



When fraud hits: handling civil fraud claims in Australia

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If you are, or think you might be, the victim of a civil fraud, Australian law and procedure provides an array of tools aimed at assisting the victim to recover its loss. Fraud claims might arise in the context of contractual disputes, shareholder disputes and investment disputes where the mere whiff of dishonesty can enable a claimant to deploy some of these tools to recover its loss or reach an early settlement. If you are a victim of fraud, or otherwise implicated in fraud, reacting swiftly, decisively and intelligently is crucial.

Where is a civil fraud, criminal offences might also have been committed - for example, theft, money laundering, and bribery. The point at which the authorities (such as ASIC or the DPP) should be brought in requires careful strategic consideration because doing so may delay recovering any loss.

Civil causes of action

Misleading or deceptive conduct - conduct that misleads or deceives or is likely to mislead or deceive can give rise to a claim

Breach of duty - fraudulent conduct by a company director may give rise to penalty orders, compensation orders, equitable claims for constructive trust over profits, account of profits or equitable compensation

Deceit - this is an action where the fraudster makes a false representation to the victim, and the victim relies on the representation which causes financial loss

Money had and received - where money has been taken, there may be a claim for money had and received on the basis of unjust enrichment

Conspiracy - this is where a number of people work together, using unlawful means, that result in damage to the victim. This allows the victim to pursue third parties

Conversion - like the criminal offence of theft, civil conversion involves the fraudster deliberately dealing with the victim's property inconsistently with the victim's rights such that the victim is deprived of the property

Contract - in some instances a contract might exist between the fraudster and the victim and the fraudulent activity might amount to a breach of the contract

Fiduciary relationship and additional claims

Where there is a fiduciary relationship between the victim and the fraudster, other powerful claims are potentially available (in particular against third parties).

There are several categories of fiduciary relationships, for example:

Agents owe fiduciary duties to their principals

Directors owe fiduciary duties to their companies

Partners owe fiduciary duties to their fellow partners

Lawyers owe fiduciary duties to their clients

Trustees owe fiduciary duties to the beneficiaries of the trust

Employees may sometimes owe fiduciary duties to their employer

Claims where there is a fiduciary relationship

Secret commission

An agent owes fiduciary duties to his principal not to put himself in a position of conflict of interest, or to make a secret commission. An agent who receives payment from a third party

without the informed consent of his principal may be in breach of that duty. In such circumstances the principal (the victim) may have a financial claim against the agent (the fraudster) AND the payer. There may also be criminal consequences.

Both the payer and the agent should obtain the principal's written consent to minimise the risk of liability. For a payer, it is not enough for him to say that he relied on a representation from the agent that the principal consented - however if false, the payer may have a claim against the agent.

Knowing Receipt

A third party, who has received trust property in breach of fiduciary duties owed by a fiduciary to the victim, may be liable as a recipient of that property if he knew or ought to have known that the property was received in breach of trust.

Dishonest Assistance

A third party can become personally liable for breaches of trust committed by a fiduciary where the third party is a dishonest accessory to the breach of trust, whether by inducing or assisting in the breach.

Tools in pursuit of fraud

A claimant has a range of tools available, including but not limited to:

Worldwide Freezing Order - prohibits the fraudster from disposing of, or dealing with, his assets around the world. If the fraudster breaches the order, he can be imprisoned

Proprietary Injunction - a powerful injunction which attaches to the property taken or its identifiable proceeds

Asset Disclosure Order - requiring the fraudster to inform the victim of the nature, value and location of his assets

Search Order - requires a fraudster to allow the victim's lawyers to enter the fraudster's premises and to search for, copy and remove documents or electronic material

Norwich Pharmacal Order - requires a relevant third party, such as the fraudster's bank, to disclose documents or information to the victim

Passport Delivery-up Order - the Australian courts can make orders preventing a person leaving Australia and requiring the person to surrender his passport

Tracing - a process where a victim can follow the property which was taken, even if converted (for example, from cash to shares), and might enable the victim to bring claims against third parties for the identified property

Crisis Management

If you find yourself in a crisis situation involving fraud, it is important that you:

- Immediately contact your lawyer, who will provide the crucial protection of lawyer-client privilege
- Do not create any new documents, including emails, text and voice messages, which could be used as evidence
- Do not share your knowledge of the fraud as this may result in tipping off the fraudster

Our experience

W Advisers has experience of prosecuting and defending fraud claims, both domestically and internationally. Recent experience includes obtaining freezing and asset disclosure orders for a Canadian fund client.