

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION

Case No. K11227674

FUEL RECOVERY SERVICES AUSTRALIA
PTY LTD (ACN 622 364 854)

Applicant

v

THE SECRETARY TO THE DEPARTMENT
OF TRANSPORT

Respondent

MAGISTRATE:	J GRAINGER
WHERE HELD:	Melbourne
DATE OF HEARING:	12 June 2019, 28 November 2019,
DATE OF FINAL SUBMISSIONS	17 December 2019
DATE OF DECISION:	5 August 2020

APPEARANCES:	Counsel	Solicitors
For Applicant	Ms Paltiel, solicitor	Axial Advisory
For Respondent	Ms Evans, counsel	Office of the General Counsel, Department of Transport

HER HONOUR:

BACKGROUND

Fuel Recovery Services

1. Fuel Recovery Services Australia Pty Ltd (**Fuel Recovery Services**) is a wholly owned subsidiary of Scancam Operations Pty Ltd (**Scancam**). Scancam provides 'anti fuel theft security services, software, equipment and solutions (**Scancam Technology**) in various forms, to discourage fuel theft and assist in recovering amounts lost in fuel theft situations' to various fuel retailers.¹
2. Fuel Recovery Services was set up to 'pursue relief for loss associated with fuel-theft through debt recovery, including issuing court proceedings as required.' Fuel Recovery Services has contracts with various fuel retailers, which it contends assign their rights to recover unpaid fuel debts of the drivers of motor vehicles involved in fuel-theft to Fuel Recovery Services.²
3. Whilst Fuel Recovery Services uses the term 'fuel theft' in its submission, this application relates to fuel 'drive-offs', that is, cases in which a person fills a motor vehicle with fuel at a retail site and drives off without paying for the fuel, either intentionally (fuel-theft) or inadvertently.³
4. When a fuel drive-off occurs, neither the fuel retailers nor Fuel Recovery Services know the identity of the drivers of the motor vehicles. However, Fuel Recovery Services has the licence plate numbers for the motor vehicles that the drivers were driving which it obtains through Scancam's CCTV footage.⁴
5. Accordingly, Fuel Recovery Services has applied for orders for preliminary discovery by the respondent, Roads Corporation of Victoria Trading as VicRoads (**VicRoads**) to help it to identify the drivers of the motor vehicles involved in the fuel drive-offs.⁵
6. Specifically, Fuel Recovery Services has applied for orders requiring VicRoads to provide it with the names and addresses of the registered operators⁶ of 181 motor vehicles bearing the licence plates listed in Further Amended Schedule 1 (**Schedule 1**) of its further amended summons as at the corresponding dates listed in the Schedule (**the registered operators of motor vehicles allegedly involved in fuel**

¹ Fuel Recovery Services' Further Outline of Submissions dated 27 November 2019.

² Fuel Recovery Services' Further Outline of Submissions dated 27 November 2019.

³ As defined by the Parliament of Victoria's Law Reform, Road and Community Safety Committee's Inquiry into fuel drive-offs, March 2016 LRRCS Report No. 1, 58th Parliament, p1 (**Inquiry into fuel drive-offs**).

⁴ Fuel Recovery Services' Further Outline of Submissions dated 27 November 2019.

⁵ After the court announced its decision on 5 August 2020 but before the court published its reasons for decision, the court was informed by the solicitor for VicRoads that as result of amendments made to the *Road Safety Act 1986* (Vic) (**Road Safety Act**) by the *Transport Legislation Amendment Act 2019* (Vic), which came into effect on 1 January 2020, the Secretary to the Department of Transport is now the legal custodian of all Victorian registration and licensing data that is collected in accordance with the *Road Safety Act* and regulations. Neither party opposed an order that the Secretary to the Department of Transport be substituted as the respondent to this application in these circumstances and any reference to VicRoads in these reasons should be read as a reference to the Secretary to the Department of Transport.

⁶ Defined by s 3 of the *Road Safety Act* as the person recorded on VicRoad's register as the person responsible for the vehicle.

drive-offs).⁷ Fuel Recovery Services contends that this information will help it to identify the drivers of the motor vehicles which have been involved in fuel drive-offs.

VicRoads

7. VicRoads is the statutory roads corporation responsible for the registration and licencing system for motor vehicles in Victoria. VicRoads' licencing powers, registration powers and functions are set out in the *Road Safety Act 1986* (Vic) (***Road Safety Act***). As part of its powers and functions, VicRoads collects information about the registered operators of motor vehicles (**registered operators**). VicRoads contended that this information is highly sensitive personal information including photographs, names and addresses of registered owners.⁸
8. Under the *Road Safety Act*, VicRoads is authorised to disclose personal information kept on the register only in carefully circumscribed circumstances. VicRoads has no power to disclose information outside of these circumstances. VicRoads contended that disclosure to a company for the purpose of undertaking debt recovery is not one of the circumstances in which it may disclose personal information of registered operators of motor vehicles. Disclosure for that purpose could only be made if it is authorised by law.⁹
9. For the reasons set out below, VicRoads opposes Fuel Recovery Services' application which, if granted, would require it to disclose personal information in relation to 181 registered operators of motor vehicles allegedly involved in fuel drive-offs.

RULE 32.03 OF THE MAGISTRATES' COURT GENERAL CIVIL PROCEDURE RULES 2010 (VIC)

10. Fuel Recovery Services' application for orders for preliminary discovery from VicRoads is made under rule 32.03 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) (**rule 32.03**). Preliminary discovery is a procedure which enables a party who is unable to identify the person who it wishes to sue to seek the assistance of the court in identifying that person.¹⁰
11. Relevantly, rule 32.03 provides that the court may order a corporation to make discovery to the applicant all documents which are or have been in the possession of the corporation relating to a person whose description the applicant has been unable to ascertain sufficiently for the purpose of commencing a proceeding in the court against that person (in this rule called the 'person concerned') if the applicant has made reasonable inquiries and it appears that the corporation has or is likely to have knowledge of facts, or has or is likely to have or

⁷ Fuel Recovery Services' initial claim was for preliminary discovery of approximately 500 number plates, including the names and address of the registered operators of motor vehicles where the drivers had signed an 'IOU' with the respective fuel retailers. Fuel Recovery Services no longer seeks information from Vic Road in relation to these unidentified drivers.

⁸ VicRoads' Further Outline of Submissions dated 26 November 2019.

⁹ Section 90K(i) of the *Road Safety Act*.

¹⁰ *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 at [1] (***Dallas Buyers Club v iiNet***).

has had or is likely to have had in its possession any document or thing, tending to assist in such ascertainment.

12. In this case, the persons whose description Fuel Recovery Services has been unable to ascertain sufficiently for the purpose of commencing a proceeding are the drivers of the motor vehicles involved in the fuel drive-offs.
13. In addition to the matters explicitly set out in r 32.03, an applicant making an application under rule 32.03 must be able to point to some facts that demonstrate that the applicant has or may have the right to obtain relief against the person concerned.¹¹
14. Accordingly, in order to succeed in its application, Fuel Recovery Services must satisfy the court that:
 - a) it may have a cause of action against the persons concerned, being the drivers of the motor vehicles involved in fuel drive-offs,¹²
 - b) it has made reasonable inquiries to identify the drivers of the motor vehicles allegedly involved in fuel drive-offs and has been unable to obtain sufficient information in respect of their description for the purpose of commencing a proceeding against them in the Magistrates Court, and
 - c) VicRoads has or is likely to have information 'tending to assist' in the ascertainment of the description of the unidentified drivers.
15. Fuel Recovery Services and VicRoads agreed on the legal principles that apply to r 32.03. Broadly speaking, the threshold test for an order for preliminary discovery under rule 32.03 is set at quite a low level¹³ and a benevolent approach should be applied.¹⁴ Rule 32.03 is to be given a wide interpretation and is to be freely available to an applicant who is experiencing difficulty in identifying a person against whom he or she has a potential cause of action.¹⁵
16. However, Fuel Recovery Services and VicRoads did not agree on what the threshold test is. VicRoads submitted that in addition to satisfying the court about the matters set out in paragraph 14 above, Fuel Recovery Services must also satisfy the court that the purpose for which Fuel Recovery Services seeks the information is to begin proceedings against the drivers of the motor vehicles involved in fuel drive-offs. In contrast, Fuel Recovery Services submitted that it only has to satisfy the court that it 'desires' to commence proceedings against those drivers.

VicRoads' submissions in relation to whether Fuel Recovery Services must satisfy the court that the purpose for which it seeks the information from VicRoads is to

¹¹ *McCracken v Stockdale* (VSC, Beach J, No 9148/94, 27 March 1995, unreported).

¹² *Boyd v Automatic, Inc* 4 February 2019 [2019] FCA 86 [34].

¹³ *Gull Petroleum (WA) Ltd v Tah Land Pty Ltd* [2001] FCA 153, [59] (**Gull Petroleum**); *TFS Corporations Ltd v Dellaverde* [2015] WASC 239, [4].

¹⁴ *Primrose Textiles Pty Ltd v Kolliner & Anor* [1999] VSC 69; *Paxus Services Ltd v People Bank Pty Ltd* [1990] FCA 500, *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679, [15].

¹⁵ *Compass Airlines Pty Ltd v Anop Research Services Pty Ltd* (unreported, SC (Vic) Beach J, No 3272/90, 1 May 1991).

commence proceedings against the drivers of the motor vehicles involved in fuel drive-offs

17. VicRoads relied on the New South Wales Court of Appeal decision of *Roads and Traffic Authority of New South Wales v Care Park Pty Ltd (RTA v Care Park)*¹⁶ in support of its submission.
18. In *RTA v Care Park*, the Court of Appeal considered the interpretation of rule 5.2(2) of the *Uniform Civil Procedure Rules 2005* (NSW), which is the equivalent of Victoria's rule 32.03.
19. VicRoads relied on the following aspects of the court's decision.
20. The Court of Appeal held that the court must have regard to whether the possessed information can sufficiently fulfil the purpose of commencing proceedings, not whether the applicant has a purpose of commencing proceedings.¹⁷ That sufficiency will be determined by the requirements of the rules of court prescribing the particulars of a defendant to be given in an originating process.
21. Further, the Court held that the requisite mental state required to be shown is indicated by the words 'the person against whom the applicant desires to bring proceedings.' The task of the Court is to decide whether the applicant has established that he or she has such a 'desire'.¹⁸ Whether the applicant has such a desire is also relevant to the Court's power to exercise the discretion.¹⁹
22. The Court of Appeal also held that purpose requirement necessitates the Court finding that an applicant has a 'bona fide desire' and not merely a 'capricious desire' unsupported by any ground for believing that the object of the desire will be realised. The desire to commence proceedings must be genuinely held and objectively based. An applicant must do more than simply assert some subjective desire.²⁰

Fuel Recovery Services' submissions in relation to whether it has to satisfy the court that the purpose for which it seeks the information from VicRoads is to commence proceedings against the drivers of the motor vehicles involved in fuel drive-offs

23. Fuel Recovery Services relied on the following matters in response to VicRoads's submissions in relation to the NSW Court of Appeal's decision in *RTA v Care Park*.
24. The Court of Appeal found that the 'purpose' referred to in r 5.2 should be interpreted as a 'desire' to commence proceedings.²¹
25. The Court of Appeal further found that the 'desire' to commence proceedings is conditional, and exists even in the case that it may later be abandoned in a stated event.²² Fuel Recovery Services relied on the statement of Young JA, who said that the concept of 'purpose' in the rule for preliminary discovery 'means no more than

¹⁶ [2012] NSWCA 35, (Barrett JA, with whom Beazley JA, Campbell JA and Basten JA agreed) (*RTA v Care Park*).

