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MEMORANDUM

Date: 9th October 2007

To: A I P D

Re: Preliminary Discovery – RTA of NSW v. Australian National Car Parks Pty Ltd ([2007] NSWCA 114)

I am asked to provide an Advice on the New South Wales Court of Appeal decision *RTA of NSW v. Australian National Car Parks Pty Ltd* ([2007] NSWCA 114 (15/5/07)). I will refer to this decision as 'the RTA decision'.

[1] GENERAL OVERVIEW OF THE DECISION

The issue raised in the RTA decision is preliminary discovery and I refer to previous Advice I have given on the matter of discovery and privacy. Under the privacy provisions – *Privacy Act 1988*, Principle 11- 'personal information' cannot be disclosed by the record keeper of such information unless (*relevantly*) 'the disclosure is required or authorised by or under law…". Thus, as Mason P notes in the decision at paragraph 7, where a subpoena, or FOI request is made, disclosure is 'authorised' by law. Similarly, a plaintiff may bring a 'suit for discovery' and, in the course of litigation, discovery may be ordered and thus 'authorised by law'. The difficulty confronting the AIPD and its operatives, is, however, that disclosure of the 'personal information' is usually required prior to the commencement of litigation in order to determine whether litigation is required and it is at this stage that the privacy principles operate and in most instances they operate to prevent disclosure.

Thus, in the RTA decision the respondent, Australian National Car Parks Pty Ltd, wished to identify the drivers of certain vehicles that had parked improperly in its car parks and applied to the RTA for information held by it relating to the vehicles. The respondent could have applied for the information by way of an FOI request, but the evidence – although rather scanty – was that that procedure was cumbersome and time consuming. Equally, the respondent could have obtained the information through a suit for discovery, or during the course of litigation, but, again, either route presented difficulties, not the least of which was that until the respondent identified the driver of each car on each relevant day, it could not commence proceedings. And the edge to this difficulty was the fact that separate claims would have to be issued for

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each vehicle and for each occasion it was improperly parked and the amounts involved in such claims would only be around $ 100 each.

The course adopted by the respondent to circumvent these difficulties was to apply under the uniform civil procedure rules (UCPR) for preliminary discovery. This is a procedure designed to enable a party to ascertain a 'prospective defendant's' identity, or whereabouts.

The Court of Appeal unanimously upheld the respondent's right to obtain preliminary discovery and to thus compel the RTA to disclose the information it held as to the vehicles registered keepers. Preliminary disclosure pursuant to the UCPR was thus disclosure of personal information 'pursuant to law' and did not, therefore, constitute a breach of the privacy principles.

This conclusion is not remarkable and is entirely consistent with Advice I have previously given about discovery under this principle. Similar provisions to the UCPR apply throughout Australia, although the wording and principles that apply in each case will vary to some extent.

The main difficulty with preliminary discovery from an investigate position is that it requires disclosure, at least to a third party, of the investigation and it requires application to a court, with the attendant cost and procedural requirements. Where there is no necessity to maintain a covert investigation then there is every reason to embark upon preliminary discovery. One important positive in doing so, is that once you have commenced preliminary discovery proceedings documentary evidence and evidence *per se*, can be preserved by court order. So for example, where a dentist drops a drill bit down a patient's throat and the bit is subsequently recovered during a surgical procedure, preliminary discovery will be important to obtain and preserve the drill bit from the hospital. Once it is secured, scientific examination of it will then be possible to determine why it was dislodged from the drill and thus a decision can be made as to whether litigation should be commenced and in this way you are able to preserve both the evidence and the patient's rights without being committed prematurely to litigation.

In summary then, preliminary discovery can provide a relatively easy, quick and convenient procedure to discover the identity and whereabouts of a potential defendant. Where it is undesirable in a litigation sense to disclose the investigation, then this procedure would not be used for obvious reasons. There is a cost to apply to a court for preliminary discovery, both in terms of the application fee, the hearing fee and the time and resources involved. Also a prerequisite is that you are able to identify a respondent to the application who you can identify as having at least some relevant information and, of course, if the application is dismissed, there will be an order made against the applicant for costs.

