



SUPREME COURT OF WESTERN AUSTRALIA

Factsheet: Discovery

Order 26 of the Rules of the Supreme Court requires parties to the proceeding to give discovery of all documents which are or have been in a party's possession, custody or power relating to any matter in question in the proceedings.

Discovery is the process by which parties disclose to the other parties details of relevant documents and provide each party with access to all relevant documents before trial.

The aim of discovery is to avoid either party being surprised or ambushed, to save costs and to encourage settlement.

1. What is a "Document"?

A document for the purposes of discovery has a broad definition. It is not limited to paper documents.

Order 26 1A of the RSC says a document means a record of information and includes –

- (a) Any disc, tape sound-track or other device in which sounds or other means of transmitting data (not being visual images); and
- (b) Any film, negative, disc, 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 device, of being reproduced.

2. When is a document in your possession, custody or power?

Documents which are in the possession or power of an agent on your behalf, or in the possession of partnership of which you are a member, are in your possession for the purposes of discovery.

A document is in your custody if you hold it as servant or agent for a third party who owns it.

A document is in your power if it is in your possession or you have an immediate legal right at the time of discovery to demand possession of it from another person in whose possession it is.

The Court has power to direct a party to take steps to obtain access to and discover documents which are in the possession, custody or power of a third party where there is real likelihood that a party to the proceeding would be given access to the documents upon request.

3. What is a matter in question?

Unless there is an order which limits the documents which you must discover, you must give discovery of all documents in your possession, custody or power and which relate to any matter in question.

The pleadings determine what matters are in issue between the parties. Documents relate to a matter in issue where:

- the document would be evidence upon any issue in the proceedings;
- the document may, either directly or indirectly, enable you to advance your own case;
- the document may directly, or indirectly, damage the case of the other party;
- the document may, directly or indirectly, enable the other party to advance his or her own case; and/or
- the document may directly, or indirectly, damage your case.

4. When do you have to give discovery?

A party generally has no obligation to give discovery until served with a notice pursuant to O26 rule 1(1) RSC.

However, during case management, judges or registrars will usually make orders for the parties to provide discovery. The general rule is that discovery will occur after pleadings have closed but this is always subject to the demands in a particular case. The Court has very wide powers to determine the stage at which, and the extent to which, discovery should be ordered.

The obligation to provide discovery, once an order is made, is a continuing one. Any document that comes into existence or that comes into your possession, custody or power, after you have initially provided discovery, and that falls within the terms of the original order, must also be discovered. You must prepare a supplementary List of documents verified by affidavit.

5. Will discovery be limited to certain documents?

The Court does not order general discovery in all cases. When making orders, the case managing judge or registrar will have regard to the cost and delay of discovery, the value, complexity and importance of the subject matter in dispute and the financial position of the parties to determine the extent of your obligation to give discovery, and your entitlement to discovery from the other party.

6. How do I give discovery?

Your first step is to prepare a list of documents verified by affidavit. The list must be in the format of Form 17 RSC and the Affidavit must be the format of Form 18 RSC.

The list must include all documents in your possession, custody or power. The documents must be numbered in a convenient order and each document must be described, as succinctly as possible, but with enough detail to enable clear identification. The list must also include the documents that you may object the other party inspecting. These documents are listed in Part 1A of Form 17.

You must also list documents that were once, but are no longer, in your possession, custody or power: Part 2A of Form 17. You must then state the date upon which each document was last in your possession, custody or power, what has become of the document and who currently has possession, custody of or power over it: Part 2B of Form 17.

Your second step is to produce the documents on the list.

Relevant and irrelevant material

Order 26 rule 1B permits a party to edit discovered documents (by masking the irrelevant parts) where the document contains information that is not related to a matter in question or information that the party objects to producing.

Privilege

You may object to producing a document for inspection on the basis of privilege. A privilege is a legal right to resist compulsory disclosure of documents. Where a claim for privilege is made, the party claiming privilege must properly describe that document, that is the form of the document, who the communication is between, the date of the document, whether it is a copy or an original and the basis upon which the privilege is claimed. The most common claims for privilege are legal professional privilege and without prejudice privilege.

Legal professional privilege

Legal professional privilege protects communications between lawyers and their clients from being disclosed without the permission of the client. This privilege enables a party to object to production of documents which would reveal communications between a client and his lawyer that are made for:

- (a) the dominant purpose of giving or obtaining legal advice; or
- (b) the provision of legal services, including representation in legal proceedings.

Without prejudice privilege

You may object to producing documents that contain admissions you made during negotiations to settle litigation.

The privilege extends to negotiations before proceedings have commenced, provided there is a genuine attempt to reach settlement.

7. How do I give inspection?

You must allow the other party to inspect the documents contained in your List of Documents (other than those to which you're objecting). When the List of Documents is served on the other party, a notice must also be served on that party specifying the time (within 7 days) and place where the documents may be inspected. The time and place must be reasonable.

The documents produced for inspection must be identified by their number in the List of Documents (or some other means which makes the documents easy to identify).

When inspecting the documents from the other party you can make copies of any documents, and facilities should be provided for you to make copies at inspection. If that is not possible, you may request copies of the documents be provided. The other party can charge you reasonable costs associated with making those copies.

8. What can happen if I don't give discovery?

If you fail to comply with an order for discovery, the Case Management Registrar may make an order that, unless you comply with the order for discovery by a particular date, your case will be struck out or judgment will be entered against you.

If you fail to provide all of the documents which should have been discovered, there may be other consequences, including an adjournment of any trial, an order for a retrial and orders that you pay the costs associated with any such order.

9. Confidentiality and the obligation not to use documents for any other purpose

There is an implied undertaking given by each party that they will only use the documents in discovery for the purposes of the proceeding.

For that reason, you are not able to object to inspection of a document on the grounds of confidentiality. If you are concerned about disclosing commercially sensitive information, then you may apply for orders that inspection be restricted to the lawyers for the inspecting party.