

# GATHERING EVIDENCE

## 1. DISCOVERY

- **[TIP]**: Discuss under SCR and CPA (OO to disclose existence of critical docs at earliest opportunity) (**CPA, s 26**)).

### 1.1. PRELIMINARY DISCOVERY: TO IDENTIFY A DEFENDANT

- **IF (SCR, r 32.03(1))**:
  - **(a)** Prospective P has made **reasonable inquiries** and is unable to identify D to bring a proceeding against; and
  - **(b)** It appears that a person has or is likely to have **relevant docs or knowledge** to assist identification
- = Court may **ORDER that person to (SCR, r 32.03(2))**:
  - **(a)** Attend court to be **orally examined** re the description of the person (D); or
  - **(b)** Make **discovery** to the prospective P, re D's identity.
- NB: Preliminary discovery CANNOT be used to identify D's location or gather evidence.
- NB: Court may impose restrictions on how the evidence is used by prospective P (e.g. **Dallas Buyers Club** – FCA prohibited DBC from disclosing customers' details to 3<sup>rd</sup> parties or using details for any purpose other than recovering compensation).

### 1.2. PRELIMINARY DISCOVERY: TO IDENTIFY A CLAIM

- **IF (SCR, r 32.05)**:
  - **(a)** There is *reasonable cause* to believe that prospective P has/may have the **right to relief** from prospective D;
  - **(b)** *After making all reasonable inquiries*, prospective P **lacks sufficient info** to enable them to decide whether to commence a proceeding; AND
  - **(c)** There is *reasonable cause* to believe that someone has, is likely to have, has had, or is likely to have had in their **possession any doc** relating to the Q whether prospective P has the right to obtain relief, AND that inspection of the doc **would assist prospective P** to make the decision
- = Court may order that the person **MAKE DISCOVERY** to prospective P of any doc described **in para-(c)**.
- NB: To give effect to the overarching purpose of the **CPA = r 32.05** should be CONSTRUED BENEVOLENTLY and given the fullest scope its language will reasonably allow (**Grocon Constructors, Vickery J**).

### 1.3. DISCOVERY FROM NON-PARTY?

- On *application* of any party, Court may order that a **non-party** whom it appears has/is likely to have, or has had/is likely to have had, **in their possession** any doc which **relates to any Q** in the proceeding → to **MAKE DISCOVERY** to the Applicant of any such doc (**SCR, r 32.07**).

#### **Richardson Pacific v Fielding (1990) FedCt** – Discovery from Non-Party

Held	<ul style="list-style-type: none"><li>• Discretion to order non-party discovery should be exercised w/ <b>CAUTION</b>.</li><li>• No hard-and-fast rule re when to order; but circumstances where non-party discovery <b>might be ordered</b> include:<ul style="list-style-type: none"><li>◦ Where the non-party has the <i>only copy</i> of the particular doc(s) being sought;</li><li>◦ Where there is no other reasonable way to prove the matter, other than by the doc sought.</li></ul></li></ul>
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### 1.4. DISCOVERY PROCESS

#### 1.4.1. #1: NOTICE FOR DISCOVERY

- **RULE**: Where the pleadings b/w any parties are closed, any of those parties may, by *notice for discovery* (in Form 29A **(2)**) → require the party served to make discovery of all **DOCUMENTS** which are or have been in their **POSSESSION** and which, in accordance w/ **r 29.01.1**, are **REQUIRED TO BE DISCOVERED (SCR, r 29.02(1))**.
  - NB: In practice = order for mutual discovery is made by a judge at the first directions hearing (cf. serving NfD).

##### 1.4.1.1. A) IS IT A 'DOCUMENT'?

- **'DOCUMENT'** = INCLUDES, in addition to a **document in writing (ILA, s 38)**:

<b>(a)</b> Any book, map, plan, graph or <b>drawing</b> ;	<b>(d)</b> Any disc, tape, soundtrack or other device in which <b>sounds</b> or other data (but not visual images) are embodied so as to be capable (w/ or w/o the aid of some other equipment) of being reproduced therefrom;
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(b) Any <b>photograph</b> ;	(e) Any film (incl. microfilm), negative, tape or other device in which one or more <b>visual images</b> are embodied so as to be capable (w/ or w/o the aid of some other equipment) of being reproduced therefrom;
(c) Any <b>label</b> , marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;	(f) <b>Anything</b> whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant w/ them.

