IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2016 02269

VOLUNTEER FIRE BRIGADES VICTORIA INC — Plaintiff

v

COUNTRY FIRE AUTHORITY — Defendant

JUDGE:	J FORREST J
WHERE HELD:	Melbourne
DATES OF HEARING:	19 September, 20 September 2016
DATE OF RULING:	29 September 2016
CASE MAY BE CITED AS:	Volunteer Fire Brigades Victoria v CFA (Discovery ruling)
MEDIUM NEUTRAL CITATION:	[2016] VSC 573

PRACTICE AND PROCEDURE: Discovery of documents – Discovery categories – test for discovery of documents - *Country Fire Authority Act 1958* (Vic) - *Fair Work Act 2009* (Cth) – Proportionality – *Civil Procedure Act 2010* (Vic) – Subpoena Production of documents - Application to set aside subpoenas – Limiting scope of subpoenas – Whether subpoenas constituted a 'fishing expedition' – Whether subpoenas served a 'legitimate forensic purpose' – 'on the cards' test – Whether subpoenas were 'oppressive' and 'abuse of process'.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	S J Wood QC with E A Gisonda B Jellis S Gladman	Robinson Gill Lawyers
For the Defendant	C O'Grady QC with B Avallone	Lander & Rogers
For the State Recipients	C Horan QC with R Shann	Victorian Government Solicitors' Office

HIS HONOUR:

Introduction

1 This proceeding is soon due to go to trial. It involves a dispute between the Volunteer Fire Brigades Victoria Inc (**VFBV**) and the Country Fire Authority (**CFA**). At the heart of the controversy is a proposed enterprise bargaining agreement (**EBA**) between CFA and the United Firefighters Union.

2 Central to the allegations made by VFBV against CFA are these two propositions:

(a) that the current CFA board members and executives (appointed in July and August of this year) failed to fulfil their statutory duties under the *Country Fire Authority Act 1958* (Vic) (**the Act**) to engage in consultation with VFBV and were, in effect, pressured by members of the government to enter into the EBA; and

(b) that the terms of the proposed EBA are inconsistent with the statutory obligations of CFA under the Act and constitute an unlawful fettering of CFA's powers.

3 This application concerns firstly, the adequacy of CFA's discovery and second, the efficacy of over a dozen subpoenas issued by VFBV to members of the CFA board, its executives, the Minister, and a number of state agencies and departments.

4 As to discovery, I am satisfied that CFA should make discovery of two categories of documents, namely: category two which relates to advice concerning the proposed EBA and category four which relates to documents concerning government policy and communications from the Minister and his office in respect of the proposed EBA.

5 I am also satisfied that the subpoenas to the individual board members and executives should be answered by the recipients; as should the subpoena addressed to the Minister. During the course of the application, the subpoenas to the government departments were amended substantially; however I think that only the

subpoena addressed to the Department of Justice and Regulation should be answered.

6 My reasons now follow.

Background

7 Given the nature of this application, I shall précis the relevant dates and events which are germane to this application.

8 The current EBA between CFA and VFBV was entered into in 2010 and is due to be replaced. It is the proposed EBA that has caused all the trouble.

9 Between 10 June and 17 June 2016, nine members of the CFA Board were dismissed by the Minister for Emergency Services for refusing to put the proposed EBA to a vote of its career (non-volunteer) staff. The members of that board described the proposed EBA as 'unlawful and impeding the board from fulfilling its legislative responsibilities.'[1]

10 On 17 June 2016, the Governor in Council appointed five new members to the CFA Board. On or around 19 July 2016, a further four new members were appointed.

11 On 30 June 2016, the Chief Officer resigned from CFA.

12 On 12 August 2016, the CFA Board requested that CFA's employees, who would be covered by the proposed EBA, approve the agreement by a vote pursuant to s 181 of the *Fair Work Act 2009* (Cth) (**FWA**).

Procedural issues

13 On 10 June 2016, VFBV obtained an injunction from McDonald J in the following terms:

> Until 4.30pm on Wednesday, 22 June 2016, the defendant, whether by itself, its officers, servants, agents or howsoever otherwise, be restrained from requesting any of its employees whose employment would be covered by a proposed enterprise agreement to

[1] Whether this is an accurate assertion will, of course, be determined at trial.

replace the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*, to approve that agreement by voting for it, within the meaning of section 181(1) of the *Fair Work Act 2009* (Cth).

The VFBV also gave an undertaking as to damages in relation to the injunction, should its proceeding fail.

14 On 10 August 2016, VFBV filed and served its Statement of Claim.

15 On 17 August 2016, McDonald J made consent orders that each party make discovery of the following categories of documents:

(a) each document referred to in the party's pleadings:

(b) any documents which may be produced by the party during evidence at trial;

(c) any document which may harm the party's case; and

(d) any document or class of documents which any other party reasonably requests the other party to discover, such request to be made on or before 4:00 pm on 26 August 2016.

His Honour also ordered that any third party subpoenas be issued by the parties by 31 August 2016.

