

# DISCOVERY IN VICTORIAN COURTS

## A FIRST POINT OF REFERENCE

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Practices concerning discovery have changed considerably in recent years, as a product of legislative intervention and more active case management. This is particularly notable in Victoria, by reason of the *Civil Procedure Act 2010* (Vic) (CPA), but is also evident in other jurisdictions. Practitioners must be aware of these changes, and the court's current expectations regarding the conduct of discovery by legal practitioners. See further *Volunteer Fire Brigades Victoria v CFA (Discovery ruling)* [2016] VSC 573, [33]-[34]; *Liesfield v SPI Electricity Pty Ltd (Ruling no. 1)* (2013) 43 VR 493, [21]-[30].

### What is discovery?

Discovery is a pre-trial procedure where a party to proceedings discloses and makes available for inspection relevant documents to the other parties.

### What is the applicable legal framework?

The court has broad powers to manage discovery:

- the CPA - Part 4.3;
- *Supreme Court (General Civil Procedure) Rules 2015* - Order 29;
- Practice Note SC CC1, s 9;
- Practice Note SC Gen 5 - Technology in Civil Litigation, Part C.

The overarching purpose and overarching obligations under the CPA are also regularly applied. Depending on the nature of the dispute, it may be necessary to consult other practice notes, for example, Practice Note SC CL4 – Major Torts List.

### When must discovery be given?

Discovery is typically completed following the close of pleadings. However, discovery obligations are ongoing (r 29.15). See also “Early discovery of critical documents”.

### Which documents must be discovered?

Discovery of documents is usually limited to the following documents of which the party giving discovery is, after a *reasonable search*, aware at the time discovery is given (r 29.01.1):

- documents on which the party relies;
- documents that adversely affect the party's own case;
- documents that adversely affect another party's case; and
- documents that support another party's case.

If a party giving discovery reasonably believes that a document is already in the possession of the party

to which discovery is given, that party is not required to discover that document (r 29.01.1(4)(a)).

However, if there are material documents that were once but are *no longer in the possession* of the party making discovery, that must be disclosed: see r 29.02(1).

Parties are encouraged to consider whether limited categories of discovery should be exchanged: see r 29.05 and SC CC1, s 9.1.

### Early disclosure of critical documents

Parties have an overarching obligation to disclose documents critical to the resolution of the dispute (CPA, s 26).

The test is: is the document one that a party would reasonably be expected to have relied on as forming the basis of a party's claim when commencing the case? Alternatively, is it a document that the party knows will adversely affect their case? (*Yunghanns v Colquhoun-Denvers (s 29 CPA application)* [2021] VSC 243, [158].

Early disclosure under s 26 must occur at the earliest reasonable time after the person becomes aware of the existence of the document, or such other time as the court may direct (CPA, s 26(2)).

Finally, the court may make any order or direction modifying or regulating discovery (CPA, s 55). The exercise of this judicial discretion is informed by the overarching purpose set out in the CPA, s 7 (*Hanks v Johnston (No 3)* [2016] VSC 629, [29]-[31]; CPA, s 8(1)).

### What is a reasonable search?

What is reasonable depends on the context. A party may take into account (r 29.01.1(5)):

- the nature and complexity of the proceeding;
- the number of documents involved;
- the ease and cost of retrieving a document;
- the significance of any document to be found; and
- any other relevant matter.

### What does “possession” mean?

“Possession” means possession, custody or power (r 29.01(2)).

*Possession* means the physical or corporeal holding of a document pursuant to a legal right to its possession (*Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* (2006) 155 FCR 1, [53]).

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**Custody** means the mere actual physical or corporeal holding of a document, regardless of any legal right to possession (*Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* (2006) 155 FCR 1, [53]).

**Power** means an enforceable right to inspect a document or to obtain possession or control of a document from a third party who ordinarily has possession or control of it (*Hanks v Johnston (No 3)* [2016] VSC 629, [22]).

**Corporate group:** A party may be obliged to make discovery of documents belonging to related party, if it is established that, without any need for consent, the party making discovery either (a) has a **presently enforceable legal right** to obtain inspection of the document from whoever actually holds it; or (b) **has an actual and immediate ability to inspect** that document. This right is assessed on a case-by-case basis. See *ACCC v Prysmian CESE SRL (No 8)* [2014] FCA 376, [17]; *Taylor v Santos* (1998) 71 SASR 434, 438.

In some circumstances, the court may make an order (a **Sabre Order**) directing a party to take reasonable steps to procure documents from a non-party where there is a real likelihood that the non-party would produce such documents upon request (*Sabre Corporation Pty Ltd v Russ Calvin's Hair Co* (1993) 46 FCR 428).

**Proportionality:** The scope of discovery can be both flexible and far-reaching. However, parties must not expect a perfect trial. The trial must be the best the court can provide within reason and in proportion to the issues in dispute and the court's resources. (*Volunteer Fire Brigades Victoria v CFA (Discovery ruling)* [2016] VSC 573, [34]. See also *Liesfield v SPI Electricity Pty Ltd (Ruling no. 1)* (2013) 43 VR 493, [25], [28]-[30]).

#### **Withholding production of privileged documents**

A party must **disclose** all relevant documents in their possession, by listing them in their affidavit of documents, regardless of any objections. Form 29B, which prescribes the form for an affidavit of documents (r 29.04(1)), is structured such that privileged documents are to be described in "Part 2 of Schedule 1". It is not unusual for privileged documents to be described broadly using "catch-all" type descriptions, however this should not cut across the obligation for each document to be sufficiently described so as to enable its identification (r 29.04(1)(b)).

A party may object to **production** (r 29.09(1)) where the document is properly subject to one or more of: (1) client legal privilege; (2) privilege against self-incrimination (or self-exposure to a penalty); (3) public interest immunity; and (4) settlement or "without prejudice" privilege.

#### **What about confidential documents?**

Generally, the fact that a document is confidential is not by itself sufficient to deny production/inspection (see, for example, *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 27)* [2021] VSC 321, [21(2)]).

However, if production/inspection is objected to on the basis of confidentiality, the court will consider: (1) the document's relevance, (2) the extent to which it is confidential, (3) the use to which the information might be put once it is known (such as by a trade rival), (4) the utility or procedural fairness of imposing restrictions or conditions to preserve the confidential information, and (5) any other relevant matters, including ensuring compliance with the overarching purpose in the CPA (*Mobil Oil v Guina Developments* [1996] 2 VR 34, 38.6, 39.9-40.4; *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd* [2018] VSC 471, [6]). By way of example, inspection of documents containing trade secrets may be limited to a party's lawyers, and not permitted by the party themselves.

#### **Implied obligation not to use for collateral purposes (aka "the Harman Undertaking")**

Parties obtaining documents by discovery are subject to an implied obligation that they may only use or disclose the documents for the purposes of the proceedings. This is commonly referred to as the "Harman Undertaking" (*Harman v Secretary of State for the Home Dept* [1983] 1 AC 280, 304G (Lord Diplock), 307H-308A (Lord Keith), 312B (Lord Scarman (dissenting)); *Hearne v Street* (2008) 235 CLR 125, [105]-[111] (Hayne, Heydon and Crennan JJ); CPA, s 27).

Failure to comply with the "Harman Undertaking" may constitute contempt of court.

#### **What happens if I fail to comply with my discovery obligations?**

A party can compel discovery by seeking an order to enforce the other party's discovery obligations where that second party has failed to make discovery in accordance with the Rules (r 29.11). The party who gave discovery may be required to make a further affidavit stating whether a document or class of documents thought to be in existence is or has been in the possession of the party (r 29.08(2)).

For serious contraventions, the court has the power to impose a broad range of sanctions including: (1) preventing a party from taking any step in the proceeding (CPA, s 56(2)(d)); (2) making an order for indemnity costs against any party or legal practitioner (CPA, s 56(2)(c)); and (3) dismissing a claim, defence or any part thereof (CPA, s 56(2)(j); rr 24.02, 29.12.1 and 29.14; *Ren & Ors v Sinicorp Pty Ltd & Ors* [2021] VSC 728, [96]-[107]).

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