List of Questions and Proposals

2. Legal Framework for Discovery in Federal Courts

Question 2–1 What issues, if any, arise in the application of the *Peruvian Guano* case to discovery in civil proceedings before the High Court?

Question 2–2 Does the requirement for leave of the court effectively regulate the use of discovery in civil proceedings in the Federal Court?

Question 2–3 Is the law sufficiently clear on when the Federal Court should grant leave for discovery of documents in civil proceedings?

Question 2–4 Should the *Federal Court of Australia Act 1976* (Cth) be amended to adopt the provisions of s 45 of the *Federal Magistrates Act 1999* (Cth) in relation to discovery, so that discovery would not be allowed in the Federal Court unless the court made a declaration that it is appropriate, in the interests of the administration of justice, to allow the discovery? If not, should another threshold test be adopted? What should that threshold test be?

Question 2–5 Are the categories of documents required to be disclosed under the *Federal Court Rules* (Cth) too broad? If so, where should the parameters be set?

Question 2–6 Should O 15 r 2 of the *Federal Court Rules* (Cth) be amended to adopt the categories of documents discoverable in Fast Track proceedings, so that discovery in the Federal Court is limited to the following documents of which the party giving discovery is aware at the time orders for discovery are made or discovers after a good faith proportionate search:

(a) documents on which the party intends to rely; and

(b) documents that have significant probative value adverse to a party's case?

Question 2–7 Are the disclosure obligations on parties to proceedings before the Family Court working well and is the Court adequately equipped to deal with instances of non-compliance with disclosure obligations?

Proposal 2–1 Section 45 of the *Federal Magistrates Act 1999* (Cth), which provides that discovery is not allowed unless the court declares that it is appropriate in the interests of the administration of justice, should note that disclosure obligations under part 24 of the *Federal Magistrates Court Rules 2001* (Cth) (including the obligations to produce documents under rr 24.04 and 24.05) are not contingent upon compliance with s 45 of the Act.

3. Discovery Practice and Procedure in Federal Courts

Question 3–1 What issues, if any, have arisen in the procedures adopted by the High Court for the discovery of documents in civil proceedings?

Question 3–2 In general, does the amount of money spent on the discovery process in proceedings before the Federal Court generate:

(a) too much information;

(b) too little information; or

(c) about the right amount of information

to facilitate the just and efficient disposal of the litigation?

Where possible, please provide examples or illustrations of the costs of discovery relative to the information needs of the case.

Question 3–3 Are there any particular approaches to the discovery of electronically-stored information that help to save time and cost in the process? Do any particular approaches cause inefficiencies or waste?

Question 3–4 Has discovery by categories of documents, or particular issues in dispute, reduced the burden of discovery in proceedings before the Federal Court? If not, what has prevented the parties, their lawyers and the court from cost-effectively limiting the scope of discovery?

Question 3–5 Has the creation of discovery plans and use of pre-discovery conferences helped to ensure proportionality in the discovery of electronically-stored information in Federal Court proceedings? If not, what has prevented the court, the parties and their lawyers from establishing practical and cost-effective discovery plans in advance of the search for electronic documents?

In particular, are the expectations stated in *Practice Note CM 6* for parties to exchange their best preliminary estimate of the cost associated with discovery, and to agree on a timetable for discovery, generally being met in practice?

Proposal 3–1 Following an application for a discovery order, an initial case management conference (called a 'pre-discovery conference') should be set down, at a time and place specified by the court, to define the core issues in dispute in relation to which documents might be discovered. At the pre-discovery conference, the parties should be required to:

(a) outline the facts and issues that appear to be in dispute;

(b) identify which of these issues are the most critical to the proceedings; and

(c) identify the particular documents, or outline the specific categories of documents, which a party seeks to discover and that are reasonably believed to exist in the possession, custody or power of another party.

Proposal 3–2 Prior to the pre-discovery conference proposed in Proposal 3–1, the party seeking discovery should be required to file and serve a written statement

containing a narrative of the factual issues that appear to be in dispute. The party should also be required to include in this statement any legal issues that appear to be in dispute. The party should be required to state these issues in order of importance in the proceedings, according to the party's understanding of the case. With respect to any of the issues included in this statement and concerning which the party seeks discovery of documents, the party should be required to describe each particular document or specific category of document that is reasonably believed to exist in the possession, custody or power of another party.

