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AUSTRALIA

Law and Practice

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Contents

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

In Australia, fraud is criminalised at a federal and state level, by:

- Parts 7.3–7.7 of the Criminal Code Act 1995 (Cth) (the "Criminal Code"); and
- the provisions of the criminal legislation in each state (Criminal Code 2002 (ACT) Part 3.3; Crimes Act 1900 (NSW) Part 4AA; Criminal Code Act 1913 (WA) Section 409; Criminal Code Act 1899 (Qld) Section 408C; Criminal Code Act 1924 (Tas) Section 253A; Criminal Code Act 1983 (NT) Section 227; Criminal Law Consolidation Act 1935 (SA) Section 139; Crimes Act 1958 (Vic) Sections 81–82).

There are many words used to define or capture the act of "fraud" in Australian law, including "dishonesty", "deception" or "moral turpitude".

Fraud prosecutions are both various and flexible in assisting victims. The main offences that arise in relation to fraud are:

- obtaining property by deception (Section 134.1(1) of the Criminal Code);
- obtaining a financial advantage by deception (Section 134.2 (1) of the Criminal Code);
- general dishonesty – obtaining a gain (Section 135.1(1) of the Criminal Code);
- general dishonesty – causing a loss (Section 135.1(3) of the Criminal Code); and
- general dishonesty – causing a loss to another (Section 135.1(5) of the Criminal Code).

Notably, in Nadinic v Drinkwater (2017) 94 NSWLR 518, Leeming JA summarised key concepts relevant to a claim of fraud in common law and in equity, as follows (at (22)): "For present purposes, it will suffice to distinguish the two senses in which 'fraud' is used in civil litigation which correspond to different meanings at law and in equity. The difference turns on the state of mind of the person said to have committed fraud. At common law, 'fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'" – Derry v Peek (1889) 14 App Cas 337 at 374.

The contrast with equity was explained by Viscount Haldane LC in Nocton v Lord Ashburton [1914] AC 932 at 953–954: "[i]n Chancery the term 'fraud' thus came to be used to describe what fell short of deceit, but imported breach of

a duty to which equity had attached its sanction." His Lordship emphasised that a person who misconceived the extent of the obligation which a court of equity imposed upon him or her, "however innocently because of his ignorance", was taken to have violated an obligation which he was taken by the Court to have known, and with the result that the conduct was labelled fraudulent. He said of fraud in this sense at 954 that "what it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a court of conscience."

On a smaller scale, the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth)) (ACL), provides protections to consumers including, amongst other things, in respect of misleading and deceptive conduct. Since 1 July 2021, a consumer is defined as any person:

- who acquires goods or services for an amount not exceeding AUD100,000; or
- who, where the amount of goods or services exceeds AUD100,000, acquires the goods or services for personal, domestic or household use.

Section 18 of the ACL contains a general prohibition against a person/company, in trade or commerce, engaging in conduct that is misleading or deceptive, or likely to mislead or deceive. Additionally, Section 29(1)(d) of the ACL contains a specific prohibition against a person/company, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply of goods or services, making a false or misleading representation that a particular person has agreed to acquire goods or services. Although Section 29 uses "false or misleading" rather than "misleading or deceptive", the Australian courts have held that there is no material difference between the two phrases (ACCC v Dukemaster Pty Ltd [2009] FCA 682; ACCC v Coles Supermarkets Australia Pty Ltd (2014) 317 ALR 73) and claimants often plead breaches of both provisions.

Common law misrepresentation overlaps with the statutory provisions and is relevant in circumstances where the statutory provisions do not apply, including where the claims exceed the monetary limits stipulated. Common law misrepresentation involves (i) the giving of false information by a party (or their agent) to an innocent party before a contract is made; and (ii) the statement inducing the innocent party to enter into a contract. A misrepresentation may be innocent, negligent or fraudulent with the crucial difference being whether the person making the statement believed the statement to be true at the time of making the statement.

1.2 Causes of Action After Receipt of a Bribe

The decision of the Supreme Court of the United Kingdom in FHR European Ventures LLP & Others v Cedar Capital Partners LLC [2014] UKSC 45 (FHR) resolved the debate in the UK surrounding the rightful owner of a bribe that has been paid to an agent. The Supreme Court unanimously held that where an agent accepts a bribe or secret commission, it is held on trust for the agent's principal who is entitled to a proprietary interest in the benefit. Whilst English law is not binding in Australian courts, the decisions are nonetheless persuasive and it is likely that the findings in the FHR case would apply equally in Australia.

The causes of action available to claimants whose agent has received a bribe include:

- "Mareva" or freezing orders, and proprietary injunctions to freeze the bribe/commission and their traceable proceeds;
- false accounting offences that exist at both the Commonwealth level and state/territory level;
- criminal actions for domestic bribery under Divisions 141 and 142 of the Criminal Code when Commonwealth public officials are involved, or under state and territory legislation which makes it a crime to bribe public officials and private individuals;
- criminal actions for bribery of foreign public officials under Section 70.2 of the Criminal Code; and
- claims for breach of fiduciary duty where an agent is the fiduciary of the principal.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

It is well established in Australia that a third party can breach a trust either by "knowing receipt" or "knowing assistance" (Barnes v Addy (1874) 9 Ch App 244 ("Barnes")). When either is established, this will create a constructive trust in favour of the claimant (Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 ("Farah"); Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41).

Liability for knowing receipt is a category of constructive trusteeship which depends on the defendant having received and become chargeable with trust property, and having knowledge of the breach before parting with the property (Barnes, 251–252).

Liability for knowing assistance is more complicated and, following the Australian High Court's decision in Farah, can be imposed if one of the following categories of knowledge can be established:

- actual knowledge;
- wilfully shutting one's eyes to the obvious;
- wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; and
- knowledge of circumstances which would indicate the facts to an honest and reasonable person.

Further, the Farah decision has created uncertainty surrounding the requirement that the breach be one that amounts to a "dishonest and fraudulent design" in the context of "knowing assistance". Whereas the Western Australian Court of Appeal in Westpac Banking Corporation v Bell Group Ltd (No 3) [2012] WASCA 157 ("Bell") adopted a more relaxed test, the court in Hasler v Singtel Optus Pty Ltd ("Hasler"); Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty Ltd v Almad Pty Ltd (2014) 87 NSWLR 609 clarified that the Bell decision did not intend to broaden the class of breaches of fiduciary duty in the context of "knowing assistance". Notwithstanding this, in Hasler, the court found that the relevant conduct was caught within the meaning of "dishonest and fraudulent design" on any view.

More recently, the Victorian Court of Appeal case, Harstedt Pty Ltd v Tomanek [2018] VSCA 84, has provided guidance as to the liability of parties who assist or facilitate another's fraudulent acts. In a case where a party has, by reason of a breach of fiduciary duty or fraudulent activity, received or otherwise profited from misappropriated funds, that party may become liable in the following ways:

- "knowing assistance" in the breach – where a person knowingly assists with a dishonest and fraudulent scheme;
- "knowing inducement" or immediate procurement of the breach – a third party may be liable as an accessory if they induce or otherwise procure fraudulent conduct or a breach of fiduciary duty;
- corporate alter ego – a company will be fully liable for the profits derived as a result of fraudulent conduct or the breach of fiduciary duty if the company is the wrongdoer's "corporate creature or vehicle"; and
- trustee de son tort – a party may be held liable as a "trustee de son tort" or "of his own wrong" where they are not a trustee but presume to act as a trustee and then commit a breach of trust or fraudulently profit from their position.