¹⁷ *RTA v Care Park*, [97].

¹⁸ *RTA v Care Park*, [98].

¹⁹ *RTA v Care Park*, [110].

²⁰ *RTA v Care Park*, [106].

²¹ *RTA v Care Park*, [112].

²² *RTA v Care Park*, [118] (Barrett JA), [64] (Young JA).

that the applicant has an intention or desire to commence proceedings if, after inquiry, that still is perceived as a proper course to take', and should not be inflated to mean more than this.²³

26. Fuel Recovery Services also relied on the decision of the NSW Court of Appeal in *Hooper v Kirella*²⁴ where the court held that it was of no consequence that after preliminary discovery is made, proceedings may never be instituted. In that case, the applicant sought preliminary discovery to identify the parties responsible for distributing newsletters containing alleged misrepresentations. The Court held that even if none of the respondents identified through preliminary discovery were actually responsible for the distribution of the impugned newsletter, this did not alter the validity of the applicant's assertion of a claim.²⁵

Does Fuel Recovery Services have to satisfy the court that the purpose for which it seeks the information from VicRoads is to commence proceedings against the drivers of the motor vehicles involved in fuel drive-offs?

27. In *RTA v Care Park*, the Court of Appeal dismissed the Roads and Traffic Authority of New South Wales' (RTA) appeal against the decision of a judge who ordered the RTA to provide preliminary discovery of the names and address of registered operators of motor vehicles that had overstayed at car parks owned by Care Park.
28. The critical issue between the parties was whether, in order to engage the power conferred by r 5.2, an applicant must demonstrate a desire, intention or purpose to commence proceedings against another person, whose identity or whereabouts were unknown and had not been revealed by reasonable inquiries.²⁶
29. The argument in *RTA v Care Park* focussed on whether the 'purpose' referred to in r 5.2, the equivalent of 32.03, which refers to 'an applicant, having made reasonable enquiries', being 'unable to sufficiently ascertain the identity or whereabouts of a person for the purpose of commencing proceedings against that person,' 'merely characterised the lack of information available to the applicant, or whether it also identified a purpose which the applicant was required to hold'.²⁷
30. As Barrett JA put it:
- The central issue is whether the court must be satisfied, as a condition going to its ability to make an order, that the applicant has a purpose of commencing proceedings against a particular person and whether what might be termed a "conditional purpose" - that is, a purpose of suing that may be abandoned in the light of information brought to light by the discovery order - is a sufficient purpose to permit the court entertaining the discovery application to move to the next stage of deciding whether actually to make an order.²⁸
31. Whilst the Court of Appeal unanimously dismissed the RTA's appeal, the reasoning of the Court of Appeal judges differed. In summary, the majority (Barrett JA, Beazley

²³ *RTA v Care Park*, [70].

²⁴ *Hooper and Ors v Kirella Pty Ltd; Transfield Pty Ltd v Airservices Australia* (1999) 96 FCR 1 (*Hooper v Kirella*).

²⁵ *Hooper v Kirella*, [59], [61].

²⁶ *Hooper v Kirella*, [5].

²⁷ *RTA v Care Park*, [7].

²⁸ *RTA v Care Park*, [92].

and Campbell JJA agreeing), held that the 'desire' to commence proceedings is a threshold requirement that an applicant must have, and that the 'desire' may be characterised as something less fixed and certain than an 'intention' or 'purpose', and may be conditional.

32. In reaching his decision, Barrett JA relied on the wording of the definition contained in rule 5.1 of the NSW rule, which relevantly states:

In this Part -

“applicant” means an applicant for an order under this Part.

“identity or whereabouts” includes the name and (as applicable) the place of residence, registered office, place of business or other whereabouts, and the occupation and sex, **of the person against whom the applicant desires to bring proceedings**, and also whether that person is an individual or a corporation.

33. After looking closely at the words of the rule, Barrett JA stated:

The “purpose of commencing proceedings” is thus the yardstick against which sufficiency of information in the applicant's possession is measured, not something that the applicant must have. It is the objective sufficiency of the possessed information to fulfil the “purpose” of commencing proceedings to which the court must have regard, not the question whether the applicant has a purpose of commencing proceedings. That objective sufficiency will be determined by the requirements of the rules of court prescribing the particulars of a defendant to be given in (and in connection with) an originating process of the kind appropriate to the particular proceedings.

The mental state that the applicant must be found to have regarding the bringing of proceedings is indicated by the words “the person against whom the applicant desires to bring proceedings”. The task of the court is to decide whether the applicant has established that he or she has such a “desire”.²⁹

34. Barrett JA later added:

One of the findings on which the power to make an order depends is a finding that the applicant “desires” to commence proceedings against a particular person whose particulars are insufficiently known to fulfil the purpose of commencing proceedings against him or her, with sufficiency for that purpose being determined in the way already mentioned.

The “desire” of the applicant might, in one sense, be seen as a subjective matter but it would, I think, be wrong to think that regard should only be had to what the applicant says about what he or she wishes to do. The relevant desire must be what Lopes LJ, in *Midland Railway Co v Robinson* (1887) 37 Ch D 386 at 405, referred to as “a bona fide desire” and not merely “a capricious desire” unsupported by any ground for believing that the object of the desire can be realised. In *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 at 779, Lord Reid said that he would not hold a desire “proved by some equivocal words or acts”. The existence of a serious question to be tried is sometimes said to depend on whether there is a substantial question of fact or law, or both, which the claimant “bona fide desires to have tried”: *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 AC 438. The same quality of genuinely held and objectively based desire is relevant in the present context. It is therefore for an applicant under rule 5.2 to do more than simply assert some subjective desire.³⁰

²⁹ *RTA v Care Park*, [97]-[98].

³⁰ *RTA v Care Park*, [105]-[106].

35. He also said:

Demonstration of a relevant state of mind of the applicant as to future commencement of proceedings ... plays a part in the decision as to the existence of the court's power to exercise the discretion, although it may subsequently become relevant again to the question of exercise. At that later point, it may be appropriate to assess the quality of the applicant's state of mind with respect to the bringing of the particular proceedings against the particular person and, for example, to consider whether it is insubstantial or misguided so as to make any proceedings merely speculative, doomed to fail or otherwise not deserving of the discretionary assistance that the court is empowered by rule 5.2 to give.

...[W]hile a finding as to the applicant's state of mind is necessary at the threshold, it is, in my opinion, incorrect to regard the necessary finding as one that the applicant 'intends' to bring proceedings.... Having regard to the second definition in rule 5.1 and its impact on the meaning of rule 5.2(1)(a) in the way I have already described, the state of mind that must be found at the threshold is that the applicant "desires" to bring proceedings.³¹

36. Finally, Barrett JA held that an applicant who has a genuinely held and soundly based desire to sue a prospective defendant (or person concerned), albeit a desire that might be abandoned for good reason later discovered by the applicant, which he described as a 'conditional intention or purpose', has a desire to commence proceedings, which is sufficient for the purpose of rule 5.2.³² Barrett JA held:

On the construction I consider to be correct, the question that should have been addressed is whether [the applicant] had a "desire" to commence proceedings against each [prospective defendant]. The issue is therefore whether a "desire" that is conditional in the way I have described is nonetheless a "desire" of the kind with which the rules are concerned. In my opinion, it is.³³

Discussion

37. The Supreme Court of Victoria has held that a requirement of r 32.03 is that the plaintiff must actually have a genuinely held and objectively based desire to commence a proceeding.³⁴

38. Applications which are capricious or lack an objective basis must be rejected.³⁵

39. There needs to be evidence on oath of this desire and whilst the evidence need not be extensive,³⁶ it must be realistic and not, 'insubstantial or misguided so as to make any proceedings merely speculative, doomed to fail or otherwise not deserving of the discretion assistance that the court is empowered by rule 5.2 [the equivalent of r 32.03] to give'.³⁷

40. Accordingly, I reject VicRoads' submission that Fuel Recovery Services must satisfy the court that the purpose for which it seeks the information from VicRoads is to commence proceedings against the drivers involved in the fuel drive-offs. Rather, Fuel Recovery Services must satisfy the court that it desires to commence

³¹ *RTA v Care Park*, [111].

³² *RTA v Care Park*, [117] and [119].

³³ *RTA v Care Park*, [118].

³⁴ *Crisp v RSM Bird Cameron Partners* [2013] VCC 489, [39].

³⁵ *RTA v Care Park*, [106].

³⁶ *Bilbarin Holdings Pty Ltd t/as David Smash Repairs v NRMA Insurance Ltd* 138 FLR 195, [202].

³⁷ *RTA v Care Park*, [110].

proceedings against the drivers involved in the fuel drive-offs, whose particulars are insufficiently known to fulfil the purpose of commencing proceedings against them,³⁸ which is 'something less fixed and certain than an intention or a purpose'.³⁹

41. If Fuel Recovery Services satisfies the Court about the matters in paragraph 14 above and that it desires to commence proceedings against the drivers involved in the fuel drive-offs, the Court has a discretion to grant preliminary discovery.

