

## 2025 Litigation and Dispute Resolution (LAW4303)

### **Full Topic List:**

Topic 1 – Introduction to Litigation and the Civil Justice System

Topic 2 – Pre-litigation steps and Appropriate Dispute Resolution (ADR)

Topic 3 – Costs in Litigation

Topic 4 – Jurisdiction, Parties and Claims

Topic 5 – Commencing Proceedings, Service and Appearance

Topic 6 – Defining the Issues in Dispute and Summary Disposition

Topic 7 – Urgent Applications

Topic 8/9 – Gathering Evidence

Topic 10 – Class Actions

Topic 11 – Judgment, Enforcement and Evaluating Civil Litigation

Text in small font indicates content identified by lecturers, tutors, or course materials as non-examinable, unlikely to be on the exam, or simply unnecessary information that serves no practical use in assessments.

## Topic 8/9 – Gathering Evidence

### 1. Discovery between parties (traditional approach)

How does it work and when does it occur?

This discovery between parties occurs *after* the close of pleadings. So once pleadings close, the discovery process begins -ie this is the point when notice for discovery can first happen. Basically, this means we do arguments first and then evidence second.

The rationale is that once pleadings are closed, parties can then examine the evidence.

This begs the question when are pleadings closed:

According to Supreme Court Rule (SCR) 14.08, pleadings are closed:

- (a) Where no pleading beyond a defence is ordered or served, at the expiration of 30 days after service of the defence.
- (b) Where pleadings beyond a defence are ordered or served, at the expiration of 30 days after service of the last of those pleadings.

#### How Discovery is Conducted

Order 29 of the SCRs is where we find the parameters of the discovery process

This involves:

1. **Notice for Discovery:** The process starts with one party serving a notice for discovery on their opponent. A party serves a Notice for Discovery on another party.

SCR 29.02(1) basically just explains that discovery takes place after the pleadings as we have already mentioned.

It specifically says "Where the pleadings between any parties are closed, any of those parties may, by notice for discovery served on any other of those parties, require the party served to make discovery of all documents which are or have been in that party's possession and which, in accordance with Rule 29.01.1, are required to be discovered".

2. **Affidavit of Documents:** Then the party being asked to make discovery responds by serving an Affidavit of Documents where they set out the matters that they are going to discover, and also set out whether there are claims of privilege that they are going to make out in relation to some of those documents

Specific criteria for this are covered below.

3. **Inspection of Documents:** Following the Affidavit of Documents, inspection of the disclosed documents takes place.

## What is Included in an Affidavit of Documents as just mentioned (r 29.04)

### Definition of possession discussed below

Rule 29.04 outlines the specific requirements for an Affidavit of Documents – the specific details are covered below but not really all that important. It must be in Form 29B and must meet this criteria:

- Identify the documents that are or have been in the possession of the party making the affidavit. This requires a clear listing of all relevant documents.
- Enumerate the documents in a convenient order and describe each document, or groups of similar documents, sufficiently to enable identification. This ensures that the other party can understand what has been disclosed.
- Distinguish between documents currently in the party's possession and those that have been but are no longer in their possession. For documents no longer in possession, the affidavit must state when the party parted with the document and the party's belief as to what has become of it.
- If the party claims that any document in their possession is privileged from production, the affidavit must state sufficiently the grounds of the privilege.

### So what constitutes a document

The Interpretation of Legislation Act 1984 (Vic), section 38, provides a broad definition of "document" which basically includes anything you can possibly think of with only some rare minor exceptions. Document is defined as including in addition to a document in writing

- Any book, map, plan, graph, or drawing.
- Any photograph.
- Any label, marking, or other writing that identifies or describes anything of which it forms part, or to which it is attached
- Any disc, tape, sound track, or other device in which sounds or other data (not visual images) are embodied so as to be capable of reproduction.
- Any film (including microfilm), negative, tape, or other device in which visual images are embodied so as to be capable of reproduction.
- Anything whatsoever on which is marked any words, figures, letters, or symbols capable of carrying a definite meaning.

# A - The evolution of representative proceedings

## 1. Overview

### Definition and Purpose

Representative proceedings, often referred to colloquially as class actions, are governed by the *Supreme Court Act*. They are used when a proceeding potentially affects a large number of people, particularly where individual claims are too small to make separate litigation practical. For example, the lecturer referred to the bank fees class action where banks charged fees of around \$25 for overdrafts. Individually, these small claims would not justify litigation, but collectively, when affecting thousands of people, the amounts became significant enough to pursue in a single proceeding.

### Options for Group Claims

One option in multi-party litigation is to use the joinder rules, joining many plaintiffs to one proceeding. However, this is often unwieldy and inefficient, particularly when there are large numbers of plaintiffs. Representative proceedings provide an alternative mechanism, allowing one plaintiff to represent a defined class of group members who have been similarly affected by the conduct in question. The representative plaintiff brings the proceeding on behalf of all group members.

### Distinction from Traditional Party Rules

In representative proceedings, not all group members are considered parties in the traditional sense. Unlike joined plaintiffs, group members do not instruct lawyers directly. Obligations that usually apply to parties under civil procedure rules apply only to the representative plaintiff, not to every group member. This creates a trade-off: efficiency is gained, but group members have limited ability to influence the proceedings or the outcome.

### Binding Nature and Opt-Out Mechanism

Representative proceedings are binding on all group members unless they opt out by the specified date. If a person does not opt out, they are considered to have had their rights determined in the class action and are barred from bringing their own separate proceeding later. This ensures a single opportunity to argue the case on behalf of all group members.

### Requirements for a Representative Plaintiff

There must be one representative plaintiff, though it is possible to change the lead plaintiff during the course of the proceeding if necessary. The representative plaintiff must also be a group member with their own claim determined in the proceeding; they cannot represent the group without having a claim themselves. Representative plaintiffs often receive an additional payment as recognition for the burden of acting on behalf of others. Acting as a lead plaintiff can be demanding, involving cross-examination, medical examinations, and other litigation processes.