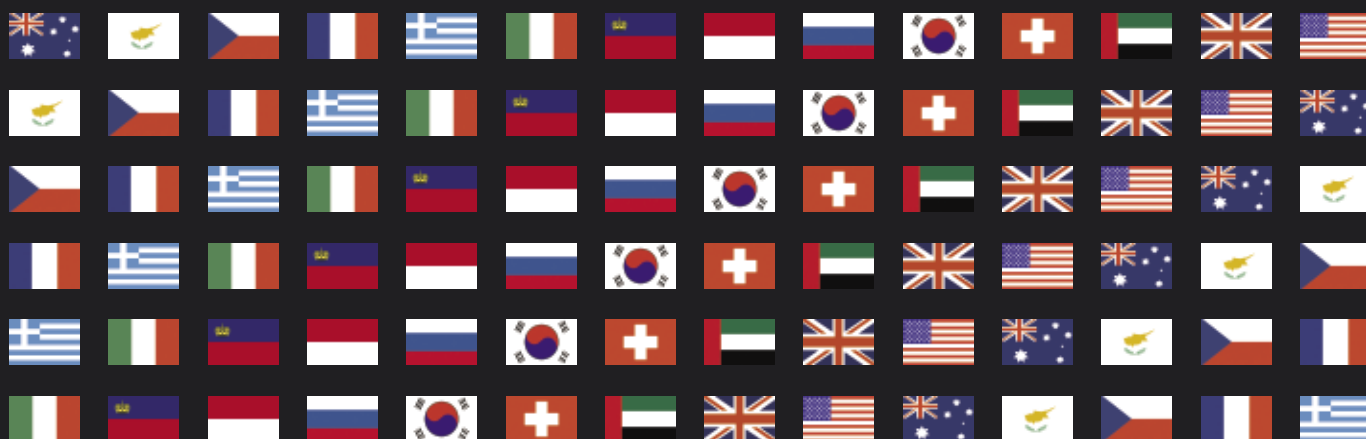


# Asset Recovery 2022

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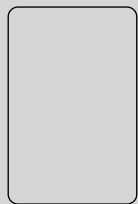
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# Asset Recovery

## 2022

**Contributing editors**

**Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam**  
Reed Smith LLP

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Lexology Getting The Deal Through is delighted to publish the tenth edition of *Asset Recovery*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Russia and the United Arab Emirates.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam of Reed Smith LLP, for their assistance with this volume.



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## CIVIL ASSET RECOVERY - JURISDICTIONAL ISSUES

### Parallel proceedings

1 | Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There is no automatic restriction. The question is considered under the court's general discretion.

A stay of the civil proceedings may be granted if the court considers that there is a real danger of injustice in the criminal proceedings if the civil proceedings continue. The overriding principle is one of balancing the interests of justice between the parties. For a recent example of the application of these principles in favour of a company charged with a criminal offence, see *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 964. Although each case will be considered on its merits, the courts have become increasingly mindful of giving sufficient weight to the practical legal prejudice to an accused, in light of the privilege against self-incrimination, the cost of multiple legal proceedings and the accused's right in the accusatorial process of criminal proceedings not to disclose any aspect of their defence. However, in weighing up the risk of prejudice, courts are also prepared to craft orders guarding plaintiffs against the risk of prejudice of a temporary blanket stay of the civil proceedings.

In an appropriate case, the court may make orders enabling the civil proceedings to progress to a certain point (eg, made ready for hearing), and then be stayed until the criminal proceedings have concluded. Alternatively, the court may be willing to order some, but not all, interlocutory steps (eg, service of subpoenas, inspection of documents produced on subpoena or the hearing of any strike out application). See, for example, *National Australia Bank Limited v Human Group Pty Ltd* [2019] NSWSC 1404 and *Impiombato v BHP Group Limited* [2020] FCA 350.

### Forum

2 | In which court should proceedings be brought?

Each state or territory has a court system, and there is also a federal court system. There is a hierarchy of courts within each system, with the Supreme Court being the highest court in each state or territory. The High Court of Australia is the final court of appeal.

The court in which civil proceedings for the recovery of assets should be brought will depend on a variety of factors, including the amount claimed, the nature of the causes of action and relief sought, connecting factors to the forum and the location of the defendant's known assets. Most claims in fraud matters of any significant size or complexity are brought in the relevant state or territory Supreme Court, all of which hear monetary claims above certain thresholds, including claims for equitable relief.

### Limitation

3 | What are the time limits for starting civil court proceedings?

Limitation periods are generally governed by state and territory legislation.

In most jurisdictions, causes of action for breach of contract or in tort have a six-year limitation period from the date the cause of action accrued.

As far as equitable claims are concerned, in most jurisdictions, the legislation only applies to a limited extent. However, where the legislation has no direct application to a cause of action founded in equity, the courts may nevertheless apply the statutory limitation periods by analogy.

In most jurisdictions, fraud postpones the running of the limitation period until after the claimant has discovered, or could with reasonable diligence have discovered, the fraud.

In limited circumstances, courts also have the discretion to extend the time to commence proceedings.

### Jurisdiction

4 | In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

The jurisdiction of courts can be defined by reference to the common law and (partly) statute. The foundation of jurisdiction for actions in personam is service of the originating process.

Service can be effected on any person who is physically present, no matter how briefly, within the geographic jurisdiction of the issuing court. Service outside Australia must be authorised under the rules of the issuing court. Those rules take into account the effect of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, to which Australia is a signatory.

