

## INTERLOCUTORY PROCEDURES & APPLICATIONS

### Interlocutory procedures and applications

Interlocutory  
injunctions

Search orders

Freezing orders

Security for  
costs

**Interlocutory proceedings:** Application to obtain an order that does not finally determine the parties' rights in the litigation – *Hardel v Burrell*

#### Interlocutory orders:

- Can be later amended, discharged or varied by Court – *Fewin v Prentice*
- If refused, can make a second application (where change of circumstances or fresh info) – *Albany Port Authority*
- Appeal only with leave of CoA

**Must be consistent with objects and case management principles in O1 r4A and 4B.**

- Relief sought is necessary for proper conduct of the proceedings?
- Efficient and cost effective way of resolving dispute?
- Will always be a costs order ...

#### Applications:

1. Interlocutory injunctions → Order imposing a restraint on the other party to preserve the "status quo" until trial.
2. Freezing orders
  - Restrain a df (or potentially a third party with control over the df's assets) from removing its assets from Aus or disposing of, dealing with, or diminishing the value of its assets.
  - To prevent the frustration or inhibition of the Court's processes by seeking to meet a danger or prospective danger that a judgment will be wholly or partially unsatisfied.
3. Security for costs → Order that the pf provide security to cover the df's costs in the event that the pf loses the case and is ordered to pay the df's costs bcos the pf is ...
  - a. impecunious
  - b. outside the jurisdiction
  - c. bankrupt/insolvent
  - d. in default of previous costs order etc
4. Search orders
  - Compel the df to permit persons specified in the order to enter premises and to search for, inspect, copy and remove the things described in the order.
  - To secure or preserve evidence which is or may be relevant to an issue in proceedings or anticipated proceedings.

## COSTS OF INTERLOCUTORY APPLICATIONS

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Successful party on an application normally entitled to costs of the application

1. Common costs orders → **generally interlocutory costs paid forthwith and fixed.**
  - *There be no order as to costs.*
  - *Costs follow the event* → party that succeeds in the event (interlocutory application) gets costs automatically.
  - *The costs of the case management conference be **reserved*** → “reserved” until trial then court must make order.
  - *The costs of the case management conference be **costs in the cause*** → party that wins the “cause” gets costs automatically.
  - *The defendant pay the plaintiff’s costs of the case management conference **fixed in the sum of \$x and to be paid forthwith.***
  - *The defendant pay the plaintiff’s costs in any event, **to be taxed** if not agreed.*
2. Costs fixed in accordance with CPD 4.7.1.1
  - Application - \$572
  - Affidavit in support - \$572
  - Substantive contested application / special appointment - \$2574

## DOCUMENTS REQUIRED

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1. Form of application
  - a. Chamber summons (Form 77) – O59 r3
    - Generally all applications relating to the conduct of any cause or matter to be heard in chambers – O59 r1 (also CPD 4.1.4)
      - Time to plead
      - Leave to amend pleadings
      - Discovery and inspection
    - Applications for leave of the Court – O59 r1
  - b. Notice of motion (Form 65) – O59 r3
    - Application in chambers made ex parte
    - Potentially for interlocutory injunctions/freezing orders/search orders
  - c. Letter – O4A r5A; CPD 4.1.4
2. Affidavit in support – O36 r2(3)
3. Memorandum of conferral (Form 108) or waiver of conferral (Form 109) – O59 r9
4. Minute of proposed orders (Form 78) – O59 r10
5. Undertaking as to damages

## FORM OF SUMMONS

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Interlocutory applications ordinarily by chamber summons:

1. Authority [**CITE O59 r3**]

- Applications in pending proceedings in chambers made in accordance with O59 – O4 r2
- Business to be dealt with in chambers – O59 r1
  - Generally all applications relating to the conduct of any cause or matter to be heard in chambers.
  - Applications for leave of the Court.
- Application in chambers made by summons – O59 r3
- Form 77 – O59 r4

2. Requirements

- State orders sought and grounds for application – O59 r3(3)
- Supported by affidavit – O36 r2(3)
- Served 7 days before hearing date – O59 r5(1)

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**FORM OF LETTER**

O4A r5A(1): Request to make interlocutory orders and case management directions made by letter to the Case Manager.