With respect to breach of fiduciary duty and knowing assistance claims, a question that may arise is whether a plaintiff is entitled to obtain both the remedies of equitable compensation and an account of profits from multiple wrongdoers. In Xiao v BCEG International (Australia) Pty Ltd [2023] NSWCA 48, the New South Wales Court of Appeal recently determined that although a plaintiff cannot obtain both equitable compensation and an account of profits from a single defendant, where multiple defendants are involved, a plaintiff is entitled to make a "split election" seeking different remedies from different wrongdoers. This is because the liability of the knowing recipient (who profited from their own misconduct) is different in nature and extent to the liability of the fiduciary (who made no profit from the default), particularly given that the knowing recipient does not owe a duty of loyalty to the principal. For this reason, seeking "a gain-based remedy from a knowing recipient is not inconsistent with a compensation remedy against the defaulting fiduciary" (at [69]).

1.4 Limitation Periods

At the federal level, fraud offences have the following limitation periods:

- no time limitation for offences where the maximum imprisonment for a first offence exceeds six months;
- one year after the offence was committed for offences where the maximum imprisonment is six months or less; and
- one year for offences where punishment is a pecuniary penalty and no imprisonment (Crimes Act 1914 (Cth) Section 15B).

Recently, the Full Federal Court in Walker v Members Equity Bank Ltd [2022] FCAFC 184 also confirmed that there is a three-year limitation period on criminal prosecutions brought by the Australian Securities & Investments Commission (ASIC) for false or misleading representations under the Australian Securities and Investments Commission Act 2001 (Cth), where time starts to run from when the alleged offence occurs.

At the state level, fraud extends the limitation period in relation to the causes of action available in the Australian jurisdiction to fraud victims, which depends on the cause of action itself (tort, contract, etc) (Limitation of Actions Act 1958 (Vic) Section 27; Limitation of Actions Act 1974 (Qld) Section 38; Limitation Act 1985 (ACT) Section 33; Limitation Act 2005 (WA) Section 38; Limitation of Actions Act 1936 (SA) Section 25; Limitation Act 1974 (Tas) Section 32, Limitation Act 1981 (NT) Section 42; Limitation Act 1969 (NSW) Section 55).

For example, Section 55 of the Limitation Act 1969 (NSW) provides that the relevant limitation period for actions based on fraud or deceit, or actions where the identity of a person against whom a cause of action lies is fraudulently concealed, only starts running from when a "person having (either solely or with others) the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment".

1.5 Proprietary Claims Against Property

Where the misappropriated property can be sufficiently identified (whether it be within mixed funds, property that is substituted for the original, or any proceeds from the sale of the property) and the claimant can establish a proprietary entitlement to that property via tracing rules, the court will exercise its equitable jurisdiction to recognise the proprietary claim and will grant an appropriate remedy in the circumstances. The exception to this is where the claimant seeks a remedy against a bona fide purchaser for value of the property without notice of the claimant's equitable interest.

In RnD Funding Pty Limited v Roncane Pty Limited [2023] FCAFC 28, the High Court of Australia recently confirmed that a pre-existing fiduciary duty between the party asserting the equitable proprietary right and the party who holds or has disposed of the original property is not a requirement for tracing in equity. Rather, it is the nature of the equitable property rights that forms the foundation of tracing.

There are complex apportionment and priority rules which exist for the proceeds of fraud that have been mixed with other funds. If the recipient purchases something valuable with misappropriated funds from a mixed account, the claimant may be entitled to claim to a charge on the asset purchased, provided the asset is identifiable (Re Oatway [1903] 2 Ch 356 applied recently in Re Renewable Energy Traders Pty Ltd (in liq) (ACN 140 736 849) [2019] 140 ACSR 466; [2019] FCA 1795). If the claimant's property is traced to a third party, whether the claimant has any proprietary claim depends on whether the third party was a bona fide purchaser of the property or a mere volunteer (Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903). The claimant may not claim against a bona fide purchaser for value, who had no notice of the existence of a prior interest.

On the other hand, where third parties receive property as volunteers, they may be liable as constructive trustees. In this case, the claimant and third party would share the property in proportion to their contributions (In re Diplock; Diplock v Wintle [1948] Ch 465 cited in Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903). In circumstances where the third party uses the claimant's money on improving its own assets, the claimant will not be entitled to any proportionate share in the increased value of the asset (In re Diplock; Diplock v Wintle [1948] Ch 465 cited in Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903).

1.6 Rules of Pre-action Conduct

There are no specific rules of pre-action conduct that apply prior to the commencement of fraud claims. However, jurisdictions do impose formalities that are to be completed prior to or at the time civil proceedings are commenced more generally.

Specifically, the Civil Dispute Resolution Act 2011 (Cth) (CDRA) requires applicants to file a "genuine steps statement", which sets out the steps taken by the parties to resolve the dispute or otherwise explain why no such steps

have been taken (in the case of fraud claims, the urgency of the matter or anonymity of the fraudster may prevent the parties from taking "genuine steps" before commencing proceedings). The CDRA does not specify what will constitute genuine steps, as this will depend on the parties' circumstances and the nature of the dispute.

A party that does not file a genuine steps statement, or that has not taken genuine steps to resolve a dispute, will not be prevented from commencing a claim in the Federal Court of Australia. However, the court may take this into account when exercising its powers, including its discretion to award costs.

Generally speaking, the courts of the states/territories do not impose similar formalities on prospective claimants.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Freezing orders can be obtained in each Australian jurisdiction to prevent the loss or dissipation of assets (Uniform Civil Procedure Rules 2005 (NSW) Part 25 Division 2; Uniform Civil Procedure Rules 1999 (Qld) Chapter 8 Part 2 Division 2; Uniform Civil Rules 2020 (SA) Chapter 10 Part 2 Division 5; Supreme Court Rules 1987 (NT) Regulation 37A.02; Rules of Supreme Court 1971 (WA) Order 52A; Supreme Court Rules 2000 (Tas) Part 36 Division 1A; Court Procedure Rules 2006 (ACT) Part 2.9 Division 2.9.4 Subdivision 2.9.4.2; Supreme Court (General Civil Procedure) Rules 2015 (Vic) Order 37A.02).

Freezing orders may be obtained on an interim basis pending the outcome of a final hearing. The court has a discretion to grant a freezing order. In accordance with Part 25 Division 2 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), in order to obtain a freezing order, the applicant must:

- show that there is a good arguable case against the wrongdoer;
- show that there is a real risk the wrongdoer is likely to dissipate the assets;
- where an order is sought against a third party, show that the third party is holding, using or is otherwise in possession of the asset; and
- address discretionary concerns, such as the form of the order and the value of the relevant assets.

Freezing orders are classified as "in personam" orders, meaning that their operation is concerned with individuals rather than with specific assets. This distinction is significant, as it means that orders are not limited to within Australia (that is, a "domestic freezing order"); rather, the orders may also deal with assets that are located overseas (ie, a "worldwide freezing order") provided that the court is satisfied that the order "is undoubtedly relevant to the exercise of the court's discretion to grant the order" (Deputy Commissioner of Taxation v Huang [2021] HCA 43 [30]).

There are also court fees associated with the granting of a freezing order. The court will not grant a freezing order without the applicant providing the usual undertakings as to damages (Frigo v Culhaci (1988) NSWCA 88; Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 CLR 249), as in its absence if the proceedings were to fail, the respondents would have no remedy available to them. The court may require the applicant to make a payment to the court, or to give other security for the performance of the undertaking. It should also be noted that under Australian law, there is no need to give a cross-undertaking as to damages.

