Discovery in Federal Courts

Submission to Australian Law Reform Commission

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A Qualification to Responses and the Importance of Proposal 3-7

A number of the questions in the ALRC's Discussion Paper ask for views as to whether a particular rule or practice is working or achieving a certain outcome. This submission incorporates anecdotal evidence where the author is aware of it. The anecdotal evidence is based on the author's past experience as a legal practitioner, current role as an academic in the Faculty of Law at the University of New South Wales and discussions with legal practitioners. However, anecdotal evidence must be treated with great care as there is no way to ensure its reliability. People suffer from bounded rationality leading to the use of heuristics, or rules of thumb, that can produce unreliable results. For example, individuals tend to make predictions by extrapolating from highly salient and memorable events even when those events are statistically aberrational. In the current context legal practitioners may assess the operation of discovery based on their most salient memories, which might be a particular negative experience. Responses to the questions posed by the ALRC's Discussion Paper may also be influenced by a view that the experience in the C7 litigation or that the New South Wales Supreme Court Chief Justice Spigelman's anecdote of the flag-fall for discovery in a significant commercial dispute being often $2m, are the norm. We currently have no reliable evidence as to whether these examples are representative or are anomalies.

The responses that the ALRC will receive to its Discovery in Federal Courts Discussion Paper and Discovery Costs Questionnaire will be helpful in providing further information on the issue of discovery that may suggest alternative explanations and other avenues of research. However, many of the questions and issues in the Discussion Paper and Questionnaire lend themselves to empirical study and would benefit from data collection facilities. It is highly desirable to be able to accurately determine how much discovery costs in an individual case and to compare those costs to the total cost for the case and in relation to what was at stake in the case. In many ways proposal 3-7 is the most significant suggestion in the Discussion Paper as it would allow reform in the Federal Courts to be driven by fact rather than fashion. To borrow from Justice Heydon's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [156], the question becomes:

> Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly?

A Threshold Issue - Identification of Issues

Before discovery is able to take place, the Court and the parties need to have clearly identified the issues in dispute as this will define the scope of discovery.

Traditionally, the identification of the issues in litigation is performed by the pleadings. The pleadings are able to continue to perform this role in many cases provided they are drafted with sufficient clarity and precision. The following cases explain the link between pleadings and discovery.

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In *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [1996] ATPR 41-522. Burchett J said (at 42,679):

> The primary function (of a statement of claim) is to tell the defending party what the claim is that he has to meet. That is a matter of elementary and natural justice; the claim cannot be answered until it is known. When a sufficient defence has been filed to a sufficient statement of claim, a further function will generally have been performed — that of defining the question or questions for decision. This definition is required, of course, from an early stage, or else discovery and other interlocutory procedures are likely to prove misdirected, wasteful and unproductive. In order to achieve these fundamentals, a statement of claim must set out clearly, not just the bare claim that is made, but also "the material facts on which it is based", including facts that, if not specifically pleaded might take the other party by surprise.

In *BT (Australasia) Pty Ltd v NSW* [1997] FCA 1553 (24 December 1997) Sackville J observed:

> The motions presently before the Court are closely connected with disputes between the parties related to discovery, especially discovery of documents in the possession, custody or control of Agencies. Indeed, I think it fair to say that, in this case, the discovery tail has wagged the pleadings dog. By that I mean that the parties have been engaged in repeated disputation about discovery issues, often without always precisely addressing the pleading issues which ultimately determine the scope of discovery (subject to the powers of the Court to modify those obligations). It is, after all, the pleaded issues that will determine the outer limits of discovery obligations (assuming these obligations are not otherwise limited by an order of the Court).

In *F Hoffmann-La Roche AG v Chiron Corporation* [2000] FCA 346 at [3] Burchett J observed in the context of a patent case:

> The framework within which discovery may be ordered is fixed by the pleadings: *Temmler v Knoll Laboratories (Australia) Pty Ltd* (1969) 43 ALJR 363, per Windeyer J; *Intalite International NV v Cellular Ceilings Ltd (No 1)* [1987] RPC 532 at 535; *Avery Ld v Ashworth, Son & Co Ld* (1915) 32 RPC 463 at 469-470, per Eve J. They determine the issues, and from the issues may be identified the categories of documents the Court should consider when deciding what orders to make in respect of discovery.

In *Humphries v SAS Signage Accessories Supplier Pty Ltd (No 2)* [2009] FCA 1238 at [16] Spender J put the position succinctly:

> The scope of discovery is determined by the pleadings.

The submission notes that the ALRC considers the rules on pleadings generally to be outside its current Terms of Reference but that this area of civil litigation merits further consideration. ALRC, DP 2 at [3.138]. However, many of the problems associated with discovery would be alleviated if the issues in dispute were clear. The further consideration of pleadings should include an assessment of methods for the articulation of the issues in dispute ie changes to pleading practice and alternatives to pleadings.

In terms of the current reference it should be noted that some forms of litigation are dealt with through a case management conference at which the parties and the Judge determine the issues the subject of the proceedings. The pre-discovery conference recommendations later in the Discussion Paper attempt to do the same thing but the issues may need to be resolved earlier to avoid interlocutory disputes about pleadings. Conferences may fulfil a number of roles in addition to addressing discovery.

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

The anecdotal evidence on the requirement for leave of the Court is that it is rarely dealt with as a formal requirement. Rather, the parties will usually determine that they require discovery and will make

provision for this in Short Minutes of Order which will be handed up to the judge at a directions hearing. The judge may then question the parties as to the need for discovery or the scope of discovery that is envisaged. This obviously varies depending upon the judge and the nature of the matter. Some judges have a predisposition towards a particular type of discovery. For example, some judges continue to regard general discovery as being more efficient than discovery by categories as time is not spent debating the definition of the categories and disputes about whether documents fall within the categories are avoided.

The introduction of *Federal Court of Australia Act 1976* (Cth) section 37M may make the discussion about discovery at direction hearings more fulsome or more searching but that provision has only been in place for a relatively short time.

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

The granting of leave is a matter of discretion for the judge. The case law indicates that on a discovery application the Court should balance the costs, time and possible oppression to the producing party against the importance and likely benefits which arise to the requesting party from production of the documents. See *Australian Broadcasting Commission v Parish* (1981) 41 FLR 292 at 295, *Index Group of Companies Pty Ltd v Nolan* [2002] FCA 608 at [6] - [7], *Parkin v O'Sullivan* [2006] FCA 1413 at [19] - [20], *United Salvage Pty Limited v Louis Dreyfus Amateurs SNC* [2006] FCA 116 at [3]. The judge also receives guidance from practice note CM 5 - Discovery which addresses the types of questions that a judge would expect to be answered. Another important factor, as set out above, is the nature and extent of the issues raised in litigation by the pleadings. The greater the precision with which the issues are stated, the better situated a judge is to determine whether discovery is needed and, if it is, the scope of that discovery.