Proposal 3–3 Prior to the pre-discovery conference proposed in Proposal 3–1, the parties should be required to file and serve an initial witness list with the names of each witness the party intends to call at trial and a brief summary of the expected testimony of each witness. Unless it is otherwise obvious, each party's witness list should also state the relevance of the evidence of each witness.

Question 3–6 Should parties be required to produce to each other and the court key documents early in proceedings before the Federal Court? If so, how could such a procedural requirement effectively be imposed?

Question 3–7 Are existing procedures under O 15 rr 10 and 13 of the *Federal Court Rules* (Cth) adequate to obtain production of key documents to the court or a party? How could these procedures be utilised more effectively?

Proposal 3–4 In any proceeding before the Federal Court in which the court has directed that discovery be given of documents in an electronic format, the following procedural steps should be required:

(a) the parties and their legal representatives to meet and confer for the purposes of discussing a practical and cost-effective discovery plan in relation to electronically-stored information;

(b) the parties jointly to file in court a written report outlining the matters on which the parties agree in relation to the discovery of electronic documents and a summary of any matters on which they disagree; and

(c) the court to determine any areas of disagreement between the parties and to make any adjustments to the proposed discovery plan as required to satisfy the court that the proposed searches are reasonable and the proposed discovery is necessary.

If so satisfied, the court may make orders for discovery by approving the parties' discovery plan.

Question 3–8 Should special masters be introduced to manage the discovery process in proceedings before the Federal Court? If so, what model should be adopted?

Proposal 3–5 Part VB of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the court with broad and express discretion to exercise case management powers and impose sanctions in relation to the discovery of documents, in line with ss 55 and 56 of the *Civil Procedure Act 2010* (Vic).

Question 3–9 Should there be a presumption that a party requesting discovery of documents in proceedings before the Federal Court will pay the estimated cost in advance, unless the court orders otherwise?

Question 3–10 Should the Federal Court have explicit statutory powers to make orders limiting the costs able to be charged by a law practice to a client for discovery, to the actual costs to the law practice of carrying out such work (with a reasonable allowance for overheads, but excluding a mark up or profit component)?

Proposal 3–6 The Federal Court should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings, including the technologies used in the discovery of electronically-stored information.

Proposal 3–7 The Australian Government should fund initiatives in the Federal Court to establish and maintain data collection facilities, to record data on the costs associated with discovery of documents, as well as information on the proportionality of a discovery process—in terms of the costs of discovery relative to the total litigation costs, the value of what is at stake for the parties in the litigation, and the utility of discovered documents in the context of the litigation.

Question 3–11 What issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Family Court?

Question 3–12 What issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Federal Magistrates Court?

4. Ensuring Professional Integrity: Ethical Obligations and Discovery

Question 4–1 In practice, how do lawyers make decisions about whether to discover a document which falls within the scope of a discovery request or order, but that is not substantially relevant to the issues in dispute?

Question 4–2 In practice, how do lawyers make decisions about whether to discover relevant documents that may potentially fall outside the scope of a discovery request or order?

Question 4–3 Is discovery used as a delaying strategy in litigation before federal courts? If so, how and to what extent?

Question 4–4 Is discovery used to increase legal costs unnecessarily, either for the profit of law firms, to exhaust the resources of opposing parties, or for any other reason? If so, how, to what extent, and for what reasons?

Question 4–5 How does delegation of responsibility for reviewing and categorising documents relevant to the discovery process affect the practice of discovery in litigation before federal courts?

Question 4–6 How does outsourcing discovery overseas affect the practice, including the cost and efficiency, of discovery in litigation before federal courts?

Question 4–7 Are relevant and discoverable documents wrongfully destroyed in anticipation, or in the course, of litigation before federal courts? If so, how, by whom, and to what extent? If this occurs, are the current provisions in New South Wales and Victoria effectively addressing this problem?

Question 4–8 Is the discovery process deliberately abused by lawyers working in litigation before federal courts? If so, how and to what extent?

Question 4–9 Are lawyers and litigants properly informed about their professional and legal responsibilities in relation to discovery? If not, what are the best ways of ensuring that lawyers and litigants are properly informed about their professional and legal responsibilities in relation to discovery?

