

1. CPA– Disclosure Obligations

 **s 26 CPA – Disclosure**

All parties must disclose known documents (s38 ILA) within their Possession; custody; control (r 29.01) that are critical to resolution of the dispute at earliest reasonable time (CPA s 26(1)–(2)); excludes privileged docs (s 26(3)); ongoing obligation (s 26(4)).

a. Overarching Obligation (OO) to Disclose – s 26

- Who? All parties bound by CPA (s 26(1)).
- What? **Must** disclose existence of **all documents** within **scope** (past/present possession, custody, or control) that are:
 - Known to the party; and
 - Critical to resolution of the dispute
- When? At **earliest reasonable time** after awareness or as directed (s 26(2)).
- Ongoing obligation – continues for duration (s 26(4)).
- Exception: does not apply to privileged documents (s 26(3)).
- Sanction for misuse: contempt of court (s 27).

b. Court's Discovery Powers – ss 54–56

- s 54: Discovery per court rules unless court orders otherwise.
- s 55: Broad powers (e.g. limit, stage, cost-shifting, assistance with locating). **HD P77**
- s 56: **Sanctions include:**
 - Dismissal/striking out the relevant claim or defence
 - Costs (including indemnity)
 - Awarding compensation
 - Adverse inference
 - Referral to disciplinary authorities

2. SCR – Discovery Between Parties

 **Order 29 SCR – Discovery**

After close of pleadings (r 14.08), a party must discover docs in possession, custody or control after reasonable search (r 29.01.1), including docs adverse or supportive of any case.

a. Process – O 29

- When? **after pleadings close** (r 14.08).
- Process: notice for discovery (r 29.02(1)) → affidavit of document (r 29.04; Form 29B) → inspection
- within 42 days (r 29.03)

N.B Restricted Discovery

- r 29.05: Court can order at any time:
 - discovery by a party not required; or
 - discovery limited to certain documents, classes of documents or questions in the proceeding
- *Mobil Oil*:
 - **Confidentiality alone is not sufficient to deny inspection;**
 - Consider whether action could proceed without confidential info being revealed beyond lawyers and experts so confidentiality could be maintained
- CPA s 55 – Court orders in relation to discovery (broad powers)

N.B. see above

- r 29.07: Discovery at any stage

- [r 29.15](#): Supplementary discovery -
- [r 32.03](#): Discovery to identify unknown defendant -
- Discovery from known potential defendant to assess whether to sue - [r 32.05](#); *Hunter*
- [r 32.07](#): Discovery from non-party with relevant docs-

(discuss per procedure/item)

For the item to be discoverable it must be:

1. A document - [s38 ILA](#)

2. In scope - [r 29.01.1](#)

- Possession; custody; control - [r 29.01\(2\)](#)
- After reasonable search, discover: - Critical to resolution of the dispute
 - (a) Docs relied on
 - (b) Docs adverse to own case
 - (c) Docs adverse to another's case
 - (d) Docs supporting another's case
- Reasonable search from OP = factors incl. complexity, cost, relevance - [r 29.01.1\(5\)](#)

3. Exceptions/Limitations?

[s 131A EA](#) - the operation of privilege is specifically extended to **pre-trial stages** incl. pre-trial discovery, non-party discovery, interrogatories, notices to produce etc.

a. Client Legal Privilege

- [s 118](#): Legal advice privilege – dominant purpose test.
- [s 119](#): Litigation privilege – dominant purpose of litigation.
- [s 120](#): Extends to self-represented parties.
- [s 131A](#): Applies to pre-trial (e.g. discovery, interrogatories).
- Loss/waive privilege: consent ([s 122\(1\) EA](#)), inconsistency ([s 122\(2\) EA](#)), fraud or illegal ([s 125 EA](#)), communications were not confidential ([s 126 EA](#)).

Dominant purpose test:

Consider how the document came into being, not how it was discovered or otherwise used ([Esso](#))

- Focus is on the creation of the doc
- Does not have to be the dominant purpose, just a dominant purpose
- Question of fact, requires objective assessment
- Note potential copies issue in Propend Finance

NB. Expert report

Expert reports are usually obtained by the parties for the purposes of litigation and would therefore be subject to CLP.