A foreign defendant may apply to set aside service or stay the proceedings on various grounds, including that service was not authorised by the relevant court rules, the forum chosen by the claimant was inappropriate (*forum non conveniens*), or that the dispute falls within the scope of a foreign exclusive jurisdiction clause to which the claimant had agreed.

A defendant who has been sued in an inappropriate Australian superior court can apply for the proceedings to be transferred to another superior court under the Jurisdiction of Courts (Cross-Vesting) Acts.

## CIVIL ASSET RECOVERY - PROCEDURE

### Time frame

5 | What is the usual time frame for a claim to reach trial?

The usual time frame for a claim to reach trial varies considerably depending on several factors, including the size, scale and complexity of the matter, and if there are concurrent criminal proceedings.

Section 37M of the Federal Court of Australia Act 1976 (Cth) aims to have disputes resolved 'as quickly, inexpensively and efficiently as possible'. State and territory civil procedure acts also contain sections to similar effect.

It is rare for contested proceedings to reach trial in less than six months. Proceedings ordinarily reach trial in a period of six to 18 months. If civil proceedings have been stayed pending the outcome of concurrent criminal proceedings, then it might take longer than usual for the claim to reach trial.

### Admissibility of evidence

#### 6 | What rules apply to the admissibility of evidence in civil proceedings?

Applicable rules of evidence in federal, state and territory courts are established by legislation enacted in the relevant jurisdiction. In particular, each jurisdiction has its own Evidence Act. These acts are based largely upon the common law but expand upon it in various ways.

Evidence is admissible where it is relevant to a fact in issue and is not otherwise excluded. Areas of potential exclusion include hearsay evidence, opinion evidence, tendency evidence, credibility evidence and privilege. Courts also have a general discretion to exclude or limit evidence.

Generally, evidence is admitted primarily through documents and written statements, in the form of affidavits, witness statements or statutory declarations. The latter are usually 'read' onto the record in court and serve as evidence in chief for that witness. The witness is then usually cross-examined and re-examined. In some matters, however, witnesses may be required to give the entirety of the evidence orally.

### Witnesses

#### 7 | What powers are available to compel witnesses to give evidence?

At the request of a party to proceedings, the court may issue a subpoena compelling a person to attend court to give evidence.

Except as otherwise provided by the uniform Evidence Acts, every person is competent to give evidence, and competent persons compellable to give evidence (section 12). There are certain limited exceptions to compellability in proceedings within the uniform Evidence Acts. These include, for example, the Sovereign, the Governor-General, the governor of a state, the administrator of a territory, a foreign sovereign or head of state of a foreign country and, in limited circumstances, a member of a house of parliament (section 15).

A person called to give evidence will, however, be entitled to refuse to answer specific questions if certain limited privileges apply (eg, privilege against self-incrimination or legal professional privilege).

### Publicly available information

#### 8 | What sources of information about assets are publicly available?

Publicly available sources of information about assets include the following:

- the Australian Securities and Investments Commission, which maintains company and business name registers containing information relating to companies such as registration status, officeholders and, in some cases, shareholders and financial statements;
- the Personal Property Securities Register, which is a national online register where details of security interests in personal property can be registered and searched, at least by a creditor; and
- state or territory-based land and property information bodies, which maintain records of interests in real property.

### Cooperation with law enforcement agencies

#### 9 | Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Information and evidence may be obtained through various means, as follows:

- requesting the relevant agency for consideration under the agency's guidelines or statutory obligations;
- making an application for access to documents held by government agencies under freedom of information legislation, subject to various exemptions; and
- (most commonly) a party to civil proceedings causing the civil court to issue a subpoena requiring the production of specific documents, which will be subject to any claims for public interest immunity or legal professional privilege.

If material is obtained from foreign jurisdictions via mutual assistance channels for a criminal investigation or proceeding, it is inadmissible in any civil proceeding unless the Attorney-General approves of its use for that other proceeding (section 43B of the Mutual Assistance in Criminal Matters Act 1987 (Cth)).

### Third-party disclosure

#### 10 | How can information be obtained from third parties not suspected of wrongdoing?

A claimant can apply for a *Norwich Pharmacal* order (named after *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133) requiring a third party who has become relevantly involved in a transaction to disclose information that may be relevant to a potential claim, including the identity of the wrongdoer. It can be used to trace the disposition of monies obtained fraudulently (eg, by requiring a bank to disclose information).

Also, court rules contain procedures for obtaining preliminary discovery to identify a prospective defendant or to decide whether to institute proceedings.

A party to proceedings may also cause subpoenas to be issued to third parties requiring them to attend court to give evidence or produce documents to the court, or both. A subpoena must be issued for a legitimate forensic purpose and, where documents are sought, identify those documents with reasonable particularity.

A party can also apply for an order for non-party discovery requiring a third party to disclose the existence of relevant documents.

## CIVIL ASSET RECOVERY - REMEDIES AND RELIEF

### Interim relief

#### 11 | What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

The key interim relief is a freezing order (*Mareva* injunction) and a search order (*Anton Piller* order). Both are exceptional remedies that are ordinarily sought on an ex parte basis.

To obtain a freezing order, the claimant must show that he or she has a good arguable case against the defendant and there exists a real danger that the defendant will deal with his or her assets in such a way as to wholly or partly deprive the claimant of the benefit of a final judgment. It will apply to the defendant's assets, typically whether located in or outside Australia, up to a specified sum. The operation of the freezing order must not be frustrated by any third party who has notice of it

(eg, banks). In appropriate cases, the court may make a freezing order against a third party.

