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Topic 6: Discovery & Interrogation

1. Discovery

- Provides for the prior to the commencement of proceedings, or prior to the commencement of a third-party claim: **O 32**
  - Sometimes a person may be confident they are a victim of a civil wrong, but may not know the ID of the person
  - **Example**: A person is defamed, but does not know the source of the defamatory comment

- - Person may have suffered loss as a result of being supplied with defective good, and they know who supplied them, but having thrown out the package may not know who the manufacturer is, and they want to sue

A. *Discovery before issuing proceedings*

1. **Ask:** How do I seek discovery of an identified Individual to take action against?
   - **Test:** Rule 32.03(1)
   (1) A person may apply to the court if
       (a) they have made reasonable inquiries and are unable to ascertain the description of the person sufficiently for the purposes of commencing proceedings and
       (b) there is someone who is likely to have knowledge of facts or possession of documents which might assist in the ascertainment of the ID of the possible defendant
           NB: You need to find this out prior to the application being made to the court as the court does not to have its time wasted if you can readily obtain the information through sending of letter.
   (2) (a) Court may order for an oral examination of a person and/or for discovery or production of relevant documents
           NB: This is not available to a P wanting to ID the whereabouts of a named D once proceedings against D have started, it is only available to those ID (b)
   - **Orders:** Rule 32.03(3)
   (3) The court orders the person or corporation to produce any document or thing in their possession related to the description of the person concerned

2. **Ask:** Does the Plaintiff have a case?
   - If yes, then proceed to **r 32.05** for the test.
   (a) They must have a reasonable cause to believe that they have a cause of action against the ascertained party; and
   (b) Must have made reasonable inquiries, without being able to obtain sufficient information for them to be able to decide whether to commence proceedings; and
   (c) There must be a reasonable cause to believe that the prospective defendant possesses relevant materials.
       - This rule also applies to a defendant seeking to joining 3 parties.
       o Procedure (commenced by originating process with affidavit in support & Costs obtained in **rr 32.08 & 32.11(1)** [Intert page number]

B. *Discovery After Issuing Proceedings*

There is an overarching obligation to disclose the existence of all documents, that have been or are in that person's possession, custody or control of which the person is aware and ought to reasonably consider, are critical to the resolution of the dispute.

Overarching obligation to disclose existence of documents
(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
    (a) of which the person is aware; and
    (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
(2) Disclosure under subsection (1) must occur at—
    (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
    (b) such other time as a court may direct.

Ask: When is it available to be used?
- Normally available only where proceedings have been commenced by writ or where an order has been made that they are taken to have been commenced by writ **Rule 29.01**
- Normally available only after pleadings have closed: **Rule 29.07** However, the court may order otherwise: **CPA s 55(2)(e)**
    2) Without limiting subsection (1), a court may make any order or give any directions—
       e. requiring discovery of specified classes of documents prior to the close of pleadings;

However, limitations do apply, and the court may limit discovery to particular documents or classes of particular questions: **Rule 29.05 (Order Limiting Discovery)**
    In order to prevent unnecessary discovery, the Court may, before or after any party is required to make discovery by virtue of a notice for discovery served in accordance with Rule 29.02, order that discovery by any party shall not be required or shall be limited to such documents or classes of document, or to such of the questions in the proceeding, as are specified in the order.

Ask: What is the time period for discovery of documents? = within 42 days where notice for discovery is served: **Rule 29.03**
Ask: What form should the 'Affidavit of Documents' take? = Shall be in the Form 29B and shall

- Identifies documents which are or have been in party's possession
- Enumerates them in convenient order and describes them sufficiently to enable them to be identified;
- States which are in possession and which aren't; for those that aren't a description of the docs, when they parted with the document and their belief as to what has become of the document
- States grounds for claiming privilege in relation to those documents for which privilege is claimed
  - **Rule 29.04(d)**