16 On 26 August 2016, CFA filed and served its Defence.[2] VFBV filed and served its Reply on 6 September 2016.

17 On 29 August 2016, CFA received VFBV's request for the categories of documents to be discovered by CFA.

18 On 6 September 2016, VFBV filed subpoenas to produce (pursuant to rule 42A of the *Supreme Court (General Civil Procedure) Rules 2015*) addressed to individual board members, executives as well as a Minister and Government Departments.

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[2] On 15 September 2016, CFA was granted leave to file and serve its amended Defence by 22 September 2016.

19 On 15 September 2016, Michelle McLean (a CFA board member) complied with the subpoena directed to her and lodged documents with the Prothonotary. Five other CFA board members (the subject of subpoenas) and two CFA executives were represented by counsel for CFA at this hearing and sought to have the subpoenas set aside.

20 The four government departments which were the subject of subpoenas were represented by counsel at this hearing. Each sought to have the subpoena set aside.

The issues

21 Before going to the principal issues to be agitated at trial, it is necessary to mention some of the provisions of the Act.

22 Section 20AA(1) provides that the general powers given to CFA are subject to the provisions of the Act:

> Subject to this Act, the Authority has the power to do all things necessary or convenient to be done for or in connection with the performance of its duties and functions.

23 Sections 6F and 6G set out a series of principles recognising that CFA is 'first and foremost a volunteer-based organisation'[3] and that the volunteer charter (**charter**) is 'a statement of the commitment and principles that apply to the relationship between the Government of Victoria, the authority and volunteer officers and members'.[4]

24 Relevant to this case is the statement of recognition[5] that the charter requires the government to commit to consulting with VFBV in relation to volunteer officers and members 'on any matter that might reasonably be expected to affect them'. Specifically, under s 6H, a mandatory obligation is imposed on CFA to 'have regard to the commitment and principles set out in the volunteer charter'.

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3 Section 6F.
4 Section 6G(a).
5 Section 6G(c).

25 The charter (which I will not set out in any detail) includes the following, 'this volunteer charter ensures that the State of Victoria and CFA will commit to consultation on volunteers about all matters which might reasonably be expected to affect volunteers'.

26 At the heart of the dispute between the combatants are the following assertions by VFBV:[6]

(a) **The duty of CFA to consult:** CFA was subject to a mandatory obligation to consult with VFBV before deciding whether or not to put the proposed EBA to a vote of the employees. As part of this allegation, VFBV will endeavour to establish that the State Government put pressure (covert and/or subtle) on CFA Board members to put the proposed EBA to a vote of the career firefighters.

(b) **Fettering of the powers of CFA**: The proposed EBA would impermissibly fetter the powers and control conferred by the Parliament through the Act on CFA and its Chief Officer (**CO**).

(c) **Discrimination against volunteers:** The proposed EBA discriminates against volunteers, in favour of paid staff, based solely on their paid status.

Discovery

27 VFBV has sought discovery by categories, as set out below with the position of the parties regarding each category:

Category of discovery	CFA Position	VFBV Position
1. Board Papers provided to or produced by the CFA Board (or any subcommittee of the Board) between 1 November 2015 and 12 August 2016, which record any analysis, advice or report concerning the effect (or possible effect) of the Proposed Agreement on: (a) Volunteer Members of the CFA; (b) The exercise of powers, or the performance of functions and duties, by: i. The Chief Officer; ii. The CEO; iii. The CFA; (c) The capacity of the Chief Officer, the CEO and the CFA, to prepare for and respond to fire incidents. (d) The cost or possible cost of the Proposed Agreement.	Discovered	-

6 Pursuant to orders of McDonald J, VFBV filed its outline of legal contentions prior to this hearing.

2.	Documents dated between 1 November 2015 and 12 August 2016, which record any analysis, advice or report concerning the effect (or possible effect) of the Proposed Agreement on: (a) Volunteer Members of the CFA; (b) The exercise of powers, or the performance of functions and duties, by: i. The Chief Officer; ii. The CEO; iii. The CFA. (c) The capacity of the Chief Officer, the CEO, and the CFA, to prepare for and respond to fire incidents. (d) The cost or possible cost of the Proposed Agreement	Objects	Maintains
3.	Without derogating from the categories set out above, Documents to or from the Chief Officer or CEO or any member of the Board dated 1 November 2015 and 12 August 2016 which refer to the effect (or possible effect) of the Proposed Agreement on: (a) Volunteer Members of the CFA; (b) The exercise of powers, or the performance of functions and duties, by: i. The Chief Officer; ii. The CEO; iii. The CFA. (c) The capacity of the Chief Officer, the CEO, and the CFA, to prepare for and respond to fire incidents. (d) The cost or possible cost of the Proposed Agreement	Discovered	-
4.	Documents dated between 1 June 2016 and 12 August 2016, concerning the Government's policy position in respect of the Proposed Agreement (as that policy is identified in sub-paragraph 12(c)(i) of the Defence), including Documents recording or evidencing any communications with the Minister for Emergency Services or any person employed in the Minister's office.	Objects	Maintains
5.	Documents dated between 1 November 2015 and 12 August 2016 recording or evidencing any communications with any officer of the Department of Premier and Cabinet, including but not limited to Mr Mark Bates, in respect of the Proposed Agreement.	Objects	Maintains
6.	Documents dated between 1 November 2015 and 12 August 2016 recording or evidencing any communications with any officer of the Department of Economic Development, Jobs, Transport and Resources in respect of the Proposed Agreement.	Objects	Maintains
7.	Documents dated between 1 November 2015 and 12 August 2016 that refer to the Government's policy position from time	Objects	Maintains

	to time in respect of the Proposed Agreement.		
8.	Documents (including any minutes or notes) recording the meetings described in paragraphs 17A, 20(a) and 22A of the Defence.	Discovered	-
9.	Documents that refer to the events listed in the particulars to paragraph 22F of the Defence in the following classes: a. Documents (including notes) recording those events; b. Documents (including any speaking notes, talking points, or other briefing papers) prepared by, or provided, to: i. the Chief Officer; ii. the Acting Assistant Chief Officer; iii. the CEO; iv. Mr Gary Cook; v. Mr Trevor Logan; vi. Mr John Haynes; vii. Mr Trevor Owen; for use at, or otherwise in preparation for, those events; c. Documents evidencing or recording any communications by any of the persons referred to in sub-paragraph (b) above that refer to those events.	Objects to (c)	Not pressed
10.	Each current CFA: a. Standing Order; b. Standard Operating Procedure; c. General Policy	Objects	Not pressed
11.	Any Deed, Contract, Agreement, or Memorandum of Understanding between the CFA and the UFU that had effect or was entered into between 1 November 2015 and 12 August 2016.	Objects	Maintains
12.	The "Infrastructure Agreement" referred to in cl 88.1 of the Proposed Agreement.	Discovered	-
13.	Any document between 3 September 2010 and 12 August 2016 recording any analysis, report or comment upon the operation of any clause in the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010* that requires agreement between the CFA and the UFU.	Objects	Maintains
14.	Documents recording any currently unfilled operational positions within the CFA.	Objects	Not pressed

Principles relevant to discovery

28 Section 7 of the *Civil Procedure Act 2010* (Vic) (**CPA**) demands that a court facilitate

'the just, efficient, timely and cost effective resolution of the real issues in dispute'. The court is then, by s 55(1) of the CPA, given an overriding discretion to 'give any directions in relation to discovery that it considers necessary or appropriate'.[7]

29 The detail of s 55 of the CPA reads:

> (2) Without limiting subsection (1), a court may make any order or give any directions—
>
> (a) requiring a party to make discovery to another party of—
>
> (i) any documents within a class or classes specified in the order; or
>
> (ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;
>
> (b) relieving a party from the obligation to provide discovery;
>
> (c) limiting the obligation of discovery to—
>
> (i) a class or classes of documents specified in the order; or
>
> (ii) documents relating to one or more specified facts or issues in dispute; or
>
> (iii) some or all of the issues set out in a statement of issues filed in the proceeding;
>
> (d) that discovery occur in separate stages;
>
> (e) requiring discovery of specified classes of documents prior to the close of pleadings;
>
> (f) expanding a party's obligation to provide discovery;
>
> (g) requiring a list of documents be indexed or arranged in a particular way;
>
> (h) requiring discovery or inspection of documents to be provided by a specific time;
>
> (i) as to which parties are to be provided with inspection of documents by another party;
>
> (j) relieving a party of the obligation to provide an affidavit of documents;
>
> (k) modifying or regulating discovery of documents in any other way the court thinks fit.
>
> (3) A court may make any order or give any directions requiring a party

[7] Section 55(1). Section 55(2) then sets out a number of non-exclusive orders that might be made by a court to facilitate discovery.

discovering documents to—

(a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;

(b) make available a person who is able to—

(i) explain the way the documents are arranged; and

(ii) help locate and identify particular documents or classes of documents.

30 Rule 29.01 also dictates the scope and limits of discovery to be provided by a party, subject to a court order to the contrary.[8]

31 In *Liesfield v SPI Electricity Pty Ltd (Ruling No 1)*,[9] I discussed the scope of both s 55(1) of the CPA and O 29 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):

> These provisions make clear that the Court's powers in relation to discovery are broad. In sum, both the Act and Rules mandate that any order concerning discovery should be directed to finding the most efficient, effective and economical management of the discovery exercise, bearing in mind the nature and complexity of the trial.[10]

32 There is no ambiguity about the application of the principles of the CPA. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*[11] the High Court said of its NSW analogue:

> The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. *It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.*
>
> *That purpose may require a more robust and proactive approach on the part of the courts. Unduly technical and costly disputes about non-essential issues are clearly to be avoided*. However, the powers of the court are not at large and are not to be exercised according to a judge's individualistic idea of what is fair in a given circumstance. Rather, the dictates of justice referred to in s 58 require that in determining what directions or orders to make in the conduct of the proceedings, regard is to be had in the first place to how the overriding purpose of the CPA can be furthered, together with other relevant matters, including those referred to in s 58(2). The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not

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8 Rules 29.01 & 29.05.

9 (2013) 43 VR 493 ('*Liesfield*').

10 Ibid 500 [25].

11 (2013) 250 CLR 303 ('*Armstrong*'); see also the observations of the Court of Appeal in *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302.

> at all costs. The terms of the CPA assume that its purpose, to a large extent, will coincide with the dictates of justice.[12]

33 The approach to discovery has changed markedly in the past half-decade or so. The *Peruvian Guano* test has been consigned to the dustbin.[13] The CPA now requires a court to cut through the layers of interminable argument and nit picking which had traditionally accompanied discovery contests. This case is just such an example of the old approach; three senior and five junior counsel (three engaged by VFBV) to argue about discovery and a day-and-a-half's argument over documents which can only have been created in in the last six months or so.

34 The overriding consideration of the CPA is to ensure that the parties receive a fair trial i.e. 'a just resolution' to use the words of the CPA. However, a fair trial is not a perfect trial.[14] It is, rather, the best trial that a court can provide to the parties within reason and in proportion to the issues in dispute and the court's resources. Accordingly, demands for discovery of documents which are peripheral to the central issues cannot be entertained. The Court is obliged to focus on the central issues as best it can be determined at this point in the litigation.

35 It is also important to note in the discovery context that there is a continuing obligation under s 26 of the CPA on a party to discover any document of which it becomes aware, that is of any significance in the dispute:

> (1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
>
> (a) of which the person is aware; and
>
> (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
>
> (2) Disclosure under subsection (1) must occur at—
>
> (a) the earliest reasonable time after the person becomes aware of the existence of the document; or

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12 *Armstrong* (2013) 250 CLR 303, 323 [56] – [57] (emphasis added).

13 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 48 LT 22.

14 *Holt v Wynter* (2000) 49 NSWLR 128, 142 [79]; see also *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

(b) such other time as a court may direct.

…

(4) The overarching obligation imposed by this section—

(a) is an ongoing obligation for the duration of the civil proceeding; and

(b) does not limit or affect a party's obligations in relation to discovery.

36 Finally, where discovery potentially requires extensive trawling through databases and emails, a court must be conscious of the words of the High Court in *Armstrong* and obligations under the CPA. As I said in *Liesfield,* the days of the search for the smoking gun are gone. The key is ensuring the discovery exercise is proportionate not only to the relevance of the issues, but also to the likely cost to be incurred bearing in mind that it is the trial that is the focus of the proceeding and not the discovery fight.

Application of the principles of discovery in this case

37 The following observations relate to the application of these principles to the discovery sought by VFBV from CFA.

38 First, the test posited by counsel for CFA in relation to the scope of discovery is too narrow: it was argued that at trial the questions to be determined will largely be those of construction of the Act and comparison of the provisions of the Act and the terms of the proposed EBA. It was said that in relation to the effects of the proposed EBA I should limit discovery to those documents which would be admissible at trial under the provisions of the *Evidence Act 2008* (Vic).

39 Specifically, in relation to documents to be discovered in relation to the effects of the proposed EBA, it was said that such would necessarily contain subjective expressions of opinion or conjecture which would not ever be admissible at trial.

40 However, even with the introduction of the CPA, this is not how discovery works. Discovery has never been limited in such a way; discovery is an integral component in trial preparation. Discovery is not concerned with admissibility: it is part of the

fact finding exercise in getting a case to trial. Indeed, often discovery may lead to a train of inquiry not confined to the tender (or putative tender) of a particular document in the course of a trial. Further, it may be that the document, or its contents can be deployed by a party in cross examination rather than part of its case. Much depends upon what happens at trial. One thing is clear: it is not for this Court on an interlocutory application to determine whether a potentially discoverable document will or will not be admissible at trial: that is the function of the trial judge.

41 As long as the document in the possession of a party goes to a real (and not peripheral) issue to be determined at the trial then, absent any proportionality consideration, it is relevant and ought to be discovered.

42 Second, the urgency in completing discovery is not as great as CFA would make out. I accept that it is in everyone's interests that there be a speedy trial. But it must be a quick and *fair* trial; if providing discovery within reasonable limits sets the trial back a couple of weeks or, for that matter, a month, then I can see no great prejudice to CFA. It has an EBA in place and has an undertaking as to damages. It would, in my opinion, be contrary to the interests of justice if discovery on a significant relevant issue was truncated to allow the trial to commence one month earlier than if the CFSV was forced to go to trial without appropriate discovery – within limits.

43 Third, although there was a little huffing and puffing about the difficulties associated with discovery, nothing concrete emerged. It has to be remembered that discovery of categories 1 and 3 has already been completed and that one assumes that in the course of that exercise there is some accumulated knowledge as to what might be the response to discovery under the other categories.

44 Now, turning to the individual categories. As is apparent from the table, CFA has discovered documents within categories 1, 3, 8, 9 and 12. Although there are complaints about the adequacy of that discovery, this is not the time or place to determine that issue. CFA will be aware of its obligations under the CPA in relation to the adequacy of discovery. Rather, the contest turns upon whether CFA should

provide discovery in any of the remaining categories.

45 The application of the principles I have set out and an examination of the categories of discovery required by VFBV demonstrates that when examined as a whole, they are far too wide and, in many places, either irrelevant or covered by other categories. As a conglomerate, these categories represent a totally non-proportionate approach to the issues in the trial. It would have been helpful if the person who drafted the categories had taken time to read the observations of the High Court in *Armstrong*.

46 However, the approach in oral submissions was more nuanced, and counsel for VFBV focused on category 2 which I set out again here:

> Documents dated between 1 November 2015 and 12 August 2016, which record any analysis, advice or report concerning the effect (or possible effect) of the Proposed Agreement on:
> (a) Volunteer Members of the CFA;
> (b) The exercise of powers, or the performance of functions and duties, by:
> i. The Chief Officer;
> ii. The CEO;
> iii. The CFA.
>
> (c) The capacity of the Chief Officer, the CEO, and the CFA, to prepare for and respond to fire incidents.
>
> (d) The cost or possible cost of the Proposed Agreement.

47 To my mind, this category encapsulates the nub of VFBV's case on the fettering of powers. It is wider (but not oppressively wider) than categories 1 and 3 (which have been discovered) and it is, I think, germane to a consideration of a core issue at the trial – namely the effect of the EBA upon the functions of CFA and, in particular, the operations of its officers and the volunteers.

48 I will not permit discovery of documents relating to the 'cost' of the implementation of the proposed EBA. This does not go to the question of inconsistency and, in any event, is moot given the letter of comfort provided by the Minister. At best, it is a peripheral issue.

49 I do not regard the time line as being too broad – and it is consistent with that answered by CFA in relation to category 1 discovery. Compliance with discovery under this category is not oppressive.

50 So, I propose to order that CFA provide discovery of documents within this category with the exception of subparagraph (d).

51 Category 4 reads:

> Documents dated between 1 June 2016 and 12 August 2016, concerning the Government's policy position in respect of the Proposed Agreement (as that policy is identified in sub-paragraph 12(c)(i) of the Defence), including Documents recording or evidencing any communications with the Minister for Emergency Services or any person employed in the Minister's office.

52 Category 4 also goes to a trial issue – documents held by CFA emanating from the Government and relating to the proposed EBA. This addresses both the nature of the agreement and any potential influence (overt or subtle) exercised by the government over the CFA board at a critical time. Documents within this category should be discovered with one alteration – the inclusive qualification should read 'including any communication…'

53 As to the other categories, each is either peripheral to the key issues in dispute or too wide:

(a) categories 5, 6 and 7 are too wide. In any event, any document falling within these categories and genuinely relevant to the issues of the trial will be covered by discovery already made or to be made under categories 2 and 4;

(b) categories 9 and 10 were not pressed;

(c) category 11 is far too wide and irrelevant;

(d) category 13 is extraordinarily wide in scope (3 September 2010 to 12 August 2016) and irrelevant in that it covers every clause of the current EBA; and

(e) category 14 was not pressed.

54 So, in summary, CFA should provide discovery of categories 2 and 4 (as amended) – but no more.

The subpoenas

Principles relevant to production by subpoena

55 In *Messade v Baires Contracting Pty Ltd,*[15] I set out the principles in relation to the provision of documents in relation to the adequacy of a subpoena. With one exception (which is irrelevant here), those principles were adopted by the Court of Appeal in *Woolworths Ltd v Svajcer:*

> (a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;
>
> (b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;
>
> (c) the applicant for the witness summons must also satisfy the court that it is 'on the cards', or that there is a 'reasonable possibility', that the documents sought under the subpoena 'will materially assist the defence'.
>
> (d) a 'fishing expedition' is not a legitimate forensic purpose and will not be permitted;
>
> (e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.
>
> (f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied.
>
> (g) in criminal proceedings a 'more liberal' view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused.
>
> (h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.[16]

56 To this list, should now be added the considerations mandated by the CPA and particularly, the overarching purpose (and associated powers of the Court) which I have set out at [28]-[29].

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15 [2011] VSC 56, [6].
16 [2013] VSCA 270, [16].

57 The distinction between a subpoena issued under O 42A and discovery is important and was emphasised by counsel for CFA and the Government Departments. The obligation on the party subject to a subpoena has been considered in a number of decisions in NSW and in this state. The leading decision is that of the NSW Court of Appeal in *National Employers' Mutual General Association Ltd v Waind and Hill*:

> Upon the first step the person to whom the subpoena is addressed may seek to, and have, the subpoena set aside on the ground that it was improperly issued and an abuse of the power to compel the production of documents in any one of a number of ways. Such a case is where the subpoena is used for the purpose of discovery. The essential feature of discovery in this connection, as appears from *Burchard's* case and *Small's* case is that the person to whom the subpoena is addressed will have to make a judgment as to which of his documents relate to issues between the parties. It is oppressive to place upon a stranger the obligation to form a judgment as to what is relevant to the issue joined in a proceeding, to which he is not a party. Hence it is an abuse of the use of a subpoena to impose this obligation. It follows that it is an abuse to use any subpoena, i.e. even to a party to obtain discovery. This was the reasoning in *Small's* case. Of course, discovery as such is otherwise available to a party. It follows that a subpoena can only properly be used for the production of documents described in particular or general terms which does not involve the making of such a judgment. It does not follow, however, that because the party who issues a subpoena is unaware of the precise description of a particular document, or whether a particular document or documents is in the possession of the witness, or even whether it exists, or is unaware of its contents, that the subpoena, or even a subpoena in general terms, amounts to the use of the subpoena for the purpose of "discovery". [17]

58 There is also a point to be noted about subpoenas issued under O 42A, which was made by Kaye J in *Newnham v Davies*:

> Subparagraph (1) of that rule specifically provides that the rule applies where a party seeks to require a person, not a party, to produce any document "for evidence" before the hearing of an interlocutory or other application in the proceeding, or before the trial of the proceeding. Thus, by its express terms the rule only authorises the issue of such a subpoena where the document, the subject of the subpoena, may potentially be admissible as evidence in the proceeding. Obviously, in order to be admissible, the document, of which production is sought, must have at least some potential relevance to the issues defined in the proceedings. [18]

59 The words 'may potentially be admissible' are important. In coming to his conclusion, Kaye J cited *Kennedy Taylor (Vic) Pty Ltd v Grocon Pty Ltd*,[19] in which Gillard J emphasised this qualification:

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17 [1978] 1 NSWLR 372, 381-382.
18 [2010] VSC 13, [6].
19 [1999] VSC 242.

> On a plain and literal interpretation of r42.10, aided by the definition and the forms, it is inescapable that the procedure under s42.10 is only available where the document is potentially required for evidence at the trial of a proceeding.
>
> That is not to say that the procedure is not available if in the end result the document is not adduced into evidence but it is available to enable a party to inspect a document in order to make a decision whether or not to adduce it in evidence. [20]

60 The purpose for the rule was also considered by Beach J in *Belsart Pty Ltd v Man Po Holdings (Australia) Ltd*.[21] His Honour held that the rule was introduced to remove the inconvenience and injustice that could result from possible evidence produced on subpoena only being produced at trial.[22] As the above authorities indicate, the real question is not 'admissibility' at large – which is determined at trial - but rather relevance.

61 It follows then that in determining whether documents are to be produced under subpoena pursuant to O 42A, a court must be satisfied that the documents sought to be produced are potentially relevant (in the sense of s 55 of the *Evidence Act 2008* (Vic): 'the evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'). But this Court on an interlocutory application should go no further.

62 I should add one further matter. Determining whether a subpoena is directed to discovery generally as opposed to matters of evidence is no easy task – particularly when it is not known what will be produced pursuant to the subpoena.[23] All of the authorities raised in oral submissions concerning the distinction between discovery and production pursuant to a subpoena predate the introduction of the CPA. The timely and efficient disposition of applications such as this cannot be achieved by trying to draw some form of bright line between the two categories – indeed I suspect this is impossible in this case. This is particularly so where the setting aside of a subpoena on the basis it amounted to discovery would result in an identical application being made

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20 Ibid [71] – [72].
21 [1998] VSC 46.
22 Ibid [11]-[13].
23 *Burchell v Hill* [2010] VSC 96.

under O 32.07 – with further delay and cost to the parties.

Subpoenas in this proceeding

63 The 13 subpoenas issued pursuant to rule 42A and the subject of this application are addressed to: 8 individuals (seven associated with CFA and one to a government minister), 4 government departments and 1 government agency (Emergency Management Victoria). The agency subpoena was withdrawn during the course of the hearing.

Subpoenas to individuals

64 The eight individuals to whom subpoenas were issued:[24]

(a) Greg Smith AM, Chairman of CFA Board;

(b) Michelle McLean (who has complied with the subpoena), member of CFA Board;

(c) Simon Weir, member of CFA Board;

(d) Pam White, member of CFA Board;

(e) Gillian Sparkes, member of CFA Board;

(f) Frances Diver, Chief Executive Officer of CFA;

(g) Steve Warrington, Chief Officer of CFA; and

(h) Hon James Merlino MP, Emergency Services Minister and Deputy Premier of Victoria.

65 At the commencement of the hearing, counsel for CFA withdrew its opposition to a number of parts of the subpoenas and the contest was confined to the following subparagraph (a) within each of the subpoenas addressed to the board members and

[24] I note that that three earlier 30 August 2016 subpoenas were directed to former CFA board members and the former Emergency Services Minister of Victoria.

executives of CFA:[25]

> The documents and things you must produce are as follows:
>
> 1. Any letters, correspondence or communications (or any notes or records of any communications), with any Relevant Person in the Relevant Period, in relation to:
>
> (a) the Proposed Agreement.

The 'relevant period' is defined as 1 April 2016 to 12 August 2016. In the seven subpoenas addressed to the CFA board and the executives, the 'relevant person' is defined as meaning: (a) a minister in the State of Victoria; (b) any adviser or staffer working in the office of a Minister in the State of Victoria; and (c) any person acting or purporting to act on behalf of, or as an intermediary for, a Minister in the State of Victoria. The 'proposed agreement' is defined as 'the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2016*, including previous versions of that agreement'.

66 In seeking to set aside the subpoenas, counsel for CFA contended that as there was a process of discovery in place, there was an overlap between the documents sought under (a) and the categories of documents discovered by CFA -thereby constituting an abuse of process.

67 Counsel for CFA also argued in the context of the pleaded case that each of the subpoenas was unreasonably broad and oppressive, and imposed upon the recipient a requirement to make a judgment call as to whether or not a particular document related to the subject matter of the subpoena. Alternatively, if that argument be rejected, then counsel said that the temporal limitation in relation to the proposed EBA should be 17 June to 12 August, instead of 1 April to 12 August 2016.

68 For the following reasons, the amended subpoenas to the four CFA board members and two executives should be answered.

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[25] Identified in (a) – (g) at [62].

69 First, the subpoenas are directed specifically to a central issue in the trial, namely the effect of the proposed EBA on the operations of CFA. There is a legitimate forensic purpose underpinning the subpoenas.

70 Second, whilst there is the prospect of overlap between documents produced pursuant to the subpoenas and discovery by CFA, this does not constitute an abuse of process. It is simply not known whether documents in the possession of individual board members or executives are necessarily held by CFA. It is CFA who is insistent upon a speedy trial and in those circumstances I see nothing untoward in requiring board members and executives to answer the subpoenas concurrently with the discovery process.

71 Third, each of the recipients, it can be reasonably supposed, is in a position to have such documents in his or her custody. In other words, given their position within CFA hierarchy, it is on the cards that such documents may be in their possession and will assist VFBV's case.

72 Fourth, I am satisfied that there is a reasonable prospect that documents produced pursuant to the subpoenas may have evidentiary value at trial. As I have discussed (at some length), making the distinction between discovery and evidence is not easy and given this category is clearly relevant to the issues at trial, there is no reason not to require production.

73 Fifth, even if I was persuaded that the only basis for production was formulating a claim rather than endeavouring to obtain relevant evidence for trial, then in the context of this case I would be highly reluctant to set aside the subpoenas given that the inevitable consequence would have been for the VFBV to issue a third party discovery application under O 32.07. Notwithstanding the procedural niceties referred to in a number of the authorities, a court must now take into account the overarching purpose of the CPA in relation to the efficient use of judicial resources and minimising delay in the preparation of a case for trial. That is particularly so in the context of this case, in which CFA is urging a speedy trial.

74 Sixth, whilst I accept that the authorities demonstrate that a recipient to a subpoena

should not have to exercise any degree of judgment as to which documents are or are not relevant to the issues in the proceeding, that is not the case here. The documents sought do not require any exercise of judgment and relate to a matter of fact - namely, communications between government and CFA concerning the proposed EBA. Moreover, each of the recipients (with one exception – a lawyer) who has complied with the subpoena is represented by the lawyers for CFA who presumably can provide advice if required.

75 Seventh, there is no basis upon which to suggest that the production is oppressive in any way to the recipient.

76 Moving now to the subpoena addressed to the Minister, the 'relevant person' is defined to include members of the current CFA board and executives, as well as previous members of the CFA board and executives. The 'relevant period' is 8 June to 12 August 2016. The subpoena seeks production of:

> The documents and things you must produce are as follows:
>
> 1. Any letters, correspondence or communications (or any notes or records of any communications), with any Relevant Person in the Relevant Period, in relation to:
>
> (a) the Proposed Agreement;
>
> (b) their appointment or proposed appointment to the Country Fire Authority;
>
> (c) the terms of their appointment or proposed appointment to the Country Fire Authority; and
>
> (d) their tenure as an officer of the Country Fire Authority.

77 This category of documents goes directly to the question of the communications from the Minister or his office to CFA board members and executives in relation to the proposed EBA. This is part and parcel of a central issue at trial: that of proper consultation with VFBV in conformity with the Act. The subpoena has a legitimate forensic purpose. I adopt what I have just said in relation to the other seven subpoenas to the individual CFA board members and executives which applies with equal force to this category. The Minister should answer this part of the subpoena.

78 In summary, I am satisfied that the subpoenas to the seven individuals, which does not include Ms McClean who has complied with the subpoena, should be answered. I propose to require production of the documents to the Court by Wednesday 5 October 2016.

Subpoenas to Government Departments

79 The four government departments to which subpoenas were issued are:

(a) Department of Premier and Cabinet (**DPC)**;

(b) Department of Treasury and Finance (**DTF**);

(c) Department of Economic Development, Jobs, Transport and Resources (**DJTR**); and

(d) Department of Justice and Regulation (**DJR**).

80 On the second day of the application, counsel for VFBV filed an amended version of each of the subpoenas; which I will deal with individually.

