expenditure on self-regulation) at 30 June 1992.

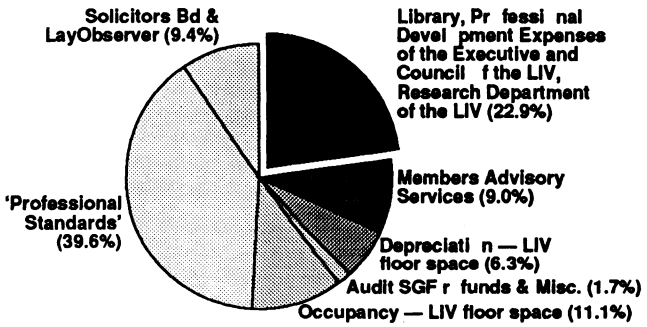

Figure 2: Breakdown of money received from the SGF and spent on Law Institute activities.

Which way out?

The Solicitors Guarantee Fund today is a murky hotchpotch of historical compromises and competing interests, struggling to respond to current needs, exposed like many other institutional and semi-public undertakings to unwelcome nakedness by the collapse of the 1980s economy. This scrutiny now reveals the SGF as a community resource rather than an attribute of the Law Institute. The Institute itself recognises that it must convey a sense of public responsibility. It has devoted a major weekend conference of Council (March 1992) to SGF issues and shown an ability to debate the issues of control, but will not acknowledge that it acts as a trustee or that it is bound by a duty to society to put wider social interests before its own.

The SGF is, for the moment, free of major public attention such as that caused by the *Little* case. Undistracted, the LIV has a major opportunity to review not just the 'inputs' to the SGF and trends in banking practice, but also fund 'outputs' and administrative practices, in the interests of public accountability and improving respect for the legal profession.

In those jurisdictions worldwide where the profession controls client compensation and regulation, similar opportunities undoubtedly exist for bar associations and law societies to seize the day. Conflicts of interest of the sort described in this paper are present to different degrees in many law society

funds. As in New Zealand, it is only a matter of time before the administration of funds will reflect badly on us as lawyers unless we come to grips with our wider responsibilities.

In the SGF we have a once elegant and efficient organism that is in need of both surgery and chemotherapy in order to demonstrate that duty to society. The following opportunities are worth careful consideration:

- Removal of LIV (self) regulation expenditure from the fund.

  Increasing members' contributions to the SGF by the amount necessary to fund the excision referred to above.
- Transfer of SGF control to a joint government-LIV committee with a view to phasing out any reliance on trust account interest income as and if research reveals a favourable cost/benefit relationship in direct interest credits to client accounts.
- Phase in the financing of legal aid, law reform and legal education from consolidated revenue.
- Limit the opportunities for defalcations by transferring the trust audit role to LIV in-house auditing teams,[25] and/or providing an LIV centralised, but optional 'overnight' computer bureau service for practitioners' trust accounts.[26]
- In the light of prior proposals, determine whether, in the short term, certain minimum percentages of SGF income may be allocated to each of the major Fund beneficiaries in any year, thereby recognising the historical trend to SGF support of the range of public purposes, assisting in their financial stability and reducing the annual tendency to argue the cost of LIV control of the fund.