Order 44 – expert evidence

- Expert code of conduct (Form 44A)
- Modern developments – joint reports, concurrent evidence ('hot tubbing')

Order 33 – medical examinations and reports

- [r 33.04](#) – notice for medical examination
- Note more specific regulation in transport accident and workers' compensation legislation and policy

See also CPA Part 4.6 (expert witnesses and evidence)

b. Journalist Privilege – [s 126K](#)

- [S 126J](#): Definitions – journalist, informant, news medium
- [S 126K](#): Journalist privilege relating to identity of informant 线人.
- Exception: a party can make an application to overturn this privilege where the public interest outweighs (*Roberts-Smith (No 3) and (No 6)*):
 - **Likely adverse effect** on the informant or other person ([s 126K\(2\)\(a\)](#))
 - **Public interest** in communication of information to the public by the media and the media's ability to access sources ([s 126K\(2\)\(b\)](#))

c. Public Interest Immunity – [s 130 EA](#)

- [s 130\(1\)](#): Court may refuse discovery if disclosure would be contrary to the public interest.
- [s 130\(4\)](#): Applies where evidence relates to **matters of state** and disclosure would be harmful
- [s 130\(5\)](#): Factors to consider incl. national security, law enforcement, fairness.

d. Settlement Negotiation Privilege – [s 131](#)

- Communications/documents made during genuine attempt to settle = inadmissible.
- [s 131\(2\)](#): Exceptions:
 - Consent (waiver) of the communication or document: [s 131\(2\)\(a\)](#)
 - The substance of the document has been disclosed: [s 131\(2\)\(b\)](#)
 - The document was relevant to determining liability for costs: [s 131\(2\)\(h\)](#)

3. Defaults in Discovery

- A **default notice** can be served on the **non-complying party** under Form 29D ([r 29.12.1](#)).
- After 7 days of no response to notice by X the Court may – [r 29.12.1\(3\)](#):
 - (a) If defaulting party is the P - dismiss proceedings
 - (b) if defaulting party is the D, that their defence be struck out
- Unavailable documents
 - unavailable and no reproduction is available, and likely to cause unfairness
 - Court may or on application to make order ([s 89B\(1\) Evidence \(Miscellaneous Provisions\) Act](#))
 - a ruling or order may be ([s 89B\(2\)](#)):
 - an **adverse inference**
 - a fact in issue can be presumed to be true in the absence of evidence to the contrary
 - certain evidence not be adduced
 - a defence or statement of claim be struck out in whole or in part
 - evidential burden of proof be reversed
 - the party can be XXN on the doc and explain
- Documents destroyed
 - If pre-issuing, no breach of discovery
 - if post-issuing
 - breach of discovery, defence can be struck out ([r 29](#));
 - an indictable offence ([s 254\(1\) CA](#))
 - the court can order sanctions be imposed & other severe financial penalties ([s 56 CPA](#))
 - consider: OO; breach of OO ([ss28, 29](#))

4. Other Evidence-Gathering Tools

a. Interrogatories ([O 30](#))

- **Written Qs** → sworn answers; Qs must relate to the **material facts** pleaded
- When? [r 30.02](#)
 - Any party may serve interrogatories on another party relating to any question between them in the proceeding
 - If pleadings are closed - may be served without leave ([r 30.02\(2\)](#))
 - if the pleadings are open - the court can order that a party serve interrogatories on another ([r 30.02\(3\)](#))
 - The court can grant leave to serve further interrogatories to an interrogating party ([r 30.02\(4\)](#))
- Default

- Where party has failed to answer interrogatories, court may order that they be provided
- After **7 days** of service the court can further order the proceeding dismissed or the defence struck out: [r 30.09](#)

b. Subpoenas ([O 42](#))

- Subpoena to produce, give evidence, or both ([r 42.02](#))
- Must serve personally ([r 42.05](#))
- Set aside if abuse of process / oppressive / no legitimate forensic purpose ([r 42.04](#))
- Contempt for non-compliance ([r 42.12](#))

