

Trust account scam presents regulatory risk

Law firms and lawyers be warned. A new trust account scam is gaining traction in Australia. The scam presents potential regulatory risks to those who fall victim to its allure.

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What is the scam?

The scam commonly operates as follows. A new client contacts an Australian law firm by email and claims to represent a large international company attempting to collect debts in Australia. The firm accepts the instructions and issues letters of demand to the alleged debtor. Alternatively, the firm may even be instructed not to contact the debtor directly at all. Shortly after this, the firm receives a foreign currency cheque apparently issued by an international banking institution in payment of the new client's outstanding debt. The firm notifies the client who instructs the firm to bank the cheque into its trust account and thereafter to transfer the funds to it by EFT.

It can take a significant period of time (up to eight weeks) for a local Australian bank to clear a foreign currency cheque. Further, a cheque can still be dishonoured by an international bank even after the funds have reached a local account. This could result in the funds 'appearing' in the firm's trust account and the firm disbursing the funds only to later realise that the funds were never present at all.

It is common for a firm to hold amounts sourced from numerous clients in its trust account. The risk is that by disbursing amounts to this international client the firm has inadvertently withdrawn the funds of other clients or caused the firm's trust account to be in debit. The firm will be required to re-pay the funds from its own resources—usually those of the partners or principals.

Trust accounting obligations

The Legal Profession Act 2006 (LPA) defines trust money as money received in the course of or in connection with the provision of legal services by a law firm for or on half of another person (LPA, s 235(1)). Lawyers must not withdraw trust money except to pay to or disburse according to the direction of the person for whom the money is held. In the above circumstances the overseas client has apparently authorised the disbursement.

Of course, however, if the withdrawal causes a deficiency in the trust account or it means the lawyer cannot pay or deliver another client's trust money, then the lawyer may have committed an offence, currently punishable by a fine



of up to \$77 000 (LPA, s 255). It is a defence if the lawyer has a reasonable excuse. The question though is how reasonable is it to be duped by a scammer, particularly in light of a lawyer's professional obligation to service a client with competence and diligence.

Other ramifications

A contravention of the LPA can constitute unsatisfactory professional conduct or professional misconduct (LPA, s 466(1)(a)). Trust account breaches are taken very seriously by the Courts and have previously led to findings of professional misconduct. This applies equally to breaches which are inadvertent, lack an element of dishonesty or indicate a simple lack of awareness of regulatory obligations. The reason for this is that where trust accounting matters are concerned, an individual client's faith can be betrayed but so too can the confidence of the public in the profession.

Practical tips

There are some simple techniques that law firms can utilise to minimise the likelihood of being swindled in this way. Steps can include:

- Make a phone call. Resist acting for clients based on written instructions alone. If you receive emailed instructions, insist on talking to the 'new client' before you can action their instructions. A legitimate client is unlikely to refuse to speak with you but you may hear the crickets chirp if you insist on this with a scammer.
- Request the new client deposit funds into your account by EFT before you can act.



- Research your clients and find out how they do business. Does an out of the blue email to your firm seem out of character in the context of who this client says they are?
- Only accept foreign bank cheques from trusted or long standing clients.
- Inform the client that the funds will not be disbursed until the firm's bank receives confirmation that the funds are fully cleared and that this may take several months.
- Check with your firm's bank and whether it has heard of an international banking institution who has purportedly issued a cheque. It does not necessarily mean the institution doesn't exist if the bank has never come across the overseas entity but it may be a red flag and lead you to investigate further.
- Make enquiries directly with the overseas banking institution to confirm whether the cheque is legitimate. Often fraudulent cheques will appear to be sourced from legitimate banking institutions.