However, as the RTA decision shows, procedures can be developed to deal with the resources issues and to thus justify applications, even if, in some instances, a particular application may fail. Thus, while each claim that the respondent wished to

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make in respect of each vehicle may have only amounted to a hundred dollars, there was a sufficient number of such claims to justify an application under the UCPR, with, ultimately, an appeal to the Court of Appeal.

The effectiveness of this preliminary discovery procedure was emphasised by Mason P in the RTA decision itself when His Honour pointed out that it is available even when there is no certainty that litigation will be instituted. That is, the procedure is designed to enable prospective plaintiffs to identify prospective defendants. Once identified, other steps may then be necessary in order to determine whether there is a maintainable claim against the party, or parties, identified as 'prospective defendants'. His Honour expressed the position in this way -

> "The possibility that additional evidence may be required to make out a prima facie case of identifying the driver does not mean that the information in the [RTA] Register lacks utility or forensic worth as regards the driver's identity or whereabouts. As stated, preliminary discovery is not restricted to applicants seeking the last piece of a jigsaw." *Supra* [27]

The basic requirements that must be met in an application for preliminary discovery can be summarised as follows –

1. there must be a matter in respect of which litigation may arise so that a prospective plaintiff and a prospective defendant can be identified;
2. the prospective litigation must fall within the relevant jurisdiction out of which the application for preliminary discovery is to be issued;
3. the identity and / or the location of the prospective defendant must be unknown to the prospective plaintiff who is the applicant in the preliminary discovery proceedings;
4. the applicant must have made unsuccessful 'reasonable inquiries' seeking the identity and /or location of a prospective defendant – what are 'reasonable' will depend upon the facts of each matter, however, where, for example, approaches have been made to public authorities who would be expected to hold such information and those approaches have been rejected upon privacy grounds, this requirement will usually be made out;
5. Under the New South Wales UCPR –
   a. the application must be made on notice to the party perceived as holding the information sought and must be supported by affidavit, setting out the documents, information or kind of things sought to be discovered – and this will usually require some identification of the documents (or things) in which the information sought is likely to be held;
   b. there must be an intention at the time of the application to institute proceedings against the prospective defendant, but this intention is not immutably fixed or unqualified (RTA decision *supra* [12]); that is, upon disclosure of the information the intention may be changed;
   c. it is not necessary to establish a *prima facie* case against the prospective defendant, however, unless the affidavit is able to disclose evidence that

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would justify litigation then the court is unlikely to exercise it's discretion in favour of granting the application;

d. importantly, the applicant must establish that the respondent may have the required information – so, for example, it is insufficient to establish that the respondent will have in it's possession a particular document, unless you can also show that that document may contain the required information that will 'assist' in discovering the identity and / or location of the prospective defendant.

Importantly, the court emphasised that the information, document, or thing sought to be obtained is not required to positively provide the identity, or location, of the prospective defendant. It need not be, in the words of the court, the 'last piece in the jigsaw'. What is required, however, is that the applicant establish that it 'tends to assist' in obtaining that information.

Each application will be determined on it own particular facts and involves persuading the court to exercise it's discretion in favour of granting preliminary discovery. Each jurisdiction will have its own particular procedural and substantive rules that may restrict, or expand, the opportunities for using this procedural mechanism. However, it is clear that where you are able to identify a party as holding information that may assist you in discovering the identity and / or location of a prospective defendant, then preliminary discovery is a mechanism which should be considered. It's use may be contra-indicated where, for example, there is a desire not to disclose the potential litigation, but in most instances where litigation is a serious possibility, then the procedural steps required to be met will usually be justified. Preliminary discovery is also a very useful mechanism for preserving property and to enable scientific examination of things to be conducted as a precursor to litigation.

[2] SPECIFIC QUESITONS ADDRESSED

You have asked several questions relating to the RTA decision. My answers are –

Q.1 Where there is a prospective claim and the identity, or location, of a prospective defendant are unknown, then 'reasonable' steps need to be taken to ascertain the identity, or location, of the person. Enquiries to the usual sources – which will be rejected on privacy grounds – need to be made and then preliminary discovery against the RTA can then be sought.

Q.2 Preliminary discovery is available where you have been otherwise unable to obtain the information. In other words, where you apply to the usual sources and are rebuffed, then the court's discretion to order preliminary discovery is enlivened.

Q.3 Preliminary discovery does not depend upon the respondent requesting the perspective defendant's permission. His, or her, permission is irrelevant and not a required step in the procedure so that preliminary discovery may not mean

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disclosure of the investigation to the prepositive defendant. In section [1] above I have suggested that one of the disadvantages of preliminary discovery is that it alerts the prepositive defendant to the investigation and usually this will be the case. For example, preliminary discovery to an employer will usually disclose the investigation. Where, however, the preliminary discovery application is made to a public body, such as the RTA, there is no necessary reason for the investigation to be disclosed and, as you correctly indicate in your request for advice, in some instances disclosure itself may constitute an unlawful act. The way to ensure that disclosure is not inappropriately made is to seek an appropriate order in the preliminary discovery application.

Q.4 Yes. The procedure in the RTA case was limited to ascertaining the identity and / or location of prospective defendants; However, there are similar procedural rules to enable discovery of other information and things, in order to preserve evidence and to enable interrogation of the documents. These procedures are also available against third parties and thus enable investigation of prospective claims in order to, *inter alia,* determine whether to institute proceedings and if so, against whom to institute them. The preservation of evidence is an important aspect of these procedural rules, which are found in most jurisdictions.

Q.5 "Authorised by law" has been narrowly construed, however, it certainly does encompass preliminary discovery. That is, whatever it may mean in other contexts, where the Supreme Court of New South Wales orders preliminary discovery the disclosure is 'authorised by law', as there is no mandate to read down the phrase to require authorization by Commonwealth law, or by a Commonwealth (Federal) court. It is a general phrase which will be construed as covering orders by State and Territory courts, tribunals and other entities given the legislative power to make analogous orders to those made by the Supreme Court of New South Wales under the UCPR.

Q.6 No : cf. *Sobh v. Police Force of Victoria* ([1994] 1 V.R. 41) The decision concerned civil proceedings and the UCPR are expressed in terms of identifying prospective 'defendants' and thus do not extend to criminal proceedings. This will be the position in respect of most preliminary discovery rules, however, that is not the end of the matter at all. First, in some instances potential witnesses in criminal matters may also be prospective defendants. Second, once proceedings have been commenced by way of summons, subpoenas may be issued.

[3] AN OVERVIEW OF THE ISSUES

1. **Civil Litigation** – Preliminary discovery, or a suit for discovery, enable discovery of the identity and location of prospective defendants, the reservation of evidence generally and the interrogation of documents. This process requires an application to a court, supported by evidence and depends

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upon being able to identify categories of documents, or evidence, in the possession, custody or control of another party, which is, or may be relevant, to prospective litigation. The other party need not been the prospective defendant, or even a prospective party to proceedings.
This procedure can be relatively cheap and quick, although where the application is made against a third party strictly so called there is the danger of an adverse costs order if the application fails. A disadvantage of this procedure may be the disclosure of the investigation, but this does not always follow and orders may be sought to prevent premature disclosure.

When application is made to a public authority, it may be resisted on 'public interest immunity' grounds. However, if disclosure is ordered by A court then that disclosure will be 'authorised by law' and will not constitute a breach of the privacy principles. Obviously, an FOI request is also possible, however, it may be a more costly and less effective remedy, especially as it may require several applications to obtain the relevant documents and this may entail court proceedings. Preliminary discovery may often be a more effective route, if only because having identified the documents and evidence you require, disclosure will then depend upon whether you have satisfied the requirements of the court rules, rather than upon whether you have satisfied a public servant that the documents sought ought to be disclosed in the public interest. In short, preliminary discovery is a wider remedy than an FOI request that is based upon identifying documents, rather that information contained in classes of documents.

2. **Criminal Litigation** – the basic rule remains that discovery is not available in criminal cases, either against a defendant, or against the Crown : cf. *Sobh v. Police Force of Victoria* ([1994] 1 V.R. 41). However, once a summons has been issued, then subpoenas may be issued and in many instances subpoenas can be issued against police, forensic departments and the Crown. The real difficulties arise in the time before charge – here, preliminary discovery is difficult and very largely proscribed at common law and by virtue of the privacy principles. There is, however, scope for pre-charge discovery. In addition to FOI requests, preliminary discovery may be available where it is possible to identify a potential cause of action against another party which requires investigation. In this instance the normal civil rules apply, although a degree of caution is required as it is impermissible to use information gained in one proceeding for a collateral purpose. In many instances the solution is to carefully identify the type of information, or evidence, required to be interrogated, as this will usually lead to the identification of the party who is likely to have possession, custody, or control of it. Once these steps have been taken, then it may be a relatively simple step to issue a subpoena, or, as a last resort, an FOI request.