References

1. The Attorney General convened a working party in 1991 which reported to him in July 1992 on the SGF structure and its distributions. The working party included representatives of the Law Institute, the Bar, Legal Aid Commission, Leo Cussen Institute and the Law Foundation. The recommendations of the working party (now implemented by legislation) relate principally to administrative matters and do not substantially affect its structure.
2. Reported in *Australian Law News*, March 1992 at p.6. Although speaking in his capacity as the Australian Law Council Human Rights Committee Chair, Mr Cowdery spoke generally about public perceptions of lawyers, in the context of society's legal institutions.
3. Abel, Richard, *American Lawyers*, Oxford University Press, 1989 at p.151 and footnote 108 to Chapter 7).
4. Originally published in 'Professional Ethics: Setting, Terrain and Teacher', in *Ethics Teaching in Higher Education*, Daniel Callahan and Sissela Bok (eds), NY Plenum, 1980, pp.205-41, and reprinted with permission in *Ethical Issues in Professional Life*, Joan C. Callahan, (ed.), Oxford University Press, 1988 pp.408-11, at 411.
5. Abel, Richard L., 'Why does the ABA Promulgate Ethical Rules?', (1981) 59(4) *Texas Law Review*.
6. Kultgen, J., 'The Ideological Use of Professional Codes', (1982) 1(3) *Business and Professional Ethics Journal* 53-69, reprinted with permission in *Ethical Issues in Professional Life*, above, pp.411-421 at p.418.
7. Wines, William, 'Lawyer Proliferation and the Social Responsibility Model', (1989) *Journal of Legal Education* pt 2, pp.231-3 at p.233, referring to Peters and Waterman, *In Search of Excellence*, New York, 1982, pp.13-16.
8. Total complaints for the years 1988-91 and for the 6 months to 30.6.92 respectively were: 734, 927, 2623, 2870 and 1538 (6 months): Professional Standards Half Yearly Reports, Law Institute of Victoria.
9. Derived from Annual Reports and published accounts, LIV, 1980-91.
10. In 1964 the Banks at first refused to pay interest on trust balances and the LIV decided to ask the Government to be its banker. Immediately the banks returned to the negotiating table. The Government did not then attempt further active involvement, but was clearly alert to its responsibilities as a result of the Opposition's attack.
11. The amounts moving in and out of a solicitor's account can change by the hour. Manual calculation of these movements at fractional interest rates was too expensive. It was also virtually impossible for a bank to identify which clients' accounts were 'moving' and which were 'stationary'.
12. The Institute has access to bank computer tapes for the purpose of monitoring a number of items concerned with the calculation and accumulation of interest.
13. Note that although all US States have client compensation funds, the number with profession-controlled regulatory systems has been reduced to just 13. Abel, R.L., *American Lawyers*, above, at p.149.
14. Law Institute of Victoria Annual Report 1991 and 1992. Note the cost in 1991 of administering the Fund and related expenses ($6,634,981) exceeded payments for defalcations ($6,076,567). In 1992-3, $7m is expected to be allocated to Professional Standards.
15. The present contribution is $10 per year per practitioner. See *Legal Profession Practice Act* 1958, s.59(1). Compare this with some Canadian Provinces where the amount of practitioner contributions has approached $1000 per head, and the England and Wales contribution of £1000 per head.
16. In 1991, 62% of Victorian legal aid expenditure consisted of payments to private practitioners (1992 — 59%), LACV Annual Reports 1991-92.
17. Fund expenses of $6,634,981 in 1991 are a prior claim on the Fund's Income Suspense Account (s.53(4), *Legal Profession Practice Act* 1958), over and above the share of legal aid ($4,430,201) received under ss.53(4) and 53(9). To date there has been no serious discussion about parity of access to the Suspense Account so far as legal aid and Fund expenses are concerned, although the Attorney-General's Working Party recommends a cap on Fund administration expenditure (see ref.1).
18. The Institute's auditor, Mr T.A. Jonas, regularly qualifies his audit report of the SGF with a statement such as: 'It has been necessary for me to rely upon the Fund's bankers in relation to the accuracy of these amounts and I am therefore not in a position to form an opinion as to their correctness'. See Annual Report LIV for year ended 30.6.90.
19. It is also understood that Professional Standards has successfully negotiated with the banks to receive computerised details of all accounts in the names of solicitors or controlled by them, in an effort to discourage any trend to secret accounts. Such accounts are one means of avoiding trust auditors' scrutiny and increasing the number of defalcations.
20. The 1993 amending Act now enables such an audit by the Auditor-General, but it is not clear when the audit will commence and whether it will include the whole of the interrelated LIV activities, or merely those of the SGF. See *Legal Profession Practice (Guarantee Fund) Act* 1993, s.6(4).
21. Mr Little began his crusade on these issues in 1986 when the new compulsory insurance provisions came into effect (1.1.86), eventually spending three months in Pentridge in late 1991 for non-payment of a fine for contempt imposed by the Supreme Court.
22. See LIV 'Information on Solicitors Guarantee Fund' October 1991; submission to the Senate Standing Committee on Legal and Constitutional Affairs (The Cooney Committee) Inquiry into the Costs of Justice. Table at p.6. See also s.17A *Legal Profession Practice Act* 1958, which gives very broad objects to the LIV in this area.
23. Transcript of Proceedings, *Cornall v Little*, Supreme Court of Victoria, 7 June 1991 at p.21.
24. See *Hansard* 708, Wednesday 18 September 1991. Mr Clark, Liberal Member for Balwyn in the Legislative Assembly, considered that, in part '... the Institute is spending money outside of its statutory authority... [The Attorney-General's] department says the Fund has been audited, but the auditor does not certify statutory compliance, only accuracy.' At p.709. Mr Little again sought Mr Clarke's intervention in a letter published in the Age on 19.10.92. To date his response has not been made public, but the criticism struck home. The Institute's fairly leisurely response was, in effect, the 1993 amendment Act which authorised from 1 July 1993 a range of SGF expenditure on particular aspects of self-regulation. See s.6(3) *Legal Profession Practice (Guarantee Fund) Act* 1993.
25. It is understood that LIV audits tend to reveal undesirable accounting practices more often than private audits, and may be provided to practitioners at a lower cost than private auditors. Moves in the direction of LIV audits are now occurring.
26. Practitioners could access a relatively lower cost LIV bureau to process their trust account movements every 24 hours and provide them with reports and trust management advice via modem link. The SGF and public confidence would benefit to the extent that those few practitioners operating their practices according to patterns which are known to precede defalcations would tend to show up on 'mask' program profiles. Mask programs run in the background whilst the trust accounting package operates in the foreground. The reduction in independence is real but the benefit in lower practitioner overheads and greater public confidence in those joining the bureaux would also be real. It may be expected that bureau members could advertise their membership as an additional marketing incentive to clients.