Scope of Discovery
General discovery requires documents to be discovered if the party relies on them; they adversely affect a party's case, or if they support another party's case: **Rule 29.01.1**
  (1) **Unless the Court otherwise orders, discovery of documents pursuant to this Order is limited to the documents referred to in paragraph (3).**
  (2) Paragraph (1) applies despite any other rule of law to the contrary.
  (3) **Without limiting Rules 29.05 and 29.07, for the purposes of this Order, the documents required to be discovered are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given—**
      (a) documents on which the party relies
      (b) documents that adversely affect the party's own case;
      (c) documents that adversely affect another party's case;
      (d) documents that support another party's case.
  (4) Notwithstanding paragraph (3)—
      (a) if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is given, the party giving discovery is not required to discover that document;
      (b) a party required to give discovery who has, or has had in his, her or its possession more than one copy, however made, of a particular document is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.
  (5) For the purposes of paragraph (3), in making a reasonable search a party may take into account—
      (a) the nature and complexity of the proceeding;
      (b) the number of documents involved;
      (c) the ease and cost of retrieving a document;
      (d) the significance of any document to be found; and
      (e) any other relevant matter.
Note that this is a more restrictive test than the older common law test in Peruvian Guano.
  - The Court can make an order or general discovery at any time: **Rule 29.05.1**
  - May order limiting discovery to prevent unnecessary discovery: **Rule 29.05**
  - The court may also order for expanded discovery: **Rule 29.05.2**
    - This requires discovery of documents other than those falling within **Rule 29.01.1(3)**
      - **Example:** All documents that may assist must be disclosed, and if OP thinks another party may have a lead in evidence, then that party can make an application for expanded discovery.
There are some documents that do not need to be provided due to privilege:
Test: **Whether the documents were prepared for the dominant purpose of submission to legal advisers for advice, or for use in legal proceedings.**
  - Legal Professional purposes: *Evidence Act 2008* (Vic) s 117-126; Esso Australia Resources v Commissioner of Taxation
  - Privilege against self incrimination: *EA 2008* (Vic) s 128
  - Documents evidencing settlement negotiation: s 131A
  - Confessional Communisation: ss 127, 131A
Public Policy reasons: National Security: s 130; Commercial sensitive information/Trade Secrets r 29.05
  - These can be challenged to provide documents on basis of privilege: **Rule 29.11**

Inadequate Discovery
Ask: Has this occurred?
  - If yes, consider that the court may order that a party discloses the documents in its possession: **r 29.08**
    - You would write to the party, and if they refuse, you have a bass for seeking an order, and would make the application with the appended affidavit listing your correspondence.
Ask: Can there be a request ordered for discovery because of non-compliance with discovery
  - Yes, the court can make such an order where P's claim can be dismissed, or D's defence may be struck out: **Rules 29.11, 29.12.1; CPA s 56(2)(j)**

Next Step >
Inspection:
  - It can be determined which documents the parties wish to inspect: **Rule 29.13**
  - They may want to look at all the documents *But this is expensive*: Will demand to see important ones

Documents no longer in possession
- Sometimes documents have been destroyed or abandoned prior to imminent proceedings
- Orders may be made that the party in possession take steps to ensure the documents are provided for the purpose of disclosure
- Destroyed prior to litigation: *British American Tobacco Australia Services Ltd v Cowell (representing the estate of McCade (dec'd)* (2002) 7 VR 524
    - o Trial Judge held that BAT and then solicitors Clayton Utz adopted a 'document retention policy' where thousands of documents were destroyed prior to the litigation or warehoused during a time where there was no pending litigation against BAT. Awarded P $700,000
- **Offence:** Destruction of documents = criminal offence**: *Crimes Act 1958* (Vic) s 254.**

C. *Discovery from Non-Parties:*
- **Rule 32.07:** Permits discovery from non-parties after proceedings have commenced:
    - o An applicant who is a party to a proceeding can make an application to the court to order a person who is not a party to make discovery of a particular document
    - o The order will be made if that non-party has or likely to have or has had or is likely to have had in their possession any document which relates to any Q in the proceeding.

2. Interrogatories
- These are documents containing questions which the other party must answer and to get facts from the other party which will help the case.

Test: Rule 32.02
(1) Subject to the <u>other</u> paragraphs of this Rule, any <u>party</u> may <u>serve</u> interrogatories on another <u>party</u>relating to any <u>question</u> between them in the <u>proceeding</u>.
(2) Where the pleadings between any parties are closed, interrogatories may be <u>served</u> without leave of the Court by any of those parties on any <u>other</u> of them.
(3) Where paragraph (2) does not apply, the Court may <u>order</u> that any <u>party</u> may <u>serve</u> interrogatories on any <u>other</u> <u>party</u>.
(4) By leave of the Court an <u>interrogating party</u> may <u>serve</u> further interrogatories.
(5) For the purpose of <u>Rule 63.70</u>, an interrogatory <u>served</u> without reasonable cause is work which is not necessary.

Ask: What is the time period for answering questions? = must be filed and served in affidavit form within 42 days: **Rule 30.04**
- Answers must be specific, addressing the substance of the interrogatory without evasions unless objectionable: **Rule 30.06**

Refusing to Answer (Justifications)
Ask: What are the justifications to refuse to answer? **Rule 30.07**
    - o Parties must answer in a non-evasive manner, except where it
        - ▪ Does not relate to any question
        - ▪ Unclear, vague
        - ▪ Oppressive
        - ▪ Requires them to give an opinion which they are not qualified to do.

Effect of Answers – **Rule 30.11**
Failure to Comply: - **Rules 30.09, 30.09.1**
- Court may order the party answer or answer further, as the case may be, within such time as it directs.