

Undertakings

- Court requires applicant to provide undertakings as to damages
- ‘Usual undertaking’:
 - The applicant, by its counsel, undertakes to court that it will abide by any order the court may make as to damages, should the court determine that the respondent has suffered any damage by reason of this order which the applicant ought to pay
 - If there are costs that arise out of the fact of the injunction, if applicant is unsuccessful, they will bear those costs.
 - Courts can manage the risks of wrongly granting a pre-trial injunction by requiring applicant to pay damages that flow from granting injunction.

Service of Order

- Service of order for interlocutory injunction is required to give D notice and for order to be enforced
- Order needs to be endorsed with notice warning D of consequences of failure to comply

Search orders (Order 37B)

- Ex parte orders authorising seizure of documents and other evidence.
- **r 37B.02(1)**: The Court may make a search order,
 - in any proceeding or in anticipation of any proceeding,
 - with or without notice to the respondent,
 - [for the purpose of securing or preserving evidence](#) and
 - [requiring a respondent to permit persons to enter premises](#) for the purpose of securing the preservation of evidence which is or may be relevant to an issue in the proceeding or anticipated proceeding.
- A search order may be in **Form 37BA (r 37B.02(2))**.
- Search order should be [served between 9am – 2pm on business day](#) to permit respondent to readily obtain legal advice ([4.11 Practice Note SC Gen 16](#)).
- Search order [must not be executed at same time as execution of search warrant](#) by police or other proper authority ([4.12 Practice Note SC Gen 16](#)).

Test:

- **r 37B.03(1)**: The Court may make a search order if the Court is satisfied that—
 - (a) applicant has a [strong prima facie case](#);
 - *Anton Piller* (Ormrod LJ): ‘Such orders will [rarely be made](#), and only when there is no alternative way of ensuring that justice is done to the applicant.’
 - Court gave P an order that their solicitors could collect confidential documents from the D’s premises because P had evidence that [D was going to give this information to a rival company](#).
 - (b) [the potential or actual loss or damage to the applicant will be serious if search order is not made](#); and
 - (c) there is [sufficient evidence](#) in relation to the respondent that—
 - (i) the respondent [possesses important evidentiary material](#); and

- (ii) there is a **real possibility** that the respondent might destroy such material or cause it to be unavailable for use in evidence.

Affidavit in support:

- **r 37B.03(2)**: Application shall be supported by an affidavit which shall include:
 - (a) **description of the things** or the categories of things in relation to which the order is sought;
 - (b) **address or location of premises**;
 - (c) **why search order is sought**, including whether there is a real possibility that things will be destroyed or made unavailable for use in evidence;
 - (d) **prejudice, loss or damage** likely to be suffered by applicant if order not made;
 - (e) **name, address, firm and commercial litigation experience** of an independent solicitor (required by **r 37B.06**) who consents to being appointed to serve the search order and supervise its execution;
 - (f) if **premises are residential**, whether or not applicant believes the only occupant is likely to be female, a child, or vulnerable person (age, mental incapacity, infirmity or English language ability)
 - If occupants likely to include female or child, the **independent solicitor should be a woman or search party should include a woman** (**4.13(a) Practice Note SC Gen 16**).
 - If occupant is vulnerable person

Undertaking as to damages

- **r 37B.03(3)**: Applicant must give the usual undertakings as to damages and must undertake to pay the independent solicitor's reasonable costs and disbursements (also **4.7 Practice Note SC Gen 16**).
 - **'Usual undertaking'** as to damages = The applicant, by its counsel, undertakes to the court that it will abide by any order which the court may make as to damages, should the court determine that the respondent has suffered any damage by reason of this order which the applicant ought to pay.

Independent solicitors

- **r 37B.06(1)**: The court **must** appoint one or more solicitors, each of whom is independent of the applicant's solicitors (the **independent solicitors**) and each of whom is prepared to give such undertakings as the Court requires, to supervise the execution of the search order and other things court thinks appropriate.

Practice Note SC Gen 16:

- **4.3**: **Search party must include independent solicitor** who will supervise the search.
- **4.8**: Independent solicitor is an **important safeguard against abuse of the order**.
- **4.9**: Independent solicitor must not be a member or employee of applicant's solicitors.

Responsibilities of independent solicitor include:

- (a) **serve the order** and the documents referred to in Rule 37B.08(1)(b);
- (b) offer to explain, and, if the offer is accepted, **explain the terms** of the search order to the respondent;
- (c) explain to the respondent that he or she has the **right to obtain legal advice**;
- (d) **supervise** the carrying out of the order;

- (e) before removing things from the premises, make a list of them, allow the respondent a reasonable opportunity to check the correctness of the list, sign the list, and provide the parties with a copy of the list;
- (f) take custody of all things removed from the premises until further order of the Court;
- (g) if the independent solicitor considers it necessary to remove a computer from the premises for safekeeping or for the purpose of copying its contents electronically or printing out information in documentary form, remove the computer from the premises for that purpose, and return the computer to the premises within any time prescribed by the order together with a list of any documents that have been copied or printed out;
- (h) submit a written report to the Court within the time prescribed by the order as to the execution of the order; and
- (i) attend the hearing on the return date of the summons, and have available to be brought to the Court all things that were removed from the premises. On the return date, the independent solicitor may be required to release material in his or her custody which has been removed from the respondent's premises or to provide information to the Court, and may raise any issue before the Court as to execution of the order.