A freezing order will ordinarily be accompanied by an order compelling the defendant to file an affidavit disclosing the nature and value of his or her assets. Other, less common, ancillary orders may include an order requiring the delivery of designated assets not specifically in issue in the proceedings or an order restraining the defendant from leaving the jurisdiction.

A search order compels the defendant to permit persons specified in the order to enter premises and to search for, identify and remove specified things. The key matters of which the court must be satisfied are that the claimant has a strong prima facie case against the defendant and that 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.

A claimant can also seek other forms of interim relief. These include orders for the detention, custody or preservation of property that is the subject of the proceedings. The usual methods of preservation are an interlocutory injunction or appointment of a receiver.

### Non-compliance with court orders

#### 12 | How do courts punish failure to comply with court orders?

Courts have a wide discretion to impose sanctions for a failure to comply with the court's orders, including making adverse cost orders against the defaulting party or its solicitor (or both), striking out a pleading, rejecting evidence, or staying or dismissing the proceedings and giving judgment.

Breach of a court order can also give rise to a charge of contempt. Penalties for contempt include the imposition of a fine, the sequestration of assets or, in serious cases, imprisonment. It is usually left to the offended party to enforce contempt.

### Obtaining evidence from other jurisdictions

#### 13 | How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Australian superior courts have the power to make an order for the issue of a letter of request to the judicial authorities of a foreign country requesting the taking of evidence from a person in that country.

These requests are usually made under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (the Hague Convention) or a bilateral agreement with another country. If the foreign state is not a party to any such treaty, the request may still be made, but the receiving country is under no obligation to comply with the request.

An order for the sending of a letter of request is discretionary and the party seeking the order must persuade the court that the discretion should be exercised because it 'appears in the interests of justice to do so' (see, for example, section 7(1) of the Foreign Evidence Act 1994 (Cth)). Legislation in most Australian jurisdictions requires the court to consider various matters in this regard.

A letter of request may also ask for the production of documents, at least where those documents are ancillary to the oral testimony of the witness. However, it remains unclear whether Australian courts have jurisdiction to issue a letter of request to a foreign country solely for the production of documents under the Hague Convention. In New South Wales, the Chief Justice of the Equity Division of the Supreme Court recently remarked, albeit in obiter, that she was inclined to the view that such jurisdiction does exist in respect of documents to be used as evidence at trial (*La Valette v Chambers-Grundy* [2019] NSWSC 1355 at [82]). Another judge recommended that consideration be given to adopting a rule for the express conferral of the requisite power

(*Gloucester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of Stamp Duties* [2013] NSWSC 1419).

Court rules in all jurisdictions now allow subpoenas to be served overseas under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965. However, where leave is required to issue a subpoena abroad, an Australian court would be unlikely to grant leave if it would result in a clear breach of international law or comity.

### Assisting courts in other jurisdictions

#### 14 | What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Australian courts will assist parties in enforcing foreign judgments. Those judgments may be enforced by either registering the judgment under the Foreign Judgments Act 1991 (Cth) or at common law.

The High Court of Australia confirmed that Australian superior courts may make a freestanding freezing order in aid of foreign proceedings in certain circumstances, including where there is a danger of an actual or prospective foreign judgment remaining unsatisfied if assets are removed from Australia (see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36).

State and territory supreme courts also have the power, following a request from a foreign court, to make orders requiring a person to give evidence or produce specified documents (but not give discovery) in aid of the foreign proceedings. If the foreign court is from a country that is not a signatory to the Hague Convention or a bilateral agreement with Australia, the request is to be sent via the diplomatic channel and will be considered and executed based on comity.

### Causes of action

#### 15 | What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

The main causes of action in civil asset recovery cases include the following:

- in equity: breach of fiduciary duty or breach of trust;
- in tort: claims for deceit, detinue, conversion, conspiracy or inducing breach of contract;
- a restitutionary claim for monies had and received; and
- certain statutory actions under the Corporations Act 2001 (Cth) (the Corporations Act) and the Competition and Consumer Act 2010 (Cth).

In equity, third parties may also be pursued for 'knowing receipt' of trust property or 'knowing assistance' in a breach of fiduciary duty. Certain equitable claims may be proprietary, such as where a beneficiary claims against a defaulting trustee for the recovery of trust property (or its traceable proceeds). Also, it is well accepted that where property is acquired from another by theft, proprietary relief by way of imposition of a constructive trust will be granted where appropriate.

### Remedies

#### 16 | What remedies are available in a civil recovery action?

The main remedies available in a civil recovery action include the following:

- damages;
- equitable compensation;
- equitable lien or charge;
- an account of profits;
- constructive trust;
- order for restitution;

- order for delivery of goods; and
- relief under the Corporations Act or the Competition and Consumer Act 2010 (Cth) (eg, for declarations, damages or compensation orders), or both.

A successful claimant will also be entitled to claim interest (both pre- and post-judgment) and legal costs, although usually only a proportion of the total legal costs can be recovered.

### Judgment without full trial

#### 17 | Can a victim obtain a judgment without the need for a full trial?

A victim can obtain a judgment without the need for a full trial, typically, by obtaining either default or summary judgment.

A claimant may seek default judgment where the defendant fails to file a defence. The judgment will typically be given in the absence of the defendant. If the claim is for unliquidated damages, judgment may be given on liability only with damages to be assessed.

A claimant may obtain a summary judgment without proceeding to a contested final hearing if it can satisfy the court that there is no real defence to the claim or only a defence as to the amount of the claim. The court will not determine the proceedings summarily if there is a real question in dispute.

Under various statutory regimes, a victim (including a corporation) may also be able to make a claim for a victim's compensation order against a convicted person for losses caused by the relevant criminal offence (see, eg, section 97 of the Victims Rights and Support Act 2013 (NSW)).

### Post-judgment relief

#### 18 | What post-judgment relief is available to successful claimants?

A freezing order may be available against a judgment debtor if the court is satisfied that there is a danger that a judgment will be wholly or partly unsatisfied because the judgment debtor absconds, or the assets of the judgment debtor are dissipated or removed from the jurisdiction before the claimant can apply for one of the traditional forms of execution.

The court may also make ancillary orders, such as an assets disclosure order, an order appointing a receiver to the defendant's assets or an order restraining a judgment debtor from departing the jurisdiction.

A judgment creditor may also obtain an order for examination of the judgment debtor requiring him or her to answer specific questions or produce documents to aid enforcement.

### Enforcement

#### 19 | What methods of enforcement are available?

The principal means of enforcement are as follows:

- writ of execution, granting the sheriff's office authority to seize and sell a judgment debtor's real or personal property, or both, and pay the net proceeds to the judgment creditor;
- garnishee order, which directs third parties owing money to the judgment debtor (eg, wages) to pay the judgment creditor directly;
- charging order, which operates to charge certain property in favour of the judgment creditor; and
- insolvency orders, for example, winding up a company or making an individual bankrupt to effect a distribution of the judgment debtor's assets among creditors.

### Funding and costs

#### 20 | What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Various funding arrangements are available to parties contemplating or involved in litigation.

Generally, lawyers can offer 'conditional' billing where the lawyer's ability to recover his or her fees depends on whether the legal action is successful. Typically, no fee is charged if the legal action is unsuccessful and an 'uplift' percentage is added to the lawyer's fees if the action is successful.

Third-party funding, whereby a party with no pre-existing interest in the proceedings funds the litigation in exchange for a share of the amount recovered, is permitted in Australia. The market for this funding is well established and active, particularly in the class-actions space. It is not uncommon for multiple plaintiff law firms, each with separate funding arrangements, to commence 'competing' class actions against the same defendant. Courts have broad powers to make orders dealing with such a scenario, including consolidation, a permanent stay of particular proceedings, declassing or class closure. In *Wigmans v AMP Limited* [2021] HCA 7, the majority of the High Court said that there can be no 'one size fits all' approach when addressing a multiplicity of proceedings. Further, when exercising the power to permanently stay competing proceedings, it is necessary to determine which proceeding would be in the best interest of group members, considering various factors that vary from case to case.

Damages-based (ie, contingency) fee arrangements remain prohibited in all Australian states and territories, except for Victoria where they are only available for class actions. In Victoria, a plaintiff in a group proceeding may apply for an order that legal costs payable to the law practice representing the plaintiff and group members be payable as a specified percentage of the final award or settlement amount, and for those costs to be shared between the plaintiff and all group members (section 33ZDA(1) of the Supreme Court Act 1986 (Vic)). The court must be satisfied that such an order is 'appropriate or necessary to ensure that justice is done in the proceeding' (section 33ZDA(1)). Such an order simultaneously renders the law practice liable for any adverse costs or security for costs orders made against its client (section 33ZDA(2)). This model, introduced in Australia in 2020, provides an alternative to the traditional third-party funding of class action proceedings. It remains to be seen how this model will operate in practice, and whether other Australian jurisdictions will pass similar legislative reform.

After-the-event insurance is becoming increasingly common, particularly in the class actions space.

Courts seek to manage the costs of litigation in various ways, including by exercising broad case management powers. Generally, these powers must be exercised to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Also, courts have wide discretion concerning costs and can make interim costs orders against a party, including against parties in default.

## CRIMINAL ASSET RECOVERY - LEGAL FRAMEWORK

### Interim measures

#### 21 | Describe the legal framework in relation to interim measures in your jurisdiction.

The following will focus on the operation of the Proceeds of Crime Act 2002 (Cth) (POCA), which is the principal federal legislation for confiscation. Each state and territory jurisdiction also has legislation that governs confiscation of the proceeds and instrumentalities of crime (collectively, the Confiscation Acts), including interim measures.

Three main types of interim measures can be obtained under POCA, all of which can be applied for on an ex parte basis from a court:

- restraining orders
- freezing orders; and
- the seizure of property under a search warrant.

The most important type of interim measure is a restraining order under Part 2-1, as it is necessary in most cases to obtain that order over the property before a forfeiture order can be obtained (see Parts 2-2 and 2-3). A restraining order prevents the disposal of or dealing with property, either absolutely or subject to conditions, pending the outcome of confiscation proceedings. It is usually made following an application to the court by the Australian Federal Police (AFP). The suspect need not have been convicted or even charged. The circumstances in which the order can be made include where there are reasonable grounds to suspect that the suspect committed a relevant offence, or that the property is the proceeds or an instrument of a relevant offence. The order can potentially cover all property of a suspect, including property owned by the suspect or subject to his or her effective control. The court may allow reasonable living and business expenses (excluding legal costs incurred in connection with POCA or criminal proceedings) to be met from the restrained property if certain conditions are met (section 24).