In the case where a substantive respondent does not comply with the freezing order, the efficacy of the order depends upon compliance by third parties. This is due to the fact that the effect of a freezing order is not confined to the parties, but extends to include a third party where a freezing order has also been made against them or notice of the order is given to the third party. In the latter case, the third party is not bound by the order but will be guilty of contempt of court if it does anything to support the breach. Specifically, the third party may be penalised in the form of a committal, sequestration or fine. Similarly, where a defendant refuses or neglects to do any act within the time specified in this order for the doing of the act, or disobeys the order by doing an act which the order requires them to abstain from doing, they will also be liable to imprisonment, sequestration of property or other punishment.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

As outlined in Rules 25.12 and 25.13 of the UCPR, orders ancillary to a freezing order are available to assist in requiring a defendant to disclose their assets. The overarching objective of an ancillary order, similar to that of a freezing order, is to prevent events that would frustrate the court's processes. The most common form of order is that the respondent discloses the nature, location and details of their assets. By requesting that the defendant disclose the nature of their assets, this allows for the identification of third parties such as banks and financial intermediaries who have custody of the assets and enables notice of the order to be given to these parties to bind them to the order (Universal Music Pty Ltd v Sharman License Holdings Ltd (2005) 228 ALR 174, 181 [20]) ("Universal Music").

In the case where there is a failure on the part of the defendant to disclose their assets at all or in a timely fashion, leave is likely to be granted to cross-examine a deponent on an assets disclosure affidavit (Universal Music at 184 [28]).

Failure to comply with the requirements to give disclosure, or provision of false or misleading information, is likely to give rise to a charge of contempt. Penalties for a charge of contempt may include the sequestration of assets, the imposition of a fine or even imprisonment. In most cases, it is left up to the offended party to enforce contempt.

2.2 Preserving Evidence

There are several forms of key interim relief available to claimants in order to preserve evidence. The two common remedies available to the claimant are known as a freezing order (Mareva injunction) or a search order (Anton Piller order), both of which are sought on an ex parte basis.

Details of a freezing order and the requirements that must be met in order for such an order to be granted are outlined in **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

Additionally, a claimant may obtain a search order, in order to enter premises and inspect, remove or make copies of relevant documents or specified things in circumstances where it is feared that those documents or things might be destroyed or suppressed. The availability of search orders came after the decision in Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55. The key matters the court will take into consideration when determining whether or not to grant a search order include whether:

- there is a strong prima facie case;
- the damage suffered by the applicant is serious;
- the defendant is in clear possession of incriminating documents or items in general; and
- there is a real possibility that the defendant might destroy, or otherwise cause to be unavailable, important evidentiary material that is in the defendant's possession.

It is incumbent on the applicant of an ex parte search order (or a freezing order) to ensure they have fully disclosed all facts material to the determination of the application to the court, including any defences available to the respondent and any correspondence exchanged between the parties relating to the dispute. This was emphasised in Direct Flow Pty Ltd t/a Arthur Rubber v Andrew Peterson t/a Maxx Rubber [2023] NSWSC 318, where the New South Wales Court of Appeal refused to grant the plaintiff access to materials collected on the execution of a search order. The Court considered that the plaintiff's non-disclosure to the Court of communications between the parties prior to the application of the search order was material in that (i) it did not bring to the Court's attention matters which the defendant may have tendered as evidence; and (ii) if the relevant information had been disclosed, there was a high probability that the Court would have dismissed the original search order application.

A claimant may also seek other forms of interim relief to preserve evidence. Specifically, these orders include detention, custody or preservation of property that is relevant to the proceedings by way of an interlocutory injunction or the appointment of a receiver.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Before the commencement of proceedings, evidence may also be obtained through the application for pre-action discovery from relevant third parties. Specifically, a claimant is able to apply for a Norwich Pharmacal order (derived from the case of Norwich Pharmacal Co v Commissioners of Customs and Excise [1974] AC 133) if the court has determined that "the interests of justice are relevant to the exercise of the judicial discretion and in considering the interests of justice the judge must consider whether the applicant is left without an effective remedy, if the order sought is not made" (Re Pyne [1007] 1 Qd R 326, 331). Upon the successful grant of a Norwich Pharmacal order, the third party who is involved in a transaction must provide information to the claimant that would be relevant to a claim. This includes the identity of the wrongdoer. For example, by requiring the disclosure of relevant information, this order can be used to trace the disposition of money that has been obtained fraudulently.

Where an order permits that material evidence can be obtained from a third party, the material is only to be used with regard to the particular proceedings for which the order was made, and should not be used for other purposes without the permission of the court.

Subsequently, where a proceeding has already begun, a party to the proceedings can issue a subpoena to relevant third parties in order to produce documents to the court and/or attend court to give evidence. For the subpoena to be valid it must be issued for a legitimate forensic purpose and documents that are to be sought must be identified with a reasonable level of particularity. Where an order is made for a person to appear or disclose documents, a restriction

on such material may arise by way of the privilege against self-incrimination (refer to section **6.1 Invoking the Privilege against Self-incrimination**).

2.4 Procedural Orders

An interlocutory application to obtain a freezing order or asset preservation order is typically sought on an ex parte basis, that is, without providing notice to the respondent, in order to avoid the frustration of a prospective court judgment, as a result of the dissipation of assets by the respondent (UCPR r 25.13).

In making an ex parte application, an applicant must demonstrate (in addition to the other factors required for the interlocutory order) that there is a risk that the respondent will either flee the jurisdiction, or dispose of or diminish the value of the assets, so that an eventual judgment is wholly or partly unsatisfied (UCPR r 25.14(4)).

2.5 Criminal Redress

The interplay between civil proceedings and a criminal prosecution is important because a fraud victim needs to take urgent steps to recover and prevent stolen assets being shifted, laundered or sent overseas, whilst pressing criminal charges against the perpetrator(s) of the crime. In Australia, recovery of assets via the commencement of civil proceedings does not prevent the pressing of criminal charges.

With the exception of urgent applications for relief, it is usual for civil recovery actions to be stayed pending the conclusion of criminal proceedings against a party charged with criminal offences arising out of the same or overlapping factual matters.

The decision in National Australia Bank Ltd v Human Group Pty Ltd [2019] NSWSC 1404 illustrates that courts are prepared to grant orders protecting plaintiffs from the risk of prejudice suffered by reason of a stay of civil proceedings. This is balanced with the risk of prejudice to the accused in the conduct of their defence at a criminal trial. Overall, and subject to the court's balancing of the aforementioned competing factors, fraud victims can, and ought to, take proactive steps in civil litigation to ascertain the whereabouts of, and recover, the misappropriated funds.

2.6 Judgment Without Trial

Summary Judgment

A plaintiff may apply for a summary judgment to be heard on an ex parte basis, where there is evidence of the facts to substantiate the plaintiff's claim (UCPR r 13.1). Additionally, there must be evidence, rather than a mere opinion, to support the plaintiff's belief that the defendant has no defence to the claim or part thereof (Cosmos E-C Commerce Pty Ltd v Sue Bidwell & Associates Pty Ltd [2005] NSWCA 81 [47]). For instance, a defendant's failure to defend the claim may indicate that there appears to be no issue to be tried, as a result of the defendant failing to traverse the plaintiff's allegations. Ultimately, however, the granting of a summary judgment is an exercise of discretionary power by the court.

Onus of the Applicant

In New South Wales, Rule 19.4 of the Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015 (NSW) (regarding which rules are adopted in a uniform manner across the states and territories) requires that a solicitor, who seeks any interlocutory relief in an ex parte application, must disclose to the court all factual or legal matters that they are aware of, and that the solicitor has reasonable grounds to believe would support an argument against granting the

relief, or limit its terms adversely to the client. Equivalent rules exist in each state/territory.

Default Judgment

A plaintiff may seek a court order for a default judgment within 28 days of serving a statement of claim on the defendant if no statement of defence has been filed by the defendant. A default judgment is an order that is made against the defendant, without the court having heard the matter, due to the defendant's failure to respond to the statement of claim.