5. Technology in Discovery

- **SCV Practice Note SC Gen 5**
 - [CI 4.1](#)– Expectation to use tech to reduce cost/delay.
 - [CI 4.3](#) – Hard copy documents to be exception rather than rule;
 - Unreasonable failure to cooperate in use of tech will constitute a breach of the OOs of the parties
 - Tech-assisted review (TAR) accepted ([McConnell Dowell](#):Review of >4 million docs by TAR consistent with CPA ss 7 and 9)

Topic 10 - Class Actions

1. Definition and Nature

- Multiple plaintiffs can sue D through: (1) Traditional **joinder** under [r 9.02](#); or (2) A group proceeding under [s 33A SCA](#)
- Main plaintiff = 'representative party'; other plaintiffs = 'group members'.
- Class members not parties but bound by result (res judicata).
- Define the **potential class**: The plaintiff commences this proceeding on behalf of himself and others who ...

2. Threshold Requirements – [SCA s 33C](#)

A group proceeding may commence if:

- (a) **≥7** persons have claims against the same person([s 33C\(1\)\(a\) SCA](#)); AND
- (b) All claims arise out of **same/similar/related circumstances**([s 33C\(1\)\(b\) SCA](#)); AND
- (c) All claims raise a substantial **common issue of law or fact** ([s 33C\(1\)\(a\) SCA](#)). NB. 'Substantial' means 'real or of substance', but does not necessarily have to be the main issue ([Wong](#))

* class action but there are two potentially different defendants - refer to [HD notes P52](#)

Threshold Requirements – [s 33C SCA](#)

At least 7+ group members, claims arise from same, similar or related circumstances, and involve substantial common issues of law or fact.

3. Commencing a Class Action

- An application must be commenced by a **writ** ([s 33H\(1\) SCA](#)).
- Must include in writ:
 - Group description (no need to name all) – [s 33H\(2\)\(a\)](#)
 - Nature of claims and relief – [s 33H\(2\)\(b\)](#)
 - Common Qs of fact/law to the claims of the group – [s 33H\(2\)\(c\)](#)
- Not necessary to name the group members / specify their number to commence ([s33H\(3\)](#))

Representative party:

- Must have standing ([s 33D\(1\)](#)).
- If PR settles their own claim: must have the settlement approved by the court ([s 33W\(1\)](#)). They may continue in the position as RP ([s 33D\(2\)](#)), however the court may order substitution with a new RP ([s 33W\(2\)](#)).
- Must monitor proceedings, understand legal/financial risks ([s 33T\(1\)](#)) – replacement possible).

✦ Commencement & Opt Out – ss 33E–33J

Representative must have standing against D (s 33D), application by a writ (s 33H1));

opt-out notice required (s 33J); group members bound unless they opt out (s 33ZB).

4. Opt-Out Mechanism – s 33J

[s 33E](#): Consent to be a group member not required unless special category

[s 33J](#): Right of group member to opt out

- [s 33J\(1\)](#): court must fix a date before which a group member may opt out of a representative proceeding
- [s 33J\(2\)](#): Opt-out via **written notice**
- [s 33J\(3\)](#): court can extend opt out period
- [s 33J\(4\)](#): hearing of matter must not commence before the opt out period has expired without leave

Notice requirements – ss 33X–33Y:

- [s 33X](#): Must inform members about proceedings, opt-out right, deadline.
- [s33Y](#): The form and content of a [s 33X](#) notice must be approved by the court.

Practice Note: The form of the opt out notice to be given by a group member is prescribed by the SCR: see [O 18A.04](#) and Form 18AB

5. Discontinuance

Court may order the proceedings to be discontinued where:

- [s 33L](#): Must discontinue if group <7.
- [s 33M](#): Cost of identifying group members & distributing proceeds would be excessive.
- [s 33N](#): Interests of justice require (e.g., separate proceedings more efficient).
- [s 33N \(1\)](#): In determining the interests of justice, the court will have regard to –
 - (a) the **costs** of the proceeding as a representative action vs separate proceedings;
 - (b) whether the relief sought could be obtained by an **alternative means**;
 - (c) if the group proceeding is not an **efficient and effective** way to deal with the claim(s);
 - (d) It is otherwise inappropriate for the claim to be pursued by group proceeding.

* relevant cases refer to HD notes P56: [Bright](#); [McBride](#)

✦ Settlement & Discontinuance – s 33V

Must be approved by court to ensure it is fair and reasonable (s 33V); court may hear from contradictor or make further orders (s 33ZF).

