

SUPREME COURT OF VICTORIA

Practice Note No. 5 of 2010

The Chief Justice has authorized the issue of the following Practice Note, effective as of 3 May 2010. This Practice Note will apply in substitution for Practice Note No. 3 of 2006.

Freezing Orders

(also known as '*Mareva* orders' or 'asset preservation orders')

1. This Practice Note supplements Order 37A of Chapter I of the Rules of the Supreme Court 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 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.
2. This Practice Note addresses (among other things) the Court's usual practice relating to the making of a freezing order and the usual terms of such an order. While a standard practice has benefits, this Practice Note and the example form of order contained in Form 37AA cannot limit the judicial discretion to make such order as is appropriate in the circumstances of the particular case.
3. Words and expressions in this Practice Note that are defined in Order 37A have the meanings given to them in that Order.
4. A form of freezing order without notice is contained in Form 37AA. The Form may be adapted to meet the circumstances of the particular case. It may be adapted for a freezing order made on notice as indicated in the footnotes to the Form (the footnotes and references to footnotes in Form 37AA should not be set out in the order). Form 37AA contains provisions aimed at achieving the permissible objectives of the order, consistently with the proper protection of the respondent and third parties.
5. The purpose of a freezing order is to prevent frustration or abuse of the process of the Court, not to provide security in respect of a judgment or order.
6. A freezing order should be viewed as an extraordinary interim remedy because it can restrict the right to deal with assets, even before judgment, and is commonly granted without notice.
7. The respondent is often the person said to be liable on a substantive cause of action of the applicant. However, the respondent may also be a third party, in the sense of a person who has possession, custody or control, or even ownership, of assets which he or she may be obliged ultimately to disgorge to help satisfy a judgment against another person. Rule 37A.05 addresses the minimum requirements that must ordinarily be satisfied on an application for a

freezing order against such a third party before the discretion is enlivened. The third party will not necessarily be a party to the substantive proceeding, (see *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380) but will be a respondent to the application for the freezing order or ancillary order. Where a freezing order against a third party seeks only to freeze the assets of another person in the third party's possession, custody or control (but not ownership), Form 37AA will require adaptation. In particular, the references to '*your assets*' and '*in your name*' should be changed to refer to the other person's assets or name (e.g. '*John Smith's assets*', '*in John Smith's name*').

8. A freezing order or an ancillary order may be limited to assets in Australia or in a defined part of Australia, or may extend to assets anywhere in the world, and may cover all assets without limitation, assets of a particular class, or specific assets (such as the amounts standing to the credit of identified bank accounts).
9. The duration of a freezing order made without notice will ordinarily be limited to a period terminating on the return date of the summons, which should be as early as practicable (usually not more than a day or two) after the order is made, when the respondent will have the opportunity to be heard. The applicant will then bear the onus of satisfying the Court that the order should be continued or renewed.
10. A freezing order should reserve liberty for the respondent to apply on short notice. An application by the respondent to discharge or vary a freezing order will normally be treated by the Court as urgent.
11. 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. Sometimes it may not be possible to satisfy this principle (for example, an employer may discover that an employee has been making fraudulent misappropriations, but does not know how much has been misappropriated at the time of the discovery and at the time of the approach to the Court).
12. The order should exclude dealings by the respondent with assets for legitimate purposes, in particular:
 - (a) payment of ordinary living expenses;
 - (b) payment of reasonable legal expenses;
 - (c) dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and
 - (d) dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made.
13. Where a freezing order extends to assets outside Australia, the order should provide for the protection of persons outside Australia and third parties. Such provisions are included in Form 37AA.

14. The Court may make ancillary orders. The most common example of an ancillary order is an order for disclosure of assets. Form 37AA provides for such an order in para 8 and for the privilege against self-incrimination in para 9. Section 128A of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2008* (Vic) govern, within those jurisdictions, objection to compliance on the self-incrimination ground. In particular section 128A(3)-(10) govern the procedure to be followed after objection is taken in accordance with para 9 of Form 37AA.
15. The Rules of Court confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. Firstly, the Court may make a freezing order before a cause of action has accrued (a '*prospective*' cause of action). Secondly, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new 'long arm' service rule.
16. As a condition of the making of a freezing order, the Court will normally require appropriate undertakings by the applicant to the Court, including the usual undertaking as to damages.
17. If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages, the applicant may be required to support the undertaking by providing security.
18. The order to be served should be endorsed with a notice which meets the requirements of Rule 66.10.
19. An applicant for a freezing order without notice is under a duty to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia.
20. The affidavits relied on in support of an application for a freezing order or an ancillary order should, if possible, address the following:
 - (a) information about the judgment that has been obtained, or, if no judgment has been obtained, the following information about the cause of action:
 - (i) the basis of the claim for substantive relief;
 - (ii) the amount of the claim; and
 - (iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;
 - (b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;
 - (c) the matters referred to in Rule 37A.05; and

- (d) the identity of any person, other than the respondent, who, the applicant believes, may be affected by the order, and how that person may be affected by it.

Dated: 30 April 2010

Signed: Vivienne Macgillivray, Executive Associate to the Chief Justice