1. Requirements – O4A r5B(1)

- File letter and any relevant documents
- Minute of proposed orders
- Email copy to associate and give copy to other parties

2. Timing

- At least 2 days before Case Manager required to make the order – O4A r5B(2)
- Otherwise can't refer to or rely on the docs without leave – O4A r5B(3)

3. Letter not required if – O4A r5A(2)

- Made orally during a case management conference **or**
- Made by way of summons or motion bcos formal process is justified by the circs of the case or nature of the request

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**FORM OF AFFIDAVIT**

O36 r2(3): Interlocutory application usually determined solely on affidavit evidence.

1. Affidavit on oath or affirmation – s 9 OASDA

- Sworn or affirmed before authorised witness (concluding statement to that effect).
- Signed on each page by deponent and authorised witness.
- Authorised witness:
  - JP, public notary, “experienced legal practitioner” (2 yrs post admission not involved in preparation of affidavit/litigation).
  - Must sign and write name and witness qualification.

- Lawyer must include endorsement – CPD 1.2.4(4): “[Name], a legal practitioner who has held a practice certificate for at least 2 years and who holds a current practice certificate.”
2. Meets form requirements – O37 r2
- State deponent’s name, address, occupation and whether a party to the proceedings or an employee of a party.
  - Docs referred to in affidavit attached and index at front of affidavit.
    - “A copy of the email marked “SM-1” is attached to this affidavit.”
    - Other party can obtain immediate production of docs referred to in pleadings or affidavits (notice to produce) – O26 r8(2).
  - Served on other parties – O72 r5, r5A
    - Affidavit in opposition filed not less than 2 days before hearing date – O59 r5(3)
    - Otherwise leave required – O37 r14
3. **Evidence in admissible form** → direct evidence unless RSC provide otherwise – O37 r6(1)
- a. **Hearsay:** May contain statements of info or belief if expressly state source of info and belief in its truth – O37 r6(2)(c), (3A)
- State source **and** belief – *Blythe*
    - **“I am informed by X and believe that**, eg on 4 August 2024, Mr Smith telephoned Ms Grant and said to her that ...”
    - Can include boiler plate depending on deponent: “The matters deposed to in my affidavit are from my own knowledge. Where I depose to matters in this affidavit on the basis of information provided to me, I believe those matters to be true and correct.”
  - To reveal original source of hearsay and provide opportunity to challenge it – *Westpoint v Goakes*
  - NOT second-hand hearsay!
- b. **Inadmissible material:**
- Irrelevant material
  - Conclusionary statements → “Fred was driving the car in a dangerous manner” (fact driving was dangerous is a conclusion, describe what Fred was doing).
  - Speculative statements → “I would have” (speculative, state “invariable practice” to do something).
  - Non-expert opinions
  - Vague language
  - Subjective state of mind (“I thought”, “I believed”) unless relevant.
- c. **Conversations:**
- Give best evidence of what the witness recalls (“To the best of my recollection, words to the effect of ...”)
  - **Avoid direct speech** unless witness recalls actual words used – *Kane’s Hire*
    - Indirect – “I said to Fred that I had read his advertisement.”

- Direct – “I said: *Fred, I have read your advertisement.*”

d. **Other defects:**

- Unnecessary to deal with facts that are not in issue.
- Docs speak for themselves → do not explain contents or state legal effect.
- Motive, offensive or argumentative language.
- Explanation/justification of deponent’s own evidence.
- Possibility of collusion if same language across multiple deponent’s affidavits.

4. Objections

- a. Affidavit may be struck out (in whole or part) and adverse costs order if:
  - i. Inadmissible – O37 r6(3)
  - ii. Irrelevant – O37 r7
  - iii. Scandalous or oppressive – O37 r7
- b. Object if **objectionable content may be material** for purposes of interlocutory application.

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**FORM OF MEMORANDUM OF CONFERRAL**

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O59 r9: Parties must confer before filing interlocutory application in chambers.