VICROADS' POSITION

42. VicRoads opposes the application. In summary, it submits that the Court should dismiss the application because:
- a) Fuel Recovery Services has not properly identified that it has a case for relief against the driver of the motor vehicles involved in the fuel drive-offs,
 - b) Fuel Recovery Services has not made reasonable inquiries to ascertain the description of the drivers in each case,
 - c) the Court should not be satisfied that the purpose for which Fuel Recovery Services seeks the information is to commence proceedings against each of the drivers, but rather, find that Fuel Recovery Services seeks the information to pursue debt recovery, and
 - d) even if Fuel Recovery Services were to be provided with the name and addresses of the registered operators of the motor vehicles allegedly involved in fuel drive-offs, that information may not be information 'tending to assist' in the identification of the drivers of the motor vehicles who allegedly failed to pay for the fuel.
43. VicRoads also submitted that even if Fuel Recovery Services satisfied the court about these threshold matters, the Court should exercise its discretion by refusing the application due to concerns VicRoads has about how Fuel Recovery Services will use the information it receives from them, which is private, sensitive and personal information.
44. VicRoads also opposes the 'bulk nature' of the application.
45. In relation to paragraph 42(c) above, for the reasons set out in paragraphs 27 to 41 above, the question for the court is whether Fuel Recovery Services desires to commence proceedings against the drivers involved in the fuel drive-offs, not whether the purpose for which Fuel Recovery Services seeks the information is to commence proceedings against them.

THE EVIDENCE

46. Fuel Recovery Services relied on the evidence of Eoin Sean Byrne contained in his affidavits affirmed on 9 May 2019 (**Mr Byrne's first affidavit**), 12 June 2019 (**Mr Byrne's second affidavit**), 17 July 2019 (**Mr Byrne's third affidavit**) and 31 July 2019 (**Mr Byrne's fourth affidavit**) (**Mr Byrne's affidavits**), together with the oral

³⁸ *RTA v Care Park*, [105].

³⁹ *RTA v Care Park*, [113].

evidence he gave at the hearing of the application during cross-examination and re-examination.

47. Mr Byrne is one of two directors of Fuel Recovery Services.
48. VicRoads did not rely on any evidence in opposition to the application.

HAS FUEL RECOVERY SERVICES SHOWN THAT IT MAY HAVE A CAUSE OF ACTION AGAINST THE DRIVERS OF THE MOTOR VEHICLES INVOLVED IN FUEL DRIVE-OFFS?

The law

49. Whilst an applicant need not demonstrate a prima facie case against the person concerned,⁴⁰ the applicant must show that its claim is 'more than a hunch, suspicion, or hope'⁴¹ and it is not enough merely to assert that there is a case against the person concerned.⁴² There must be some tangible backing, or objective foundation, that takes the existence of the cause of action beyond mere allegation, suspicion or assertion.⁴³
50. The evidence required must 'incline the mind' toward the matter of fact indicating the elements of the potential cause of action and the applicant must show there is reason to believe that he or she may have a right to relief against the person he or she wishes to sue, in this case, the drivers of the motor vehicles involved in the fuel drive-offs.⁴⁴ This is an objective test.⁴⁵
51. An applicant must show that the order sought is necessary in the interests of justice, that is, the making of the order is necessary to provide the applicant with an effective remedy in respect of the 'actionable wrong' of which the applicant complains.⁴⁶
52. An order for discovery will not be made if, on the evidence, it is clear that an applicant does not have a cause of action against the person whose identity is sought to be established.⁴⁷

Fuel Recovery Services' evidence and contentions in relation to whether it may have a cause action against the drivers of the motor vehicles involved in the fuel drive-offs

53. Fuel Recovery Services contended that it may have a cause of action against the drivers of the motor vehicles involved in the fuel drive-offs set out in Schedule 1 because Mr Byrne's evidence shows that:

⁴⁰ *Hooper v Kirella*, [33], *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679, [13].

⁴¹ *McCracken v Stockdale* (VSC, Beach J, No 9148/94, 27 March 1995, unreported).

⁴² *Rush v Commissioner of Police* (2006) 150 FCR 165, [6]; *Hooper v Kirella* (1999) 96 FCR 1, [39].

⁴³ *Waller v Waller* [2009] WASCA 61 at [75], *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679, [13];

⁴⁴ *Rush and Ors v Commissioner of Police* (2006) 150 FCR 165, [6]; *Hooper v Kirella*, [33], [39]; *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679, [13]-[14], [17]; *Boyd v Automatic, Inc* [2019] FCA 86, [20], [36]; *McCracken v Stockdale* (VSC, Beach J, No 9148/94, 27 March 1995, unreported).

⁴⁵ *Gull Petroleum*, [59], *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679, [13].

⁴⁶ *Hooper v Kirella*, [34].

⁴⁷ *Horden House Pty Ltd v Arnold* [1989] VR 402.

- a) Each of the drivers entered into a contract that required them to pay for the fuel dispensed by the relevant fuel retailer as a copy of that contract is displayed on a sticker⁴⁸ at every fuel pump at every fuel retailer where a drive-off is alleged to have taken place.⁴⁹
- b) Each of the drivers was in breach of that contract as employees of the various fuel retailers identified the drivers involved in the fuel drive-offs through the high definition CCTV footage that Scancam provides to the fuel retailers at each of the relevant locations.⁵⁰
- c) The relevant fuel retailers assigned the debts owed by each of the drivers to Fuel Recovery Services under a number of 'Debt Purchase Agreements' between Scancam and the relevant fuel retailers and a 'Services Agreement' between Scancam and Caltex Australia Petroleum Pty Ltd.⁵¹

54. Fuel Recovery Services conceded that it had not provided the court with evidence of every sticker at every fuel pump, and direct evidence from the fuel retailers' employees that they had checked that the drivers involved in the fuel drive-offs were accurately identified in the CCTV footage. However, it contended that Mr Byrne's evidence that Anthony Schmidt, the other director of Fuel Recovery Services, had personally stuck the stickers to every fuel pump at every relevant fuel retailer and that Mr Byrne had seen each sticker⁵² was sufficient evidence to show that there was a contract between the drivers of the motor vehicles involved in the fuel drive-offs and the fuel retailers. It also contended that Mr Byrne's evidence about the usual practices of the employees after a fuel drive-off had taken place⁵³ was sufficient evidence to show that the contract had been breached by the drivers.
55. In addition, whilst Fuel Recovery Services also conceded that Mr Byrne had made 'sloppy and embarrassing' errors in his affidavits in relation to the contracts that assigned the debts to Fuel Recovery Services, it contended that the errors were 'technical' errors that arose due to mistakes that were made when the contracts were scanned and that these errors did not vitiate the contracts or make them invalid. Fuel Recovery Services contended that there was sufficient evidence before the court for the court to be satisfied that the contracts it is relying on to show that the fuel retailers had assigned the unpaid fuel debts to Fuel Recovery Services were valid and binding.
56. Fuel Recovery Services also submitted that even if there is insufficient evidence of the contracts between Fuel Recovery Services and the various fuel retailers for the court to be satisfied that the debt owed by each of the drivers involved in the fuel drive-offs to the respective fuel retailers had been assigned to Fuel Recovery Services, Fuel Recovery Services is the equitable assignee of the fuel debts and has

⁴⁸ Exhibit EB-5 of Mr Byrne's first affidavit.

⁴⁹ See paragraphs 12 to 14, 17 to 18 and 23 to 25 of Mr Byrne's first affidavit, paragraph 10 of Mr Byrne's second affidavit and paragraph 23 and 24 of Mr Byrne's third affidavit.

⁵⁰ See paragraphs 15 to 18 of Mr Byrne's first affidavit.

⁵¹ See paragraphs 9 to 11 of Mr Byrne's first affidavit, paragraphs 7 to 9 of Mr Byrne's second affidavit, paragraphs 11 to 22 of Mr Byrne's third affidavit and paragraphs 6 to 16 of Mr Byrne's fourth affidavit.

⁵² Paragraph 23(c) of Mr Byrne's third affidavit.

⁵³ Paragraphs 17 and 18 of My Byrne's first affidavit.

standing to issue debt recovery proceedings against the drivers involved in the fuel drive-offs.⁵⁴

57. In summary, Fuel Recovery Services contended that Mr Byrne's evidence establishes that Fuel Recovery Services may have a cause of action in debt recovery against the drivers of the motor vehicles involved in the fuel drive-offs.

VicRoad's submissions in relation to whether Fuel Recovery Services may have a cause of action against the drivers of the motor vehicles involved in the fuel drive-offs

58. VicRoads submitted that Fuel Recovery Services' evidence in relation to the cause of action it has against the drivers involved in the fuel drive-offs is so deficient that it has been unable to demonstrate that it 'may' have a cause of action against them.
59. Specifically, VicRoads submitted that despite multiple affidavits being filed, Fuel Recovery Services has failed to demonstrate that it may have a cause of action against the drivers of the motor vehicles involved in the fuel drive-offs because:
- a) Fuel Recovery Services has not filed evidence establishing a cause of action against each individual driver involved in a fuel drive-off, and
 - b) in respect of Fuel Recovery Service's right to issue proceedings against the drivers involved in the fuel drive-offs, the proof of the assignment of the debt to Fuel Recovery Services is problematic and it is not clear whether the debts have actually been assigned.
60. In relation to whether Fuel Recovery Services has satisfied that court that each individual driver owes a debt to the relevant fuel retailer, VicRoads submitted that there is no evidence that a sticker had been placed on every relevant fuel pump, that the fuel retailer has accurately recorded the drive-off against the CCTV footage obtained or that the CCTV footage has been reviewed and the driver did not exit the motor vehicle to pay for the fuel. Nor is there is any evidence that Fuel Recovery Services has spoken to the attendant and Site Manager at the relevant fuel retailers about the alleged incidents and ascertained whether the unidentified drivers have subsequently paid for the fuel. Instead Fuel Recovery Services appears to rely on evidence of normal business practices. VicRoads submits that this is insufficient for the Court to order preliminary discovery of registration information.
61. In relation to whether Fuel Recovery Services has satisfied that court that the debts owed by the drivers involved in the fuel drive-offs have been assigned to it, VicRoads submitted that its evidence in relation to the Caltex fuel retailers was particularly deficient and that Fuel Recovery Services should have provided the court with evidence from Caltex confirming that the debts had been assigned to Fuel Recovery

⁵⁴ See *Thomas v National Australia Bank Limited* [2000] 2 Qd R 448; [1999] QCA 525, [2] 449 (McMurdo P), [18] 453 (Pincus JA); *ABB Australia Pty Ltd v Commissioner of Taxation* [2007] FCA 1063, [59] (Lindgren J); *Goodridge v Macquarie Bank Ltd* [2010] FCA 67, [172] (Rares J) (although appeal of this decision was allowed in *Leveraged Equities Ltd v Goodridge* (2011) 191 FCR 71, the point of law regarding there be no strict requirement for notice to the debtor in an equitable assignment of debt was not rejected); *Alma Hill Constructions Pty Ltd v Onal* (2007) 16 VR 190, 194 [13] (Kaye J); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 527 [57] (French CJ, Crennan and Kiefel JJ), 532 [78] Gummow and Bell JJ.

Services in light of the errors and omissions contained in Mr Byrne's affidavits in relation to the agreements between Caltex, Scancam and Fuel Recovery Services.