Question 4–10 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery?

Question 4–11 Should professional conduct rules be amended to include specific legal ethical obligations concerning discovery?

Proposal 4–1 The Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should develop commentary as part of, or as a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the discovery of documents.

Proposal 4–2 The Australian Government, state and territory governments, the Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should ensure legal profession legislation and/or professional conduct rules provide that a law practice can only charge costs for discovery which are fair and reasonable.

Question 4–12 How should lawyers determine what are fair and reasonable costs in the context of discovery?

Question 4–13 How might law firms foster a culture of reasonable and ethical discovery practice?

Question 4–14 What is the best way to ensure clients, lawyers and courts report allegations of lawyer misconduct to relevant disciplinary bodies?

Question 4–15 Should professional conduct rules provide that a practitioner must promptly disclose to the relevant legal professional body the occurrence of any misconduct arising in the context of discovery?

Question 4–16 If practitioners should be required to disclose misconduct in accordance with Question 4–15, what conduct should they be required to disclose?

Question 4–17 In practice, how often do costs assessors refer lawyers to disciplinary bodies for investigation of suspected gross overcharging?

Question 4–18 Are existing legal professional disciplinary structures sufficient to deal with allegations of discovery abuse?

Question 4–19 If existing legal professional disciplinary structures are not sufficient to deal with allegations of discovery abuse, how should lawyers be disciplined for:

(a) a failure to comply with discovery obligations; or

(b) conduct intended to delay, frustrate or avoid discovery of documents?

Question 4–20 What impact, if any, has electronic discovery had on the legal ethical obligations owed by lawyers?

Question 4–21 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations in the context of electronic discovery?

Question 4–22 Should professional conduct rules be amended to include specific legal ethical obligations concerning electronic discovery?

Proposal 4–3 The Law Council of Australia, the Australian Bar Association and the legal professional bodies in each state and territory should develop commentary as part of, or a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the electronic discovery of documents.

Question 4–23 Are law students and lawyers studying the legal and ethical responsibilities of lawyers with respect to discovery? If so, is existing training and education sufficient?

Question 4–24 How should law students and lawyers be trained in the legal and ethical responsibilities of lawyers with respect to discovery?

Question 4–25 Is discovery abuse and misconduct likely to be reduced in practice if law students and lawyers are provided with more education about the legal and ethical responsibilities of lawyers with respect to discovery?

Proposal 4–4 Providers of legal education should give appropriate attention to the legal and ethical responsibilities of lawyers in relation to the discovery of documents in existing and proposed civil litigation, case management and ethics subjects that form part of:

(a) law degrees, particularly those required for admission to practice as a solicitor or barrister;

(b) practical legal training required for admission to practice as a solicitor or barrister; and

(c) continuing legal education programs, including those required for obtaining and maintaining a practising certificate.

Proposal 4–5 Legal professional bodies should issue to their members 'best practice' notes about the legal ethical obligations of lawyers with respect to discovery.

5. Alternatives to Discovery

Question 5–1 What measures could be taken to reduce the front-loading of costs in relation to pre-action protocols?

Question 5–2 What safeguards could be implemented to ensure that individual litigants are not denied access to justice as a result of pre-action protocols?

Question 5–3 What requirements can be incorporated into pre-action protocols to maximise information exchange between parties in civil proceedings before federal courts?

Question 5–4 What else should be included in pre-action protocols for particular types of proceedings to aid parties in narrowing the issues in dispute?

Question 5–5 Are cost sanctions an effective mechanism to ensure that parties comply with pre-action protocols?

Proposal 5–1 The Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.

Proposal 5–2 A new pre-trial procedure should be introduced to enable parties to a civil proceeding in the Federal Court, with leave of the Court, to examine orally, on oath or affirmation, any person who has information relevant to the matters in dispute in the proceeding.

Question 5–6 Could cost issues in proceedings before federal courts be controlled by limiting pre-trial oral examinations to particular types of disputes?

Question 5–7 What mandatory considerations, if any, should a court take into account in granting leave for oral examination?

Question 5–8 Is there a need for new procedures for access to information in civil proceedings, such as interim disclosure orders?

Question 5–9 What is the best way of ensuring that federal courts consider alternatives to the discovery of documents in civil proceedings?