

- Affidavit of documents, which is served in response to the notice of discovery;
- Is the document discoverable?

Notice for discovery (s 29.02(1)):

- Once pleadings are closed, either party can serve a Notice for Discovery (**Form 29A**) on the other, requiring them to disclose all relevant documents in their possession, custody or control (**r 29.01(2)**). This formally starts the discovery process.
- A party upon whom a notice for discovery is served shall make discovery of documents within 42 days after the service of the notice (**r 29.03**).

Affidavit of documents (s 29.04):

- File an affidavit of documents which needs to be in form 29B. It shall:
 - (a) Identify the documents which are or have been in the possession of the party making the affidavit;
 - (b) Enumerate the documents in convenient order and describe each document or group;
 - (c) Distinguish those documents which are in the possession of the party from those no longer in its possession, and state when it parted with each and what has become of it;
 - (d) Where privilege is claimed, state the grounds of that privilege.
 - This is different to the CPA because if claiming privilege, there is no need to disclose (can just keep hidden and not tell the other side about it), but when the party gets to discovery under the SCR, each party needs to list any document that they want to claim privilege (cannot hide it – have to let the other side know that the document exists).

Is the document discoverable?

Step 1: Is the document a *document*?:

- **Section 38 Interpretation of Legislation Act 1984 (Vic)** "document" includes (in addition to a document in writing):
 - (a) Any book, map, plan, graph or drawing;
 - (b) Any photograph;
 - (c) Any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;
 - (d) Any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there from;
 - (e) Any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there from; and
 - (f) Anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them;

Step 2: Is the document in the party's possession?

- Under **r 29.01(2)**, the party needs to only make discovery of documents that are within their possession, custody, or power.
 - Possession: the physical holding of the document resulting from the right to its possession (e.g. an agent).

- Custody: the mere actual physical holding of a document, regardless of ownership, regardless of the right to possession (e.g. an employee).
- Power: the enforceable right to obtain possession or control of the document from the person who is holding it (i.e. an enforceable right to obtain possession from another person)

Step 3: Is the document relevant?

- Under r 29.01.01(3), 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.

Look at all the documents your client holds and work out if one of these 4 categories apply – if they fall outside of these categories, they do not need to be discovered. If neither side is going to use the documents, then they are not discoverable.

What is reasonable search? (r 29.01.1(5)):

- ...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.

Step 4: Is there an exception?

- Discovery not required if:
 - Party giving discovery reasonably believes the document is already in the possession of the party to which discovery is given (r 29.01.1(4)(a)).
 - Note that if something has been disclosed, it does not need to be discovered.
 - Additional copies of documents already discoverable (r 29.01.1(4)(b)).
- No search for category or class of document:
 - The party must include in the affidavit of documents a statement of (s 29.04(2)).
 - (a) the category or class of document not searched for; and
 - (b) the reason why.

Step 5: If there has been a breach, consider default:

Where the other fails to make discovery (sending the actual documents) or if they have not even provided an affidavit of documents, the plaintiff may serve default notice on Form 29D (r 29.12.1(2)).

When a party doesn't comply with discovery (for example, they don't provide the affidavit of documents or don't hand over the actual documents), the rules let the other side trigger enforcement steps under Order 29 and Order 24.

Notice of Default (r 29.12.1(3)):

- If the other side hasn't complied:
 - You serve them a Notice of Default (Form 29D), giving them 7 days to fix the issue.
 - If they still don't comply after 7 days, you can apply to the court for sanctions.
- The court may order:
 - Dismissal of the proceeding (if the plaintiff is the one in default), or
 - Strike out the defence (if the defendant is in default).

Committal on default (r 29.14):

- If the failure continues, it can even amount to contempt of court.
 - The defaulting party (and even their lawyer, if they failed to advise their client properly) can face committal proceedings, i.e., contempt of court.

Note that s 56 of the CPA (the consequences) in theory also relates to breaching discovery under the CPA (refer above to CPA disclosure).

