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**Australian Law Reform Commission  
Inquiry into Discovery in the Federal Courts  
Submission by Allens Arthur Robinson**

The following submission is made by Allens Arthur Robinson to the Australian Law Reform Commission (**ALRC**), in response to the consultation paper entitled *Discovery in Federal Courts*, dated November 2010 (**Consultation Paper**).

This submission focuses on issues and proposals that are of particular interest to this firm and its clients, and is structured thematically. Given the nature of our practice, this submission concerns the Federal Court in particular, although the issues and proposals raised may be equally applicable to the High Court, Family Court or Federal Magistrates Court.

Where appropriate, reference is made in square brackets to the ALRC's "questions and proposals" set out in the Consultation Paper.

## **1. Overview**

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We consider that the existing system of discovery in the Federal Court is generally adequate, but that it could be modified in several respects to reduce cost and promote access to justice.

The principal function of the civil justice system is to resolve disputes between parties efficiently and justly according to law. When considering any reform to the civil justice system, great care should be taken to ensure that the reform is carefully planned, supported by evidence and that measures intended to promote efficiency do not undermine the goal of justice according to law.

This submission concerns the Court's involvement in the discovery process, the requirement for leave, the scope of discovery, legal fees, pre-trial oral depositions and the use of technology in discovery. Our position on each of these issues is summarised below.

- (a) There is scope for greater involvement by the Court in the discovery process, but such involvement must be targeted and responsive to the needs of the parties before the Court. Rather than introducing new powers and procedures, the Court should be encouraged to make greater use of its existing case management powers and to require proper pleadings in all cases. (See section 2).
- (b) The existing leave requirement for discovery in the Federal Court should be strengthened by requiring a positive declaration in each case that permitting discovery is appropriate, in the interests of justice and proportionate. (See section 3).
- (c) The existing test for discovery in the Federal Court is generally appropriate, but should be narrowed by limiting the application of the test to documents currently in a party's possession or custody and by further clarifying the obligation to conduct a "reasonable search". (See section 4).

- (d) It is not necessary or appropriate for law firms to be required to limit their fees to the "actual" costs of carrying out discovery-related work. (See section 5).
- (e) Oral depositions are unnecessary and will increase the cost of the discovery process. (See section 6).
- (f) Federal Court Practice Note CM6 should be mandatory for all matters, with greater involvement by the Court to apply and enforce the rules that currently exist. Further, CM6 should be extended to include rebuttable presumptions that certain categories of documents need not be searched or produced, provisions to facilitate the consistent de-duplication of electronic documents and the use of uniform search engines for large scale matters. (See section 7).

## 2. Court involvement in the discovery process

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### 2.1 Special masters

*[Question 3-8]*

There is scope for greater involvement by the Court in the discovery process, provided such involvement is carefully targeted. Ideally, judges would have sufficient time and technical expertise to manage the discovery process closely. A docket judge, fully apprised of all the issues in the proceeding, is in our view best placed to resolve discovery issues.

However, financial and other constraints mean that judges, through no fault of their own, often have insufficient time and awareness of the practicalities of discovery to make timely, informed and detailed directions and to supervise the minutiae of the process. In those circumstances, the "next best" option is to introduce special masters to manage the discovery process, subject to three provisos.

First, there should be a clear and automatic right of appeal to the docket judge from any decision of the special masters.

Second, sufficient resources should be allocated to ensure that special masters have the necessary practical expertise and are able to resolve disputes quickly. Otherwise, this reform would merely result in an additional procedural step in the civil justice process. To avoid unnecessary duplication, special masters should replace the existing e-registrars and, like the e-registrars, be fully trained to deal with e-discovery issues.

Third, as is the case in the United States, parties should be able to apply to have the docket judge deal with discovery issues at first instance, instead of a special master. Special masters may not be appropriate in all cases. As a general rule, the discovery process would be managed by a special master, but the general rule should be applied flexibly.

In our experience, the "practice court" model in the Supreme Court of Victoria has generally worked well. The practice court hears and determines interlocutory applications not within the jurisdiction of an Associate Justice and urgent applications. If the ALRC is

mindful to recommend that special masters be introduced, it would, in our view, be appropriate to adapt the Victorian "practice court" model for use in the Federal Court.

## 2.2 Case management powers

*[Proposal 3-5]*

The Court already has broad discretion to exercise case management powers and to impose sanctions in relation to the discovery of documents. For example, the Court has the power to make tailored discovery orders under Order 15 rule 3, and to make orders for particular discovery under Order 15 rule 8. The Court also has a very broad power to give directions about practice and procedure, and to sanction non-compliance with those directions, under section 37P of the *Federal Court of Australia Act 1976* (Cth).

In our view, any concerns about the existing system do not stem from the availability of case management powers and sanctions, but rather from the manner in which those powers are currently exercised. Lenience is often shown where a party wilfully or negligently fails to comply with the rules or a timetable. That said, it is important that the Court appreciates that the work involved in locating, reviewing and providing discovery of documents in large cases is often a complex and time consuming task. It can be difficult to accurately estimate the time large discovery exercises will take at the outset of the process and it is necessary for the Court to supervise discovery with this in mind.

New or more express powers would not address these concerns unless the Court exercises its discretion more strictly and consistently. Instead, judges and special masters should be encouraged, through judicial education or otherwise, to make greater use of their existing case management powers and to monitor more closely the parties' compliance with the timetable.

## 2.3 Pre-discovery conferences

*[Question 3-5; Proposals 3-1, 3-2 and 3-3]*

Pre-discovery conferences may be productive, provided they take place at an appropriate time and are managed efficiently. Such conferences are sound in theory, particularly in the context of the use of technology. (The need for early agreement on matters relating to the use of technology in discovery is discussed further in section 7, below). However, care should be taken to ensure the procedures for such conferences are sufficiently flexible.

Ideally, it would always be possible to identify the "core issues in dispute" at an early stage of a proceeding. However, this is not always the case. In many proceedings issues evolve and change over time for legitimate reasons, including as a result of information gathered from the discovery process. It is critical, therefore, that any early identification of issues be seen as a dynamic process, and that it not be used to constrain one or the other party as the proceeding unfolds. Further, the ability of parties to resolve issues at the beginning of a proceeding should not be overestimated. It should be possible to defer pre-discovery conferences if in all the circumstances it would be more productive to do so.

Rather than requiring parties to file formal written statements of the issues in dispute or witness lists, we consider that the existing rules concerning pleadings should be tightened and more strictly applied. The purpose of pleadings is to identify the issues in dispute.

Provided cases are properly pleaded, the existing system is well-placed to assist early identification of key issues. Additional statements of issues would cause duplication and have the potential for confusion.

In our experience, failure to identify "core issues in dispute" is usually the result of deficient pleadings. Many pleadings are vague, repetitive, insufficiently particularised and often contain irrelevant material. Respondents are often reluctant to challenge a deficient statement of claim, unless it clearly discloses no cause of action, because the cost of doing so is disproportionate to the perceived benefit to the respondent. The applicant will usually be permitted to re-plead in any event, and common deficiencies such as repetition and vagueness may not prevent the respondent from mounting a defence.

We consider that this is one area in which the Court might be encouraged to intervene more actively. This is a large issue and we are conscious that it may be outside the scope of the ALRC's reference but the issues worthy of consideration include:

- encouraging the Court to strike out deficient pleadings on its own motion (that "encouragement" could take the form of a statement of intent of policy in a Practice Note);
- a re-assessment of the rule in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 and s31A of the *Federal Court of Australia Act 1976* (Cth); and
- in conjunction with or separately from that assessment, allowing the Court to take into account the likely effect of the pleading under attack on the other side's discovery burden. The discovery burden could be taken into account in a manner analogous to the "balance of convenience" in an interlocutory injunction application. A weak or vague pleading that results in an onerous discovery burden ought to be more vulnerable than one which would not have that result.

### 3. Threshold test

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#### 3.1 Leave

*[Questions 2-2, 2-3 and 2-4]*

The existing leave requirement should be strengthened by requiring the Court to make a positive declaration in each case that allowing discovery is appropriate, in the interests of justice and proportionate. This would not be a substantive reform, but it would require the Court to turn its mind to the fundamental question of whether discovery is truly necessary in a particular case, even if both parties have consented to it.

To minimise wasted costs, the decision whether to grant leave should be made at an early stage in the proceeding and, in any event, before the parties begin to negotiate the scope of discovery or attend a pre-discovery conference (but after pleadings have closed).

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## 4. Scope of discovery

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### 4.1 General test

*[Questions 2-5 and 2-6]*

In our view, subject to the comments below, the scope of the general test for discovery in the Federal Court is generally appropriate. The test strikes an appropriate balance between, on the one hand, the need for a functional and transparent system of disclosure and, on the other hand, the need to avoid imposing unrealistic expectations and disproportionate costs on commercial parties.

The existing general test might be further narrowed by limiting the application of the test to documents currently in a party's possession or custody,<sup>1</sup> unless there is some reason to believe or suspect that a party is "warehousing" relevant documents. That is, there should be a rebuttable presumption that parties need not discover documents:

- (a) currently in their power (but not in their custody or possession); or
- (b) once but no longer in their possession, custody or power.

The obligation to discover documents that were once but are no longer in a party's possession, custody or power imposes a significant administrative burden on parties and is adhered to inconsistently in practice. It is also unnecessary in circumstances where the Court may impose a variety of sanctions on parties who deliberately fail to preserve documents that are relevant to the proceeding.

An alternative approach might be to modify the obligation to conduct a "reasonable search" so that parties need not take positive steps to search for relevant documents that were once but are no longer in their possession or custody. Parties would still be required to discover relevant documents, no longer in their possession or custody, of which they are already aware: this approach would affect only the obligation to *search for and identify* relevant documents.

In any event, we consider that the obligation to conduct a "reasonable search" could be further clarified. This could be achieved by publishing a set of non-binding practical steps or "best practice" guidelines that, if followed by a party, will be deemed to constitute a "reasonable search". Practical steps could include, for example, preparation of a scope and search plan and key word searches of relevant employees' emails and other electronic databases.

Further, there should be a rebuttable presumption that a party need not search certain sources of possibly discoverable documents. Those sources might include, for example, back-up tapes, meta-data and electronic drafts (see section 7.2, below). An opposing party who seeks to expand a search beyond the presumption should be required to demonstrate that it is proportionate and in the interests of justice to do so. Further, that party should be

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<sup>1</sup> In this submission, we use the term "possession" to mean physically held by the party under a legal right to possession, while "custody" means physically held by the party regardless of a legal right to possess. By contrast, documents are within the "power" of a party if the party has a presently enforceable right to inspect the documents or obtain possession of the documents from a third party.

required to pay any additional costs, relevant to the additional required search or searches, at the outset, pending a final costs order. This reform would not necessarily require an amendment to the rules. Rather, it could be implemented by a practice note setting out how the Court will exercise its discretion.

Limiting discovery to "documents that have significant probative value" or "key documents" is unlikely to be productive, because these criteria are highly subjective and parties would still be required to conduct a full-scale document review to identify all of the "key documents" (see introduction to section 7, below). In our view, the burden of discovery would be more effectively and appropriately ameliorated by focusing on the scope of the search rather than the test for relevance.

## 4.2 Categories

### *[Question 3-4]*

Subject to our comments below, discovery by category may be appropriate in some cases, but more care and attention should be given to the drafting and scope of categories to ensure that they simplify the discovery process. Time spent by the Court in settling categories before the discovery process begins would substantially reduce the complexity, uncertainty and costs associated with providing documents. Where categories are appropriately drawn they can limit discovery and reduce arguments later in the proceeding as to whether a particular type of document is "relevant". Categories should be couched, as far as possible, in terms which would allow the question of whether or not a document should be discovered to be answered objectively.

However, categories that address relevance should be used in conjunction with categories that address *where* to search (or *where not* to search). In our view, narrowing the search for documents, and therefore limiting the number of documents that must be reviewed for relevance, is most likely to reduce the costs of discovery. Categories of documents that need not be discovered, or "negative categories", often limit the scope of a search more effectively than positive categories and should be used where appropriate. For example, the Court might order that a party give general discovery of all relevant documents except those held by third-party service providers and to which the party has an enforceable right of possession.

Tiered discovery orders should also be used where appropriate. For example, the general test might be applied to certain sources of documents (such as hard-copy correspondence and file notes), while other sources (such as emails, which are usually more numerous but are more suited to electronic searching) might be subject to a narrower category-based test.

## 5. Legal fees

### 5.1 Limits on fees

#### *[Question 3-10; Proposal 4-2]*

Law firms should not be required to limit their fees to the "actual" costs of carrying out discovery-related work. Legal fees incurred in carrying out such work are legitimate costs

incurred in the course of resolving a dispute. Provided the costs of discovery are reasonable, there is no reason why the traditional loser-pays rule should not continue to apply. The costs assessment process ensures the reasonableness of party-party costs. The market for legal services efficiently regulates solicitor-client costs, particularly in the commercial sector. Clients in this sector tend to be large, sophisticated entities, with the capacity to negotiate fees and raise any concerns with their lawyers.

Further, existing regulation is sufficient to deal with any overcharging by lawyers. As the ALRC notes at paragraph 3.213 of its Consultation Paper, clients may apply for taxation of their lawyers' fees, while the Federal Court Rules empower the Court to disallow certain solicitor-client costs. In addition, professional conduct rules in each jurisdiction address the failure of lawyers to uphold their legal and ethical obligations, including in the context of discovery. It would achieve little to add a further level of regulation.

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## 6. Pre-trial oral examinations

### 6.1 Oral depositions

*[Proposal 5-2]*

Pre-trial oral depositions are unnecessary and will increase the cost of the discovery process. Practical questions about a party's document management system (for example, questions about the scope and location of document collections) can be informally addressed at a pre-discovery conference. Prima facie, there is no need for such questions to be answered on oath. If, for whatever reason, such a need arises in a particular case, the existing rules are adequate to meet that need.

Similarly, oral depositions are inappropriate mechanisms for narrowing the issues in dispute. As noted in section 2.3 above, it is not always possible to identify the core issues at an early stage. Further, the issues in dispute should be defined by the pleadings, properly considered and with the benefit of legal advice. Oral depositions will result in significant front-loading of costs and may be abused for the purpose of "fishing expeditions".

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## 7. Use of Technology

*[Questions 3-3, 3-5; Proposal 3-4]*

The use of electronic communications, tools and related technology in modern business has meant that an enormous number of documents and communications are created, sent and stored electronically, in many different formats. Accordingly, the discovery of electronic documents, and the problems and challenges that it raises, are key issues in any analysis of discovery practice and procedure. Even small and fairly focused disputes can raise issues requiring the examination of large numbers of electronic documents to identify relevant communications or documents. In light of this, and the fact that most relevant materials are stored and managed electronically by parties, for discovery processes to be effective and cost efficient, it is essential that technology be used proactively in those processes.

## 7.1 Mandatory use and application of Federal Court Practice Note CM6 (CM6)

Experience has shown that in the early stages of a matter, choices are made by parties regarding the method of collection, culling and processing of potentially relevant documents and information. For these processes to be efficient and not wasteful it is important that early agreement be reached, or a baseline standard be set, regarding acceptable methods by which electronic documents will be searched, collected, culled, reviewed and provided to other parties and the Court. Specifically, parties should, to the extent possible, confer and reach agreement on areas including:

- scope of discovery and what constitutes a reasonable search ;
- a strategy for the identification, collection, processing, analysis and review of documents;
- the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data);
- a timetable and estimated costs for discovery; and
- an appropriate Document Management Protocol.

Decisions in relation to each of these aspects can have significant cost implications, so an early assessment of these areas and negotiation and agreement between the parties is important. We consider that Federal Court Practice Note CM6 (**CM6**) coupled with the Pre-Discovery Conference Checklist provides a useful framework for such negotiation and agreement. However, in our view, it is not sufficient in its own right.

Our experience has shown that, due to its advisory nature, CM6 is less effective because parties are disinclined to meet and confer voluntarily early in a proceeding to discuss discovery related issues. In practice, only a minority of matters involving 200 or more documents (as contemplated by the Practice Note) are conducted in accordance with the rules prescribed in CM6. Currently, parties are required to apply to the Court for an order that CM6 will apply to the proceeding. Such applications are rarely made and are generally reserved only for the very largest matters. The effect of this is that, in most proceedings, the use of technology is governed entirely by the parties themselves with no attempt to negotiate and agree on a consistent process or mode of exchange for discoverable documents. Therefore parties commonly make decisions on the areas outlined above that lead to inconsistent treatment of documents as compared with other parties to the proceeding. This, in turn, results in subsequent additional costs being incurred by all parties in an attempt to effectively utilise documents and data which has been provided by others.

To facilitate the *"quick, inexpensive and efficient resolution of matters"* as intended by CM6, we suggest that CM6 must apply to all cases as a matter of course, and that greater judicial intervention be utilised to apply and police the rules that currently exist. The use of pre-discovery conferences, discussed above in section 2.3, will assist in this regard.

## 7.2 Addition and amendment to CM6

While the Pre-Discovery Conference Checklist and CM6 provide a valuable starting point for negotiation and agreement between the parties, there are a number of further provisions that we consider could provide significant potential cost savings to the parties.

- (a) A modest but useful innovation would be to create rebuttable presumptions that certain categories of documents need not be searched or produced in the absence of a demonstrated need. As noted above, obvious examples in the context of technology are backup tapes, metadata, and drafts of electronic documents. Such presumptions ought to:
  - (i) reduce the expense of discovery by eliminating any need to search these categories of documents (the search of which can be expensive and time consuming) absent a demonstrated need;
  - (ii) provide parties with a clear understanding of what is not being searched;
  - (iii) place the burden on the party seeking discovery to justify searches of categories of documents which are often voluminous, expensive to search, and not necessarily of significant probative value; and
- (i) provide a framework which may increase the prospect of the parties successfully negotiating discovery orders, by making clear to each what their alternatives to a negotiated outcome are likely to be.
- (b) De-duplication standard guidelines should be established to form a basis for the market to create a uniform method of eliminating duplicate documents from individual parties' discovery. Currently, de-duplication is carried out using an algorithm such as MD5 or SHAH1. Each electronic file receives a unique value with such values used to identify and eliminate duplicates from a data set. Presently, there are a number of different software applications and methods used to create these unique MD5 and SHAH1 values. The effect of this is that while a party can eliminate duplicates from their own data set, it is generally not possible to eliminate duplicates across other parties' documents. Therefore, parties may well need to review documents received from an opposing party which are, in fact, duplicates of their own documents. This issue may be addressed through adoption of the following measures:
  - (i) Identification of a third party to formulate and update as necessary the procedure for de-duplication of documents. For example, the Association of Litigation Support Managers (ALSM);
  - (ii) CM6 to be amended to provide prescriptive information on the method for the creation of MD5 or SHAH1 (including the fields and order of fields to be utilised). Currently, a list of fields is provided in Schedule 8 of the CM6 Advanced Document Management Protocol, however we suggest that this be extended to include the order of such fields and included in the body of CM6 itself; and

- (iii) over time, for software developers to modify their tools so that the prescribed fields are utilised as a matter of course facilitating a consistent de-duplication process across the industry.

### 7.3 Uniform concept search engines on matters where appropriate

As the number of documents and communications created in electronic format continues to grow, so too does the complexity of locating and retrieving key documents relevant to a proceeding. In many cases, the sheer number of electronic documents makes it prohibitively expensive and time consuming to collect and review all potentially relevant electronic documents in the custody of an individual or organisation in order to identify the relevant and even key documents. In light of this, content and concept searching tools may be utilised in an attempt to narrow the pool of potentially relevant documents.

As such tools develop, and the volume of electronic documents continues to grow, there may be greater reliance on concept searching. Not only might the technology be used to identify the core issues and key documents as quickly as possible, but also to exclude documents from the review process.

Where the use of a search engine is appropriate, there should be a consistent approach to:

- the document types which are indexed and searched (and those which are not);
- the grouping of documents by concept and the methodology for such categorisation; and
- the nature of searches which may be carried out.

At present, parties utilise a variety of search engines to locate and cull documents. While each search engine has its strengths and weaknesses, many possess limitations which can have a significant impact on the nature of results obtained from a search and the manner in which documents are categorised. The use of a common search engine, or engines which meet minimum standards, in a proceeding would ensure that the results obtained from parties' searches are as consistent as is technically possible. This should make parties more confident of the search results and may reduce disputes and related expenses, particularly when used as an exclusionary tool.

We are happy to meet with you and discuss further any of the matters addressed in this submission.

#### Allens Arthur Robinson

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#### Contacts:

##### Peter O'Donahoo

Partner, Melbourne

Email: Peter.O'Donahoo@aar.com.au

Tel: (03) 9613 8742

##### Ross Drinnan

Partner, Sydney

Email: Ross.Drinnan@aar.com.au

Tel: (02) 9230 4931