It is difficult to define a matter of discretion such as when discovery should be ordered with a high level of clarity because many factors may come into play depending upon a particular case. The law at present is sufficiently clear but what is perhaps missing is greater consideration of these factors by judges when being asked to determine if discovery should be ordered.

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?

The regulation of discovery is possible without the adoption of a provision such as section 45 of the *Federal Magistrates' Act 1999* (Cth) provided judges approach the requirement of leave of the Court as something that they need to expressly turn their mind to and be convinced of first, the need for discovery and second, the scope and manner of discovery, rather than simply accepting the consent orders put forward by practitioners. Some cases may more clearly require discovery than others so that a searching inquiry is not needed.

An argument that may be put forward for a provision such as section 45 of the *Federal Magistrates' Act 1999* (Cth) is that it would assist cultural change in relation to determining if discovery is warranted as it would require a Court to make an affirmative decision.

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?**

The categories of documents referred to in Order 15 Rule 2 of the Federal Court Rules operate as a default. In many cases the issue of discovery will be discussed between the parties and the judge so that a tailored approach is adopted with the categories in Order 15 Rule 2 simply being one option that is available. Other options would include general discovery and discovery by categories. Equally, there is no reason why in a non-Fast Track proceeding the approach that is set out in the Fast Track Practice Note CM 8 could not be adopted. See *Utex Pty Limited v Maritime Global Pty Limited* [2010] FCA 1149 where the Applicants sought to have proceedings entered into the Fast Track List but this was opposed by the Respondents. Justice McKerracher did not order that the proceedings be transferred to the Fast Track but did seek to employ some of the approaches set out in the Fast Track Practice Note.

The default position for discovery should be aimed at "routine" cases that the Federal Court deals with. Cases that are novel or complex should have discovery regimes specifically tailored for them. The existing regime in Order 15 Rule 2(3) is sufficient. If the tailoring of discovery to the dispute needed to be made more explicit then it may be useful to add a court rule, as opposed to having a practice note, which adopts the "menu" approach recommended by Lord Justice Jackson in the UK Costs Review. The "menu approach" was incorporated in a draft rule 31.5A to be inserted in the Civil Procedure Rules. In relation to the scope of discovery the rule provided:

> (6) At the first or any subsequent case management conference the court shall decide which of the following orders to make in relation to disclosure:
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> (a) an order dispensing with disclosure; or
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> (b) an order that a party disclose the documents on which it relies, and at the same time requests any specific disclosure it requires from any other party; or
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> (c) an order that (where practical) directs, on an issue by issue basis, the disclosure to be given by a party on the material issues in the case; or
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> (d) an order that a party give standard disclosure;
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> (e) an order that a party disclose any documents which it is reasonable to suppose may contain information which may (i) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure, or (ii) lead to a train of enquiry which has either of those consequences; or
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> (f) any other order in relation to disclosure that, having regard to the overriding objective, the court considers appropriate.

See Lord Justice Jackson, *Civil Litigation Costs Review – Final report* (December 2009) p370-372 Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf

It should also be noted that regardless of the way in which the categories of discovery are expressed, a large part of the cost that is incurred by parties is from the initial gathering and searching of documents to be able to provide discovery. The narrower and more precise the categories that are used then the greater time and effort that must be employed by the party providing discovery as they must remove non-responsive documents. However, this should reduce the costs for the party receiving the discovery as the material they need to review should be less voluminous. As a result, the way in which the scope of discovery is specified will impact on the way in which costs are distributed between those giving and receiving discovery.

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?

The United States provides a good model for developing approaches to discovery of electronically stored information as shown by the amendments to the Federal Rules of Civil Procedure. The United States also has far more written judgments on ESI issues than in Australia so that guidance from the experiences and learning of judges faced with case management of electronic discovery is readily available. In Australia, however, there would be a handful of judgments on ESI issues. Use may also be made of the Sedona Conference which routinely provides guidance on the cutting edge issues faced by litigants in relation to ESI.

There are probably 3 overarching approaches to ESI that provide guidance for judges and legal practitioners. They are:

- proportionality;
- transparency;
- co-operation.

Proportionality has been adopted in Australian law. In relation to ESI the focus needs to shift from high level proportionality such as the amount in issue or what is at stake in the litigation and focus on whether the specific information sought is of sufficient potential significance to justify the burden of discovery. The proportionality analysis is about weighing the significance of a particular issue to the outcome of the case and the resources that should be expended in seeking to obtain ESI relevant to that issue. This approach is implicit in the case law on getting leave for discovery but needs greater emphasis (see *Humphries v SAS Signage Accessories Supplier Pty Ltd (No 2)* [2009] FCA 1238 at [18]).

Transparency refers to all parties to the litigation and the judge understanding how discovery of ESI will be undertaken. This means being aware of the search strategy to be employed and understanding the universe of ESI that is to be searched. This is discussed further below.

Co-operation is essential in relation to ESI and even in an adversarial system is supported by self interest. The only way that the ESI to be discovered can be efficiently searched and limited to the real issues in dispute is if the parties co-operate in identifying responsive sources of data and devise search strategies that are aimed at addressing the real issues. A failure to identify relevant sources of data and devise specific search strategies may result in discovery being under or over inclusive.

The search strategy for use in relation to ESI effectively involves the combination of technology and knowledge of the data set to be able to device a methodology which will result in the production of responsive ESI. At one level this may mean the use of key word searches and the need to develop appropriate key words. It may also involve the use of concept searching which utilises sophisticated statistical and linguistic models to create the search strategy. The litigation support and IT profession are

best placed to explain the technological aspects of search strategies. However, there must also be input from lawyers and the parties to be able to ensure that the way in which IT systems function, where ESI is stored and the types of terminology used by parties (including acronyms, nicknames and abbreviations) are factored into the structure of the search strategy. To devise an effective search strategy the following practices will be helpful:

- combine the knowledge of the person requesting ESI with the person that understands the ESI so that the end result is a search strategy that is both of utility and recognises any limitations on what may or may not be available;

- the results of a search strategy are tested through a feed back loop so that there is a level of confidence that the search is producing the ESI sought. This may require changes to the search strategy if responsive ESI that was expected to be caught is not captured or non-responsive ESI is produced creating more ESI for review;

- the use of the pre-discovery conference to discuss all of the above matters so as to educate the parties and the judge in devising a effective search strategy.