**Adverse costs orders** for failure to confer or file memorandum of conferral – CPD 4.3.2(12)

1. Memorandum of conferral (Form 108) – O59 r9(1)

→ Substantive content – **CPD 4.3.2**

- State that the **parties have conferred** to try to resolve the matters giving rise to the application.
  - In person or by telephone unless **impracticable**, then exchange of appropriate correspondence justified.
  - **Genuine attempt** to resolve the dispute or narrow the issues.
    - Not exchanging furious corro or demand to accept defeat – *Youlden*
    - Not opposing conditions – *Murray Riverside*
  - Shortly prior to making the application.
- State the **matters that remain in issue**.
  - Only matters really in dispute are referred to the Court.
  - All parties appreciate what the real issues are.

2. Memorandum seeking waiver of conferral (Form 109) – O59 r9(2)

→ Substantive content – **CPD 4.3.2**

- Court may waive requirement to confer in the case of **urgency** or **for other good reason**.
  - Urgency → freezing orders or injunction to restrain imminent action.
  - Other good reason → attempts to confer have been unsuccessful.
    - Not many circs where good reason not to confer.
    - Approach with caution.

- Must **confer to agree programming** of application for case management conference.

<p><b>FORM 108 – CPD 4.3.2.1</b></p> <p>I refer to the plaintiff’s application dated # November 2025 for summary judgment and certify that:</p> <p>1. Conferal</p> <p>The parties have conferred to try and resolve the matters giving rise to this application as follows:</p> <p>[State facts relied on to show conferral]</p> <p>(a) on 30 October 2025, the plaintiff’s solicitor wrote to the defendant’s solicitor requesting ..</p> <p>(b) on 31 October 2025, the plaintiff’s and the defendant’s solicitors engaged in telephone conferral ..</p> <p>(c) etc.</p> <p>2. Matters in dispute</p> <p>[The following/all the matters] the subject of this application remain in dispute.</p> <p>3. Conference</p> <p>The parties have agreed that, subject to the directions of the Court, the application should be heard as follows:</p> <p>(a) [in general chambers/for a special appointment] in September 2025;</p> <p>(b) programming orders [the defendant must file any affidavit(s) and written submissions seven days before the hearing];</p> <p>(c) the hearing of the application will take [two hours];</p> <p>(d) the parties unavailable dates are [29 September 2025 and 30 September 2025].</p> <p><b>OR</b></p> <p>The parties have been unable to agree a programme for the hearing of the application. The parties requested programmes are attached.</p>	<p><b>FORM 109 – CPD 4.3.2.2</b></p> <p>I refer to the plaintiff’s application dated # November 2025 for summary judgment and certify that:</p> <p>1. Reasons for not conferring</p> <p>The parties have not conferred as required by O 59 r 9(1) for the following reasons:</p> <p>[State facts relied on to support waiver]</p> <p>(a) on 30 October 2025, the plaintiff’s solicitor wrote to the defendant’s solicitor requesting ..</p> <p>(b) on 31 October 2025, the plaintiff’s solicitor attempted to engage in telephone conferral with the defendant’s solicitor ...</p> <p>(c) the defendant has refused and show it intends to continue to refuse to confer despite the plaintiff’s endeavours to do so.</p> <p>2. Intention to seek waiver</p> <p>The [plaintiff/defendant] intends to move the Court to waive the operation of O 59 r 9(1).</p> <p>3. Conference</p> <p>The [plaintiff/defendant] requests that the application should be heard as follows:</p> <p>(a) [in general chambers/for a special appointment];</p> <p>(b) programming orders [the defendant must file any affidavit(s) and written submissions seven days before the hearing];</p> <p>(c) [give more details re time required if have conferred];</p> <p>(d) the [plaintiff/defendant’s] unavailable dates are [29 September 2025 and 30 September 2025].</p>
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## INJUNCTIONS

Interlocutory injunction: Order to preserve the “status quo” until trial – *Mineralogy v Sino Iron*

1. Power – s 25(9) SCA: Court may grant an interlocutory injunction “in all cases which it shall appear to be just or convenient.”
2. Test – *Mineralogy v Sino Iron*
  - a. Has the pf made out a **prime facie case**?
    - Show there is a serious question to be tried – *Life Combat Sports*
    - Consider nature of rights asserted and practical consequences of grant.
    - Breach of contract, nuisance, trespass, breach of confidence etc

