

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Australia]

2020



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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

- 1. Is it possible to apply for an interim measure in order to assure the effective enforcement of a Court decision?**

Answer: Yes. Under various legislation concerning civil procedure, interim and precautionary measures can be obtained.

- 2. Is it mandatory to pay court fees for this type of application?**

Answer: Yes. Each court specifies the fees involved in making an interim and precautionary measure application. The fee will differ depending on whether the applicant is an individual or corporation and the jurisdiction of the court.

- 3. What is the ordinary/average length of time for this kind of procedure?**

Answer: The average length of time for an application for an interim measure will vary between jurisdictions. If sufficient urgency and potential for irreparable harm (such as, the threat of a debtor dissipating assets) can be demonstrated, an urgent application can be heard and determined on an urgent basis. This is usually done by approaching a duty judge in a state Supreme Court or the Federal Court of Australia.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES.

- 1. For which types of interim measures are the parties allowed to apply? (e.g., injunction, freezing orders, caveat, restraining order, etc.)**

Answer: There are several measures which are contained in various pieces of civil procedure legislation such as:

- 1. Inspection, Detention and Preservation of Property:** This provides for an order for the inspection, detention and preservation of any property whether in the possession, custody or power of a party;
- 2. Disposal of Perishable Property:** Where the proceeding concerns property which is of a perishable nature or likely to deteriorate or diminish in value if kept, an order may be made for its sale or other disposal;
- 3. Freezing Orders:** This order is made for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that an order or prospective order of the court will be wholly or partly unsatisfied. The order may include restraining a party from removing assets located in or outside of Australia or disposing of, dealing with or diminishing the value of such assets. It can be made with or without the respondent's knowledge.

4. Before issuing a freezing order, the court will generally require the applicant to give an undertaking to compensate the debtor for damage suffered as a result of a wrongfully issued order;
5. Search Orders: An applicant may seek an order requiring a debtor who holds goods relevant to the proceeding, to enter a premise in order to search for and seize the goods;
6. Urgent Interlocutory Injunctions: An urgent injunction can be granted at any stage of a proceeding or before the proceeding where the application is considered urgent;
7. Appointment of a Receiver: The court may order the appointment of a receiver to manage the business pending the eventual outcome of any proceedings.

There are also various interim measures available under specific statutes providing the courts with powers to grant caveats and injunctions.

III. PROCEDURE

1. Competent Court

a) Which court has jurisdiction to grant these interim and precautionary measures?

Answer: The interim and precautionary measures may be granted in both Federal and State and Territory courts, depending on the jurisdiction of the application to register or recognise the foreign judgment. The jurisdiction under which the measures are to be sought will depend on the nature of the proceeding.

The *Foreign Judgment Act 1991* (Cth) (**FJA**) specifies the appropriate court for the type of judgment seeking to be enforced:

- where the judgment is a money debt ordered during proceedings under the Commerce Act of 1986 of New Zealand (other than under s36A, 98H or 99A) - the Federal Court of Australia or the Supreme Court of a State or Territory
- where judgment is not a money debt but given in such a proceeding - the Federal Court of Australia
- in any other case - the Supreme Court of a State or Territory

2. When can the application for interim and precautionary measures be submitted?

- a) Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?**

Answer: An application for interim or precautionary measures may be made at the time of the filing of the proceeding. The underlying lawsuit will usually need to be accompanied with a Notice of Motion or interlocutory process setting out the interim measures sought and a supporting affidavit.

3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g., deadline to submit the lawsuit)

Answer: An application for an interim or precautionary measure may be made prior to the filing of an application where it is considered urgent. The party making such an application for a measure prior to the commencement of proceedings may be ordered to give an undertaking to the court that the proceeding will be commenced within a certain amount of time as specified by the court.

4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes. Interim orders may be made at any stage during the proceeding; however, applications for urgent injunctions will generally not succeed if there has been a delay in making the application, so these should be applied for as early as possible.

5. Criteria used by the court for granting these measures

- a) What requirements must be fulfilled in order to apply for an interim measure? (e.g., periculum in mora, fumus boni iuris, security, etc.)**

Answer: Before the court will grant an order for an interim measure, the court must be satisfied that there is:

A prima facie case

There must be a probability at trial, that on the current evidence, the plaintiff will be entitled to relief. A plaintiff is therefore required to establish the primary basis of its claim.

Balanced against the Risk of Detriment

While the order is likely to cause detriment to one party in some way, the court will consider the nature of the applicant's claim and the competing interest of any parties potentially affected by the proposed order.

No Practical Effect of Determining the Proceedings

Where the grant or refusal of such an application may lead to the effective determination of the main proceeding, the court has a duty to balance the risk of injustice to either party.

Balance of Convenience

The courts will consider the most convenient form of interim measure and any possible difficulties in enforcing such an order.

Undertaking as to Damages

The Court will usually require an undertaking from the applicant to compensate the respondent for any loss or damages the respondent may suffer from the imposition of interim relief if it is ultimately successful.

