



New South Wales

DISTRICT COURT ACT 1973—RULE

1. This rule is made by the Rule Committee on 8 October 1996, and has effect on and from 18 October 1996.

2. The amendments made by this rule do not apply in respect of actions commenced before 1 November 1996.

3. Subject to paragraph 2, the District Court Rules 1973 are amended by omitting Part 22 and inserting instead:

PART 22

DISCOVERY AND INSPECTION OF DOCUMENTS

Definitions

1. In this Part:

- (a) “document” includes any part of a document;
- (b) “excluded documents” means in relation to an action, subject to any order of the Court to the contrary:
 - (i) any document filed in the action and any copy thereof;
 - (ii) any document served on party A (as described in rule 3 (1)) after the commencement of the action and any copy thereof;
 - (iii) any document which wholly came into existence after the commencement of the action;
 - (iv) any additional copy of a document included in a list of documents under rule 3 (3), which contains no mark, deletion or other matter, relevant to a fact in issue, not present in the document so included; and
 - (v) any document comprising an original written communication sent by party B prior to the date of commencement of the action of which a copy is included in a list of documents under rule 3 (5).
- (c) “privileged document” means in relation to an action:
 - (i) a document of which evidence could not be adduced in the action over the objection of any person, by virtue of the operation of Part 3.10 (other than sections 128 and 130) of the Evidence Act 1995;

- (ii) where party B is a natural person, a document the contents or production of which may tend to prove that party B:
 - (A) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (B) is liable to a civil penalty, within the meaning of section 128 (1) of the Evidence Act 1995;
- (iii) a document that relates to matters of state within the meaning of section 1'30 of the Evidence Act 1995, unless and until the Court directs that it cease to be a privileged document;
- (d) a document or matter is to be taken to be relevant to a fact in issue if it could, or contains material which could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

Notice to produce for inspection

2. (1) A party (party A) may by notice served on another party (party B) require party B to produce for the inspection of party A:

- (a) any document (other than a privileged document) referred to in any pleading, affidavit or witness statement filed or served by party B;
- (b) any other specific document (other than a privileged document) clearly identified in the notice, relevant to a fact in issue.

(2) The maximum number of documents which party A may require party B to produce in reliance on subrule (1) (b), whether by one or more notices, is 50.

(3) Party B, upon being served with a notice under subrule (1), shall within a reasonable time:

- (a) produce for the inspection of party A such of the documents as are in the possession, custody or power of party B;
- (b) in respect of any document which is not produced, serve on party A a notice stating in whose possession the document is, to the best of the knowledge, information and belief of party B, or that party B has no knowledge, information or belief as to that matter.

(4) A notice under subrule (1) may specify a time for production of all or any of the documents required to be produced. If the time specified is 14 days or longer after service of the notice it is to be taken to be a reasonable time for the purpose of subrule (3) unless the contrary is shown. If the time specified is less than 14 days after service of the notice it is to be taken to be less than a reasonable time unless the contrary is shown.

Order for discovery

3. (1) The Court may, on the application of a party or of its own motion, order that any party (party B) give discovery to any other party (party A) or parties (each of which is included in the expression “party A”) of:

- (a) documents within a class or classes specified in the order;
- (b) one or more samples (selected in such manner as the Court may specify) of documents within such a class.

(2) A class of documents shall not be specified in more general terms than the Court considers to be justified in the circumstances.

(3) Subject to subrule (2), a class of documents may be specified:

- (a) by relevance to one or more facts in issue;
- (b) by description of the nature of the documents and the period within which they were brought into existence;
- (c) in such other manner as the Court considers appropriate in the circumstances.

(4) The effect of an order for discovery under subrule (1) is that the parties involved are required to comply with the succeeding provisions of this rule.

(5) Party B must, within 28 days of the order being made (or of notice of the order being received by party B, if party B was not present or represented when the order was made) or such other period as the Court may specify, serve on party A:

- (a) a list, complying with subrule (6), of all the documents or samples specified in the order (other than excluded documents) which:
 - (i) are in the possession, custody or power of party B; or
 - (ii) are not, but were later than 6 months prior to the commencement of the action, in the possession, custody or power of party B;

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- (b) an affidavit made in accordance with subrule (7) stating:
 - (i) that the deponent has made reasonable enquiries and
 - (A) believes that there are no documents (other than excluded documents) falling within any of the classes specified in the order which are, or were later than 6 months prior to the commencement of the action', in the possession, custody or power of party B other than those referred to in the list of documents;
 - (B) believes that the documents in part 1 of the list are within the possession, custody or power of party B;
 - (C) believes that the documents in part 2 of the list are within the possession or power of the persons (if any) respectively specified in that part;
 - (D) as to any document in part 2 in respect of which no such person is specified, that the deponent has no belief as to whose possession or power the document is in; and
 - (ii) in respect of any documents which are claimed to be privileged documents, the facts relied on as establishing the existence of the privilege; and
 - (c) where party B is represented by a solicitor, a certificate by that solicitor stating:
 - (i) that the solicitor has advised party B as to the obligations arising under an order for discovery (and where party B is a corporation, which officers of party B have been so advised); and
 - (ii) that the solicitor is not aware of any documents within any of the classes specified in the order (other than excluded documents) which are, or were later than 6 months prior to the commencement of the action, in the possession, custody or power of party B, other than those referred to in the list of documents.
 - (6) The list of documents shall:
 - (a) be divided into two parts, of which part 1 relates to documents in the possession, custody or power of party B, and part 2 relates to documents which are not, but were later than 6 months prior to the commencement of the action, in the possession, custody or power of party B;