Second, a freezing order under Part 2-1A may be issued by a magistrate to a financial institution preventing the withdrawal of funds from a specified account. It may be issued where there are reasonable grounds to suspect that the account balance reflects the proceeds or an instrument of certain offences, and there is a risk of dissipation. A freezing order is usually obtained as a precursor to a restraining order. Unless extended, it ceases to have force after three working days (section 15N).

Finally, suspected tainted personal property may be seized under a search warrant issued by a magistrate under Part 3-5. The property must be returned after 14 days unless an application for a restraining order or forfeiture order is made concerning it (section 260).

### Proceeds of serious crime

**22** | Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Investigative bodies will consider, on a case-by-case basis, whether to take steps to identify, trace and freeze suspected proceeds of crime.

At the Commonwealth level, for example, the Criminal Assets Confiscation Taskforce (the Taskforce) – which is led by the AFP and includes the Australian Taxation Office (ATO) and the Australian Criminal Intelligence Commission – works in partnership with other law enforcement and regulatory agencies to identify, investigate and litigate asset confiscation matters. The Taskforce describes its approach to investigation as 'proactive and intelligence-led'. It also takes referrals regarding potential confiscation matters from Commonwealth agencies, AFP criminal investigations and state, territory or foreign law enforcement agencies. The Taskforce will consider whether a particular matter is suitable for proceeds action or whether other remedies (eg, pursuit by the ATO of taxation remedies) are more appropriate.

### Confiscation – legal framework

**23** | Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

POCA covers confiscation concerning indictable offences against Commonwealth laws, foreign indictable offences and state and territory offences with a federal aspect. The Confiscation Acts govern confiscation concerning offences against the respective state and territory laws.

POCA's regime contains a comprehensive range of confiscation orders. Some jurisdictions (South Australia,

Queensland and, to a lesser extent, Victoria and the Australian Capital Territory are modelled on the Commonwealth confiscation regime. All proceedings under POCA are civil proceedings and the burden of proof is on the balance of probabilities (sections 315 and 317).

The fundamental premise of these laws is that where a person has profited from criminal activity, those profits should be returned to society. Further, lawfully acquired property used in the commission of an offence should also be forfeited.

All jurisdictions provide for both conviction and non-conviction-based confiscation. In most jurisdictions, four types of confiscation orders can be sought from a court by the relevant state agency:

- orders for the forfeiture of assets;
- pecuniary penalty orders;
- literary proceeds orders (requiring that a person who has committed an offence disgorge literary proceeds derived concerning that offence); and
- unexplained wealth orders.

However, there are several significant differences between each jurisdiction regarding how confiscation orders are obtained and the operation of certain orders.

How the benefit figure is calculated will vary according to the nature of the order sought.

### Confiscation procedure

**24** | Describe how confiscation works in practice.

#### Overview

Confiscating the proceeds of crime is a complex process that usually involves the following steps:

- investigating by the relevant state agency, to substantiate unlawful conduct and identify property;
- obtaining a court order restraining property;
- obtaining a subsequent court order confiscating property; and
- disposing of confiscated property.

Law enforcement agencies are given significant information-gathering powers to assist them with their investigations. Under POCA, these include oral examinations, production orders, notices to financial institutions, monitoring orders and search and seizure powers.

The section below sets out the process for obtaining two specific types of confiscation order: forfeiture orders and unexplained wealth orders.

#### Forfeiture orders

Forfeiture orders may be either conviction or non-conviction based.

There are two types of conviction-based forfeiture orders under POCA:

- forfeiture upon application by the Commissioner of the AFP or Commonwealth Director of Public Prosecutions (CDPP) (no restraining order required) (section 48). The application for forfeiture must be made within six months of the conviction of an indictable offence, and the court must be satisfied that the property is either the proceeds or instrument of the offence; and
- automatic forfeiture, six months after conviction of a 'serious offence', of all property (unless otherwise excluded) that is subject to a restraining order relating to the offence (section 92). A serious offence is defined under POCA to be an indictable offence punishable by imprisonment for three or more years of a certain nature, including money laundering offences.



Non-conviction-based forfeiture orders may either be person-directed or asset-directed. In both cases, the property must first be subject to a restraining order for at least six months before the forfeiture order can be made.

Property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in a property that is neither the proceeds nor an instrument of unlawful activity (section 94).

Once forfeited, the property vests in the Commonwealth.

### Unexplained wealth orders

Most Australian jurisdictions now have unexplained wealth laws. The laws are controversial because they reverse the onus of proof and the long-standing legal tradition of the presumption of innocence. In essence, individuals who cannot lawfully account for the wealth they hold may be liable to pay that wealth to the state. However, there are differences between each jurisdiction, especially regarding whether some connection to criminal conduct is required.

Under sections 179B and 179E of POCA, where there are reasonable grounds to suspect that a person's wealth exceeds the value of his or her lawfully acquired wealth, the court may make an order requiring the person to attend court and prove, on the balance of probabilities, that his or her excess wealth was not derived from a relevant offence. If the court is not satisfied that part of the person's wealth was not derived from such offences, the court may make an unexplained wealth order requiring them to pay that part of his or her wealth to the Commonwealth.

### Agencies

#### 25 | What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

Federally, since 2012, the AFP has responsibility for most confiscation proceedings, both conviction and non-conviction based. The CDPD only retains responsibility for conviction-based confiscation where no restraining order is necessary to preserve the property.