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?

The difficulty with discovery by categories is that the drafting of the category may suffer from imprecision or merely the vagueness of the English language so that there is room for argument as to whether particular documents are within or not within the category. Further there may be differences of interpretation in relation to what a category is calling for which further adds to disputes.

It may be that the problem with categories of documents is that they are devised by each party working separately as opposed to them working collaboratively. The idea of collaboration may seem strange in the context of adversarial litigation but that is the way in which the search strategy for ESI should be developed. This has two possible ramifications. First, where discovery involves ESI it may be that the imprecision or vagueness associated with categories is not an issue because what is involved is devising search terms or concept searches which have an ability to be set more broadly or more narrowly depending upon what has to be searched for. Second, it suggests that some of the learning about discovery and ESI might be employed in relation to the more standard paper based discovery. In a world where information is originating and being stored electronically more and more frequently it may be that a focus on discovery by categories is really only dealing with a small subset of cases. If a party is in the position where its documents only exist in some paper-based form then it may be that general discovery is appropriate because the volume is unlikely to be large.

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?

The anecdotal evidence on discovery plans and the use of pre-discovery conferences is that, similar to the requirement for leave of the court in relation to discovery, the determination of the scope and strategy for dealing with ESI is agreed between the parties at a level that they are comfortable with but without a great deal of judicial input. In some cases this approach may be entirely appropriate due to what is at stake in the litigation or because discovery is relatively straight forward.

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.

The use of pre-discovery conferences should be employed whenever discovery is likely to be a substantial undertaking or there is reason to believe that it will be conducted in an antagonistic environment.

The pre-discovery conference should not be used in every case, as in some instances the cost of the conference will be greater than any benefit generated. This is likely to be the case with routine matters. It is also necessary to consider whether there may be conferences dealing with the pleadings and issue identification prior to discovery. If such a conference has taken place then the content of the pre-discovery conference may vary from that put forward in proposal 3-1.

A pre-discovery conference should not be conditioned on an application for a discovery order. A judge should be able to require a pre-discovery conference without such a precondition. This is because parties may agree to discovery rather than seek a formal order.

It would be useful to know how the scheduling or case management conferences mandated in the Fast Track List, Tax List and in the Representative Proceedings Practice Note have been employed and their success as the proposal would take what is currently required in special circumstances and make it available more broadly.

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.

The suggestion to file and serve statements containing a narrative of the issues that are in dispute raises the following issues:

- whether the existing form of pleadings used in the Federal Court should be replaced by such a statement;
- alternatively, whether the narrative statement would be used as an adjunct to pleadings and therefore how it may interact with those pleadings, and
- whether the additional step of a narrative statement which in some ways would replicate the role of the pleadings would be warranted in all cases or only in relation to more complex matters.

This submission recommends that narrative statements remain an option available to an individual judge who believes in circumstances of a particular case they are warranted for its efficient management but that they not be mandated.

It may be that judicial officers would benefit from training as to the use of conferences as this still remains a fairly novel way to conduct case management in Australia.

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?

This question raises many of the same issues that are associated with the introduction of pre-action protocols in Australia. Most legislation adopting pre-action protocols requires the exchange of documentation to assist parties in understanding the relative strengths and weaknesses of their case and their opponents case with a view to achieving some form of resolution prior to the commencement of court proceedings. The difficulty with such an approach is determining when the frontloading of costs is warranted through it avoiding unnecessary litigation. In some categories of case incurring these costs

may be warranted, whilst in others it will simply be an additional expense. The same issues arise here in relation to the production of key documents.

There are also questions as to how the "key" documents are to be determined. One minor change would be to alter the court rule that allows a party to request a copy of a document referred to in a pleading and instead require that any documents referred to expressly or impliedly in a pleading should be provided with that pleading. Another option for consideration would be whether "key" documents should be considered to be those that are relied on for the drafting of the statement of claim or defence. A similar requirement is found in section 26 of the *Civil Procedure Act 2010* (Vic) which imposes an overarching obligation to disclose all documents that a persons considers, or ought to reasonably consider, are "critical to the resolution of the dispute". The Explanatory Memorandum to the Bill explains:

> The term "critical documents" is intended to capture a class of documents considerably narrower than those required to be discovered, but is broader than the concept of "decisive" documents. The test is meant to capture those documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case.

The difficulty with this proposal (and with question 3-6 more generally) is that once cases become larger or more expansive in their allegations then the range of documents that need to be considered to be able to formulate a claim or defence also increases. In large cases the amount of documentation may also be quite large. To address that situation it may be possible to have a presumption that the documents relied upon for drafting the pleadings are to be provided unless an application is made to the court to demonstrate why this is overly burdensome. One advantage of focussing on the documents used for the production of pleadings is that a party must have ready access to those documents in any event and so there is not additional costs in terms of seeking to gather or find the documentation. Further, it would seem to be highly unlikely that a document could be regarded as "key" and yet not be referred to in the process of preparing the pleadings.

Another caveat or consideration in relation to adoption of the proposal is that the focus is on "key documents" but the information that is key to the proceedings may be the knowledge of a witness. Even if this knowledge is recorded in a proof or draft statement it is most likely protected from disclosure as it would attract legal professional privilege.

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?

Order 15 rule 10 provides that "[w]here a pleading or affidavit filed by a party refers to a document, any other party may, by notice to produce served on him require him to produce the document for inspection". "Reference" in this context does not require as much as incorporation by reference but it does need more than an inference from the pleading that some document must exist. Some "direct allusion" is required. See *King v GIO Australia Holdings Ltd* [2001] FCA 1487 at [10] and *Practice and Procedure High Court and Federal Court of Australia* (LexisNexis Online) at [40,915.5]. As stated in response to Question 3-6, the requirement to produce a document referred to in a pleading could be broadened so as to promote production of documents at an earlier stage in the litigation. As a practitioner the author has experienced cases where some applicants would provide documents referred to in their pleading unprompted and other cases where applicants resisted producing documents on the basis that a reference was indirect, even though the documents would be part of discovery.