- b. Does the **balance of convenience favour the grant** of interlocutory injunction?
  - Inconvenience/injury to pf if refused > inconvenience/injury to df if granted.
    - Pf → loss of profit, additional costs, loss of reputation?
    - Df → contract for services, not ready to perform, prejudice, damages adequate remedy – *Sino Iron v Mineralogy*
  - If quia timet must show that df threatened action will cause imminent or substantial damage to pf – *John Holland*

## 2. Application

- a. Summons or notice of motion if ex parte – O59 r3
  - Originating motion (Form 64) and notice of motion (Form 65) – O54 r5
  - Ex parte if urgent or inappropriate to give notice to df.
  - Duty of full disclosure on ex parte application – *Oswal*
    - Possible defences
    - Any financial info re inability to meet undertakings
- b. **Supported by affidavit** – O36 r2(3)
  - Balance of convenience in pf's favour.
  - Positive actions (if any) avail to pf (eg whether can make alternative arrangements – *Barter Enterprises*).
- c. Minute of proposed orders (Form 78) – O59 r10
- d. Memorandum of conferral (Form 108) or waiver of conferral (Form 109) – O59 r9
- e. **Undertaking as to damages** – CPD 4.3.4
  - Given by anyone who is a beneficiary of the restraint.
  - Even if not party to the proceedings.
- f. Usually written submissions
- g. **Potentially certificate of urgency** – CPD 4.3.3
  - Given by solicitor for party desiring to make urgent application.
  - Undertake to produce certificate at hearing of application.

### EXAMPLE SUMMONS & PROPOSED ORDERS

*Let all parties concerned attend the Supreme Court at 9:00am on Wednesday 24 September 2025 on the hearing of an application on the part of the plaintiff for orders that:*

1. **until judgment in this action, or further order,** [substance of interlocutory injunction – the defendant (and its servants, employees or agents) be restrained from taking any action or causing any action to be taken which ceases the supply of water from the bore on Lot 2, Jobe Beach Road to Lot 1, Jobe Beach Road];
2. **there be liberty to apply;**
3. **the costs of this application be in the cause/reserved.**

**The grounds of this application are:**

1. [cause of action – breach of clause 14 of the Water Agreement];

2. *the plaintiff has a prima facie case for relief on the basis that [the defendant is obliged to continue to supply water to Lot 1, Jobe Beach Road pursuant to a deed entered into between the plaintiff and the defendant];*
3. *the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs the injury which the defendant would suffer if an injunction were granted because [outline inconvenience/injury – the plaintiff will:*
  - a. *lose \$1,000,000 in revenue for each week of the summer holiday period; and*
  - b. *be required to make approximately 50 full-time equivalent staff redundant].*

*Dated Wednesday 17 September 2025.*

*This summons was taken out by the plaintiff's solicitors.*

*To: Shanahan Pty Ltd*

3. **Alternative** to interlocutory injunction → undertaking to the Court.
  - Df may offer undertaking in lieu of injunction.
    - Can control terms and scope of undertaking through negotiation.
    - Potential costs savings.
  - Court must not accept undertaking if no power to grant equivalent injunction – *ACCC v Real Estate Institute*
  - Undertaking enforceable as if it were an injunction – O55 r12
4. Variation or dissolution of injunction – *Mercanti*
  - Assumption interlocutory injunction was rightly made.
  - Only where material change of circumstances or new material which could not reasonably have been put before the Court.
5. Enforcement of undertaking as to damages → in Court's discretion.
  - a. Generally pf who has failed at trial on the merits should recompense df unless df's conduct makes it unjust to do so – *Ansett Transport*
  - b. Inquiry as to damages – *European Bank*
    - i. What is the alleged loss
    - ii. Did the loss flow from the injunction
    - iii. Could the loss have been foreseeable

## **FREEZING ORDERS**

### **Against prospective judgment debtor**

1. Power
  - a. O52A r2: Court may make a freezing order for the purpose of preventing the frustration or inhibition of the Court's processes by seeking to meet a danger that a prospective judgment will be wholly or partially unsatisfied.
    - i. Restrain from removing any assets
    - ii. Restrain from disposing of, dealing with, or diminishing the value of those assets
  - b. Inherent jurisdiction – O52A r6