Generally, for most states and territories, the police force is responsible for investigating assets, and the CDPD is responsible for confiscation proceedings. However, the New South Wales Crime Commission and the Queensland Crime and Corruption Commission are responsible for non-conviction based confiscation in those states.

## CRIMINAL ASSET RECOVERY – CONFISCATION

### Secondary proceeds

#### 26 | Is confiscation of secondary proceeds possible?

Yes. Under the Proceeds of Crime Act 2002 (Cth) (POCA) and in most other jurisdictions, the definition of the proceeds of crime explicitly includes property that is wholly or partly derived (or realised) from a disposal (or other dealing) with the proceeds of crime.

### Third-party ownership

#### 27 | Is it possible to confiscate property acquired by a third party or close relatives?

Yes. Under POCA and in various other jurisdictions, confiscation of property that is the proceeds or instrumentality of crime and that is acquired by a third party is generally permitted, unless it has been acquired as follows:

- for sufficient consideration (for money, goods or services that reflect its commercial value); and
- without knowledge, and in circumstances that would not arouse a reasonable suspicion, that the property was the proceeds or instrumentality of crime.

Further, under POCA and in various other jurisdictions, if an innocent third party has an interest in property that is the subject of a forfeiture order, the court may direct that such interest be excluded from the operation of the relevant forfeiture order. Alternatively, a compensation order can be made in favour of that person following the disposal of the property.

### Expenses

#### 28 | Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Confiscation proceedings under POCA and most state and territory jurisdictions are civil, not criminal, in nature. In most jurisdictions, therefore, subject to any specific legislative provisions, the ordinary rules regarding civil cost recovery apply to the costs of confiscation proceedings (ie, costs follow the event) (*Commissioner of the AFP v Fysh (No. 2)* [2013] NSWSC 105 and *Bow Ye Investments Pty Ltd v DPP (No. 2)* [2009] VSCA 278).

### Value-based confiscation

#### 29 | Is value-based confiscation allowed? If yes, how is the value assessment made?

In most jurisdictions, value-based confiscation is allowed. The mechanics for obtaining such an order differ significantly across jurisdictions.

Under section 116 of POCA, the Commissioner of the Australian Federal Police or the Commonwealth Director of Public Prosecutions can apply to a court for a pecuniary penalty order. This is an order that requires a person to pay an amount of money to the Commonwealth. The basis for a pecuniary penalty order is that a person has been convicted of an indictable offence, or has committed a serious offence.

The court must quantify a pecuniary penalty order under Part 2-4, Division 2. Broadly, this involves a value determination of the benefits derived from the commission of the offence. In assessing the value of those benefits, the court must analyse the evidence before it concerning certain specified matters but must not subtract expenses or outgoings incurred concerning the illegal activity (section 126).

These (or analogous) provisions have been applied to achieve different results in different contexts. For example, in several cases concerning illicit drugs, the gross proceeds of the offence have been regarded as the value of the offender's benefit, with no account taken of the acquisition costs of the illegal drugs. However, in a 2015 insider trading case, it was held that determining the value of the benefit derived from the unlawful sale of shares purchased lawfully must involve bringing into account the cost price of the shares against the gross proceeds of their sale (see *Director of Public Prosecutions (Cth) v Gay* [2015] TASSC 15).

A pecuniary penalty order may be sought and made even if another confiscation order has been made concerning the offence. However, the amount of the pecuniary penalty must be reduced by an amount equal to the value of any forfeited property (section 130).

The amount payable under a pecuniary penalty order is a civil debt due to the Commonwealth (section 140). However, it can be enforced by the creation of a charge over any restrained property (section 142).

### Burden of proof

#### 30 | On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

Generally, under POCA and the Confiscation Acts, the state agency that is seeking a restraining or confiscation order from the court bears the onus of proof.

However, in those jurisdictions where an application can be made for an unexplained wealth order, the onus of proving that a person's wealth is not derived from an offence lies on that person.

Also, on an application to exclude property from a restraining or forfeiture order (or from automatic forfeiture) under POCA or relevant Confiscation Acts, the party seeking the exclusion order bears the burden of proving that it has an interest in the property, which is neither the proceeds nor instrument of crime.

### Using confiscated property to settle claims

**31** | May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

In most cases, confiscated property cannot be used to satisfy such claims (assuming the claimant does not have an interest in the property). However, in several jurisdictions, the court may reduce the amount otherwise payable under a pecuniary penalty order by subtracting the amount the person has to pay by way of restitution, compensation or damages concerning an offence to which the order relates.

Further, in Victoria, a restraining order may be made to preserve property so that it be available to satisfy an order for restitution or compensation under the Sentencing Act 1991 (Vic). Property that is forfeited must also be used to satisfy any such order.

### Confiscation of profits

**32** | Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?

In short, yes. Profits obtained through the commission of criminal offences can be confiscated in all Australian jurisdictions.

By way of example, in *Commissioner of the AFP v Fysh* [2013] NSWSC 81, a pecuniary penalty order was made under POCA requiring the defendant to pay to the Commonwealth the amount of the profit he made on the purchase and sale of shares for which he had been found guilty of insider trading offences under the Corporations Act. On those facts, the court held that the amount of the benefit derived by the defendant was the net gain received (excluding brokerage fees) as a result of the transaction.

### Non-conviction based forfeiture

**33** | Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Non-conviction-based forfeiture is allowed in all jurisdictions except Tasmania.