- NB: Includes deleted emails/docs that may still be stored on a back-up system (**Sony v UTas**).

#### 1.4.1.2. B) IS IT IN 'POSSESSION'?

- '**POSSESSION**' = possession, custody or power (**SCR, r 29.01(2)**).
  - Possession** = the physical holding of the doc, resulting from the right to its possession.
  - Custody** = the mere actual physical holding of a doc, regardless of the right to its possession;
  - Power** = the enforceable right to obtain possession or control of the doc from the person who is holding it.

#### 1.4.1.3. c) IS IT 'REQUIRED TO BE DISCOVERED'?

- '**REQUIRED TO BE DISCOVERED**' = any of the following docs of which the party is, after a **reasonable search**, aware at the time discovery is given (**SCR, r 29.01.1(3)**):
  - (a) Docs on which the **party relies**;
  - (b) Docs that **adversely** affect the party's own case;
  - (c) Docs that **adversely** affect *another party's* case;
  - (d) Docs that **support** *another party's* case.
- What is a 'Reasonable Search'? In making a reasonable search → a party may *take into account* (**SCR, r 29.01.1(5)**):
  - (a) Nature and complexity of the **proceeding**;
  - (b) **Number** of docs involved;
  - (c) **Ease** and **cost** of retrieving a doc;
  - (d) **Significance** of any doc to be found; and
  - (e) Any **other** relevant matter.
- EXCEPTIONS?**
  - Discovery is NOT required if (**SCR, r 29.01.1(4)**):
    - (a) Party giving discovery reasonably believes the doc is **already in the possession** of the other party;
    - (b) Additional copies of the doc are **already discoverable**.
  - Privileged** docs (e.g. evidence of settlement negotiations) are NOT discoverable → [see 'Privilege', below].
  - Restricted Discovery**: At any time, Court can order that → discovery by a party is **NOT required**, or is **limited** to certain docs, certain classes of docs, or certain Qs in the proceeding (**SCR, r 29.05**).
    - E.g. To prevent disclosure of trade secrets to a competitor, or to avoid parties incurring unjustified costs.

#### **Mobil Oil v Guina Developments (1996) VicCA** – Restricted Discovery

Held	<ul style="list-style-type: none"> <li><b>Confidentiality alone</b> will <b>NOT ordinarily be sufficient</b> reason to deny inspection by opposite party.</li> <li><u>Consider</u>:           <ul style="list-style-type: none"> <li>Could action proceed w/o confidential info being revealed beyond counsel, solicitors and nominated experts, so confidentiality can be maintained? (E.g. Disclose to lawyers, but NOT the party).</li> <li>Could the party 'forget' the info?</li> <li>Is disclosure of the confidential info necessary for the attainment of justice in the case?</li> </ul> </li> <li>If the material is confidential but does NOT bear upon the case P is seeking to make → should NOT be revealed.</li> </ul>
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#### 1.4.2. #2: AFFIDAVIT OF DOCUMENTS

- Recipient of Notice must make discovery within 42 days of service (**r 29.03**); and must prepare an Affidavit of Documents in Form 29B, which must (**SCR, r 29.04(1)**):
  - (a) **Identify the docs** which are or have been in the party's possession;
  - (b) **Enumerate the docs** in convenient order and describe each doc (or in the case of a group of docs of the same nature = describe the group) sufficiently to enable the doc or group to be identified;
  - (c) **Distinguish** those docs which ARE in the party's possession from those docs that HAVE BEEN but are no longer in the party's possession – and *with respect to the latter*:
    - (i) State when the party parted w/ the doc; and
    - (ii) The party's belief as to what has become of it;
  - (d) Where the party making the affidavit claims that any doc in their possession is **privileged** from production = state sufficiently the grounds of the privilege.
- NB: If party does NOT search for a category or class of doc → MUST include in the Affidavit of Documents a statement of the category or class of doc NOT searched for AND the reason why (**SCR, r 29.04(2)**).