Order 15 rule 13 states that "[t]he Court may, at any stage of any proceeding, order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the proceeding". In *Schulman v Abbott Tout Lawyers (A Firm) t/a Abbott Tout Solicitors* [2010] FCA 308 at [33] the rule was said to give the court power to require privileged documents to be produced to the court for it to resolve a dispute in relation to privilege. See also *P Dawson Nominees Pty Ltd v ASIC (No 2)* (2009) 255 ALR 466. The rule is expressed in broader terms and could be relied on for the production of

documents to the Court in a range of circumstances. Consequently, the rule as framed is probably adequate but it does not appear to have been used extensively.

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.

This proposal should be adopted. The ALRC is concerned that this proposal may increase costs. However, in the case of discovery of ESI it would be rare that the sort of planning envisaged by Proposal 3-4 would create greater costs than would be saved by having a plan which is able to narrow discovery and avoid later discovery disputes. Monitoring of the costs as part of the data collection referred to in proposal 3-7 could be undertaken.

The proposal could be improved by providing greater guidance as to the matters on which the parties should attempt to agree. The *Pre-Discovery Conference Checklist* that is related to Federal Court Practice Note *CM6 - Electronic Technology in Litigation* lists a number of matters that could be incorporated. It may be possible to expand those categories or matters into a questionnaire or check list as has been done in the United Kingdom's *Practice Direction 31B: Disclosure of Electronic Documents* (July 2010) or Ontario's *Annotated E-Discovery Checklist* (with suggestions on how to minimize e-discovery costs) available at http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx . The advantage of a questionnaire or check list is that it will avoid matters being overlooked or omitted because of a lack of knowledge or inadvertence. If an item is not relevant to a particular discovery then that can be noted.

It may also be advantageous to impose an obligation on legal practitioners, as exists in the United States, that they are required to certify that the discovery request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action". See *Federal Rules of Civil Procedure Rule* 26(g)(1)(B)(iii). The certification forces a practitioner to avoid an all-encompassing knee-jerk request for discovery and instead focus on the discovery that a case really needs and is proportionate to the substance of the case. This then allows a judge to specifically ask a legal practitioner why certain approaches to discovery are adopted in the 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?

The types of roles assigned to special masters in the US has varied considerably but may be summarised as including the following:

- a passive observer in relation to document production or depositions;
- attending oral depositions and reporting on the conduct of the deposition to the judge;
- attending oral depositions and making on-the-spot rulings about the propriety of questions, the validity of objections and the sufficiency of answers;
- specific tasks within the discovery process such as reviewing documents to provide preliminary rulings on whether they are protected by legal professional privilege or offering opinions about the scope of the legal obligation to produce;
- more wide-ranging monitoring of discovery steps including policing compliance with deadlines;
- a general role of supervising the entire discovery process including setting discovery schedules, the sequence and dates for specific discovery events, assessing information needs, evaluating the disruptions and burdens that various alternative modes of production would impose on the custodian and recommending compromise procedures;
- assisting in settlement negotiations similar to a mediator;
- preparing preliminary rulings about the admissibility of voluminous documents at trial;

See Wayne Brazil, Special Masters in the Pre-trial Development of Big Cases: Potential and Problems in Wayne Brazil, *Managing Complex Litigation* (1983) pp 6 - 12.

In Australia a more circumspect approach to special masters should be adopted, at least at the beginning. In the Federal Court special masters should be introduced to assist in the formulation of a discovery plan and the conduct of a pre-discovery conference. In effect they would facilitate the procedural steps referred to in proposal 3-4. This could be particularly helpful for parties and legal representatives who do not have extensive experience with the use of information technology in relation to discovery and could therefore act as a way to balance the playing field as well as educate those parties. Special masters should also be available to assist in the resolution of privilege disputes. This is an area that can be very time consuming but also requires a quite high level of legal knowledge. It has been used successfully in the United States. See *In re Vioxx Products Liability Litigation* 501 F Supp 2d (ED La 2007).

Neither suggestion for the use of special masters would interfere with the Federal Court's individual docket system or with case management generally. The judge would still remain in control of a case but they would have assistance in relation to expensive and time consuming tasks that would allow the proceedings to be dealt with more efficiently consistent with the overarching purpose.

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).

The Federal Court Rules Order 10 rule 1(1) provides "[o]n a directions hearing the Court shall give such directions with respect to the conduct of the proceeding as it thinks proper". Order 10 rule 1(2)

goes on to state that the Court may make orders in relation to "(a) (i) discovery and inspection of documents".

Sections 55 and 56 of the *Civil Procedure Act 2010* (Vic) would seem to make express what is impliedly within the power of a Federal Court judge pursuant to Order 10. The adoption of more express powers would primarily serve an educational function by alerting judges and legal practitioners to the types of orders that can be made in relation to discovery so as to tailor it to a particular case.

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?

There should not be a presumption that a party requesting discovery of documents should pay the estimated costs in advance. The ALRC may wish to consider whether the UK approach of standard discovery (which is effectively the scope of discovery specified in the Federal Court Rules at present) and specific disclosure (which allows the Court to make an order for disclosure of documents, classes of documents or to order that a search be carried out) could be adopted in Australia. If there were to be two different levels of discovery then it may be that in relation to the equivalent of the UK's specific disclosure there could be a requirement that the party seeking specific disclosure pay the estimated cost in advance. See Civil Procedure Rules (UK) Rules 31.5, 31.6, 31.12.

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)?

Any concerns about overcharging in relation to discovery are best dealt with through cost assessment or review. It may be that the better way to reduce the cost of discovery is to focus on limiting the scope of discovery and applying principles such as proportionality.

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.

Education and training in relation to information technology and discovery is essential for judicial officers. The only way that a judicial officer can meaningfully engage in a discussion about how discovery should take place in relation to ESI is to understand the way in which technology works and what is and is not possible in relation to technology.

The education and training program also needs to be repeated at regular intervals because technology is constantly changing. For example, at one point in time knowledge of keyword searching would have been sufficient but it is now necessary to have an understanding of both keyword searching and concept searching. It is also necessary to understand how information is stored which at one time may have meant comprehending, at a high level, the operation of a computer or network but new developments such as "cloud computing" where an entity's information is no longer under its direct control will impact on how discovery and electronic technologies will be employed.

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.

This proposal is dealt with at the beginning of this submission. The establishment and maintenance of data collection facilities would be an important step in being able to accurately evaluate the discovery process.

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?

