

FREEZING ORDERS¹

'Since *Jackson v Sterling Industries Ltd*, it has been accepted in Australia, as a general proposition, that a freezing order could be granted if the circumstances are such that there is a danger of the defendant absconding, or a danger of the assets being removed from the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if successful in obtaining a judgment, will not be able to get it satisfied. The danger must be sufficiently substantial to warrant the freezing order. The need to identify a relevant danger was first articulated in *Mareva Compania Naviera SA v International Bulkcarriers SA*, where Lord Denning MR stated:

"If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets"²

A. Introduction

1. There is a detailed and helpful practice note in the Supreme Court of Victoria which discusses freezing orders (*Practice Note SC Gen 17 – Freezing Orders*). The following statement is included in the introduction to the practice note:

This Practice Note supplements Order 37A of the *Supreme Court (General Civil Procedure) Rules 2015* relating to freezing orders (also known as 'Mareva orders' after *Mareva Compania Naviera SA v International Bulkcarriers SA* (The Mareva) [1975] 2 Lloyd's Rep 509, or 'asset preservation orders'). Order 37A has been made as part of

¹ © A Coote May 2023

² *Deputy Commissioner of Taxation v Huang* [2021] HCA 43 at [18] (Gageler, Keane, Gordon and Gleeson JJ)

an endeavour to harmonise Court Rules and orders in such applications across the Supreme Courts of all other States and Territories and the Federal Court.

B. Supreme Court Rules: 37A

2. A *freezing order* has the meaning given by r 37A.02(1) of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*(**the Court Rules**).³

3. Rule 37A.02(1) of the Court Rules provides:

The Court may make an order (a *freezing order*), upon or without notice to the respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet the danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

4. Rule 37A.02(2) of the Court Rules provides:

A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

5. The Court may make any order ancillary to a freezing order (**an ancillary order**) that the Court considers appropriate, including an order eliciting information relating to the assets relevant to the freezing order or prospective freezing order or for the purpose of determining whether the freezing order should be made.⁴

6. Rule 37A.05(1), (2) and (3) of the Court Rules sets out several pre-conditions for an order against a judgment debtor or prospective judgment debtor or third party, as follows:

³ r 37A.01, *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

⁴ r 37A.03, *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

- (a) there must be a judgment in favour of an applicant by the Supreme Court of Victoria or, if there is a sufficient prospect that the judgment will be registered in or enforced by the Supreme Court of Victoria, another court⁵; or
- (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in –
 - (i) the Supreme Court of Victoria; or
 - (ii) another court, if there is a sufficient prospect that the other court will give judgment in favour of the applicant and there is a sufficient prospect that the judgment will be registered in or enforced by the Supreme Court of Victoria.

7. If the pre-conditions are met, then r 37A.05(4) of the Court Rules provides that:

The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because any of the following might occur –

- (a) the judgment debtor, prospective judgment debtor or another person absconds; or
- (b) the assets of the judgment debtor, prospective judgment debtor or another person are –

⁵ r 37A.05(1)(a), *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

- (i) removed from Australia or from a place inside or outside Australia; or
- (ii) disposed of, dealt with or diminished in value.

8. The Court may also make a freezing order or an ancillary order or both against a person other than the judgment debtor or prospective judgment debtor (a third party), if the Court is satisfied, having regard to all the circumstances, that:

- (a) there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because –
 - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
 - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
- (b) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment of the Court, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.⁶

9. The Court may also make a freezing order or ancillary order if it considers it is in the interests of justice to do so.⁷

⁶ r 37A.05(5), *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

⁷ r 37A.05(6), *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

10. The Court retains its inherent, implied or statutory jurisdiction to make a freezing order or ancillary order.⁸

11. The following matters are relevant to procedure:

- (a) a freezing order may be in Form 37AA⁹;
- (b) in making a freezing order or an ancillary order, the Court must have regard to the practice note concerning freezing orders¹⁰;
- (c) pursuant to r 37A.02(5) of the Court Rules, an affidavit relied on in support of an application for a freezing order or an ancillary order should, as far as possible, address the following:
 - (i) information about the judgment that has been obtained, or if no judgment has been obtained, the following information about the cause of action –
 - (A) the basis of the claim for substantive relief;
 - (B) the amount of the claim; and
 - (C) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;

⁸ r 37A.06, *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

⁹ r 37A.02(3), *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

¹⁰ r 37A.02(4), *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

- (ii) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;
- (iii) the matters referred to in Rule 37A.05; and
- (iv) the identity of any person, other than the respondent, who the applicant believes may be affected by the freezing order and how that person may be affected by it.

C. Principles governing an application for a freezing order

12. The principles governing an application for a freezing order have been summarised by the Victorian Court of Appeal¹¹ as follows:

- (a) "The purpose of granting a freezing order is to prevent the frustration or inhibition of the Court's process by seeking to meet a danger that a prospective judgment of the Court will be wholly or partly unsatisfied. Its purpose is not to provide security in respect of a prospective judgment or order.";
- (b) "A freezing order is to be viewed as an extraordinary interim remedy. The order is a drastic remedy which calls for a high degree of caution on the part of the Court before an order is made.";

¹¹ *Argyle Building Services Pty Ltd v Franek & Ors* [2020] VSCA 196 at [70] – [71]; see also *Rozenblit v Vainer* [2019] VSCA 164 at [19]

- (c) “It must be shown that there is a reasonable possibility, not necessarily more than a 50 per cent chance, that assets may be disposed of or dealt with or diminished in value if an order is not made.”;
- (d) “The value of the assets covered by a freezing order should not exceed the likely maximum amount of the applicant’s claim, including interest and costs.”;
- (e) “As a condition of making a freezing order it will normally be appropriate to require the applicant to give undertakings to the Court, including the usual undertaking as to damages, supported if necessary by the provision of security.”;
- (f) “The order being discretionary, other considerations including the balance of convenience may bear upon the Court’s ultimate decision, but it is not a distinct requirement that the balance of convenience favours the making of the order.”;
- (g) “The inherent jurisdiction of the Court is preserved and r 37A.05 simply addresses the minimum requirements that ordinarily need to be satisfied in an application.”; and

- (h) “A wide range of factors may be relevant to the exercise of the discretion to grant or refuse a freezing order.”

8 May 2023

Adam Coote

Barrister

Green’s List