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- (b) include a brief description by reference to nature and date (or period) of each document or group of documents, and in the case of a group, the number of documents in that group;
 - (c) specify against the description of each document or group in part 2 of the list the person (if any) in whose possession the document or group of documents is believed to be;
 - (d) identify any document or group of documents which is claimed to be privileged, and specify:
 - (i) any provision of Part 3.10 of the Evidence Act 1995 under which the privilege is claimed to arise; or
 - (ii) the circumstances which it is claimed bring the document or group of documents within rule 1 (c) (ii) or (iii).

(7) The affidavit shall be made:

- (a) where party B is a natural person and not a disable person—by party B;
- (b) where party B is a disable person—by party B's tutor;
- (c) where party B is a corporation—by an officer of the corporation having knowledge of the facts so far as they are known to the corporation, or by its liquidator or provisional liquidator;
- (d) where party B is the Crown—by an officer of the Crown having knowledge of the facts so far as they are known to the Crown.

(8) If at any time after the affidavit is made, and before the end of the trial or hearing, party B becomes aware:

- (a) that any document within the class or classes specified in the order (not being an excluded document) but not included in part 1 of the list of documents is within, or has come into, party B's possession, custody or power; or
- (b) that any document included in part 1 of the list of documents which was claimed to be a privileged document, was not, or has ceased to be, a privileged document,

party B shall thereupon give written notice to party A of that fact and comply with subrule (10) in respect of the document, as if that document had been in part 1 of the list of documents and the list had been served on the date of the giving of such notice.

(9) Party B shall ensure that the documents described in part 1 of the list (other than privileged documents) are:

- (a) at the time the list of documents is served on party A and for a reasonable time thereafter, physically kept and arranged in a way that makes the documents readily accessible, and capable of convenient inspection by party A; and
- (b) at the time the list of documents is served on party A and until completion of the trial of the action, identified in a way that enables particular documents to be readily retrieved.

(10) Within 21 days after service of the list of documents, or within such other period or at such other time as the Court may specify, party B shall, on request by party A:

- (a) produce for inspection by party A the documents described in part 1 of the list (other than privileged documents);
- (b) make available a person who is able to, and does on request by party A, explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents;
- (c) provide facilities for the inspection and copying of such of the documents (other than privileged documents) as are not capable of being copied by photocopying;
- (d) subject to an undertaking being given by the solicitor for party A to pay the reasonable costs thereof (or if party A has no solicitor, subject to party A providing to party B an amount not less than a reasonable estimate of the reasonable costs of the use thereof), provide photocopies of, or photocopying facilities for the copying of, such of the documents as are capable of being copied by photocopying.

(11) No copy document, or information from a document, obtained by party A as a result of discovery by party B shall be disclosed or used otherwise than for the purposes of the conduct of the action, without the leave of the Court, unless the document has been received into evidence in open Court.

(12) Nothing in subrule (11) shall affect the power of the Court to make an order restricting the disclosure or use of any document whether or not received into evidence, or the operation of any such order.

Powers of Court

4. The Court may, on the application of a party, or of its own motion:

- (a) by order discharge, vary or extend any of the obligations arising under rules 2 and 3;
- (b) determine any question of privilege or other question arising from the operation of this Part;
- (c) where a party does not comply with an obligation arising under rules 2 and 3:
 - (i) by order, dismiss or limit any claim made by that party;
 - (ii) by order, strike out or amend any pleading filed by that party;
 - (iii) strike out, disallow or reject any evidence which that party has adduced or seeks to adduce;
 - (iv) require that party to pay the whole or part of the costs of another party of the action; or
 - (v) make such other order as the Court considers appropriate in the circumstances.

Personal injury claims

5. Rule 2 (1) (b) and rule 3 shall not apply to an action on a common law claim for damages arising out of the death of, or bodily injury to, any person or for contribution in respect of damages so arising, unless the Court, for special reasons, otherwise orders.

Contempt

6. Neither the provisions of rule 4 (c) nor any order made thereunder shall affect the liability of a party or any other person for contempt of court in respect of any breach of an order for discovery under rule 3 (1).

EXPLANATORY NOTE

The purpose of the amendments is to introduce, for actions commenced in the District Court on or after 1 November 1996, the procedural system regarding discovery and inspection of documents recently introduced into the Supreme Court.

E. J. O'Grady
Secretary to the Rule Committee