2. **Jurisdictional criteria** – O52A r5(1)-(4):

- a. Pf has been given a judgment against the df **or** pf has a **“good arguable case”** on an accrued or prospective cause of action.
  - “Good arguable case” → reasonably arguable case on legal and factual matters – *Rimex Wheel*
- b. There is a **real or substantial** danger that the prospective judgment will be wholly/partially unsatisfied because – *Duro Felguera*
  - i. the prospective debtor/third party might abscond **or**
  - ii. assets of the prospective debtor/third party might be removed or otherwise disposed of, dealt with, or diminished in value –
    - Sufficient to justify drastic remedy of freezing order – *Duro Felguera*
    - eg general dishonesty of df → risk of asset dissipation – *Rimex Wheel*

3. Court should **exercise its residual discretion** to make the freezing order – *Rimex Wheel*

- Assets to be frozen?
- Duration of freezing order?
- Undertakings by pf?
- Carve outs for living, legal, business expenses?

4. Application

- a. Notice of motion bcos **ex parte** – O59 r3
  - Originating motion (Form 64) and notice of motion (Form 65) – O54 r5
  - Duty of full disclosure on ex parte application – *Oswal*
    - Possible defences
    - Any financial info re inability to meet undertakings
- b. **Supported by affidavit** – O36 r2(3)
  - Substantive content – **CPD 9.6.1(20)**
    - Basis of cause of action.
    - Amount of claim.
    - Address the jurisdictional criteria.
    - Knowledge of possible defence if ex parte.
    - Nature and value of df’s assets.
    - Any person who may be affected (other than df) and how affected.
- c. **Minute of proposed orders** (Form 78) – O59 r10
  - What should be included in the freezing order – **CPD 9.6.1.1**
    - Nature of assets to be frozen → all assets without limitation, assets in a particular place, classes of assets, specific assets (but value should not exceed pf’s claim).
    - Duration of freezing order
      - More limited if ex parte.

- Return date of motion 1 or 2 days after order is made so df has opportunity to be heard.
    - Exclusion of any living, legal and business expenses and dealings in discharge of good faith obligations.
    - Ancillary orders to support freezing order eg disclosure of assets.
    - Liberty for df to apply on short notice.
  - d. **Memorandum of waiver of conferral** (Form 109) – O59 r9
  - e. **Undertaking as to damages** (and potentially security) – **CPD 9.6.1(16)-(17)**
    - Pf must pay compensation to any person affected by the freezing order.
    - May be required to provide security to support undertaking if insufficient assets.
  - f. Usually written submissions
5. Ancillary orders – O52A r3: Court may make an ancillary order to a freezing order as the Court considers appropriate.
- For purposes of eliciting info re assets or determining whether the freezing order should be made.
  - Example: Disclosure of assets, privilege against self-incrimination – CPD 9.6.1(14)
6. Costs – O52A r8: Usually “**costs in the cause/reserved**” – CPD 9.6.1.1

**EXAMPLE AMOUNT OF FREEZING ORDER – *Rimex Wheel***

- Amount of pf’s claim - \$197k
- Interest - \$12k
- Legal costs - \$51k
- Carve outs for living expenses (\$150/day) and legal expenses (\$5k lump sum).

**Against third party with control over prospective debtor’s assets**

1. Test – O52A r5(5): Court may make a **freezing order against a third party** if satisfied that:
  - a. there is a danger that a prospective judgment will be wholly or partially unsatisfied because:
    - i. the third party holds a power over the assets of the prospective judgment debtor  
**or**
    - ii. the third party possess or controls the assets **and**
 → Situation where third party (bank) controls df’s assets.
  - b. a process may be avail to the pf under which the third party may be obliged to disgorge assets or contribute towards the judgment.
2. Court should **exercise its residual discretion** to make the freezing order – *Rimex Wheel*
3. Usually must pay all reasonable expenses and costs of the third party.

**SECURITY FOR COSTS**

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1. Power: