DISCLOSURE DEMYSTIFIED

A guide to your rights and responsibilities when producing and requesting documents

Bartier Perry LAWYERS

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WHAT TO DO IF YOU GET A SUBPOENA

Received a subpoena and not sure what you have to do next? Can you ignore it? Can you claim the cost of answering it? In this e-book we examine:

- Producing documents in answer to a subpoena
- Protecting sensitive information
  - Making a claim for legal privilege
  - Protecting commercially sensitive information through confidentiality regimes
  - Protection of information under standard court practice
- What your rights are after you've produced documents.

What is a subpoena?

A subpoena is an order made by a court at the request of a party to a court case that requires the recipient to either produce documents, attend court to give evidence, or both.

The most common subpoena is for the production of documents.

A subpoena for the production of documents will specify the:

- person to whom the subpoena is directed by name, or by description of office or position
- categories of documents sought
- date by which the subpoena has to be served on you
- date by which the documents have to be produced
- date on which the proceedings are listed in the court so that the court can check whether documents have been produced and make orders for access to the documents by the parties.

As a subpoena is a court order, failing to respond to a subpoena without lawful excuse is a contempt of court. There may be civil or criminal penalties.

If a subpoena is served after the date for service specified in the subpoena, you are not obliged to comply with it.

Formalities

A subpoena must be served by giving it to an individual or delivering it to the registered office of a company (including by post).

If a subpoena is served after the date for service specified in the subpoena, you are not obliged to comply with it.

In some instances, you may be offered conduct money (usually about $30) to comply with the subpoena to produce. If you are issued with a subpoena to attend to give evidence (rather than a subpoena to produce documents), you are not required to comply with the requirements of the subpoena unless conduct money has been paid. Conduct money is to cover the cost of your travel to and from the court, and any other reasonable expenses associated with you attending and returning from the court as required by the subpoena. If you are issued with a subpoena to produce documents, you may be entitled to payment of any reasonable loss or expenses incurred by you in complying with the subpoena. Importantly, you must still comply with the subpoena to produce documents, even if you have not received payment yet.

Ordinarily, the parties will attempt to agree on an amount of conduct money. If the parties are unable to agree, you may make an application to the court, seeking an order for costs of compliance. If you are having difficulties recovering your costs in relation to your compliance with a subpoena to produce documents, please contact our team of experienced lawyers for advice.

Tip - separate the documents into bundles that correspond with the categories. Complete the declaration on the back of the subpoena to confirm that you require the return of the documents, or that the documents can be destroyed.

What you have to do

On receipt of a subpoena, you should identify and collate any documents you have that fall within the listed categories. At this stage, you should consider whether there are any grounds upon which the subpoena ought to be set aside, such as on the grounds that the scope of the documents requested in the subpoena is oppressive or would constitute a fishing expedition (see page 7). You should also consider whether the documents requested in the subpoena may be subject to privilege or confidentiality issues (see page 9).

Once you have collated all documents to be produced, there are two ways to get the documents to the court:

- attend court on the date specified on the subpoena with the documents (along with a copy of the subpoena); or
- deliver or send the documents (along with a copy of the subpoena) to the court registry, addressed to the Registrar, so that the documents are received at least two clear days before the day the subpoena is listed before the court.

Note that:

- If you do not have any documents in the categories described in the subpoena, you can simply write and tell the court.
- You do not need to create documents to answer the subpoena.
- If you hold electronic documents, you can either produce copies on a USB device or similar or print them.

Court attendance

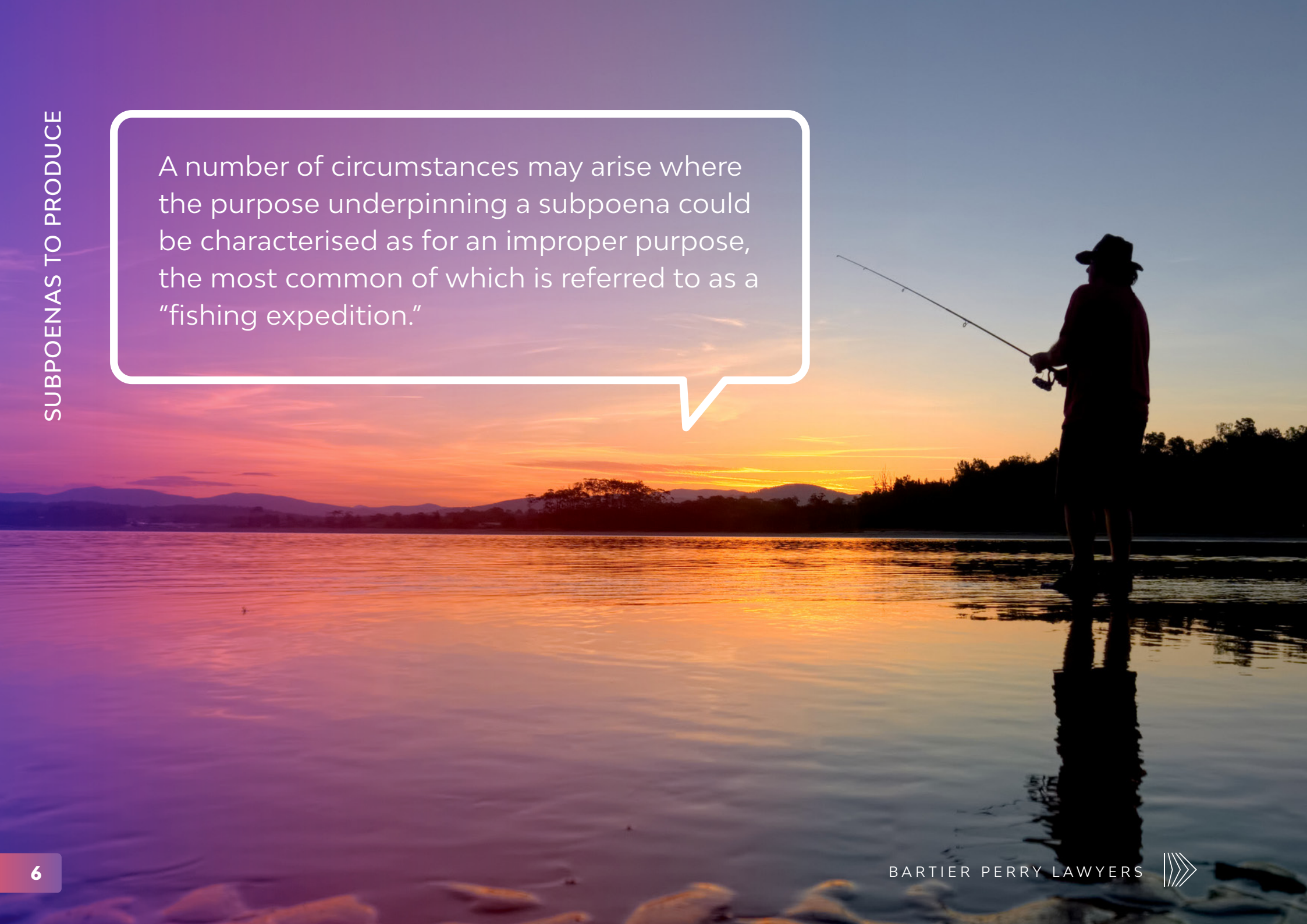
If you have not sent documents to the court registry, you will need to attend court to formally produce them.

Unless there has been a claim of privilege or commercial sensitivity made over the documents (see page 9), it is likely that the court will make a "general access order" granting all of the parties to the litigation the right to examine the documents.

Conclusion of proceedings

At the conclusion of the litigation the court will either return the documents to you or destroy them.

A number of circumstances may arise where the purpose underpinning a subpoena could be characterised as for an improper purpose, the most common of which is referred to as a "fishing expedition."



SETTING ASIDE A SUBPOENA:
OPPRESSION AND FISHING EXPEDITIONS

In our first section of how to deal with a subpoena, we looked at the simple machinery behind subpoenas, and how you should respond to one should you have the joy of "being served."

You will recall that a subpoena is a court order compelling production of documents, attendance at court to give evidence, or both. As such, strict compliance with the terms of the subpoena is necessary.

However, at both state and federal levels a party with a "sufficient interest" may make an application to fully or partly set aside a subpoena.

The case law relating to subpoenas has led to an emergence of two bases upon which you can apply to set aside or vary a subpoena:

- where the subpoena has been issued for an improper purpose
- where compliance with the subpoena would be oppressive to the receiving party.

Improper purpose

A number of circumstances may arise where the purpose underpinning a subpoena could be characterised as for an improper purpose, the most common of which is referred to as a "fishing expedition."

For example, a subpoena might seek production of documents that go beyond the scope of the issues raised in the proceedings, and so it may be argued that those documents should not be produced because they are not relevant.

Similarly, a subpoena will also be characterised as a "fishing expedition" if there is no apparent basis for supposing that any documents caught by the subpoena could assist or weaken the case of any of the parties. Importantly, the party issuing the subpoena to produce must be able to demonstrate that the subpoena has been issued for a legitimate forensic purpose. The court may look to the pleadings and particulars of the case to determine this issue.

Courts have regularly stated that parties to litigation should not use a subpoena as a substitute for discovery from a non-party. Discovery is the general process by which parties to litigation obtain documents from each other party (see page 15 below on preliminary discovery).

A subpoena that is not precise about the documents to be produced, or which requires the recipient to make a judgment as to which documents relate to the issues between the parties, is liable to be set aside.

Oppression

The other ground to set aside or vary a subpoena is where compliance with the subpoena would be so burdensome on its recipient as to be oppressive.

Assessing the question of oppressiveness is one that involves balancing the burden placed on the recipient and the public interest that documents relevant to the issues in dispute should be freely available to the parties.

The types of factors relevant to these considerations include the volume and breadth of material that is required to be produced, the relevance they have to the proceedings, and the costs and time that would be expended in complying with the subpoena.

For example, in the digital age it is not uncommon for an enormous amount of electronic material to fall within the scope of a subpoena. At times, it can be a long and costly exercise to identify and retrieve this data. As such, if compliance with a subpoena will be unduly onerous and expensive, there may be grounds to set aside the subpoena, or at least to limit the scope of the subpoena.

Another factor that the court may consider is whether the recipient of the subpoena has sufficient resources to deal with the subpoena. For example, larger companies are less likely to be oppressed by a wide or ambiguous subpoena than an individual would be.

Rather than having the subpoena set aside, the court may also consider whether it is possible to impose limitations on the scope of documents requested to alleviate the oppressiveness of the request.

What if my information is private?

If an application to set aside a subpoena is unsuccessful, then you will need to produce the documents sought.

If you have concerns as to disclosing privileged or commercially sensitive information contained within the documents, read on for options available to a subpoena recipient to protect that information.

The fair balance to be struck is between the interests of the parties seeking to review the documents, and the party claiming confidentiality.

PRIVILEGE AND CONFIDENTIALITY
SUBPOENAS AND SENSITIVE INFORMATION

Do you know what options you have available to you in preparing documents to be produced in court? Especially if these documents are of a sensitive nature or record communications between you and your lawyers?

So far, we have examined the effect of subpoenas, and the grounds upon which you might ask the court to set one aside.

This section deals with the two options available to you if you wish to protect any sensitive information, including documents recording communications between you and your lawyers, and information containing commercially sensitive information.

You should follow a broad process in preparing documents for court as follows:

1. documents answering the categories sought in the subpoena should be collated by you
2. any documents that contain communications with your lawyers, or recording commercially sensitive information, should be separated out from all the other documents into their respective bundles
3. you should end up with three bundles: (1) for general access following production; (2) marked "Subject to legal professional privilege"; and (3) marked "Subject to confidentiality"
4. you can then seal each bundle in an envelope or in some other way and produce to the court.

It is safer to separate the documents attracting legal professional privilege from those that are commercially sensitive, as the issues that arise from each claim to protect that information are different.

Legal professional privilege

Once the bundle of documents marked "Subject to legal professional privilege" are lodged with the court, they cannot be inspected by any other party until the court otherwise orders.

You should note however, if the court is pressed by one of the parties to the dispute, the onus is on you, as the party claiming privilege, to satisfy the court that access to the produced documents should be denied.

In essence, there are two types of legal professional privilege, being documents recording confidential information between a lawyer and a client, or the contents of that communication, created for the dominant purpose of providing:

- legal advice to the client (Advice Privilege)
- professional legal services relating to litigation (Litigation Privilege).

If you have documents that fall within either of those categories, you should consult a lawyer for advice on how best to show the court that the documents attract legal professional privilege, and so access to them should be denied.

Commercially sensitive

If you are producing commercially sensitive information, you should be aware that the rules are not as clear, nor as favourable to you. However, courts may be inclined to protect your rights in respect of commercially sensitive information in some circumstances.

The fair balance to be struck is between the interests of the parties seeking to review the documents, and the party claiming confidentiality. Such considerations are especially relevant if you, as the subpoenaed party, are a trade rival to one of the parties to the litigation.

Increasingly, courts have been inclined to limit access to such documents to the legal advisers of the litigants, subject to those individuals providing a confidentiality undertaking not to disclose such information to clients or any other person.

Again, if you are producing information that is commercially sensitive, you should seek legal advice in order to best protect your information.

Summary

That concludes our examination of the issues of privilege and confidentiality in documents subject to subpoena. Remember, you need to separate the documents requested into their respective categories. If in any doubt, contact our team of experienced lawyers who can help you protect any confidential or legally privileged information.

Even after the production of documents to court under subpoena, there remains good reason to be vigilant

WHAT HAPPENS AFTER YOU'VE PRODUCED?
IMPLIED UNDERTAKINGS AND SUBPOENAS

Once you have produced documents to a court under a subpoena, you might wonder what happens to those documents and how they might be used against you (especially in circumstances where you're not a party to the proceedings).

So far, we have looked at what a subpoena is, how to comply with one served on you, and how to protect sensitive and privileged documents.

We now look at how documents produced under subpoena can be admitted as evidence, and the rights of persons who produce those documents.

Production and entry into evidence

When you produce documents to a court under a subpoena, those documents do not automatically become admitted into evidence in the proceedings.

On the return date of a subpoena (which is noted on the subpoena form), there is a hearing at the court where parties to the proceedings and third parties who are producing documents can ask the court to make orders as to who can access the documents and at what time.

For example, a party may be given access to the documents prior to another one, so that it can review the documents first and remove any legally privileged documents before the other side reviews them.

It is quite common for parties to a proceeding not to attend the return of subpoena if documents have been produced and the proposed access order (which is noted on the subpoena form) does not prejudice their case. If the parties do not object to the access order, the court simply makes the order in accordance with the terms of the subpoena.

Once access orders have been made, the parties will then have the ability to review the documents produced. If a document produced is relevant to one party's claim or defence, they will then need to put that document into evidence in the proceedings.

This can be done by:

- attaching the documents which they wish to rely on to witness statements or affidavits
- tendering a copy of the documents to the Judge during the final hearing generally on the basis that they are a business record.

The "implied undertaking"

When you produce documents to a court, as a general rule, a party who has sought production of those documents can only make use of them for the purpose of the legal proceedings already on foot (and not for any other reason).

This is sometimes referred to as an "implied undertaking" – that is, the person who receives the documents is said to have impliedly provided an undertaking that they will not use documents which the court has compelled production of, in other proceedings or for any other purpose.

In effect this means that the produced documents:

- cannot be used in other proceedings (even if the substance of the proceedings is similar)
- cannot be "leaked" to the media
- cannot be accessed by the general public so that new proceedings can be brought against the producing party.

This implied undertaking applies to *all* people who receive the documents throughout the proceedings, not just the parties to the proceedings. However, this implied undertaking does not apply to a third party who independently applies to the court and is granted access to the documents.

When the rule doesn't apply

However, in some circumstances, a court may grant a party leave to use the documents produced for another purpose. To obtain leave of the court, a party will need to ask the court to relieve them of their undertaking or obtain the consent of the producing party to use the documents in the way they propose.

The main reason parties generally seek the court's indulgence is so that they can add new causes of action against an existing party or alternatively add a new party to the proceedings. When determining such an application, the court is mindful of avoiding duplication of proceedings and costs incurred by the parties. The court is also mindful of not causing injustice to the producing party or other parties to the proceedings.

In summary

Even after the production of documents to court under subpoena, there remains good reason to be vigilant in respect of the use to which those documents are put by parties who may seek access to them.

If you have been served with a subpoena, contact our team of experienced lawyers who can help you comply with it and protect any confidential or legally privileged information.

In NSW, there are two types of Notices of Produce – a Notice to Produce for inspection by the parties, and a Notice to Produce to Court

HAVE YOU BEEN ISSUED WITH A NOTICE TO PRODUCE?

A Notice to Produce is a procedure by which a party to proceedings may serve another party with a notice requiring the production of specified documents, or things. These notices generally have the same effect as a Subpoena to Produce for Inspection but is only issued to a party in the proceedings as opposed to a non-party (not a plaintiff or defendant in the proceedings).

In NSW, there are two types of Notices of Produce – a Notice to Produce for inspection by the parties, and a Notice to Produce to Court. Both are governed by the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR). In light of the differences between the Notices, detailed below, parties should carefully consider which Notice to Produce is appropriate in the circumstances (and comply with the UCPR) to ensure that the Notice to Produce is not set aside and that the particular information sought is what is produced.

21.10 Notice to produce for inspection by parties

(1) Party A may, by notice served on party B, require party B to produce for inspection by party A--

(a) any document or thing that is referred to in any originating process, pleading, affidavit or witness statement filed or served by party B, and

(b) any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue.

(2) A notice to produce may specify a time for production of all or any of the documents or things required to be produced.

34.1 Notice to produce to court

(1) A party may, by notice served on another party, require the other party to produce to the court, or to any examiner--

(a) at any hearing in the proceedings or before any such examiner, or

(a1) at any time fixed by the court for the return of subpoenas, or

(b) by leave of the court, at some other specified time, any specified document or thing.

(2) The other party must comply with a notice to produce--

(a) by producing the notice or a copy of it, and the document or thing, to the court, or to the examiner authorised to take evidence in the proceeding as permitted by the court, at the date, time and place specified for production, or

(b) by delivering or sending the notice or a copy of it, and the document or thing, to the registrar at the address specified for the purpose in the notice, so that they are received not less than 2 clear days before the date specified in the notice for production.

The obvious difference between the notices is that Notice to Produce for inspection by parties requires that the document/s be made available for inspection (although it is often the case that copies of the document/s are provided to the issuing party as a matter of convenience), whereas a Notice to Produce to Court requires that the documents be produced to the court directly in a similar manner to a Subpoena for Production.

The more subtle difference between the two however is that a Notice to Produce for inspection requires production of a document that is specified in the pleadings or evidence, and *"any other specific document or thing that is clearly identified and is relevant to a fact in issue."* That is to say, there is a requirement that the document be clearly identified (i.e., with some degree of specificity rather than just general description of a class of documents or merely infer the existence of a document) and is also relevant to a fact in issue. The same criteria are not specified in relation to a Notice to Produce to Court.

For instance, it would be appropriate for a Notice to Produce for inspection to seek "Minutes of Meeting of Building Company Pty Ltd dated 12 June 2021" rather than "All Minutes of Meeting of Building Company Pty Ltd." This is provided that the Minutes of Meeting of Building Company Pty Ltd on 12 June 2021 was relevant to a fact in issue in the proceedings. However, for the purpose of a Notice to Produce to Court it is permissible to describe documents sought more broadly.

Preliminary discovery applications are useful tools to assist with determining whether to commence a legal action

LOOKING TO COMMENCE LEGAL ACTION?
WHAT YOU NEED TO KNOW ABOUT PRELIMINARY DISCOVERY APPLICATIONS IN NSW

Preliminary discovery applications are a useful tool in litigation to help determine whether you have a potential claim against another party, or to locate or identify a potential defendant so that you can bring a claim against them. It is an efficient and cost-effective way to answer these questions without bringing proceedings prematurely.

When should you use preliminary discovery?

You should consider bringing an application for preliminary discovery:

- if you need to identify or locate the whereabouts of a prospective defendant
- if you require information or documents in order to determine whether you should commence proceedings against someone.

What can you obtain from preliminary discovery?

In New South Wales, there are three kinds of applications for preliminary discovery:

1. To identify or determine the whereabouts of a prospective defendant

If you know you have a cause of action against a prospective defendant, and a party holds information or documents that may assist you in determining the identity or whereabouts of that prospective defendant, the court may order a party to provide this information or documents to you under rule 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW) **('UCPR')**.

In order to be successful, you must be able to demonstrate to the court that, after having made reasonable inquiries, you have been unable to successfully determine the identity or whereabouts of the prospective defendant in order to commence proceedings against them.

2. To obtain documents or information from a prospective defendant and determine whether you have a claim against them

If you are considering bringing legal action against a prospective defendant, the court may order for that party to produce information and documents to you prior to commencing proceedings under rule 5.3 of the UCPR where:

- after having made reasonable inquiries, you cannot obtain sufficient information to determine whether you have a potential claim against a prospective defendant
- the prospective defendant may have information or documents that would allow you to determine whether you have a claim
- the information or documents would assist in making that determination.

In considering a preliminary discovery application under rule 5.3, the court must not assess the merits of a claim, as was found in *O'Connor v O'Connor* [2018] NSWCA 214. This case also broadened the scope of what may be 'discoverable' to include documents that concern your entitlement to bring a claim, the potential value of that claim, and any potential defences that the prospective defendant may rely upon if you were to bring a claim against them.

3. To obtain documents or information from a non-party and determine whether you have a claim against them

If the documents or information you require are held by someone else, who is not the prospective defendant, the court may issue a preliminary discovery order under rule 5.4 of the UCPR.

Applications under this rule can also be made after proceedings have already commenced.

To bring a successful preliminary discovery application under rule 5.4, you must show that the party may have or may have had possession of documents or information that are relevant to a question in your proceedings. For example, in *Kimberley Securities v Byrne* [2008] NSWSC 1214, the Supreme Court made orders for preliminary discovery against a company that was related to the prospective defendant.

'Questions in Proceedings'

A common challenge when bringing preliminary discovery applications under rule 5.4 is establishing the relevance of the requested documents to a "question in the proceedings," especially when proceedings have not yet commenced. The court may question why you are seeking information from a non-party before having sought information from the prospective defendant themselves.

In *Ian Edward Morton & 5 Ors v Nylex Ltd & 1 Or* [2007] NSWSC 562, an application under rule 5.4 failed because it did not pertain to a question in the ongoing preliminary discovery proceedings (a rule 5.3 application against the prospective defendant), even though they were likely to relate to a question in future substantive proceedings.

"Reasonable inquiries"

Before making preliminary discovery orders of any kind, the court will consider whether you have made reasonable inquiries to obtain those documents prior to bringing an application. This includes requesting relevant documents from the prospective defendant or other third parties. You should demonstrate to the court that you have made numerous attempts to access the documents or information without success.

Lawyers can assist you by making such inquiries on your behalf.

Important considerations

As with all litigation proceedings, there is a level of risk and expense involved in bringing an application for preliminary discovery. Here are some important things to consider before bringing a preliminary discovery application:

1. Have you chosen the correct kind of application?

The court strongly cautions against "blending" preliminary discovery applications under the UCPR. Recently, in *British Airways PLC v Roller Truck Australia Pty Ltd & Anor* [2023] NSWDC 112, the District Court rejected an application which had been brought under rule 5.2, on the grounds that it was essentially seeking preliminary discovery under rule 5.3. Abadee J clearly stated that "Rules 5.2 and 5.3 have separate work to do" [34].

2. What is the scope of your application?

Documents and information requested for the purposes of preliminary discovery must be narrow and cannot be:

- a fishing expedition
- unduly onerous or costly for the person upon which the orders are sought against
- a method to obtain material to strengthen a prospective plaintiff's position before proceedings have commenced.

3. Compliance

If an order for preliminary discovery is sought against a person that is not the prospective defendant, you must pay sufficient conduct money to that person.

4. Costs

As with all litigation, there are costs implications of putting on an application for preliminary discovery. If unsuccessful, you may be ordered to pay the successful party's costs.

Usually, the court will order for costs to be paid by the unsuccessful party on an 'ordinary basis' (also known as party/party costs). Costs on an ordinary basis are often only about 60% to 75% of actual costs incurred.

In special circumstances, the court may order an unsuccessful party to pay costs on an 'indemnity basis' (also known as solicitor/client costs), which are usually 85% or greater of actual costs incurred.

5. Jurisdiction

Each state or territory may have slightly different rules for preliminary discovery and should be a consideration.

The Federal Court also have a unique set of rules for preliminary discovery which will be explored in our next section on discovery.

Conclusion

Overall, an application for preliminary discovery can be a proactive, expedient, and effective way to determine whether you have a claim against another party. Preliminary discovery may also help you when trying to bring proceedings that are time-sensitive, such as an application for freezing orders. For further information, read our article on issuing freezing orders to maximise your chances of recovering stolen funds.

The test for whether an order for preliminary discovery should be made is an objective test

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WHAT YOU NEED TO KNOW ABOUT PRELIMINARY DISCOVERY APPLICATIONS IN THE FEDERAL COURT

Preliminary discovery applications are a useful tool in litigation to help determine whether you have a potential claim against another party, or to ascertain a description of a potential respondent so that you can bring a claim against them.

If you are considering commencing proceedings in relation to a Federal Court matter, you may need to make an application for preliminary discovery within the Federal jurisdiction. Federal Court matters may relate to administrative law, bankruptcy, corporations law, consumer law, intellectual property or other areas covered by Federal Law.

Whilst these types of applications for preliminary discovery are similar to those described in NSW, the Federal Court has different requirements that must be satisfied in order to successfully bring an application for preliminary discovery. Further, it is important to remember that any such application should only be brought after all reasonable efforts have been made to gather the required documents and information from other sources, as is the case in the New South Wales jurisdiction.

1. An application to ascertain the description of the respondent – where the applicant wishes to ascertain the description of a respondent, an application can be brought under rule 7.22 of the *Federal Court Rules 2011* (Cth) (FCR). To be successful, the applicant must demonstrate that:
   a. there may be a right for the applicant to obtain relief against a prospective respondent
   b. the applicant is unable to ascertain the prospective respondent's description
   c. another person knows or is likely to know the prospective respondent's description or has or is likely to have a document that would assist in ascertaining their description.

The scope of documents or information requested by the applicant in this kind of application must be reasonable. In the matter of *Khan v Google LLC* [2023] FCA 785, the court found that the information requested by an applicant cannot go *"beyond what [was] reasonably required to assist [the applicant] to ascertain the description of the [prospective respondent]"* [35].

2. Application to ascertain whether there is a claim to be made – where the applicant wishes to determine whether there is a claim to be made against the prospective respondent, an application can be brought under rule 7.23 of the FCR. To be successful, the applicant must demonstrate that:

   a. the applicant reasonably believes that they have a right to obtain relief from the prospective respondent

   b. after making reasonable inquiries, the applicant does not have sufficient information to determine whether or not to commence proceedings to obtain that relief

   c. the applicant reasonably believes that the prospective respondent has or is likely to have documents that are directly relevant to the question of whether there is a right to obtain relief

   d. inspection of those documents would assist the applicant in making that decision.

The test for whether an order for preliminary discovery should be made is an objective test of whether the application *may* have a right to relief and whether a person in the same position as the applicant would *reasonably* believe that they may have a right to obtain relief (*Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193 [180]).

The scope of the documents and information that an applicant may be entitled to under rule 7.23 of the FCR is limited to what is sufficient to allow an applicant to *"know whether the cost and risk of litigation is worth the candle"* (*Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* (No 3) [2021] FCA 1428 [49]). This scope includes documents and information that will assist with understanding the liability, quantum and costs considerations relevant to the prospective matter.

In *Pfizer v Samsung* (No 3), the court noted that the purpose of preliminary discovery is not to strengthen or enhance an applicant's decision to commence proceedings if a decision to commence proceedings could reasonably be made on existing material [50].

3. Costs

Security for costs

Prior to the preliminary discovery application being heard, the prospective respondent may seek orders that the prospective applicant pay money to the court as a security for the prospective respondent's costs and expenses.

Order for costs

Ordinarily, costs are awarded to the successful party on a party-party basis, meaning that the successful party is entitled to have their costs paid by the unsuccessful party subject to taxation of those costs.

In special circumstances, such as a party's failure to comply with preliminary discovery orders, the court may order that a party pay costs of the application on an indemnity basis.

Conclusion

As in New South Wales Courts, an application for preliminary discovery in the Federal Court is an effective way to determine whether you have a viable claim against another party before deciding to commence proceedings after all other reasonable enquiries have been made. Often, bringing such an application will focus the opposing party's attention on the real issues in dispute and provide an opportunity to resolve the matter before substantive proceedings are commenced, and the incurrence of the associated time and cost.

If you are unsure whether you have a basis to commence legal proceedings against an individual and think that a preliminary discovery application may be of assistance, please contact our team.

GET IN TOUCH

Contact our smart and friendly team today who will take the time to understand your needs.

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