2.7 Rules for Pleading Fraud

It is well established in Australia that a contention of fraud "should be pleaded specifically and with particularly" (Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39 [26]).

In Nadinic v Drinkwater (2017) 94 NSWLR 518, the NSW Court of Appeal explored a number of key principles relevant to the meaning of "fraud" at law and equity, the availability of recission as a remedy for fraud and the procedural consequences of alleging and finding fraud. Noteworthy are the following with respect to pleading fraud as stated by Leeming JA at [45]–[49].

- A fraud allegation in the sense of deliberate falsehood or reckless indifference to the truth must be pleaded specifically and be particularised. This requires the party making the fraud allegation to "focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity" (citing Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39 [26]).
- A finding of fraud is a serious one that mandates strict adherence to Section 140 of the Evidence Act 1995 (NSW), which sets out the balance of probabilities standard in a civil proceeding. To reasonably satisfy a court in reaching a finding of fraud, a party must provide clear and cogent proof to support the allegation; "inexact proofs, indefinite testimony or indirect inferences" will not suffice (see Briginshaw v Briginshaw [1938] HCA 34).
- The seriousness of a finding of dishonesty or reckless indifference to the truth will ordinarily mean that it may not be made without providing an opportunity to the party against whom the allegation is made to deal with the criticism.
- A finding of fraud should be made clearly and the reasons for the finding must be well articulated. This is because "the seriousness of a finding of fraud, including statutory fraud, does not permit of other than a specific finding that the fraud, or the contravening conduct, has in fact occurred" (Sgro v Australian Associated Motor Insurers Ltd (2015) 91 NSWLR 325, 336 [54] per Beazley P).

2.8 Claims Against "Unknown" Fraudsters

Depending on the type and level of insurance coverage maintained, a claimant may be able to seek compensation for loss suffered by reason of an "unknown" fraudster from their insurer.

There are various victim compensation schemes in Australia which may provide both corporations and individuals with a means of obtaining restitution in cases where the unknown identity of the fraudster(s) would otherwise leave them without redress (see R v David Michael Wills (Application by Woolworths Ltd) for a direction for compensation pursuant to Section 77B of the Victims Support and Rehabilitation Act

1996 (NSW) [2013] NSWDC 1; Victims Rights and Support Act 2013 (NSW); Victims of Crime (Financial Assistance) Act 2016 (ACT); Criminal Injuries Compensation Act 2003 (WA); Victims of Crime Financial Assistance Act 2009 (Qld); Victims of Crime Assistance Act 2006 (NT); Victims of Crime Compensation Act 1994 (Tas); Victims of Crime Assistance Act 1996 (Vic); Victims of Crime Act 2001 (SA)).

For example, under Section 97 of the Victims Rights and Support Act 2013 (NSW), an "aggrieved person", ie, someone who has sustained loss through or by reason of the relevant offence, can apply for a direction that compensation be paid out of the property of a person, which includes corporations, convicted of that offence.

The court's power to make the order is discretionary. Such power can be exercised suo moto, that is, on the court's initiative, or upon an application by or on behalf of an aggrieved person. Any amount granted by the court cannot exceed the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for debt recovery.

An aggrieved person can also commence civil proceedings against the offender and obtain damages, even if a direction for compensation is obtained; however, double recovery is not permitted (Civil Liability Act 2002 (NSW) Section 37(2); Civil Liability Act 2003 (Qld) Section 32B; Civil Liability Act 2002 (Tas) Section 43E(2); Civil Liability Act 2002 (WA) Section 5AM; Proportionate Liability Act 2005 (NT) Section 16(2); Civil Law (Wrongs) Act 2002 (ACT) Section 107I(2); Wrongs Act 1958 (Vic) Section 24AK(2); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) Section 12).

2.9 Compelling Witnesses to Give Evidence

Upon the request of a party to proceedings, the court may issue a subpoena to compel a person to attend court to give evidence. Unless otherwise specified within the Uniform Evidence Acts, every person is competent to give evidence; and a person who is competent to give evidence about a fact is compellable to give that evidence (pursuant to Section 12 of the Evidence Act 1995 (Cth)). There are limited exceptions that primarily relate to the State or persons in government positions, such as a member of a house of parliament.

A person ordered by the court to give evidence may be entitled to refuse answering questions on the basis of certain privileges, such as the privilege against self-incrimination or legal professional privilege.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on to a Corporate Entity

Criminal Liability

Where the directing mind and will of the company commits an offence, the company, as a legal person, can be liable for the commission of the offence by virtue of the criminal directing mind and liability will be attributed to the company itself (Tesco Supermarkets v Nattrass [1972] AC 153; Mousell Brothers Ltd v London and North-Western Railway Co [1917] 2 KB 836). For instance, directors and managers, who are concerned with the company's management, can be regarded as the directing mind and will of the company to the extent that they control the company's operations. Consequently, the states

of mind of these directors are regarded as that of the company itself (H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159).

Sections 12.2 and 12.3 of the Criminal Code Act 1995 (Cth) have been enacted to impose liability on a company for both the physical elements and fault elements giving rise to the commission of crimes by a company's organ(s).

Civil Liability

Corporations are separate legal entities, such that the extent to which the owner or shareholders can be held liable for the deeds of a company is limited (Salomon v A Salomon & Co Ltd [1897] AC 22). However, the courts have been willing to pierce the corporate veil and impose liability on shareholders, directors and managers of a company, where the corporate structure has been used as a vehicle to commit fraud (Re Darby, ex parte Brougham [1911] 1 KB 95). Such liability can be fixed on directors, particularly in the context of sole director companies where the director is also the majority and/or controlling shareholder of the company (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481).

Professional advisors to a company may also be liable where their advice amounts to aiding, abetting, counselling, or procuring a contravention (Corporations Act 2001 (Cth) Section 79).

For instance, in the decision of ASIC v Somerville & Ors (2009) 77 NSWLR 110, a solicitor, who provided legal advice to company directors that amounted to phoenix activity, was found to be involved in the contravention through his advisory conduct.

3.2 Claims Against Ultimate Beneficial Owners

Generally, a claim may be brought against the ultimate beneficial owner of a company where it can be shown that a company was set up as a sham and/or manifested the alter ego of a director, majority shareholder or other beneficial owner of the company, to perpetrate a fraud (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481; Ford (in his capacity as Commissioner for Fair Trading) v TLC Consulting Services Pty Ltd [2011] QSC 233; Artedomus (Aust) Pty Ltd v Del Casale (2006) 68 IPR 577; [2006] NSWSC 146; Smith v Hancock [1894] 2 Ch 377). There is no fixed test to determine when such a claim may succeed; rather, each case turns on its facts. Such a claim requires the piercing of the corporate veil, which courts have been willing to do if it can be shown that the "concept of separate corporate personality is sought to be used to defeat public convenience, or to justify wrong, or to protect fraud, or to defend crime" (Ace Property Holdings Pty Ltd v Australian Postal Corporation [2011] 1 Qd R 504; [2010] QCA 55 at [88]). It is also possible for the corporate veil to be pierced in instances where a court "can see that there is in fact or in law a partnership between companies in a group" (Pioneer Concrete Services Ltd v Yelnah Pty Ltd and Others (1986) 5 NSWLR 254, 267) or where there is "a finding by unrebutted inference that one of the reasons for the creation of the intervening company was to evade a legal or fiduciary obligation" (Pioneer Concrete Services Ltd v Yelnah Pty Ltd and Others (1986) 5 NSWLR 254, 267; Gilford Motor Company Ltd v Horne [1933] Ch 395).