Findings in relation to whether Fuel Recovery Services may have a cause action against the drivers of the motor vehicles involved in the fuel drive-offs

62. I do not accept VicRoads' submission that Fuel Recovery Services' evidence in relation to the cause of action it contends it has against the drivers involved in the fuel drive-offs is so deficient that it has been unable to demonstrate that it 'may' have a cause of action against them for the following reasons.
63. I accept Mr Byrne's evidence in relation to the stickers placed on the fuel pumps which contain the details of the 'fuel contract' between the drivers of the motor vehicles and the fuel retailers, together with his evidence in relation to the CCTV systems installed at each of the relevant fuel retailers sites including his evidence that the cameras, which operate 24 hours a day, record any fuel drive-offs and the licence plate numbers of the motor vehicles involved in the fuel drive-offs and his evidence that the site managers at the relevant fuel retailers review the CCTV footage to ensure that it is accurate.⁵⁵ In my view, this evidence is sufficient to show that the drivers involved in the fuel drive-offs may have entered into contracts with the fuel retailers, which they breached, and that the drivers owe a debt to the fuel retailers in relation to the fuel they allegedly have not paid for. This evidence amounts to 'more than a hunch, suspicion, or hope'⁵⁶ or a mere assertion.⁵⁷
64. I also accept Mr Byrne's evidence contained in his affidavits⁵⁸ and the evidence that he gave during cross-examination that each of the fuel retailers listed in Schedule 1 have assigned their unpaid fuel debts to Fuel Recovery Services. Whilst there were undoubtedly some errors and omissions in Mr Byrne's affidavits in relation to the agreements between the fuel retailers and Fuel Recovery Services, those errors and omissions were sufficiently explained or corrected by Mr Byrne in subsequent affidavits and during his cross-examination and re-examination.
65. Given that Fuel Recovery Services does not have to show it has a prima facie case against the unidentified drivers, I reject VicRoads' contention that Fuel Recovery Services needed to provide the court with evidence from the Caltex retailers, in particular, that they have assigned the unpaid fuel debts to Fuel Recovery Services in order for me to be satisfied that it may have a cause of action against the drivers of the motor vehicles involved in the fuel drive-offs. In my view, the evidence before the court of the assignment of the debts amounts to 'more than a hunch, suspicion, or hope'⁵⁹ or a mere assertion that Fuel Recovery Services has had the unpaid fuel debts assigned to it.⁶⁰ Rather, in my view it is reasonably arguable that the debts owed to the various fuel retailers by the drivers involved in the fuel drive-offs have been assigned to Fuel Recovery Services and that Fuel Recovery Services is

⁵⁵ See paragraphs 17 and 18 of Mr Byrne's first affidavit and paragraph 23(c) of his third affidavit.

⁵⁶ *McCracken v Stockdale* (VSC, Beach J, No 9148/94, 27 March 1995, unreported).

⁵⁷ *Rush v Commissioner of Police* (2006) 150 FCR 165, [6]; *Hooper v Kirella*, [39].

⁵⁸ See paragraphs 9 to 11 of Mr Byrne's first affidavit, paragraphs 7 to 9 of Mr Byrne's second affidavit, paragraphs 11 to 22 of Mr Byrne's third affidavit and paragraphs 6 to 16 of Mr Byrne's fourth affidavit.

⁵⁹ *McCracken v Stockdale* (VSC, Beach J, No 9148/94, 27 March 1995, unreported).

⁶⁰ *Rush v Commissioner of Police* (2006) 150 FCR 165, [6]; *Hooper v Kirella*, [39].

authorised to seek preliminary discovery to assist it to ascertain the identities of the drivers who incurred those debts.

66. In conclusion, taking into account that the threshold test for an order for preliminary discovery is of a low level, that a benevolent approach should be applied to rule 32.03, and that Fuel Recovery Services does not have to prove that it has a prima facie case against the drivers involved in fuel drive-offs, I am satisfied that Fuel Recovery Services has shown that it may have a cause of action against the drivers involved in the fuel drive-offs.

HAS FUEL RECOVERY SERVICES MADE REASONABLE INQUIRIES TO IDENTIFY THE DRIVERS INVOLVED IN THE ALLEGED FUEL DRIVE-OFFS?

The law

67. Whether Fuel Recovery Services has made reasonable inquiries to identify each of the unidentified drivers is a question of fact.⁶¹
68. Every avenue or inquiry need not be exhausted but orders will not be made solely on the basis that the applicant is of the belief that an application under r 32.03 is the most convenient way of obtaining the information.⁶²

Fuel Recovery Services' evidence and contentions in relation to whether it has made reasonable inquiries to identify each of the unidentified drivers involved in the alleged fuel drive-offs

69. Fuel Recovery Services contended that it has made reasonable inquiries to identify each of the drivers involved in the fuel drive-offs based on Mr Byrne's evidence that:
- a) The only information Fuel Recovery Services has to assist it to identify each of the drivers involved in the fuel drive-offs is the CCTV footage of the drivers putting fuel in their motor vehicles and the registration numbers of those motor vehicles.
 - b) VicRoads is the only entity that holds information in relation to the names and addresses of the registered owners of the motor vehicles involved in the fuel drive-offs.
 - c) Fuel Recovery Services wrote to VicRoads requesting information to help it ascertain a description of the unidentified drivers, which VicRoads refused to provide.
 - d) It is impracticable to file a police report because:
 - (i) the effort, time and costs involved in engaging employees to file police reports, assist police and to then monitor the progress of the matter constitute a disproportionately onerous burden,
 - (ii) in any event, Scancam's research indicates that the police are reluctant to invest enforcement resources in pursuing fuel drive-off theft

⁶¹ *Steffen v ANZ Banking Group* [2009] NSWSC 666, [15].

⁶² *The Age Company Ltd v Liu* [2013] NSWCA 26, [87].

offenders due to low conviction rates and minimal loss recovery as recorded in the Parliament of Victoria's Law Reform, Road and Community Safety Committee's Inquiry into fuel drive-offs Report of March 2016 (**Inquiry into fuel drive-offs**),⁶³ and

- (iii) civil remedies for losses incurred in drive-off incidents may be made in bulk, however reports of fuel-theft to the police must be made individually, resulting in a fragmented, slow and ineffective recovery process.

VicRoad's submissions in relation to whether Fuel Recovery Services has made reasonable inquiries to identify each of the drivers involved in the fuel drive-offs

- 70. VicRoads submitted that Fuel Recovery Services has not made reasonable inquiries to identify each of the drivers involved in the fuel drive-offs because Fuel Recovery Services has not contacted Victoria Police to investigate any of these incidents, which may involve another aspect of criminality, such as where the motor vehicle involved in the fuel drive-off is stolen, in addition to the alleged fuel theft.
- 71. VicRoads also submitted that Fuel Recovery Services' 'high level and vague' evidence in relation to general statements made by Victoria Police in 2016 to the Inquiry into fuel drive-offs is insufficient to explain why it has not asked Victoria Police to investigate each of the fuel drive-offs and accordingly, the court should find that it has not made reasonable inquiries to identify each of the drivers.
- 72. Lastly, VicRoads submitted that civil remedies for losses incurred in drive-off incidents cannot be 'made in bulk' and would not be less costly or time consuming than asking Victoria Police to investigate the fuel drive-offs.

Discussion

- 73. There is no dispute that Fuel Recovery Services is unable to identify the drivers involved in the fuel drive-offs from the CCTV footage in its possession. Accordingly, Fuel Recovery Services only has two options for identifying the drivers – asking Victoria Police to investigate the fuel drive-offs or asking VicRoads to provide it with the names and address of the registered operators of the motor vehicles involved in the fuel drive-offs. The solicitors representing Fuel Recovery Services have asked VicRoads to provide it this information, which VicRoads has refused to do so.
- 74. As stated above, Fuel Recovery Services admitted that it had not asked Victoria Police to investigate each of the fuel drive-offs and it relied on what is contained in the Inquiry into fuel drive-offs in relation to Victoria Police's unwillingness to investigate fuel drive-offs as evidence of the reasonableness of its decision.
- 75. The Inquiry into fuel drive-offs sets out Victoria Police's approach to fuel drive-offs. Relevantly, the report states (footnotes omitted, emphasis added):

On 1 July 2013, Victoria Police changed the way it approached fuel drive-offs in Victoria. The change set out in a Police Commissioner's Instruction

⁶³ VicRoads did not object to the report being tendered and admitted into evidence under s 48(1)(f) of the *Evidence Act 2008* (Vic).

(the '2013 Instruction'), meant that a fuel drive-off might only be investigated if there was sufficient information to indicate criminality. Examples of criminality would include the use of stolen numberplates or where the vehicle itself was stolen.

It should be noted that even where such cases proceeded to trial, police were unable to recover the lost income for fuel retailers. According to Victoria Police, the instruction also set out that:

- 'Fuel drive-offs [are] considered to be civil in nature;
- There is no formal reporting required to police;
- Victoria Police would not attend a site unless there were specific safety concerns or a crime scene (other than CCTV footage); and
- **Victoria Police would only investigate a reported incident where reliable and credible evidence exists that establishes a prima facie criminal offence'...**

The question of how best to utilise and prioritise police resources also appears to have been an important element in the changed approach. In Chapter three, Victoria Police provided an annual cost of \$3.3 million spent investigating fuel drive-offs. The Commissioner for Privacy and Data Protection suggested that these investigations accounted for 18,000 police hours annually. Considering how best to utilise police resources was a point raised by Mr Stephen Fontana, Assistant Commissioner, Victoria Police during the public hearings:

We had a lot of other demands for service dealing with family violence incidents, road policing incidents and also dealing with other crime in the community — crimes of violence, issues with drug-related offences — and petrol was consuming a lot of our time unnecessarily, particularly when we were of the view that it is clearly preventable and there is a lot more that the industry could do to put in tougher practices to prevent it [such as prepayment requirements].

A further reason for the change in approach was the construction of the theft offence itself. A crucial element in proving the offence of theft is that an appropriation must be dishonest. In cases where a person left their details with a fuel attendant but did not return to pay, or where there was no clear intent that the person filling their tank sought to steal the fuel, police considered that those scenarios ought to be treated as amounting to a civil debt. Therefore, the absence of criminality in a fuel drive-off was more properly characterised as civil rather than criminal in nature. Further, **where there is no evidence of criminality, Victoria Police will not lodge a police report of the incident.**⁶⁴

76. VicRoads did not object to the Inquiry into fuel drive-offs' report being tendered into evidence and it did not challenge any aspects of the contents of the report that Fuel Recovery Services sought to rely on. In addition, whilst the report is four years old, there was no other evidence before the court about Victoria Police's approach to investigating fuel drive-offs. Accordingly, on the basis of all the material before the court, I infer that the information contained in the Inquiry's report accurately sets out Victoria Police's position in relation to investigating fuel drive-offs. I also accept Mr Byrne's evidence that one of the reasons that Fuel Recovery Services has not asked Victoria Police to investigate each of the drivers involved in the fuel drive-offs in order to ascertain their description sufficiently for issuing proceedings against them is Victoria Police's approach to investigating fuel drive-offs as described in the Inquiry's report. However, given the report is around four years old, I have not placed a lot of weight on the material contained in the Inquiry's report.