The response to this question is based on the author's teaching of the subjects Litigation 1 (compulsory undergraduate course), Complex Civil Litigation (undergraduate elective) and Complex Commercial Litigation (postgraduate elective) at the University of New South Wales in 2009 and 2010 and discussions with colleagues responsible for the subject Law, Lawyers & Society and the clinical legal education program at Kingsford Legal Centre.

Litigation 1 deals with civil procedure and in that context discovery. The prescribed text is Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (Law Book Co. 2009).[1] The text incorporates a discussion on the problems caused by the discovery process and includes extracts from the ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (1999), [6.67] - [6.68], [6.71], [6.73], *Seven Network Limited v News Limited* [2007] FCA 1062, [2] - [10], [21] and Victorian Law Reform Commission, *Civil Justice Review* (2008), [5.4.1] - [5.4.3]. These extracts set out various forms of misconduct in relation to discovery including obstructing disclosure, destroying or concealing documents, and imposing costs on opponents. It also links discovery to the overriding purpose in section 56 of the *Civil Procedure Act 2005* (NSW) and the concept of proportionality. The text goes on to deal with the Court rules and requirements for discovery in New South Wales.

The complex litigation subjects referred to above examine the causes of complexity which includes the adversarial conduct of litigation by lawyers. The point is illustrated through extracts from Christine Parker and Adrian Evans, *Inside Lawyer's Ethics* (2007) and ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (1999), [3.30] - [3.41]. These subjects also contain modules dealing with "Discovery and Complex Litigation" which includes reference to the VLRC, *Civil Justice Review* (2008) chapter on discovery and a module on "Discovery in the Electronic Age" which addresses discovery of ESI.

The way in which a subject is taught will vary from lecturer to lecturer. The author of this submission teaches discovery to undergraduate students by not overtly focussing on "ethics" but rather dealing with the obligations of legal practitioners and procedures regarded as best practice. The emphasis is placed on the duties that legal practitioners owe both to their clients and to the Court and that the conduct of discovery may bring those duties into conflict where clients want discovery to be conducted in a way that may be of technical advantage to them, i.e. imposing costs or causing delay but that such conduct is contrary to the lawyers' duty to the court. The undergraduate subject then deals with the mechanics of how discovery works, which through the existence of the overriding purpose, brings into play the need to be cognisant of balancing justice, cost and avoiding delay.

In the complex litigation subjects, and to a lesser degree in Litigation 1, emphasis is given to evaluating approaches to the conduct of discovery so that discovery may be conducted in the most efficient way possible. As a result there is significant discussion of various reforms in Australia such as the move away from the Peruvian Guano test to what is directly relevant, the pros and cons of discovery by categories,

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[1] I understand that this text is used at the University of Sydney as well as at UNSW.

the use of sampling, how the advent of ESI has changed the way in which discovery is conducted and the possibility of adopting novel mechanisms such as the oral deposition. The subjects also focus on overseas examples, with particular emphasis on how the United States deals with ESI after the amendments to the Federal Rules of Civil Procedure and whether some of their innovations such as pre-discovery conferences should be utilised in Australia.

The subject Law, Lawyers & Society does not deal with discovery but does address the related area of legal professional privilege. Law, Lawyers & Society considers the arguments raised in claiming legal professional privilege in a number of cases (in the context of discovery; subpoenas etc), their legal and ethical bases and the consequences of misusing the privilege (remedies and sanctions). In the clinical education programs the ethical duties of lawyers engaging in discovery and use of subpoenas are discussed in the context of specific cases. This occurs most frequently in the larger cases that the Kingsford Legal Centre runs. The ethical issues are also shared with other students at tutorials where the students discuss the issues that have arisen in their individual cases. The clinical education programs allow those students working on cases to see the application of ethics in practice.

The lawyers' legal and ethical duties in relation to discovery are dealt with in the UNSW law school curriculum. Nonetheless, the ALRC's concern about ethics in discovery will be incorporated into the UNSW Law Faculty Curriculum Review Process which is currently under way and the results of the ALRC's final report will be of great interest.

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

The author would be interested in suggestions as to how law students may be better trained in the legal and ethical responsibilities of lawyers with respect to discovery. The author's current approach to this issue is:

- provide students with material that alerts them to the type of practices which are unacceptable in relation to discovery so that they have an awareness of the issue;

- use anecdotes and case studies to illustrate unacceptable conduct and the ramifications of such conduct. For example, one of the more salient case studies that the author has used relates to an American attorney who withheld discoverable documents in a large antitrust (Competition Law) case. After frequent requests for the documents, which had to exist because of references in other documents included in discovery or the deposition of certain witnesses, finally produced the documents resulting in his loss of partnership, being struck off the roll and receiving other penalties;

- making compliance with ethical obligations in the self interest of the student, i.e. one's professional standing and practicing certificate should not be sacrificed in the hope of winning a case for a client as there will be other clients. This may also mean equipping a student with the ability to explain to a client why unethical practice in relation to discovery is against the client's self-interest.

The above approach is driven by the fact that what motivates a person to comply with ethical responsibilities varies. Some comply because they are genuinely law-abiding citizens and members of the legal profession and others comply because of the threat of sanctions. Some are more able to withstand pressure from colleagues or superiors than others.

A clinical legal education program (and other forms of experiential learning such as case studies) also provide an important avenue for teaching the legal and ethical responsibilities of lawyers as they place students in real-life ethical dilemmas that they need to solve, albeit with the assistance of academics and/or practicing lawyers.

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?

Yes. There may be recalcitrant individuals who will engage in discovery abuse and misconduct regardless of the level of education provided to them. However, in the vast majority of cases discovery and misconduct may be more determined by a cultural acceptance of certain misconduct within the profession as being consistent with adversarial litigation. As a result it would be beneficial to ensure that law students and practitioners are educated as to acceptable and unacceptable conduct in relation to discovery. Education is not a replacement for judicial oversight in a particular case or for the profession disciplining its members when misconduct occurs. However, education, particularly for law students and new members of the profession, can assist them to identify the situations where they may be asked to act in an improper way through having learnt that such conduct is not allowed.

It should also be acknowledged that a valuable form of education is judicial statements in decided cases in relation to what is expected in relation to the conduct of the legal profession. The High Court's comments in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 and the, now numerous, comments by judges about the need for a "cards on the table" approach in relation to trial also serve to educate lawyers as to conduct that is or is not acceptable.

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.

