

Extraordinary Injunctive Relief: An Australian and Commonwealth Perspective

Panel 4: Thursday, 7 November 2019, 2:00pm

Sally Heidenreich, Murray Chambers

Adelaide, Australia



Freezing (*Mareva*) orders in Australia

- The *Mareva* order – “one of the law’s two nuclear weapons”: *Bank Mellat v Nikpour* (1985) FSR 87, at 92.
- Australian common law position derived from historical English authority:
 - *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd’s Rep 509.
 - *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093.
 - *Stewart Chartering Ltd v C&O Management SA* [1980] 1 WLR 460.
 - *Barclay-Johnson v Yuill* [1980] 1 WLR 1259.
 - *Rahman v Abu-Taha* [1980] 1 WLR 1268.
 - *Iraqi Ministry of Defence v Arcepey Shipping* [1981] QB 65.
 - *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923.

Freezing (*Mareva*) orders in Australia

- Legislative framework:
 - Rules differ (slightly) from jurisdiction to jurisdiction.
 - Federal Court of Australia: Rules 7.32 to 7.38.

7.32—Freezing Orders

- (1) *The Court may make an order (a **freezing order**), with or without notice to a 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 Australia or from disposing of, dealing with, or diminishing the value of, those assets.*
- The Federal Court Rules also make express provision for:
 - Ancillary orders (Rule 7.33).
 - Orders against non-parties (Rule 7.34).
 - Orders against actual or prospective judgment debtors (Rule 7.35).
 - Service outside of Australia (Rule 7.37).
 - Costs (Rule 7.38).



Freezing (*Mareva*) orders in Australia

- Legislative framework (continued):
 - Supreme Court of South Australia: Rule 247.
247—Freezing Orders
 - (2) *Freezing order*
 - (a) *The Court may make an order (a freezing order), upon or without notice to a 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.*
 - (b) *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.*
 - The South Australian Supreme Court Rules expressly provide for:
 - Ancillary orders (Rule 247(3)).
 - Orders against non-parties (Rule 247(4)).
 - Orders against actual or prospective judgment debtors (Rule 247(5)).
 - Service outside of Australia (Rule 247(7)).
 - Costs (Rule 247(8)).



Freezing (*Mareva*) orders in Australia

- Legislative framework (continued):
 - *Corporations Act 2001* (Cth): Section 486A.

486A—Court may make an order to prevent officer or related entity from avoiding liability to company

(1) The Court may make one or more of the following:

- (a) an order prohibiting, either absolutely or subject to conditions, an officer, employee or related entity of a company from taking or sending out of this jurisdiction, or out of Australia, money or other property of the company or of the officer, employee or related entity;*
- (b) an order appointing:*
 - (i) a receiver or trustee, with specified powers, of property of an officer or employee of a company, or of property of a related entity of a company that is a natural person; or*
 - (ii) a receiver, or a receiver and manager, with specified powers, of property of a related entity of a company that is not a natural person;*
- (c) an order requiring an officer or employee of a company, or a related entity of a company that is a natural person, to surrender to the Court his or her passport and any other specified documents;*
- (d) an order prohibiting an officer or employee of a company, or a related entity of a company that is a natural person, from leaving this jurisdiction, or Australia, without the Court's consent.*



Freezing (*Mareva*) orders in Australia

- Legislative framework (continued):
 - *Corporations Act 2001* (Cth): Section 1323.