⁶⁴ Inquiry into fuel drive-offs, pp 46 – 47.

77. In addition, whilst I do not accept Mr Byrne's broad assertion that civil law processes for attempting to recover the losses in relation to the fuel drive-offs are likely to be less costly and time consuming than asking Victoria Police to investigate each fuel drive-off, and that 'bulk' civil applications can be made, and it is clear that when a person is convicted of fuel theft, Victoria Police have the power to apply for an order that the accused person reimburse the fuel retailer the value of the stolen fuel on the fuel retailer's behalf,⁶⁵ I am not satisfied that Fuel Recovery Services has applied for preliminary discovery simply because it is more 'convenient' than using criminal law processes. This is because I am satisfied that asking Victoria Police to investigate every fuel drive-off incident would be a time consuming exercise that may lead to considerable delays, with little prospect of success based on the information Victoria Police provided to the Inquiry into fuel drive-offs as set out in paragraph 76 above.

Findings in relation to whether Fuel Recovery Services has made reasonable inquiries to identify each of the unidentified drivers

78. In my view, it would not be reasonable to require Fuel Recovery Services to ask Victoria Police to investigate the 181 fuel drive-off incidents listed in Schedule 1 before they applied for preliminary discovery against VicRoads due to the likely delays associated with the time consuming nature of this exercise and in light of material provided to the Inquiry into fuel drive-offs by Victoria Police that:
- a) Victoria Police will not investigate a fuel drive off without 'reliable and credible evidence' that 'establishes a prima facie criminal offence', in other words, reliable and credible evidence that each of the individual drivers had a 'clear intent' to steal the fuel as opposed to having 'inadvertently' driven off without paying for their fuel, or evidence that the motor vehicle involved in the fuel drive off was stolen or had false number plates attached to it, or that the driver of the motor vehicle was otherwise involved in other criminal activities,⁶⁶
 - b) Victoria Police statistics show a low success rate of conviction based on 'judicial decisions that found that the intent to take the fuel, and to do so dishonestly, needed to occur at the point of taking the fuel and not after, when a person left the site',⁶⁷ which suggests that the deterrent effect of criminal prosecutions may be low, and
 - c) Victoria Police have been 'unable to recover the lost income for fuel retailers' even where their investigations have resulted in matters proceeding to trial.⁶⁸
79. In relation to paragraph a) above, it appears that the only evidence that the fuel retailers, Scancam or Fuel Recovery Services have in relation to the fuel drive-offs is the CCTV footage of drivers filling their motor vehicles with fuel and driving off without having paid for the fuel and the registration plates of the motor vehicles they were driving, and I am not satisfied that such evidence can be described as 'reliable and credible evidence' that 'establishes a prima facie criminal offence'.

⁶⁵ See sections 84 and 86 of the *Sentencing Act 1991* (Vic).

⁶⁶ Inquiry into fuel drive-offs, pp 46-47.

⁶⁷ Inquiry into fuel drive-offs, p 48.

⁶⁸ Inquiry into fuel drive-offs, p 47.

80. For these reasons, I am satisfied that Fuel Recovery Services has made reasonable inquiries to identify each of the drivers.

DOES FUEL RECOVERY SERVICES DESIRE TO COMMENCE PROCEEDINGS AGAINST THE DRIVERS INVOLVED IN THE FUEL DRIVE-OFFS?

Fuel Recovery Services' evidence and contentions in relation to whether it desires to commence proceedings against the drivers involved in the fuel drive-offs

81. Fuel Recovery Services relied on Mr Byrne's evidence that Fuel Recovery Services intends to issue proceedings to recover losses arising from unpaid fuel debts that have been incurred by the fuel retailers it has agreements with and to deter drivers from failing to pay for their fuel in the future.⁶⁹
82. During cross-examination, Mr Byrne gave evidence that on receiving the names and addresses of the registered operators of the motor vehicles involved in the fuel drive-offs, Fuel Recovery Services would send the registered operators a letter demanding payment for the unpaid fuel and a \$40 administration fee if the fuel had not already been paid for online through Fuel Recovery Services' debt payment facility.
83. However, Mr Byrnes agreed in cross-examination that:
- a) The unpaid fuel debts listed in Schedule 1 total \$9674.68.
 - b) All of the debts are less than \$200.
 - c) Only six debts are over \$100.
 - d) The smallest debt is \$5.
 - e) Only two of the debts are larger than the \$151.10 filing fee that Fuel Recovery Services would have to pay to issue proceedings in the Magistrates Court to recover the debt.
 - f) If Fuel Recovery Services issued proceedings against all 181 drivers involved in fuel drive-offs, it would have to pay filing fees totalling over \$27,000, which is more than three times the amount of the total debt.
 - g) As a result, even if Fuel Recovery Services succeeds in recovering the debts from the drivers involved in the fuel drive-offs, it will make a significant loss.
84. Despite this, Mr Byrne maintained that Fuel Recovery Services wanted to recover the debts owed from the drivers involved in the fuel drive-offs regardless of the size of the debt.
85. Mr Byrne's evidence was that issuing proceedings against the drivers involved in fuel drive-offs was 'commercially sound' because many drivers would pay the debts after receiving the letters of demand and the issuing of proceedings against the drivers who did not pay the debt after receiving a letter of demand would deter other people from driving off without paying for fuel. Mr Byrne also gave evidence that he believed that fuel retailers would regard the deterrence purpose as valuable and would be more likely to engage Scancam's services if Fuel Recovery Services was able to

⁶⁹ See paragraphs 6 and 26 of Mr Byrne's first affidavit and paragraphs 7, 8, 25 and 26 of Mr Byrne's third affidavit.

issue proceedings against drivers involved in fuel drive-offs. He also gave evidence that any losses made in Victoria would be offset against revenue earned in other states.

86. Mr Byrne told the court that Scancam's 'gold quality' CCTV systems, which took photos of the licence plates of the motor vehicles that were involved in the fuel drive-offs, together with the letters of demand would deter the drivers who were involved in the fuel drive-offs from doing it again and well as deter people generally from not paying for fuel, which was important because there are around 1800 drive off incidents a month throughout Australia, fuel drive-offs cost fuel retailers over \$120 million last year and Victoria Police could not 'handle the problem'. Mr Byrne's evidence was that criminal sanctions did not deter people from engaging in fuel drive-offs because the number of fuel drive-offs was increasing each year. He gave evidence that Fuel Recovery Services planned to tell the general community about its debt recovery processes in the future in order to send a message to the community that people cannot steal fuel and get away with it, although he conceded that Fuel Recovery Services was still discussing its strategy in this regard.
87. In response to VicRoads' submissions, Fuel Recovery Services submitted that:
- a) It will have met the requirement that it desires to commence proceedings against the drivers involved in the fuel drive-offs if it can demonstrate that commencing proceedings is a 'proper course to take' having made all necessary inquiries.⁷⁰
 - b) It is of no consequence that after preliminary discovery is made, proceedings may never be instituted against the drivers involved in the fuel drive-offs.⁷¹
 - c) The Federal Court's decision in *Dallas Buyers Club LLC v iiNet Limited*⁷² (***Dallas Buyers Club v iiNet***) is authority for the proposition that a court may grant an application for preliminary discovery in circumstances where the applicant desires to commence proceedings against a large number of defendants for small amounts where the claims may have a deterrent effect and that such an exercise is not 'frivolous'.⁷³
 - d) Fuel Recovery Services would not breach s 24 of the *Civil Procedure Act 2010* (Vic) (***CPA***) simply by making claims where the filing fee to issue proceedings are larger than the amount of the claims and Fuel Recovery Services would be unlikely to recover its costs from the defendants. Whether the costs incurred in a proceeding are reasonable and proportionate is not a formulaic assessment, but a question which must be assessed by the Court on the circumstances of each case⁷⁴ and the obligation, which is not cast in definite and absolute terms, requires a consideration of a reasonably proportionate relationship between the ends and means and consideration of matters such as the acceptance of the parties of reasonable settlement offers.⁷⁵

⁷⁰ *RTA v Care Park*, [70].

⁷¹ *Hooper v Kirella*, [59], [61].

⁷² *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 (***Dallas Buyers Club v iiNet***).

⁷³ *Dallas Buyers Club v iiNet*, [74] to [78].

⁷⁴ *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337, [13] – [15].

⁷⁵ *Actrol Parts Pty Ltd v Coppi (No 3)* (2015) 49 VR 573, [60]-[61], [71] (***Actrol v Coppi***).

VicRoad's submissions in relation to whether Fuel Recovery Services desires to commence proceedings against the drivers involved in the fuel drive-offs

88. VicRoads submitted that Fuel Recovery Services' 'purpose' is not to commence civil proceedings but to engage the court in assisting debt recovery.
89. VicRoads submitted that the court should not accept the evidence of Mr Byrne in respect of Fuel Recovery Services' intention to commence proceedings against the drivers involved in the fuel drive-offs and instead should find that Fuel Recovery Services does not have a desire to commence proceedings against each of the approximately 181 alleged debtors for the following reasons:
- a) The amount of the alleged debts in Schedule 1 are very modest. Almost all the debts are under \$100, some as small as \$10. Only six of the alleged debts are over \$100. Of those, none are over \$200. The total sum of the debts is \$12,322. The cost of issuing proceedings in every case will significantly outweigh the amount of any claim. The filing fee (\$147.40) alone is greater than almost all the alleged debts. In addition, it is likely that the Magistrates Court will refer any complaints issued against the drivers involved in the fuel drive-offs to Arbitration, and given the amount of the claims will be less than \$500, the court must not award costs to Fuel Recovery Services unless it is satisfied that special circumstances make it appropriate to do so.⁷⁶
 - b) Fuel Recovery Services is a for-profit commercial entity. It would be an irrational and commercially unsound decision to commence proceedings against each of these persons.
 - c) Because the costs involved would significantly outweigh the amount of the claims, Fuel Recovery Services would be acting in breach of s 24 of the *CPA* by commencing proceedings against each of the drivers involved in the fuel drive-offs. Section 24 of that Act 'prescribes a positive and continuing obligation to use reasonable endeavours to ensure that legal and other costs in connection with civil proceedings are reasonable and proportionate to the complexity and importance of the issues and the amount in dispute'.⁷⁷
90. VicRoads also submitted that the Court should reject Mr Byrne' evidence that Fuel Recovery Services intends to issue proceedings against the drivers involved in the fuel drive-offs despite it being uneconomical to do so because it has a broader deterrence purpose. This is because:
- a) Fuel Recovery Services cannot prove that it intends to commence civil proceedings against those absent-minded, law abiding drivers who drive off, because they are likely to pay the debt once it has been brought to their attention and there is no need to deter drivers who inadvertently fail to pay for their fuel,
 - b) there is no evidence that issuing civil proceedings against a 'criminal' driver who intends to steal fuel and who is committing an offence, would be a

⁷⁶ Section 105(1) *Magistrates' Court Act 1989*.