This proposal should be adopted, although it probably already exists in university law degrees and practical legal training. However, the ALRC's focus on this issue will serve as a catalyst for considering how the responsibility of lawyers in relation to discovery may be better imparted to students and the legal profession.

Introductory Comment on pre-action protocols

The issue of pre-action protocols has been addressed by the Civil Dispute Resolution Bill 2010. The Senate referred the provisions of the Civil Dispute Resolution Bill 2010 to the Legal and Constitutional Affairs Legislation Committee which provided a report on 2 December 2010 available at http://www.aph.gov.au/Senate/committee/legcon_ctte/civil_dispute_resolution_43/report/report.pdf .

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

It is inescapable that pre-action protocols will front-load costs. Pre-action protocols by their nature take steps such as exchange of documents and alternative dispute resolution and move them forward to pre-commencement of litigation. The aim of a pre-action protocol should be to reduce costs overall for a dispute by allowing that dispute to be resolved more quickly. Accordingly, less costs are incurred

through avoiding the taking of the "usual steps" involved in litigation before a case can be resolved. As a result an effective pre-action protocol will only apply to cases for which they are suitable. Generally speaking these are matters that are likely to be contested and for which the costs associated with compliance with the pre-action protocol are proportionate to what is at stake in the proceedings.

On the basis that the pre-action protocol is employed in relation to appropriate cases then the measures that may be taken to reduce the front-loading of costs include:

- Parties are clear on the steps they need to take to comply with the protocol so that they neither do too little nor too much. If insufficient information is provided then the aim of an early settlement may not be achieved. If too much information is provided then the settlement may be achieved but only after incurring more costs than was necessary.

- The parties take a proportionate approach to compliance with the protocol which means they have a clear idea of what a case is worth and it is possible to set a budget for compliance with the protocol that ensures the cost of compliance is a fraction of the amount at stake. With experience it may be possible to provide some guidance such as the cost of compliance should be the lesser of 5% of the amount at stake or $10,000.

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?

There is an issue as to what is meant by the expression "individual litigant". Does it mean:

- a self-represented party who through lack of legal representation is either unaware or unable to comply with the relevant protocol;

- to any natural person, whether legally represented or not; or

- to any person, including corporations who must be legal represented.

The amount of leeway a court may or should give in relation to non-compliance is likely to vary depending on which of the above scenarios is applicable.

The current requirements in the Commonwealth and Victorian Legislation on pre-action protocols are that a failure to comply with the protocol does not prevent the commencement of litigation, but rather, can be considered in relation to costs orders. This should provide some protection to individual litigants as they are not prevented from accessing the Court when they do not or are unable to comply with the pre-action protocol requirements. This approach does not shield them from a later cost order.

Other safeguards that might be considered are:

- including the lack of legal representation or lack of financial resources in the matters to be considered in determining what are "reasonable" or "genuine" steps in relation to compliance with a protocol

- allowing an individual to apply to the Court to be relieved from compliance with a pre-action protocol.

- the provision of simple pro-forma letters of demand that can be used in relation to certain categories of case.

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

There is a danger in referring to maximising information exchange as parties may simply take all documentation that they have relevant to the dispute and send it to their opponent on the basis that "this is everything we have", so that it cannot be said that documents were withheld but at the same time it minimises the need for costs and forensic analysis on the party providing the documentation.

Information exchange needs to be proportionate and it needs to focus on quality of information not just quantity.

A sensible approach would seem to be that a party should disclose the documents or information which demonstrates why it has a cause of action or why it is entitled to relief. However, such a requirement is more easily stated than complied with. Especially in more complex cases, the amount of documentation may be extremely large and the analysis to demonstrate the right to relief as burdensome as drafting a pleading. This is why Lord Justice Jackson recommended against a protocol for large commercial cases in the UK Costs Review. See Lord Justice Jackson, *Civil Litigation Costs Review – Final report* (December 2009) p345 available at http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf

After the commencement of proceedings information exchange is sought to be facilitated by requirements such as "key" documents, as raised in question 3-6 of the current Discussion Paper, or documents that are critical to the resolution of the dispute as used in section 26 of the *Civil Procedure Act 2010* (Vic). Pre-action protocols apply prior to the filing of pleadings so that determining what the necessary information to exchange is may be even more difficult to define. However, these tests may provide some guidance as to what would be an acceptable level of disclosure ie the documents or information that a party would reasonably expect to rely on if it was to commence legal proceedings.

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?

The issues in dispute may be further narrowed if parties are able to take the next step after the provision of relevant information/documentation and provide their perspective or interpretation as to why they are entitled to relief. The party should "join the dots" for its opponent so that a party's position is clear.

This may be similar to the "narrative" referred to in paragraph 5.37 of the Discussion Paper. However this additional step will incur additional costs as there is a need to provide a document that is compelling in its reasoning and legal analysis. Consequently the amount of the costs which are front-loaded are increased.

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

Sanctions are essential to avoid pre-action protocols being a procedural "speed-bump". To achieve the desired cultural change that lays behind the reforms it is necessary to ensure compliance at the beginning.

The use of costs awards is a traditional sanction in litigation and would be appropriate for non-compliance. The early orders need to be subject of a certain level of reasoning and explanation so as to provide guidance to later matters.

However, costs awards should only be made where the expectations on the parties regarding compliance with the pre-action protocol have been clearly articulated. This would be the case where specific steps in a pre-action protocol are applicable to a particular case. If no pre-action claim letter or no supporting documents are provided when required then a sanction may clearly and permissibly follow. However, due to the requirement of proportionality it may often be the case that there is room for differing opinions as to what level of detail should be included in a claim letter or which documents are necessary to comprehend the basis of a claim. Equally, ADR that fails due to a bad faith attempt and ADR undertaken in good faith that still fails to achieve a resolution can be difficult to discern.

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.

Yes, as the success of pre-action protocols depends on a bespoke approach it follows that there must be research or at least consultation to determine which categories of case benefit from a protocol and what pre-action steps those cases should be subject to. More generally consultation between those designing pre-action protocols and the legal profession is essential so that norms of conduct and the goals of specific protocols are not devoid of reality and bear some resemblance to what can be reasonably expected but with a view to seeking improvement.

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.

Proposal 5-2 should be adopted through a pilot program in one of the Federal Court's registries. However, there needs to be clear guidance to parties in the court rules as to the procedure for the deposition. In many ways, it is the content of the court rules that needs to be most closely examined as the choices made in drafting those rules will impact on the utility and cost of the deposition process. To date there are three models available - the procedure employed in the United States, the procedure recommended by the VLRC and the proposal put forward by Justice Ray Finkelstein at the joint Federal Court of Australia and Law Council of Australia Case Management Workshop in May 2008.

The US model is summarised in the Discussion Paper and in Michael Legg, The United States Deposition - Time for Adoption in Australian Civil Procedure? (2007) 31 (1) *Melbourne University Law Review* 146. The other options are summarised below.

The main aspects of the VLRC proposal are:

- The parties should be entitled, with leave of the court, to examine any person on oath or affirmation.
- The court should be empowered to give such directions as it thinks appropriate as to the conduct of pre-trial examinations including, (a) limiting the number and duration of examinations; (b) restricting the subject matter of a particular examination; and (c) ordering that specified persons be examined concurrently.
- The court may appoint an independent legal practitioner to be present at the examination, to administer the oath and to control the conduct of the examination.
- Allows for a US style Rule 30(b)(6) examination of a corporation, but instead of the corporation designating the deponent, the examining party and the corporation must endeavour to reach agreement as to the most appropriate person(s) to be examined on the specified matters. Where agreement cannot be reached, the court appoints the person(s) to be examined on the corporation's behalf.
- Examinees should be required to answer all questions put to them but are protected against self-incrimination and can claim legal professional privilege.
- Examinations should be informal and the rules of evidence should not apply. Objections should be noted on the record for determination by the court if the answer is later sought to be introduced into evidence. No objection should be permitted as to the form of questions, except where a question is misleading or offensive.

- Consideration should be given to the use of telephone directions as a mechanism to resolve disputes.

- Sanctions in respect of misbehaviour should be able to be imposed on all participants in the examination process. Sanctions should include costs orders, and such other orders as the court considers appropriate.

- Information obtained through a pre-trial examination should be able to be used at trial in four circumstances: (a) to impeach a witness who gives evidence inconsistent with their deposition (ie a prior inconsistent statement); (b) where the examinee has died or is unavailable; (c) where all parties to the litigation consent; and (d) where the court gives leave.

- The reasonable costs incurred in preparation for and conduct of examinations, subject to the discretion of the court, should be recoverable as costs of the proceeding.

The proposal put forward by Justice Finkelstein contains the following features:

- depositions may be had only by leave or at the court's initiative.

- at least in the beginning, depositions would generally be taken before court-appointed discovery masters.

- the number and length of any depositions would be subject to court control (or the discovery master).

- the party requesting the deposition would bear its costs and those of the deponent, at least in the first instance.

- the deposition may be taken by telephone or other remote means.

- the US rule 30(b)(6) type deposition of an organisation is provided for.

- the examination of a deponent must proceed as it would at trial under the Evidence Act 1995 (Cth). Although the need for certain exceptions may be needed.

- provision is made for a party to place their questions in writing and have the discovery master ask the deponent those questions and record the answers verbatim. A similar procedure already exists under Order 24 of the Federal Court Rules.

- the Court may impose sanctions including the reasonable expenses and legal advisers' fees incurred by any party on a person who impedes the examination.

The VLRC and Finkelstein proposals, whilst very similar in many respects because they adhere closely to the US model, differ on a number of important points from the US and from each other.

Both proposals require leave of the Court for a deposition to be employed, thus giving the Court greater knowledge of how the deposition is to be used and therefore greater control. The Court would be able to make orders that specify:

- identity of the deponent;

- date of the deposition;

- location of the deposition;

- length of the deposition;

- who may/must be present at the deposition;

- method for recording the testimony; and
- issues for examination at the deposition.

Court control is needed to prevent discovery abuse. This modification to the US system seems to be uniformly accepted as necessary in Australia.

Both proposals allow for the use of sanctions in the form of costs orders for impeding the deposition. The VLRC leaves open the use of other orders.

Both proposals allow for Rule 30(b)(6) depositions of corporations and other organisations. The ALRC Discussion Paper does not consider this issue. The US FRCP rule 30(b)(6) deposition was adopted so that a person could speak for a corporation as to the corporation's, not the person's, knowledge. This meant the deposing party did not have to determine who could speak for the company and the company did not have to incur the inconvenience of having numerous officers or employees deposed as the deposing party seeks to determine who has the relevant knowledge. The corporation then has the burden of finding a person with the knowledge or designating a person to acquire the requisite knowledge. However, as the corporation is affixed with the knowledge of the person who is deposed, and the individual may not have personal knowledge, the corporation may need to spend considerable time and effort ascertaining what exactly is the corporation's knowledge and preparing the deponent. In the US a corporation may be sanctioned for designating deponents without the requisite knowledge. Equally the requesting party must describe with "reasonable particularity" the matters for examination so as to guide the corporation as to the required knowledge.

A deposition similar to the US FRCP rule 30(b)(6) deposition may be very useful in facilitating discovery by addressing document retention policies, the operation of computer systems, what categories of documents are within a party's possession, custody or control, so as to identify appropriate categories of documents and allow for more narrowly crafted discovery requests. The efficiency flows from the unfiltered access to the corporation's representative which allows for a more useful dialogue than the exchange of letters. However, there is a balance to be achieved between ensuring that the corporation's representative provides correct and complete responses with the cost that may be necessary to adequately prepare that person, especially if sanctions may follow.

The Finkelstein approach, like the FRCP, puts the onus on the corporation to find the correct persons. The VLRC requires the parties to reach agreement or for the Court to decide. If it is not the corporation that chooses its representative then it is difficult to see how the corporation can be held responsible if the person lacks the requisite knowledge.

The proposals differ on the application of the rules of evidence, Finkelstein J requires the deposition to proceed as though the examination were at trial (although unspecified exceptions may apply) whilst the VLRC seeks a more informal approach and forbids objections as to form. The US system is somewhere in between. The application of rules of evidence assists in making the testimony admissible at trial but it also promotes a more formal and adversarial approach which may be less helpful in adducing information. For example, if the deposition is aimed at understanding a document retention policy or where and how documents are stored, then even if hearsay and opinion requirements are not met, the testimony is still very useful. Indeed, applying the rules of evidence may prevent this type of testimony and prevent the adducing of information that could significantly assist in reducing discovery. Depositions improve the quality of information available and therefore improve parties' decision-making processes. The way in which the rules of evidence are used will impact on how useful and different the information extracted from the deposition is, compared to existing forms of discovery or affidavit evidence. This proposal supports a more informal approach where objections are only necessary to protect a privilege or where the form of the question (e.g. ambiguity) could be corrected at the time. A party wanting to rely on the deposition in Court will have the onus of ensuring admissible questions are asked so that they are not challenged by an opponent at trial. A deponent will still have to answer objectionable questions except where a privilege applies.