6. Settlement and Court Control

- [s 33D](#): Representative party has standing to sue for group members, even if representative reaches an individual settlement
- [s 33W](#): Rep party must get leave to settle their own claim, and in that event a new rep would probably be chosen:
- [s 33V](#): Settlement of group claims requires court approval.
- [s 33ZC](#): Group appeals from judgments are possible

7. Costs

- [s 33ZD\(b\)](#): Group members are not liable for costs in a group proceeding.
- [s 33ZD\(a\)](#): Costs may be ordered against rep P or D.
- [ss 33Q–33R](#): Exception: subgroup representatives.

8. Group Costs Orders (GCOs) – Contingency Fees (Vic only)

Contingency fee model – permits plaintiff's lawyers (not funders) to charge a percentage of recovery.

Who applies? Representative Plaintiff

- [s 33ZDA\(1\)](#): Court may order GCO to permit:
 - [\(a\)](#): Solicitor's legal costs to be a % of award/settlement;
 - [\(b\)](#): Costs to be shared among plaintiff and group members.
- [s 33ZF](#): Court retains discretion to grant it.

🔗 Group Costs Orders (Vic only) – [s 33ZDA](#)

Court may permit solicitor's costs to be a % of award ([s 33ZDA\(1\)\(a\)](#)), shared by group members ([s 33ZDA\(1\)\(b\)](#)); only on application by P; court discretion ([s 33ZF](#)).

ALSO DISCUSS [JOINDER](#)

Topic 11 - Judgment, Enforcement and Evaluating Civil Litigation

1. [Summary Disposition](#)

a. Judgment in default (behaviour)

[R 21.01](#): judgment in default of appearance

[R 21.02](#): judgment in default of defence

[R 21.06](#): judgment in default of defence to counterclaim

b. Summary Judgment (merit of the case)

[s 63 CPA](#): the claim or defence (or counterclaim) has no real prospect of success

[s 61 CPA](#): P apply

[s 62 CPA](#): D apply

c. Judgment on failure to prosecute ([r 24.01](#)) or obey order for particulars or discovery ([r 24.02](#))

2. Facilitating Settlement & Offers

a. Settlement Mechanisms

- 'Without prejudice' communications → inadmissible ([EA s 131](#))
- Pre-litigation offers: [r 26.08.1](#)
- Calderbank: [Hazeldene](#)
- Offer of compromise: [SCR O26](#)

b. Costs consequences ([r 26.08](#)):

If offer better than judgment: Court shall consider for costs

May award indemnity costs from offer date (or another chosen time)

3. Discontinuance / Withdrawal

[r 25.02](#): P or D may discontinue/withdraw part or all of claim with leave or consent

[r 25.04](#): Notice of discontinuance filed = settlement

[r 63.15](#): Unless Court orders otherwise, discontinuing party to pay costs of others

4. Judgment Enforcement

a. [Right to enforce](#)

CPA: allows enforcement of civil judgments

Time limit: 15 years ([LAA s 5\(4\)](#)); leave required if >6 years ([r 68.02\(1\)\(a\)](#))

b. [Risks of Non-Payment](#)

Accrual of interest ([SCA ss 57–60](#)) – high rate (10%)

Enforcement costs recoverable

c. Modes of Enforcement

*no need to talk about practical success possibility, pick one and analyse

- Warrant of Execution (O 68) AND Warrant of Seizure and Sale (of debtor's property to recover the debt) (SCR O 69)
- Warrant of Possession (SCR O 70)
- Charging Orders
- Appointment of Receiver
- Bankruptcy/Winding Up (company law)
- Attachment of Debts
- Attachment of Earnings (an order that attaches to the debtor's earnings)
- Installment Order

Best mode: depend on the financial circumstances of the Judgment Debtor – can use Discovery in Aid of Enforcement (O 67)

5. Stay

- Judgment Debtor may apply for a stay of execution of the judgment (r 66.16)
- Usually the application is made immediately after judgment, to the judge hearing the matter
- Consequence: If granted, the creditor cannot enforce the judgment until expiry of the period.
- Granting of stays is discretionary