⁷⁷ *Actrol v Coppi*, [57].

greater deterrent than the issuing of criminal proceedings against those drivers, and

- c) if Fuel Recovery Services genuinely intends to issue proceedings for a deterrent purpose, it is unusual that it does not have a communications strategy, as conceded by Mr Byrne in cross-examination, and it could choose to issue proceedings in relation to one or two of the largest debts and, if it was ultimately successful, disseminate the outcome of the litigation in accordance with a well-developed communications strategy.

- 91. In addition, VicRoads submitted that it was significant that Mr Byrne agreed in cross-examination that the board of Fuel Recovery Services must decide whether or not it will issue proceedings against each of the drivers involved in the fuel drive-offs and that Mr Byrne gave evidence that the board had not yet made a decision to issue proceedings against any drivers who, after having received a letter of demand from Fuel Recovery Services, had failed or refused to pay for the fuel.
- 92. VicRoads submitted that at its highest, Mr Byrne's evidence was that Fuel Recovery Services 'wishes' to commence proceedings after Fuel Recovery Services has sent letters of demand to the drivers of the motor vehicles involved in the fuel drive-offs if the driver does not pay his or her debt.
- 93. Lastly, VicRoads contended that if deterrence was truly desired, Fuel Recovery Services could select one or two large debts, rather than seeking 181 small ones. In that case, Fuel Recovery Services would still need to show how it is said that issuing civil proceedings against any driver will deter others.

Findings in relation to whether Fuel Recovery Services desires to commence proceedings against the drivers involved in the fuel drive-offs

- 94. I accept Mr Byrne's evidence in relation to why Fuel Recovery Services wants the names and addresses of the registered operators of the motor vehicles involved in the fuel drive-offs, and what it intends to do with this information if this application is granted, which is summarised at paragraphs 80 to 87 above. In particular, I accept Mr Byrne's evidence that if the drivers involved in the fuel drive-offs do not pay the debts owed after receiving a letter of demand, Fuel Recovery Services intends to commence proceedings against them even where the cost of issuing proceedings is greater than the amounts owed.
- 95. I am satisfied that this evidence shows that Fuel Recovery Services has a 'genuinely held', 'bona fide desire' to commence proceedings against the drivers involved in the fuel drive-offs, and 'not merely a 'capricious desire' unsupported by any ground for believing that the object of the desire can be realised'.⁷⁸
- 96. In my view, nothing turns on Mr Byrne's evidence that Fuel Recovery Services will send letters of demand to the drivers involved in the fuel driver-offs before it decides whether it will issue proceedings against them. Pellam J in *Dallas Buyers Club LLC v iiNet Limited (No 4)*⁷⁹ held that rule 7.22 of the *Federal Court Rules 2011* (Cth),

⁷⁸ *RTA v Care Park*, [105]-[106], [117], [119].

⁷⁹ *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838 (*Dallas Buyers Club (No 4)*).

which is the equivalent to rule 32.03, can be used to garner information about unidentified wrongdoers not only to sue them but also to negotiate with them.⁸⁰

97. Accordingly, I reject VicRoads' submission that the purpose for which this application has been brought, being debt recovery, is an improper purpose in so far as r 32.03 is concerned.
98. In relation to VicRoads' submission that 'the absent-minded, law abiding driver who drives off is likely to never be sued because the debt would be paid' and that the 'criminal driver who intended to steal fuel is committing an offence for which the criminal law would be a more compelling deterrent', it is clear from the Inquiry into fuel drive-offs as set out at paragraph 75 above that Victoria Police do not prosecute many drivers involved in fuel drive-offs, not many of those prosecutions are successful and when they are, Victoria Police rarely recover any of the fuel retailers losses, which in my view significantly reduces the deterrent effect of the criminal law in relation to fuel drive-offs.
99. On the other hand, whilst I am not satisfied that the deterrence effect of Fuel Recovery Services issuing civil proceedings against drivers involved in fuel drive-offs will be a large one, I am satisfied that it is likely that some deterrence effect will flow from issuing civil proceedings against the drivers and that some fuel retailers would consider this deterrence effect to be of value.
100. This, combined with Fuel Recovery Services having satisfied me that they intend to send letters of demand to the drivers involved in the fuel drive-offs seeking recovery of the outstanding fuel debts and, if the debt is not paid, they have a genuinely held and bona fide desire to issue proceedings against the drivers regardless of the amount owed, is sufficient for me to be satisfied that Fuel Recovery Services has met the requirement that it desires to commence proceedings against the drivers involved in the fuel theft. VicRoads essentially conceded this in its submission that at its highest, Fuel Recovery Services has shown that it 'wishes' to issue proceedings against the drivers involved in the fuel drive-offs. This is because 'wishes' and 'desires' are synonymous.
101. Finally, I reject VicRoads' submission that issuing proceedings against the drivers involved in the fuel drive-offs would breach s 24 of the *CPA* because the filing fee will be larger than the amounts claimed and Fuel Recovery Services will not be able to recover its costs from the defendants.
102. VicRoads relied on the decision of Justice Bell in *Actrol Parts Pty Ltd v Coppi (No 3) (Actrol v Coppi)*⁸¹ in support of this submission. In *Actrol v Coppi*, Justice Bell found that the plaintiff breached s 24 of the *CPA* in circumstances where it incurred legal costs in the vicinity of \$600,000 and the defendant incurred legal costs in excess of \$300,000 in defending proceedings where the plaintiff conceded it had not suffered any compensable loss, the alleged breaches of contract and duty were minor, the plaintiff refused reasonable settlement offers and went to trial with a claim for nominal damages on a point of principle. Justice Bell dismissed the plaintiff's claim and its application that the defendant pay its costs and ordered that the plaintiff pay the defendant's costs on an indemnity basis.

⁸⁰ *Dallas Buyers Club* (No 4), [33].

⁸¹ (2015) 49 VR 573 [57].

103. In my view, the facts in *Actrol v Coppi* are not at all analogous with what I accept Fuel Recovery Services desires to do in relation to issuing proceedings against the drivers involved in the fuel drive-offs. This is because it is very likely that any proceedings issued by Fuel Recovery Services against the drivers involved in the fuel drive-offs would be referred to arbitration,⁸² and arbitrations are conducted in a manner which is designed to limit the costs incurred by the parties.⁸³ In addition, if Fuel Recovery Services is awarded less than \$500, the court must not award costs to Fuel Recovery Services unless 'special circumstances make it appropriate to do so'.⁸⁴ In these circumstances, it is unlikely that Fuel Recovery Services would be in breach of s 24 of the *CPA* simply by issuing proceedings where the legal costs will be greater than the amount owed, which is, in any event, permissible under the *Magistrates Court Act 1989* and relevant rules.
104. In all of the circumstances, Fuel Recovery Services has satisfied me that it has a genuinely held, bona fide and soundly based, objective desire to commence proceedings against the drivers of the motor vehicles involved in the fuel drive-offs.

DOES VICROADS HAVE, OR VICROADS LIKELY TO HAVE, INFORMATION 'TENDING TO ASSIST' IN THE ASCERTAINMENT OF THE DESCRIPTION OF THE UNIDENTIFIED DRIVERS

Fuel Recovery Services' evidence and contentions in relation to whether VicRoads has or is likely to have information 'tending to assist' in the ascertainment of the unidentified drivers

105. Fuel Recovery Services contended that VicRoads has information 'tending to assist' in the ascertainment of the description of each of the drivers involved in the fuel drive-offs because it holds information identifying the registered operator of the motor vehicles involved in the fuel drive-offs.
106. Fuel Recovery Services relied on the decision of the New South Wales Supreme Court in *RTA v Care Park* where the court held that identification of the registered operator of a motor vehicle would 'tend to assist' in the identification of the driver involved in car park dispute.⁵⁰
107. Fuel Recovery Services also submitted that it is not necessary that the information discovered categorically establish the identity of the prospective defendant to meet this requirement⁵¹ and that in this particular respect, identification of the registered operators of the motor vehicles involved in the car park dispute is analogous to identification of the potential defendants involved in fuel drive-offs.

VicRoads' contentions in relation to whether VicRoads has or is likely to have information 'tending to assist' in the ascertainment of the drivers involved in the fuel drive-offs

⁸² Section 102(3) of the *Magistrates Court Act 1989* sets out the limited circumstances when the Court may order that a matter not be referred to arbitration.

⁸³ See s 103 of the *Magistrates Court Act 1989* and Order 2 of the *Magistrates Court (Miscellaneous Civil Proceedings) Rules 2010*.

⁸⁴ Section 105(1) of the *Magistrates Court Act 1989*.

108. VicRoads submitted that even if Fuel Recovery Services were to be provided with the names and addresses of the registered operators, that information may not be information ‘tending to assist’ in the identification of the drivers of the motor vehicles involved in the fuel drive-offs.
109. VicRoads submitted that this is because the proper defendants to any civil proceeding in respect of a breach of contract claim are the parties to the contract, being the drivers of the motor vehicles and the relevant fuel retailers, not the registered operators of the motor vehicles. VicRoads also submitted that as its register only records the information of the registered operators of the motor vehicles, not the drivers, if Fuel Recovery Services were to be provided with the names and addresses of the registered operators of the motor vehicles listed in Schedule 1, all it would be able to do is make inquiries of those registered operators as to whether they were the alleged debtor and Fuel Recovery Services would have no power to compel the registered operators to provide any information to them.
110. However, VicRoads noted that the New South Wales Supreme Court has accepted that identification of a registered operator of a motor vehicle would tend to assist in the identification of the driver in the context of a car park dispute.⁸⁵

Findings in relation to whether VicRoads has or is likely to have information ‘tending to assist’ in the ascertainment of the drivers involved in the fuel drive-offs

111. In *Roads & Traffic Authority of New South Wales v Australian National Car Parks Pty Ltd* and *RTA v Care Park*, the NSW Court of Appeal held that identifying the registered operator of a motor vehicle that was parked in a car park would tend to assist an applicant to identify whether it was the registered operator who had parked the motor vehicle and, if not, who had.⁸⁶ These cases related to applications for preliminary discovery of the names and addresses of registered operators of motor vehicles that had allegedly parked too long in Australian National Car Parks’ and Care Park’s motor vehicle parks.
112. The NSW Court of Appeal also held that this was sufficient to satisfy the test in rule 5.2(1)(b) of the *Uniform Civil Procedure Rules 2005* (NSW), the equivalent of rule 32.03.⁸⁷
113. A similar decision was made by the Federal Court in relation to the account holders who may or may not have been the BitTorrent users in *Dallas Buyers Club v iiNet*.⁸⁸
114. The Victorian Supreme Court has also held that it is clear that where an applicant’s claim is against the driver of a motor vehicle, who may not be the same person as the vehicle’s registered operator, the name and contact details of the registered operator of the motor vehicle is information ‘tending to assist’ in the identification of

⁸⁵ *Roads & Traffic Authority of New South Wales v Australian National Car Parks Pty Ltd* [2007] NSWCA 114 (*RTA v Australian National Car Parks*), [16]; *RTA v Care Park*, [120].

