

What does the Covid-19 crisis mean for victims of fraud in Australia?

THE MOST CRITICAL PHASE OF THE CRISIS

1. Special legislation

To date, the Australian Government has introduced a number of specific pieces of legislation in response to the Covid 19 pandemic. These include:

- legislation whereby eligible businesses can access a wage subsidy of \$1,500 per fortnight for each eligible employee from 30 March 2020;
- legislation providing temporary relaxation of insolvency laws;
- a mandatory code of conduct providing a moratorium on termination of commercial leases for failure to pay rent and requiring landlords to reduce rent proportionally with a tenant's reduced turnover; and
- legislation establishing a scheme whereby the government guarantees 50 percent of loans to small and medium enterprises up to \$250,000.

2. Does the crisis have an effect on civil justice?

Courts in all jurisdictions in Australia have put in place procedures allowing hearings to be conducted remotely, by telephone or in a virtual courtroom using videoconferencing facilities. Judges have also been open to hearing matters in novel ways for Australian Courts, such as the receiving evidence by deposition.

Jury trials commenced prior to the outbreak of COVID-19 are proceeding as scheduled. However, all new jury trials have been suspended. Accused in remand awaiting trial will remain in remand, unless eligible for bail.

The Courts are hearing bail applications as a matter of priority. The suspension of new jury trials means that any new criminal prosecutions will likely be delayed until after the pandemic has subsided.

Whilst there has been no change to the procedural rules relating to service, Federal Courts and some State courts have permitted the filing of unsworn affidavits.

3. Does the crisis have an effect on deadlines (of procedural and substantive law)?

In the wake of the outbreak, some Federal and State Courts vacated or deferred hearings where, in the Court's view, it was not possible to conduct proceedings electronically. Alternatively, some judges have refused to delay matters despite submissions that a remote hearing might prejudice the parties. Generally, the pandemic has had the effect of delaying timetables as the Courts and legal profession adjust to the new procedures.

4. Does the crisis have an effect on enforcement?

The following measures have been put in place which have had an impact on enforcement:

- The Australian Insolvency laws have been temporarily amended. See discussion at 8 below.
- The Australian government has released a code of conduct which provides a mandatory moratorium on the termination of commercial leases for failure to pay rent and requires landlords to reduce rent proportionally with a tenant's reduced turnover. The Code applies to tenants with a turnover of less than \$50 million that have experienced a downturn in revenue of more than 30%.
- The Australian Banking Association has issued a media release stating that banks will defer loan repayments on loans up to \$10 million for 6 months for businesses affected by COVID-19.
- The Australian corporate regulator has issued a media release indicating that it will suspend some of its regulatory and supervisory work to focus on COVID-19.
- The Australian competition regulator has issued a similar media release advising that it will seek to minimise enforcement activities such as statutory notices and compulsory examinations to reduce the regulatory burden on businesses.

5. How are particularly urgent matters handled, in particular requests for interim measures such as injunctions and freeze orders?

Urgent Court applications are being heard on an expedited basis mostly by telephone or by software such as Microsoft Teams. To enable urgent applications to be dealt with swiftly, the Courts have directed parties to provide them with notice before filing.

6. How do lawyers work during the crisis?

Most law firms in Australia have closed their offices and most members of the legal profession are working from home. Face to face meetings have generally been replaced by telephone or video conferences.

7. How do banks work during the crisis?

Banks have been classified by the Australian government as an essential service. As a result, most bank branches remain open to the public. However, customers have been encouraged to use online banking services and communicate via telephone rather than personal visits to banks.

8. *Does the crisis have an effect on insolvency law?*

Temporary amendments to Australian insolvency and corporations' laws have been introduced in response to the outbreak of COVID-19. These include:

- The timeframe for a natural person to respond to a bankruptcy notice has been extended from 21 days to 6 months
- The monetary threshold for a bankruptcy notice has been increased from \$5,000 to \$20,000.
- The timeframe for a corporation to respond to a creditor's statutory demand has been extended from 21 days to six months
- The monetary threshold for a creditor's statutory demand against a corporation has been increased from \$2,000 to \$20,000.
- Directors have received temporary relief from their duty to prevent insolvent trading for a period of 6 months commencing 24 March 2020. This protection will only apply if a debt is incurred in the ordinary course of business and during this six-month period.

FORECAST: AFTER THE CRISIS AND LONG-TERM EFFECTS

9. *Which measures introduced during the crisis will be withdrawn immediately?*

At this stage, the following measures will end by late September 2020:

- The amendments to the insolvency laws referred to at 8 above.
- The landlord code referred to at 4 above.

10. *Which measures will remain in place?*

At this stage, it is difficult to predict with precision which measures will remain in place after the pandemic has ceased. However, it is expected that the Courts and law firm will embrace the more frequent use of the new technologies being trialed during this period. It is also expected that working from home for professionals will become more common place.

11. Will enforcement of economic crime, including corruption matters be weakened due to the lack of financial resources?

The economic disruption caused by the outbreak of Covid 19 has already resulted in increased levels of fraud such as online identity theft.

12. Do you expect a rise of new anti-corruption prosecutions after the crisis?

The increase in fraudulent activity during the pandemic is likely to result in increased prosecutions once the crisis has come to an end.

13. Will the ratio of third party funded matter rise?

Litigation funding has been a common feature of the Australian legal landscape following a landmark decision of the High Court of Australia in 2006 and there are now a large number of litigation funders, both local and international, operating in Australia. It is expected that the downturn in the economy caused by the pandemic will result in an increase litigation funding for cash strapped litigants.

Contact details:

John Mitchell

Partner

Arnold Bloch Leibler

Tel: +61 2 9226 7233

Email: jmitchell@abl.com.au