   But, what other steps may be taken to obtain discovery of, for example, the identity of potential defence witnesses and the preservation of evidence?

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It must be remembered that the superior courts –Supreme Courts, Federal Courts – enjoy a supervisory role over puisne courts and an inherent power to protect their own processes and to prevent those processes being used to oppress citizens. Thus they enjoy an inherent power to order discovery and the preservation of evidence, in order to ensure that defendants receive a fair trial. The decision of *Norwich Pharmacal Co. v. Customs and Excise Commission* ([1974] A.C. 1330 is a example of this, although it involved civil delicts, rather than criminal ones. *Barton v. The Queen* ((1980) 147 CLR 75) is another example dealing with court control over its process in respect to the issuing of *ex officio* indictments. As the decision in *SOBH* (*supra*) illustrates, such discovery applications may be resited by claims of 'public interest immunity', however where there is a police investigation, then it is not beyond the realm of the possible to mount a (preliminary) discovery application and certainly it may be mounted through the FOI route. Certainly, once a charge has been preferred then there is the real possibility if invoking the court's inherent power over it's processes to obtain (preliminary) discovery.

3. **A POSSIBLE SOLUTION** – The brief analysis of the RTA decision set out above indicates that there are various avenues that may be employed in order to obtain preliminary discovery. Which avenue is adopted in any particular case must be considered carefully, however, there is no basis for arguing that preliminary discovery cannot be obtained even in criminal cases. What is required is the development of some expertise in this area, which will come from working with investigators, which would enable investigators to make the applicable application to the correct court quickly and in a cost effective manner.

   Discovery applications today are also resisted by various public departments, such as DOCS and this resistance is enforced by legislative prohibitions. When combined with public interest immunity arguments, the standard arguments used by departments to resist FOI requests and the common law impediments to discovery in criminal cases, preliminary discovery is exceedingly difficult. However, application to a superior court under its inherent power may, today, provide a viable alternative.

   Finally, although generally there is not a duty upon police officer to investigate allegations of criminal conduct carefully [cf. *Gruber v. Backhouse* (2003) 190 FLR 122; *Emanuel v. Dau* (1996) 133 FLR 312)] it is sometimes possible to engage with the Crown in such a manner as to effectively compel them to investigate particular lines of enquiry. Thus, for example, it may be possible to force them to undertake identified forensic tests, or searches of public registers. Obviously, this approach must be carefully considered, but it can be a quite potent weapon in the defence arsenal in certain situations.

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An innovative approach to criminal litigation is always useful, especially today when police and crown law officers often engage in the process of warehousing, the selective compiling of computer records, the creation of special departmental files and the selective dispossession of files as between departments and offices. Gathering evidence of these practices is sometimes more important – and more effective – than being able to actually locate relevant information. These practices and the practical difficulties of investigating allegations of criminal conduct, place a very real premium upon the need for expert legal assistance in conducting such investigations.

In summary then, preliminary discovery rules provide an effective mechanism for discovering and reserving evidence in civil cases before a decision is made as to whether to litigate or not. In the criminal arena the opportunities for preliminary discovery are significantly more limited, but not excluded and in both civil and criminal litigation there is the very real possibility of invoking a superior court's inherent power to order discovery in order to ensure a fair trial, or hearing. The courts have developed some special rules for such applications and public departments, for example, police forces, will usually resist them on 'public interest immunirty grounds'. There is also a growing body of legislation which, like the Privacy Act, proscribes disclosure. However, like preliminary discovery and the privacy act there are often avenues for circumventing these prohibitions.

In addition to preliminary discovery the inherent power of the superior courts to order discovery and to preserve evidence are important arrows in the investigators quiver. Their use is to be recommended.

4. **ONE FINAL NOTE OF CAUTION -** This advice is, of course, directed towards an investigative process conducted by members of AIPD. This means that they will not usually be able to directly mount applications to courts as they will not be the party who potentially will institute (or defend) proceedings. This issue, however, is really no different to any other interlocutory step being instituted by solicitors for clients, but on instructions.

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