Application for judgement (order 24):

- Where a party fails to comply with an order to for discovery/inspection/interrogatories (r 24.02):
 - If party is P, proceeding can be dismissed
 - If party is D, defence can be struck out

McCabe v British American Tobacco Australia Services Ltd:

Facts:

- Plaintiff (Rolah McCabe): terminally ill with lung cancer, sued British American Tobacco (BAT) for negligence and misleading conduct, claiming their cigarettes caused her illness.
- Before trial, her lawyers discovered that BAT had destroyed thousands of internal documents that were highly relevant to what the company knew about the dangers and addictiveness of smoking.
- The destruction occurred under BAT's so-called "Document Retention Policy", implemented with the advice of its lawyers.
- This policy was supposedly an "administrative clean-up" for efficiency but was in fact designed to conceal or destroy harmful documents before litigation was commenced.
- McCabe applied under **r 24.02** for the defendant's defence to be struck out, arguing that the destruction made a fair trial impossible.

Held:

- Justice Eames (trial decision) found that BAT and its legal advisers had deliberately subverted the discovery process to deny McCabe a fair trial (while the trial had not started, they knew litigation was on its way). The court held that the "Document Retention Policy" was a sham, created primarily to allow BAT to destroy incriminating material under the guise of efficiency.
- BAT's conduct, including the destruction of evidence and the misleading of both the plaintiff and the court, amounted to a serious abuse of process. Eames J concluded that no lesser remedy could remove the prejudice suffered by McCabe, and therefore struck out the defence, and entered judgment for the plaintiff on liability.
- However, the court of appeal overturned the decision.

- It held that because the destruction of documents occurred **before proceedings were commenced**, and before they knew McCabe would bring proceedings – there was no breach of discovery obligations.
- The court ruled that a strike-out could only be justified if the conduct amounted to an attempt to pervert the course of justice, which requires proof of an intent to obstruct specific or imminent proceedings, something not proven here (the case had not started, and there were no discovery obligations).
- Consequently, the orders striking out the defence and granting judgment for McCabe were set aside. McCabe’s special leave application to the High Court was later refused.

Extra general discovery provisions to consider:

Restrictions on discovery:

- The Court may order that discovery by a party is not required, or that discovery be limited to certain documents, certain classes of documents or certain questions in the proceeding (r 29.05).
- Discovery at any stage: the court may order that a party make discovery of documents (or classes of document) to any other of those parties at any stage even if pleadings are not closed (r 29.07).
- Supplementary discovery: a party who has made an affidavit of documents is under a continuing obligation to make discovery of documents with respect to documents of which the party obtains possession after making the affidavit (r 29.15).

Confidential information:

- Per *Mobil Oil*, confidentiality alone is not a sufficient reason to deny discovery it is not another arm of privilege. (e.g., commercially sensitive document that a company does not want the other side to see) – consider whether the action could proceed without the confidential information being revealed to anyone other than the lawyers and/or experts, so that confidentiality is maintained.
 - Also ties into the court being able to make whatever order it wants in terms of discovery (s 54 CPA).
- In *Mobil Oil Australia Ltd v Guina Developments*, the Victorian Court of Appeal held that while discovery can seriously intrude upon a party’s privacy and commercial interests, confidentiality or commercial sensitivity alone is not a sufficient reason to deny discovery or inspection. The ordinary rule remains that full disclosure must be made so that litigation is conducted fairly. However, the court recognised that in cases involving trade rivals, once commercially sensitive material is inspected, confidentiality is “destroyed once and for all.” Accordingly, while there is no automatic right to have discovery curtailed, the court has discretion to mould discovery orders to protect legitimate commercial confidentiality, for example, by limiting inspection to solicitors, counsel, or experts, or requiring undertakings of confidentiality.

Permitted use of discoverable documents:

- Obligation (implied undertaking) not to use a discovered doc for any purpose other than the litigation in which it is disclosed, unless tendered in evidence (*Hearne v Street*).
 - If you get a document in discovery against an insurer, and then you have an additional case against the same insurer, you cannot use that document (from the previous case) – you need to get it rediscovered in the current case.
- Extends to pleadings, answers to interrogatories, documentary witness statements and non-party discovery material