6. Procedure

- a) Which are the main steps of the procedure after filing the interim measure application? (e.g., holding a hearing, presenting evidence, etc.)**

Answer: After the interim application has been filed and served on all affected parties, the court will convene a hearing. At the hearing, any other party may also make an application in relation to the proceeding. The court may make orders in relation to any applications or otherwise adjourn the hearing until a later date.

Furthermore, the court may give any directions it deems necessary as to the order of evidence and the general conduct of the proceedings.

- b) Is it possible for the Court to order an interim measure without hearing the other party? (in audita parte debitoris). If YES, under what circumstances can the parties apply for it?**

Answer: It is possible for an interim measure hearing be to heard without the proposed defendant being given prior notice. This is usually in cases of extreme urgency where for example, the other party cannot be contacted but there is a pressing need for orders to be made. Generally, unless there is a real need for urgency, notice must be given to all parties affected by the orders being sought.

c) What are the main steps of the procedure in this case?

Answer: Where the application is made *ex parte*, an applicant must disclose all material facts to the court including any information which may be adverse to the applicant's case. The applicant would also need to provide evidence to the court of its attempt to contact the respondent or evidence of the urgency of the matter which necessitates the hearing of the matter without the respondent.

In particular, an applicant is to provide material disclosure of any information which is likely to influence the court in the making of any orders. A failure to disclose may lead to any orders made being dissolved and exposure to a costs order.

7. Opposition of the defendant

a) Is it possible for the defendant to oppose interim and precautionary measures?

Answer: Yes. The defendant is able to oppose interim and precautionary measures both before and during the hearing.

b) Is it possible for the defendant to ask the Court for the substitution of the interim measure for a guarantee?

Answer: The defendant may request that in lieu of an interim measure, usually an injunction, the court accept an undertaking, without admission, not to engage in the conduct being sought to be restrained. An undertaking effectively has the same force as an injunction and can be enforced in the same way. The court may, under certain circumstances, also accept a bank guarantee or other security in order to ensure it is possible for judgment to be met if obtained.

8. Appeal

a) Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?

Answer: An appeal may be granted from a court's decision in relation to any orders made. Firstly, a party must seek leave to appeal the decision made in relation to the application. There are time periods in which a leave to appeal application must be filed which differs within different jurisdictions. Generally, a leave to appeal application must be filed between 14- 28 days after the decision is made.

b) Is it possible to enforce the interim measure once an appeal is filed?

Answer: The interim measure may continue to be enforced despite a pending appeal, subject to any order of the appellate court staying the enforcement of the lower court's order.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. Is it possible to enforce the interim measure when the other party obstructs it?

Answer: Yes. General enforcement methods are available to an applicant who wishes to enforce an order. There are various enforcement methods which the applicant may employ even when the other party obstructs the enforcement. For instance, if a party refuses to pay a judgment registered or recognised in Australia, the judgment creditor may apply for garnishee orders for payment of the judgment debt from judgment debtor's bank account or wages.

2. Is it possible to modify a previous interim measure?

Answer: Where an order has been made, the court has the power to set aside or modify the order. The other party is able to apply to set aside or vary an order.

The court will consider where there is a material change in circumstances or if there is new evidence that was not available at the time the order was made.

3. When is it possible to raise an interim measure?

Answer: At any time in the proceedings, including before, during or after the filing of the main suit.

4. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

Answer: There will be a filing fee at the time that the motion is filed, depending on the jurisdiction. Costs can also be ordered against the unsuccessful party to an interim application, although costs are usually ordered against an unsuccessful party at the end of the totality of the main proceedings.

V. ARBITRATION

1. Is it possible to apply for an interim measure in order to assure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?

Answer: Under various jurisdictions, an arbitral tribunal can, at the request of a party, grant interim measures including:

- maintaining or restoring status quo pending the determination of the dispute

- preventing an action which is likely to cause harm or be prejudicial to the arbitral process itself
- the preservation of assets of which a subsequent award may be satisfied
- the preservation of evidence which may be relevant to the resolution of the dispute

A court can also grant interim measures of protection - see answer A under Foreign Procedure and Arbitration below.

2. Are the arbitrators entitled to order an interim measure?

Answer: Yes. An arbitral tribunal may make such orders, whether a sole arbitrator or a panel of arbitrators.

VI. FOREIGN PROCEDURE & ARBITRATION

1. Is it possible to apply for an interim measure before your country Courts in order to assure the effective enforcement of a foreign Court Decision or Arbitration Award? If YES: how is this procedure executed?

Answer: Yes. Under the *International Arbitration Act 1974* (Cth), an arbitration award may be enforced in Australia where the award was made in a country party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The award is enforceable under any court of a State or Territory as well as the Federal Court of Australia. The application for an interim measure will be made in accordance with the civil procedure rules contained in the relevant jurisdiction and court as outlined above.

VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.

1. Please state/provide any other issues of interest in your jurisdiction.

Answer: None.

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