The Finkelstein proposal employs a discovery master to oversee the deposition while the VLRC allows, but does not require, the use of an independent legal practitioner. The VLRC also suggests oversight

through adopting the US approach of providing for telephone directions. The discovery master allows for greater oversight by having an umpire present at the deposition but it also creates an additional cost. Whether a judge, registrar or third party should be present at a deposition should be in the discretion of the Court.

The position on the costs of depositions may differ between the VLRC and Finkelstein proposals. The VLRC would make those costs recoverable by the successful party while the Finkelstein proposal is that they should be borne by the party requesting the deposition initially but without any position on how those costs be dealt with once the proceeding concludes. This submission would support deposition costs being borne by each party at the deposition but with third parties receiving conduct money the same as for subpoenas. At the conclusion of proceedings deposition costs should be treated the same as other costs, that is, in the normal course, costs follow the event.

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

In the Federal Court where close judicial management already exists, it would be appropriate to allow for a deposition to be requested in any case that came before the court subject to the party requesting it being able to explain the necessity for its use i.e. it will save cost or produce information not available through other forms of discovery.

Justice Finkelstein gave two examples of circumstances where he foresaw that the court might be inclined to allow depositions. The first is pertinent to the current inquiry - where the volume of documents discovered is large and the use of depositions to clarify the meaning of those documents is likely to reduce the number of documents to be placed before the court (or into evidence at trial), the number of witnesses to be called, or the subjects on which witnesses will need to be cross-examined. His Honour thought this may have been helpful in C7-like litigation.

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

The court should consider the following matters in granting leave for an oral examination:

- whether the requesting party has described with reasonable particularity the matters for examination at the deposition and the person to be deposed;
- the cost of the deposition relative to the significance of the information sought through the deposition; and
- whether the information sought through the deposition cannot be obtained from another source more cheaply or efficiently.

These considerations are to prevent an approach to discovery of leaving no stone unturned, which when applied to depositions, has the propensity to increase costs dramatically either because the scope of depositions becomes unnecessarily wide or the witnesses deposed are not central to the proceedings. Further, if the deposition becomes a step in the litigation process that is mechanically applied, it may be employed as a matter of routine rather than because it is necessary and give rise to unnecessary costs.

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

The author has previously acted for a client that provided discovery in federal court proceedings in a manner similar to that described for interim disclosure orders. The author's client collected all of its documentation that was relevant to the case based on a general discovery approach and then allowed the opponent to informally inspect the documents to indicate which materials it wanted discovery of. The subset indicated by the opponent then became the client's discovery. This approach differed from the

interim disclosure orders described in that a privilege review of all documentation took place before informal inspection was granted. The purpose of this anecdote is to demonstrate that the Federal Court's current case management powers are sufficient to craft new procedures.

The question of preventing waiver of privilege when access to privileged documents is provided to an opponent requires further consideration. In the US the Federal Rules of Evidence were amended to add rule 502(d) which provides:

> A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

An order under Rule 502(d) allows the parties to a federal proceeding to enter into a "quick peek" agreement whereby (1) the responding party makes potentially relevant information available to opposing counsel for review; (2) opposing counsel identifies which information is relevant to its requests; and (3) the responding party then conducts a responsiveness and privilege review of the identified information only. See Jessica Wang, Nonwaiver Agreements after Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements (2009) 56 *UCLA Law Review* 1835 at 1843-1844. The "quick peek" agreement allows the parties to avoid the heavy costs of a privilege review without waiving privilege. However, there must be a federal court order otherwise the parties run the risk of waiving the privilege as to non-parties to the suit or as to subsequent or collateral proceedings. See Michele Lange and Kristin Nimsger, *Electronic Evidence and Discovery: What Every Lawyer Should Know Now* (2d ed 2009) p 100 ("Under Rule 502(d), a court order regarding privilege is binding on the entire world, including third parties and state courts.").

A similar arrangement, also made possible under Rule 502(d) is to enter into a "claw back" agreement. This differs from a "quick peek" agreement in that the parties agree to produce material in the usual manner without any intention that privilege be waived. If a privileged document is inadvertently produced, the producing party must inform the receiving party, who in turn must return the document and not use it in the litigation. See Jessica Wang, Nonwaiver Agreements after Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements (2009) 56 *UCLA Law Review* 1835 at 1842 and *Rajala v McGuire Woods LLP* 2010 WL 2949582 at *3-4 (D Kan 2010). Again, there must be a federal court order in order for the parties to take comfort that such disclosure will not result in waiver.

In Australia the effectiveness of avoiding waiver where a party voluntarily discloses privileged communications as part of discovery is determined by the common law or the case law interpreting the Uniform Evidence Law. It has been said that Australian law is "inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege" (*Mann v Carnell* (1999) 201 CLR 1 at [30]) and does recognise that disclosure of privileged communications in certain circumstances, such as pursuant to a confidentiality regime, may avoid waiver. See *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, *Meadon Pty Ltd v Nonmack (No 247) Pty Ltd* (1994) 54 FCR 200 and *Hartogen Energy Ltd (in liq) v Australian Gas Light Company* (1992) 36 FCR 557. Further, section 122(5) of the Uniform Evidence Law has the effect that privilege will not be lost if disclosed confidentially or under compulsion of law. However, to the author's knowledge, there is no case law specifically applying these principles to interim disclosure orders containing "quick peek" or "claw back" agreements. There must be some level of uncertainty as to the effectiveness of such procedures in protecting privilege which may make lawyers and parties wary about adopting them, even if they could reduce costs. A court rule or statutory solution may be needed to provide certainty.

It should also be noted that even if waiver of privilege is avoided the content of the privileged information is still seen by an opponent who may consciously or unconsciously use that knowledge in their litigation strategy. Some parties will not want to take this risk.

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

Three options come to mind - a court rule/practice note, judicial education or an innovative judicial decision. A practice note that links minimising the cost of discovery to the overarching purpose by requiring consideration of whether the information sought can be obtained from another source or through an alternative mechanism for accessing documents that is cheaper and quicker than discovery, would be a starting point. There then needs to be some examples of what those other sources or mechanisms may be. In terms of mechanisms it may mean using subpoenas, interrogatories or depositions instead of discovery if they are more efficient.