

# Using the Civil Courts to obtain recovery for victims of fraud

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# COMMON SCENARIO



# This is what victoria police advise



VICTORIA POLICE

- Reporting Fraud – [www.police.vic.gov.au](http://www.police.vic.gov.au)

- In many cases where a person loses money, it will not be a criminal, but a civil matter. Particularly when a matter involves breaches of contract or non-payment of debts. Police cannot investigate civil matters.

- Police only investigate criminal matters in order to charge offenders and place evidence before a court. Civil action is the most appropriate method of recovering money**

- and it is recommended a person consults with a solicitor if this is the case. If the complaint and supporting information supports a finding that a criminal offence may have been committed, then the matter will be referred for investigation.

# KEY TAKE AWAY

## DON'T GO STRAIGHT TO POLICE

- Different focus
- No obligation to report (but keep in mind s.326 *Crimes Act 1958*)
- Limited resources
- Inadequate training
- No Control
- Risk of stay of civil proceedings – see for example *Re AWB Ltd (No.1)* (2008) 21 VR 252; *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237



*Private law firms will be hired by police to pursue criminal suspects for profit, under a radical new scheme to target cyber criminals and fraudsters.*

*In a pilot project by the **City of London police**, the lead force on fraud in England and Wales, officers **will pass details of suspects and cases to law firms, which will use civil courts to seize the money.***

*The force says the scheme is a way of more effectively tackling **fraud** – which is now the **biggest type of crime**, estimated to cost £193 billion a year. **It is overwhelming police and the criminal justice system.***

**The Guardian - 15 August 2016**

# Blueprint for action

## 1. Investigation stage

- Covert
- Arrange a team
- Legal professional privilege

Speed  
Flexibility  
Control

## 2. Analysis stage

- Insurance?

## 2. Civil Claim

- Injunctions?
- No SOC yet



# Common law

## Personal claim v Proprietary claim

### Personal claim – *right in personam*

- Available against specific individuals
- No knowledge = Unjust enrichment (money had & received); conversion.
- Knowledge = deceit; dishonest assistance
- Relief: damages, equitable compensation, personal liability to account



## Proprietary claim – *right in rem*

- A right over a particular asset *exercisable against the whole world*.
- Constructive trusts are imposed in two situations
  1. breach of a pre-existing fiduciary duty (strict liability);
  2. unconscionable conduct of the defendant (e.g. receives stolen property).
- s 116(2) *Bankruptcy Act: property held on trust by the bankrupt for another person is excluded from the definition of property divisible among creditors*



## Knowing or unconscionable receipt claim

- A powerful weapon
- extends to all recipients who via the rules of tracing can be shown to have received the assets or their traceable proceeds – this greatly expands the number of potential defendants
- the claim requires the defendant to have a certain level of knowledge before liability is imposed
  - SUFFICIENT = Knowledge of the circumstances that would *indicate the facts* to an honest and reasonable person
  - INSUFFICIENT = knowledge of the circumstances that would put an honest and reasonable person *on inquiry*

# Statutory claims

## Corporations Act 2001 (Cth)

- Breach of duties and powers by officers (Part 2D.1)
  - s 181 (good faith in best interests)
  - s 183 (use of information causing detriment)
- Voidable transactions (Div.2, Part 5.7B)



# Tracing

A means by which a claimant can link the fraud with certain assets believed to be the proceeds of that fraud.

## **Tracing in equity** (*for rights in rem*)

- Need the presence of a fiduciary or existence of a trust
- Available when the subject matter is mixed with other property. Remedy = an equitable charge.
- Third parties: if the property has been transferred to a volunteer without notice (as opposed to a bona fide purchaser for value) the volunteer holds it on behalf of the true owner.

# Freezing orders

Directs respondent not to deal with their assets

Obtain before or after prospective judgment

Prevents frustration of the court process

Preserves the status quo



# Search Orders

**Permits entry into premises**

**Prevents frustration of the court process**

**Preserves the status quo**

**Search party**

- Independent supervising solicitor
- Independent computer expert
- Plaintiff's solicitor and representative



# The Harman Obligation

- Documents and information produced under compulsion in contentious legal proceedings, which are not in the public domain, are not to be used for a collateral purpose to the proceedings in which the docs/info was originally produced – unless leave of the Court is first obtained.

See: *Hearne v Street* (2008) 235 CLR 125 [96]

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