For instance, in Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481, the Federal Court of Australia found that a company had contravened Section 911A of the

Corporations Act 2001 (Cth) by carrying on a financial services business and issuing a financial product in the absence of holding an Australian Financial Services licence. The Federal Court further held that the actions of the company were also attributable to the sole director, shareholder and secretary of the company. This was because the evidence established that the company was used as a sham to disguise the sole director's fraudulent Ponzi scheme; particularly given that the actions of the company were carried out at the sole director's behest, the sole director "took all the necessary steps, provided the advice and ran the scheme" and the funds provided by the company's investors "were not applied to the purchase of share portfolios on their behalf but were transferred to accounts in the name of or associated with (the sole director) and used to fund her lifestyle and/or... to repay investors who redeemed their investments in part or in whole" (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481, 554 [282]–[283]).

3.3 Shareholders' Claims Against Fraudulent Directors

Shareholders, former shareholders, or persons entitled to be registered as members may with leave of the court bring a claim on behalf of the company against the directors, who exercise control over the company, through a statutory derivative action under Part 2F.1A of the Corporations Act 2001 (Cth). A statutory derivative action is brought by shareholders on behalf of the company for wrongs that have been done to the company by the directors, and where it is probable that the company itself will not bring proceedings. This may occur where the directors of a company will not pass a resolution that the company ought to bring proceedings against those directors for breaches of directors' duties. Prior to commencing a derivative action, the shareholders bringing the action must provide notice in writing to the company.

Furthermore, for a court to grant leave to shareholders to bring a derivative action, the court must be satisfied that the shareholders are acting in good faith, the proceedings are in the company's best interests, the company is unlikely to bring proceedings itself in relation to the fraudulent conduct of the directors, and that there is a serious question to be tried (Corporations Act 2001 (Cth) Section 237(2); Swansson v RA Pratt Properties Pty Ltd (2002) 42 ACSR 313; [2002] NSWSC 583). The best interests of a company are determined by considering the type and nature of the company, such as where there is a closely held company, and where there would be a reasonable expectation of involvement in the management of the company.

Additionally, the court may consider whether a company is well resourced, and the effect that the derivative action will have on the company's business, such as whether the action would cause the company to cease trading, or to divert resources from its ordinary operations. There is also a rebuttable presumption that granting leave to bring a derivative action is not in the company's best interests, where the company has decided not to commence proceedings or has discontinued proceedings (Corporations Act 2001 (Cth) Section 237(3)(b)).

In considering whether to grant leave to shareholders of a company to commence a statutory derivative action, a court will also consider whether the shareholders have ratified or approved the misconduct of the directors (Corporations Act 2001 (Cth) Section 239).

Additionally, in some instances a statutory derivative action will not be available to shareholders,

where the company is in liquidation (Smart Company Pty Ltd (In Liquidation) v Clipsal Australia Pty Ltd (No 6) [2011] FCA 419).

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

The courts have taken an expansive view in relation to fraud and misleading conduct/misrepresentation claims in Australia. Overseas parties may be joined to fraud claims in Australia where:

- the representation or conduct, although originating overseas, is received in Australia (Ramsey v Vogler [2000] NSWCA 260, [36]–[48]);
- part of the conduct occurs in Australia and part outside (Trade Practices Commission v Australian Meat Holdings Pty Ltd (1988) 83 ALR 299);
- the conduct overseas nonetheless involves instructing an agent to act in Australia (Bray v F Hoffman-La Roche Ltd (2002) 118 FCR 1); and
- the conduct overseas has a technology element that is capable of being accessed in Australia (Australian Competition & Consumer Commission v Hughes (t/a Crowded Planet) [2002] ATPR 41–863, 44, 792).

Joinder of Parties

Each state has different civil procedure legislation governing the joinder of parties, including foreign entities or individuals.

In NSW, Rule 6.24 of the UCPR provides the following.

"(1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party;

(2) Without limiting subrule (1), in proceedings for the possession of land, the court may order that a person (not being a party to the proceedings) who is in possession of the whole or any part of the land (whether in person or by a tenant) be added as a defendant."

Additionally, individuals can apply to the court to be joined as a plaintiff or defendant (UCPR r 6.27) depending on the circumstances.

Extraterritorial Jurisdiction

Australian courts may exercise extraterritorial jurisdiction if expressly provided by the law.

The Corporations Act 2001 (Cth) does not contain an express provision on extraterritorial application. However, Section 581 of the Corporations Act 2001 (Cth) mandates Australian courts to act as an aid of, or an auxiliary to, foreign courts of prescribed countries (see Corporations Regulations 2001 (Cth) reg 5.6.74) that have jurisdiction in external administration matters. Australian courts also have discretion to assist the courts of non-prescribed countries in external administration matters.

However, certain provisions of the Competition and Consumer Act 2010 (Cth) do have extraterritorial effect. For instance, Section 5(1) of the Competition and Consumer Act 2010 (Cth) states that certain provisions of legislation, including the ACL (save for Part 5-3), extends to the engaging of conduct outside Australia by bodies corporate incorporated or carrying on

business within Australia, Australian citizens, or persons ordinarily resident within Australia.

In Valve Corporation v Australian Competition and Consumer Commission [2017] 351 ALR 584, the Federal Court found that the consumer guarantee regime in the ACL was applicable to a company that conducted its business in a foreign jurisdiction and where the proper law of the contract was also of a foreign jurisdiction. The Federal Court noted that Section 67(b) of the ACL expressly provides that the consumer guarantee regime applies to the conduct of foreign corporations in Australia, even if a law other than Australian law had been chosen to govern the contract for the supply of goods and services to a consumer. The Federal Court also found, inter alia, that despite the foreign corporation being incorporated outside of and not having a physical presence in Australia, the representations it made to its large base of Australian consumers through its online platform nonetheless amounted to the "supply of goods" (ie, computer software) within Australia, which meant that the foreign company "undoubtedly carried on a business in Australia" (Valve Corporation v Australian Competition and Consumer Commission [2017] 351 ALR 584, 607 [86]).

It should be noted that despite the express intention of Parliament for a legislation to have extraterritorial effect, this would neither deter a foreign party from objecting to the jurisdiction of Australian courts nor object to the enforcement of any judgment rendered by an Australian court.

Service of Writ out of the Jurisdiction

Service of originating process outside Australia is permitted by Part 11 and assisted by Part 11A of the UCPR.

Part 11A deals with the operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 ("Hague Convention"), providing a set of uniform rules concerning the service of Australian judicial documents in civil and commercial matters to parties to the Convention (other than Australia). The Hague Convention, which came into force in Australia on 1 November 2010, offers an alternative but not mandatory method of service of judicial documents outside Australia. The Trans-Tasman Proceedings Act 2010 (Cth) governs service in New Zealand.

5. Enforcement

5.1 Methods of Enforcement

In cases where the defendant fails to make a payment within the timeframe set by the court, or at all, the claimant may take steps to enforce the judgment.

Writ of Execution of Property

Pursuant to Section 106(1) (a) of the Civil Procedure Act 2005 (NSW), a writ for the levy of property is another form of enforcement whereby the sheriff's office is ordered by the court to seize and sell property owned by the judgment debtor. Property that can be seized includes:

- money, cheques, bonds, and securities;
- personal property in which the debtor has a beneficial interest; and
- land (where the judgment is regarding more than AUD10,000).

It is important to note that there are a number of items protected from seizure under Australian law (for example, kitchen items, safety equipment, tools of trade to enable the debtor to earn an income).

The judgment debtor's property is bound to the sheriff's office from the time the writ is delivered to the sheriff and is valid for 12 months from the date of issue. The money that is obtained from the sale of the property is utilised to pay off the outstanding judgement debt.