Under POCA, there are two types of non-conviction-based forfeiture order:

- person-directed forfeiture order: forfeiture of property where the court is satisfied that a person is engaged in conduct constituting one or more serious offences (section 47); or
- asset-directed forfeiture order: forfeiture of property where the court is satisfied that the property is the proceeds or instrument of certain offences, or no claim has been made in respect to the property (section 49).

In both cases, the property must first be subject to a restraining order for at least six months before the forfeiture order can be made.

Similarly to conviction-based forfeiture, property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in the property that is neither the proceeds of unlawful activity or the instrument of any serious offence (section 73).

### Management of assets

**34** | After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

The regime for managing restrained and confiscated property is broadly consistent across all jurisdictions.

The Public Trustee (the Trustee) (or an equivalent body) will take custody and control of the property, often once a restraining order has been made.

The Trustee is usually empowered to obtain information about the property, manage and otherwise deal with it. Once a forfeiture or other confiscation order has been made, the Trustee must dispose of the property (to the extent the property is not money). The Trustee is entitled to recover costs incurred in connection with the exercise of its duties, including managing the property, as well as an amount of remuneration for the Trustee.

The balance of the proceeds must be credited to a dedicated fund. This fund is primarily used in each jurisdiction to support programmes for crime prevention, intervention or diversionary measures, other law enforcement initiatives and victims' compensation.

## CRIMINAL ASSET RECOVERY – CROSS-BORDER ISSUES

### Making requests for foreign legal assistance

**35** | Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Mutual assistance to and from Australia is governed by the Mutual Assistance in Criminal Matters Act 1987 (Cth) (MAA).

Requests under the MAA are made by the Attorney General, usually on behalf of the Australian Federal Police or the Commonwealth Director of Public Prosecutions (CDPP), but also on behalf of state and territory investigative and prosecution agencies. Under the MAA, Australia can request assistance from foreign countries for, among other things, the issue of orders similar in nature to restraining orders, search warrants, monitoring orders and production orders under the Proceeds of Crime Act 2002 (Cth) (POCA), in aid of a criminal proceeding or criminal investigation commenced in Australia regarding a serious offence.

The process under the MAA is assisted by several bilateral mutual assistance treaties to which Australia is a party.

### Complying with requests for foreign legal assistance

**36** | Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Australia can assist foreign countries to recover assets under the MAA or, in limited circumstances, via domestic proceeds of crime action. Requests under the MAA must be made to the Attorney General.

There is a range of provisional measures available under the MAA to identify, locate and trace the proceeds of crime located in Australia. These include production orders, monitoring orders, search warrants and time-limited domestic restraining orders pending receipt of a foreign restraining order.

Australian authorities can also take action under the MAA to register a foreign restraining order, including a non-conviction-based order, made in respect of a foreign serious offence. A 'foreign serious offence' is an offence against the law of a foreign country, the maximum penalty

for which is death, imprisonment for a period exceeding 12 months or a fine exceeding A\$66,600.

In limited circumstances, Australia may also consider taking domestic action on behalf of a foreign country under POCA, including obtaining a freezing or restraining order. This action can take place without a foreign proceeds of crime order, and a mutual assistance request may not be required.

## Treaties

### 37 | To which international conventions with provisions on asset recovery is your state a signatory?

Australia is a signatory to several international conventions with provisions on asset recovery, including the following:

- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the United Nations Convention against Transnational Organized Crime 2000;
- the United Nations Convention against Corruption 2003;
- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990; and
- the Terrorist Financing Convention 1999.

## CRIMINAL ASSET RECOVERY – PRIVATE PROSECUTIONS

### Private prosecutions

#### 38 | Can criminal asset recovery powers be used by private prosecutors?

In no jurisdiction can a private prosecutor bring a confiscation application. Only the state agencies as set out in the Proceeds of Crime Act 2002 (Cth) (POCA) and the Confiscation Acts can apply for confiscation orders under those respective Acts. Under POCA, for example, those applications must be brought by either the Commissioner of the Australian Federal Police or the Commonwealth Director of Public Prosecutions.

## UPDATE AND TRENDS

### Emerging trends

#### 39 | Are there any emerging trends or hot topics in civil and criminal asset recovery in your jurisdiction?

The Australian Federal Police (AFP) and relevant state agencies continue to actively litigate proceeds of crime matters. For the financial year that ended on 30 June 2020, the AFP reported A\$38.8million in realised assets as a result of proceeds of crime actions, with a 'return on investment' of 1.95 (against costs of A\$20million). The AFP has adopted 'return on investment' for asset confiscation as a key performance indicator for its proceeds of crime work, in place of 'assets restrained'. The AFP's priorities concerning national and international policing and investigations, as stated in the AFP's Corporate Plan 2020–21, include, among other things, combating transnational serious and organised crime, and fraud and corruption. These areas of crime, in particular where money laundering and drug-related offences are involved, typically give rise to proceeds recovery actions. For example, in June 2021, the AFP announced that Operation Ironside had led to it seizing drugs, weapons, millions of dollars in assets and A\$44.9 million in cash as part of a global investigation targeting an encrypted communications platform used by organised crime syndicates. In Australia alone, over 200 individuals have been charged. More broadly, the federal government has committed an

additional A\$300.2 million in funding to the AFP over four years beginning in the financial year that ended on 30 June 2021.

