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The Australian Law Reform Commission
Level 25, 135 King Street
SYDNEY NSW 2000

Dear Sirs

AUSTRALIAN LAW REFORM COMMISSION PAPER ON DISCOVERY IN THE FEDERAL COURT

We attach our submission in respect of the above enquiry.

1. Page 34, 2.5. "A party must have the leave of the Court to file and serve a Notice of Discovery." This is often achieved by consent orders at directions hearings and therefore the court never gets to hear an argument as to what type of discovery or whether the discovery is required at all.

2. Page 40, 2.43 – the need for "Court supervision and control of the use of discovery in the Federal Court" is, in my opinion, the starting point. The rules generalise to the point of confusing major pieces of litigation concerning vast sums of money with other types of matters of less value in terms of money (such as dispute between directors and the Corporations Act).

3. Page 41, 2.44 – doubts as to whether the leave requirement is working as effective control. I would agree based on the fact that generally speaking this is by agreement at a time when a procedural timetable is set out.

4. Page 41, 2.45, 2.46 – agree.

5. Page 41, 2.47 – does address the fact that under the rules summarised on page 34, that there may be documents that adversely affect the party's own case and assist in providing evidence to the other side's allegations or defence. That issue is not addressed.

6. Page 42, 2.49. How does a Court determine, for example, whether there are emails between parties that represent the "best evidence" in relation to a particular allegation being made that firstly affects the case of the party that holds the emails and should be available to the Court.

7. Page 43, 2.52 – this is very accurate.

8. ALRC's views 2.54 – 2.59 inclusive is accurate. What needs to be revised, is the requirement that discovery not simply be automatically part of the direction hearing timetable settled between the parties by consent

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before the directions hearing, but the subject of an actual hearing before the Judge in which specific argument is presented in relation to the type of document sought, the identity of any documents (if known) and the reasoning behind the request.

9. Page 46, 2.66 – this is agreed. Furthermore, it is usually the defendant/respondent that is overborne while the plaintiff makes out that general discovery is crucial to substantiate the plaintiff's case/reduce to zero the strength of the defendant's case.

10. Page 47, 2.70 – the problem with the "good-faith proportion at search" is that the parties, themselves, are usually advised by their solicitors to make available all the documents that they have in their possession and it is the solicitors that would advise whether these are documents that meet the requirements. This is already a burden on the party, even without actually paying legal costs to a lawyer, simply to find documents that may go back some years (for example, financial statements) that effectively have nothing to add to the issues to be tried.

11. Page 48, 2.74 – again, this is a valid concern and usually made by the applicant/plaintiff.

12. Page 49, 2.84 – I support the idea that there must be closer judicial case management in the discovery process which although in the short term may cost more because parties have to appear in Court before a Judge, it also may eliminate hours of hunting for documents that have no relevance. In addition, what may be worthwhile is that the list of documents may be required to be more comprehensive, actually summarising a document sufficient for a Court to determine how relevant, if at all, it is to the issues to be aired.

13. Page 62, 3.22 – this begs the question as to whether "potential litigants" organised electronic information so that documents can easily "be found". The reality is that most businesses organise their information, electronic or otherwise, in a way that is suitable to them and there is no thought of litigation at the time this is carried out. It is one of the main reasons why the preservation, collection and discovery of documentation is such an onerous process.

14. Page 67, 3.54 – by contrast to "senior partners of law firms quoting $2 million as the flag fall for discovery" there are a larger number of smaller firms who are involved in the discovery process where the flag fall cannot be that amount and recovery of fees are never available to those parties in the outcome of the hearing. It may very well be that in a dispute concerning hundreds of millions of dollars, $2 million for discovery becomes a relatively reasonable amount.

15. Page 68, 3.59 – this is an accurate summary.

16. Page 69, 3.62 – I also agree that settlement of litigation usually occurs after discovery of documents which, in the broad sense is logical because there is a better picture then known of the strength of the evidence supporting the various parties' cases.

17. Page 73, question 3-2. In general, the amount of money spent on the discovery process and proceedings of the Federal Court generate too much information to facilitate the just and efficient disposal of litigation. In a recent matter settled by form of mediation, in a commercial dispute involving actions by certain directors/shareholders under the Corporations Act, four folders of documents were discovered by the applicants with much fewer documents being provided by the respondents, many of which were copies of what the applicants had provided but were provided because of the threat by the solicitors for the applicants of further applications to Court in an effort to "wring out the last drops" of discoverable documents, whether they were relevant or not.

18. Page 73, question 3-3. Unless the document is stored in a way that is available for easy retrieval (which is the general principle of electronic documentation generally), there is no simple way of finding documents that are relevant. Compare this with point 3.22, referring to the way in which companies organise electronic information.

19. Page 74, 3.82 – this is a truism but is essential. It effectively requires good faith on the part of both solicitors, who are probably advising their clients that by enforcing a broad discovery rule, they may achieve strategic advantages which will force the other party to give up or seek an early settlement,

rather than see the discovery process for what it should be, which is a discovery of documents relevant to, and only those relevant to, and the process.

20. Paragraphs 3.83, 3.84, 3.85, 3.86 are accurate.

21. Question 3.4 has been addressed above.

22. Question 3.5. The writer has not had the benefit of a discovery plan and use of pre-discovery conferences and cannot comment other than to say that that process appears to be very useful to achieve a more cost effective and timely process where parties know that there are a significant amount of documents around, many of which would not be relevant.

23. Item 3.99. The writer is in favour of strong judicial case management.

24. Paragraphs 3.118 to 3.124 inclusive – statement of issues in dispute. This could have real benefits in allowing the Judge to understand the documentation that may be relevant to the issues to be argued and those to be abandoned, rather than to produce sets of documents and then determine what is not going to be necessary as the issues are limited further down the track.

25. Paragraph 3.126. There is a significant difference between the philosophy behind fast track lists and the ordinary cases where the issues can be narrowed down to a simple few issues which need urgent attention, as opposed to a broad issue where litigation has resulted from a period of correspondence or attempted negotiation between the parties. In that regard, determining a list of witnesses and list of evidence may require some time and only if the parties, especially the respondents, are given sufficient time, can a system such as that envisaged in 3.125 and 3.126 be introduced.

26. Proposal 3.1 should be trialled.

27. Proposal 3.2 could end up being an overlap with 3.1 since it is to take place beforehand.

28. Proposal 3.3 does not make sense procedurally until 3.1 is sorted out.

29. Question 3 – 6. This is really covered in the answer to question 3 – 7.

30. Question 3 – 7. The existing procedures are adequate and the court has sufficient power. It is up to the representatives of each party not to simply agree glibly to general discovery in consent orders proposed before the court in order merely to save time.

31. Proposal 3.4. In developing a “cost effective discovery plan” the parties may be unevenly balanced and it may not be possible for a party (specifically the respondent) to advise how it can produce documents if they are scattered over a number of personal computers without any formal system in place to retrieve them, other than simply going through what “they have retained.”

Please do not hesitate to contact the writer for further clarification.

Sincerely

GERALD SANTUCCI