1323—Power of Court to prohibit payment or transfer of money, financial products or other property

- (1) *Where ... the Court considers it necessary or desirable to [protect] the interests of a person to whom [another person] is liable, or may be or become liable, to pay money ... the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:*
- (d) *an order prohibiting a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;*
 - (e) *an order prohibiting a person holding money, financial products or other property, on behalf of the relevant person, or on behalf of an associate of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the financial products or other property, to, or to another person at the direction or request of, the person on whose behalf the money, financial products or other property, is or are held;*
 - (f) *an order prohibiting the taking or sending out of this jurisdiction, or out of Australia, by a person of money of the relevant person or of an associate of the relevant person;*
 - (g) *an order prohibiting the taking, sending or transfer by a person of financial products or other property of the relevant person, or of an associate of the relevant person ... from a place in this jurisdiction to a place outside this jurisdiction (including the transfer of financial products from a register in this jurisdiction to a register outside this jurisdiction) ...*

Freezing (*Mareva*) orders in Australia

- High Court of Australia:
 - *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612: A *Mareva* order is not a security.
 - *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380: A *Mareva* order is not an injunction.
 - *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199: The doctrinal basis of the *Mareva* order is the court's power to protect its own processes.
 - *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1: A *Mareva* order can be made in relation to a prospective judgment of a foreign court.
 - *ABCC v CFMEU* (2018) 262 CLR 157: A *Mareva* order is “*the paradigm example of an order which is intended to prevent the frustration of the court's processes.*”



Freezing (*Mareva*) orders in Australia

- Establishing an evidentiary basis for a freezing order application:
 - Statements regarding intention to dissipate assets (or arrangements made to do so)
 - Actual asset dissipation or dealing with assets
 - Fraud or serious wrongdoing
 - Prior unreliable or untrustworthy conduct
 - Method of doing business or corporate structure unreliable or untrustworthy
 - Domiciled in, or fixed assets, business or family located within, jurisdiction
 - Highly-liquid, easily-convertible assets
 - Credit record
 - Chain of enquiry leading to a “*blank wall*”
 - Discreditable or evasive conduct in response to enquiries
 - Substantial assets in other jurisdictions where Australian judgments enforceable



Anti-suit injunctions in Australia

- Australian common law position derived from historical English authority:
 - *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871:
 - Jurisdiction should only be invoked when the “*ends of justice*” require it.
 - Directed not at the foreign court, but at the party proceeding or threatening to proceed in the foreign jurisdiction.
 - Issued only against a party “*amenable*” to the court’s jurisdiction.
 - Jurisdiction to award should be exercised with caution because of effect on foreign courts.
 - Appropriate to restrain “*vexatious*” or “*oppressive*” proceedings, to be considered on a case-by-case basis.
 - Court must consider not only the injustice to the defendant of being pursued in a foreign forum, but also the injustice to the plaintiff of not being able to pursue a particular claim.



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Anti-suit injunctions in Australia (and the Commonwealth)

- Anti-suit injunctions in the context of compulsory statutory regimes:
 - Competition and consumer law:
 - Australian legislation: *Competition and Consumer Act 2010* (Cth).
 - Section 18 to Schedule 2: “A person must not, in trade and commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”
 - *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No. 2)* [2018] FCA 1093: Anti-suit injunction appropriate to restrain proceedings in Illinois despite a choice of law clause in favour of the courts of Illinois, because the Plaintiff would otherwise be deprived of a cause of action under section 18.
 - Insolvency law:
 - *Carlyle Capital Corporation (in liq) v Conway* [2013] 2 Lloyd’s Rep 179: Anti-anti-suit injunction appropriate to restrain proceedings in Delaware because Guernsey the only jurisdiction in which all of the Plaintiff’s claims, both statutory and equitable, could be pursued.
 - *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41: Anti-suit injunction appropriate to restrain a foreign creditor from pursuing proceedings in their home jurisdiction that would result in a judgment that might elevate their priority over other unsecured creditors.

Questions?

Sally Heidenreich

Phone: +618 8110 9100

Email: sally.heidenreich@murraychambers.com.au

Web: <https://www.murraychambers.com.au/chambers-members/sally-heidenreich>

Mail: Murray Chambers
12 Coglin Street
Adelaide SA 5000
Australia

(質問は日本語でも受け取れますので、どうぞ遠慮なく連絡ください。)

