

## Obtaining Information to Assist in Deciding Whether to Commence Court Proceedings

Do you think you might have a claim but are unable to make a decision without obtaining further information? What can you do if someone else has the documents you want? This article briefly touches on some of the mechanisms that can be used to obtain information from other people before committing to commence proceedings: pre-action/preliminary discovery, freedom of information applications and reliance on rights afforded to members of corporations under the *Corporations Act 2001* (Cth).

Commencing court proceedings is not a step to be taken lightly. Not only does it carry the potential for adverse costs orders if you later decide not to pursue the claim, but commencing proceedings prior to having enough information can lead to bad strategic decisions impacting your ability to extract a favourable commercial settlement and also significantly increasing your legal costs through creating an environment for pleadings disputes and amendments. There are a variety of mechanisms which may be used to obtain information to assist in making the decision on whether to commence proceedings, including pre-action discovery applications, freedom of information (FOI) applications and requests pursuant to the *Corporations Act 2001* (Cth).

### Pre-Action Discovery

“Pre-action” or “preliminary” discovery is a court procedure that can be a powerful tool to obtain information, define the issues, and facilitate informed consideration of whether to commence court proceedings and against whom. As it is a court application, it is a formal process, one that still might take several months to resolve, and one over which the court can exercise considerable control.

While there are minor variations between the jurisdictions in Australia, preliminary discovery is generally available either:

1. to obtain information from any person or entity necessary to identify a potential defendant (**Identification Scenario**); or
2. to obtain information from a potential defendant to determine whether to commence proceedings against that defendant (**Commencement Scenario**).

Pre-action discovery is subject to some restrictions. The applicant must:

- a. reasonably believe that it has a claim or right to relief (against the unidentified defendant in an Identification Scenario or that defendant in the Commencement Scenario); and

- b. have made all reasonable inquiries and still have insufficient information (to identify the defendant in the Identification Scenario or decide whether to commence proceedings against the defendant in the Commencement Scenario); and
- c. reasonably believe the entity against which the order is sought is likely to have documents relevant to making the decision and that inspection of those documents will assist (in identifying the defendant in an Identification Scenario or in making a decision as to whether to commence proceedings in the Commencement Scenario).

As a discretionary order, the court can in some instances (but does not commonly) require an applicant to undertake significant steps prior to ordering preliminary discovery, for example, requiring the applicant be examined orally by the court and for the applicant to produce documents to the court.

It might be thought there is a high risk that a potential party may be less than forthcoming in producing documents that identify them as a defendant or strengthen a case against them. However, as an order generally requires a party to swear an affidavit that they have produced all documents, non-compliance risks of perjury and contempt are usually seen as a greater risk.

If pre-action discovery is ordered the use of the information obtained will be restricted. The documents produced are subject to the usual *Harman* undertaking to only use the information for the purposes of the proposed proceedings (or making a decision about commencing the proposed proceedings). Secondly, as was shown in the *Dallas Buyers Club* case, in unusual cases the courts are also willing to apply a high level of scrutiny over the precise proposed use of the documents and information contained in the documents and will prevent access to the information if they are not satisfied the use is permissible. Courts can also require significant financial deposits as security for compliance with the court’s conditions of access (see article [Update on Dallas Buyers Club LLC v IINet Ltd \(No 4\) \[2015\] FCA 838](#)).

In addition to your own legal costs in making an application for pre-action discovery, you are also exposed to the other party’s legal costs. In an Identification Scenario, you will generally have to pay the third party’s legal costs in responding to the application and in complying with an order. In the case of a Commencement Scenario, you will also generally be required to pay both the respondent’s costs of the application and the respondent’s reasonable costs of complying with any order for pre-action discovery. While the costs liability can be off putting, in the event that proceedings are commenced the costs that an applicant is ordered to pay a respondent and the applicant’s own costs in seeking pre-action discovery may be able to be recouped as part of the costs awards in the substantive proceedings.

Despite the formality and short term costs consequences, this process provides a powerful mechanism in cases where other processes such as FOI might not be available, and the costs incurred in obtaining the documents can often be insignificant compared to the benefits obtained from the orders and the costs saved by ensuring you have the correct defendant or a feasible cause of action.

## Freedom of Information

If a government department, agency or minister holds or might hold documents containing information you require, you can make an FOI application. FOI applications have the advantage of being relatively informal (a simple application form) and inexpensive. For some, it will also be an advantage that the reason the information is sought is irrelevant to the disclosure (aside from removal of personal information) and accordingly, an FOI application can be made either without solicitors or anonymously through use of solicitors. FOI applications can also be speedy (decision within 30 days) if the request is straightforward and there is no dispute over whether the documents can be withheld.

Having said this, FOI applications have their limitations, and there is some art to drafting the requests. Firstly, they depend on a government, agency or Minister holding documents, and those documents containing the information you require. Secondly, a relatively common response from the agency or department, even where the application has been carefully drafted and confined, is that the application is too broad in scope and ought to be further narrowed to reduce the administrative burden in searching for the documents. Thirdly, there are a number of grounds on which access to documents that fall within the scope of your request can be denied, such as if they would reveal deliberative processes, diminish the value of commercially sensitive information or would involve unreasonable disclosure of personal information about any person. You may never know these documents exist as the agency does not have to disclose the existence of documents which are exempt. This can be a real disadvantage if you are trying to determine what evidence exists to support your claim.

As a result, if you believe documents exist but they are not disclosed, you should consider whether to proceed with a pre-action discovery application as the exemptions to production are more narrow and the existence of documents must be disclosed even if there is an objection to inspection.

If access is denied and you know what document has been denied, you generally have a right of review under the applicable Freedom of Information legislation. While rights of review (both internal and external) exist, external review can involve significant delays which might be problematic if there is a need to make a decision about a claim in a relatively short period.

## Accessing Corporation Information

If you are a "member" (commonly called a shareholder) of a corporation, you have certain rights under the *Corporations Act 2001* (Cth) to access a company's:

- a. register (including the register of members);
- b. constitution;
- c. financial reports; and
- d. minutes of company meetings.

A copy of the constitution or company register is available to a member through, respectively, a request in writing or an application (in the prescribed form) along with payment of a modest fee. Minutes of company meetings are available for inspection by members free of charge.

A member may also elect to receive a copy of the company's financial reports, or if a member does not so elect, the company must, on at least one occasion, directly notify the member of the website where the financial reports may be accessed.

## Conclusion

Pre-action/preliminary discovery, freedom of information applications and reliance on the rights afforded to members of corporations under the *Corporations Act 2001* (Cth) are all potentially useful mechanisms to assist in deciding whether to commence court proceedings. Each has its own advantages and limitations, which make them appropriate in different circumstances.

Whilst these mechanisms can be extremely useful, in light of their differences and the potential costs consequences, it is advisable to carefully consider which of them is most appropriate to your situation. If necessary you should seek legal advice before you take further steps to obtain information in this way.

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