The nature of freezing orders, particularly as they apply to assets located outside of Australia, has received renewed attention in light of the decisions of Justice Jagot in *Deputy Commissioner of Taxation v Huang* [2019] FCA 1728 and of the Full Court (on appeal) in *Huang v Deputy Commissioner of Taxation* [2020] FCAFC 141. In February 2021, the High Court granted the Deputy Commissioner special leave to appeal the Full Court's decision (*Deputy Commissioner of Taxation v Huang* [2021] HCATrans 21). The case concerns the continuation of a freezing order in connection with an unpaid A\$140 million tax bill issued by the Australian Taxation Office (ATO) to billionaire businessman Mr Huang Xiangmo (also known as Changran Huang). The case raises (among other matters) the question of whether the freezing order can extend to Mr Huang's assets outside Australia, in particular in Hong Kong and China, in circumstances where the ATO conceded that it was unlikely that a judgment in favour of the ATO would be enforceable in either of those jurisdictions given that it was based on a foreign revenue debt. At first instance, Justice Jagot was prepared to grant such an order on the ground that enforcement in those jurisdictions was 'not impossible'. On appeal, the Full Court overturned that decision and held that there must be a 'realistic possibility' of enforcement in the place to which the proposed freezing order relates, before such an order will be granted, which there was not on the facts of this case. The High Court's decision will provide useful guidance on the limits for when offshore assets can be the subject of a freezing order, which is an issue of increasing relevance in a world of greater financial interconnectedness.

In the proceeds-of-crime space, there has been a continued focus on the practice known as 'cuckoo smurfing', a form of money laundering whereby a person offshore wishes to transfer money to a bank account in Australia using a money remitter, but the remitter, acting as part of a criminal syndicate, withholds the funds. Instead, a series of deposits of illicit cash (to be laundered), totalling the amount that was to be transferred, are made into the bank account in Australia by local 'smurfs', generally, in amounts below the threshold for reporting cash transactions.

Since the High Court's decision in *Lordianto v Commissioner of the Australian Federal Police* [2019] HCA 39, which reaffirmed the broad reach of POCA in 'cuckoo smurfing' cases, there have been two cases involving applicants seeking to establish that property including their Australian bank accounts, following the transfer of money from Indonesia using the services of money changers, had been acquired in circumstances that would not have aroused a reasonable suspicion that it was proceeds of an offence or an instrument of an offence, and therefore should be excluded from the relevant restraining orders (section 330(4)(a) POCA).

In *Gwe v Commissioner of the Australian Federal Police* (2020) 103 NSWLR 509, the New South Wales Court of Appeal confirmed that, although the 'reasonable suspicion' test is an objective one, it must be undertaken in light of the actual knowledge of the party seeking the exclusion order. In that case, the relevant applicant gave unchallenged and uncontradicted evidence that she did not look at and, by necessary implication, had no knowledge of the fact or detail of multiple individual deposits under A\$10,000 (so structured to avoid reporting requirements) into her account. Her evidence was that she only looked at the total balance of her accounts as disclosed on her hard copy bank statements and electronic banking platform, and she was not cross-examined on that evidence. Consequently, the court held that the relevant property acquired by the applicants, including their interest in the bank account, should have been excluded from the restraining orders. On the other hand, in *Commissioner of the Australian Federal Police v Tjongosutiono* [2020] NSWSC 1815, the Supreme Court of New South Wales did not accept evidence from the defendant, a stockbroker and sophisticated

bank customer who had been cross-examined, that he never looked at his bank accounts beyond checking the balances. Instead, the court found, based on a detailed review of the evidence, that the defendant was aware that over A\$1 million had been deposited into his account over a lengthy period in amounts of less than A\$10,000. Accordingly, the court was not satisfied that he had not acquired the relevant property in circumstances that would not arouse a reasonable suspicion that it was the proceeds of an offence or an instrument of an offence.

## Coronavirus

40 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The federal, state and territory governments of Australia all passed wide-reaching legislation in response to the covid-19 pandemic in an attempt to cushion its devastating impact. That legislation spans across all industries, and include a range of temporary financial assistance packages and tax subsidies for individuals and businesses suffering financial distress, and additional statutory protections for residential and commercial tenants and debtors unable to pay their debts, including changes to corporate and directors' regulatory responsibilities in light of the difficult and unpredictable trading conditions. From an asset recovery perspective, three developments are most noteworthy.

First, Australian courts have remained open to civil litigants throughout the pandemic, continuing to administer cases and hear matters, including on an urgent basis where required. Owing to strict social distancing laws, new practice notes and court procedural rules have been introduced requiring certain matters to be conducted through videoconferencing and audio-conferencing technologies. Practitioners and judges had to quickly adapt to this new normal. Some formalities have been dispensed with (eg, revised procedural rules permit evidence to be filed without being sworn). Importantly, access to justice has continued despite the challenging conditions.

Second, reforms were passed extending the time for corporate debtors to respond to a creditor's statutory demand to six months (instead of the usual 21 days). Without extension, these amendments will expire on 31 July 2021. Temporary measures were also introduced to prevent the eviction of tenants for non-payment of rent. These measures, while temporary, have played an important role in affording distressed businesses time to assess their financial position and plan to recover once trading conditions improve.

Third, changes were also made to temporarily alleviate personal liability for directors for insolvent trading. A new section 588GAAA was inserted into the Corporations Act 2001 (Cth) to provide directors with a new safe harbour, 'temporary relief due to coronavirus', from personal liability for any debts incurred by a business while insolvent. The relief applied for six months until 31 December 2020. Directors' duties, however, were not relieved.

The law continues to rapidly change in response to the pandemic as different parts of the country go into and out of periods of lockdown. Businesses need to continue to closely monitor these changes.

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