Subpoena to the Department of Premier and Cabinet in the State of Victoria

81 This subpoena reads as follows:

> The documents and things you must produce are as follows:
>
> 1. Documents created from 1 April 2016 to 12 August 2016 which refer to or give advice about:
>
> (e) the fact that it was or was proposed to be Victorian State Government Policy to:
>
> (i) support the Fair Work Commission making final recommendations in relation to the Proposed Agreement; and/or
>
> (ii) support the final recommendations that were made by Commissioner Roe on 1 June 2016
>
> (including, but not limited to, any notes of any meeting that took place between 1 April 2016 to 12 August 2016 with Peter Marshall or any other senior official of the United Firefighters Union).

82 As discussed earlier, VFBV asserts that there was no proper consultation as required by the Act. It contends the Government's policy was that the proposed EBA was to be signed, and if that policy was based on analyses or advice or other such information that was not shared with either CFA or with VFBV, then this points to the conclusion that there was no proper consultation. It argues that the question of whether it was Government policy to support the Fair Work Commission's final recommendations in relation to the proposed EBA or those of the Fair Work Commissioner, relates directly to its allegations, concerning an alleged lack of meaningful consultation.

83 For the following reasons, I am of the view that this subpoena should be set aside.

84 First, the question of government policy is not an issue in the trial, rather its implementation by CFA is the point. It is clear that the government wants the proposed EBA to go to a vote. I repeat that the case turns upon questions of adequacy of consultation (in a real sense) and any inconsistencies (and their consequences) between the proposed EBA and the Act. In my view, there is no legitimate forensic purpose behind a subpoena requiring the production of documents relating to government policy. On this basis alone, the subpoena should be set aside.

85 Second, in any event, documents in CFA's possession relating to government policy and communications to CFA are to be discovered as part of category four. It is the communication of the policy to CFA that is the real issue – not the existence of the policy.

86 Third, if I am wrong about this then such documents have such peripheral relevance to require the Department to conduct a search for the material (which will be voluminous) would be oppressive or at least disproportionate to any evidentiary value the documents may possess.

Subpoena to the Department of Treasury and Finance

87 This subpoena reads as follows:

> The documents and things you must produce are as follows:

1. Documents created from 1 April 2016 to 12 August 2016 which record or contain any analysis or advice given to a Minister in the State of Victoria about:

(a) the cost or possible cost of the Proposed Agreement;

88 This subpoena should also be set aside. There is no legitimate forensic purpose established – the costs consequences of the proposed EBA are irrelevant to the core issues of the trial. All the more so, given the letter of comfort provided by the Minister to CFA.

89 If I am wrong about relevance, then the breadth of the subpoena (any analysis provided to any minister) is so wide as to render the search for such document disproportionate to its probative value.

Subpoena to the Department of Economic Development, Jobs, Transport and Resources in the State of Victoria

90 This subpoena reads as follows:

1. Documents created from 1 April 2016 to 12 August 2016 which refer to or give advice about:

(e) the fact that it was or was proposed to be Victorian State Government Policy to:

(i) support the Fair Work Commission making final recommendations in relation to the Proposed Agreement; and/or

(ii) support the final recommendations that were made by Commissioner Roe on 1 June 2016

91 This subpoena should also be set aside for the reasons above in [84] –[86].

Subpoena to the Department of Justice and Regulation

92 This subpoena reads as follows:

1. Documents created from 1 January 2016 to 12 August 2016 which record or contain any analysis or advice about:

(a) the effect (or possible effect) of the Proposed Agreement on Volunteer Members of the Country Fire Authority;

(b) the effect (or possible effect) of the Proposed Agreement on the

exercise of powers, or the performance of functions and duties, by:

(i) the Chief Officer as defined in the Country Fire Authority Act 1958 (Vic);

(ii) the Chief Executive Officer as defined in the Country Fire Authority Act 1958 (Vic);

(iii) the Country Fire Authority;

1A. Documents created from 1 April 2016 to 12 August 2016 which refer to or give advice about the fact that it was or was proposed to be Victorian State Government Policy to:

(Note: The above Documents are limited to those sent to, prepared by, or contributed to, by any Officer of the Department).

93 This subpoena falls into a different class from the three just considered. It is directed to the Department directly responsible for CFA. Part 1 goes to the question of the effect of the proposed EBA on the volunteer members and CFA executives. I repeat what I have said at [69] – [75] in relation to the subpoenas addressed to the individuals. Those propositions hold true for a subpoena addressed to this Department.

94 Whilst I accept that there may well be overlap with discovery provided by CFA, that does not result in this subpena being set aside. It is 'on the cards' that documents which would assist the case of VFBV are held by the Department.

95 In relation to Part 1A which goes to government policy, I would set aside that part of the subpoena for the reasons set out at [84] – [86].

Summary of conclusions

(1) CFA should provide discovery only of documents within categories 2 and 4 as amended in this ruling.

(2) Consistent with the terms of this ruling, the eight individual subpoenas and the subpoena to the DOJR must be answered by delivery of the documents to the Court by 4:30 pm on Wednesday, 5 October 2016.

(3) The three subpoenas addressed to State Government Departments other than DOJR are set aside.