

Ordinarily a party to a court proceeding has a right to inspect all documents held by the other party that are relevant to the dispute. The only exception to this is if the document is privileged. Confidentiality is not a ground to oppose inspection by another party and until recently it was not usual for a party to try to limit inspection on the grounds of confidentiality.

This can be contrasted with the position regarding a party issuing a subpoena to a non-party for the production of confidential documents in the court proceeding.

Sometimes a subpoena is issued that by its terms is very broad and can include a request for confidential or commercially sensitive documents from the non-party to the proceeding. While confidentiality is not a ground to oppose production the parties commonly agree or the courts commonly require particular confidentiality regime to govern the inspection of the documents. This is separate to any right to challenge a subpoena on one of the established grounds.

The absence of an automatic right or common practice to protect confidential or commercially sensitive documents from trade competitors produced by parties to court proceedings in the discovery process gives rise to one asking, what can a party involved in a proceeding do to protect their confidential and commercially sensitive documents? Such documents might include a supply contract with generous pricing for a particular client or company accounts that show the margins the company is running that may be relevant to the proceeding and so may be inspected by another party. Sometimes a party's concerns are addressed by the Harman Principle. This is an implied obligation that all parties to a proceeding will not use documents obtained through inspection of discovered documents for a collateral purpose. This means that a company cannot use a sales spreadsheet obtained through discovery to renegotiate a contract with another party. However, even with this implied obligation in place there is still the risk that it may be impossible for a party to separate their knowledge gained from reviewing discovered documents from future commercial transactions or their conduct.

The question of protection of relevant commercially sensitive documents in discovery arose in a recent decision (*Alcoa of Australia v Apache Energy* [2014] WASCA 148). The Western Australian Court of Appeal confirmed that in the context of inspection of discovered documents courts could limit a party to the action regarding who (if the party is a corporation, or if the solicitors for the party also act for interested non-parties like insurers, which individuals can view the documents) could inspect discoverable documents and for what purpose those documents could be used.

The Court held that despite the existence of the Harman Principle the protection of confidential and commercially sensitive documents could require a stricter confidentiality regime to be in place before a party is allowed to inspect otherwise discoverable documents. The Court made orders that Alcoa must comply with a confidentiality regime when dealing with the identified confidential and commercial documents.

The Court also rejected an argument that the principles of open justice required the production of all relevant documents that are not privileged. The Court in this respect noted that open justice was an irrelevant consideration at the inspection stage of the proceeding and may only become relevant at the trial stage for documents adduced at trial where a court may be more reluctant to suppress confidential information on the basis of open justice.

The Alcoa case related to the gas explosion that occurred on Varanus Island and the subsequent failure to supply customers of Apache. The Court was concerned amongst other things that the documents could be used by the interested non-party insurers to make decisions regarding other parties claiming damages against Apache or that gas sale prices contained in confidential sales contracts could be used by other purchasers.

This case indicates the Court's willingness to make orders to protect a party's confidential documents from wide distribution in situations where the Harman Principle does not provide enough certainty of protection for parties prior to trial. It is also a good reminder that in disputes with competitors or customers parties should ensure that mechanisms are in place to protect confidential or commercially sensitive information if there is an exchange or provision of documents to the other party to the dispute.

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