Writ of Possession of Property

Similar to a writ for the levy of property, a writ for possession of property relates to the seizure by the sheriff's office of real property in cases where the proceeds from the sale of the personal property of the judgment debtor are insufficient to meet the outstanding judgment debt. The court must authorise the sheriff's office, which it will be reluctant to do (given the gravity of the process) if there are alternate means by which the debt could be satisfied.

Garnishee Orders

A garnishee order is commonly sought to enforce a judgment debt against a creditor to recover money from third parties, including employers, banks, other financial intermediaries, who hold money of the judgment debtor, such as the debtor's wages, bank account or others who owe the debtor money. Pursuant to Section 106(1)(b) of the Civil Procedure Act 2005 (NSW), the court can direct a third party who owes money to the judgment debtor to pay the judgment creditor directly. Notably, where a third party fails to comply with a garnishee order, the third party may become liable for a part, or the entirety, of the judgment debt.

Charging Orders

A charging order may be obtained to extend a charge over property, including land, shares in a company or money held in a financial institution (Civil Procedure Act 2005 (NSW) Section 126(1)). The judgment creditor may apply for a charging order pursuant to Section 106(1)(c) of the Civil Procedure Act 2005 (NSW).

A charging order operates to charge the property in favour of the judgment creditor to the extent that is necessary in order to satisfy the judgment. The debtor is restrained from selling, transferring or otherwise dealing with the property (Civil Procedure Act 2005 (NSW) Section 126(2)).

However, this type of order is narrow in scope and should therefore only be relied upon in cases where the debt faced is substantial and the debtor holds substantial assets.

6. Privileges

6.1 Invoking the Privilege Against Self-incrimination

A party may refuse to provide information or produce documents that it may otherwise be required to disclose, if certain privileges apply, specifically the privilege against self-incrimination and the right to silence.

Self-incrimination

The privilege against self-incrimination is the right of an individual to refuse to answer any questions or produce any materials, if doing so "may tend to bring him into the peril and possibility of being convicted as a criminal" (Sorby v Commonwealth (1983) 152 CLR 281; (1983) 46 ALR 237, 241). This common law right is available to:

- individuals suspected of a crime;
- individuals questioned in civil proceedings; and
- people within non-curial context.

Section 128 of the Evidence Act 1995 (Cth) establishes the privilege against self-incrimination. Under this section, a witness is able to object to giving evidence if that evidence proves the witness (a) has committed an offence against or arising under an Australian law or a law of a foreign country or (b) is liable to a civil penalty.

Right to Silence

Differing from the privilege against self-incrimination is the right to silence. The right to silence protects a defendant from being obligated to testify against oneself, regardless of whether or not that testimony has the potential to be incriminating. Established by Section 17 of the Evidence Act 1995 (Cth), this statutory right provides that a "defendant is not competent to give evidence as a witness for the prosecution". It solely applies to criminal proceedings and ensures that a defendant cannot give evidence at their own trial unless they elect to during their own defence.

6.2 Undermining the Privilege Over Communications Exempt From Discovery or Disclosure

A party may withhold documents that are subject to legal professional privilege. This privilege arises in relation to:

- communications between a lawyer and their client for the dominant purpose of providing or receiving legal advice; and
- a lawyer, their client and/or a third party for the purpose of conducting legal proceedings.

At common law and under Sections 118 and 119 of the Uniform Evidence Acts, such communications are protected from compulsory production in the context of court or similar proceedings.

However, as set out in Section 125 of the Evidence Act 1995 (Cth), privilege does not exist to assist a party in committing fraud. Section 125(1)(a) provides that privilege does not apply to: "...[a] communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty."

Thus, if there is commission of fraud or an abuse of power, privilege of such documents may no longer be relied on.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

A court may award exemplary damages in response to a defendant's tortious conduct, such as where it discloses a certain degree of fraud or malice (Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118). It is within the court's discretion to grant exemplary damages, and that discretion is usually exercised depending on the specific circumstances of each case (Gray v Motor Accidents Commission (1998) 196 CLR 1; (1998) 158 ALR 485, 491 [26]). Subject to any statutory prohibitions, such as Section 21 of the Civil Liability Act 2002 (NSW) which prohibits an award of exemplary, punitive and aggravated damages in personal injury claims founded in negligence, an award of exemplary damages may be justified where "the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious

disregard of the plaintiff's rights" (John D Mayne and Harvey McGregor, Mayne & McGregor on Damages (Sweet & Maxwell, 12th edition, 1961) 196).

This also includes deliberate, intentional, or reckless conduct of the defendant (Whitfeld v De Lauret & Co Ltd (1920) 29 CLR 71, 77 (Knox CJ); XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; Lamb v Cotogno (1987) 164 CLR 1; Gray v Motor Accident Commission (1998) 196 CLR 1; (1998) 158 ALR 485). For instance, in the decision of Musca & Ors v Astle Corporation Pty Ltd & Anor (1988) 80 ALR 251, exemplary damages were awarded in a cause of action for deceit where the defendant's deceitful conduct was found to have exposed the plaintiff and her child to considerable risk, including unemployment by inducing her to leave an established job. Such conduct was considered to merit punishment by the court by way of exemplary damages.

Additionally, the quantum of exemplary damages may be reduced, where a compensatory award exceeds the benefit obtained by the defendant by reason of their tort (Musca & Ors v Astle Corporation Pty Ltd & Anor (1988) 80 ALR 251).

7.2 Laws to Protect "Banking Secrecy"

Common Law

Under the common law, a banker's duty to keep confidential certain affairs of their customers is dependent on the terms of the engagement as between the banker and its customer. This duty of confidentiality is usually an implied term of the contract between a banker and customer, although it may be express, and extends beyond the mere state of affairs of customers' bank accounts to any information derived from the banking relations of the bank and its customer. This includes any transactions that involve the customer's account. The duty is qualified by four exceptional circumstances, where it is permissible for a banker to disclose otherwise privileged information. These exceptions were enumerated by Bankes LJ in Tournier v National Provincial and Union Bank of England [1924] 1 KB 461. These circumstances include:

- where disclosure is under compulsion of law;
- where there is a duty to the public to disclose;
- where the bank's interests necessitate disclosure; and
- where the disclosure is in accordance with the customer's express or implied consent.

Additionally, there may be a concurrent equitable duty to maintain confidentiality, where existing customers expect that information that they provide to a bank is protected by law. Arguably, this is a more robust basis for the duty of confidentiality, as it does not rely on the existence of a contract. By comparison, the contractual basis requires a court's determination that such a duty can be implied in the contract. This distinction between the equitable and contractual bases is reinforced by the fact that parties are free to insert express provisions that are inconsistent with the general duty of confidentiality.

Statutory Duty of Confidentiality

From a privacy perspective, a banker is restrained from disclosing personal information, unless the customer has consented to the disclosure, the disclosure is required by law, or the disclosure is reasonably necessary for the enforcement of the criminal law, or of a law imposing a pecuniary penalty, or for the protection of the public revenue (Privacy Act 1988 (Cth) Section 14).

Statutory Requirements to Disclose

In certain circumstances, the duty of confidentiality may be negated in order to facilitate the production of evidence under statutory instruments.

For instance, a banker may be required to disclose evidence in relation to a fraud claim under Section 28 of the Australian Crime Commission Act 2002 (Cth). Additionally, under Section 213 of the Proceeds of Crime Act 2002 (Cth) a financial institution may be required to provide information or documents to an "authorised officer", as defined in Section 338 of the Proceeds of Crime Act 2002 (Cth), to determine any of the following information:

- whether an account has been held by a specified person;
- the balance of the account;
- whether a particular individual is a signatory to an account;
- details of transactions on an account;
- the details of any related accounts;
- determining whether a stored value card was issued to a specified person;
- the details of transactions made using this card; or
- whether a transaction was conducted by the financial institution on behalf of the specified person.