⁸⁶ *RTA v Australian National Car Parks*, [26]-[27] and *RTA v Care Park*, [62].

⁸⁷ *RTA v Care Park*, [120].

⁸⁸ *Dallas Buyers Club v iiNet*, [56] to [58].

the driver of the vehicle at a given time, even if the registered operator and the driver are different people.⁸⁹

115. I have no doubt that these decisions should be applied to the facts in this application, and accordingly, I am satisfied that VicRoads has or is likely to have information ‘tending to assist’ in the ascertainment of the description of the drivers involved in the fuel drive-offs.

VICROADS’ ADDITIONAL SUBMISSIONS

116. Finally, VicRoads submitted that even if the Court were to find that the threshold requirements in Rule 32.03 are satisfied, the Court should exercise its discretion to refuse the application for the following reasons:

- a) The statutory purpose of the register maintained by VicRoads is not to assist fuel retailers to recover their debts. The purposes of registration are set out in s 5 of the *Road Safety Act* in the following terms:

5. Purposes of registration

The purposes of registration are -

- (i) to ensure that the design, construction and equipment of motor vehicles and trailers which are used on a highway meet safety and environmental standards; and
 - (ii) to enable the use of motor vehicles and trailers on highways to be regulated for reasons of safety, protection of the environment and law enforcement; and
 - (iii) to provide a method of establishing the identity of each motor vehicle or trailer which is used on a highway and of the person who is responsible for it.
- b) When a registered operator provides VicRoads with their personal information, it is for these purposes. The *Road Safety Act* carefully circumscribes the circumstances in which VicRoads is authorised to disclose personal information. The recovery of civil debts is not a circumstance in which VicRoads is authorised to make such a disclosure.
- c) Section 90K of the *Road Safety Act* sets out when information held by VicRoads can be used or disclosed, and VicRoads can only disclose information about the registered operators of motor vehicles for debt recovery in relation to fuel drive-offs or fuel theft, reducing the number of fuel drive-offs or fuel theft and investigating whether fuel theft has occurred if the disclosure is ‘authorised by law’.⁹⁰
- d) In circumstances where the alleged debtor may not be the registered operator of the motor vehicle he or she was driving, the Court should be anxious to avoid any undue interference with the privacy interests of third parties by not

⁸⁹ *Wilson Parking Australia (1992) Pty Ltd v Roads Corporation* [2020] VSC 135, [12] Richards J citing *RTA v Care Park* [120].

⁹⁰ Section 90K(i).

releasing that registered operators' personal information. Once the information is released, it is no longer subject to the privacy controls in the *Privacy and Data Protection Act 2014* (Vic). The protection of the privacy of third parties is an important consideration, including how the information will be used once released, how it will be stored, how and when it will be disposed of.⁹¹

- e) The Inquiry into fuel drive-offs examined the complex issues involved in releasing registration information for the purpose of fuel drive-offs and squarely rejected a proposal for fuel retailers to access VicRoads registration data without a court order or via a private third party. Amongst the many reasons for rejecting the proposals were:

legitimate concerns that such a power could be misused, with individual members of the community subjected to intrusive and unnecessary debt collection and court processes. The Committee does not believe that such access meets community expectations concerning the use of sensitive, personal information held by government agencies. Finally, once this data is provided to fuel retailers, there is no capacity for government to continue regulating how it is used, stored, amended, released or destroyed. The release of such information poses significant risks to the community given the nature of the data held by VicRoads (for example, dates of births, addresses, medical conditions etc.).⁹²

- f) By way of background, s 90R of the *Road Safety Act* prohibits the Court from granting preliminary discovery for the purpose of recovery of private motor vehicle park fees. It was introduced following consumer law concerns about the practice of some motor vehicle park operators. The Minister moving that the legislative amendment stated in his Second Reading Speech (emphasis added).⁹³

Where a customer does not pay the amount specified in the payment notice, the motor vehicle park operator can obtain a preliminary discovery order in the Magistrates Court requiring VicRoads to disclose the name and address of the registered operator of the vehicle in question. The motor vehicle park operator will then write a series of letters of demand, demanding that the customer pays the amount owed, plus an additional late payment fee.

.. Additionally, it is common practice for the motor vehicle park operators to onsell the debts to debt collection agencies. These agencies will proceed to write similarly threatening letters of demand to the motor vehicle park customers.

These practices have given rise to a number of matters of significant public concern.

The actions of these motor vehicle park operators amount to an abuse of court process. The rules of preliminary discovery, as set out in the relevant court rules, allow applicants to seek information to assist in identifying a person against whom they wish to commence proceedings. However, some motor vehicle park operators are using the preliminary discovery process not as a genuine preliminary to a potential court proceeding, but instead to support a business model of posting mass demands to customers and relying on a proportion of them paying.

⁹¹ Section 90Q(3) of the *Road Safety Act* makes it an offence for a person to knowingly or recklessly use or disclose information obtained under s 90R other than in accordance with s 90R.

⁹² Inquiry into fuel drive-offs, pp 62-63.

⁹³ *Road Safety Amendment (Private Car Parks) Bill 2015, Second Reading Speech*, Hansard, 12 March 1991, pp 1882-1883.

...

On average, motor vehicle park operators are requesting the details of over 50 000 vehicles per year. In some instances, motor vehicle park operators are using single applications to request the details of over 1000 vehicles. It is impossible for a court to properly assess whether a potential cause of action exists in relation to each of these applications. In practice, only an extremely small number of these disputes actually result in motor vehicle park operators commencing civil proceedings in a court.

Additionally, there is a risk that the uncontrolled release of information under preliminary discovery could undermine the community's confidence in the ability of the government to protect their personal information. It also has the potential to affect the integrity and accuracy of data held by government agencies because consumers may become reluctant to update their records knowing that it may be released to private companies.

117. In relation to s 90R of the *Road Safety Act*, while VicRoads did not submit that is directly applicable to this application, it submitted that its relevance is that it reveals a Parliamentary intention to protect consumers from registration information being released to private companies, including (but not limited to) debt collectors.
118. In summary, VicRoads submitted that the court should not exercise its discretion to grant the application because it should give significant weight to concerns raised by VicRoads in relation to how Fuel Recovery Services would use the information it receives from VicRoads about the registered operators of motor vehicles involved in fuel drive-offs, in particular, VicRoads' concerns about who in Fuel Recovery Services will have access to that information, the extent to which the people with access to the information will be supervised and when the information will be destroyed.
119. VicRoads also relied on its submissions set out in paragraphs 88 to 93 above in support of its submission that the court should refuse to exercise its discretion and refuse Fuel Recovery Services' application for preliminary discovery.

FUEL RECOVERY SERVICES' SUBMISSIONS IN REPLY TO VICROADS' ADDITIONAL SUBMISSIONS

120. Fuel Recovery Services submitted that VicRoads' reference to s 90(k)(i) of the *Road Safety Act* is not relevant because it is relying on s 99 (i).
121. Fuel Recovery Services also submitted that the Act does not give 'sensitive information' any special legal protection and in any event, the information Fuel Recovery Services is seeking is not 'sensitive information' such as a registered operator's medical information, just 'personal information' such as a registered operator's name and address.
122. Fuel Recovery Services also submitted that it only seeks registered operators' names and addresses for very limited purposes, that is, to recover debts arising from fuel drive-offs, and that it respects VicRoads' obligations to protect this data. Fuel Recovery Services relied on Clause 7(a) of its Debt Purchase Agreement with the

respective fuel retailers,⁹⁴ which states that Fuel Recovery Services will not provide the fuel retailer with any personal information in relation to the debtors.

123. Fuel Recovery Services submitted that in any event, the licence plates that Scancam's CCTV cameras record is not personal information and that the fuel contracts at the fuel pumps inform drivers that they may be recorded by audio or visual equipment.
124. Fuel Recovery Services also maintained that it genuinely desired to commence civil claims against the drivers involved in the fuel drive-offs and was trying to do this in the most efficient and cost-effective manner.
125. Fuel Recovery Services submitted that on the face of it, the facts in *Dallas Buyers Club v iiNet*, where the Federal Court granted the application for preliminary discovery, are analogous to the facts in this case to the extent that both cases involve a 'bulk application' for preliminary discovery to ascertain the description of prospective defendants in circumstances where the intended civil proceedings involve a large number of claims for small amounts that are likely to be less than the cost of issuing proceedings.
126. Fuel Recovery Services also relied on the fact that Perram J in *Dallas Buyers Club v iiNet* referred to the NSW Court of Appeal's decisions in relation to the 'car park cases',⁹⁵ which both parties rely on, and noted that these 'car park cases' are factually similar to the facts in *Dallas Buyers Club v iiNet*.⁹⁶

SHOULD I EXERCISE MY DISCRETION BY GRANTING FUEL RECOVERY SERVICES' APPLICATION FOR PRELIMINARY DISCOVERY?

127. Whilst Fuel Recovery Services has satisfied me that the jurisdictional pre-requisites to the power in rule 32.03 have been enlivened, that power nevertheless remains a discretionary one and the exercise of the discretion is moulded by the scope, purpose and ambit of the rule itself.⁹⁷
128. The respondents in *Dallas Buyers Club v iiNet* made similar submissions to the submissions VicRoads has made in this case. The respondents submitted that the court should not exercise its discretion to grant preliminary discovery because 'the monetary claims the applicants had against each infringer of copyright were so small that it was plain that no such case could or would be maintained by the applicants and there was never going to be a court case against the customers which made any commercial sense'. The respondents also submitted that they were 'subject to statutory obligations of privacy which, given what they said was the paucity of the case against the customers, were not lightly to be cast aside by Court orders'.⁹⁸
129. However, the Federal Court granted the application because it was 'very far from apparent' that the current exercise was 'frivolous' even though the damages for the copyright infringement were likely to be 'modest'.⁹⁹ The Court also observed that the

⁹⁴ See paragraphs 17 and 22 and exhibit EB-11 of Mr Byrne's third.