Independent Computer Experts (ICE)

- 4.6: If it is envisaged that specialised computer expertise may be required to search the respondent's computers for documents, or if the respondent's computers are to be imaged (i.e. hard drives are to be copied wholesale, thereby reproducing documents referred to in the order and other documents indiscriminately), special provision will need to be made, and an independent computer specialist will need to be appointed who should be required to give undertakings to the Court.

Terms of Order

- r 37B.05: The terms of the search order may direct each person who is named or described in the order– to enter premises [(1)(a)(i)], to take and retain any thing described in order [(1)(c)], to make copies/ photographs of any thing in the order [(2)(b)] or anything else as Court considers appropriate [(1)(e)].

Search Orders and CPA

***Coachair v Mifsud & Anor* – Search Orders and CPA**

- Ex-parte search order – strong prima facie case that D had, prior to cessation of his employment with P, breached obligations of confidence by downloading thousands of commercially sensitive documents.
- Search order related to D and his new employer (latter not a party to the main proceeding).
- Issue: Breadth of search terms – order involved 37,507 key words to be searched for in documents and hard drives obtained when order executed.

Held (McDonald J):

- Court reduced breadth of search terms. This is consistent with the obligations under ss 23 and 24 CPA to narrow issues in dispute and to ensure that costs are proportionate to the real issues in dispute.

Freezing orders

- To stop D intentionally trying to become judgment proof/ frustrate enforcement of court order in P's favour (eg by sending assets off overseas).
- Freezing order should be viewed as an **extraordinary interim remedy** as it can restrict the right to deal with assets (even before judgment) and is commonly granted without notice (**4.3 Practice Note SC Gen 17**).

- **r 37A.02:**

- (1) The Court may make a freezing order, with or without notice to the respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied;
- (2) A freezing order may be an order **restraining** a respondent from removing any assets located in or outside Aus or from disposing of, dealing with, or diminishing the value of, those assets;
- (3) Use Form 37AA;

Test:

1. Applicant has a **good arguable case** (**r 37A.05(1)(b)**); AND
 2. Having regard to all the circumstances, there is **a danger that a prospective judgment will be wholly or partly unsatisfied** because (**r 37A.05(4)**):
 - (a) the prospective judgment debtor **might abscond**;
 - (b) or their assets might be – (i) **removed from Aus**, or from a place inside or outside Aus; or (ii) **disposed of, dealt with or diminished in value**.
- Court can make ancillary orders, if appropriate (**r 37A.03(1)**); eg for respondent to tell applicant where and what the assets are, **(2)(a)**;

Who can you get a freezing order against?

- **r 37A.04:** Respondent need not be party to a proceeding
- **r 37A.05(4):** Judgment debtor or prospective judgment debtor
- **r 37A.04(5):** A **third party**, if court is satisfied, having regard to all circumstances, that –
 - (a) there is danger that Court judgment 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 of the judgment debtor/prospective judgment debtor; or
 - (ii). the third party is in possession of, or in a position of control or influence concerning, assets of judgment debtor/prospective judgment debtor; or
 - (b) a third party, under a Court process, is obliged to disgorge assets or contribute toward satisfying the judgment.
- A **third party** who has **possession, custody or control, or ownership of assets** may be obliged to disgorge to help satisfy judgment against another person (**4.4 Practice Note SC Gen 17**).
- Third party will not necessarily be party to proceeding (*Cardile*) but will be a respondent to the application for the freezing order (**4.5 Practice Note SC Gen 17**).

What can be frozen?

- **r 37A.05(4), (5): Assets** [may be limited to assets in Australia, or **may extend to anywhere in the world**, may cover all assets without limitation, assets of a particular class, or specific assets (4.6 Practice Note SC Gen 17)].
 - Not limited to assets in the proceeding
- **Value of assets** should not exceed the likely maximum amount of the applicant's claim, including interest and costs (4.9 Practice Note SC Gen 17).
- The order should **EXCLUDE** dealings by the respondent with assets for **legitimate purposes**, in particular (4.10 Practice Note SC Gen 17):
 - (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;
 - (d) dealings and dispositions in the **discharge of obligations bona fide and properly incurred** under a contract entered into **before** the order was made.
- Where freezing order extends to assets outside Australia, the order should provide for protection of persons outside Australia and third parties (4.11 Practice Note SC Gen 17).

Affidavit in support:

- **r 37A.02(5): Affidavit in support** must contain
 - (a) **Info about the judgment** that has been obtained, *or* **info about the cause of action** including
 - (i) the **basis of the claim** for substantive relief,
 - (ii) the **amount** of the claim, and
 - (iii) if application made *ex parte*, the applicant's **knowledge of any possible defence**;
 - (b) The **nature and value of the respondent's assets**, so far as they're known, within and outside Aus;
 - (c) Matters in r 37A.05: The **danger** of respondent or person controlling assets absconding, removing assets from Aus, dealing with assets or diminishing their value;
 - (d) The **identity of any other person who the applicant believes may be affected** by the freezing order and how that person may be affected by it.
- As condition of making freezing order, applicant has to give usual **undertaking as to damages** (compensate anyone who has to expend money in carrying out the order) (4.14 Practice Note SC Gen 17).
 - If applicant has **insufficient assets**, applicant may be required to **support undertaking by providing security** (4.15 Practice Note SC Gen 17).
- Applicant is under duty to make **full and frank disclosure** of all material facts to Court (4.17 Practice Note SC Gen 17). This includes disclosure of:
 - **Possible defences** known to applicant
 - Any info which may **cast doubt on applicant's ability** to meet usual undertaking as to damages within Australia