The "officers" who may request the information outlined above include a member or employee of the Australian Police Force, the Integrity Commissioner, Chief Executive Officer of the Australian Crime Commission, and staff member of the Australian Crime Commission (Proceeds of Crime Act 2002 (Cth) Section 213(3)).

Furthermore, under Section 40 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), a "reporting entity" must report any suspicious matter to the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC). Section 62 of the Banking Act 1959 (Cth) also requires an Authorised Deposit-taking Institution (ADI) to provide information to the Australian Prudential Regulatory Authority (APRA) in respect of the ADI or any member of a group of bodies corporate of which the ADI is a member. Additionally, ASIC may require a bank to produce specified books relating to the affairs of the bank under Section 30 of the Australian Securities and Investments Commission Act 2001 (Cth). Under Section 77A of the Bankruptcy Act 1966 (Cth), a trustee in bankruptcy may require a banker to provide to the trustee (or another), specified accounts, deeds, or documentation.

7.3 Crypto-assets

Classification as "Property"

There has yet to be an Australian court decision that classifies crypto-assets as constituting "property". Nonetheless, crypto-assets are legally recognised under Australian taxation laws and company laws. For instance, ASIC considers that the legal status of cryptocurrency is influenced by the structure of the Initial Coin Offering (ICO), and the rights that attach to the tokens. Consequently, tokens of cryptocurrency may be regarded as "financial product(s)" under the Corporations Act 2001 (Cth), such as in the form of managed investment schemes, securities, and derivatives. The implications of this classification are that the cryptocurrency will be subject to disclosure, registration, licensing, and conduct obligations as required under the Corporations Act.

For income tax purposes, the Australian Tax Office views Bitcoin and analogous cryptocurrencies as assets, which can be held or traded. For instance, an isolated transaction involving

the sale of cryptocurrency may result in the cryptocurrency being treated as a capital gains tax asset.

Meanwhile, a state district court has held that a cryptocurrency investment account is sufficiently secure to constitute an investment for the purposes of security for legal costs (Hague v Cordiner (No 2) [2020] NSWDC 23). This court considered that the volatility of cryptocurrency could be addressed by requiring the claimant to notify the defendant's solicitors of any drop below the secured amount. This decision suggests that Australian laws are moving towards regarding cryptocurrency as property in the future.

Freezing Orders

Australian courts have granted freezing orders in respect of cryptocurrency, where there is a real risk that the cryptocurrency may be destroyed, resulting in the diminution of its value. For instance, in Chen v Blockchain Global Ltd; Abel v Blockchain Global Limited (2022) VSC 92, the court referred to freezing orders having been made over all the defendant's assets, including a digital wallet holding bitcoin. In granting the freezing order, the court considered that there was a serious question to be tried in relation to whether or not the defendant had defrauded the plaintiffs. Additionally, the court considered that the prospective destruction of the bitcoin would vitiate a final judgment.

In Australian Securities and Investments Commission (ASIC) v A One Multi Services Pty Ltd [2021] FCA 1297, Derrington J of the Federal Court considered that since cryptocurrency is extremely liquid and easily transferrable the assets may be dissipated in a manner that is difficult to trace, unless an individual with the power of a receiver is appointed to recover them.

Fraud Involving Crypto-assets

The volatility of the value of cryptocurrency hinders the ability to trace its value in cases of fraud, as it may not be possible to maintain records identifying the fundamental value of the cryptocurrency.

Nonetheless, there are Commonwealth laws which impose mandatory reporting obligations in relation to suspicious transfers of cryptocurrency. The legal status of a "Digital Currency Exchange Register" within Sections 5 and 76B of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act) means that the exchange and transfer of cryptocurrency is subject to the Anti-Money Laundering/Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) (the AML/CTF Rules), which was created pursuant to Section 229 of the AML/CTF Act. For instance, under Section 41(2) of the AML/CTF Act, a reporting entity is required to report suspicious matters to the Australian Transaction Reports and Analysis Centre. Additionally, Rule 18.2 of the AML/CTF Rules stipulates the content that is required to be included in a suspicious matter report that involves digital currency.

Trends and Developments

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HFW is a leading global law firm in the aerospace, commodities, construction, energy and resources, insurance, and shipping sectors. The firm has more than 600 lawyers, including 185 partners, based in offices across the Americas, Europe, the Middle East and Asia-Pacific. HFW prides itself on its deep industry expertise and its entrepreneurial, creative and collaborative culture. HFW's fraud and insolvency group are experienced commercial litigators with a particular focus on dealing with high-value, cross-border matters. The team's expertise spans a wide range of sectors and industries, and includes litigation on behalf of administrators, liquidators, provisional liquidators and other office-holders, fraud-related insolvencies, fraud investigations and asset tracing.

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The trends and developments in relation to fraud and asset tracing in Australia have come to the fore in recent years in light of certain significant and complex fraud cases, as well as the rapid evolution and use of technology. Last year's Australian Trends & Developments chapter reported on the collapse of Forum Finance Pty Ltd following the misappropriation of funds through forged customer invoices, and the Plutus Payroll scheme, the largest tax fraud in Australia.

Overall, the Australian legal landscape has proven to be well suited to the pursuit of fraud claims and the tracing of assets. That being said, the federal government continues to tighten measures in relation to the provision of financial services, with a view to protecting consumers and "mum and dad" investors, particularly in light of the rise of "finfluencers" and various investment and cyberscams.

The government is also considering reforms to the anti-money laundering and counter-terror finance regime in an attempt to mitigate the risk of criminal money laundering within the jurisdiction as well as curbing any financial support towards Russia's invasion of Ukraine. Reforms are also being considered to the corporate insolvency regime to protect and maximise value for the benefit of all interested parties and the economy.

Comprehensive Review of the Corporate Insolvency Regime

In September 2022, the Parliamentary Joint Committee on Corporations and Financial Services commenced a broad enquiry into Australia's corporate insolvency laws. The terms of reference suggest inquires will be undertaken across a broad spectrum of areas, including considering the existing legislation surrounding unlawful "phoenixing" and possible reform, reforms related to unfair preference claims and trusts with corporate trustees, and the role of government agencies in the overarching system, such as the Australian Securities and Investments Commission (ASIC) in being a corporate insolvency regulator and the Australian Taxation Office's (ATO) role and enforcement approaches to corporate insolvency. The Committee intends to table a report before both Houses of the Parliament by 30 May 2023.

The inquiry is timely given ASIC's and ATO's enhanced commitment to investigating illegal phoenixing activity. This involves a company's directors abandoning or transferring assets from one entity into another entity, whereby Company A is ladened with debts and will eventu-

ally be placed into liquidation with no assets to pay its creditors. In the meantime, the directors would continue to operate their business through Company B which will remain solvent. Most often, it will be the employees, creditors and sub-contractors of Company A who would be most impacted as they would all be out of pocket. Such a scheme not only involves various breaches of directors' duties, but also the potential fraudulent concealment or removal of assets, as well as fraudulent and/or criminal breaches by company officers of the Corporations Act 2001 (Cth) (the "Corporations Act") or the Australian Securities and Investments Commission Act 2001 (Cth) (the "ASIC Act").

Also relevant to the topic of the removal of company assets are unfair preference claims in corporate insolvencies.