⁹⁵ *RTA v Care Park; RTA v Australian National Car Parks*.

⁹⁶ *Dallas Buyers Club v iiNet*, [59].

⁹⁷ *Dallas Buyers Club v iiNet*, [4]-[5].

⁹⁸ *Dallas Buyers Club v iiNet*, [2].

⁹⁹ *Dallas Buyers Club v iiNet*, [76].

respondents' submission that what the applicants had in mind was 'frivolous or de minimis' did not 'afford sufficient weight to the 'genuine rights' which existed in relation to the copyright infringements.

130. Further, the court observed in *Dallas Buyers Club v iiNet* that the applicants may have been able to obtain aggravated damages for the copyright infringement, and that it was not beyond the realm of possibilities that damages of a sufficient size might be awarded in an appropriately serious case in a bid to deter people from the file sharing of films.
131. Whilst Fuel Recovery Services did not suggest that it would be entitled to aggravated damages from any of the unidentified drivers who have been involved in the fuel drive-offs, I nonetheless accepted Mr Byrne's evidence that Fuel Recovery Services desires to issue proceedings against the unidentified drivers in circumstances where the costs of doing so are likely to significantly outweigh any amounts Fuel Recovery Services could recover from the drivers, in part due to the deterrence effect this may have. In addition, whilst I agree with VicRoads' argument that the deterrent effect of issuing civil proceedings against the drivers involved in the fuel drive-offs is likely to be minimal, I have decided to exercise my discretion to grant Fuel Recovery Services' application because:
- a) The fuel retailers, who appear to have assigned their rights to recover the debts owed by the drivers involved in the fuel drive-offs to Fuel Recovery Services have 'genuine rights' to recover those debts and these types of debts are clearly not covered by, and, in my opinion, are not analogous to the types of claims that are referred to in s90R of the *Road Safety Act*.
 - b) As set out in paragraph 79 above, it appears that Victoria Police will not pursue people who drive off without paying for their fuel unless they are provided with clear evidence that the drivers intended to steal the fuel or that the drivers were involved in other more serious crimes such as theft of motor vehicles and offences under the *Road Safety Act*, that such prosecutions are rarely successful when they proceed to a contested hearing, and in any event, Victoria Police are unable to recover the losses on behalf of the fuel retailers.¹⁰⁰
 - c) If Fuel Recovery Services does not ask Victoria Police to investigate the fuel drive-offs, it does not appear that there is any other way for Fuel Recovery Services to obtain any information that is likely to assist it to identify the drivers involved in the fuel drive-offs other than by obtaining the names and addresses of the registered operators of the motor vehicles involved in the fuel drive-offs from VicRoads.
 - d) The rules are to be construed beneficially and given the fullest scope the language reasonably allows.¹⁰¹

¹⁰⁰ Inquiry into fuel drive-offs, pp 46-48.

¹⁰¹ *Paxus Services Pty Ltd v People Bank Pty Ltd* (1990) 99 ALR 728 at 733; *Scarletti Pty Ltd v Millwood Printing Co Pty Ltd* (Unreported, Supreme Court of Victoria, Full Court, 28 July 1994); *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360; 211 ALR 147 at 153; [26]; *Steffen v ANZ Banking Group* [2009] NSWSC 666 at [19].

132. I have also decided to exercise my discretion to grant Fuel Recovery Services' application despite the privacy concerns raised by VicRoads, although I accept that these concerns are relevant to the exercise of my discretion.
133. As Refshauge J observed in *Kusa v Vong (trading as Allen Vong & Associates) (Kusa v Kong)*, the rules 'constitute a significant infringement of the ordinary rights of the respondent, such as a right to privacy' and 'the Court is not to be unmindful to the potential to interfere with rights of privacy of persons who are not wrongdoers and who may not have participated in any wrongdoing of the potential defendant, even unwittingly.'¹⁰²
134. However, Perram J also made the following observation in *Dallas Buyers Club (No 4)*:
- In situations where different rights clash it is usual for courts to try and accommodate both rights as best they can. Here that can be done by requiring the information to be provided but by imposing, by way of conditions, safeguards to ensure that the private information remains private.¹⁰³
135. Mr Byrne gave evidence that any information provided to Fuel Recovery Services by VicRoads would be kept in a database hosted on a secure server that only the directors of Fuel Recovery Services could access for the purpose of sending a registered operator of a motor vehicle involved in a fuel drive off a letter of demand. Mr Byrne's evidence was that in the future, it may be necessary to authorise employees of Fuel Recovery Services to access the database for the purpose of sending letters of demand, but that Fuel Recovery Services had not yet made any decision about this. Mr Byrne also gave evidence that if the application was granted, Fuel Recovery Services would agree to only give directors of Fuel Recovery Services access to the database and that Fuel Recovery Services would only keep the information about the registered operator of a motor vehicle involved in a fuel drive-off until the debt was paid or Fuel Recovery Services had concluded that the debt was unrecoverable. The information would not be used in relation to new fuel drive-offs because the motor vehicle may have been sold in the intervening period. Most importantly, Mr Byrnes told the court that Fuel Recovery Services would agree to any reasonable requests made by VicRoads in relation to how the information about the registered operators should be stored.
136. I accept Mr Byrne's evidence in relation to how Fuel Recovery Services intends to deal with the information provided to it by VicRoads. Further, given that VicRoads and Fuel Recovery Services have already agreed on the orders to be made in the event that Fuel Recovery Services' application is granted, which includes orders in relation to how personal information is to be dealt with, I am satisfied that the personal information that Fuel Recovery Services will be receiving from VicRoads can be adequately safeguarded from misuse.
137. Finally, I am not persuaded that I should refuse Fuel Recovery Services' application due to the bulk nature of the application, even in circumstances where Mr Byrne agreed in cross-examination that if Fuel Recovery Services' application was successful, it was likely that Fuel Recovery Services would make similar applications around once every six months.

¹⁰² [2018] ACTSC 254, [50], [52].

¹⁰³ *Dallas Buyers Club (No 4)*, [86].

138. As Refshauge J stated in *Kusa v Vong*, cases where there are multiple potential defendants do not provide counter-examples to the principles that apply to the law of preliminary discovery.¹⁰⁴ Refshauge J then referred to *RTA v Australian National Car Park* and *RTA v Care Park*, where the applicants, whose applications were granted, wanted to sue all drivers who had failed to pay the proper parking fee but simply did not know their names and addresses and *Dallas Buyers Club v iiNet*, where Perram J granted the application for various Internet Service Providers to provide identity details of their customers who had downloaded a film where the customers were not necessarily the same people who had allegedly breached the applicant's copyright.¹⁰⁵

CONCLUSION

139. For these reasons, Fuel Recovery Services' application is granted and I make the following orders:¹⁰⁶

1. Leave is granted to Fuel Recovery Services to file its Further Amended Summons dated 19 November 2019.¹⁰⁷
2. The Secretary to the Department of Transport is substituted as the Respondent to this application.¹⁰⁸
3. The Secretary to the Department of Transport discover to Fuel Recovery Services all documents which are in its possession, recording the names and addresses of the registered operators of the motor vehicles bearing the licence plates listed in Further Amended Schedule 1 of Fuel Recovery Services' originating summons dated 19 November 2019 as at the corresponding dates listed in Further Amended Schedule 1.
4. Fuel Recovery Services, acting through its employees or legal representatives, may use the names and addresses of the registered operators of the vehicles at the dates listed in Further Amended Schedule 1 as at the corresponding dates listed in that schedule only for the purposes of ascertaining the description of each of the potential defendants to proposed proceedings for debt recovery and commencing proceedings in respect of the fuel drive-off incidents in Further Amended Schedule 1.

¹⁰⁴ [2018] ACTSC 254, [72].

¹⁰⁵ *Dallas Buyers Club v iiNet*, [72]-[73].

¹⁰⁶ VicRoads informed the court that if Fuel Recovery Services' application was granted, it agreed to the form of the order proposed by Fuel Recovery Services, which was set out in paragraph 52 of Fuel Recovery Services' final written submissions dated 17 December 2019. The parties also agreed on the amount of costs to be paid by Fuel Recovery Services to VicRoads.

¹⁰⁷ VicRoads informed the court that if Fuel Recovery Services' application was granted, it did not oppose the filing of the further amended summons.

¹⁰⁸ The solicitor for VicRoads informed the court today that as result of amendments made to the *Road Safety Act* by the *Transport Legislation Amendment Act 2019 (Vic)*, which came into effect on 1 January 2020, the Secretary to the Department of Transport is now the legal custodian of all Victorian registration and licensing data that is collected in accordance with the *Road Safety Act* and regulations and asked that any orders made by the court in this matter be directed to the Secretary to ensure that the court's decision has binding legal effect. Neither party opposed an order that the Secretary to the Department of Transport be substituted as the respondent to this application in these circumstances.

5. Fuel Recovery Services pay the Secretary to the Department of Transport's costs of \$27,500 (including GST) in addition to the Secretary to the Department of Transport's reasonable costs of complying with order 3.
6. Fuel Recovery Services:
 - a) is to receive any electronic documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3 using a Secure File Transfer Protocol,
 - b) must securely store within Australia, using password protection, any electronic documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3.
 - c) must not make copies of any electronic documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3,
 - d) must store any documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3, in compliance with Victorian privacy and data protection laws at all times until destroyed,
 - e) will destroy any electronic documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3, within 366 days from the date of the production, unless Fuel Recovery Services has commenced proceedings against the relevant registered operator, in which case Fuel Recovery Services must destroy the remaining electronic documents or personal information within 60 days of resolving such proceedings, and
 - f) must immediately notify the Secretary to the Department of Transport of any unauthorised access to any of the electronic documents or personal information (within the meaning of Part 7B of the *Roads Safety Act 1986*) discovered by the Secretary to the Department of Transport under order 3 and must act promptly to minimise any breach and comply with any instructions provided by the Secretary to the Department of Transport.
7. Orders 3 and 5 are stayed for 28 days.
8. Liberty to apply.¹⁰⁹

¹⁰⁹ These reasons and the order set out in paragraph 139 were amended by consent on 1 September 2020 under Order 36.08 of the *Magistrates' Court General Civil Procedure Rules 2010*.