In Metal Manufacturers Pty Limited v Morton [2023] HCA 1, the High Court of Australia determined that a creditor may not rely on the statutory right of set-off under Section 553C of the Corporations Act to defend an unfair preference claim because the transaction would lack the requisite mutuality required by Section 553C. This is because Section 553FC requires the mutual credits, debts or other mutual dealings to have arisen between the creditor and the company from circumstances that subsisted in some way before the commencement of the winding up, which was not the case in the proceedings. The High Court of Australia also further found that there was no "mutual dealing" between the same persons and there was also no "mutual interest" as the liability created by Section 588FF(1)(a) is not owed to the company, but is owed to the liquidator as an officer of the court, whereby the liquidator is not an agent of the company.

Increased Enforcement Focus on Disrupting Cyberscams and Related Reforms

Data compiled by the Australian Competition & Consumer Commission (ACCC) indicates that in 2022, targeting scams resulted in losses of over AUD3 billion to Australians. In view of such, enforcement activities by ASIC and the Australian Federal Police (AFP) with respect to disrupting crypto-asset and other cyberscams are expected to continue in the near future.

In November 2022, ASIC announced its enforcement priorities for 2023 where it noted that a priority going forward will be to protect Australians from investment scams and high-risk investment products, including crypto-assets. This is particularly timely given the arrests made by the AFP around the same time of four Chinese nationals living in Sydney who were charged as part of an investigation into an organised crime syndicate. The syndicate involved a cyber-enabled investment scam that resulted in losses of more than USD100 million world-wide, particularly to investors in the United States.

Related to this issue is the increased public and political scrutiny witnessed in 2022 in light of the cybersecurity and data handling practices of some of Australia's leading companies. Notably, the high-profile data breaches concerning Optus, a leading telecommunications company, and Medibank, a leading private health insurance company, have, inter alia, prompted the Australian government to consider 116 substantial reforms proposals to the Australian Privacy Act 1988 (Cth). The reforms are intended to significantly strengthen and modernise Australia's privacy law, thereby potentially reducing the incidence of cyber-related threats and fraudulent activities stemming from data privacy breaches.

Reforms to the Anti-money Laundering and Counter-Terror Finance (AML/CTF) Regime

Since the introduction of Australia's AML/CTF regime in 2006, technology has evolved significantly, allowing more complex crimes to emerge and existing protective measures to become insufficient.

On 30 March 2022, the Federal Senate Legal Constitutional Affairs References Committee ("the Committee") release a report titled, "The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime". The Committee was critical of the current regime, which is primarily governed by the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) ("the AML/CTF Act") and supporting instruments. With the ongoing sanctions that have been imposed upon Russian nationals worldwide following the Russia-Ukraine war, the Committee noted that there was serious concern as to whether Australia's current AML/CTF regime was adequate.

In response to the Russian sanctions, AUSTRAC, Australia's money laundering regulator, announced in June 2022 that it had established a dedicated intelligence team to monitor and triage financial reporting about Russian sanctions. The reporting is intended to be used to produce actionable financial intelligence to detect sanctions evasions for the use of the AFP and the Australian Sanctions Office (ASO). Although this is a step towards addressing the Committee's concerns, several other criticisms also warrant consideration.

Amongst the Committee's criticisms was the regime's lack of regulation over designated non-financial service providers (DNFS) such as lawyers, real estate agents, accountants and company service providers. For example, Australian lawyers do not currently have reporting obligations under existing AML/CTF laws in respect of clients, on the basis that such reporting would be a breach of legal professional privilege. Australia is one of three states out of the 39 member states in the Financial Action Task Force (an intergovernmental organisation founded to combat money laundering) who have not to date enacted regulations in relation to DNFS, the risk being that Australia may become increasingly vulnerable to criminal money laundering.

The Committee recommended, amongst other things, the establishment of a beneficial ownership register to provide more transparency to company structures. The Australian government is in the process of modernising Australia's company registry to enable the development of a beneficial ownership register.

In November 2022, the Australian government initiated a public consultation on the initial design and features of a Public Beneficial Ownership Register (the "PBO Register"), which concluded on 16 December 2022. The Consultation Paper proposes a phased approach to the introduction of a PBO Register. Initially, only Australian proprietary companies, unlisted Australian public companies, unlisted Australian managed investment schemes (MISs), and unlisted corporate collective investment vehicles (CCIVs) will be required to maintain a Register and take reasonable steps to identify and verify their beneficial owners. Publicly listed companies are expected to continue to identify their beneficial ownership through the substantial holding notice and tracing notice regimes. The Australian government has also proposed to introduce enforcement provisions and penalties to enhance compliance with the beneficial ownership disclosure regime articulated in the Consultation Paper. It

is anticipated that the legislation relating to the PBO Register will be enacted in 2023.

On 20 April 2023, the Attorney-General of Australia announced the public consultation of the reforms to the AML/CTF regime. The Consultation Paper indicates that the proposed reforms are intended to simplify and modify the AML/CTF regime in Australia as well as extending the regime to certain high-risk professions, including lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones (also known as "tranche-two entities"). Both overarching aims are in line with the Committee's recommendations. Submissions under the public consultation process are due by 16 June 2023, following which the Australian government intends to publish a second consultation paper incorporating industry submissions in late-2023.

The Need for an Australian Financial Services Licence

In order to conduct a financial services business in Australia, the individual/business must hold an Australian Financial Services (AFS) licence, unless there is an exemption allowed under Section 911A of the Corporations Act. The key obligations of an AFS licensee are set out in Section 912A of the Corporations Act. Whilst ASIC maintains a register of AFS licensees, cases involving unregistered AFS licensees are still prevalent.

Last year's Australian Trends & Developments chapter reported on the case of ASIC v Melissa Caddick and Maliver Pty Limited [2021] FCA 1443. In that case, the Federal Court of Australia found that both Ms Caddick and Maliver Pty Limited ("Maliver") operated a financial services business for a number of years without an AFS licence in contravention of Section 911A of the Corporations Act.

After considering the evidence before it, the court held that all of Maliver's actions were undertaken or performed at the relevant times at the instigation of, and jointly with, Ms Caddick. The court considered that Ms Caddick was the sole director and guiding mind of Maliver, who made representations on behalf of Maliver to investors, sent key correspondence on behalf of Maliver and was intimately involved in its day-to-day operations. She also advised and assisted in the investment of funds for clients who transferred money to Maliver.

In that regard, the court considered that Maliver was merely a vehicle by which Ms Caddick operated her fraud. Ultimately, the court held that to the extent that Maliver was conducting a financial services business without holding an AFS licence in breach of Section 911A, Ms Caddick also carried on a financial services business without holding an AFS licence in breach of Section 911A.

During 2022, receivers have recovered some of the assets of Ms Caddick and Maliver, including her home, jewellery, artwork and other possessions. The proceeds from the sale of these assets may be used by the receivers to satisfy claims made against Ms Caddick and Maliver.

We also reported that ASIC has recently introduced guidelines to regulate "finfluencers"; ie, content creators who talk about money, shares, budgeting and investing on social media platforms. Whilst some finfluencers genuinely wish to empower people to become more financially literate, there are also those who prey upon the vulnerable.

ASIC's new guidelines make clear that finfluencers must have an AFS licence, and unlicensed finfluencers could face up to five years' jail time

or fines of more than AUD1 million if they discuss money, budgeting, shares and/or investing without an AFS licence. ASIC has also warned influencers who earn money through affiliate links which direct readers to online brokers that such conduct could constitute provision of a financial service, thereby requiring an AFS licence.

Recently, the Federal Court of Australia found that social media finfluencer, Tyson Scholz, contravened the Corporations Act by carrying on a business without an Australian financial services licence, particularly noting that the advice given by Mr Scholz stemmed from continuous and systematic business operations from which he derived a profit as opposed to being a one-off piece of advice. It is anticipated that such enforcement actions against finfluencers will continue to increase in times to come.

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